CHAPTER XVI.

THE POLICE POWER OF THE STATES.

Frequently when questions of conflict between national and State authority are made, and also when it is claimed that government has exceeded its just powers in dealing with the property and controlling the actions of individuals, it becomes necessary to consider the extent and pass upon the proper bounds of another State power, which, like that of taxation, pervades every department of business and reaches to every interest and every subject of profit or enjoyment. We refer to what is known as the police power.

The police of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.1

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1 Blackstone defines the public police and economy as "the due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." 4 Bl. Com. 102. Jeremy Bentham, in his General View of Public Offences, has this definition: "Police is in general a system of precaution, either for the prevention of crimes or of calamities. Its business may be distributed into eight distinct branches: 1. Police for the prevention of offences; 2. Police for the prevention of calamities; 3. Police for the prevention of endemic diseases; 4. Police of charity; 5. Police of interior communications; 6. Police of public amusements; 7. Police for recent intelligence; 8. Police for registration." Edinburgh ed. of Works, Part IX, p. 187. Under the head of police for charity may be classed the provision which it is now customary with all enlightened States to make for the custody and care, and if possible the cure, of insane persons. That the State, for the protection of others, may cause such persons to be restrained of their liberty is undoubtedly, and it has been common to provide that this may be done on the certificate of physicians to the diseased mental condition. But while confinement on such a certificate may be justified when no mistake is made as to the fact, it is certain that it cannot be if the person deprived of his liberty was not in truth at the time insane. No number of physicians can be given the power to take from a sane man his liberty, without a public investigation in which he may produce his witnesses; and any legislation assuming to confer such power would be void. On this general subject the following cases are of interest: Anderson v. Burrows, 4 C. & P. 210; Fletcher v. Fletcher, 1 El. & El. 439; Colby v. Jackson, 12 N. H. 629; Look v. Dean,
In the present chapter we shall take occasion to speak of the police power principally as it affects the use and enjoyment of property; the object being to show the universality of its presence, and to indicate, so far as may be practicable, the limits which settled principles of constitutional law assign to its interference.

No definition of the police power can be more complete and satisfactory than some which have been given by eminent jurists in deciding cases which have arisen from its exercise, and which have been so often approved and adopted, that to present them in any other than the language of the decisions would be unwise, if not inexcusable. Says Chief Justice Shaw, "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain,—the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power; the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise." 1


1 Commonwealth v. Alger, 7 Cush. 53, 84. See also Commonwealth v. Tewksbury, 11 Met. 55; Hart v. Mayor, &c. of Albany, 9 Wend. 671; New Albany & Salem R. R. Co. v. Tilton, 12 Ind. 3; Indianapolis & Cincinnati R. R. Co. v. Kerekeval, 18 Ind. 84; Ohio & Missis-
"This police power of the State," says another eminent judge, "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, Sic utere tuo ut alienum non laedes, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." And again: [By this] "general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right in the legislature to do which, no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." 1 And neither the power itself, nor the discretion to exercise it as need may require, can be bargained away by the State. 2

Where the Power is located. In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. 3 Neither can the national government, through

sippi. R. R. Co. v. McClelland, 25 Ill. 140; People v. Draper, 25 Barb. 344; Baltimore v. State, 15 Md. 376; Police Commissioners v. Louisville, 3 Bush, 597; Wynenhamer v. People, 13 N. Y. 378; Taney, Ch. J., in License Cases, 5 How. 504, 588; Waitie, Ch. J., in Mann v. Illinois, 94 U. S. 113, 124. [Brown, J., in Lawton v. Steele, 102 U. S. 133, 14 Sup. Ct. Rep. 499, says of this power of the State, that "It is generally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement by summary proceedings of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the prohibition of wooden buildings in cities; the regulations of railways and other means of public conveyance, and of interments in burial grounds; the restrictions of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill-fame and the prohibition of gambling houses and places where intoxicating liquors are sold."

See article in 36 Am. L. Rev. 681, tracing in some measure the judicial development of the doctrine of the police power.] 1 Redfield, Ch. J., in Thorpe v. Rutland & Burlington R. R. Co., 27 Vt. 140, 149. See the maxim, Sic utere, &c., — "Enjoy your own property in such manner as not to injure that of another," — in Broom, Legal Maxims, (5th Am. ed.) p. 327; Wharton, Legal Maxims, No. XC. See also Turbeville v. Stampe, 1 Ld. Raym. 264; and 1 Salk. 13; Jeffries v. Williams, 5 Exch. 792; Humphreys v. Brodgen, 12 Q. B. 739; Pixley v. Clark, 35 N. Y. 620; Philadelphia v. Scott, 81 Pa. St. 80. 2 Beer Company v. Massachusetts, 97 U. S. 25, 33, citing Boyd v. Alabama, 94 U. S. 615. 3 So decided in United States v. De Witt, 9 Wall. 41, in which a section of the Internal Revenue Act of 1867 —
any of its departments or officers, assume any supervision of the police regulations of the States. All that the federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal Constitution.¹

Conflict with Federal Authority. But while the general authority of the State is fully recognized, it is easy to see that the power might be so employed as to interfere with the jurisdiction of the general government; and some of the most serious questions regarding the police of the States concern the cases in which authority has been conferred upon Congress. In those cases it has sometimes been claimed that the ordinary police jurisdiction is by necessary implication excluded, and that, if it were not so, the State would be found operating within the sphere of the national powers, and establishing regulations which would either abridge the rights which the national Constitution undertakes to render absolute, or burden the privileges which are conferred by law of Congress, and which therefore cannot properly be subject to the interference or control of any other authority. But any accurate statement of the theory upon which the police power rests will render it apparent that a proper exercise of it by

which undertook to make it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell oil of petroleum inflammable at a less temperature than 116° Fahrenheit — was held to be a mere police regulation, and as such void within the States. That the States may pass such laws, see Patterson v. Common-wealth, 11 Bush, 311. A license may be required for the peddling of patented articles. People v. Russell, 49 Mich. 617, 14 N. W. 668. On the general subject of the police power of the States, see also United States v. Reese, 92 U. S. 214; United States v. Cruikshank, 92 U. S. 542. But the States cannot, by police regulations, interfere with the control by Congress over inter-state commerce. Post, pp. 857, 858, 867, and notes.¹

¹ See this subject considered at large in the License Cases, 5 How. 504, the Passenger Cases, 7 How. 283, and the Slaughter-House Case, 16 Wall. 36; People v. Compagnie Général, 107 U. S. 59, 2 Sup. Ct. Rep. 87; Head Money Cases, 112 U. S. 580, 5 Sup. Ct. Rep. 247. The Fourteenth Amendment does not limit the subjects in relation to which the police power of the State may be exercised. Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357; Minneapolis & St. Louis Ry. Co. v. Beckwith, 120 U. S. 25, 9 Sup. Ct. Rep. 297, and cases cited. Congress has no power to authorize a business within a State which is prohibited by the State. License Tax Cases, 5 Wall. 402, per Chase, Ch. J. In Canada, power over sales of liquor is in the Dominion parliament, and, after license in pursuance of its authority, the provincial parliament cannot forbid. Severn v. The Queen, 2 Can. Sup. Ct. 71; Mayor, &c. v. The Queen, 3 Can. Sup. Ct. 605. [Action in the nature of police regulation is void if against the express provisions of the constitution though otherwise within the general power to make police regulations. State v. Fruehlich, 115 Wis. —, 91 N. W. 115. On the constitutional limitations of the police power, see 55 Cent. L. Jour. 225.]
the State cannot come in conflict with the provisions of the Constitution of the United States. If the power extends only to a just regulation of rights with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the State, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities.

Obligation of Contracts. The occasions to consider this subject in its bearings upon the clause of the Constitution of the United States which forbids the States passing any laws impairing the obligation of contracts have been frequent and varied; and it has been held without dissent that this clause does not so far remove from State control the rights and properties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is declared, are subject to this power; (a) and not only may regula-

(a) [What shall be the public policy of a State is determined by itself, and is subject to no Federal control unless it contravenes the Federal Constitution or some treaty or congressional statute conformable thereto. Hartford Fire Insurance Co. v. Chicago, M. & St. P. R. Co., 175 U. S. 91, 20 Sup. Ct. Rep. 33. And the Federal courts will enforce the public policy of a State in regard to usurious contracts. Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. Rep. 178. But the public policy of a State cannot be extended to the infringement of rights acquired outside of the State, nor can the State penalize acts merely collateral to the enjoyment of such rights. In 1894 Louisiana enacted "that any person . . . who in any manner whatever does any act to effect for himself, or for another, insurance on property then in this State, in any marine insurance company which has not complied in all respects with the laws of this State, shall be subject to a fine of ", &c. This came under consideration in Allegrey v. Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. 427. A was a citizen of L, resident in New Orleans. He was an exporter of cotton from N. O. to the ports of Great Britain and of the Continent. As incidental to his business, he entered in N. Y. City into a contract of insurance with the Atl. M. Ins. Co. of that city, which contract was for an open policy of $200,000. This contract was to be performed entirely within the State of N. Y. and was there entirely valid. Under it, whenever A made a shipment of cotton which he desired insured, he notified the insurance company by mail or by telegraph, and the insurance attached to the parcel specified at the instant of despatch of the latter or telegram. Upon receipt of the notification, the insurance company made out a special policy of insurance upon the parcel and delivered it to A's agent in N. Y., who thereupon paid the premium. The insurance company never complied with the conditions prescribed by Louisiana to be observed by all marine insurance companies doing business therein. A mailed in N. O., in compliance with the conditions of the contract, a letter addressed to the insurance company, specifying a particular cargo of cotton then shipped upon which insurance was to attach, and for this L filed its petition against him, praying judgment for the penalty, which was decreed. A sued out a writ of error, alleging that the action of L deprived him of his liberty and his prop-
tions which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity. 1

1 In the case of Thorpe v. Rutland & Burlington R. R. Co., 27 Vt. 140, a question arose under a provision in the Vermont General Railroad Law of 1849, which required each railroad corporation to erect and maintain fences on the line of its road, and also cattle-guards at all farm and road crossings, suitable and sufficient to prevent cattle and other animals from getting upon the railroad, and which made the corporation and its agents liable for all damages which should be done by its agents or engines to cattle, horses, or other animals thereon, if occasioned by the want of such fences and cattle-guards. It was not disputed that
ey without due process of law. The U. S. Supreme Court reversed the action of the L. court, and, in giving the opinion of the court, Mr. Justice Peckham said: "The act done within the limits of the State, under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which defendants were at liberty to perform, and which the State legislature had no right to prevent, at least with reference to the Federal Constitution . . . In the privilege of pursuing an ordinary calling or trade and of acquiring, holding, and selling property [which, earlier in the opinion, had been declared to be included in the liberty of the citizen] must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property, or to do business within the jurisdiction of the State, may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as obtained in the statutes, yet the power does not and cannot extend to prohibiting the citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is to be insured may at the time when such insurance attaches be within the limits of the State. The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 211; Tidton v. Blair, 21 Wall. 211. The contract in this case was thus made. It was a valid contract, made outside of the State, to be performed outside of the State, although the subject was property temporarily within the State. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have liberty to do that act and to give that notification within the limits of the State, any prohibition of the State statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the State had no right or jurisdiction to prevent its citizens from making outside the limits of the State." But in Hooper v. California, 155 U. S. 448, 15 Sup. Ct. Rep. 207, it was held that a State may in pursuance of its public policy penalize any act done within its borders, looking toward the formation of contract relations with foreign corporations which it has forbidden to do business within its borders. The State may regulate the formation of contracts of insurance within its borders, and the parties are powerless to waive the benefits of such regulation. Equitable Life A. S. c. Clements, 140 U. S. 229, 11 Sup. Ct. Rep. 822. See Nutting v. Massachusetts, 183 U. S. 509, 22 Sup. Ct. Rep. 238; aff. 175 Mass. 106, 55 N. E. 895, in which the cases of Hooper and Aligeyer are distinguished and reconciled.]
Perhaps the most striking illustrations of the principle here stated will be found among the judicial decisions which have held

this provision would be valid as to such corporations as might be afterwards created within the State; but in respect to those previously in existence, and whose charters contained no such provision, it was claimed that this legislation was inoperative, since otherwise its effect would be to modify, and to that extent to violate, the obligation of the charter-contract. "The case," says the court, "resolves itself into the narrow question of the right of the legislature, by general statute, to require all railways, whether now in operation or hereafter to be chartered or built, to fence their roads upon both sides, and provide sufficient cattle guards at all farm and road crossings, under penalty of paying all damages caused by their neglect to comply with such requirements. . . . We think the power of the legislature to control existing railways in this respect may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is, by the fifth article of the bill of rights of this State, expressly declared to reside perpetually and inimitably in the legislature; which is, perhaps, no more than the enunciation of a general principle applicable to all free States, and which cannot therefore be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railroads to be carried into effect by their by-laws and other regulations, it is of course always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of if they would."

"So far as railroads are concerned, this police power which resides primarily and ultimately in the legislature is two-fold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes, and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several railroads in the State to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all of their railroads to come to a stand before passing draws in bridges; or of the Massachusetts legislature to require the same thing before passing another railroad. And by parity of reasoning may all railroads be required so to conduct themselves as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.

"There would be no end of illustrations upon this subject. . . . It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety-beams in case of the breaking of axles, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be. Inegeman v. Western R. Co., 16 Barb. 355.

"2. There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right
that the rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State with a view to the public protection, health, and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter-contract, removed from the sphere of State regulation, and that the charter implies an undertaking, on the part of the State, that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues. The obligation of the contract by no means extends so far; but, on the contrary, the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due regulation, protection, and enjoyment.

in the legislature to do which no question ever was or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm that the right to do the same in regard to railways should be made a serious question." And the court proceed to consider the various cases in which the right of the legislature to regulate matters of private concern with reference to the general public good has been acted upon as unquestioned, or sustained by judicial decisions; and quote, as pertinent to the general question of what laws are prohibited on the ground of impairing the obligation of contracts, the language of Chief Justice Marshall in Dartmouth College v. Woodward, 4 Wheat. 518, 629, that "the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." See, to the same effect, Suydam v. Moore, 8 Barb. 358; Wadhron v. Rensselaer & Saratoga R. R. Co., 8 Barb. 390; Galena & Chicago U. R. R. Co. v. Loomis, 13 Ill. 548; Fitchburg R. R. v. Grand Junction R. R. Co., 1 Allen, 552; Venzie v. Mayo, 45 Me. 560; Peters v. Iron Mountain R. R. Co., 25 Mo. 107; Grannahan v. Hannibal, &c. R. R. Co., 30 Mo. 546; Indianapolis & Cincinnati R. R. Co. v. Kercheval, 16 Ind. 84; Galena & Chicago U. R. R. Co. v. Appleby, 28 Ill. 283; Blair v. Milwaukee, &c. R. R. Co., 29 Wis. 264; State v. Mathews, 44 Mo. 523; Commissioners, &c. v. Holyoke Water Power Co., 101 Mass. 440; Railroad Co. v. Fuller, 17 Wall. 500; Toledo, &c. R. R. Co. v. Deacon, 63 Ill. 91; Ames v. Lake Superior, &c. R. R. Co., 21 Minn. 241; N. W. Fertilizing Co. v. Hyde Park, 70 Ill. 634; State v. New Haven, &c. Co., 43 Conn. 351. [Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 10 Sup. Ct. Rep. 179; Matthews v. St. Louis & S. F. R. Co., 121 Mo. 298, 24 S. W. 501, 25 L. R. A. 161, and note. Upon the proposition that police regulations are subject to change, from time to time, as the public welfare may demand, without impairing the obligation of contract, see Pingree v. Michigan Central Ry. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274, where the charter gave to the company the right to fix rates for passenger carriage within the maximum of three cents per mile, and it was held that any subsequent attempt to fix rates was unconstitutional as impairing the obligation of contract. See, also, Detroit v. Detroit Cit. St. Ry. Co., 184 U. S. 363, 22 Sup. Ct. Rep. 410.]
The limit to the exercise of the police power (a) in these cases must be this: the regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with

(a) [Police regulations cannot be purely arbitrary nor purely for the promotion of private interests. A statute requiring railroads and transportation companies to turn over to a storage company or public warehouseman all property which the consignee fails to call for or receive within twenty days after its arrival is unconstitutional. State v. Chicago, M. & St. P. R. Co., 63 Minn. 381, 71 N. W. 400, 38 L. R. A. 072. A gift element carried on by a merchant in connection with his business and involving no element of chance cannot be prohibited. Long v. State, 73 Md. 527, 21 Atl. 083, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425. In State v. Ashbrook, 164 Mo. 375, 55 S. W. 027, 48 L. R. A. 205, an act of the legislature which was aimed at department stores of any considerable magnitude was considered and held void. The act divided commodities into twenty-eight groups, and provided that in cities having fifty thousand inhabitants or more, any merchant who employed more than fifteen persons in the same establishment and sold more than one group of commodities should be subject to a certain license fee, not less than three hundred dollars per group. No provision for inspection or other regulation was made. The court held that the whole scheme was an unwarranted attempt at discrimination against large merchants. In discussing the limits of the police power, Robinson, J., in giving the opinion of the court, said: "In order to sustain legislation of the character of the act: in question as a police measure, the courts must be able to see that its object [operation] to some degree tends towards the prevention of some offence or manifest evil, or has for its aim the preservation of the public health, morals, safety, or welfare. If no such object is discernible, but the mere guise and masquerade of public control, under the name of 'An Act to Regulate Business and Trade, &c.', is adopted, that the liberty and property rights of the citizens may be invaded, the courts will strike down the act as unwarranted. Mere legislative assumption of the right to direct and indicate the channel and course into which the private energies of the citizen shall flow, or the attempt to abridge or hamper his right to pursue any lawful calling or avocation which he may choose without unreasonable regulation or molestation, have ever been condemned in all free government." For an ordinance of similar purpose, similarly disposed of, see Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707, 38 L. R. A. 201, and for cases on department stores and their regulation, see note to this case in L. R. A. ; see also People v. Coolidge, 124 Mich. 504, 88 N. W. 594, 50 L. R. A. 493. Police regulations cannot be purely arbitrary; e.g., barbers cannot be singled out from men of all trades and callings and alone deprived of right to work on Sunday. Eden v. People, 161 Ill. 906, 43 N. E. 1108, 32 L. R. A. 659; Ex parte Jentzsch, 119 Cal. 468, 44 Pac. 503, 32 L. R. A. 646; contra, People v. Haynor, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689. Mines shipping by rail or by water cannot be singled out and alone compelled: to provide special facilities for coal weighing. Harding v. People, 160 Ill. 459, 34 N. E. 694, 32 L. R. A. 415. Upon extent of police power, see State v. Schienmeyer, 42 La. Ann. 1168, 8 So. 307, 10 L. R. A. 135, and note. Restrictions upon the use of property by its owner cannot be purely arbitrary. They must be in some degree necessary to protect the legitimate interests of others. A riparian owner cannot be prevented from driving piles upon his own land and erecting buildings upon such piles, where they neither impede the flow materially nor interfere with navigation. Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 505, and note; State v. Gilman, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847; Northwestern Telephone & R. Co. v. Minneapolis, 81 Minn. 410, 82 N. W. 627, 85 N. W. 59, 53 L. R. A. 175. But see Summerville v. Pressley, 53 S. C. 56, 51 S. E. 646, 9 L. R. A. 554, and note. Non-performance of an impossibility cannot be made a crime. Port Huron v. Jenkinson, 77 Mich. 414, 43 N. W. 923, 6 L. R. A. 54. Nor can any other police regulation be purely arbitrary. Noel v. People, 187 Ill. 587, 85 N. E. 816. See also Albury v. Louisiana, note a, p. 835, ante; also many of the cases in note 1, p. 508, and note 2, p. 15, ante.]
any of the provisions of the charter; and they must not, under pretence of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise.¹

¹ The maxim, Sic utere tuo ut alienum non lèdas, is that which lies at the foundation of the power; and to whatever enactment affecting the management and business of private corporations it cannot fairly be applied, the power itself will not extend. It has accordingly been held that where a corporation was chartered with the right to take toll from passengers over their road, a subsequent statute authorizing a certain class of persons to go toll free was void.² This was not a regulation of existing rights, but it took from the corporation that which they before possessed,

¹ Washington Bridge Co. v. State, 18 Conn. 53; Bailey v. Philadelphia, &c. R. R. Co., 4 Harr. 389; State v. Noyes, 47 Me. 169; Pingry v. Washburn, 1 Aiken, 264; Miller v. N. Y. & Erie R. R. Co., 21 Barb. 515; People v. Jackson & Michigan I'nk Road Co., 9 Mich. 285, 307; Sloan v. Pacific R. R. Co., 61 Mo. 24; Attorney-General v. Chicago, &c. R. R. Co., 35 Wis. 425. In Benson v. Mayor, &c. of New York, 10 Barb. 223, 246, it is said, in considering a ferry right granted to a city: "Franchises of this description are partly of a public and partly of a private nature. So far as the accommodation of passengers is concerned, they are publici juris; so far as they require capital and produce revenue, they are privati juris. Certain duties and burdens are imposed upon the grantees, who are compensated therefor by the privilege of levying ferryage, and security from spoliation arising from the irrevocable nature of the grant. The State may legislate touching them, so far as they are publici juris. Thus, laws may be passed to punish neglect or misconduct in conducting the ferries, to secure the safety of passengers from danger and imposition, &c. But the State cannot take away the ferries themselves, nor deprive the city of their legitimate rents and profits." And see People v. Mayor, &c. of New York, 32 Barb. 102, 116; Commonwealth v. Pennsylvania Canal Co., 66 Pa. St. 41; Hegeman v. Western R. R., 13 N. Y. 9. [Powers granted to corporations are to be narrowly construed where their exercise is inimical to the public welfare, and a power granted by charter to one railroad "to connect with any railroad running in the same direction with this road, and where there may be any portion of another road which may be used by this company" does not authorize the consolidation of two parallel and competing lines, and a subsequently enacted constitutional prohibition of such consolidation does not impair the obligation of a contract, even if it could be held that the deprivation of a long grant but yet unused power were such impairment. Pearsall v. Great N. R. Co., 101 U.S. 640, 10 Sup. Ct. Rep. 705, and Louisville & N. R. Co. v. Kentucky, 101 U.S. 677, 16 Sup. Ct. Rep. 714, aff. 97 Ky. 675, 31 S. W. 470. State may compel insurance companies doing business within its borders to make full reports concerning their business and their financial condition. Eagle Ins. Co. v. Ohio, 152 U.S. 440, 14 Sup. Ct. Rep. 868.] After the organization of a company for electric communication, it may be required to obtain the approval of its plans by city commissioners before laying wires in the streets. People v. Squire, 107 N.Y. 503, 14 N.E. 820. A provision that an insurance policy referring to the application shall not be received in evidence unless such application is attached to it, is valid as to policies issued thereafter by an existing company. New Era Life Ins. Co. v. Musser, 120 Pa. St. 384, 14 Atl. 155.

² Pingry v. Washburn, 1 Aiken, 264. Of course the charter reserved no right to make such an amendment.
namely, the right to tolls, and conferred upon individuals that which before they had not, namely, the privilege to pass over the road free of toll. "Powers," it is said in another case, "which can only be justified on this specific ground [that they are police regulations], and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort, and well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it." And it was therefore held that an act subsequent to the charter of a plank-road company, and not assented to by the corporators, which subjected them to a total forfeiture of their franchises for that which by the charter was cause for partial forfeiture only, was void as impairing the obligation of contracts. And even a provision in a corporate charter, empowering the legislature to alter, modify, or repeal it would not authorize a subsequent act which, on pretense of amendment, or of a police regulation, would have the effect to appropriate a portion of the corporate property to the public use. And where by its charter the corporation was em-


2 Ibid. And see State v. Noyes, 47 Me. 180.

3 Detroit v. Plank Road Co., 43 Mich. 140, 5 N. W. 275. It has been held that the reservation of a right to amend or repeal would not justify an act requiring a railroad company to cause a proposed new street or highway to be taken across their track, and to cause the necessary embankments, excavations, and other work to be done for that purpose at their own expense; thus not only appropriating a part of their property to another public use, but compelling them to fit it for such use: Miller v. N. Y. & Erie R. R. Co., 21 Barb. 513; People v. Lake Shore, &c., Ry. Co., 52 Mich. 277, 17 N. W. 841; Chicago & G. T. Ry. Co. v. Hough, 61 Mich. 507, 28 N. W. 532. Contra, Portland & R. R. Co. v. Deering, 78 Me. 61, 2 Atl. 670; even if there is no reservation in the charter of the right to alter, &c., Boston & M. R. R. Co. v. Comrs., 79 Me. 380, 10 Atl. 153. Companies may be compelled to put in farm crossings at their own expense. Ill. Cent. R. R. Co. v. Willenborg, 117 Ill. 203, 7 N. E. 608. See also Montclair v. New York, &c., Ry. Co., 45 N. J. Eq. 436, 18 Atl. 342. This, however, can scarcely be a more severe exercise of the power than is the amendment to the charter of a railroad corporation which limits the rates of fare and freight which may be charged; for the exercise of this might be carried to an extent which would annihilate the whole value of railroad property. The power, however, is very fully sustained, where the right to amend is reserved in the charter. Attorney-General v. Chicago, &c., R. R. Co., 35 Wis. 425; Blake v. Winona, &c., R. R. Co., 10 Minn. 418, 18 Am. Rep. 346; Chicago, &c., R. R. Co. v. Iowa, 44 U. S. 155; Piek v. Chicago, &c., R. R. Co., 6 Biss. 177. See a like rule applied to a ferry company in Par-
powered to construct over a river a certain bridge, which must necessarily constitute an obstruction to the navigation of the river, a subsequent amendment making the corporation liable for such obstruction was held void, as in effect depriving the corporation of the very right which the charter assured to it.¹ So where the charter reserved to the legislature the right of modification after the corporators had been reimbursed their expenses in constructing the bridge, with twelve per cent interest thereon, an amendment before such reimbursement, requiring the construction of a fifty-foot draw for the passage of vessels, in place of one of thirty-two feet, was held unconstitutional and void.² So it has been held that a power to a municipal corporation to regulate the speed of railway carriages would not authorize such regulation, except in the streets and public grounds of the city; such being the fair construction of the power, and the necessity for this police regulation not extending further.³ But there are decisions on this point which are the other way.⁴

On the other hand, the right to require existing railroad corporations to fence (a) their track, and to make them liable for all

² Washington Bridge Co. v. State, 18 Conn. 53.
³ State v. Jersey City, 29 N. J. 170.
⁴ Crowley v. Burlington, &c., Ry. Co., 65 Iowa, 658, 22 N. W. 407, 22 N. W. 918. See Merz v. Missouri P. Ry. Co., 88 Mo. 672. In Buffalo & Niagara Falls R. R. Co. v. Buffalo, 5 Hill, 209, it was held that a statutory power in a city to regulate the running of cars within the corporate limits would justify an ordinance entirely prohibiting the use of steam for propelling cars through any part of the city. And see Great Western R. R. Co. v. Decatur, 33 Ill. 381; Branson v. Philadelphia, 47 Pa. St. 329; Whitson v. Franklin, 34 Ind. 392. Affirming the general right to permit the municipalities to regulate the speed of trains, see Chicago, &c., R. R. Co. v. Haggerty, 67 Ill. 113; Pennsylvania R. R. Co. v. Lewis, 79 Pa. St. 53; Hans v. Chicago, &c., R. R. Co., 41 Wis. 44. That the legislature may compel railroad companies to carry impartially for all, see Chicago, &c., R. R. Co. v. People, 67 Ill. 11; Cincinnati, &c., R. R. Co. v. Cook (Ohio), 6 Am. & Eng. R. R. Cas. 317; Louisville, N. O. & T. Ry. Co. v. State, 66 Miss. 662, 6 So. 203; but an act abrogating the requirement of impartial carriage is void as to inter-state transportation. The Sue, 22 Fed. Rep. 843. But if the carriage is of persons from State to State, the State has no such control. Hall v. De Cuir, 95 U. S. 486. See Carton v. Illinois Cent. R. R. Co., 59 Iowa, 148, 13 N. W. 67, 6 Am. & Eng. R. R. Cas. 305. See cases, post, pp. 844, 873.

(a) Other landowners may be required to fence their lands also, and may be denied the right to recover for trespasses by domestic animals unless their lands are
beasts killed by going upon it, has been sustained on two grounds: first, as regarding the division fence between adjoining proprietors; and in that view being but a reasonable provision for the protection of domestic animals; and second, and chiefly, as essential to the protection of persons being transported in the railway carriages.1 Having this double purpose in view, the owner of

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fenced as required. Poindeexter v. May, 98 Va. 145, 34 S. E. 971, 47 L. R. A. 688. And a law permitting half of a party wall to be placed upon the land of an adjoining proprietor, even against his will, is good. Swift v. Calman, 102 Iowa, 206, 71 N. W. 223, 37 L. R. A. 462.]
beasts killed or injured may maintain an action for the damage suffered, notwithstanding he may not himself be free from negligence. 1 But it would, perhaps, require an express legislative declaration that the corporation should be liable for the beasts thus destroyed to create so great an innovation in the common law. The general rule, where a corporation has failed to obey the police regulations established for its government, would not make the corporation liable to the party injured, if his own negligence contributed with that of the corporation in producing the injury. 2

The State may also regulate the grade of railways, and prescribe how, and upon what grade, railway tracks shall cross each other: and it may apportion the expense of making the necessary crossings between the corporations owning the roads. 3 And railroad liable for cattle killed irrespective of negligence is bad. Jensen v. Union Pac. Ry. Co., 6 Utah, 253, 21 Pac. 904, 4 L. R. A. 724; Biedenberg v. Montana, &c. Ry. Co., 8 Mont. 271, 20 Pac. 314. And it is not competent to make railroad companies liable for injuries for which they are in no way responsible. It is therefore held that an act imposing upon railroad companies the expense of coroners’ inquests, burial, &c., of persons who may die on its cars, or be killed by collision, &c., is invalid as applied to cases where the company is not in fault. Ohio, &c. R. R. Co. v. Lackey, 78 Ill. 55. That it is as competent to lessen the common-law liabilities of railroad companies as to increase them, see Kirby v. Pennsylvania R. R. Co., 76 Pa. St. 506. And see Camden & Amboy R. R. Co. v. Briggs, 22 N. J. 628; Trice v. Hannibal, &c. R. R. Co., 49 Mo. 435.


2 Jackson v. Rutland & Burlington R. R. Co., 25 Vt. 150. And see Marsh v. N. Y. & Erie R. R. Co., 14 Barb. 364; Joliet & N. I. R. R. Co. v. Jones, 20 Ill. 221; Tonawanda R. R. Co. v. Mungen, 5 Denio, 255, and 4 N. Y. 340; Price v. New Jersey R. R. Co., 31 N. J. 229; Drake v. Philadelphia, &c. R. R. Co., 51 Pa. St. 240. In Indianapolis & Cincinnati R. R. Co. v. Kercheval, 10 Ind. 84, it was held that a clause in the charter of a railroad corporation which declared that when the corporations should have procured a right of way as therein provided, they should be seised in fee-simple of the right to the land, and should have the sole use and occupation of the same, and no person, body corporate or politic, should in any way interfere therewith, molest, disturb, or injure any of the rights and privileges thereby granted, &c., would not take from the State the power to establish a police regulation making the corporation liable for cattle killed by their cars. [Jensen v. Union P. R. R. Co., 6 Utah, 258, 21 Pac. 904, 4 L. R. A. 724, holds that railroad cannot in the absence of negligence on its part be made liable for stock killed by it.]

it may establish regulations requiring existing railways to ring the bell or blow the whistle of their engines immediately before passing highways at grade, or other places where their approach might be dangerous to travel, or to station flagmen at such or any other dangerous places. And it has even been intimated that it might be competent for the State to make railway corporations liable as insurers for the safety of all persons carried by them, in the same manner that they are by law liable as carriers of goods; though this would seem to be pushing the police power to an extreme. But those statutes which have recently become

be required to put up depots at railroad junctions. State v. Wabash, &c. Ry. Co., 83 Mo. 144. Part of the expense of changing grade to overhead crossings may be laid upon a town. Appeal of Waukon, 17 Conn. 95, 17 Atl. 368. The legislature may regulate the speed at highway and other crossings. Rockford, &c. R. R. Co. v. Hillmer, 72 Ill. 235. "While the franchise of a railroad company licenses generally unlimited speed, power is reserved to the legislature to regulate the exercise of the franchise for public security." Ryn. Ch. J., in Horn v. Chicago, &c. R. R. Co., 38 Wis. 463. The regulation is in favorum vitam. Haas v. Chicago, &c. R. R. Co., 41 Wis. 44. But running at unlawful speed does not impose an absolute liability. Louisville, N. O. & T. Ry. Co. v. Caster, Miss., 5 So. 388. [The State, acting directly or through a city council, may compel the railway companies over whose tracks a viaduct extends to repair the same, and may apportion among them the expense of such repair. Although the viaduct was built at the joint expense of the railway companies and the city, acting under agreement. Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. Rep. 518, aff. 47 Neb. 519, 99 N. W. 624. A railway company may be required to pay the whole expense of change of grade at a crossing. New York & N. E. R. R. Co. v. Town of Bristol, 151 U. S. 550, 14 Sup. Ct. Rep. 427, aff. 62 Conn. 657, 29 Atl. 122.] 1

1 The legislature has the power, by general laws, from time to time, as the public exigencies may require, to regulate corporations in their franchises, so as to provide for the public safety. The provision in question is a mere police regulation, enacted for the protection and safety of the public, and in no manner interferes with or impairs the powers conferred on the defendants in their act of incorporation." Galena & Chicago U. R. R. Co. v. Loomis, 19 Ill. 646. And see Stuyvesant v. Mayor, &c. of New York, 7 Cow. 568; Benson v. Mayor, &c. of New York, 10 Barb. 223; Bulkley v. N. Y. & N. H. R. R. Co., 27 Conn. 493; Venzie v. Mayo, 45 Me. 620; 49 Me. 156; Galena & Chicago U. R. R. Co. v. Dill, 22 Ill. 201; Same v. Appleby, 28 Ill. 283; Ohio & Mississippi R. R. Co. v. McClelland, 25 Ill. 140; Clark's Adm'r v. Hannibal & St. Jo. R. R. Co., 35 Mo. 202; Chicago, &c. R. R. Co. v. Triplet, 38 Ill. 482; Commonwealth v. Eastern R. R. Co., 103 Mass. 254, 4 Am. Rep. 555; Kaminisky v. R. R. Co., 25 S. C. 63. 2

2 Toledo, &c. R. R. Co. v. Jacksonville, 67 Ill. 37; Western & A. R. R. Co. v. Young, 81 Ga. 367, 7 S. E. 912. In many States now there are railroad commissioners appointed by law, with certain powers of supervision, more or less extensive. Respecting these it has been said in Maine: "Our whole system of legislative supervision through the railroad commissioners acting as a State police over railroads is founded upon the theory that the public duties devolved upon railroad corporations by their charter are ministerial, and therefore liable to be thus enforced." Railroad Commissioners v. Portland, &c. R. R. Co., 63 Me. 269, 18 Am. Rep. 208.

3 Thorpe v. Rutland & Burlington R. R. Co., 27 Vt. 140. Carriers of goods are liable as insurers, notwithstanding they may have been guiltless of negligence, because such is their contract with the shipper when they receive his goods for transportation; but carriers of persons assume no such obligations at the
common, and which give an action to the representatives of persons killed by the wrongful act, neglect, or default of another, may unquestionably be made applicable to corporations previously chartered, and may be sustained as only giving a remedy for a wrong for which the common law had failed to make provision. And it cannot be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition.

common law, and where a company of individuals receive from the State a charter which makes them carriers of persons, and chargeable as such for their own default or negligence only, it may well be doubted if it be competent for the legislature afterwards to impose upon their contracts new burdens, and make them respond in damages where they have been guilty of no default. In other words, whether that could be a proper police regulation which did not assume to regulate the business of the carrier with a view to the just protection of the rights and interests of others, but which imposed a new obligation, for the benefit of others, upon a party guilty of no neglect of duty. But perhaps such a regulation would not go further than that in Stanley v. Stanley, 26 Me. 101, where it was held competent for the legislature to pass an act making the stockholders of existing banks liable for all corporate debts thereafter created; or in Peters v. Iron Mountain R. R. Co., 23 Mo. 107, and Grannahan v. Hannibal, &c. R. R. Co., 30 Mo. 516, where an act was sustained which made companies previously chartered liable for the debts of contractors to the workmen whom they had employed. That a statute creating such absolute liability is valid, is held in Chicago, R. I. & P. Ry. Co. v. Zernecke, 59 Neb. 689, 82 N. W. 26, 55 L. R. A. 610.

Southwestern R. R. Co. v. Paulk, 24 Ga. 350; Coosa River Steamboat Co. v. Barclay, 30 Ala. 120. In Boston, Concord, and Montreal R. R. v. State, 32 N. H. 215, a statute making railroad corporations liable to indictment and fine, in case of the loss of life by the negligence or carelessness of the proprietors or their servants, was adjudged constitutional, as applicable to corporations previously in existence. To an indictment or action under a like Massachusetts act contributory negligence is no defence. Com. v. Boston, &c. R. R., 134 Mass. 211; Merrill v. Eastern R. R., 139 Mass. 289, 1 N. E. 548, 139 Mass. 292, 29 N. E. 660.

Restraints on Sale of Liquors. Those statutes which regulate or altogether prohibit the sale of intoxicating drinks as a beverage have also been, by some persons, supposed to conflict with the federal Constitution. Such of them, however, as assume to regulate merely, and to prohibit sales by other persons than those who are licensed by the public authorities, have not suggested any serious question of constitutional power. They are but the ordinary police regulations, such as the State may make in respect to all classes of trade or employment. But those which undertake altogether to prohibit the manufacture and sale of intoxicating drinks as a beverage have been assailed as violating express provisions of the national Constitution, and also as subversive of fundamental rights, and therefore not within the grant of legislative power.

That legislation of this character was void, so far as it affected imported liquors or such as might be introduced from one State into another, because in conflict with the power of Congress over commerce, was strongly urged in the License Cases before the Supreme Court of the United States; but that view did not obtain the assent of the court. Opinions were expressed by a majority


of the court that the introduction of imported liquors into a State, and their sale in the original packages as imported, could not be forbidden, because to do so would be to forbid what Congress, in its regulation of commerce, and in the levy of imposts, had permitted;¹ but it was conceded by all, that when the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be under Congressional protection as an import, or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State like any other property.² It was also decided, in these cases, that the power of Congress to regulate commerce between the States did not exclude regulations by the States, except so far as they might come in conflict with those established by Congress; and that, consequently, as Congress had not undertaken to regulate commerce in liquors between the States, a law of New Hampshire could not be held void which punished the sale, in that State, of gin purchased in Boston and sold in New Hampshire, notwithstanding the sale was in the cask in which it was imported, but by one not licensed by the selectmen.³ The authority of the License Cases is, however, seriously impaired by late decisions of the same court. Upon the principle, now well settled,⁴ that the failure of Congress to act as to matters directly affecting interstate commerce is equivalent to a declaration that it shall be free, it is held a State has no power to prevent the bringing of liquor into it from another


² Daniel, J., held that the right to regulate was not excluded, even while the packages remained in the hands of the importer unbroken (p. 612). See also the views of Grier, J. (p. 631). [See, in this connection, Re Wilson, 8 Mackey (D. C.), 311, 12 L. R. A. 624. While the liquor is yet in the original package, the State may prohibit and punish its sale to a person of known intemperate habits. Com. v. Zelt, 128 Pa. 615, 21 Atl. 7, 11 L. R. A. 602.]


⁴ See p. 688, note 2.
State, and that it cannot prohibit the sale within it of liquor in the original package by a non-resident. But the manufacture of

board of control, a commissioner and certain county dispensers, and after an inspection by a State chemist. Packages of wines and liquors made in other States and imported by a resident of the State for his own use, and in the possession of railroad companies which, as common carriers, had brought the packages within the State, were seized and confiscated as contraband by constables of the State. The court held "that when a State recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States; that such legislation is void as a hindrance to interstate commerce, and an unjust preference of the products of the enacting State as against similar products of the other States," and that therefore "as respected residents of the State of South Carolina desiring to import foreign wines and liquors for their own use, the act in question in that case was void." The statute was thereupon modified in such manner as to permit the importation, but to require that before any such importation the intending importer should "first certify to the [official] chemist . . . the quantity and kind of liquor proposed to be imported, together with the name and place of business of the person, firm, or corporation from whom it is desired to purchase, accompanying such certificate with the statement that the proposed consignor has been requested to forward a sample of such liquor to the said chemist. . . . Upon the receipt of said sample, the said chemist shall immediately proceed to test the same, and . . . [upon finding it pure, &c.] shall issue a certificate to that effect," which should be attached to the consignment. Any package imported without such certificate was to be confiscated and destroyed. This provision was considered in Vance v. Vandecook Co., 170 U. S. 438, 18 Sup. Ct. Rep. 674, and held invalid as an unlawful interference with interstate commerce. In Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. Rep. 694, it was held that the importation was not completed until the goods had been delivered to the consignee, or at any rate
intoxicating liquor within the State may be forbidden although intended solely for exportation.1

until the carrier ceased to hold them as carrier. The Iowa law forbidding transportation from place to place within the State did not apply to the station agent who unloaded a box containing whiskey from a freight car and wheeled it into the railway company’s freight warehouse, there to await delivery to the consignee. And in State v. Holleman, 55 S. C. 207, 31 S. E. 362; 33 S. E. 366, 45 L. R. A. 597, it was held that, despite the Dispensary Law, a person might purchase liquors outside the State and himself transport them from the place of purchase to his home, and there keep them for his own use, because such act was interstate commerce, and the Wilson Law did not permit the State law to attach until the liquors had reached their destination. For other cases on South Carolina Dispensary Law, see State v. Aiken, 43 S. C. 222, 20 S. E. 221, 26 L. R. A. 345; McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410. For a construction of the Alabama Dispensary Law, see Sheppard v. Dowling, 127 Ala. 1, 28 So. 701, 83 Am. St. 63. Upon interstate sales of intoxicating liquors and State regulation thereof, see a valuable note to 42 L. ed. U. S. 1089. Upon liquor legislation generally, see Foster v. Kansas, 112 U. S., 205, 5 Sup. Ct. Rep. 8, 97; Re Caswell, 18 R. I. 835, 29 Atl. 259, 27 L. R. A. 82, 85, and note; State v. Creedon, 78 Iowa, 550, 43 N. W. 673, 7 L. R. A. 295; Lemly v. State, 70 Miss. 241, 12 So. 22, 20 L. R. A. 644, and note; Trussell v. Gray, 73 Md. 250, 20 Atl. 905, 9 L. R. A. 780, and note; and VOEN v. Creton, 158 Pa. 48, 20 Atl. 865, 9 L. R. A. 814, and note. Upon what is an original package, see Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. Rep. 132, in which it was held that a cigarette package three inches long, and an inch and a half wide, containing ten cigarettes, was not an original package where many such were deposited in the basket owned by the express company and by that company carried to consignee in the same basket and poured out on consignee’s counter; whether, if each small package had been addressed to consignee, the holding would have been otherwise, quare; see concurring opinion by Mr. Justice White. For a similar holding with regard to cigarette packages, see McGregor v. Cone, 101 Iowa, 465, 73 N. W. 1041, 39 L. R. A. 484. See also State v. Chapman, 1 S.D. 414, 47 N. W. 411, 10 L. R. A. 432; Keith v. State, 91 Ala. 2, 8 So. 353, 10 L. R. A. 430. Upon the Constitutional protection of the “original package,” see 85 Cent. L. Jour. 342, and 35 Am. L. Rev. 669. For further cases upon interstate commerce, see Fuqua v. Pabst Brewing Co., 90 Tex. 238, 35 S. W. 27, 750, 35 L. R. A. 241; Ohio & M. R. Co. v. Taber, 98 Ky. 593, 32 S. W. 163, 30 S. W. 18, 31 L. R. A. 685; Houston Direct Navigation Co. v. Ins. Co. of N. A., 90 Tex. 1, 32 S. W. 889, 30 L. R. A. 713; State v. Wheelock, 95 Iowa, 577, 61 N. W. 220, 30 L. R. A. 429; Hopkins v. Lewis, 84 Iowa, 650, 51 N. W. 255, 15 L. R. A. 397 (original package); Lang v. Lynch, 38 Fed. Rep. 49, 4 L. R. A. 831.] After a railroad has stored such liquor in its warehouse for several days, it ceases to be a carrier and becomes amenable to the law. State v. Creedon, 78 Iowa, 556, 43 N. W. 673. See also State v. O’Neil, 68 Vt. 140, 2 Atl. 580; aff. 144 U. S. 323, 12 Sup. Ct. Rep. 693. A State may not prohibit the sale within its borders of oleomargarine manufactured in another State, so long as such substance is recognized by Congress as a legitimate article of commerce. Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. Rep. 757. On oleomargarine in original packages, see RE Gooch, 44 Fed. Rep. 276, 10 L. R. A. 830. Nor is it permitted to indirectly accomplish such prohibition by requiring all oleomargarine sold within its borders to be colored pink or otherwise adulterated. Collins v. New Hampshire, 171 U. S. 30, 18 Sup. Ct. Rep. 768. Upon prohibition of sale of oleomargarine, manufacturer intends, at his convenience, to export such liquors to foreign countries or to other States.” Lamar, J., p. 24.

1 Kidd v. Pierce, 128 U. S. 1, 9 Sup. Ct. Rep. 6. “The manufacture of intoxicating liquors in a State is none the less a business within that State, because the
These State laws, known as Prohibitory Liquor Laws, the purpose of which is to prevent altogether the manufacture and sale of intoxicating drinks as a beverage, so far as legislation can accomplish that object, cannot be held void as in conflict with the fourteenth amendment. And in several cases it has been held that the fact that such laws may tend to prevent or may absolutely preclude the fulfillment of contracts previously made is no objection to their validity. Any change in the police laws, or indeed in any other laws, might have a like consequence.

The same laws have also been sustained, when the question of conflict with State constitutions, or with general fundamental principles, has been raised. They are looked upon as police regulations established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances. It has also been held competent to declare the liquor

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kept for sale a nuisance, and to provide legal process for its condemnation and destruction, and to seize and condemn the building occupied as a dram-shop on the same ground. And it is only where, in framing such legislation, care has not been taken to observe those principles of protection which surround the persons and dwellings of individuals, securing them against unreasonable searches and seizures, and giving them a right to trial before condemnation, that the courts have felt at liberty to declare that it exceeded the proper province of police regulation. Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in, and by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that, for the purposes of sale, becomes a criminal offence; and, without any change whatever in his own conduct or employment, the merchant of yesterday becomes the criminal of to-day, and the very building in which he lives and conducts the business which to that moment was lawful becomes the subject of legal proceedings, if the statute shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be

of the State to evade the State law, was sustained and applied notwithstanding the contract was valid where made. The general rule is, however, that if the contract is valid where made, it is valid everywhere. See Sortwell v. Hughes, 1 Curtis, 214; Adams v. Couillard, 102 Mass. 167; Hill v. Spear, 50 N. H. 258; Kling v. Fries, 33 Mich. 275; Roethke v. Philip Best Brewing Co., 33 Mich. 340; Webber v. Donnelly, 33 Mich. 409; [Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. Rep. 884.]


3 See Mugler v. Kansas, 123 U. S. 625, b Sup. Ct. Rep. 273; Kaufman v. Dostal, 73 Iowa, 691, 36 N. W. 443; Whitney v. Township Board, 71 Mich. 234, 59 N. W. 40; Tanne v. Alliance, 29 Fed. Rep. 190; Menken v. Atlanta, 78 Ga. 558, 2 S. E. 559. In a number of the States, statutes have recently been passed to make the owners of premises on which traffic in
justified upon the highest reasons of public benefit; but, whether satis-
factory or not, the reasons address themselves exclusively to the legisla-
tive wisdom.

Taxes on Forbidden Occupations. Questions have arisen in re-
gard to these laws, and other State regulations, arising out of the im-
position of burdens on various occupations by Congress, with a view to raising revenue for the national government. These bur-
dens are imposed in the form of what are called license fees; and it has been claimed that, when the party paid the fee, he was thereby licensed to carry on the business, despite the regulations which the State government might make upon the subject. This view, however, has not been taken by the courts, who have re-
garded the congressional legislation imposing a license fee as only a species of taxation, without the payment of which the busi-
ness could not lawfully be carried on, but which, nevertheless, did not propose to make any business lawful which was not lawful before, or to relieve from any burdens or restrictions imposed by the regulations of the State. The licenses give no authority, and are mere receipts for taxes.¹

Other Regulations affecting Commerce. Numerous other illus-
trations might be given of the power in the States to make regu-
lations affecting commerce, which are sustainable as regulations of police.² Among these, quarantine regulations and health laws

¹ Taxiing liquors is carried on responsible for all damages occasioned by such traffic. It is believed to be entirely com-
petent for the legislature to pass such statutes. Bertholf v. O'Reilly, 74 N.Y. 509. But whether they can apply in cases where leases have previously been made must be a serious question.

² License Tax Cases, 5 Wall. 402; Purv-
year v. Commonwealth, 5 Wall. 475; Com-
monwealth v. Holbrook, 10 Allen, 209; Block v. Jacksonville, 36 Ill. 301; Terr. v. O'Connor, 5 Dak. 397, 41 N. W. 746; They are not contracts. Martin v. State, 23 Neb. 371, 36 N. W. 554. Nor does their payment preclude enforcement of penal-
withstanding the State constitution for-
bits its being licensed. Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 554. As to when license fees are taxes, see ante, p. 283, and note. State taxation does not forbid further municipal tax-

¹ See remarks of Grier, J., in License Cases, 5 Haw. 604, 632; Meeker v. Van Rensselaer, 15 Wend. 397. A liquor law may annul a previous license, and not be invalid on that ground. See ante, p. 400, note. Under the police power, the deal-

² As to the right to fix rates for rail-
road transportation, see cases, pp. 572-
875, post. [But it is not open to a State to compel "through trains" carrying inter-
state commerce to stop at every county-seat through which they pass, provided "local trains" furnish ample accommodation for the traffic of such places. C. C. C. & St. L. Ry. Co. v. Illi-
of every description will readily suggest themselves, and these are or may be sometimes carried to the extent of ordering the

destruction of private property when infected with disease or otherwise dangerous. These regulations have generally passed the State to be wagered upon a horse-
race. *Ex parte Lacy*, 93 Va. 159, 24 S. E. 930, 31 L. R. A. 822. May make inter-
state telegraph company responsible for negligence within the State in transmis-
sion of interstate message. W. U. Tel-
Co. v. Howell, 65 Ga. 194, 22 S. c. 285, 30 L. R. A. 158. Where corporation de-

erives its franchise from the State it is subject to State law in regard to exempt-
ing itself by contract from liabilities of common carrier, even though the contract relates to interstate commerce. St. Jos. & G. M. R. Co. v. Palmer, 38 Neb. 493, 56 N. W. 937, 22 L. R. A. 393. State may regulate pressure of natural gas trans-
ported through pipes to other States. Jamisron v. Indiana N. Gas & Oil Co., 128 Ind. 655, 28 N. E. 76, 12 L. R. A. 682. But cannot forbid its exportation. State v. Indiana & O. Oil G. & M. Co., 120 Ind. 576, 22 N. E. 778, 6 L. R. A. 579, and note. For other cases upon State laws and in-
wood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643, and note; Dwyer v. Gulf, C. & S. F. R. Co., 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, and cases cited note 1, post, 854. Agent of non-resident organ-
ized company who travels with an organ, sell-
ing it when he can or taking orders for others and delivering them when re-
ceived, is engaged in interstate commerce and not liable to State peddler's tax.

French r. State. — Tex. Crim. App. —, 53 S. W. 1015, 62 L. R. A. 100. Goods manufactured in another State to fill orders taken by travelling salesman, and shipped into the State, consigned to the buyer, and delivered by the agent to the person ordering, are the subject of inter-
state commerce, and the agent cannot be subjected to a State license tax in the State where delivered. Wyoming v. Wil-
liningham, 9 Wyo. 290, 62 Pac. 797, 62 L. R. A. 198. See also Adkins v. Richmond, 98 Va. 91, 34 S. E. 967, 81 Am. St. 706, 47 L. R. A. 683.]

1 It is usual, either by general law or by municipal charters, to confer very extensive powers upon local boards of health, under which, when acting in good faith, they may justify themselves in tak-
ing possession of, purifying, or even de-
stroying the buildings or other property of the citizen, when the public health or comfort demands such strong measures.

See Harrison v. Baltimore, 1 Gill, 264; Van Wormer v. Albany, 15 Wend. 262; Cee v. Shultz, 47 Barb. 64; Raymond v. Fish, 61 Conn. 80. [Hurst v. Warner, 102 Mich. 238, 60 N. W. 440, 20 L. R. A. 484, and see also note in L. R. A. upon quarantine regulations by health author-

Idaho, —, 59 Pac. 933, 52 L. R. A. 78. State may regulate the heating apparatus used in passenger cars, and may exempt from such regulations railroad lines less than fifty miles long. N. Y., N. II. & N. R. Co. v. New York, 166 U. S. 628, 17 Sup. Ct. Rep. 418. But a State cannot compel a railroad company to furnish double-decked cars for sheep shipped in interstate commerce, nor can it regu-
late the transportation charges on such shippments. Stanley v. Wabash, St. L. & P. R. Co., 100 Mo. 465, 13 S. W. 799, 8 L. R. A. 549. A statute of Louisiana empowered the State Board of Health to exclude healthy persons from entering localities where disease was prevalent, whether coming from within or without the State. The question was raised by the Board re-


They may forbid offensive trades being carried on in populous districts. *Ex parte Shadrer*, 33 Cal. 279; Metropolitan Board v. Heister, 27 N. Y. 601; Live Stock, &c. Association v. Crescent City, &c. Co., 16 Wall. 86; Wynnehamer v. Peo-

tle, 17 N. Y. 378; Cee v. Shultz, 47 Barb. 54; Ashbrook v. Commonwealth, 1 Bush, 139; Taunton v. Taylor, 116 Mass. 254; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Dillon, Mun. Corp. § 95; Potter's Duvris on Stat. 468. See State v. Board of Health, 19 Mo. App. 8. The disinfec-
unchallenged. The right to pass inspection laws, and to levy duties so far as may be necessary to render them effectual, is also undoubted, and is expressly recognized by the Constitution.


If they forbid the keeping of swine in certain parts of a city, their regulations will be presumed reasonable and needful. Commonwealth v. Patch, 97 Mass. 221, citing with approval Pierce v. Bartram, Cwmp. 239. And though they cannot be vested with authority to decide finally upon one's right to property when they proceed to interfere with it as constituting a danger to health, yet they are vested with quasi judicial power in deciding upon what constitutes a nuisance, and all presumptions favor their actions. See Van Wormer v. Albany, 15 Wend. 292; Kennedy v. Phelps, 10 La. Ann. 227; Metropolitan Board v. Heister, 37 N. Y. 601; Raymond v. Fish, 61 Conn. 80. And they may unquestionably be vested with very large power to establish pesthouses, and make very stringent regulations to prevent the spread of contagious diseases. As to the power of the public authorities to establish a public slaughterhouse, or to require all slaughtering of beasts to be done at one establishment, see Milwaukee v. Gross, 21 Wis. 241; Live Stock, &c. Association v. Crescent City, &c. Co., 10 Wall. 36. Compare, as to right to establish monopolies, Gale v. Kalamazoo, 23 Mich. 344. [A State cannot require all sheep to be dipped before being brought within its borders, without regard to whether they are diseased or not. State v. Duckworth, — Idaho, — 51 Pac. 468, 39 L. R. A. 305.] The license of a board of health is not a defence to an indictment for a nuisance. Garrett v. State, 49 N. J. L. 94, 7 Atl. 29.

A regulation forbidding the growing of rice within a city, on the ground of injurious effect upon health, was held valid in Green v Savannah, 6 Ga. 1. [Breaders may be required to be furnished upon dry emery wheels. People v. Smith, 108 Mich. 627, 66 N. W. 382, 32 L. R. A. 853, and upon power to protect health of employees, see note hereto in L. R. A. Orders of boards of health must be reasonable, and an order prohibiting all persons until further order from getting off any train or boat within the State is void, though made as a quarantine regulation against yellow fever prevalent in some places, because applicable as well to persons from non-infected as from infected districts. Wilson v. Alabam G. S. Ry. Co., 77 Miss. 714, 28 So. 657, 52 L. R. A. 357. See on compulsory vaccination, 4 Law Notes, 224, 54 Cent. L. Jour. 361.]

But certain powers which still more directly affect commerce may sometimes be exercised where the purpose is not to interfere with congressional legislation, but merely to regulate the times and manner of transacting business with a view to facilitate trade, secure order, and prevent confusion.

An act of the State of New York declared that the harbor-masters appointed under the State laws should have authority to regulate and station all ships and vessels in the stream of the East and North rivers, within the limits of the city of New York, and the wharves thereof, and to remove from time to time such vessels as were not employed in receiving and discharging their cargoes to make room for such others as required to be more immediately accommodated, for the purpose of receiving and discharging theirs; and that the harbor-masters or either of them should have authority to determine how far and in what instances it was the duty of the masters and others, having charge of ships or vessels, to accommodate each other in their respective situations; and it imposed a penalty for refusing or neglecting to obey the directions of the harbor-masters or either of them. In a suit brought against the master of a steam vessel, who had refused to move his vessel a certain distance as directed by one of the harbor-masters, in order to accommodate a new arrival, it was insisted on the defence that the act was an unconstitutional invasion of the power of Congress over commerce, but it was sustained as being merely a regulation prescribing the manner of exercising individual rights over property employed in commerce.¹

The line of distinction between that which constitutes an interference with commerce, and that which is a mere police regulation, is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations, as well as the States; confining their operation to the subject over which it is given control by the Constitution. But as the general police power can better be exercised the general benefit, and do not proceed to the length of impairing any right, in the proper sense of that term. The sovereign power in a community, therefore, may and ought to prescribe the manner of exercising individual rights over property. It is for the better protection and enjoyment of that absolute dominion which the individual claims. The power rests on the implied right and duty of the supreme power to protect all by statutory regulations; so that, on the whole, the benefit of all is promoted. Every public regulation in a city may, and does in some sense, limit and restrict the absolute right that existed previously. But this is not considered as an injury. So far from it, the individual, as well as others, is supposed to be benefited. It may, then, be said that such a power is incident to every well-regulated society, and without which it could not well exist. See Cooley v. Board of Wardens, 12 How. 299; Owners of the James Gray v. Owners of the John Frazer, 21 How. 184; Benedict v. Vanderbilt, 1 Robertson, 194; Steamship Co. v. Joliffe, 2 Wall. 450; Wilson v. McNamee, 102 U. S. 572; Port Wardens v. The Ward, 14 La. Ann. 289; Gilman v. Philadelphia, 3 Wall. 713, 731; Cisco v. Roberts, 36 N. Y. 292. [State may require all coal-boats and barges to be gauged, and may appoint official gaugers and prescribe their fees. Pittsburgh & S. Coal Co. v. Louisiana, 156 U. S. 500, 15 Sup. Ct. Rep. 459.]


1 See, for the distinction between the general regulation of commerce, which is under the exclusive control of Congress, and the local regulations which are mere aids to commerce, and are generally left to the States, Mobile v. Kimball, 102 U. S. 691, per Field, J., and cases, pp. 686–691, ante. [And see Harmon v. Chicago, 147 U. S. 300, 13 Sup. Ct. Rep. 306, and note thereto in 37 L. ed. U. S. 216. State may require intersecting railroads to establish facilities for interchange of traffic at junction points, and to establish joint rates via such points, even though inter-state commerce be thereby affected. Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. Rep. 115, aff. 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389. A statute of the State of Kentucky with a long and short haul provision was held to apply to commerce within the State and not to contravene the commerce clause of the Federal Constitution, though the enforcement of the statute might in some measure affect commerce generally. But this effect is incidental, not direct. "Interference with the commercial power of the general government to be unlawful must be direct and not merely the incidental effect of the enforcement of the police power of the State." Louisville & N. Ry. Co. v. Kentucky, 183 U. S. 503, 22 Sup. Ct. Rep. 95, and cases cited in the opinion. The statute construed in Louisville & N. Ry. Co. v. Kentucky, just cited, was before the Federal Supreme Court again in Louisville & N. Ry. Co. v. Zahn, 184 U. S. 27, 22 Sup. Ct. Rep. 277, in which it is held that as applied to inter-state commerce the statute is invalid.] A State
under the supervision of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national courts, the regulations which are made by Congress do not often exclude the establishment of others by the State covering very many particulars. Moreover, the regulations of commerce are usually, and in some cases must be, general and uniform for the whole country; while in some localities, State and local policy will demand peculiar regulations with reference to special and peculiar circumstances.
The State of Maryland passed an act requiring all importers of foreign goods, by the bale or package, &c., to take out a license, for which they should pay fifty dollars, and, in case of neglect or refusal to take out such license, subjected them to certain forfeitures and penalties. License laws are of two kinds: those which require the payment of a license fee by way of raising a revenue, and are therefore the exercise of the power of taxation; and those which are mere police regulations, and require the payment only of such license fee as will cover the expense of the license and of enforcing the regulation. 1 The Maryland act seems to fall properly within the former of these classes, and it was held void as in conflict with that provision of the Constitution which prohibits a State from laying any impost, &c., and also with the clause which declares that Congress shall have the power to regulate commerce. The reasoning of the court was this: Sale is the object of all importation of goods, and the power to allow importation must therefore imply the power to authorize the sale of the thing imported; that consequently a penalty inflicted for selling an article in the character of importer was in opposition to the act of Congress, which authorized importation; that a power to tax an article in the hands of the importer the instant it was landed was the same in effect as a power to tax it whilst entering the port; that consequently the law of Maryland was obnoxious to the


charge of unconstitutionality, on the ground of its violating the two provisions referred to.¹ And a State law which required the master of every vessel engaged in foreign commerce to pay a certain sum to a State officer, on account of every passenger brought from a foreign country into the State, or before landing any alien passenger, was held void for similar reasons.² Nor can a State forbid the conduction from it of natural gas in pipes.³

On the other hand, a law of the State of New York was sustained which required, under a penalty, that the master of every vessel arriving from a foreign port should report to the mayor or recorder of the city of New York an account of his passengers; the object being to prevent New York from being burdened by an influx of persons brought thither in ships from foreign countries and the other States, and to that end to require a report of the names, places of birth, &c., of all passengers, that the necessary steps might be taken by the city authorities to prevent them from becoming chargeable as paupers.⁴ And a State regulation of pilots and pilotage was held unobjectionable, though it was conceded that Congress had full power to make regulations on the same subject, which, however, it had not exercised.⁵ These several


² Passenger Cases, 7 How. 283; People v. Compagnie Générale, 107 U. S. 50, 2 Sup. Ct. Rep. 87; Head Money Cases, 112 U. S. 694, 5 Sup. Ct. Rep. 247. See also Lin Sing v. Washburn, 20 Cal. 534, where a State law imposing a special tax on every Chinese person over eighteen years of age for each month of his residence in the State was held unconstitutional, as in conflict with the power of Congress over commerce. In Canada, provincial legislation on commerce is void; the authority being with the Dominion Parliament. Severn v. The Queen, 2 Sup. Ct. Rep. (Ont.) 70.


⁴ City of New York v. Milin, 11 Pet. 102. See also State v. The Constitution, 42 Cal. 578. [But an act which requires a carrier who brings into the State a non-resident, who within one year thereafter becomes a pauper, to remove him if so requested by the State officers, or to pay for his support, is void. Bangor v. Smith, 83 Me. 422, 22 Atl. 379, 13 L. R. A. 686, and note.]

⁵ Cooley v. Board of Wardens, 12 How. 290. See Barnaby v. State, 21 Ind. 460; Steamship Co. v. Jolliffe, 2 Wall. 450; Cisco v. Roberts, 39 N. Y. 292; Wilson v. McNamee, 102 U. S. 572. As to State control of harbors, see Mobile v. Kimball, 102 U. S. 691. [Until Congress acts in the matter, there is no Federal objection to a city’s regulation of the speed of railway trains (even when they are engaged in inter-state commerce) within the city.
cases, and the elaborate discussions with which the decisions in each were accompanied, together with the leading case of Gibbons v. Ogden, 2 may be almost said to exhaust the reasoning upon the subject, and to leave little to be done by those who follow beyond the application of such rules for classification as they have indicated.

Sunday Laws. We have elsewhere referred to cases in which laws requiring all persons to refrain from their ordinary callings on the first day of the week have been held not to encroach upon the religious liberty of those citizens who do not observe that day as sacred. Neither are they unconstitutional as a restraint upon trade and commerce, or because they have the effect to destroy the value of a lease of property to be used on that day, or to make void a contract for Sunday services. 3 There can no longer be any question, if any there ever was, that such laws may be supported as regulations of police.

1 9 Wheat. 1. And see Gilman v. Philadelphia, 3 Wall. 713.
Law of the Road. The highways within and through a State are constructed by the State itself, which has full power to provide all proper regulations of police to govern the action of persons using them, and to make from time to time such alterations in these ways as the proper authorities shall deem proper. A very common regulation is that parties meeting shall turn to the right; the propriety of which none will question. So the speed of travel may be regulated with a view to safe use and general protection, and to prevent a public nuisance. So beasts may be prohibited from running at large, under the penalty of being seized and sold. And it has been held competent under the same power to require the owners of urban property to construct and keep in repair and free from obstructions the sidewalks in front of it, and in case of their failure to do so to authorize the public authorities to do it at the expense of the property; the courts distinguishing this from


As to the right to change the grade of a street from time to time without liability to parties incidentally injured, see ante, p. 285.


3 McKee v. McKee, 8 B. Monr. 433; Municipality v. Bianc, 1 La. Ann. 385; Whitleif v. Longest, 6 Ill. 628; Gosselin v. Campbell, 4 Iowa, 206; Roberts v. Oglesby, 30 Ill. 460; Commonwealth v. Curtis, 9 Allen, 266; Brophy v. Hyatt, 10 Col. 223, 15 Pac. 339; [Haigh v. Bell, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131.] This applies to beasts of non-residents. Mayor of Cartersville v. Lanham, 07 Ga. 763; Rose v. Hardie, 98 N. C. 44, 4 S. E. 41. The payment of a fine by the owner cannot be required as a condition of their release, under general charter power of this kind. Wilcox v. Hemming, 68 Wis. 144, 15 N. W. 435.

taxation, on the ground of the peculiar interest which those upon whom the duty is imposed have in its performance, and their peculiar power and ability to perform it with the promptness which the good of the community requires.1

Navigable Waters. Navigable waters are also a species of public highway, and as such come under the control of the States. The term "navigable," at the common law, was only applied to those waters where the tide ebbed and flowed, but all streams which were of sufficient capacity for useful navigation, though not called navigable, were public, and subject to the same general rights which the public exercised in highways by land.2 In this country there has been a very general disposition to consider all streams public which are useful as channels for commerce wherever they are found of sufficient capacity to float to market the products of the mines, of the forests, or of the tillage of the country through which they flow.3 And if a stream is of sufficient capacity for the floating of rafts and logs in the condition in which it generally appears by nature, it will be regarded as public, notwithstanding there may be times when it becomes too dry and shallow for the purpose. "The capacity of a stream, which generally appears by the nature, amount, importance, and necessity of the business

Pa. St. 401; Stroud v. Philadelphia, 61 Pa. St. 255. And see Boston v. Shaw, 1 Met. 130; Hildreth v. Lowell, 11 Gray, 85; Cone v. Hartford, 28 Conn. 363; State v. Jersey City, 5 Dutch. 441. [And a street-railway company may be required to pave the street for a reasonable width along its tracks, even though the power to make such requirement was not reserved when the company was authorized to occupy the streets with its tracks. Sioux City St. R. Co. v. Sioux City, 138 U. S. 93, 11 Sup. Ct. Rep. 229; Storrie v. Houston City St. R. Co., 52 Tex. 129, 40 S. W. 796, 44 L. R. A. 716. Upon liability of street-railways for paving assessments, see note to 40 L. R. A. 125.]

1 See especially the case of Godard, Petitioner, 16 Pick. 604, for a clear and strong statement of the grounds on which such legislation can be supported. Also Dillon, Mun. Corp. § 657; Cooley on Taxation, 388. In Illinois it seems not to be competent to compel the building of sidewalks or the keeping of them free of snow by the owners of abutting lots under the police power. Ottawa v. Spencer, 40 Ill. 211; Griswold v. Bloomington, 88 Ill. 551, 30 Am. Rep. 596. [Likewise in New Hampshire. State v. Jackman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 473.]


done upon it, must be the criterion. A brook, although it might carry down saw-logs for a few days, during a freshet, is not therefore a public highway. But a stream upon which and its tributaries saw-logs to an unlimited amount can be floated every spring, and for the period of from four to eight weeks, and for the distance of one hundred and fifty miles, and upon which unquestionably many thousands will be annually transported for many years to come, if it be legal so to do, has the character of a public stream for that purpose. So far the purpose is useful for trade and commerce, and to the interests of the community. The floating of logs is not mentioned by Lord Hale [in De Jure Maris], and probably no river in Great Britain was, in his day, or ever will be, put to that use. But here it is common, necessary, and profitable, especially while the country is new; and if it be considered a lawful mode of using the river, it is easy to adapt well-settled principles of law to the case. And they are not the less applicable because this particular business may not always continue; though if it can of necessity last but a short time, and the river can be used for no other purpose, that circumstance would have weight in the consideration of the question.”¹ But if the stream was not thus useful in its natural condition, but has been rendered susceptible of use by the labors of the owner of the soil, the right of passage will be in the nature of a private way, and the public do not acquire a right to the benefit of the owner’s labor, unless he sees fit to dedicate it to their use.²

All navigable waters are for the use of all the citizens; and there cannot lawfully be any exclusive private appropriation of any portion of them.³ The question what is a navigable stream

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¹ Morgan v. King, 18 Barb. 288; Moore v. Sanborne, 2 Mich. 519; Brown v. Chadbourne, 31 Me. 9; Treat v. Lord, 42 Me. 592; Weise v. Smith, 3 Oreg. 145, 8 Am. Rep. 621; Buck v. Cone, 25 Fla. 1, 6 So. 160; Gaston v. Mace, 33 W. Va. 14, 10 S. E. 60. Compare Hubbard v. Bell, 54 Ill. 110; Haines v. Hall, 17 Oreg. 105, 20 Pac. 831. [That a State may create boom companies, authorize them to improve waterways and to take tolls for floating logs through them in booms, even though such regulations indirectly affect inter-state commerce (there being no Congressional regulations thereon), and compel such companies to submit to official inspection of their booms and to pay for such inspection, see Lindsey & P. Co. v. Mullen, 176 U. S. 126, 20 Sup. Ct. Rep. 325. Whether a log boom corresponds to the requirements of a State statute authorizing log booms, and is thus exempt from the general prohibition of obstructions “not affirmatively authorized by law,” as contained in the river and harbor act of 1890, is a Federal question. United States v. Bellingham Bay Boom Co., 170 U. S. 211, 20 Sup. Ct. Rep. 343. Upon obstruction of navigable streams by log booms, see note attached to this case in 41 L. ed. U. S. 437.]


³ Commonwealth v. Charlestown, 1 Pick. 180; Kenn v. Stetson, 5 Pick. 492; Arnold v. Mundy, 6 N. J. 1; Bird v. Smith, 8 Watts, 484. One cannot acquire a prescriptive right to impede flotage. Collins v. Howard, 65 N. H. 190, 18 Atl. 794. They are equally for the use of the pub-
would seem to be a mixed question of law and fact; and though it is said that the legislature of the State may determine whether a stream shall be considered a public highway or not, yet if in fact it is not one, the legislature cannot make it so by simple declaration, since, if it is private property, the legislature cannot appropriate it to a public use without providing for compensation.

The general right to control and regulate the public use of navigable waters is unquestionably in the State; but there are certain restrictions upon this right growing out of the power of Congress over commerce. Congress is empowered to regulate commerce with foreign nations and among the several States; and wherever a river forms a highway upon which commerce is conducted with foreign nations or between States, it must fall under the control of Congress, under this power over commerce. (a) The circumstance, however, that a stream is navigable, and capable of being used for foreign or inter-state commerce, does not exclude regulation by the State, if in fact Congress has not exercised its power in regard to it; or having exercised it, the State law does

lie in the winter when covered with ice; and one who cuts a hole in the ice in an accustomed way, by means of which one passing upon the ice is injured, has been held liable to an action for the injury. French v. Camp, 18 Me. 433. But this rule is now modified, at least as to the Penobscot at Bangor, upon the ground that the right of ice harvesting is at such a place superior to that of travel. Woodman v. Pitman, 79 Me. 456, 10 Atl. 321. An obstruction to a navigable stream is a nuisance which any one having occasion to use it may abate. Inhabitants of Arundel v. McCulloch, 10 Mass. 70; State v. Moffett, 1 Greene (Iowa), 247; Selman v. Wolfe, 27 Tex. 69; Larson v. Furlong, 63 Wis. 323, 25 N. W. 584.

(a) [Permission granted by Congress to use waters for irrigation of arid lands and in aid of mining industry, does not include right to use waters above point of navigability to such an extent as seriously to interfere with navigability below that point. United States v. Rio Grande Dam & I. Co., 174 U.S. 690, 19 Sup. Ct. Rep. 770, rev. 9 N. M. 292, 51 Pac. 674. But subject to such qualification, the rights of riparian owners are determined by the State law. St. Anthony Falls Water Power Co. v. Bd. of Water Commrs, 168 U.S. 349, 18 Sup. Ct. Rep. 157. Where the waters are capable of navigation only between points within the State, the State control is complete. Com. v. King, 160 Mass. 221, 22 N. E. 905, 5 L. R. A. 522. State may compel construction of fishways in dama. State v. Meek, 112 Iowa, 333, 84 N. W. 3, 51 L. R. A. 414.]
not come in conflict with the congressional regulations, or interfere with the rights which are permitted by them.

The decisions of the federal judiciary in regard to navigable waters seem to have settled the following points:—

1. That no State can grant an exclusive monopoly for the navigation of any portion of the waters within its limits upon which commerce is carried on under coasting licenses granted under the authority of Congress, since such a grant would come directly in conflict with the power which Congress has exercised. But a State law granting to an individual an exclusive right to navigate the upper waters of a river, lying wholly within the limits of the State, separated from tide water by suffs impassable for purposes of navigation, and not forming a part of any continuous track of commerce between two or more States, or with a foreign country, does not come within the reason of this decision, and cannot be declared void as opposed to the Constitution of the United States.

repeatedly held to refer not to physical obstructions but to the imposition of duties for the right to navigate them, that is, to political regulations hampering the freedom of commerce. Cardwell v. Amer. Bridge Co., 113 U. S. 205, 5 Sup. Ct. Rep. 421; Hamilton v. Vicksburg, &c. R. R. Co., 110 U. S. 280, 7 Sup. Ct. Rep. 206; Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. Rep. 313; Sands v. Maulsbee R. Imp. Co., 123 U. S. 288, 8 Sup. Ct. Rep. 113; Willamette Iron B. Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. Rep. 811. In the last case, Bradley, J., says: "The clause in question cannot be regarded as establishing the police power of the United States over the rivers of Oregon, or as giving to the federal courts the right to hear and determine, according to federal law, every complaint that may be made of an impediment in, or an encroachment upon, the navigation of those rivers. We do not doubt that Congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and inter-state commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the States have the plenary power supposed, yet when Congress chooses to act, it is not concluded by anything that the States have done from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made except in conformity with such regulations as it may impose." [States may improve the navigability of waters accessible to inter-state commerce in the absence of repugnant Congressional legislation. Stockton v. Powell, 29 Fta. 1, 10 So. 688, 15 L. R. A. 42.]

1 Gibbons v. Ogden, 9 Wheat. 1. The case was the well-known historical one, involving the validity of the grant by the State of New York to Robert Fulton and his associates of the exclusive right to navigate the waters of that State with vessels propelled by steam. This subject is further considered in Gilman v. Philadelphia, 3 Wall. 713; and in The Daniel Ball, 10 Wall. 557, in which the meaning of the term "navigable waters of the United States" is defined. And see Craig v. Kline, 65 Pa. St. 399; 3 Am. Rep. 630.

2 Vezin v. Moor, 14 How. 568. The exclusive right granted in this case was to the navigation of the Penobscot River above Old Town, which was to continue for twenty years, in consideration of improvements in the navigation to be made by the grantees. Below Old Town there were a full and several dams on the river, rendering navigation from the sea impossible. And see McReynolds v. Smullhouse, 8 Bush, 447. It is no infraction of the public right for a city to permit individuals to put up sheds upon its piers, thereby excluding the general public, in
2. The States have the same power to improve navigable waters which they possess over other highways; and where money has been expended in making such improvement, it is competent for the State to impose tolls on the commerce which passes through and has the benefit of the improvement, even where the stream is one over which the regulations of commerce extend.

3. The States may authorize the construction of bridges over navigable waters, for railroads as well as for every other species of highway, notwithstanding they may to some extent interfere with the right of navigation. If the stream is not one which is subject to the control of Congress, the State law permitting the erection cannot be questioned on any ground of public inconvenience. The legislature must always have power to determine what public ways are needed, and to what extent the accommodation of travel over one way must yield to the greater necessity for another. But if the stream is one over which the regulations of Congress extend, the question is somewhat complicated, and it becomes necessary to consider whether such bridge will interfere with the regulations or not. But the bridge is not necessarily unlawful, because of constituting, to some degree, an obstruction to commerce, if it is properly built, and upon a proper plan, and if the general traffic of the country will be aided rather


3 See Commonwealth v. Breed, 4 Pick. 460; Depew v. Trustees of W. and E.

Canal, 5 Ind. 8; Dover v. Portsmouth Bridge, 17 N. H. 200; Illinois, &c. Co. v. Peoria Bridge, 38 Ill. 467. Under the Wisconsin Constitution a stream wholly within the State may not be completely obstructed: Sweeney v. Chicago, &c. Ry. Co., 69 Wis. 60, 18 N. W. 756; but one between it and Minnesota may be temporarily, by authority of the latter State. Kentor L. Co. v. St. Croix B. Corp., 72 Wis. 62, 38 N. W. 529. [And a State may declare a bridge which obstructs navigation upon a river wholly within the State a nuisance, and order its removal or modification, although the approval of the Secretary of War may have been given, under authority of act of Congress, for the erection of the bridge. Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 395, 17 Sup. Ct. Rep. 357. But a State has no power to regulate tolls upon a bridge used solely for inter-state commerce. Covington & C. Bridge Co. v. Kentucky, 164 U. S. 204, 14 Sup. Ct. Rep. 1087.]
than impeded by its construction. There are many cases where a bridge over a river may be vastly more important than the navigation; and there are other cases where, although the traffic upon the river is important, yet an inconvenience caused by a bridge with draws would be much less seriously felt by the public, and be a much lighter burden upon trade and travel, than a break in a line of railroad communications necessitating the employment of a ferry. In general terms it may be said that the State may authorize such constructions, provided they do not constitute material obstructions to navigation; but whether they are to be regarded as material obstructions or not is to be determined in each case upon its own circumstances. The character of the structure, the facility afforded for vessels to pass it, the relative amount of traffic likely to be done upon the stream and over the bridge, and whether the traffic by rail would be likely to be more incomed by the want of the bridge than the traffic by water with it, are all circumstances to be taken into account in determining this question. It is quite evident that a structure might constitute a material obstruction on the Ohio or the Mississippi, where vessels are constantly passing, which would be unobjectionable on a stream which a boat only enters at intervals of weeks or months. The decision of the State legislature that the erection is not an obstruction is not conclusive; but the final determination will rest with the federal courts, who have jurisdiction to cause the structure to be abated, if it be found to obstruct unnecessarily the traffic upon the water. Parties constructing the bridge must be prepared to show, not only the State authority and that the plan and construction are proper, but also that it accommodates more than it impedes the general commerce.¹

¹ See this subject fully considered in the Wheeling Bridge Case, 13 How. 518. See also Columbus Insurance Co. v. Peoria Bridge Co., 6 McLean, 70; Same v. Curtens, 6 McLean, 209; Jolly v. Terre Haute Drawbridge Co., 6 McLean, 237; United States v. New Bedford Bridge, 1 W. & M. 401; Commissioners of St. Joseph Co. v. Pidge, 5 Ind. 13.

It is, perhaps, doubtful in view of late decisions of the same court whether the Wheeling Bridge Case, involving the Ohio River, is to be given as broad an effect as has sometimes been supposed. It has several times since its decision been held that, in the absence of federal regulation, a bridge may be built under State authority across a river wholly within it, though it be capable of use in inter-state commerce and such use is thereby materially obstructed. Cardwell v. Amer. Bridge Co., 113 U. S. 205, 5 Sup. Ct. Rep. 423; Hamilton v. Vicksburg &c. R. R. Co., 119 U. S. 280, 7 Sup. Ct. Rep. 208; Escanaba Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185; Willamette Iron B. Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. Rep. 811. In this last case, a quotation from which is on p. 804, supra, though the decision is carefully limited to the case involved,—a river wholly within the State of Oregon, but leading to a port of entry,—the ruling in the Wheeling Bridge Case is also closely limited to the facts arising in it, and the case at bar distinguished. In the Wheeling case, it is said the court applied principles of international law,
4. The States may lawfully establish ferries over navigable waters, and grant licenses for keeping the same, and forbid unlicensed persons from running boats or ferries without such license. This also is only the establishment of a public way, and it can make no difference whether or not the water is entirely within the State, or, on the other hand, is a highway for inter-state or foreign commerce.1

5. The States may also authorize the constructions of dams across navigable waters; and where no question of federal authority is involved, the legislative permission to erect a dam will exempt the structure from being considered a nuisance,2 and it would seem also that it must exempt the party constructing it from liability to any private action for injury to navigation, so long as he keeps within the authority granted, and is guilty of no negligence.3

6. To the foregoing it may be added that the State has the same power of regulating the speed and general conduct of ships or other vessels navigating its water highways, that it has to regulate the speed and conduct of persons and vehicles upon the ordinary highway; subject always to the restriction that its

and passed on the force of a pre-constitutional compact of Virginia, and from the decision no inference is to be drawn that the courts of the United States claim authority to regulate all bridges below ports of entry, and to treat all State legislation in such cases as void.

1 Conway v. Taylor’s Ex’r, 1 Black, 603; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 358, 2 Sup. Ct. Rep. 257; Chivers v. People, 11 Mich. 43; Marshall v. Grimes, 41 Miss. 27; [Nixon v. Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315.] In these cases the State license law was sustained as against a vessel enrolled and licensed under the laws of Congress. And see Fanning v. Gregorie, 16 How. 624. But the State may not tax the capital stock of a ferry company of another State, whose only business within the former State is discharging and receiving persons and property passing between the States. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 195, 5 Sup. Ct. Rep. 825. Under a power to amend the charter of a ferry company, the legislature may regulate the tolls chargeable by it. Parker v. Metropolitan, &c. R. R. Co., 100 Mass. 506. [But not the tolls chargeable on inter-state commerce. See Caverington & C. Bridge Co. v. Kentucky, 151 U. S. 204, 14 Sup. Ct. Rep. 1087.] Ferry rights may be so regulated as to rates of ferriage, and ferry franchises and privileges so controlled in the hands of grantees and lessees, that they shall not be abused to the serious detriment or inconvenience of the public. Where this power is given to a municipality, it may be recalled at any time. People v. Mayor, &c. of New York, 92 Barb. 102.


CONSTITUTIONAL LIMITATIONS. [CH. XVI.

regulations must not come in conflict with any regulations established by Congress for foreign commerce, or that between the States. 1

Levees and Drains. Where, under legislative authority, the construction of levees and embankments is required, to protect from overflow and destruction considerable tracts of country, assessments are commonly levied for the purpose on the owners of lands lying on or near the streams or bodies of water from which the danger is anticipated. But if the construction should be imposed as a duty upon residents or property owners in the neighborhood, so that they should be compelled to turn out periodically or in emergencies, and give personal attention and labor to the construction of the necessary defences against overflow and inundation, it is not perceived that there could be any difficulty in supporting such a regulation as one of police, or of resting it upon the same foundations which sustain the regulations in cities, by which duties are imposed on the occupants of buildings to take certain precautions against fires, not for their own protection exclusively, but for the protection of the general public. 2 Laws imposing on the owners the duty of draining large tracts of land which in their natural condition are unproductive, and are a source of danger to health, may be enacted under the same power, 3 though in general the taxing power is employed for the purpose; 4 and sometimes land is appropriated under the eminent domain. 5

1 People v. Jenkins, 1 Hill, 469; People v. Roe, 1 Hill, 470. As to the right of regulation in general, see Harrigan v. Lumber Co., 129 Mass. 580, 37 Am. Rep. 387. As to the right to regulate fisheries in navigable waters, see Gentile v. State, 29 Ind. 407; Phipps v. State, 22 Md. 380; People v. Reed, 47 Barb. 236; Drew v. Hilliker, 56 Vt. 641; Chambers v. Church, 14 R. I. 398.

2 Cooley on Taxation, 401, 402. See State v. Newark, 27 N. J. 185, 194, per Elmer, J.; Crowley v. Copley, 2 La. Ann. 320. In Pennsylvania it has been held that the State cannot, as a measure of police, compel the owner of lands bounded on inland tide-water to construct embankments to exclude the natural flow of the water, but that where the State constructs them at its own expense, and leaves them in possession of the owner, it may impose on him the duty of repair. Philadelphia v. Scott, 81 Pa. St. 80.

3 See State v. City Council of Charleston, 12 Rich. 702, 733; Wurts v. Hoagland, 114 U. S. 600, 5 Sup. Ct. Rep. 1086. The taking of property for drainage purposes is in the exercise of this power. Winslow v. Winslow, 95 N. C. 24. Under it the cost of such an improvement made by the public authorities may be imposed upon the property benefited according to benefits. Bryant v. Robbins, 70 Wis. 258, 35 N. W. 645; Donnelly v. Decker, 68 Wis. 401, 17 N. W. 330. It is competent to require a lot-owner to fill up at his own expense a lot which otherwise would become a nuisance. Nickerson v. Boston, 131 Mass. 306.


5 Commissioners who are empowered to straighten a river to protect a country against inundation are not liable person-
Regulations of Civil Rights and Privileges. Congress, to give full effect to the fourteenth amendment to the federal Constitution, passed an act in 1875, which provided that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theatres and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.\^1 As the general power of police is in the States, and not in the federal government, the power of Congress to make so sweeping a provision may possibly be brought in question;\^2 but as the States have undoubted right to legislate for the purpose of securing impartiality in the accommodations afforded by innkeepers and common carriers, and as the proprietors of theatres and other places of public amusement are always subject to the license and regulation of the law, a corresponding enactment by the State would seem to be competent, and has been sustained as a proper regulation of police.\^3

ally for incidental injuries to individuals. Neither is there any claim against the public. Green v. Swift, 47 Cal. 586; Green v. State, 73 Cal. 29, 11 Pac. 632, 14 Pac. 610.  
\^1 Laws of 1875, c. 114.  
\^2 In 1883 the act was held unconstitutional. The Fourteenth Amendment, says Bradley, J., does not "invest Congress with power to legislate upon subjects which are within the domain of State legislation, but to provide modes of relief against State legislation or State action of the kinds referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws and the action of State officers, executive and judicial, when those are subversive of the fundamental rights specified in the amendment." Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. Rep. 18.  
\^3 Donnell v. State, 48 Miss. 601. [A State may require railroads operating wholly within its borders to furnish separate passenger cars or separate compartments in a single passenger car for white persons and for negroes, and may make it a criminal offense for a person of one race to occupy the car or compartment set apart for the use of the other. Plessy v. Ferguson, 163 U. S. 637, 16 Sup. Ct. Rep. 1138, aff. 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639. And it seems that a railroad engaged in inter-state commerce may be compelled to comply with such regulations so far as its domestic traffic is concerned. Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 21 Sup. Ct. Rep. 101. That carriers of passengers may of their own motion make similar regulations, see Chilton v. St. Louis & I. M. R. Co., 114 Mo. 88, 21 S. W. 467, 19 L. R. A. 209. See also Anderson v. Louisville & N. Ry. Co., 91 Tenn. 44, 17 S. W. 803. In Younger v. Judah, 111 Mo. 303, 19 S. W. 1109, 33 Am. St. 527, 16 L. R. A. 558, it was held that the proprietor of a theatre might, in the absence of a State statute forbidding, prohibit colored persons from attending his theatre, except they took seats in the balcony. The principle applied was that under the Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. Rep. 18; the Fourteenth Amendment did not control the conduct of private persons, but the action of the State, and was not applicable to a regulation established by a private person for the conduct of his business though of a quasi public character. In Cisco v. School Board, 161 N. Y. 588,
Regulation of Business Charges. In the early days of the common law it was sometimes thought necessary, in order to prevent extortion, to interfere, by royal proclamation or otherwise, and establish the charges that might be exacted for certain commodities or services. The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country, and prevailed to some extent up to the time of independence. Since then it has been commonly supposed that a general power in the State to regulate prices was inconsistent with constitutional liberty. It has nevertheless been conceded that in some cases this might be done, and the question of the bounds to legislative power has been made prominent in what are known as the Chicago Warehouse Cases. The legislature of Illinois, on the supposition that warehouse charges at Chicago were excessive and unfair, undertook to limit them to a maximum. They also required warehousemen to take out licenses and observe various regulations, which are not important here, and imposed certain penalties for a refusal to observe the statute. The validity of the legislation was affirmed by the State court, which overruled various objections made on constitutional grounds, among which was, that in effect it deprived warehousemen of their property without due process of law. The warehousemen denied wholly the right of the legislature to prescribe charges for private services, or for the use of private property, and it was urged by them that, if admitted at all, no bounds could be set to it. The court, in sustaining the power, placed it upon the same ground with the right to regulate the charges of hackmen, draymen, public ferrymen, and public millers. The case being removed to the federal Supreme Court, the decision of the State court was affirmed, and the principle fully approved. The ground of the decision appears to be that the employment of these warehousemen is a public or quasi public employment; that their property in the business is "affected with a public interest," and thereby brought under that general power of control which the State possesses in the case of other public employments. Says Mr. Chief Justice Waite: "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial,

60 N. E. 81, it was held that the State ... 1 Munn v. People, 69 Ill. 60. In this case, Justices McAllister and Scott dissented.]
and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the States upon some or all these subjects, and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."¹ Some of the cases here referred to seem plain enough. Ferries are public highways, and when individuals are permitted to establish them, they are allowed the sovereign prerogative of charging and collecting tolls; and tolls can never be taken except by permission of the State, which generally ought to and does prescribe their limits. A hackman exercises a public employment in the public street; one which affords peculiar opportunities for impositions and frauds, and requires special supervision, insomuch that it is commonly thought necessary to prohibit one making himself such except with permission of the State, and the number is sometimes limited so as in effect to give special privileges. The rates of toll, when mills grind for toll, are usually fixed by law; (a) but there is nothing exclusive in this: the parties may make their own bargains, and the legislative rate only controls where the parties by implication have apparently acted in reference to it. In England, formerly, the lords of manors, as millowners, had exclusive rights; and where an exclusive right exists in one's favor, to compel the public to deal with him, there can be no doubt of the right in the State to compel him to deal fairly with the public. Such a right existed in the English warehouse case of Alnutt v. Inglis,² in which the Court of King's Bench denied the right of the warehousemen to fix their own charges at discretion, when the public, under exclusive privileges which the warehousemen possessed, were compelled to deal with them.³


² 12 East, 527.

³ In Munn v. People, 60 Ill. 89, 91, Chief Justice Breese, in speaking of the power to "make all needful rules and regulations respecting the use and enjoyment of property," speaks of familiar instances in which the exercise of it in the State has been unquestioned, and among them, "in delegating power to municipal bodies to regulate charges of hackmen and draymen, and the weight and price of bread." Regulating the weight of

(a) [See, e. g., State v. Edwards, 86 Mo. 102, 29 Atl. 917, 25 L. R. A. 501.]
What circumstances shall affect property with a public interest is not very clear. The mere fact that the public have an interest although not engaged in a work of a confessedly public character, there has been no further ruling than that the State may prescribe and enforce reasonable charges. What shall be the test of reasonableness in those charges is absolutely undisclosed." "As to parties engaged in performing a public service while the power to regulate has been sustained, negatively the court has held that the legislature may not prescribe rates which, if enforced, would amount to a confiscation of property. But it has not held affirmatively that the legislature may not enforce rates which stop only this side of confiscation and leave the property in the hands and under the care of the owners without any remuneration for its use." "It has declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered. It has also ruled that the determination of the legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in forcing unreasonable and unjust rates." See also note to 5 L. R. A. 539. What regulations are reasonable in a particular case must be determined from a consideration of the particular case. Hardly any general rule can be laid down, except that rates so low as not to cover running expenses are always unreasonably low. Covington & L. Turnp. Road Co. v. Sandford, 161 U. S. 578, 17 Sup. Ct. Rep. 198. Nor can any such regulation prescribed by a State be made to apply to inter-state commerce. Gulf, C. & S. F. R. Co. v. Heffley & Lewis, 158 U. S. 98, 15 Sup. Ct. Rep. 802; upon State control over railroads, see Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. U. S. 678, and note. The reasonableness of rates is to be determined by considering their effect upon the traffic of the entire system, and not merely upon some particular portion of it. St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. Rep. 484. The State's power to regulate rates which affect only internal commerce is not affected by the fact that the carrier
in the existence of the business, and are accommodated by it, cannot be sufficient, for that would subject the stock of the merchant, and his charges, to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices. If one is permitted to take upon himself a public employment, with special privileges which only the State can confer upon him, the ease is clear enough; and it seems to have been the view of both courts in this case, that the circumstances were such as to give the warehousemen in Chicago, who were the only persons affected by the legislation, a "virtual" monopoly of the business of receiving and forwarding the grain of the country to and from that important point, and by the very fact of monopoly to give their business a public character, affect the property in it with a public interest, and render regulation of charges indispensable. 1


1 See what is said by Duress, Ch. J., in 69 Ill. 88-89, and by Waite, Ch. J., in 94 U. S. 131. In Attorney-General v. Chicago, &c. R. R. Co., 35 Wis. 425, 589, Chief Justice Ryan, in his very able opinion affirming the right to fix railroad charges by amendment to charters which reserved the power of amendment, intimated decided views in favor of the authority under the general power of police. That right would probably be claimed on the ground that railroads receive special privileges from the State; the emi-
The phrase "affected with a public interest" has been brought into recent discussions from the treatise *De Portibus Maris* of Lord

...domain being always employed in their favor, and sometimes the power of taxation.

The question of the power of the State legislature to regulate the charges of common carriers for the transportation of persons and property within the State, is fully determined in the affirmative by the decisions of the federal Supreme Court. In Railroad Company v. Fuller, 17 Wall. 600, an act was sustained which provided, 1. That each railroad company should annually, in a month named, fix its rates for the transportation of passengers and freights:

2. That it should on the first day of the next month cause a printed copy of such rates to be put up in all its stations and depots, and to be kept up during the year;

3. That the failure to comply with these requirements, or the charging of a higher rate than was posted, should subject the offending company to penalties. In the warehouse case of Munn v. Illinois, 94 U. S. 113, the power to limit charges was directly involved, and was affirmed, as it was in Chicago, &c. R. R. Co. v. Iowa, 94 U. S. 155. The State may, limit the amount of charges for transportation, provided such regulation does not amount to a taking of property by compelling carrying without reward, unless restrained by contract in the charter. But the charter power to fix rates does not forbid such regulation. Railroad Com. Cases, 110 U. S. 307, 6 Sup. Ct. Rep. 334, 348, 349, 388, 391, 1191; Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. Rep. 1028; Georgia R. R. & B. Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. Rep. 47; Pennsylvania R. R. Co. v. Miller, 132 U. S. 75, 10 Sup. Ct. Rep. 34. The charges for business done wholly within the State may thus be regulated although a road affected may run through several States. Railroad Com. Cases, supra. The reasonableness of charges is a judicial question. And for its determination the cost of doing the business must be known as well as the gross earnings to be yielded under the rates in question. Chicago, M. & St. P. R. Co. v. Tompkins, 170 U. S. 107, 20 Sup. Ct. Rep. 336. The cases upon reasonableness of State limitation of railroad rates are collected in a note to 44 L. ed. U. S. 417. Courts should not interfere except in a perfectly clear case. San Diego Land & Town Co. v. National City, 174 U. S. 739, 19 Sup. Ct. Rep. 804. See also Smyth v. Ames, 109 U. S. 408, 18 Sup. Ct. Rep. 418, mod. in 171 U. S. 301, 18 Sup. Ct. Rep. 888; Rengan v. Farmers' L. & T. Co., 154 U. S. 392, 14 Sup. Ct. Rep. 1047. State cannot require railway company to carry shipper of live stock free from transportation charges. Atchison, T. & S. F. Ry. Co. v. Campbell, 61 Kan. 493, 60 Pac. 1051, 75 Am. St. 328. A State cannot empower a commission to fix rates finally without opportunity for a judicial hearing on the question or their reasonableness. Chicago, M. & St. Paul Ry. Co. v. Minnesota, 184 U. S. 418, 10 Sup. Ct. Rep. 402, 702. But in Camden, &c. R. R. Co. v. Briggs, 22 N. J. 623, and Phila., &c. R. R. Co. v. Bowers, 4 Houst. 500, it was held that there was no power to regulate rates where no such authority was reserved in the charter, and see cases at end of note. In these cases no question arose of the application of the power to contracts, for transportation through the State, or from or to points within a State and other points outside; but in Peik v. Chicago, &c. R. R. Co., 94 U. S. 164, it was decided that the State had power to prescribe a maximum of charges to be made by railroad companies, not only for transporting persons or property within the State, but also persons or property taken up outside the State and brought within it, or taken up inside and carried without. Note was made in the case that Congress had established no regulation with which the State statute would conflict. But this case is substantially overruled as to this point by Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. Rep. 4, where the Illinois statute forbidding a greater charge for a shorter than for a longer haul in the same direction was held inapplicable to the case of a continuous voyage from a point within to a point without the State, as an interference with inter-state commerce. Like rulings have been made in several cases. Caron v. Ill. Cent. R. R. Co., 59 Iowa, 148, 13
Hale, where the important passage is as follows: "A man for his own private advantage may, in a port or town, set up a wharf or

crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. If the king or subject have a public wharf unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharves only licensed by the queen, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c., neither can they be enhanced to an inmoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf, crane, and other conveniences are affected with a public interest, and they cease to be *juris privat* only; as if a man set out a street in new building on his own land; it is now no longer bare private interest, but is affected by a public interest."

If the case of a street thrown open to the public is an apt illustration of the public interest Lord Hale had in mind, the interest is very manifest. It will be equally manifest in the case of the wharf, if it is borne in mind that the title to the soil under navigable water in England is in the Crown, and that wharves can only be erected by express or implied license, and can only be made available by making use of this public property in the soil. If, then, by public permission, one is making use of the public property, and he chances to be the only one with whom the public can deal in respect to the use of that property, it seems entirely reasonable to say that his business is affected with a public interest which requires him to deal with the public on reasonable terms.

In the following cases we should say that property in business was affected with a public interest: 1. Where the business is one the following of which is not of right, but is permitted by the State as a privilege or franchise. Under this head would be comprised the business of setting up lotteries, of giving shows, &c., of property for private uses. Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403, 17 Sup. Ct. Rep. 130. Company having franchise to lay gas-pipes in street may be restricted to reasonable rates and compelled to abstain from discrimination among patrons. Rushville v. Rushville Nat. Gas Co., 122 Ind. 757, 23 N. E. 553, 15 L. R. A. 321, and note. For various State cases passing upon question of inter-state commerce, see State v. Stripling, 118 Ala. 120, 21 So. 400, 36 L. R. A. 81; W. Union Tel. Co. Eubank, 100 Ky. 501, 33 S. W. 1068, 36 L. R. A. 711; State v. Scott, 98 Tenn. 254, 29 S. W. 1, 36 L. R. A. 401; Frueda v. Pabst Brewing Co., 90 Tex. 298, 33 S. W. 29, 750, 33 L. R. A. 241; McCann v. Eddy, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110; aff. 170 U. S. 560, 19 Sup. Ct. Rep. 755. Singer Mfg. Co. v. Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; Lafarier v. Grand Trunk R. Co., 84 Me. 288, 21 Atl. 848, 17 L. R. A. 111; Mobile & O. R. Co. v. Dismukes, 94 Ala. 131, 19 So. 259, 19 L. R. A. 113; State v. Hicks, 44 La. Ann. 770, 11 So. 74.]
keeping billiard-tables for hire, and of selling intoxicating drinks when the sale by unlicensed parties is forbidden; also the cases of toll-bridges, &c. 2. Where the State, on public grounds, renders to the business special assistance, by taxation or otherwise. (a) 3. Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public casement. 4. Where exclusive privileges are granted in consideration of some special return to be made to the public. Possibly there may be other cases.

Miscellaneous Cases. It would be quite impossible to enumerate all the instances in which the police power is or may be exercised, because the various cases in which the exercise by one individual of his rights may conflict with a similar exercise by others, or may be detrimental to the public order or safety, are infinite in number.

(a) [As by granting the power of eminent domain. Where a corporation has such special privileges it must serve the public without discrimination. Inter-Ocean Publishing Co. v. Associated Press, 181 Ill. 438, 58 N. E. 822, 49 L. R. A. 568; Haugen v. Albina Light & W. Co., 21 Ore. 411, 23 Pac. 211, 14 L. R. A. 424; Richmond N. Gas Co. v. Clawson, 163 Ind. 650, 68 N. E. 1049, 51 L. R. A. 744. See also People v. Chicago Gas Trust Co., 190 Ill. 265, 22 N. E. 798, 8 L. R. A. 497. Where no special privilege or aid is received, the corporation must be left free to contract as it pleases. State v. Associated Press, 159 Mo. 410, 60 S. W. 91. The legislature cannot fix by statute the measure of compensation to be paid by a city for labor or other services it may be compelled to employ. This principle applied in a case where the statute provided that the same rate of wages must be paid on city contracts as laborers in like occupation received in the same locality. People ex rel. Rodgers v. Coler, 160 N. Y. 1, 50 N. E. 710, 52 L. R. A. 814, 82 Am. St. 605. For other cases involving similar principles, see Com. v. Perry, 165 Mass. 117, 28 N. E. 1129, 11 L. R. A. 325, 31 Am. St. 533, declaring invalid an act forbidding withholding of wages for imperfect work; Ramsey v. People, 142 Ill. 390, 32 N. E. 364, 17 L. R. A. 853, holding that an act relating to the payment of wages to miners upon basis of quantity of coal mined was invalid; Godcharles v. Wigeman, 115 Pa. 431, 6 Atl. 351; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 55 Am. St. 843, cases in which acts to secure coal miners, and other laboring in certain factories, the payment of their wages at regular intervals and in lawful money only, were held void. Contra, Hancock v. Yaden, 121 Ind. 366, 23 N. E. 258, 5 L. R. A. 526; Avent-Beattyville Coal Co. v. Comm., 99 Ky. 213, 23 S. W. 502, 28 L. R. A. 273; Agee v. Smith, 7 Wash. 471, 53 Pac. 870, and see note to State v. Goodwill, supra, 25 Am. St. 870, on the Fourteenth Amendment considered with relation to Special Privileges, Burdens and Restrictions. Other cases on the subject are, State v. Fire Creek, C. & C. Co., 33 W. Va. 188, 10 S. E. 285, 6 L. R. A. 359, 25 Am. St. 891; Froerer v. People, 141 Ill. 171, 31 N. E. 355, 16 L. R. A. 492; Braceville Coal Co. v. People, 147 Ill. 60, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. 206; State v. Loonis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 Sup. Ct. Rep. 1, aff. 108 Tenn. 421, 53 S. W. 955, 70 Am. St. 682. In this last case a statute of Tennessee requiring the redemption in cash of stock orders or other evidences of indebtedness issued by employers in payment of wages earned by employees is held to be constitutional. Followed in Dayton Coal and Iron Co. v. Barton, 183 U. S. 23, 22 Sup. Ct. Rep. 5. The case of People ex rel. Rodgers v. Coler, supra, is authority for the doctrine that a municipal corporation, as to matters affecting its property and private contracts, has the same status as private corporations and individuals. Clark v. State, 142 N. Y. 101, 36 N. E. 817, is distinguished.]

ber and in variety. (a) And there are other cases where it becomes necessary for the public authorities to interfere with the control by individuals of their property, and even to destroy it, where the owners themselves have fully observed all their duties to theirfellows and to the State, but where, nevertheless, some controlling public necessity demands the interference or destruction. A strong instance of this description is where it becomes necessary to take, use, or destroy the private property of individuals to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other greater public calamity. Here the individual is in no degree in fault, but his interest must yield to that "necessity" which "knows no law." The establishment of limits within the denser portions of cities and villages, within which buildings constructed of inflammable materials shall not be erected or repaired, may also, in some cases, be equivalent to a destruction of private property; but regulations for this purpose have been sustained notwithstanding this result. Wharf lines may also be established for the general good, even though they prevent the owners of water-fronts from building out on soil which constitutes private property. And, whenever the legisla-

1 Saltpetre Case, 13 Coke, 13; Mayor, &c. of New York v. Lord, 18 Wend. 129; Russell v. Mayor, &c. of New York, 2 Denio, 401; Sorocco v. Garry, 3 Cal. 69; Hale v. Lawrence, 21 N. J. 714; American Print Works v. Lawrence, 21 N. J. 245; Meeker v. Van Rensselaer, 15 Wend. 307; McDonald v. Redwing, 13 Minn. 38; Philadelphia v. Scott, 61 Pa. St. 80; Dillon, Mun. Corp. §§ 756-759; [Atkens v. Wells River, 70 Vt. 109, 40 Atl. 223, 41 L. R. A. 566.] And see Jones v. Richmond, 18 Gratt. 517, for a case where the municipal authorities purchased and took possession of the liquor of a city about to be occupied by a capturing military force, and destroyed it to prevent the disorders that might be anticipated from free access to intoxicating drinks under the circumstances. [But this case is overruled in Wallace v. Richmond, 04 Va. 204, 25 S. E. 588, 30 L. R. A. 551.] And as to appropriation by military authorities, see Harmony v. Mitchell, 1 Blatch. 549; s. c. in error, 13 Haw. 115.


3 Commonwealth v. Alger, 7 Cush. 63. See Hart v. Mayor, &c. of Albany, 0 Wend. 571, 24 Am. Dec. 165. [Height of buildings fronting on Copley Square. Boston, may be limited to ninety feet.

(a) Compulsory education laws are upheld as within the police power of the State. State v. Jackson, — N. II. —, 53 Atl. 1021; State v. Bailey, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435.]
tured deem it necessary to the protection of a harbor to forbid the removal of stones, gravel, or sand from the beach, they may establish regulations to that effect under penalties, and make them applicable to the owners of the soil equally with other persons. Such regulations are only "a just restraint of an injurious use of property, which the legislature have authority" to impose.¹

CONSTITUTIONAL LIMITATIONS. [CH. XVI.

So a particular use [or disposition (a)] of property may sometimes be forbidden, where, by a change of circumstances, and without the fault of the owner, that which was once lawful, proper, and unobjectionable has now become a public nuisance, endangering the public health or the public safety. (b) Mill-dams are sometimes destroyed upon this ground; and churchyards which

A statute prohibiting sale of game out of season is valid as applied to game imported into the State. Ex parte Maier, 104 Cal. 476, 37 Pac. 402, 42 Am. St. 129.

1 Miller v. Craig, 11 N. J. Eq. 175. And offensive manufactures may be stopped. Coe v. Schultz, 47 Barb. 61. Public wells may be filled up. Ferrenbach v. Turner, 89 Mo. 416. [Deposit of sawdust in lake from which the water-supply of a city is derived may be prohibited, and a riparian owner who has long been accustomed to deposit therein sawdust from his mill cannot claim that by such regulation he is deprived of his property without compensation. State v. Griffin, 69 N. II. 1, 39 Atl. 260, 41 L. R. A. 177; People v. Truckee Lumber Co., 110 Cal. 307, 48 Pac. 374, 39 L. R. A. 581.] See Leake v. Journey, 29 Tex. 172; ante, p. 850, and cases cited in note.

(a) [The owners of lands may be prevented from allowing natural gas to waste or escape from wells which he has permission for oil. Ohio Oil Co. v. Indianna, 177 U. S. 190, 20 Sup. Ct. Rep. 576, aff. 160 Ind. 909, 50 N. E. 1125. See note on “Property in petroleum oil or gas” in 44 ed. U. S. 729. See also State v. Ohio Oil Co., 150 Ind. 21, 40 N. E. 890, 47 L. R. A. 627; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294. Fish commissioners may place fish in streams flowing over private lands, and fishing therein may be prohibited for three years thereafter. State v. Theral, 70 Va. 617, 41 Atl. 1030, 43 L. R. A. 290. But a solvent debtor cannot be denied the right to transfer property to a preferred creditor. Third Nat. Bk. v. Divine Grocery Co., 97 Tenn. 603, 37 S. W. 390, 31 L. R. A. 445. Mine operator may be compelled to stop excavating five feet from boundary of his lands unless he secures written consent of adjoining proprietor. Mapel v. John, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800.]

(b) [Administrative boards may be empowered to exclude unvaccinated pupils from the public schools when there is reason to fear the outbreak of a small-pox epidemic. Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64. May be authorized to require all persons to be vaccinated unless some rule of the Constitution forbids. State v. Hay, 125 N. C. 999, 35 S. E. 459, 40 L. R. A. 588, 78 Am. St. 691; Morris v. Columbus, 102 Ga. 792, 30 S. E. 850, 42 L. R. A. 175; Bissell v. Davison, 65 Conn. 183, 32 Atl. 318, 29 L. R. A. 251. See Mathews v. Bd. of Education, 127 Mich. 530, 89 N. W. 1030, 54 L. R. A. 730, and State v. Burdige, 95 Wis. 300, 70 N. W. 347, 37 L. R. A. 167, where it is held that this requirement in the absence of imminent danger is void. Duffield v. School Dist., 102 Pa. 476, 29 Atl. 742, 25 L. R. A. 152. And a municipal corporation in enforcing compulsory vaccination is not liable for damage arising from the unintentional use of impure vaccine. Wyatt v. Rome, 105 Ga. 312, 31 S. E. 188, 42 L. R. A. 180. State may compel placing and maintenance of water-closets in habitations capable of connection with sewer. Com. v. Roberts, 155 Mass. 281, 29 N. E. 622, 16 L. R. A. 400. Owners of tenement-houses may be compelled to furnish city water on each floor. Health Dep't v. Rector of Trinity Church, 145 N. Y. 32, 30 N. E. 833, 27 L. R. A. 710. Operators of electric street-car lines may be compelled to provide screens for the protection of their motorists. State v. Nelson, 52 Ohio St. 88, 39 N. E. 22, 25 L. R. A. 317; State v. Wicks, 53 Minn. 35, 50 N. W. 645, 25 L. R. A. 750, and note; State v. Whitaker, 160 Mo. 59, 60 S. W. 1098. Statute forbidding lodging house keepers to permit more than a specified number of persons from occupying the same room is void as discriminating against them and in favor of the keepers of other places of public entertainment. Bailey v. The People, 159 N. Y. 28, 60 N. E. 98, 64 L. R. A. 833, 38 Am. St. 116.]
prove, in the advance of urban population, to be detrimental to the public health, or in danger of becoming so, are liable to be closed against further use for cemetery purposes. The keeping of gunpowder in unsafe quantities in cities or villages; the sale of poisonous drugs, unless labelled; allowing unmuzzled dogs to be at large when danger of hydrophobia is apprehended; or the keeping for sale to encourage the keeping of sheep, and to discourage the keeping of dogs, by imposing a penalty upon the owner of a dog for keeping the same. Mitchell v. Williams, 27 Ind. 63. Or by imposing a dog tax for a fund to indemnify sheep owners for losses suffered from dogs. Van Horn v. People, 46 Mich. 183; 9 N. W. 248. [Or to limit the amount which can be recovered for injury to them or destruction of them to the amount at which they were returned for taxation in the last preceding annual assessment. Sentell v. N. O. & C. R. Co., 166 U. S. 598, 17 Sup. Ct. Rep. 693. An ordinance compelling a person to kill his dog on a finding of a justice of the peace that he "is satisfied that the dog has attacked a person and is dangerous" is void. People ex rel. Shand v. Tighe, 30 N. Y. Sup. 388.] A person may be forbidden to keep more than two cows within a certain part of a city. In re Linehan, 72 Cal. 114, 13 Pac. 170. A law prohibiting the bringing of Texas and Cherokee cattle into the State because of the tendency to communicate a dangerous and fatal disease to other cattle, was sustained in Yeuzel v. Alexander, 58 Ill. 254. It has since, however, been questioned, and in Railroad Company v. Huesen, 95 U. S. 465, such an act was held to be an invasion of the power of Congress over interstate commerce. See also Hill v. De Cuir, 95 U. S. 485. But a statute is valid which makes one who has in his possession in Iowa Texas cattle, which have not wintered in the North, liable for damage done by them to other cattle. Kimmish v. Hall, 129 U. S. 217, 9 Sup. Ct. Rep. 277. See Missouri Pac. Ry. Co. v. Finley, 28 Kan. 550, 16 Pac. 951; [Grimes v. Eddy, 126 Mo. 168, 28 S. W. 766, 26 L. R. A. 638, and note upon validity and construction of statutes concerning infected animals. Idaho v. Rasmussen, — Idaho, —, 59 Pac. 338, 52 L. R. A. 78, aff. 181 U. S. 196, 21 Sup. Ct. Rep. 504. Peach trees infected with yellows may be destroyed. State v.
unwholesome provisions, or other deleterious substances,—are all subject to be forbidden under this power. And, generally, it may be said that each State has complete authority to provide for the abatement of nuisances, whether they exist by the fault of individ-

Main, 69 Conn. 123, 37 Atl. 80, 96 L. R. A. 623.)

1 The manufacture and sale of any oleaginous substance designed to take the place of butter may be forbidden, though it is healthful and marked "oleomargarine butter." Such provision is a valid exercise of the police power. Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 902, 1257, aff. 114 Pa. St. 205, 7 Atl. 913; Butler v. Chambers, 80 Minn. 69, 30 N. W. 308. So of the sale of oleomargarine colored to deceive. Waterbury v. Newton, 60 N. J. L. 634, 14 Atl. 601. In New York an act like the Pennsylvania statute was held bad as prohibiting an industry because it competed with another. People v. Marx, 99 N. Y. 377, 2 N. E. 29. But a later act was sustained, as aimed to prevent deception, which forbade the sale of a like product made in imitation or semblance, or designed to take the place of natural butter. People v. Arensberg, 105 N. Y. 123, 11 N. E. 277. Oleomargarine may be required to be stamped: Pierce v. Maryland, 63 Md. 592; or colored pink: State v. Marshall, 64 N. H. 640, 15 Atl. 210. [But not when brought from another State. Collins v. New Hampshire, 171 U. S. 30, 18 Sup. Ct. Rep. 708, rev. State v. Myers, 42 W. Va. 822, 20 S. E. 539. For many other cases on oleomargarine, see note, p. 847. See also State v. Capital City Dairy Co., 63 Ohio St. 350, 67 N. E. 62, 67 L. R. A. 181, and cases cited in note.] The sale of milk below a certain standard of purity may be forbidden, though it be mixed with pure water. Com. v. Waite, 11 Allen, 204; People v. Cipperly, 101 N. Y. 684, 4 N. E. 107; State v. Campbell, 64 N. H. 402, 13 Atl. 585; State v. Smyth, 14 R. I. 100; [State v. Schlenker, 112 Iowa, 642, 84 N. W. 608, 51 L. R. A. 347, 84 Am. St. 360. And herds of cows supplying milk for public consumption may be compelled to be registered, and they and the premises whereon they are kept to be inspected and kept in a sanitary condition. State v. Broadbent, 89 Md. 565, 43 Atl. 771, 46 L. R. A. 433. Milk offered for sale, if below a prescribed standard, may be summarily destroyed. Deems v. Baltimore, 80 Md. 104, 30 Atl. 648, 26 L. R. A. 541; see in this connection, State v. Du Paquier, 46 La. Ann. 677, 15 So. 502, 20 L. R. A. 162. The addition of any adulterant, even though it be harmless and be added to preserve the milk, may be prohibited. State v. Schlenker, 112 Iowa, 642, 84 N. W. 608, 51 L. R. A. 347, 84 Am. St. 360. Statute prohibiting sale of cream as cream which contains less than twenty per cent of fat, is valid. State v. Crescent City Creamery Co., 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. St. 464. A statute prohibiting the manufacture and sale of "any substance or compound made in imitation of yellow butter" and not made "wholly of cream or milk," is constitutional. State v. Rogers, 95 Me. 94, 49 Atl. 664, 85 Am. St. 306; People v. Rotter,—Mich.—, 91 N. W. 107, seeming to overrule Northwestern Manufacturing Co. v. Judge, 66 Mich. 391, 25 N. W. 372, 56 Am. Rep. 693. The opinion in People v. Rotter collects the authorities on this question. See also People v. Bieseker, 109 N. Y. 53, 61 N. E. 290, 88 Am. St. 654, 57 L. R. A. 178. The legislature of the State may declare that a nuisance, which is such in fact, and may create a commission with power to determine whether the conditions defined by the act exist. Los Angeles County v. Spencer, 126 Cal. 670, 59 Pac. 202, 77 Am. St. 217.] The sale of fertilizers may be regulated to prevent deception. Steiner v. Ray, 84 Ala. 93, 4 So. 172. [And baking-powder manufacturers may be compelled to publish upon the labels of the cans in which they pack their powders a list of the ingredients of such powders. State v. Sherrod, 80 Minn. 446, 83 N. W. 417, 50 L. R. A. 660. Sale of alum baking-powders may be prohibited. State v. Layton, 169 Mo. 474, 61 S. W. 171. On "Summary Abatement of Nuisances by Boards of Health," see 2 Columbia L. Rev. 203.]
nals or not, and even though in their origin they may have been permitted or licensed by law.

1 See Miller v. Craig, 11 N. J. Eq. 175; Weeks v. Milwaukee, 10 Wis. 242; Water-town v. Mayo, 109 Mass. 315. One of the powers most commonly conferred upon municipal corporations is that to declare and abate nuisances. The general authority is commonly given in the common council or other legislative body, but so far as the nuisances are supposed to be injurious to the public health, jurisdiction in respect to them is likely to be conferred upon boards of health. Where nuisances are spoken of in statutes delegating this authority, public nuisances must be understood as intended, and for whatever is merely a private nuisance individuals must seek their own remedy. The delegation of this authority over nuisances is very apt to raise troublesome questions, and the authority itself is likely to be taken to be broader than it is. It is first to be understood that nothing is a public nuisance which the law itself—either common or statute—authorizes. Pittsburgh, &c. R. R. Co. v. Brown, 67 Ind. 45, 33 Am. Rep. 73; Chicago, &c. R. R. Co. v. Joliet, 79 Ill. 25. And therefore if the municipal authority should assume to declare something which was entirely lawful by the law of the State to be a nuisance, the declaration would be a mere nullity because in conflict with the superior law. An illustration is found in a case where a city declared the occupation by a railroad company of certain grounds where it had been lawfully located to be a nuisance, and forbade its longer continuance. Chicago, &c. R. R. Co. v. Joliet, 79 Ill. 25. Whether any particular thing or act is or is not permitted by the law of the State must always be a judicial question, and therefore the question what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to the local legislative or administrative boards. Yates v. Milwaukee, 10 Wall. 497; Wreford v. People, 14 Mich. 41; State v. Street Commissioners, 36 N. J. 283; Everett v. Council Bluffs, 46 Iowa, 66; Hutton v. Camden, 22 N. J. 122, 23 Am. Rep. 203; St. Louis v. Schnuckelberg, 7 Mo. App. 636. The local declaration that a nuisance exists is therefore not conclusive, and the party concerned may contest the fact in the courts. Ex parte O'Leary, 65 Miss. 80, 3 So. 144; Hennessy v. St. Paul, 37 Fed. Rep. 665; [Evansville v. Miller, 146 Ind. 413, 45 N. E. 1064, 38 L. R. A. 101.] There being no charter power to declare a nuisance, an ordinance declaring dense smoke a nuisance is void. St. Paul v. Gilfillan, 36 Minn. 208, 81 N. W. 49; [St. Louis v. Heitzeberg P. & P. Co., 111 Mo. 375, 42 S. W. 954, 39 L. R. A. 661.] So as to a prohibition of all lime-kilns in a city: State v. Mott, 61 Md. 297; and of all laundries. In re Sam Kee, 31 Fed. Rep. 808. All picnics cannot be made nuisances. Poyer v. Des Plaines, 18 Ill. App. 228. In Kennedy v. Board of Health, 2 Pa. St. 398, it was held competent for the legislature to make such local declaration conclusive; but this seems questionable. It is entirely competent, however, to confer upon the municipalities the authority to supersede the general law in respect to those matters which are found to be injurious in their locality, and to create as to them a new class of public offences. Thus, under proper legislation, a municipal council may make the selling of spirituous liquors within their jurisdiction a nuisance: Goddard v. Jacksonville, 15 Ill. 588; [McManus v. State,— Kan.— 70 Pac. 700; Davis v. Auld, 96 Me. 559, 63 Atl. 118;] or the selling of goods on Sunday: McPherson v. Chebanse, 114 Ill. 46, 28 N. E. 454; or the keeping of a bowling alley for hire: Tanner v. Albion, 5 Hill, 121; or an offensive manufactory: Kennedy v. Phelps, 10 La. Ann. 227; or a slaughter-house within certain specified limits: Metropolitan Board of Health v. Heister, 37 N. Y. 661; [or the maintenance of a privy vault on premises adjoining a public sewer: Harrington v. Providence, 20 R. I. 233, 38 Atl. 1, 38 L. R. A. 305;] or a private hospital: Milne v. Davidson, 5

2 See Beer Company v. Massachusetts, 97 U. S. 26; Fertilizing Co. v. Hyde Park, 97 U. S. 659; ante, p. 400, and note; Mug-
The State has also a right to determine what employments shall be permitted, and to forbid those which are deemed prejudicial to the public good. Under this right it forbids the keeping of gambling houses, and other places where games of chance or skill are played for money, the keeping for sale of indecent books and pictures, the keeping of houses of prostitution, (a) and the resort thereto, and in some States the sale of intoxicating drinks as a natural condition, or have become so by the act or neglect of the owner. The municipal order for removal is conclusive; Baker v. Boston, 12 Pick. 421, 22 Am. Dec. 421; though when it is to be done at the cost of the owner he is not concluded as to the cost by the action of the corporation, but has a right to be heard as to the items; Salem v. Eastern R. R. Co., 98 Mass. 431; and in Kentucky on the question of nuisance, Joyce v. Woods, 78 Ky. 386. If the corporation is itself chargeable with creating the nuisance, the cost of abating it cannot be imposed upon the owner. Weeks v. Milwaukee, 10 Wis. 242; Hannibal v. Richards, 82, Mo. 330. See Banning v. Commonwealth, 2 Duv. 95. If it has expressly permitted it, it can abate only after a judicial decision. Everett v. Marquette, 53 Mich. 450, 19 N. W. 140. The abatement must be made by the removal of that in which the nuisance consists. King v. Rosewell, 2 Salk. 459; Ely v. Supervisors of Niagara, 36 N. Y. 297; State v. Keenan, 5 R. I. 497; Miller v. Birch, 32 Tex. 208. And it must be done without inflicting unnecessary injury. Babcock v. Buffalo, 50 N. Y. 268; Weil v. Ricord, 24 N. J. Eq. 169. See Ferguson v. Selma, 43 Ala. 338; and on the subject in general, Fertilizing Co. v. Hyde Park, 97 U. S. 650. [Upon municipal power over nuisances affecting safety, health, and personal comfort, see note to 38 L. R. A. 306; over buildings and other structures as nuisances, note to 38 L. R. A. 161. To the effect that private persons may not abate a common nuisance, so declared by statute, see State v. Stark, 63 Kan. 529, 66 Pac. 243, 54 L. R. A. 910.]

beverage. These several kinds of business have a tendency which is injurious and demoralizing; and this tendency is recognized even in States where they are not forbidden, and they are subjected to regulations with a view to reducing their evils to a minimum. The regulation is likely to take the form of a license, for which a fee is exacted to cover the expense of supervision, and the days and hours when the business shall be suffered will perhaps also be prescribed. Where an occupation like gaming or the sale of demoralizing articles is altogether prohibited, it is not uncommon to provide that whatever is kept for use or sale in violation of the law shall be forfeited by the owner, and, after judicial hearing, condemned and destroyed. And taxes are some-


(a) Where there is no regulation, the fee imposed is not a license-fee but a tax, and if it does not conform to the constitutional requirements for a tax the imposition is void. State v. Moore, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472. See also Jacksonville v. Ledwith, 26 Fl. 163, 7 So. 885, 9 L. R. A. 69.]
times imposed with a view to discourage occupations which are injurious in their tendency, but which the State does not venture to prohibit.¹

So the most proper business may be regulated to prevent its becoming offensive to the public sense of decency,² or for any other reason injurious or dangerous;³ and rules for the conduct of the

² Like the keeping and exhibition of stallions and bulls in public places. Nolin v. Franklin, 4 Yerg. 103.
³ Watertown v. Mayo, 100 Mass. 315; Blydenburg v. Miles, 39 Conn. 484; Taylor v. State, 35 Wis. 298. The sale of any pistol except the navy pistol may be forbidden. Dabbs v. State, 39 Ark. 393. One operating a co-operative cheese factory may be required to give bonds. Hawthorn v. People, 109 Ill. 392. The sale of goods, except at one's regular place of business, near camp meeting grounds may be forbidden. Meyers v. Baker, 120 Ill. 567, 12 N. E. 79; Com. v. Bearer, 133 Mass. 542. An inn-keeper may be required to take out a license. Bootick v. State, 47 Ark. 126, 14 S. W. 476. But the manufacture of tobacco on any floor of a tenement house, if such floor is used as a residence, may not be forbidden. In re Jacobs, 98 N. Y. 98.

The State may regulate the occupation or business of barbers, and may require barbers to pass an examination and pay a reasonable license-fee therefor, in order to insure proper degree of competency and to protect the health of their patrons. State v. Zeno, 79 Minn. 80, 81 N. W. 748, 48 L. R. A. 88. But such regulations as limit the right of a citizen to contract with reference to his own property must have some recognizable tendency to promote the public welfare. They cannot be purely arbitrary. Dennis v. Moses, 18 Wash. 537, 62 Pac. 333, 40 L. R. A. 302; State v. Wagener, 77 Minn. 485, 80 N. W. 633, 778, 1154, 46 L. R. A. 442. Manufacturers may be compelled to pay their employees their wages weekly in Massachusetts. Re House Bill No. 1230, 103 Mass. 589, 40 N. E. 713, 28 L. R. A. 341; and upon power to regulate time of payment of wages, see note to this case in L. R. A., also upon requirement that wages be paid in lawful money, note to 28 L. R. A. 273, and Dixon v. Poe,—

Ind. —, 65 N. E. 518. In Pennsylvania it is held that insurance business may be confined to corporations. Commonwealth v. Vrooman, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250. State may provide that answer by applicant for insurance shall not be recovery unless with willfully false, material, and made without agent's knowledge of falsity, and unless it induced the company to issue the policy. J. Hancock M. L. Ins. Co. v. Warren, 59 Ohio St. 63, 51 N. E. 546, aff. in 181 U. S. 73, 21 Sup. Ct. Rep. 636. Statute providing that if insurance company shall fail to pay loss when due it shall be liable for 12 per cent additional is held valid in Fidelity and Casualty Co. v. Allibone, 90 Tex. 600, 39 S. W. 682. But see Railway Co. v. Ellis, 105 U. S. 150, 17 Sup. Ct. Rep. 255, where similar statute as to contracts between railway companies and their employees is held void. Upon power to regulate insurance, see State v. Stone, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, and Noble & W. v. Mitchell, 100 Ala. 619, 14 So. 581, 25 L. R. A. 233, and note. Ticket brokerage may be prohibited. Burdick v. People, 149 Ill. 600, 39 N. E. 948, 24 L. R. A. 152, and note; State v. Corbett, 57 Minn. 346, 59 N. W. 317, 24 L. R. A. 498; Com. v. Keary, 198 Pa. 600, 48 Atl. 472. But all regulations of business that is not in itself deleterious to the general good must be reasonable. They cannot be arbitrary, and if they are so the courts will set them aside. Ex parte Whitwell, 98 Cal. 73, 32 Pac. 570, 19 L. R. A. 727. An act forbidding one not a registered pharmacist to sell patent medicines is void as unreasonable. Noel v. People, 187 Ill. 557, 58 N. E. 618, 52 L. R. A. 287. Plumbers may be required to procure a certificate of competency from a State board of examiners, and to be registered. Singer v. State, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 561; People v. Warden, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718.]
most necessary and common occupations are prescribed when from their nature they afford peculiar opportunities for imposition and fraud.\(^1\) Cities commonly provide markets where provisions may be exposed for sale; and these are subjected to careful regulations, and furnished with official inspectors to whom every dealer may be required to exhibit his stock.\(^2\) Dealers may also be compelled to take out a license, and the license may be refused to a person of bad reputation, or taken away from a party detected in dishonest practices.\(^2\) For dealings in the markets, weights


\(^2\) See, in general, Nightingale's Case, 11 Pick. 163; Buffalo v. Webster, 10 Wendl. 99; Bush v. Sewbury, 8 Johns. 418; Ash v. People, 11 Mich. 347; State v. Leiber, 11 Iowa, 407; Le Claire v. Newport, 13 Iowa, 210; White v. Kent, 11 Ohio St. 550; Bowling Green v. Carson, 10 Bush, 94; New Orleans v. Stafford, 27 La. Ann. 417. [An act requiring peddlers in a certain county to take out a license and exempting from its operation merchants, persons selling to merchants, and persons selling property raised or manufactured by them, is held invalid in Com. v. Snyder, 182 Pa. St. 630, 38 Atl. 556; State v. Wagener, 60 Minn. 206, 72 N. W. 67, 38 L. R. A. 977. But see Rosenbaum v. State, — Neb. —, 89 N. W. 1058, 57 L. R. A. 922, and note, in which case it is held that a regulation requiring license from dealers in merchandise which exempted those selling their own productions is valid. A regulation limiting requirement for license to transients only is void; McGraw v. Marion, 08 Ky. 673, 34 S. W. 18, 47 L. R. A. 603. See also Kniseley v. Cotterel, 190 Pa. 614, 49 Atl. 861, 50 (a) [Upon police powers over markets, see Jacksonville v. Ledwith, 20 Fla. 103, 7 So. 859, 9 L. R. A. 69; State v. Sarratad, 46 La. Ann. 700, 15 So. 87, 24 L. R. A. 894, and note; City of New Orleans v. Faber, 105 La. 208, 29 So. 507, 63 L. R. A. 105. Fresh meats may be required to be sold only in public markets. Newsom v. Galveston, 70 Tex. 559, 13 S. W. 308, 7 L. R. A. 707.]
and measures are established, and parties must conform to the fixed standards under penalty. It is also common to require draymen, hackmen, pawnbrokers, and auctioneers to take out licenses, and to conform to such rules and regulations as seem important to the public convenience and protection. So for the protection of youth in institutions of learning, and for the good discipline of schools, the sale of liquors in their vicinity may be prohibited when allowed generally, and credit for livery to pupils, without the consent of the college authorities, may be subjected to penalty. So, for the protection of laborers against the oppression of employers, it is held competent to forbid their being paid in anything else than legal-tender funds. And under its general


3 State v. Ranscher, 1 Lea, 96; Boyd v. Bryant, 36 Ark. 69, 37 Am. Rep. 0. See Bronson v. Oberlin, 41 Ohio St. 470. 4 Soper v. Harvard College, 1 Pick. 177, 11 Am. Dec. 159. In Commonwealth v. Bacon, 13 Bush, 210, 26 Am. Rep. 189, it was held not competent to forbid any one carrying on stabling within a specified distance of a named agricultural society during its fairs.

5 Shaffer v. Union Mining Co., 56 Md. 74. And for the protection of the health of miners and the avoidance of unnecessary danger to their lives and limbs, the State may compel the ventilation of mines and the erection of structures to facilitate their escape in case of accident. The cost of the necessary inspections may be levied upon the owners of the mines. Chicago, W. & V. Coal Co. v. People, 181 Ill. 270, 54 N. E. 901; 48 L. R. A. 554; Consolidated Coal Co. v. People, 185 Ill. 134, 57 N. E. 889. And the State may require railway companies to compensate all employees for injuries caused by negligence of any of their servants in charge of particular branches of their
right to require merchandise to be submitted to public inspection and regulation, the State may prescribe the size of packages and place of inspection for the shipment of tobacco to foreign countries, and impose penalties for failure to conform to the regulations.\(^1\)

The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them.\(^2\) But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class while leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection.\(^3\) The same is true of young children, whose employ-

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\(^2\) Baker v. Portland, 6 Sawyer, 660.

\(^3\) It is unlawful to require an applicant for a license to follow the occupation of a barber to be a citizen of the United States; Templar v. Examining Bd. of Barbers, Mich., 90 N. W. 1058. See Traggesser v. Gray, 73 Md. 250, 20 Atl. 905, 9 L. R. A. 780, holding that liquor-selling may be restricted to citizens of the United States. Police regulations cannot be purely arbitrary nor purely for the promotion of private interests. It must appear that the general welfare is to be in some degree promoted. A statute requiring railroads and transportation companies to turn over to a storage company or public warehouseman all property which the consignee fails to call for or receive within twenty days after notice of its arrival, is unconstitutional. State v. Chicago, M. & St. P. R. Co., 68 Minn. 381, 71 N. W. 400, 38 L. R. A. 672. But in Pennsylvania it is held that the business of insurance may be confined to corporations. Com. v. Vrooman, 101 Pa. 300, 30 Atl. 217, 25 L. R. A. 250. A gift enterprise carried on by a merchant in connection with his business and involving no element of chance cannot be prohibited. Long v. State, 73 Md. 527, 21 Atl. 686, 12 L. R. A. 527, 74 Md. 655, 22 Atl. 4, 12 L. R. A. 425. And see State v. Dalton, 22 R. I. 77, 46 Atl. 295, 34 Am. St. 818, 43 L. R. A. 775.

\(^3\) It has been held that a constitutional provision forbidding the General Assembly granting "to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens," does not preclude restricting the licensing of the sale of intoxicating drinks to males. Blair v. Kilpatrick, 40 Ind. 312. The people of California deemed it wise to provide by their constitution that "no person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation, or profession;" and it has been held that the legislature is now deprived of the power to prohibit the employment
of females in drinking-cellars and other places where liquors are kept for sale. Matter of Magnique, 57 Cal. 604. [Sale of wines and liquors in dance-cellars and the like places frequented by women may be forbidden. Ex parte Hayes, 98 Cal. 655, 33 Pac. 337, 20 L. R. A. 701.] That such employment might otherwise be prohibited on good reasons, few persons will doubt. See Matter of Quong Woo, 13 Fed. Rep. 229. And in Ohio this may be forbidden under power to regulate saloons. Bergman v. Cleveland, 39 Ohio St. 651.


3 Upon the general right of the State to regulate trades and occupations, see further, Pierce v. Kimball, 9 Me. 54, 23
Am. Dec. 537; Shepherd v. Commissioners, 50 Ga. 535; State v. Callicutt, 1 Lea, 716; Fry v. State, 63 Ind. 562. [Where the constitution directs that "the legislature shall pass laws to provide for the health and safety of employees in factories, smelters, and mines," the legislature is competent to enact that "except in cases of emergency where life or property is in imminent danger" "the period of employment of workingmen in all underground mines or workings" and "in smelters and all other institutions for the reduction or refining of ores or metals shall be eight hours per day," and that the violation of any such provision by "any person, body corporate, agent, manager or employer," shall be a misdemeanor. Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383, aff. 14 Utah, 71, 64, 46 Pac. 766, 1105, 87 L. R. A. 103, 108. The case in the United States Supreme Court cites many cases bearing upon the subject, and discusses very thoroughly the effect of the Fourteenth Amendment upon the police powers of the States. See also Short v. Bullion, B. & C. Mining Co., 20 Utah, 20, 57 Pac. 729, 45 L. R. A. 003, where effect of this act upon contracts for pay for overtime is considered. That such regulation cannot be made under the ordinary constitution, see Re Morgan, 20 Colo. 415, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. 529. In Fiske v. People, 188 Ill. 206, 58 N. E. 953, 62 L. R. A. 201, it is held that an ordinance providing for provisions in city contracts limiting hours of labor upon city works to eight hours was unconstitutional as infringing freedom to contract. For other cases upon the right to limit or regulate hours of labor, see People v. Phyfe, 136 N. Y. 554, 22 N. E. 978, 19 L. R. A. 141; Re Dalton, 61 Kan. 257, 59 Pac. 336, 47 L. R. A. 230; Seattle v. Smyth, 22 Wash. 827, 00 Pac. 1129, 79 Am. St. 959; of females upheld in Wilmot v. State, — Neb. —, 91 N. W. 421, 55 L. R. A. 825; Cleveland v. Clement Bros. Const. Co., — Ohio —, 65 N. E. 885, 59 L. R. A. 775; State v. Buchanan, — Wash. —, 70 Pac. 52, 59 L. R. A. 342 (forbidding employment of women more than ten hours a day). See further upon power of State to limit hours of labor, 53 Cent. L. Jour. 384. Upon protection of health of employees, see People v. Smith, 108 Mich. 527, 66 N. W. 392, 32 L. R. A. 853, and note; protection of health within State, State v. Schlemmer, 42 La. An. 1165, 8 So. 307; 10 L. R. A. 135, and note; relation of States to general government in regard to police power, contracts, &c., note to Baldwin's View, 9 L. ed. U. S. 873. In Indianapolis U. Ry. Co. v. Houlihan, 157 Ind. 494, 60 N. E. 948, 54 L. R. A. 787, a statute making railway companies liable to employees for injuries caused by negligence of other employees of specified grade, was upheld as valid exercise of police power.] Where a municipality is given power to license occupations which are proper in themselves and not subject to special evils — e.g. that of a laundry — the license cannot be made conditional on obtaining consent of residents of the neighborhood, as this in effect would be a delegation of its power to license. Matter of Quong Woo, 13 Fed. Rep. 229. The functions of a fertilizer inspector must, except by statutory permission, be exercised within the State. Hammond v. Wilcher, 79 Ga. 421, 5 S. E. 113.
CHAPTER XVII.

THE EXPRESSION OF THE POPULAR WILL.

Although by their constitutions the people have delegated the exercise of sovereign powers to the several departments, they have not thereby divested themselves of the sovereignty. They retain in their own hands, so far as they have thought it needful to do so, a power to control the governments they create, and the three departments are responsible to and subject to be ordered, directed, changed, or abolished by them. But this control and direction must be exercised in the legitimate mode previously agreed upon. The voice of the people, acting in their sovereign capacity, can be of legal force only when expressed at the times and under the conditions which they themselves have prescribed and pointed out by the constitution, or which, consistently with the constitution, have been prescribed and pointed out for them by statute; and if by any portion of the people, however large, an attempt should be made to interfere with the regular working of the agencies of government at any other time or in any other mode than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and must be resisted and repressed by the officers who, for the time being, represent legitimate government.¹

¹ "The maxim which lies at the foundation of our government is that all political power originates with the people. But since the organization of government it cannot be claimed that either the legislative, executive, or judicial powers, either wholly or in part, can be exercised by them. By the institution of government the people surrender the exercise of all these sovereign functions of government to agents chosen by themselves, who at least theoretically represent the supreme will of their constituents. Thus all power possessed by the people themselves is given and centred in their chosen representatives." Davis, Ch. J., in Gibson v. Mason, 5 Nev. 283, 291. See Luther v. Borden, 7 How. 1; Koehler v. Hill, 60 Iowa, 617, 14 N. W. 738, 15 N. W. 609; State v. Tufty, 19 Nev. 391, 12 Pac. 895.

There are a number of provisions in different State constitutions which require that certain specified propositions—such, for example, as the amendment of the constitution or the removal of a county seat—shall be carried only by a majority vote of the electors, or perhaps by a two-thirds majority. Whether by majority in these provisions is intended a majority of all who took part in the election, by voting on any proposition then submitted, or by voting for any officer then to be chosen, or only a majority of those who voted on the particular proposition, has sometimes been made to turn on the peculiar phraseology of the constitutional provision; but it must be confessed that it is impossible to harmonize the cases, and we give references to them without attempting it. Taylor v. Taylor, 10 Minn. 107; Bayard v. Klinge,
The authority of the people is exercised through elections, (a) by means of which they choose legislative, executive, and judicial

16 Minn. 249; Gillespie v. Palmer, 20 Wis. 644; State v. Winkelman, 36 Mo. 105; State v. Mayor, &c., 37 Mo. 270; State v. Binder, 38 Mo. 450; State v. Sutterfield, 54 Mo. 301; State v. Braggfield, 67 Mo. 331; State v. St. Louis, 73 Mo. 433; State v. Francis, 95 Mo. 44, 8 S. W. 1; People v. Brown, 11 Ill. 478; Dunnovan v. Green, 67 Ill. 63; Chestnutwood v. Hood, 68 Ill. 132; State v. Swift, 63 Ind. 606; State v. Lancaster County, 6 Neb. 474; State v. Anderson, 20 Neb. 517, 42 N. W. 421; Probate Amendment Cases, 24 Kan. 760; State v. Echols, 41 Kan. 116, 20 Pac. 623; Cass County v. Johnson, 35 U. S. 800; Walker v. Oswald, 68 Md. 146, 11 Atl. 711; Branden v. Stumph, 16 Lea. 591. [Bryan v. Stephenson, 50 Neb. 620, 70 N. W. 252, 35 L. R. A. 752; Zeiler v. Central R. Co., 84 Md. 504; 55 Atl. 932; 34 L. R. A. 499; Belknapp v. Louisville, 99 Ky. 474, 35 S. W. 1118, 21 L. R. A. 256; State v. Langley, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723; People v. Berkeley, 102 Cal. 208, 36 Pac. 591, 23 L. R. A. 888.]

In respect to municipal and other corporate bodies the general rule is that if a quorum is present when an election is to be made, or other corporate action taken, and the minority for any reason refuse to vote, they must be deemed to acquiesce in the action of those who do vote. Oldknow v. Wainwright, or Rex v. Foxcroft, Burr. 1017; First Parish v. Stearns, 21 Pick. 148; Booker v. Young, 12 Gratt. 303; State v. Green, 37 Ohio St. 227. [Citizens & Taxpayers of De Soto Parish v. Williams, 49 La. Ann. 422, 21 So. 647, 37 L. R. A. 761. But see People v. Berkeley, 102 Cal. 208, 36 Pac. 591, 23 L. R. A. 888.]

(a) Several States have recently enacted laws for the prevention of bribery, intimidation, fraud, and other corrupt practices at elections. Such are generally called Corrupt Practices Acts. In Mason v. State, 58 Ohio St. 30, 50 N. E. 6, 41 L. R. A. 291, M. was ousted from the office of probate judge for having attempted to influence the votes of sundry persons by promising that in case of his election he would use his influence to secure them various appointments to office, and the right to jury trial was denied since the action was merely one to try title to office. In State v. Bland, 144 Mo. 534, 45 S. W. 410, 41 L. R. A. 227, a somewhat similar statute, it was held, should be strictly construed; B. was charged with paying money and promising appointments to subordinate offices in order to secure the withdrawal of a rival candidate, to which charge he demurred, and the demurrer was sustained on the ground that the offense prohibited was the act of corruptly influencing the vote of any voter, and not that of securing the withdrawal of an opposing candidate. It must be confessed that in the present case where B. induces his opposing candidate N. to withdraw by promising that in case he is elected he will attempt to secure N.'s appointment to a lucrative position, the circumstances being such that his attempt is practically certain to succeed, the distinction between inducing N. to withdraw in favor of B. and attempting to induce N. to vote for B. seems more subtle than substantial. Where oath of office is prescribed with provision that no other oath or qualification shall ever be required, the candidate cannot be required to make oath as to expenditures. Bradley v. Clark, 133 Cal. 190, 65 Pac. 395. Where the Constitution prohibits more than one election a year, special elections cannot be held, but the special matters must be submitted at a general election. Belknapp v. Louisville, 99 Ky. 474, 35 S. W. 1118, 31 L. R. A. 553. Where an appointment to fill a vacancy lasts until "the next election by the people," the appointee holds for the remainder of the regular term and not merely until the next general election. People v. Build, 114 Cal. 165, 45 Pac. 1009, 34 L. R. A. 46. The provision that all the qualified electors in a city "shall have the right to vote for mayor and the other elective officers" does not prevent a division of the city into wards so that each elector in a ward is restricted to voting for an alderman from his ward. State v. McAllister, 88 Tex. 284, 31 S. W. 187, 26 L. R. A. 623. But where the members of assembly are to be elected "by the legal voters of the county respectively," and each assemblyman must be an inhabitant of "the county for which he shall be chosen,"
officers, to whom are to be entrusted the exercise of powers of government.\footnote{The act of voting is an exercise of sovereignty and cannot be compelled. Kansas City v. Whipple, 136 Mo. 475, 38 S. W. 295, 36 L. R. A. 747; but why not? It certainly is not an act of the sovereign, for there are many voters but there can be only one sovereign in any state. That a citizen properly qualified and selected may be compelled to serve as an officer, see People v. Williams, 145 Ill. 578, 38 N. E. 849, 24 L. R. A. 492, and note.} Where neither by constitution nor by statute are the qualifications for office prescribed, any one is eligible who possesses the elective franchise. It may happen, therefore, that one may be an officer who is not a citizen of the United States; for in a number of the States aliens who have declared their intention to become citizens, and have the qualification of residence are given the franchise. McCarthy v. Freezle, 63 Ind. 507. Whether the converse is true,—that one not an elector cannot hold office,—in the absence of written law on the subject, is possibly open to question. In Barker v. People, 3 Cow. 686, 703, the Chancellor said: "Eligibility to office belongs not exclusively or specially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever not excluded by the Constitution." So, State v. George, 23 Fla. 555, 8 So. 61. \footnote{And see Steusoff v. State, 80 Tex. 428, 15 S. W. 1100, 12 L. R. A. 304.} But in Wisconsin it is held that only an elector can hold an office; State v. Smith, 14 Wis. 497; State v. Murray, 28 Wis. 96; and this is probably the general understanding. \footnote{So held in Oren v. Abbott, 121 Mich. 510, 80 N. W. 372, 47 L. R. A. 93, where the question arose whether a woman otherwise duly qualified and elected may hold the office of prosecuting attorney; also in State v. Van Beck, 87 Iowa, 509, 51 N. W. 625, 19 L. R. A. 622.} The question is not very important, as State constitutions or statutes generally lay down that rule, in some cases adding further requirements. \footnote{Where it is required that judges be "learned in the law," this requires that they shall have been admitted to practise law in the courts of the State. Jamieson v. Wiggan, 12 S. D. 10, 80 N. W. 137, 46 L. R. A. 317.] One holding a consulate abroad does not cease to be a qualified elector. Whent v. Smith, 5 Ark. 266, 7 S. W. 161. See Hannon v. Grizzard, 89 N. C. 115. A provision that only a qualified elector shall hold office does not prevent making payment of taxes a qualification for election as alderman. Darrow v. People, 8 Col. 417, 8 Pac. 661. It is sufficient if a disability is removed before taking office, though existing at the time of election. Privett v. Bickford, 20 Kan. 62; \footnote{Demaree v. Scates, 60 Kan. 275, 22 Pac. 1123, 20 L. R. A. 97; State v. Van Beek, 87 Iowa, 509, 51 N. W. 625, 19 L. R. A. 502. But see State v. Sullivan, 45 Minn. 309, 47 N. W. 802, 11 L. R. A. 272, and note; this case holds that the intention to become naturalized must be declared before election. Upon general subject of "Eligibility to Office, as of What Time Determined," see 1 Mich. Law Rev. 17, a paper by Floyd R. Mechem.} Under constitutional provisions that no other oath or test shall be required as a qualification for holding office than the oath of allegiance to the constitution, political ties cannot be made a prerequisite. Att'y-Gen. v. Detroit Com. Council, 58 Mich. 213, 21 N. W. 857; Evansville v. State, 118 Ind. 423, 21 N. E. 267, 4 L. R. A. 93; State v. Denny, 119 Ind. 449, 21 N. E. 274, 4 L. R. A. 63. Contro, as to election officers. People v. Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788. \footnote{See further Com. v. Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. 560, 2 L. R. A. 142; Rogers v. Buffalo, 123 N. Y. 178, 25 N. E. 274, 9 L. R. A. 679.} See In re Wormlan, 2 N. Y. S. 324. There are some implied disqualifications. One of these is that a person shall not hold incompatible offices; if he accepts an office incompatible with one already held by him, the other is vacated; Millward v. Thatcher, 2 T. R. 81; The King v. Tizzard, 9 B. & C. 418; People v. Carrigue, 2 Hill, 93; People v. Nostrand, 46 N. Y. 375; People v. Hain-}
specially submitted to them, and adopt or reject a measure according as a majority may vote for or against it. It is obviously

fan, 96 Ill. 420; State v. Hutt, 2 Ark. 282; Stubbs v. Len, 64 Me. 96; but see De Turk v. Com., 129 Pa. St. 151, 18 Atl. 757; and if he is elected to both at the same time, he declines one when he accepts the other. Cotton v. Phillips, 60 N. H. 219. [But where his first office is such that he cannot resign it at will (e.g., tax-collector), he is incapable of accepting an incompatible office until his resignation of the former has been accepted. Attorney-General v. Marston, 60 N. H. 455, 22 Atl. 669, 13 L. R. A. 470. Where an officer is prohibited from holding any other office during the term for which he is elected, his resignation does not remove the disability. State v. Sutton, 63 Minn. 147, 65 N. W. 292, 30 L. R. A. 686.] Incompatibility between two offices is an inconsistency in the functions of the two,—as judge and clerk of the same court; officer who presides his personal account for audit, and officer who passes upon it, &c.: People v. Green, 68 N. Y. 495; sheriff and justice of the peace: State Bank v. Curran, 10 Ark. 142; Stubbs v. Lena, 64 Me. 105; Wilson v. King, 3 Lit. 457, 14 Am. Dec. 84; State v. Goff, 15 R. I. 605, 9 Atl. 220; governor and member of the legislature; justice of the peace and judge of the appellate court, &c. See Commonwealth v. Binns, 17 S. & R. 221; State v. Clarke, 3 Nev. 500; State v. Feibleman, 28 Ark. 424; Mohan v. Jackson, 62 Ind. 69; State v. Weston, 4 Neb. 334; Re District Attorney, &c., 11 Phila. 626; Sublet v. Bidwell, 47 Miss. 266, 12 Am. Rep. 339; Barum v. Gilman, 27 Minn. 406, 8 N. W. 575, 38 Am. Rep. 304; McNell v. Somers, 98 N. C. 407, 2 S. E. 161. [Attorney-General v. Common Council of Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211. See also Chambers v. State, 127 Ind. 305, 29 N. E. 893, 11 L. R. A. 613, and note.] In Indiana a judge is ineligible to a non-judicial office whose term begins before the judicial term expires. Vogel v. State, 107 Ind. 374, 38 N. E. 164. See Smith v. Moore, 90 Ind. 294. It is also sometimes provided that no person shall hold offices in two departments of the government at the same time, or two lucrative offices; as to which see Dailey

v. State, 8 Blackf. 329; Creighton v. Piper, 14 Ind. 182; Kerr v. Jones, 19 Ind. 351; People v. Whitman, 10 Cal. 39; Crawford v. Dunbar, 62 Cal. 86; Howard v. Shoemaker, 35 Ind. 115; State v. Kirk, 44 Ind. 401; Foltz v. Kerlin, 105 Ind. 221, 4 N. E. 439, 6 N. E. 672; People v. Sanderson, 30 Cal. 100. Or hold both a federal and a State office. Rodman v. Harcourt, 4 B. Monr. 224, 490; Hoglan v. Carpenter, 4 Bush, 89; Re Corliss, 11 R. I. 688; State v. De Gross, 53 Tex. 857; Davenport v. Mayor, 67 N. Y. 456; People v. Brooklyn Common Council, 77 N. Y. 503, 33 Am. Rep. 659; State v. Clarke, 3 Nev. 605; People v. Leonard, 73 Cal. 230, 14 Pac. 863; but a federal watchman may be an alderman. Doyle v. Raleigh, 80 N. C. 138. Or be eligible to re-election to an office after holding it for a specified period. See Gonell v. Bier, 15 W. Va. 911; Carson v. McPheteridge, 16 Ind. 327; Horton v. Watson, 23 Kan. 229. Or be eligible while a public defaulter. See Hoskins v. Brantley, 57 Miss. 814; Cawley v. People, 66 Ill. 240. Or that he shall be disqualified for using money corruptly to procure election. Commonwealth v. Walter, 86 Pa. St. 15. Or for bribery at a nominating convention. Leonard v. Com., 112 Pa. St. 607, 4 Art. 220. See Re Nomination of Public Officers, 9 Col. 290, 21 Pac. 474; though a mere promise to serve for less than lawful fees is not a disqualification, where one has not been convicted for it as for an offence against the law. State v. Humphreys, 74 Tex. 468, 12 S. W. 99. See also, Meredith v. Chresty, 64 Cal. 95, 27 Pac. 808; People v. Goddard, 8 Cal. 492, 7 Pac. 301. Or by or for being a party to a duel. Cochran v. Jones, 14 Am. Law Reg. 222.

As to who are "officers" within the meaning of that term in provisions examined, see Butler v. Board of Regents, 32 Wis. 124; Brown v. Turner, 70 N. C. 93; Eliason v. Coleman, 86 N. C. 293; State v. Wilson, 29 Ohio St. 347; Throop v. Langdon, 49 Mich. 675; State v. Wilmington City Council, 3 Harr. 291; Dickson v. People, 17 Ill. 191; Shurbun v. Hoover, 40 Mich. 503.

It was held in Olive v. Ingram, Strange,
impossible that any considerable people should in general meeting consider, mature, and adopt their own laws; but when a law has been perfected, and it is deemed desirable to take the expression of public sentiment upon it, or upon any other single question, the ordinary machinery of elections is adequate to the end, and the expression is easily and without confusion obtained by submitting such law or such question for an affirmative or negative vote. In this manner constitutions and amendments thereof are adopted or rejected, and matters of local importance in many cases, such as the location of a county seat, the contracting of a local debt, the erection of a public building, the acceptance of a municipal charter, and the like, are passed upon and determined by the people whom they concern, under constitutional or statutory provisions which require or permit it.

It is supposed when laws are framed for the conduct of elections that their requirements will be observed; that the persons chosen to perform official duties will possess the legal qualifications, and that they will take any oath and give any bond that may be required of them by law, and be regularly inducted into office. But from accident, mistake of law, forgetfulness, or other inadvertence, and sometimes for less excusable reasons, it often happens that some one is found in possession and performing the duties of a public office who cannot defend his incumbency by the strict letter of the law. The fact renders necessary a classification of officers as de jure and de facto. (a)

(a) 1114, that a woman, being a voter, at parish elections, might be chosen sexton. Women may by law be school officers in Massachusetts. Opinion of Judges, 115 Mass. 602. And in Iowa. Huff v. Cook, 44 Iowa, 639. Also in many other States. They are also appointed notaries public in several States, are State librarians in some, and members of State charitable boards. But a woman cannot be notary public in Ohio. State v. Adams, 58 Ohio St. 612, 61 N. E. 136, 41 L. R. A. 727. Nor in Massachusetts. Opinion of Justices, 165 Mass. 699, 43 N. E. 927, 32 L. R. A. 350. She may be county clerk in Missouri. State v. Hostetter, 137 Mo. 630, 39 S. W. 270, 38 L. R. A. 208; see note to this case in L. R. A. upon right of woman to hold office. In Illinois a woman may be master in chancery: Schuchardt v. People, 99 Ill. 501; and in Colorado, a deputy clerk. It is not an "office" which only a qualified elector may hold. Jeffries v. Harrington, 11 Col. 101, 17 Pac. 565. Infants as well as women may be appointed deputies to such ministerial officers as are entitled to act by deputy. [See Jamesville & W. R. Co. v. Fisher, 109 N. C. 1, 13 S. E. 698, 13 L. R. A. 721, and note.]

1 Where the constitution leaves the location of a county seat to a local vote, the legislature has no power to decide upon it. Stuart v. Blair, 8 Bax. 141; Verner v. Simmons, 33 Ark. 212.

2 It is not competent for the legislature to confer the selection of a public officer upon a voluntary association of private individuals. Therefore a statute giving to the members of a voluntary detective association the powers of constables is void. Abels v. Supervisors of Ingham, 42 Mich. 626, 4 N. W. 200.

(a) 1 Upon officers de jure and de facto and their relations, see State v. Carr, 129 Ind. 41, 28 N. E. 88, 13 L. R. A. 177, and note. Where the governor de jure is present...
An officer de jure is one who, possessing the legal qualifications, has been lawfully chosen to the office in question, and has fulfilled any conditions precedent to the performance of its duties. By being thus chosen and observing the precedent conditions, such a person becomes of right entitled to the possession and enjoyment of the office, and the public, in whose interest the office is created, is entitled of right to have him perform its duties. If he is excluded from it, the exclusion is both a public offence and a private injury.

An officer de jure may be excluded from his office by either an officer de facto or an intruder. An officer de facto is one who by some color of right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact.\(^1\) His color of right may come from an election or appointment made by some officer or body having colorable but no actual right to make it;\(^2\) or made in such disregard of legal requirements as to be ineffectual in law; or made to fill the place of an officer illegally removed;\(^3\) or made in favor of a party not having the legal qualifications; or it may come from public acquiescence in the officer holding without performing the precedent conditions, or holding over under claim of right after

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1 One who has the representation of being the officer he assumes to be, and yet is not a good officer in point of law. Parker v. Hett, Ld. Raym. 658; King v. Bedford Level, 6 East, 356, 393. One who comes in by claim or color of right, or who exercises the office with such circumstances of acquiescence on the part of the public as at least afford a strong presumption of right, but by reason of some defect in his title, or of some informality, omission, or want of qualification, or by reason of the expiration of his term of service, is unable to maintain his possession when called upon by the government to show by what title he holds it. Blackwell on Tax Titles, 92, 93. One who exercises the duties of an office under color of election or appointment to that office. Plymouth v. Painter, 17 Conn. 585, 588.


There can be no de facto incumbent of an office in the possession of an officer. Cohn v. Beal, 61 Miss. 398; State v. Blossom, 19 Nev. 312, 10 Pac. 420. One who is in hiding cannot be a de facto officer. Williams v. Clayton, 6 Utah, 86, 21 Pac. 398.

at the seat of government and attempting to exercise the powers of his office, he is also governor de facto, and no other person can be governor de facto at the same time. Powers v. Conn., 22 Ky. L. 1807, 61 S. W. 733. An officer whose prescribed term has a stated duration and runs until his successor is elected and qualified is de jure until such qualification, and where the time for election of his successor as prescribed in the Constitution has elapsed, the officer’s term lasts until the recurrence of the regular time for election of his successor. State v. Bulkeley, 61 Conn. 257, 25 Atl. 186, 14 L. R. A. 657.]
his legal right has been terminated; or possibly from public acquiescence alone when accompanied by such circumstances of official reputation as are calculated to induce people, without inquiry, to submit to or invoke official action on the supposition that the person claiming the office is what he assumes to be. An intruder is one who attempts to perform the duties of an office without authority of law, and without the support of public acquiescence.

No one is under obligation to recognize or respect the acts of an intruder, and for all legal purposes they are absolutely void. But for the sake of order and regularity, and to prevent confusion in the conduct of public business and insecurity of private rights, the acts of officers de facto are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the State or by some one claiming the office de jure, or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be. In all other cases the acts of an officer de facto are as valid and effectual, while he is suffered to retain the office, as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties. This is an important principle, which finds concise

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1 As when one continues to perform the duties of judge after having accepted a seat in the legislature. Woodside v. Wagg, 71 Me. 207. Or a constable continues to act after removal from his town. Case v. State, 69 Ind. 46; Wilson v. King, 3 Litt. 457, 14 Am. Dec. 84.


4 Thus a justice, sued for issuing process after his term has expired, must show his capacity de jure. Grace v. Teague, 81 Me. 559.

expression in the legal maxim that the acts of officers de facto cannot be questioned collaterally.

The Right to Participate in Elections. (a)

In another place we have said that, though the sovereignty is in the people, as a practical fact it resides in those persons who hold office until their successors are elected and qualified to office to lengthen the time during which the incumbent occupies the office. State v. Menasha, 161 Ind. 260, 278, 51 N. E. 117, 357, 43 L. R. A. 408, 418.

(a) "The importance of regulating primary elections and nominations to office has of recent years become somewhat widely recognized. The right of a party to hold a nominating convention cannot be denied it on account of its smallness, nor can it be compelled to admit every voter who desires to attend its primaries without regard to his political beliefs. Britton v. Election Commrs, 129 Cal. 337, 01 Pac. 1115, 51 L. R. A. 115. Nominations by petition are now generally provided for. In State v. Poston, 59 Ohio St. 122, 62 N. E. 196, 43 L. R. A. 90, the requirement that such petition "shall contain a provision to the effect that each signer thereon pledges himself to support and vote for the candidate or candidates whose nominations are therein requested," was held valid as not interposing any unreasonable impediment to the exercise of the elective franchise. In Stephenson v. Bd. of Election Commrs, 118 Mich. 306, 76 N. W. 914, 42 L. R. A. 214, it was held that a political convention might organize itself and determine the rights of contesting delegations to seats, and that in case of nominations by rival factions, both sets of nominees must be listed on the official ballot under the party name and emblem. See also Marcus v. Ballot Commrs, 42 W. Va. 263, 26 S. E. 281, 35 L. R. A. 290; State v. Arms, 24 Mont. 447, 63 Pac. 401. In Phillips v. Gallagher, 73 Minn. 728, 76 N. W. 285, 42 L. R. A. 222, the power of a convention to control its own procedure was recognized, and the convention was permitted to reject a vote alleged to be erroneous, although the error was not sufficient to overcome the majority of a candidate, and thereafter to vote again upon the nomination for the particular office, which latter vote taken on a later day resulted in the nomination of a person not named in the first vote. Fraud or oppression was declared unnecessary to cause the court to intervene. White v. Sanderson, 74 Minn. 118, 70 N. W. 1021, 42 L. R. A. 231, recognizes the right of a convention to delegate to a committee power to name candidates and certify them to the proper public officer in order that their names may be prints upon the official ballot. Hutchinson v. Brown, 122 Cal. 180, 54 Pac. 738, 42 L. R. A. 232, recognizes the converse right to delegate to a committee power to withdraw candidates for the purpose of effecting a fusion. In Kears v. Howley, 188 Pa. 116, 41 Atl. 273, 42 L. R. A. 235, an injunction against adding to or striking from a political party committee was refused on the ground that no property interests were involved, and that any irregularities could be corrected by the party itself. In State v. Poston, 59 Ohio St. 629, 61 N. E. 150, 42 L. R. A. 237, the statutory requirement that nominees of parties polling in the last preceding election less than one per cent of the total vote could be nominated only by petition was sustained. See also De Walt v. Bartley, 140 Pa. 529, 21 Atl. 185, 15 L. R. A. 771, sustaining requirement of three per cent; State v. Black, 61 N. J. L. 146, 24 Atl. 489, 1021, 16 L. R. A. 703, five per cent. Statute prohibiting name of candidate nominated by two or more parties for same office from being entered more than once on the official ballot is valid. State v. Anderson, 100 Wis. 523, 70 N. W. 482, 42 L. R. A. 239. Where the Secretary of State is required to arrange the party lists of candidates in the order of the average numbers of votes received by the candidates of the various parties in the preceding election, and in
by the constitution of the State are permitted to exercise the elec-
tive franchise. The whole subject of the regulation of elections, including the prescribing of qualifications for suffrage, is left by the national Constitution to the several States, except as it is provided by that instrument that the electors for representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the State legislature, and as the fifteenth amendment forbids denying to citizens the right to vote on account of race, color, or previous condition of servitude. Participation in the elective franchise is a privilege rather than a right, and it is granted or denied on grounds of general policy; the prevailing view being that it should be as general as possible consistent with the public safety. Aliens are generally excluded, though in some States they are allowed to vote after residence for a specified period, provided they have declared their intention to become citizens in the manner prescribed by law. The fifteenth amendment, it will be seen, does not forbid denying the franchise to citizens except upon certain specified grounds, and it is matter of public history that its purpose was to prevent discriminations in this regard as against persons of African descent. Minors, who equally with adult persons are citizens, are still excluded, as are also women, and sometimes persons who have been convicted of infamous crimes. In some States laws will be found in existence...
which, either generally or in particular cases, deny the right to vote to those persons who lack a specified property qualification, or who do not pay taxes. (a) In some States idiots and lunatics are also expressly excluded; and it has been supposed that these unfortunate classes, by the common political law of England and of this country, were excluded with women, minors, and aliens from exercising the right of suffrage, even though not prohibited therefrom by any express constitutional or statutory provision. 1

Wherever the constitution has prescribed the qualifications of electors, they cannot be changed or added to by the legislature, 2 or otherwise than by an amendment of the constitution.

One of the most common requirements is, that the party offering to vote shall reside within the district which is to be affected

1 See Cushing’s Legislative Assemblies, § 24; also § 27. and notes referring to legislative cases; McCrary, Law of Elections, §§ 60, 73; Clark v. Robinson, 58 Ill. 498. Drunkenness is regarded as temporary insanity. Ibid. Idiots and insane persons are excluded in Alabama, Arkansas, California, Delaware, Florida, Iowa, Kansas, Louisiana, Maryland (provided they are under guardianship as such), Minnesota, Nebraska, Nevada, New Jersey, Ohio, Oregon, Rhode Island, South Carolina, Virginia, West Virginia, and Wisconsin. Convicted felons are excluded in Alabama, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, Texas, Virginia, West Virginia, and Wisconsin.

Persons under guardianship are excluded in Florida, Kansas, Maine, Massachusetts, Minnesota, Rhode Island, and Wisconsin. Paupers are excluded in Delaware, Maine, Massachusetts (see Justices’ Opinions, 124 Mass. 590), New Jersey, Rhode Island, and West Virginia.

Persons kept in any poorhouse or other asylum at public expense are excluded in California, Colorado, Missouri, and South Carolina. Persons confined in public prisons are excluded in California, Colorado, Missouri, and South Carolina. Persons under interdiction are excluded in Louisiana; and persons excused from paying taxes at their own request, in New Hampshire. Capacity to read is required in Connecticut; and capacity to read and write, in Massachusetts.


(a) [See Frieszleven v. Shallcross, 9 Houst. (Del.) 1, 19 Atl. 576, 8 L. R. A. 337. and note.]
by the exercise of the right. If a State officer is to be chosen, the voter should be a resident of the State: and if a county, city, or township officer, he should reside within such county, city, or township. This is the general rule; and for the more convenient determination of the right to vote, and to prevent fraud, it is now generally required that the elector shall only exercise within the municipality where he has his residence his right to participate in either local or general elections. (a) Requiring him to vote among his neighbors, by whom he will be likely to be generally known, the opportunities for illegal or fraudulent voting will be less than if the voting were allowed to take place at a distance and among strangers. And wherever this is the requirement of the constitution, any statute permitting voters to deposit their ballots elsewhere must necessarily be void. 1

A person's residence is the place of his domicile, or the place where his habitation is fixed without any present intention of removing therefrom. 2 The words "inhabitant," "citizen," and

1 Opinions of Judges, 30 Conn. 501; Huleman v. Rens, 41 Pa. St. 306; Chase v. Miller, 41 Pa. St. 403; Opinions of Judges, 44 N. II. 633; Bourland v. Hildreth, 26 Cal. 161; People v. Hodgsett, 13 Mich. 127; Opinions of Judges, 37 Vt. 655; Day v. Jones, 31 Cal. 261. The case of Morrison v. Springer, 15 Iowa, 304, is not in harmony with those above cited. So far as the election of representatives in Congress and electors of president and vice-president is concerned, the State constitutions cannot preclude the legislature from prescribing the "times, places, and manner of holding" the same, as allowed by the national Constitution,—art. 1, § 4, and art. 2, § 1,—and a statute permitting such election to be held out of the State would consequently not be invalid. Opinions of Justices, 45 N. H. 696; Opinions of Judges, 37 Vt. 695. There are now constitutional provisions in New York, Michigan, Missouri, Connecticut, Maryland, Kansas, Mississippi, Nevada, Rhode Island, and Pennsylvania, which permit soldiers in actual service to cast their votes where they may happen to be stationed at the time of voting. It may also be allowed in Ohio. Lehman v. McBride, 15 Ohio, n. s. 573.


(a) "The mere fact that one lives upon a steamer does not give him a voting residence at her home port, even though he has no voting residence elsewhere, and is unmarried. Howard v. Skinner, 87 Md. 556, 40 Atl. 379, 40 L. R. A. 753; Jones v. Skinner, 87 Md. 556, 40 Atl. 381, 40 L. R. A. 755. Residence is not changed by presence in and support at and by a state "soldiers' home." Wolcott v. Holm, 97 Mich. 31, 66 N. W. 837, 23 L. R. A. 215, and note on residence and attendance or presence at public institutions; see also to same effect Powell v. Spackman, — Idaho, —, 65 Pac. 503."
"resident," as employed in different constitutions to define the qualifications of electors, mean substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicile or home.\(^1\) Every person at all times must be considered as having a domicile somewhere, and that which he has acquired at one place is considered as continuing until another is acquired at a different place.\(^2\) It has been held that a student in an institution of learning, who has residence there for purposes of instruction, may vote at such place, provided he is emancipated from his father's family, and for the time has no home elsewhere.\(^3\)

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\(^1\) Cushing's Law and Practice of Legislative Assemblies, § 36; State v. Aldrich, 14 R. I. 171. [Where territory in which a voter has continuously resided up to the time of annexation to a municipality is annexed to or incorporated with it, his period of such residence is to be counted in determining his residential qualification for eligibility to office. Gibson v. Wood, 105 Ky. 740, 49 S. W. 708, 43 L. R. A. 633.]

\(^2\) That it is not a necessary consequence of this doctrine that one must always be entitled to vote somewhere, see Kreitz v. Behrensmeier, 125 Ill. 141, 17 N. E. 232.

\(^3\) Putnam v. Johnson, 10 Mass. 488; Lincoln v. Happood, 11 Mass. 360; Wilbraham v. Ludlow, 90 Mass. 587; Perry v. Reynolds, 53 Conn. 527, 3 Atl. 555. Compare Dale v. Irwin, 78 Ill. 170. A different conclusion is arrived at in Pennsylvania. Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 438. And in Iowa, Vanderpool v. O'Hanlon, 53 Iowa, 246, 5 N. W. 119, 30 Am. Rep. 210. "The questions of residence, inhabitation, or domicile,—for although not in all respects precisely the same, they are nearly so, and depend much upon the same evidence,—are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances; but, from the whole taken together, it must be determined in each particular case. It is a maxim that every man must have a domicile somewhere, and also that he can have but one. Of course it follows that his existing domicile continues until he acquires another; and vice versa, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places; and it may often occur that the evidence of facts tending to establish the domicile in one place would be entirely conclusive, were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it beyond question in another. So, on the contrary, very slight circumstances may fix one's domicile, if no controlling by more conclusive facts fix it in another place. If a seaman, without family or property, sails from the place of his nativity, which may be considered his domicile of origin, although he may return only at long intervals, or even be absent many years, yet if he does not by some actual residence or other means acquire a domicile elsewhere, he retains his domicile of origin." Shaw, Ch. J., Thorne Dike v. City of Boston, 1 Met. 242, 245. And see Alston v. Newcomer, 12 Miss. 189; Johnson v. People, 94 Ill. 305. In Inhabitants of Abington v. Inhabitants of North Bridgewater, 23 Pick. 170, it appeared that a town line ran through the house occupied by a party, leaving a portion on one side sufficient to form a habitation, and a portion on the other not sufficient for that purpose. Held, that the domicile must be deemed to be on the side first mentioned. It was intimated also that where a house was thus divided, and the party slept habitually on one side, that circumstance should be regarded as a preponderating one to fix his residence there, in the absence of other proof. And see Rex v. St. Olave's, 1 Strange, 51.

By the constitutions of several of the
Temporary absence from one's home, with continuous intention to return, will not deprive one of his residence, even though it extend through a series of years.  

Conditions to the Exercise of the Elective Franchise.

While it is true that the legislature cannot add to the constitutional qualifications of electors, it must nevertheless devolve upon that body to establish such regulations as will enable all persons entitled to the privilege to exercise it freely and securely, and exclude all who are not entitled from improper participation therein. For this purpose the times of holding elections, the manner of conducting them and of ascertaining the result, are prescribed, and heavy penalties are imposed upon those who shall vote illegally, or instigate others to do so, or who shall attempt to preclude a fair election or to falsify the result. The propriety, and indeed the necessity, of such regulations are undisputed. In some of the States it has also been regarded as important that lists of voters should be prepared before the day of election, in which should be registered the name of every person qualified to vote. Under such a regulation, the officers whose duty it is to administer the election laws are enabled to proceed with more deliberation in the discharge of their duties, and to avoid the haste and confusion that must attend the determination upon

States, it is provided, in substance, that no person shall be deemed to have gained or lost a residence by reason of his presence or absence, while employed in the service of the United States; nor while a student in any seminary of learning; nor while kept at any almshouse or asylum at public expense; nor while confined in any public prison. See Constitutions of New York, Illinois, Indiana, California, Michigan, Rhode Island, Minnesota, Missouri, Nevada, Oregon, and Wisconsin. A pauper inmate of a soldiers' home comes under such provision. Silvey v. Lindsay, 107 N. Y. 53, 13 N. E. 414. In several of the other States there are provisions covering some of these cases, but not all. A provision that no person shall be deemed to have gained or lost a residence by reason of his presence or absence in the service of the United States, does not preclude one from acquiring a residence in the place where, and in the time while, he is present in such service. People v. Holden, 28 Cal. 123; Moor v. Harvey, 128 Mass. 219. If a man takes up his permanent abode at the place of an institution of learning, the fact of his entering it as a student will not preclude his acquiring a legal residence there: Sanders v. Getchell, 76 Me. 158; Pedigo v. Grimes, 113 Ind. 145, 13 N. E. 700; but if he is domiciled at the place for the purposes of instruction only, it is deemed proper and right that he should neither lose his former residence nor gain a new one in consequence thereof. Vanderpoel v. O'Halloran, 53 Iowa, 246, 5 N. W. 119, 96 Am. Rep. 210.

That persons residing upon lands within a State, but set apart for some national purpose, and subjected to the exclusive jurisdiction of the United States, are not voters, see Opinions of Judges, 1 Met. 550; Sinks v. Reese, 10 Ohio St. 306; McGlavy, Law of Elections, § 23.

election day of the various and sometimes difficult questions concerning the right of individuals to exercise this important franchise. Electors, also, by means of this registry, are notified in advance what persons claim the right to vote, and are enabled to make the necessary examination to determine whether the claim is well founded, and to exercise the right of challenge if satisfied any person registered is unqualified. When the constitution has established no such rule, and is entirely silent on the subject, it has sometimes been claimed that the statute requiring voters to be registered before the day of election, and excluding from the right all whose names do not appear upon the list, was unconstitutional and void, as adding another test to the qualifications of electors which the constitution has prescribed, and as having the effect, where electors are not registered, to exclude from voting persons who have an absolute right to that franchise by the fundamental law. This position, however, has not been generally accepted as sound by the courts. The provision for a registry deprives no one of his right, but is only a reasonable regulation under which the right may be exercised. Such regulations must

1 See Page v. Allen, 58 Pa. St. 333. And compare Clark v. Robinson, 88 Ill. 498; Dells v. Kennedy, 49 Wis. 655, 6 N. W. 246, 381, 35 Am. Rep. 785; White v. Multnomah Co., 13 Oreg. 317, 10 Pac. 484. In State v. Corner, 22 Neb. 265, 34 N. W. 490, it is said the voter has the right to prove himself an elector, register, and vote at any time before the polls close. The Supreme Court of Pennsylvania laid down a rule in conflict with these cases, in Patterson v. Barlow, 60 Pa. St. 54, which case is in harmony with those cited in the next note.

2 Capen v. Foster, 12 Pick. 485, 23 Am. Dec. 632; People v. Kopplekom, 16 Mich. 342; State v. Bond, 38 Mo. 425; State v. Hilmantel, 21 Wis. 566; State v. Baker, 38 Wis. 71; Byler v. Asher, 47 Ill. 101; Monroe v. Collins, 17 Ohio St. 665; Edmonds v. Banbury, 23 Iowa, 267, 4 Am. Rep. 177; Ensworth v. Albin, 46 Mo. 450; Auld v. Walton, 12 La. Ann. 129; In re Polling Lists, 13 R. I. 729; State v. Butts, 31 Kan. 557, 2 Pac. 618. As to the conclusiveness of the registry, see Hyde v. Brush, 34 Conn. 454; Keenan v. Coak, 12 R. L. 52. A law closing registration three weeks before the election has been upheld. People v. Hoffman, 116 Ill. 657, 5 N. E. 596, 8 N. E. 788. Otherwise as to one closing it five days before: Daggett v. Hudson, 43 Ohio St. 548, 8 N. E. 539; and ten days before: State v. Corner, 22 Neb. 265, 34 N. W. 490. Registration may be required at a city election when it is not by State law. McMahon v. Savannah, 66 Ga. 217. See Com. v. McClelland, 83 Ky. 689. [Voter may be required to exhibit his poll-tax receipt, or make affidavit that he has paid the tax and lost or misplaced the receipt. State v. Old, 95 Tenn. 723, 34 S. W. 690, 31 L. R. A. 837. But a law attempting to invalidate ballots upon which the inspectors have neglected to mark their initials is void where the constitution provides that all persons having certain qualifications "shall be entitled to vote at all elections." Moyer v. Van Denter, 12 Wash. 377, 41 Pac. 60, 29 L. R. A. 670. Where statute provides that upon voter's taking a specified oath "his vote shall be received," such provision is mandatory. Wolcott v. Holcomb, 97 Mich. 361, 66 N. W. 837, 23 L. R. A. 215. An unregistered voter may be required to make affidavit as to his qualifications, stating them in full. Cusick's Appeal, 138 Pa. 459, 20 Atl. 574, 10 L. R. A. 228. Requirements in registration law must be reasonable. Owensboro v. Hickman, 90 Ky. 630, 14 S. W. 688, 10 L. R. A. 234, and note.
always have been within the power of the legislature, unless forbidden. Many resting upon the same principle are always prescribed, and have never been supposed to be open to objection. Although the constitution provides that all male citizens twenty-one years of age and upwards shall be entitled to vote, it would not be seriously contended that a statute which should require all such citizens to go to the established place for holding the polls, and there deposit their ballots, and not elsewhere, was a violation of the constitution, because prescribing an additional qualification, namely, the presence of the elector at the polls. All such reasonable regulations of the constitutional right which seem to the legislature important to the preservation of order in elections, to guard against fraud, undue influence, and oppression, and to preserve the purity of the ballot-box, are not only within the constitutional power of the legislature, but are commendable, and at least some of them absolutely essential. And where the law requires such a registry, and forbids the reception of votes from any persons not registered, an election in a township where no such registry has ever been made will be void, and cannot be sustained by making proof that none in fact but duly qualified electors have voted. It is no answer that such a rule may enable the registry officers, by neglecting their duty, to disfranchise the electors altogether; the remedy of the electors is by proceedings to compel the performance of the duty; and the statute, being imperative and mandatory, cannot be disregarded.\(^1\) The danger, however, of any such misconduct on the part of officers is comparatively small, when the duty is entrusted to those who are chosen in the locality where the registry is to be made, and who are consequently immediately responsible to those who are interested in being registered.

All regulations of the elective franchise, however, must be reasonable, uniform, and impartial; they must not have for their

\(^1\) People v. Kopplekom, 16 Mich. 342; Zeiler v. Chapman, 54 Mo. 602; Nofzger v. Davenport, &c. R. R. Co., 26 Iowa, 612; Chicago, &c. R. R. Co. v. Mallory, 101 Ill. 682. It has nevertheless been held that if the ballots of unregistered voters are received, they should not be rejected in a contest. Dale v. Irwin, 78 Ill. 170; Kuykendall v. Harker, 89 Ill. 120. The law does not become unconstitutional because of the fact that, by the neglect of the officers to attend to the registry, voters may be disfranchised. Ibid. Esworthy v. Albin, 46 Mo. 450. But in Full
purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.¹

In some other cases preliminary action by the public authorities may be requisite before any legal election can be held. If an election is one which a municipality may hold or not at its option, and the proper municipal authority decides against holding it, it is evident that individual citizens must acquiesce, and that any votes which may be cast by them on the assumption of right must be altogether nugatory.² The same would be true of an election to be held after proclamation for that purpose, and which must fail if no such proclamation has been made.³ Where, how-

¹ Capen v. Foster, 12 Pick. 485, 23 Am. Dec. 632; Monroe v. Collins, 17 Ohio St. 665. All male citizens resident in the State a year and the town six months being electors, an act is void which forbids to a naturalized person the right to be registered within thirty days of naturalization. Kinneen v. Wells, 144 Mass. 407, 11 N. E. 210. Under the Constitution of Ohio, the right of suffrage is guaranteed to “white male citizens,” and by a long series of decisions it was settled that persons having a preponderance of white blood were “white” within its meaning. It was also settled that judges of election were liable to an action for refusing to receive the vote of a qualified elector. A legislature unfriendly to the construction of the constitution above stated passed an act which, while prescribing penalties against judges of election who should refuse to receive or sanction the rejection of a ballot from any person, knowing him to have the qualifications of an elector, concluded with a proviso that the act and the penalties thereto “shall not apply to clerks or judges of election for refusing to receive the votes of persons having a distinct and visible admixture of African blood, nor shall they be liable to damages by reason of such rejection.” Other provisions of the act plainly discriminated against the class of voters mentioned, and it was held to be clearly unreasonable, partial, calculated to subvert or impede the exercise of the right of suffrage by this class, and therefore void. Monroe v. Collins, supra. [Where a minor becomes qualified between the completion of the preliminary registration and the final review, if he has offered his name at the preliminary for conditional registration, he can compel registration of his name at the review. Barret v. Taylor, 85 Md. 173, 30 Atl. 708, 30 L. R. A. 129; see also Drake v. Drewry, 112 Ga. 308, 37 S. E. 432. Requirement that every voter who has been six months absent from the State since last voting in it shall register with county clerk his claim to be a legal voter before he will be permitted to vote again is void for unreasonableness. Brewer v. McClelland, 144 Ind. 423, 32 N. E. 290, 17 L. R. A. 845; Morris v. Powell, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 325. A law requiring registration in person, allowing but five days for registration, and making no provision for sickness and unavoidable absence on those days is void for unreasonableness. Attorney-General v. Detroit, 78 Mich. 545, 44 N. W. 223, 7 L. R. A. 90, and note. Registration for last preceding general election may be made sufficient for a special election. Pickett v. Russell, 42 Fla. 116, 634, 28 So. 704.]


³ People v. Porter, 6 Cal. 20; McKane v. Weller, 11 Cal. 49; People v. Martin, 12 Cal. 409; Jones v. State, 1 Kan. 273; Barry v. Lauck, 5 Colo. 588; Stephens v. People, 80 Ill. 327. So if notice is given but not as the law requires: State v. Echols, 41 Kan. 1, 20 Pac. 523; or if it fails to specify time and place: Morgan v. Gloucester, 44 N. J. L. 137. But such informalities will not vitiate, if as many vote as usual. Wheat v. Smith, 50 Ark. 205, 7 S. W. 101. [But where no notice was given and only ninety-four out of one thousand two hundred voters vote
ever, both the time and the place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer, whose duty it is to give notice of the election, has failed in that duty. The notice to be thus given is only additional to that which the statute itself gives, and is prescribed for the purpose of greater publicity; but the right to hold the election comes from the statute, and not from the official notice. It has therefore been frequently held that when a vacancy exists in an office, which the law requires shall be filled at the next general election, the time and place of which are fixed, and that notice of the general election shall also specify the vacancy to be filled, an election at that time and place to fill the vacancy will be valid, notwithstanding the notice is not given; and such election cannot be defeated by showing that a small portion only of the electors were actually aware of the vacancy, or cast their votes to fill it. 1 But this would not be the case if either the time or the place were not fixed by law, so that notice became essential for that purpose. 2

for candidates for the particular office, and then by means of posters on the official ballots, the election is void. Wilson v. Brown, 22 Ky. L. 708, 58 S. W. 595.

1 People v. Cowles, 13 N. Y. 350; People v. Breunlin, 3 Cal. 477; State v. Jones, 19 Ind. 356; People v. Hartwell, 12 Mich. 508; Dishon v. Smith, 10 Iowa, 212; State v. Orvis, 20 Wis. 235; State v. Goette, 22 Wis. 305; State v. Skirving, 10 Neb. 497, 27 N. W. 723; [Adsit v. Sec. of State, 84 Mich. 420, 48 N. W. 31, 11 L. R. A. 534.] The case of Foster v. Scarf, 15 Ohio St. 532, would seem to be contra. A general election was to be held, at which by law an existing vacancy in the office of judge of probate was required to be filled. The sheriff, however, omitted all mention of this office in his notice of election, and the voters generally were not aware that a vacancy was to be filled. Nominations were made for the other offices, but none for this, but a candidate presented himself for whom less than a fourth of the voters taking part in the election cast ballots. It was held that the election to fill the vacancy was void. [When general election law requires all elections to be held at places specified or described therein, places need not be specified in a notice of election to pass upon question of issuing county bonds. Packwood v. Kittitas County, 15 Wash. 88, 45 Pac. 640, 33 L. R. A. 673.]

2 State v. Young, 4 Iowa, 561. An act had been passed for the incorporation of the city of Washington, and by its terms it was to be submitted to the people on the 16th of the following February, for their acceptance or rejection, at an election to be called and held in the same manner as township elections under the general law. The time of notice for the regular township elections was, by law, to be determined by the trustees, but for the first township meeting fifteen days' notice was made requisite. An election was held, assumed to be under the act in question; but no notice was given of it, except by the circulation, on the morning of the election, of an extra newspaper containing a notice that an election would be held on that day at a specified place. It was held that the election was void. The act contemplated some notice before any legal vote could be taken, and that which was given could not be considered any notice at all. This case differs from all of those above cited, where vacancies were to be filled at a general election, and where the law itself would give to the electors all the information.
The Manner of Exercising the Right.

The mode of voting in this country, at all general elections, is almost universally by ballot. A ballot may be defined to be a piece of paper or other suitable material, with the name written or printed upon it of the person to be voted for; and where the suffrages are given in this form, each of the electors in person deposits such a vote in the box, or other receptacle provided for the purpose, and kept by the proper officers. The distinguishing feature of this mode of voting is, that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy in regard to the persons for whom he votes, and thus escape the influences which, under the system of oral suffrages, may be brought to bear upon him with a view to overbear and intimidate, and thus prevent the real expression of public sentiment.

which was requisite. In this case, although the time was fixed, the place was not; and, if a notice thus circulated on the morning of election could be held sufficient, it might well happen that the electors generally would fail to be informed, so that their right to vote might be exercised. See also Barry v. Lauck, 5 Cold. 588; Secord v. Pouch, 44 Mich. 89, 6 N. W. 110. That where the law provides for holding an election and one is duly called, equity has no authority to enjoin it, see Walton v. Develing, 61 Ill. 201.

1 The ballot was also adopted in England in 1872.

In municipal elections voting by ballot is lawful, but not so, as to illiterates, a provision requiring the voter to indicate by a mark the candidates he wishes to vote for, as it is contrary to the guaranty that all elections shall be free and equal. Rogers v. Jacob, 88 Ky. 302, 11 S. W. 513. [Use of voting machine sufficiently satisfies requirement of ballot. Opinion of Justices, 19 R. I. 729, 35 Atl. 716, 36 L. R. A. 547; He House Bill No. 1291, 178 Mass. 605, 60 N. E. 129, 64 L. R. A. 420, but see dissenting opinions in both cases for forcible objections.]


3 "In this country, and indeed in every country where officers are elective, different modes have been adopted for the electors to signify their choice. The most common modes have been either by voting viva voce, that is, by the elector openly naming the person he designates for the office, or by ballot, which is depositing in a box provided for the purpose a paper on which is the name of the person he intends for the office. The principal object of this last mode is to enable the elector to express his opinion secretly, without being subject to be overawed, or to any ill-will or persecution on account of his vote for either of the candidates who may be before the public. The method of voting by tablets in Rome was an example of this manner of voting. There certain officers appointed for that purpose, called Diribitores, delivered to each voter as many tablets as there were candidates, one of whose names was written upon every tablet. The voter put into a chest prepared for that purpose which of these tablets he pleased, and they were afterwards taken out and counted. Cicero defines tablets to be little billets, in which the people brought their suffrages. The clause in the constitution directing the election of the several State officers was undoubtedly intended to provide that the election should be made by this mode of voting to the exclusion of any other. In this mode the freemen can individually express their choice without being under the necessity of publicly declaring the object of their choice; their collective voice can be easily ascertained, and the evidence of it transmitted to the place.
In order to secure as perfectly as possible the benefits anticipated from this system, statutes have been passed, in some of the States, which prohibit ballots being received or counted unless the same are written or printed upon white paper, without any marks or figures thereon intended to distinguish one ballot from another. These statutes are simply declaratory of a constitutional

where their votes are to be counted, and the result declared with such little inconvenience as possible." Temple v. Mead, 4 Vt. 535, 541. In this case it was held that a printed ballot was within the meaning of the constitution which required all ballots for certain State officers to be "fairly written." To the same effect is Henshaw v. Foster, 9 Pick. 312. [A court has no power to require ballots voted at an election to be later submitted to the inspection of the grand jury. Ex parte Arnold, 128 Mo. 250, 30 S. W. 769, 1036, 33 L. R. A. 386; but see note thereto in L. R. A. upon power of courts to compel submission of ballot boxes to examination for other purposes than election contests, citing cases contra under substantially similar constitutional provisions, notably People v. Londoner, 13 Col. 303, 22 Pac. 704, 6 L. R. A. 444.]

1 See People v. Kilduff, 15 Ill. 492. In this case it was held that the common lines on ruled paper did not render the ballots void. Otherwise as to dotted lines under the name of an office, for which no candidate is named. Steele v. Calhoun, 61 Miss. 556. See also Druliner v. State, 20 Ind. 308, in which it was decided that a caption to the ticket folded inside was unobjectionable. To the same effect is Millholland v. Bryant, 39 Ind. 363. A method different from the usual one of printing the names of offices will not avoid the ballot. Coffey v. Edmonds, 58 Cal. 521. See also Owens v. State, 64 Tex. 600. As to what headlines are designed to mislead within a prohibition of such, see Shields v. McGregor, 91 Mo. 534, 4 S. W. 266; Williams v. State, 69 Tex. 398, 6 S. W. 845. A ballot ought not to be rejected because it differs from the regulations prescribed by the code as to size, paper, type, &c., or because the office or sheriff is designated "sheriff and collector;" the sheriff being ex officio collector by law. State v. Watson, 9 Mo. App. 593; Kirk v. Rhoads, 46 Cal. 399.

Making the ticket diamond shaped will not avoid it: State v. Phillips, 63 Tex. 390; nor will attachment slips to it. Quinn v. Markoe, 37 Minn. 439, 35 N. W. 263. [Contra, under the Australian Ballot Law, Fletcher v. Wall, 172 Ill. 426, 50 N. E. 290, 40 L. R. A. 617.] The presiding officers of the election are the sole judges of what is a "distinguishing mark" on a ballot, where such a mark is forbidden; and ballots which they have received and counted cannot be rejected afterwards by the Governor and Council. Opinions of Judges, 45 Me. 602. In Colorado it is held that, if voted in good faith, a ticket with such mark must be counted. Kellogg v. Hickman, 12 Col. 256, 21 Pac. 325. A requirement that there shall be a space of one-fifth of an inch between names of candidates is mandatory, and avoids the whole ticket if disobeyed. Perkins v. Carraway, 59 Miss. 223. [That statutory requirements concerning ballots in elections held for purpose of passing upon proposed municipal bond issues must be strictly observed, see Murphy v. San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444. Omission on part of officer in charge of ballot-box to tear off the strips bearing the numbers of the ballots before depositing them in the box does not invalidate them, Buckner v. Lynam, 22 Nev. 426, 41 Pac. 702, 30 L. R. A. 354. For a case involving a variety of marks upon ballots, some of which were held to invalidate the ballots and others not, see Parker v. Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; also Tebbe v. Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; Dennis v. Caughlin, 22 Nev. 447, 41 Pac. 768, 29 L. R. A. 731; Sego v. Stoddard, 139 Ind. 297, 33 N. E. 204, 22 L. R. A. 468. Where through mistake of officers of election the colored sample ballots are used instead of the white ones prescribed by law, the error is harmless, as all voters used the colored ballots and secrecy is not violated. Boyd v. Mills, 63 Kan. 594, 37 Pac. 10, 25 L. R. A. 486.]
principle that inhere is in the system of voting by ballot, and which ought to be inviolable whether declared or not. In the absence of such a statute, all devices by which party managers are enabled to distinguish ballots in the hand of the voter, and thus determine whether he is voting for or against them, are opposed to the spirit of the Constitution, inasmuch as they tend to defeat the design for which voting by ballot is established, and, though they may not render an election void, they are exceedingly reprehensible and ought to be discountenanced by all good citizens. The system of ballot-voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases, and that no one is to have the right, or be in position, to question his independent action, either then or at any subsequent time. The courts have held that a voter, even in case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others who may accidentally, or by trick or artifice, have acquired knowledge on the subject should not be allowed to testify to such knowledge, or to give any information in the courts upon the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it; his ballot is absolutely privileged; and to allow evidence

1 "The right to vote in this manner has usually been considered an important and valuable safeguard of the independence of the humble citizen against the influence which wealth and station might be supposed to exercise. This object would be accomplished but very imperfectly if the privacy supposed to be secured was limited to the moment of depositing the ballot. The spirit of the system requires that the elector should be secured then and at all times thereafter against reproach or animadversion, or any other prejudice, on account of having voted according to his own unbiased judgment; and that security is made to consist in shutting up within the privacy of his own mind all knowledge of the manner in which he has bestowed his suffrage." Per Denio, Ch. J., in People v. Pease, 27 N. Y. 45, 81.

2 "The ballot," says Cicero, "is dear to the people, for it uncovers men's faces, and conceals their thoughts. It gives them the opportunity of doing what they like, and of promising all that they are asked." Speech in defence of Plautus, Forsyth's Cicero, Vol. I. p. 339. In Williams v. Stein, 38 Ind. 90, the Supreme Court of Indiana declared to be void the following enactment: "It shall be the duty of the inspector of any election held in this State, on receiving the ballot of any voter, to have the same numbered with figures, on the outside or back thereof, to correspond with the number placed opposite the name of such voter on the poll lists kept by the clerks of said election." Pettit, J., delivering the opinion of the court, after quoting several authorities, among others Commonwealth v. Woelpor, 3 S. & R. 29; People v. Pease, 27 N. Y. 45; People v. Cicott, 16 Mich. 283; Temple v. Mead, 4 Vt. 535; and the text above, says: "It is believed that those authorities establish, beyond doubt, that the ballot implies absolute and inviolable secrecy, and that the principle is founded in the highest considerations of public policy. When our present constitution was framed, voting by ballot was in vogue in nearly every State in the Union. That mode of voting had been known and understood for centuries. The term "ballot," as designating a mode of election, was then well ascertained and clearly defined.
of its contents when he has not waived the privilege is to encourage trickery and fraud, and would in effect establish this remarkable anomaly, that, while the law from motives of public policy establishes the secret ballot with a view to conceal the elector’s action, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated and the voter’s action disclosed to the public. A like ruling has been made in Minnesota. Brisbin v. Cleary, 26 Minn. 107, 1 N. W. 825. In several States, however, this numbering is required. See Hodge v. Linn, 100 Ill. 397. [And in Slaymaker v. Phillips, 5 Wyo. 453, 40 Pac. 971, 42 Pac. 1049, 47 L. R. A. 842, it was held that the requirement that every ballot be officially stamped upon the back thereof and signed manually by one of the judges of election is not an undue restriction upon the right of suffrage, even though the failure of the judges of election to perform their duty in this regard makes the ballots void. Upon marking official ballot, see a valuable note to 47 L. R. A. 806, in which many cases arising under the “Australian” ballot laws of the several States are collected. Where the voter votes for a person whose name is not printed on the ballot, the addition of the party designation to the written name, after the manner of the printed names and designations, will not be considered a distinguishing mark in the absence of proof. Jennings v. Brown, 114 Cal. 307, 46 Pa. 77, 34 L. R. A. 46.] 1

1 See this subject fully considered in People v. Cioct, 10 Mich. 283. And see also State v. Hillmantel, 23 Wis. 422; Brewer v. Wensley, 2 Overt. 99, 5 Am. Dec. 605. A very loose system prevails in the contests over legislative elections, and it has been held that when a voter refuses to disclose for whom he voted, evidence is admissible of the general reputation of the political character of the voter, and as to the party to which he belonged at the time of the election. Cong. Globe, XVI. App. 456. This is assuming that the voter adheres strictly to party, and always votes the “straight ticket”; an assumption which may not be a very violent one in the majority of cases, but which is scarcely creditable to the manly independence and self-reliance of any free people; and however strongly
Every ballot should be complete in itself, and ought not to require extrinsic evidence to enable the election officer to determine the voter's intention. Perfect certainty, however, is not required in these cases. It is sufficient if an examination leaves no reasonable doubt upon the intention, and technical accuracy is never required in any case. The cardinal rule is to give effect to the intention of the voter, whenever it is not left in uncertainty; but if an ambiguity appears upon its face, the elector cannot be received as a witness to make it good by testifying for whom or for what office he intended to vote.

disposed legislative bodies may be to act upon it, we are not prepared to see any such rule of evidence adopted by the courts. If a voter chooses voluntarily to exhibit his ballot publicly, perhaps there is no reason why those to whom it was shown should not testify to its contents; but in other cases the knowledge of its contents is his own exclusive property, and he can neither be compelled to part with it, nor, as we think, is any one else who accidentally or surreptitiously becomes possessed of it, or to whom the ballot has been shown with a view to information, advice, or altercation, at liberty to make the disclosure. Such third person might be guilty of no legal offence if he should do so; but he is certainly invading the constitutional privileges of his neighbor, and we are aware of no sound principle of law which will justify a court in compelling or even permitting him to testify to what he has seen. And as the law does not compel a voter to testify, "surely it cannot be so inconsistent with itself as to authorize a judicial inquiry upon a particular subject, and at the same time industriously provide for the concealment of the only material facts upon which the results of such an inquiry must depend." Per Denio, Ch. J., in People v. Pease, 27 N. Y. 45, 81. It was held in People v. Cicott, 16 Mich. 283, that until it was distinctly shown that the elector waived his privilege of secrecy, any evidence as to the character or contents of his ballot was inadmissible. It was also held that where a voter's qualification was in question, but his want of right to vote was not conceded, the privilege was and must be the same; as otherwise any person's ballot might be inquired into by simply asserting his want of qualification. In State v. Olin, 23 Wis. 319, it was decided that where persons who had voted at an election had declined to testify concerning their qualifications, and how they had voted, it was competent to prove their declarations that they were unnaturalized foreigners, and had voted a particular way. Compare State v. Hilmantel, 23 Wis. 422. In People v. Thalber, 56 N. Y. 525, the evidence of voters as to how they voted was received, and as they did not object to giving it, it was held proper. See on this subject McCrory's Law of Elections, §§ 194, 195. [The public are interested in preserving the secrecy of the ballot in order to make bribery ineffective, and a statutory requirement that before the voter can take any person into the booth with him to aid him in making out his ballot, he shall swear that he is unable to read English, is mandatory. Ellis v. May, 99 Mich. 558, 58 N. W. 483, 25 L. R. A. 325.]


2 People v. Seaman, 5 Denio, 409. The mental purpose of an elector is not provable; it must be determined by his acts. People v. Saxton, 22 N. Y. 303; Beardstown v. Virginia, 76 Ill. 34. But see McKinnon v. People, 110 Ill. 306; Kreitz v. Behrensmeier, 125 Ill. 141, 17 N. E. 232, 24 L. R. A. 59. And where the intent is to be gathered from the ballot, it is a question of law, and cannot be submitted to the jury as one of fact. People v. McManus, 34 Barb. 620. "In canvassing votes of electors their intentions must be ascertained from their ballots, which must be counted to accord with such intentions. If the ballots express such intentions beyond reasonable
The ballot in no case should contain more names than are authorized to be voted for, for any particular office, at that election; and, if it should, it must be rejected for the obvious impossibility of the canvassing officers choosing from among the names on the ballot, and applying the ballot to some to the exclusion of others. The choice must be made by the elector himself, and be expressed by the ballot. Accordingly, where only one supervisor was to be chosen, and a ballot was deposited having upon it the names of two persons for that office, it was held that it must be rejected for ambiguity. 1 It has been decided, however, that if a voter shall write a name upon a printed ballot, in connection with the title to an office, this is such a designation of the name written for that office as sufficiently to demonstrate his intention, even though he omit to strike off the printed name of the opposing candidate. The writing in such a case, it is held, ought to prevail as the highest evidence of the voter's intention, and the failure to strike off the printed name will be regarded as an accidental oversight. 2

1 People v. Seaman, 5 Denio, 409. See also Attorney-General v. Ely, 4 Wis. 420; Perkins v. Carraway, 50 Miss. 222. If the name of a candidate for an office is given more than once, it is proper to count it as one ballot, instead of rejecting it as illegally thrown. People v. Holden, 28 Cal. 123; State v. Pierce, 35 Wis. 93.

2 People v. Saxton, 22 N. Y. 300; Brown v. McColloish, 76 Iowa, 479, 41 N. W. 197. This ruling suggests this query: Suppose at an election where printed slips containing the names of candidates, with a designation of the office, are supplied to voters, to be pasted over the names of opposing candidates,—as is very common,—a ballot should be found in the box containing the names of a candidate for one office,—say the county clerk,—with a designation of the office pasted over the name of a candidate for some other office,—say coroner; so that the ballot would contain the names of two persons for county clerk, and of none for coroner. In such a case, is the slip the highest evidence of the intention of the voter as to who should receive his suffrage for county clerk, and must it be counted for that office? And if so, then does not the ballot also show the intention of the elector to cast his vote for the person for coroner whose name is thus accidentally pasted over, and
The name on the ballot should be clearly expressed, and ought to be given fully. Errors in spelling, however, will not defeat the ballot, if the sound is the same; 1 nor abbreviations, 2 if such as are in common use and generally understood, so that there can be no reasonable doubt of the intent. And it would seem that where a ballot is cast which contains only the initials of the Christian name of the candidate, it ought to be sufficient, as it designates the person voted for with the same certainty which is commonly met with in contracts and other private writings, and the intention of the voter cannot reasonably be open to any doubt. 3

should it not be counted for that person? The case of People v. Saxton would seem to be opposed to People v. Seaman, 6 Denio, 409, where the court refused to allow evidence to be given to explain the ambiguity occasioned by the one name being placed upon the ticket, without the other being erased. “The intention of the elector cannot be thus inquired into, when it is opposed or hostile to the paper ballot which he has deposited in the ballot-box. We might with the same propriety permit it to be proved that he intended to vote for one man, when his ballot was cast for another; a species of proof not to be tolerated.” Per Whittlesey, J. See also Newton v. Newell, 26 Minn. 629, 6 N. W. 346. The case of People v. Cicott, 16 Mich. 283, is also opposed to People v. Saxton. In the Michigan case, a slip for the office of sheriff was pasted over the name of the candidate for another county office, so that the ballot contained the names of two candidates for sheriff. It was argued that the slip should be counted as the best evidence of the voter’s intention; but the court held that the ballot could be counted for neither candidate, because of its ambiguity. And a like rule is laid down as to a provision in the Illinois Constitution which requires that, if more persons are designated for any office than there are candidates to be elected, such part of the ticket shall not be counted for either. This provision is obligatory where only one name is printed on the ticket, and it remains unerased and another is written in. Kreitz v. Behrensmeier, 125 Ill. 141, 17 N. E. 232, 24 L. R. A. 59.


2 People v. Ferguson, 8 Cow. 102. See also, upon this subject, People v. Cook, 14 Barb. 259, and 8 N. Y. 67; and People v. Tisdale, 1 Doug. (Mich.) 59.

3 In People v. Ferguson, 8 Cow. 102, it was held that, on the trial of a contested election case before a jury, ballots cast for H. F. Yates should be counted for Henry F. Yates, if, under the circumstances, the jury were of the opinion they were intended for him; and to arrive at that intention, it was competent to prove that he generally signed his name H. F. Yates; that he had before held the same office for which these votes were cast, and was then a candidate again; that the people generally would apply the abbreviation to him, and that no other person was known in the county to whom it would apply. This ruling was followed in People v. Seaman, 5 Denio, 409, and in People v. Cook, 14 Barb. 259, and 8 N. Y. 67. The courts also held, in these cases, that the elector voting the defective ballot might give evidence to enable the jury to apply it, and might testify that he intended it for the candidate the initials of whose name he had given. In Attorney-General v. Ely, 4 Wis. 420, 429, a rule somewhat different was laid down. In that case, Matthew H. Carpenter was candidate for the office of prosecuting attorney; and besides the perfect ballots there were others cast for “D. M. Carpenter,” “M. D. Carpenter,” “M. T. Carpenter,” and “Carpenter.” The jury found that there was no lawyer in the county by the name of D. M. Carpenter, M. D. Carpenter, M. T. Carpenter, or whose surname was Carpenter, except the relator, Matthew H. Carpenter; that the relator was
As the law knows only one Christian name, the giving of an initial to a middle name when the party has none, or the giving of a

a practising attorney of the county, and eligible to the office, and that the votes above mentioned were all given and intended by the electors for the relator. The court say: "How was the intention of the voter to be ascertained? By reading the name on the ballot, and ascertaining who was meant and intended by that name? Is no evidence admissible to show who was intended to be voted for under the various appellations, except such evidence as is contained in the ballot itself? Or may you gather the intention of the voter from the ballot, explained by the surrounding circumstances, from facts of a general public nature connected with the election and the different candidates, which may aid you in coming to the right conclusion? These facts and circumstances might, perhaps, be adduced so clear and strong as to lead irresistibly to the inference that a vote given for Carpenter was intended to be cast for Matthew H. Carpenter. A contract may be read by the light of the surrounding circumstances, not to contradict it, but in order more perfectly to understand the intent and meaning of the parties who made it. By analogous principles, we think that these facts, and others of like nature connected with the election, could be given in evidence, for the purpose of aiding the jury in determining who was intended to be voted for. In New York, courts have gone even farther than this, and held, that not only facts of public notoriety might be given in evidence to show the intention of the elector but that the elector who cast the abbreviated ballot may be sworn as to who was intended by it. People v. Ferguson, 8 Cow. 102. But this is pushing the doctrine to a great extent; further, we think, than consideration of public policy and the well-being of society will warrant; and to restrict the rule, and say that the jury must determine from an inspection of the ballot itself, from the letters upon it, aside from all extraneous facts, who was intended to be designated by the ballot, is establishing a principle unnecessarily cautious and limited. In the present case, the jury, from the evidence before them, found that the votes [above described] were, when given and cast, intended, by the electors who gave and cast the same respectively, to be given and cast for Matthew H. Carpenter, the relator. Such being the case, it clearly follows that they should be counted for him." See also State v. Elwood, 12 Wis. 551; People v. Pease, 27 N. Y. 45, 54, per L. v. io, Ch. J.; Talkington v. Turner, 71 Ill. 234; Clark v. Robinson, 58 Ill. 498; Kreitz v. Behrensmeier, 125 Ill. 141, 17 N. E. 382, 24 L. R. A. 60; State v. Williams, 95 Mo. 156, 8 S. W. 410; State v. Gates, 43 Conn. 533. In Wimmer v. Eaton, 72 Iowa, 374, 34 N. W. 170: ballots for F. W. were counted for F. W., who was a regular candidate, there being no one eligible or running named F. W.

In Opinions of Judges, 38 Me. 559, it was held that votes could not be counted by the canvassers for a person of a different name from that expressed by the ballot, even though the only difference consisted in the initial to the middle name. See also Opinions of Justices, 64 Me. 588. And in People v. Tisdale, 1 Doug. (N. Y.) 50, followed in People v. Higgins, 3 Mich. 233, it was held that no extrinsic evidence was admissible on a trial in court in explanation or support of the ballot; and that, unless it showed upon its face for whom it was designed, it must be rejected. And it was also held, that a ballot for "J. A. Dyer" did not show, upon its face, that it was intended for the candidate James A. Dyer, and therefore could not be counted with the ballots cast for him by his full name. This rule is convenient of application, but it probably defeats the intention of the electors in every case to which it is applied, where the rejected votes could influence the result,—an intention, too, which we think is so apparent on the ballot itself, that no person would be in real doubt concerning it. In People v. Pease, 27 N. Y. 45, 64, in which Moses M. Smith was a candidate for country treasurer, Selven, J., says: "According to well-settled rules, the board of canvassers erred in refusing to allow to the relator the nineteen votes given for Moses Smith and M. M. Smith;" and although we think this doctrine correct, the cases he cites in support
CONSTITUTIONAL LIMITATIONS. [CH. XVII.

wrong initial, will not render the ballot nugatory;¹ nor will a
failure to give the addition to a name — such as "Junior"—
render it void, as that is a mere matter of description, not con-
stituting a part of the name, and if given erroneously may be
treated as surplusage.² But where the name upon the ballot is

of it (8 Cow. 102, and 5 Denio, 409) would
only warrant a jury, not the canvassers,
in allowing them; or, at least, those cast
for M. M. Smith. The case of People v.
Tisdale was again followed in People v.
Cicott, 10 Mich. 283; the majority of the
court, however, expressing the opinion
that it was erroneous in principle, but
that it had been too long, (twenty-five
years), the settled law of the State to be
disturbed, unless by the legislature. In
Massachusetts, it is held that votes cast
for "L. Clark" cannot be counted by the
canvassers for Leonard Clark, though it
is intimated that on a trial in court it
might be shown that he was entitled to
them. Clark v. County Examiners, 128
Mass. 282.

¹ People v. Cook, 14 Barb. 259, 8 N. Y.
67; State v. Gates, 43 Conn. 533. But
see Opinions of Judges, 38 Me. 507.
² People v. Cook, 14 Barb. 250 and 8
N. Y. 67. In this case, the jury found,
as matter of fact, that ballots given for
Benjamin Welch were intended for Ben-
jamin Welch, Jr.; and the court held
that, as a matter of law, they should have
been counted for him. It was not de-
cided, however, that the canvassers were
at liberty to allow the votes to Benjamin
Welch, Jr.; and the judge delivering the
prevailing opinion in the Court of Ap-
peals says (p. 81), that the State can-
vassers cannot be charged with error in
refusing to add to the votes for Benjamin
Welch, Jr., those which were given for
Benjamin Welch, without the junior.
"They had not the means which the
court possessed, on the trial of this issue,
of obtaining, by evidence altimite, the
several county returns, the intention of
the voters, and the identity of the can-
date with the name on the defective bal-
lots. Their judicial power extends no
further than to take notice of such facts
of public notoriety as that certain well-
known abbreviations are generally used
to designate particular names, and the
like." So far as this case holds that the
canvassers are not chargeable with error

in not counting the ballots with the name
Benjamin Welch for Benjamin Welch,
Jr., it is, doubtless, correct. But sup-
pose the canvassers had seen fit to do so,
could the court hold they were guilty of
usurpation in thus counting and allowing
them? Could not the canvassers take
notice of such facts of general public
notoriety as everybody else would take
notice of? Or must they shut their eyes
to facts which all other persons must see?
The facts are these: Benjamin Welch,
Jr., and James M. Cook are the can-
dates, and the only candidates, for State
Treasurer. These facts are notorious,
and the two political parties make deter-
mined efforts to elect one or the other.
Certain votes are cast for Benjamin
Welch, with the descriptive word "jun-
ior" omitted. The name is correct, but,
as thus given, it may apply to some one
else; but it would be to a person no-
toriously not a candidate. Under these
circumstances, when the facts of which
it would be necessary to take notice
have occurred under their own supervi-
sion, and are universally known, so that
the result of a contest in the courts could
not be doubtful, is there any reason why
the canvassers should not take notice of
these facts, count the votes which a jury
would subsequently be compelled to
count, and thus save the delay, expense,
 vexation, and confusion of a contest? If
their judicial power extends to a deter-
mination of what are common and well-
known abbreviations, and what names
spelled differently are idem sonans, why
may it not also extend to the facts, of
which there will commonly be quite as
little doubt, as to who are the candidates
at the election over which they preside?
It seems to us that in every case where
the name given on the ballot, though in
some particulars imperfect, is not differ-
ent from that of the candidate, and facts
of general notoriety leave no doubt in the
minds of canvassers that it was intended
for him, the canvassers should be at lib-
erty to do what a jury would afterwards
altogether different from that of a candidate, not the same in sound and not a mere abbreviation, the evidence of the voter cannot be received to show for whom it was intended.\(^1\)

Upon the question how far extrinsic evidence is admissible by way of helping out any imperfections in the ballot, no rule can be laid down which can be said to have a preponderating weight of authority in its support. We think evidence of such facts as may be called the circumstances surrounding the election—such as who were the candidates brought forward by the nominating conventions; whether other persons of the same names resided in the district from which the officer was to be chosen, and if so whether they were eligible or had been named for the office; if a ballot was printed imperfectly, how it came to be so printed, and the like—is admissible for the purpose of showing that an imperfect ballot was intended for a particular candidate, unless the name is so different that to thus apply it would be to contradict the ballot itself; or unless the ballot is so defective that it fails to show any intention whatever: in which cases it is not admissible.\(^2\)

And we also think that in any case to allow a voter to testify by way of explanation of a ballot otherwise fatally defective, that he voted the particular ballot, and intended it for a particular candidate, is exceedingly dangerous, invites corruption and fraud, and ought not to be suffered. Nothing is more easy than for reckless parties thus to testify to their intentions, without the possibility of their testimony being disproved if untrue; and if one falsely swears to having deposited a particular ballot, unless the party really depositing it sees fit to disclose his knowledge, the evidence must pass unchallenged, and the temptation to subornation of perjury, when public offices are at stake, and when it may be committed with impunity, is too great to allow such evidence to be sanctioned. While the law should seek to


\(^1\) A vote for "Pence" cannot be shown to have been intended for "Spence." Hart v. Evans, 5 Pa. St. 13. Where, however, wrong initials were given to the Christian name, the ballots were allowed to the candidate; the facts of public notoriety being such as to show that they were intended for him. Attorney-General v. Ely, 4 Wis. 420. This case goes farther, in permitting mistakes in ballots to be corrected on parol evidence, than any other in the books. Mr. McCrary, in his Law of Elections, devotes his seventh chapter to a careful discussion of the general subject of imperfect ballots.

\(^2\) The text is quoted with approval in Kreitz v. Behrensmeier, 125 Ill. 141, 17 N. E. 282, 24 L. R. A. 69, but in that case after a recount had been made and his ballot identified by its number, a voter was allowed to testify that a certain slip upon it was not there when it left his hands; and that in writing in a candidate's name, the name of the office was partly obliterated by accident, though, if the latter was wholly obliterated, the vote could not be counted.
give effect to the intention of the voter, whenever it can be
fairly ascertained, yet this intention must be that which is ex-
pressed in due form of law, not that which remains hidden in
the elector's breast; and where the ballot, in connection with
such facts surrounding the election as would be provable if it
were a case of contract, does not enable the proper officers to
apply it to one of the candidates, policy, coinciding in this
particular with the general rule of law as applicable to other
transactions, requires that the ballot shall not be counted for
such candidate.¹

The ballot should also sufficiently show on its face for what
office the person named upon it is designated: but here again
technical accuracy is not essential, and the office is sufficiently
named if it be so designated that no reasonable doubt can exist
as to what is meant. A great constitutional privilege — the
highest under the government — is not to be taken away on a
mere technicality, but the most liberal intendment should be made
in support of the elector's action wherever the application of the
common-sense rules which are applied in other cases will enable
us to understand and render it effectual.²

¹ This is substantially the New York rule as settled by the later decisions, if
we may accept the opinion of Denio, Ch. J., in People v. Pease, 27 N. Y. 45, 84, as
taking the correct view of those decisions. See People v. Cicott, 10 Mich. 283, for a
discussion of this point. Also State v. Griffey, 5 Neb. 101; Clark v. County Ex-
aminers, 126 Mass. 282.

² In People v. Matteson, 17 Ill. 167, it was held that where "police magistrates"
were to be chosen, votes cast for "police justices" should be counted, as they
sufficiently showed upon their face the intention of the voters. So where the
question was submitted to the people, whether a part of one county should be
annexed to another, and the act of sub-
mission provided that the electors might express their choice by voting "for de-
taching R——", or "against detaching R——", it was held that votes cast for
"R—— attached," and for "R—— de-
tached," and "for division," and "against division," were properly counted by the
canvassers, as the intention of the voters was clearly ascertainable from the ballots
themselves with the aid of the extrinsic facts of a public nature connected with
the election. State v. Elwood, 12 Wis. 551. So where trustees of common
schools were to be voted for, it was held
that votes for trustees of public schools
should be counted; there being no
trustees to be voted for at that elec-
tion except trustees of common schools.
People v. McManus, 34 Barb. 920. In
Phelps v. Goldthwait, 16 Wis. 140, where a
city and also a county superintendent
of schools were to be chosen at the same
election, and ballots were cast for "su-
perorintendent of schools," without further
designation, parol evidence of surround-
ing circumstances was admitted to enable
the proper application to be made of the
ballots to the respective candidates. In
Peck v. Weddell, 17 Ohio St. 271, an act
providing for an election on the question
of the removal of a county seat to the
"town" of Bowling Green, was held not
invalid by reason of Bowling Green being
in law not a "town," but an incorporated
village. In voting for a county seat it
was held proper to count votes cast for
a town by its popular, which differed
from its legal, name. State v. Cavers,
22 Iowa, 343. Ballots in all such cases
should receive such a construction as will
make them valid if they are capable of
it. Cattell v. Lowry, 45 Iowa, 478; State
Where more than one office is to be filled at an election, the law may either require all the persons voted for, for the several offices, to be so voted for by each elector on the same ballot, or it may provide a different receptacle for the ballots for some one office or set of offices from that which is to receive the others. In such a case each elector will place upon the ballot to be deposited in each box the names of such persons as he desires to vote for, for the different offices to be filled at the election for which that box is provided. If, for instance, State and township officers are to be chosen at the same election, and the ballots are to be kept separate, the elector must have different ballots for each; and if he should designate persons for a township office on the State ballot, such ballot would, to that extent, be void, though the improper addition would not defeat the ballot altogether, but would be treated as surplusage, and the ballot be held good as a vote for the State officers designated upon it. But an accidental error in depositing the ballot should not defeat it. If an elector should deliver the State and township ballots to the inspector of election, who by mistake should deposit them in the wrong boxes respectively, this mistake is capable of being corrected without confusion when the boxes are opened, and should not prevent the ballots being counted as intended. And it would seem that, in any case, the honest mistake, either of the officer or the elector, should not defeat the intention of the latter, where it was not left in doubt by his action.

The elector is not under obligation to vote for every office to be filled at that election; nor where several persons are to be chosen to the same office is he required to vote for as many as are to be elected. He may vote for one or any greater number, not to exceed the whole number to be chosen. In most of the States a plurality of the votes cast determines the election; in others, as to some elections, a majority; but in determining upon a majority

1 See People v. Cook, 14 Barb. 259 and 8 N. Y. 67.
or plurality, the blank votes, if any, are not to be counted; and a candidate may therefore be chosen without receiving a plurality or majority of voices of those who actually participated in the election. Where, however, two offices of the same name were to be filled at the same election, but the notice of election specified one only, and the political parties each nominated one candidate, and, assuming that but one was to be chosen, no elector voted for more than one, it was held that the one having a majority was alone chosen; that the opposing candidate could not claim to be also elected, as having received the second highest number of votes, but as to the other office there had been a failure to hold an election.¹

The Freedom of Elections.

To keep every election free of all the influences and surroundings which might bear improperly upon it, or might impel the electors to cast their suffrages otherwise than as their judgments would dictate, has always been a prominent object in American legislation.² We have referred to fundamental principles which protect the secrecy of the ballot, but in addition to these there are express constitutional and statutory provisions looking to the accomplishment of the same general purpose. It is provided by the constitutions of several of the States that bribery of an elector shall constitute a disqualification of the right to vote or to hold

¹ People v. Kent County Canvassers, 11 Mich. 111. Where officers, e. g. aldermen, one for a long term and one for a short term, are to be chosen, if there is no designation of the terms upon the ballot, it must be rejected. Milligan's App., 96 Pa. St. 222. [A statute providing for "cumulative" voting, giving the right to an elector of a district in which more than one representative to the State legislature is to be elected, to cast one vote for each, or to cast as many votes as there are representatives to be elected from the district, and distribute them as he chooses, was held void in Maynard v. Board of Canvassers, 84 Mich. 228, 47 N. W. 750, 11 L. R. A. 332. The opinion in this case proceeds upon the theory that without express constitutional authority the legislature cannot authorize an elector to cast more than one ballot for the same person for a single office; that the history and traditions of the elective franchise as interpreted by the courts is opposed to such method of voting, and the constitution must clearly disclose such authority before such innovation in the exercise of the elective franchise is justified.]

² For decisions bearing upon the freedom of elections and disorder or intimidation to control it, see Commonwealth v. Hoxey, 10 Mass. 384; Commonwealth v. McHale, 97 Pa. St. 397; Republic v. Gibbs, 8 Yeates, 429, 4 Dall. 253; State v. Franke, 36 Tex. 619; State v. Mason, 14 La. Ann. 595; United States v. Cruikshank, 92 U. S. 542; Roberts v. Calvert, 93 N. C. 580, 4 S. E. 127; Patton v. Coates, 41 Ark. 111; Turbox v. Suggsru, 56 Kan. 225, 12 Pac. 935; Brassard v. Langevin, 1 Can. Sup. Ct. 540. [In Indiana the very remarkable device of giving the bribed elector the right to sue the briber for a penalty of three hundred dollars and attorney's fees was recently adopted, and was sustained in State v. Schoonover, 153 Ind. 526, 35 N. E. 119, 21 L. R. A. 767.]
office; the treating of an elector, with a view to influence his vote, is in some States made an indictable offence; courts are not allowed to be held, for the two reasons, that the electors ought to be left free to devote their attention to the exercise of this high trust, and that suits, if allowed on that day, might be used as a means of intimidation; legal process in some States, and for the same reasons, is not permitted to be served on that day; intimidation of voters by threats or otherwise is made punishable; and generally all such precautions as the people in framing their organic law, or the legislature afterwards, have thought might be made available for the purpose, have been provided with a view to secure the most completely free and unbiased expression of opinion that shall be possible.

1 See the Constitutions of Maryland, Missouri, New Jersey, West Virginia, Oregon, California, Kansas, Texas, Arkansas, Rhode Island, Alabama, Florida, New York, Massachusetts, New Hampshire, Vermont, Nevada, Tennessee, Connecticut, Louisiana, Mississippi, Ohio, Wisconsin. And it has been held on general principles that if an elector is induced to vote in a particular way by the payment or promise of any money or other valuable consideration for such vote, his vote should be rejected as illegal. State v. Olin, 23 Wis. 389. The power to reject for such a reason, however, is not in the inspectors, but in the court in which the right to try the title to the office is vested. State v. Purdy, 36 Wis. 213, 17 Am. Rep. 485. In this case it was held to be a sufficient reason for the court to reject votes, that they were obtained by means of the candidate's promise to perform the duties of the office for less than the official salary.

2 It is frequently provided, in order to make bribery ineffective, that ballots bearing distinguishing marks are void. That imprints appearing upon all ballots and imprinted thereon at time of printing, even though unlawful, are not distinguishing marks, see State v. Saxon, 30 Fla. 608, 12 So. 218, 18 L. R. A. 721; see other cases in note on Australian Ballot Laws, ante, p. 899, n. a. Inscription "O. K." on back of a ballot is a distinguishing mark. State v. Ellis, 111 N. C. 124, 16 S. E. 938, 17 L. R. A. 382. For cases discussing a variety of distinguishing marks, see State v. Walsh, 62 Conn. 260, 25 Atl. 1, 17 L. R. A. 364; Rutledge v. Crawford, 91 Cal. 625, 27 Pac. 779, 13 L. R. A. 761, and note; State v. Barden, 77 Wis. 601, 46 N. W. 899, 10 L. R. A. 156; Talcott v. Philbrick, 59 Conn. 472, 20 Atl. 430, 10 L. R. A. 150.]

3 State v. Rutledge, 8 Humph. 32. And see the provision in the Constitution of Vermont on this subject. A resort to this species of influence would generally, at the present time, prejudice the candidate's interests instead of advancing them, but such has not always been the case. Mr. Madison, after performing valuable service for the State in its legislature, was defeated when offering himself for re-election, in the very crisis of the Revolution, by the treating of his opponent. See his Life by Rives, Vol. I. p. 179. The Constitution of Louisiana [1879] requires the General Assembly to forbid by law the giving away or selling of intoxicating drinks on the day of election within one mile of any election precinct. Art. 169.

4 But it was held in New York that the statute of that State forbidding the holding of courts on election days did not apply to the local elections. Matter of Election Law, 7 Ill, 194; Redfield v. Florence, 2 E. D. Smith, 339.

5 As to what shall constitute intimidation, see Republican v. Gibbs, 3 Yeates, 429, 4 Dall. 264, and cases, p. 922, note 2. [And a statute prohibiting electioneering within one hundred feet of any polling place on election day is valid. State v. Black, 54 N. J. L. 446, 24 Atl. 469, 1029, 16 L. R. A. 703.]
Betting upon elections is illegal at the common law, on grounds of public policy; and all contracts entered into with a view improperly to influence an election would be void for the same reason. And with a just sense of the danger of military inter-


2 In Jackson v. Walker, 5 Hill, 27, it was held that an agreement by the defendant to pay the plaintiff $1,000, in consideration that the latter, who had built a log-cabin, would keep it open for political meetings to further the success of certain persons nominated for members of Congress, &c., by one of the political parties, was illegal under the statute of New York, which prohibited contributions of money “for any other purpose intended to promote the election of any particular person or ticket, except for defraying the expenses of printing and the circulation of votes, hand-bills, and other papers.” This case is criticised in Harley v. Van Wagner, 28 Barb. 109, and it is possible that it went further than either the statute or public policy would require. In Nichols v. Mudgett, 32 Vt. 546, the defendant being indebted to the plaintiff, who was a candidate for town representative, the parties agreed that the former should use his influence for the plaintiff’s election, and do what he could for that purpose, and that if the plaintiff was elected, that should be a satisfaction of his claim. Nothing was specifically said about the defendant’s voting for the plaintiff, but he did vote for him, and would not have done so, nor favored his election, but for this agreement. The plaintiff was elected. Held, that the agreement was void, and constituted no bar to a recovery upon the demand. Where two are candidates, and one withdraws in consideration of an agreement that the other, if chosen, will divide the fees, the agreement is void. Gray v. Hook, 4 N. Y. 449. An agreement that one for a fixed sum may perform all the duties of an office and receive all the emoluments is illegal. Hall v. Gavitt, 18 Ind. 390. So is an agreement between two candidates to divide emoluments and that the defeated one shall be deputy. Glover v. Taylor, 38 La. Ann. 634. A note executed in consideration of the payee’s agreement to resign public office in favor of the maker, and use influence in favor of the latter’s appointment as his successor, is void. Meacham v. Dow, 32 Vt. 721. See also Duke v. Ashbee, 11 Ired. 112; Hunter v. Nolf, 71 Pa. St. 182; Ham v. Smith, 87 Pa. St. 63; Robinson v. Kalbfleish, 5 Thomp. & C. (N. Y.) 212; McCravy, Law of Elections, § 192. A contract to assist by money and influence to secure the election of a candidate to a public office in consideration of a share of its emoluments, in the event of election, is void as opposed to public policy, and if voluntarily rescinded by the parties a recovery cannot be had of the moneys advanced under it. Martin v. Wade, 37 Cal. 108. It has even been held that a public offer to the electors by a candidate for a public office, whereby he pledged himself, if elected, to perform the duties of the office for less than the legal salary or fees, would invalidate his election. State v. Purdy, 36 Wis. 213, 17 Am. Rep. 485; Harvey v. Tama County, 53 Iowa, 228, 6 N. W. 150; Caruthers v. Russell, 53 Iowa, 348, 6 N. W. 400, 36 Am. Rep. 222; State v. Collier, 72 Mo. 13, 37 Am. Rep. 417. See Carlingen v. Page, 6 N. I. 112; Alvin v. Collin, 20 Pick. 418; State v. Church, 5 Orqg. 375, 20 Am. Rep. 740. A contract to resign an office that another may be appointed is void. Mequere v. Corwine,
ference, where a trust is to be exercised, the highest as well as the most delicate in the whole machinery of government, it has not been thought unwise to prohibit the militia being called out on election days, even though for no other purpose than for enrolling and organizing them. The ordinary police is the peace force of the State, and its presence suggests order, individual safety, and public security; but when the military appear upon the stage, even though composed of citizen militia, the circumstances must be assumed to be extraordinary, and there is always an appearance of threatening and dangerous compulsion which might easily interfere seriously with that calm and unimpassioned discharge of the elector's duty which the law so justly favors. The soldier in organized ranks can know no law but such as is given him by his commanding officer; and when he appears at the polls, there is necessarily a suggestion of the presence of an enemy against whom he may be compelled to exercise the most extreme and destructive force; and that enemy must generally be the party out of power, while the authority that commands the force directed against them will be the executive authority of the State for the time being wielded by their opponents. It is consequently of the highest importance that the presence of a military force at the polls be not suffered except in serious emergencies, when disorders exist or are threatened for the suppression or prevention of which the ordinary peace force is insufficient; and any statute which should provide for or permit such presence as a usual occurrence or except in the last resort, though it might not be void, would nevertheless be a serious invasion of constitutional right, and should not be submitted to in a free government without vigorous remonstrance.

3 MacArthur, 81. If one advances money to be used to further the election of a particular candidate irrespective of qualifications, and it is not so used, he cannot maintain a suit to recover it back. Linens v. Hesing, 41 Ill. 113. In Pratt v. People, 29 Ill. 54, it was held that an agreement between two electors that they should "pair off," and both abstain from voting, was illegal, and the inspectors could not refuse to receive a vote of one of the two, on the ground of his agreement. An election upon the question of the removal of a county seat is not invalidated by inducements held out by the several localities; such as the offer to erect the county buildings, &c. Dishon v. Smith, 10 Iowa, 212; Hawes v. Miller, 56 Iowa, 355, 9 N. W. 207; State v. Supervisors of Portage, 24 Wis. 49; Wells v. Taylor, 6 Mont. 202, 3 Pac. 255; Neal v. Shinn, 49 Ark. 227, 4 S. W. 747; State v. Elting, 29 Kan. 397; Hall v. Marshall, 80 Ky. 552; [State v. Orange, 51 N. J. L. 111, 22 Atl. 1001, 14 L. R. A. 62, and note; contra, Ayres v. Moors, 34 Neb. 210, 51 N. W. 880, 15 L. R. A. 601. A promise by a citizen to pay part of the expense of opening a street will not invalidate an ordinance providing for such opening. State v. Orange, 51 N. J. L. 111, 22 Atl. 1001, 14 L. R. A. 62, and note on bribery by gift to public.] See State v. Purdy, 36 Wis. 218.

1 See Hyde v. Melvin, 11 Johns. 521.

2 The danger, and, we may say also, the folly, of military interference with the deliberations or action of electors, except
The Elector not to be deprived of his Vote.

That one entitled to vote shall not be deprived of the privilege by the action of the authorities is a fundamental principle. (a)

It has been held, on constitutional grounds, that a law creating a new county, but so framed as to leave a portion of its territory unorganized, so that the voters within such portion could not participate in the election of county officers, was inoperative and void. ¹ So a law submitting to the voters of a county the question of removing the county seat is void if there is no mode under the law by which a city within the county can participate in the election.² And although the failure of one election precinct to hold an election, or to make a return of the votes cast, might not render the whole election a nullity, where the electors of that precinct were at liberty to vote had they so chosen, or where, having voted but failed to make return, it is not made to appear that the votes not returned would have changed the result,³ yet if any action was required of the public authorities preliminary to the election, and that which was taken was not such as to give all the electors the opportunity to participate, and

in the last necessity, was fearlessly illustrated in the case of the "Manchester Massacre," which occurred in 1819. An immense meeting of radical parliamentary reformers, whose objects and purposes appeared threatening to the government, was charged upon by the military, with some loss of life, and with injury to the persons of several hundred people. As usual in such cases, the extremists of one party applauded the act and complimented the military, while the other party was exasperated in the last degree, by what seemed to them an unnecessary, arbitrary, and unconstitutional exercise of force. The most bitter and dangerous feeling was excited throughout the country by this occurrence, and it is not too much to say that if disorders were threatening before, the government had done nothing in this way to strengthen its authority, or to insure quiet or dispassionate action. No one had been conciliated; no one had been reduced to more calm and deliberate courses; but, on the other hand, even moderate men had been exasperated and inclined to opposition by this violent, reckless, and destructive display of coercive power. See Hansard's Debates, Vol. XI. pp. 4, 51, 230.

¹ People v. Maynard, 15 Mich. 463. For similar reasons the act for the organization of Schuyler County was held invalid in Launig v. Carpenter, 20 N. Y. 447.

² Attorney-General v. Supervisors of St. Clair, 11 Mich. 63. For a similar principle, see Foster v. Scarff, 15 Ohio St. 532.

³ See Ex parte Heath, 3 Hill, 42; Louisville & Nashville R. R. Co. v. County Court of Davidson, 1 Sneed, 687; Marshall v. Kerns, 2 Swan, 68; Beards- town v. Virginia, 76 Ill. 34.

(a) But it is held that he may be restricted to candidates whose names are printed on the official ballot. State v. McElroy, 44 La. Ann. 796, 11 So. 153, 16 L. R. A. 278, and note. Voter may lawfully vote for the same man as candidate for two or more incompatible offices. Misch v. Russell, 136 Ill. 22, 20 N. E. 528, 12 L. R. A. 125, and note. A statute prohibiting the putting of the name of a candidate on a ballot as the candidate of more than party, was held void, in Murphy v. Curry, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97.]
no mode was open to the electors by which the officers might be compelled to act, it would seem that such neglect, constituting as it would the disfranchisement of the excluded electors *pro hac vice*, must on general principles render the whole election nugatory; for that cannot be called an election or the expression of the popular sentiment where a part only of the electors have been allowed to be heard, and the others, without being guilty of fraud or negligence, have been excluded.¹

If the inspectors of elections refuse to receive the vote of an elector duly qualified, they may be liable both civilly and criminally for so doing: criminally, if they were actuated by improper and corrupt motives;² and civilly, it is held in some of the States, even though there may have been no malicious design in so doing;³ but other cases hold that, where the inspectors are vested by the law with the power to pass upon the qualifications of electors, they exercise judicial functions in so doing, and are entitled to the same protection as other judicial officers in the discharge of their duty, and cannot be made liable except upon proof of express malice.⁴

Where, however, by the law under which the election is held, the inspectors are to receive the voter’s ballot, if he takes the oath

¹ See Fort Dodge v. District Township, 17 Iowa, 85; Barry v. Lauck, 5 Cald. 588. In People v. Salomon, 46 Ill. 415, it was held that where an act of the legislature, before it shall become operative, is required to be submitted to the vote of the legal electors of the district to be affected thereby, if the election which is attempted to be held is illegal within certain precincts containing a majority of the voters of the district, then the act will not be deemed to have been submitted to the required vote, and the result will not be declared upon the votes legally cast, adverse to what it would have been had no illegality intervened.

² As to common-law offences against election laws, see Commonwealth v. McHale, 97 Pa. St. 397. For an instance under a statute, see People v. Burns, 75 Cal. 627, 17 Pac. 640.


that he possesses the constitutional qualifications, the oath is the conclusive evidence on which the inspectors are to act, and they are not at liberty to refuse to administer the oath, or to refuse the vote after the oath has been taken. They are only ministerial officers in such a case, and have no discretion but to obey the law and receive the vote.1

The Conduct of the Election.

The statutes of the different States point out specifically the mode in which elections shall be conducted; but, although there are great diversities of detail, the same general principles govern them all. As the execution of these statutes must very often fall to the hands of men unacquainted with the law and unschooled in business, it is inevitable that mistakes shall sometimes occur, and that very often the law will fail of strict compliance. Where an election is thus rendered irregular, whether the irregularity shall avoid it or not must depend generally upon the effect the failure to comply strictly with the law may have had in obstructing the complete expression of the popular will, or the production of satisfactory evidence thereof. Election statutes are to be tested like other statutes, but with a leaning to liberality in view of the great public purposes which they accomplish; and except where they specifically provide that a thing shall be done in the manner indicated and not otherwise, their provisions designed merely for the information and guidance of the officers must be regarded as directory only, and the election will not be defeated by a failure to comply with them, providing the irregularity has not hindered any who were entitled from exercising the right of suffrage, or rendered doubtful the evidences from which the result was to be declared. In a leading case the following irregularities were held not to vitiate the election: the accidental substitution of another book for the Holy Evangelists in the administration of an oath, both parties being ignorant of the error at the time; the holding of the election by persons who were not officers de jure, but who had colorable authority, and acted de facto in good faith;2 the


2 As to what constitutes an officer de facto, the reader is referred to the careful opinion in State v. Carroll, 38 Conn. 440, and See Fowler v. Beebe, 9 Mass. 231; Tucker v. Aiken, 7 N. H. 113; Commonwealth v. McCombs, 50 Pa. St. 438; Fennelon v. Bntts, 49 Wis. 342; Ex parte Strang, 21 Ohio St. 610; Kimball v. Alcorn, 45 Miss. 131, and authorities referred to in these cases severally; and to cases, supra, pp. 806—808, notes. Also Conley on Taxation, 184-186; McCravy's Law of Elections, §§ 75-79.
failure of the board of inspectors to appoint clerks of the election; the closing of the outer door of the room where the election was held at sundown, and then permitting the persons within the room to vote,—it not appearing that legal voters were excluded by closing the door, or illegal allowed to vote; and the failure of the inspectors or clerks to take the prescribed oath of office. And it was said, in the same case, that any irregularity in conducting an election which does not deprive a legal elector of his vote, or admit a disqualified person to vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it, should be overlooked in a proceeding to try the right to an office depending on such election.\(^1\) The rule is an eminently proper one, and it furnishes

\(^1\) People v. Cook, 14 Barb. 259, and 8 N.Y. 67. To the same effect, see Clifton v. Cook, 7 Ala. 114; Truelhart v. Addicks, 2 Tex. 217; Dishon v. Smith, 10 Iowa, 212; Attorney-General v. Ely, 4 Wis. 420; State v. Jones, 19 Ind. 350; People v. Higgins, 3 Mich. 238; Gorham v. Campbell, 2 Cal. 135; People v. Bates, 11 Mich. 302; Taylor v. Taylor, 10 Minn. 112; People v. McManus, 31 Barb. 620; Whipple v. McCune, 12 Cal. 352; Bourland v. Hildreth, 25 Cal. 161; Day v. Kent, 1 Oreg. 123; Piatt v. People, 29 Ill. 54; Du Page Co. v. People, 65 Ill. 360; Hodge v. Linn, 100 Ill. 397; Ewing v. Filley, 43 Pa. St. 384; Howard v. Shields, 16 Ohio St. 184; Fry v. Booth, 19 Ohio St. 25; State v. Stumpf, 21 Wis. 579; McKinney v. O'Connor, 20 Tex. 5; Sprague v. Norway, 31 Cal. 173; Sheppard's Election Case, 77 Pa. St. 255; Wheelock's Election Case, 82 Pa. St. 297; Barnes v. Pike Co., 51 Miss. 305; State v. O'Day, 69 Iowa, 388; 28 N.W. 642. In Ex parte Heath, 3 Hill, 42, it was held that where the statute required the inspectors to certify the result of the election on the next day thereafter, or sooner, the certificate made the second day thereafter was sufficient, the statute as to time being directory merely. In People v. McManus, 34 Barb. 624, it was held that an election was not made void by the fact that one of the three inspectors was by the statute disqualified from acting, by being a candidate at the election, the other two being qualified. In Sprague v. Norway, 31 Cal. 173, it was decided that where the judges of an election could not read, and for that reason a person who was not a member of the board took the ballots from the box, and read them to the tellers, at the request of the judges, the election was not affected by the irregularity. In several cases, and among others the following, the general principle is asserted that any irregularities or misconduct, not amounting to fraud, is not to be suffered to defeat an election unless it is made to appear that the result was thereby changed. Loomis v. Jackson, 6 W. Va. 613, 692; Morris v. Vanlaningham, 11 Kan. 269; Supervisors of Du Page v. People, 65 Ill. 360; Chicago v. People, 80 Ill. 495; People v. Wilson, 62 N.Y. 180; Stat v. Burbridge, 24 Fla. 112, 3 So. 889. [Baltes v. Farmers' Irr. District, 60 Neb. 310, 88 N.W. 83. But where the election officers took the ballot-box with them when they left the polling-place and went to diner, this of itself invalidates the vote in that precinct. Tebbs v. Smith, 108 Cal. 191, 33 L.R.A. 673, 41 Pac. 451.] If the election is fair and the count honest, it is not fatal that the election officers were not properly qualified: Quinn v. Markoe, 37 Minn. 430, 35 N.W. 283; Sweptson v. Barton, 30 Ark. 649; Wells v. Taylor, 5 Mont. 202, 3 Pac. 255; contra, Walker v. Sanford, 78 Ga. 150, 1 S.E. 421; nor that unauthorized persons helped in the counting. Roberts v. Calvert, 98 N.C. 650, 4 S.E. 157. The failure to hold the poll open as long as the law requires may not be fatal if no one lost his vote in consequence. Cleeland v. Porter, 74 Ill. 75; Sweptson v. Barton, 30 Ark. 649. See Kuykendall v. Harker, 80 Ill. 125. And a candidate who participates in the
a very satisfactory test as to what is essential and what not in election laws.\(^1\) And where a party contests an election on the ground of these or any similar irregularities, he ought to aver and be able to show that the result was affected by them.\(^2\) Time and place, however, are of the substance of every election,\(^3\) and a failure to comply with the law in these particulars is not generally to be treated as a mere irregularity.\(^4\)

election actually held will not be allowed to question its validity on that ground. People v. Walte, 70 Ill. 25. But where the law gave three hours for an election and the polls were closed in forty minutes, the proceedings were held invalid. State v. Wollem, 37 Iowa, 131. All votes received after the polls should be closed are illegal. Varney v. Justice, 86 Ky. 596; 6 S. W. 467. And where the law required three judges and two clerks of an election, and only one of each was provided, it was held that this was not a mere irregularity and the election was void. Chicago, &c. R. R. Co. v. Mallory, 101 Ill. 583.

\(^1\) This rule has certainly been applied with great liberality, in some cases. In People v. Higgins, 3 Mich. 233, it was held that the statute requiring ballots to be sealed up in a package, and then locked up in the ballot-box, with the office at the top sealed, was directory merely; and that ballots which had been kept in a locked box, but without the office closed or the ballots sealed up, were admissible in evidence in a contest for an office depending upon this election. This case was followed in People v. Cicott, 16 Mich. 233, and it was held that whether the ballots were more satisfactory evidence than the inspector's certificates, where a discrepancy appeared between them, was a question for the jury. See also Fowler v. State, 68 Tex. 30, 3 S. W. 255. In Morrill v. Haines, 2 N. H. 240, the statute required State officers to be chosen by a check-list, and by delivery of the ballots to the moderator in person; and it was held that the requirement of a check-list was mandatory, and the election in the town was void if none was kept. The decision was put upon the ground that the check-list was provided as an important guard against indiscriminate and illegal voting, and the votes given by ballot without this protection were therefore as much void as if given \textit{viva voce}.

\(^2\) Lanier v. Gallatas, 13 La. Ann. 175; People v. Cicott, 16 Mich. 283; Taylor v. Taylor, 10 Minn. 107; Dobyns v. Weadon, 60 Ind. 298.

\(^3\) Dickey v. Hurlbut, 5 Cal. 343; Knowles v. Yeates, 31 Cal. 82; Walker v. Sanford, 78 Ga. 165, 1 S. E. 424; Williams v. Potter, 114 Ill. 628, 3 N. E. 729.

\(^4\) An election adjourned without warrant to another place, as well as an election held without the officers required by law, is void. Commonwealth v. County Commissioners, 6 Rawle, 75. An unauthorized adjournment of the election for dinner—it appearing to have been in good faith, and no one having been deprived of his vote thereby—will not defeat the election. Fry v. Booth, 19 Ohio St. 25. Adjourning an election in good faith to another polling place will not necessarily avoid it. Farrington v. Turner, 63 Mich. 27, 18 N. W. 544. Where voting had been done at a church, and the building was moved three-quarters of a mile, an election held at the new place is valid, no one being prevented from voting by the change. Steele v. Calhoun, 61 Miss. 555. So of a change of two hundred feet. Simons v. People, 110 Ill. 617, 9 N. E. 220. See also Stemper v. Higgins, 38 Minn. 222, 37 N. W. 95, where a separate voting place from the township poll was, without authority of law but in good faith, kept in a village, and the vote was held legal. [Delay of an hour in opening polls, when not brought about through fraud, and in the absence of a showing that the number (one) of voters thereby prevented from voting could have changed the result, will not invalidate the election. Pickett v. Russell, 42 Fla. 116, 634, 28 So. 764.]

\(^4\) The statute of Michigan requires the clerks of election to keep lists of the persons voting, and that at the close of the polls the first duty of the inspectors shall be to compare the lists with the number
CH. XVII.] THE EXPRESSION OF THE POPULAR WILL. 931

What is a Sufficient Election.

Unless the law under which the election is held expressly requires more, a plurality of the votes cast will be sufficient to elect, notwithstanding these may constitute but a small portion of those who are entitled to vote,¹ and notwithstanding the voters generally may have failed to take notice of the law requiring the election to be held.²

If several persons are to be chosen to the same office, the requisite number who shall stand highest on the list will be elected. But without such a plurality no one can be chosen to a public office; and it is held in many cases that if the person receiving the highest number of votes was ineligible, the votes cast for him will still be effectual so far as to prevent the opposing candidate

of votes in the box, and if the count of the latter exceeds the former, then to draw out unopened and destroy a sufficient number to make them correspond. In People v. Cicott, 16 Mich. 283, it appeared that the inspectors in two wards of Detroit, where a surplus of votes had been found, had neglected this duty, and had counted all the votes without drawing out and destroying any. The surplus in the two wards was sixteen. The actual majority of one of the candidates over the other on the count as it stood (if certain other disputed votes were rejected) would be four. It was held that this neglect of the inspectors did not invalidate the election; that had the votes been drawn out, the probability was that each candidate would lose a number proportioned to the whole number which he had in the box; and this being a probability which the statute providing for the drawing proceeded upon, the court should apply it afterwards, apportioning the excess of votes between the candidates in that proportion. [The requirements of law must be substantially complied with. An election held by a mere usurper is void, even though fairly and honestly conducted. State v. Taylor, 106 N. C. 193, 12 S. E. 1005, 12 L. R. A. 202.]


² People v. Hartwell, 12 Mich. 508. In one case a little different, where the people were in doubt if there were any vacancy to be filled, and only twenty-nine persons out of a poll of eight hundred cast their votes to fill the vacancy, it was held that these twenty-nine votes did not make an election. State v. Good, 41 N. J. 290. Even if the majority expressly dissent, yet if they do not vote, the election by the minority will be valid. Oldknow v. Wainwright, 1 W. Bl. 229; Rex v. Foxcroft, 2 Burr. 1017; Rex v. Withers, referred to in same case. Minority representation in certain cases has been introduced in New York, Pennsylvania, and Illinois, and the principle is likely to find favor elsewhere. But such representation has been held inconsistent with a constitutional provision that each elector shall be entitled to vote at all elections. State v. Constantine, 42 Ohio St. 437. [Contra, Commonwealth v. Reed, 171 Pa. 505, 33 Atl. 67, 33 L. R. A. 141. Requirement that "members of assembly shall be appointed among the several counties of the State by the legislature as nearly as may be according to the number of their respective inhabitants" is mandatory, and any substantial non-compliance will be set aside. People v. Broom. 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81. For other cases in which gerrymanders have been set aside for gross unfairness and inequality. see Parker v. State, 135 Ind. 178, 32 N. E. 833, 33 N. E. 110, 18 L. R. A. 697; State v. Cunningham, 83 Wis. 90, 65 N. W. 35, 17 L. R. A. 145; Giddings v. Blacker, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; Houghton Co. Supervisors v. Blacker, 92
being chosen, and the election must be considered as having failed.¹

The admission of illegal votes at an election will not necessarily defeat it; but, to warrant its being set aside on that ground, it should appear that the result would have been different had they been excluded.² And the fact that unqualified persons are allowed to enter the room, and participate in an election, does not

¹ State v. Giles, 1 Chand. 112; Opinions of Judges, 24 Mo. 598; State v. Smith, 14 Wis. 497; Saunders v. Haynes, 13 Cal. 145; Fish v. Collins, 21 La. Ann. 229; Sublett v. Bedwell, 47 Miss. 266, 12 Am. Rep. 338; State v. Swearingen, 12 Ga. 24; Commonwealth v. Cluley, 60 Pa. St. 270; Matter of Corliss, 11 R. I. 638, 28 Am. Rep. 588; State v. Vail, 55 Mo. 97; Barron v. Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304; Dryden v. Swinburne, 20 W. Va. 89; Swepton v. Barton, 39 Ark. 640. In People v. Molliter, 23 Mich. 341, a minority candidate claimed the election on the ground that the votes cast for his opponent, though a majority, were ineffectual because the name was abbreviated. Held, that they were at least effectual to preclude the election of a candidate who received a less number. And see Crawford v. Dunbar, 52 Cal. 25; [State v. McGregor, 60 Va. 431, 38 Atl. 165, 44 L. R. A. 416.] But it has been held that, if ineligibility is notorious, so that the electors must be deemed to have voted with full knowledge of it, the votes for an ineligible candidate must be declared void, and the next highest candidate is chosen. This is the English doctrine: King v. Hawkins, 10 East. 211; 2 Dow. P. C. 124; King v. Parry, 14 East, 649; Gosling v. Veley, 7 Q. B. 406; Rex v. Monday, 2 Cwop. 530; Rex v. Foxcroft, Burr. 1017, s. c. 1 Win. Bl. 259; Reg. v. Coakes, 3 E. & B. 249; French v. Nolan, 2 Monk, 711. And see the following American cases: Price v. Baker, 41 Ind. 572; Hutcherson v. Tilder, 4 H. & McF. 279; Commonwealth v. Green, 4 Whart. 621; Gulick v. New, 14 Ind. 98; Carson v. McPhetridge, 15 Ind. 327; People v. Clute, 50 N. Y. 451, 10 Am. Rep. 608; State v. Johnson, 100 Ind. 489. Compare Barnum v. Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304; [Gardner v. Burke, 91 Neb. 534, 85 N. W. 541, is contra.] It would seem that, if the law which creates the disqualification expressly declares all votes cast for the disqualified person void, they must be treated as mere blank votes, and cannot be counted for any purpose. Where, under the law creating it, the disability concerns the holding of the office merely, and it is not a disability to be elected, it is sufficient if the disability is removed before the term begins. State v. Murray, 28 Wis. 90; State v. Trumpet, 60 Wis. 103, 5 N. W. 876, 6 N. W. 512; Privett v. Bickford, 26 Kan. 52. Compare Scary v. Grow, 15 Cal. 117; State v. Clarke, 3 Nev. 666. [See discussion by Floyd R. Mecham of the question of "Eligibility to Office—As of What Time Determined," in 1 Mich. Law Rev. 17.]

justify legal voters in refusing to vote, and treating the election as void, but it will be held valid if the persons declared chosen had a plurality of the legal votes actually cast.\(^1\) So it is held that an exclusion of legal votes—not fraudulently, but through error in judgment—will not defeat an election; notwithstanding the error in such a case is one which there was no mode of correcting, even by the aid of the courts, since it cannot be known with certainty afterwards how the excluded electors would have voted, and it would obviously be dangerous to receive and rely upon their subsequent statements as to their intentions, after it is ascertained precisely what effect their votes would have upon the result.\(^3\) If, however, the inspectors of election shall exclude legal voters, not because of honest error in judgment, but wilfully and corruptly, and to an extent that affects the result, or if by riots or otherwise legal voters are intimidated and prevented from voting, or for any other reasons the electors have not had opportunity for the expression of their sentiments through the ballot-box, the election should be set aside altogether, as having failed in the purpose for which it was called.\(^9\) Errors of judgment are inevitable, but fraud, intimidation, and violence the law can and should protect against. A mere casual affray, however, or accidental disturbance, without any intention of overawing or intimidating the electors, cannot be considered as affecting the freedom of the election;\(^4\) nor in any case would electors be justified in abandoning the ground for any light causes, or for improper interference by others, where the officers continue in the discharge of their functions, and there is opportunity for the electors to vote.\(^5\) And, as we have already seen, a failure of an election in one precinct, or disorder or violence which prevent a return from that precinct, will not defeat the whole election, unless it appears that the votes which could not be returned in consequence of the violence would have changed the result.\(^5\) It is a little difficult at times to adopt

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\(^1\) First Parish in Sudbury v. Stearns, 21 Pick. 148.


\(^3\) Where one receives a majority of all the votes cast, the opposing candidate cannot be declared elected on evidence that legal votes sufficient to change the result offered to vote for him, but were erroneously denied the right; but the election may be declared to have failed, and a new election be ordered. Renner v. Bennett, 21 Ohio St. 431. See also Matter of Long Island R. R. Co., 19 Wend. 37; People v. Phillips, 1 Denio, 388; State v. McDaniel, 22 Ohio St. 354.


\(^5\) See First Parish in Sudbury v. Stearns, 21 Pick. 148. Enough voters to change the result must have been prevented from voting in order to vitiate the election. Tarbox v. Sughrue, 36 Kan. 225, 12 Pac. 635. And see cases, p. 922, note 2; ante.

\(^6\) Ex parte Heath, 3 Hill, 42. See ante, p. 927, and note.
the true mean between those things which should and those which should not defeat an election; for while on the one hand the law should seek to secure the due expression of his will by every legal voter, and guard against any irregularities or misconduct that may tend to prevent it, so, on the other hand, it is to be borne in mind that charges of irregularity and misconduct are easily made, and that the dangers from throwing elections open to be set aside or controlled by oral evidence, are perhaps as great as any in our system. An election honestly conducted under the forms of law ought generally to stand, notwithstanding individual electors may have been deprived of their votes, or unqualified voters been allowed to participate. Individuals may suffer wrong in such cases, and a candidate who was the real choice of the people may sometimes be deprived of his election; but as it is generally impossible to arrive at any greater certainty of result by resort to oral evidence, public policy is best subserved by allowing the election to stand, and trusting to a strict enforcement of the criminal laws for greater security against the like irregularities and wrongs in the future.

The Canvass and the Return.

If the election is purely a local one, the inspectors who have had charge of it will be expected to proceed immediately on the closing of the poll to canvass the votes and declare the result. It is commonly made their duty also, or the duty of their clerk, to issue to the person or persons appearing to be chosen a certificate or notification of his or their election, which will be presumptive evidence of the fact. It is not in the power of the inspectors by neglecting or refusing to give the proper certificate to defeat the will of the people, for the ballots determine the election and not the certificate, and the person chosen, from whom the certificate is withheld, may nevertheless proceed to qualify and take possession of the office unless opposed by a de facto incumbent. 1 If the election district comprises several precincts, the inspectors of the polls in each will make return in writing of the canvass made by them to the proper board of canvassers for the whole district, and if the election is for State officers, this district board will transmit the result of the district canvass to the proper State board, who will declare the general result. 2 In all this, the several boards

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1 Ex part Smith, 8 S. C. 495; Govan v. Jackson, 32 Ark. 553.
2 Errors in certifying boxes, &c., and making the returns will not, in the absence of fraud or changes in the ballots, warrant throwing out the vote. Kellogg v. Hickman, 12 Col. 256, 21 Pac. 325; Fowler v. State, 68 Tex. 30, 3 S. W. 255. See People v. Higgins, 3 Mich. 233; State v. Berg, 76 Mo. 136; Dixon v. Orr, 49 Ark. 238, 4 S. W. 774.
act for the most part in a ministerial capacity, and are not vested with judicial powers to correct the errors and mistakes that may have occurred with any officer who preceded them in the performance of any duty connected with the election, or to pass upon any disputed fact which may affect the result. Each board is to receive the returns transmitted to it, if in due form, as correct, and is to ascertain and declare the result as it appears by such returns; and if other matters are introduced into the return than those which the law provides, they are to that extent unofficial and unauthorized, and must be disregarded. If a district or

1 State v. Charleston, 1 S. C. x. s. 30. And see cases cited in the next note. While canvassers act in a ministerial capacity only, and must declare the result on the face of the returns, it does not follow that they are to insist upon technical accuracy in the returns, and reject those which do not comply with the very letter of the law, and that they are compelled to act upon returns which by mistake have been made inaccurate, without affording an opportunity for correction. If, for example, in a return transmitted to them, the name of one of the persons voted for is erroneously given, and the election judges are ready to correct it, a 'great wrong is done if this is not permitted. The purpose of the canvas is to determine, record, and declare the actual will of the electors; not to defeat it; and when technicalities and mistakes are seized upon and taken advantage of for party or personal ends, and without other object or necessity, the public injury is very manifest. It is of the utmost importance that the public shall have confidence in the administration of the election laws; and whatever undermines that confidence invites fraud and violence. It is true that errors which creep into the returns may be obviated on a judicial trial; but that is a slow and expensive process, and ought not to be forced upon the parties except in cases where the result upon the balloting is really in doubt. Errors which are immaterial should be overlooked, and those which are material ought to be corrected by the proper officers whenever it is practicable.

2 Ex parte Heath, 3 Hill, 42; Brower v. O'Brien, 2 Ind. 423; People v. Hildward, 20 Ill. 413; People v. Jones, 10 Ind. 357; Mayo v. Freeland, 10 Mo. 629; Thompson v. Circuit Judge, 9 Ala. 338; People v. Kilduff, 15 Ill. 492; O'Ferrell v. Colby, 2 Minn. 180; People v. Van Cleve, 1 Mich. 320; People v. Van Slyck, 4 Cow. 297; Morgan v. Quackenbush, 22 Barb. 72; Dishon v. Smith, 10 Iowa, 212; People v. Cook, 14 Barb. 269, and 8 N. Y. 67; Hartt v. Harvey, 32 Barb. 55; Attorney-General v. Barstow, 4 Wis. 567; Attorney-General v. Ely, 4 Wis. 420; State v. Governor, 25 N. J. 331; State v. Clerk of Passaic, 25 N. J. 354; Marshall v. Kerns, 2 Swan, 63; People v. Pease, 27 N. Y. 45; Phelps v. Schroder, 20 Ohio St. 549; State v. State Canvassers, 36 Wis. 498; Opinion of Justices, 53 N. H. 640; State v. Cavers, 22 Iowa, 343; State v. Harrison, 38 Mo. 610; State v. Rodman, 43 Mo. 250; State v. Steers, 44 Mo. 223; Bacon v. York Co., 26 Mo. 401; Taylor v. Taylor, 10 Minn. 107; Opinion of Justices, 64 Me. 588; Prince v. Skillin, 71 Me. 301, 86 Am. Rep. 326; Peebles v. County Com'r's, 82 N. C. 885; Clark v. County Examiners, 120 Mass. 282; State v. County Canvassers, 17 Fla. 29; Hagge v. State, 10 Neb. 61, 4 N. W. 276; State v. Wilson, 24 Neb. 130, 38 N. W. 31; Moore v. Kessler, 59 Ind. 152; State v. Hayne, 8 S. C. 87. They may not refuse to canvass because a poll book is not returned as it should be. Patten v. Florence, 38 Kan. 601, 17 Pac. 174. They may and should correct an arithmetical blunder. State v. Hill, 20 Neb. 119, 29 N. W. 258. Legal returns received after the proper time should be counted. Cresap v. Gray, 10 Oreg. 315. [After the board has acted upon returns that are fair on their face, and has rendered its return, it is functus officio and cannot revise its work. Rosenthal v. State Bd. of Canvassers, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157.]

3 Ex parte Heath, 3 Hill, 42. Papers
State board of canvassers assumes to reject returns transmitted to it, on other grounds than those appearing upon its face, or to declare persons elected who are not shown by the returns to have received the requisite plurality, it is usurping functions, and its conduct will be reprehensible, if not even criminal.\(^1\) The action of such boards is to be carefully confined to an examination of the papers before them, and a determination of the result therefrom, in the light of such facts of public notoriety connected with the election as every one takes notice of, and which may enable them to apply such ballots as are in any respect imperfect to the proper candidates or offices for which they are intended, provided the intent is sufficiently indicated by the ballot in connection with such facts, so that extraneous evidence is not necessary for this purpose.\(^2\)

If canvassers refuse or neglect to perform their duty, they may be compelled by mandamus;\(^3\) though as these boards are created for a single purpose only, and are dissolved by an adjournment without day, it has been held that, after such adjournment mandamus would be inapplicable, inasmuch as there is no longer any board which can act.\(^4\) But we should think the better doctrine to be, that if the board adjourn before a legal and complete performance of their duty, mandamus would lie to compel them to meet and perform it.\(^5\) But when the board them-

in the poll book but not a part of the return cannot be considered. Simon v. Durham, 10 Oreg. 52. Returns void on their face may be rejected. State v. State Canvassers, 36 Wis. 408. A certificate to be made by a justice and inspectors is void on its face if signed by the justice alone. Perry v. Whittaker, 71 N. C. 475.

\(^1\) Prince v. Skillin, 71 Me. 301, 30 Am. Rep. 325. But if not void on their face, the election board to which they are returned have no jurisdiction to go behind them and inquire into questions of fraud in the election. Phelps v. Schroder, 26 Ohio St. 519; Leigh v. State, 69 Ala. 261; Brown v. Comrs' Rush Co., 38 Kan. 436, 17 Pac. 301; Opinion of Justices, 58 N. H. 621. So of judges of the Supreme Court sitting as canvassers. Oagood v. Jones, 60 N. H. 273, 282.

\(^2\) State v. Foster, 33 Ohio St. 599.

\(^3\) Clark v. McKenzie, 7 Bush, 523; Burke v. Supervisors of Monroe, 4 W. Va. 371; State v. County Judge, 7 Iowa, 186; Magee v. Supervisors, 10 Cal. 376; Nisler v. Cameron, 39 Ind. 488; Commonwealth v. Emninger, 74 Pa. St. 479.

\(^4\) Clark v. Buchanan, 2 Minn. 316; People v. Supervisors, 12 Barb. 217; State v. Rodman, 48 Mo. 256.

\(^5\) To this effect is State v. Gibbs, 13 Fla. 65; People v. Schiellein, 95 N. Y. 124. In the last case it is held that the board continues as such, in spite of adjournment, till its whole duty is performed. And see People v. Board of Registration, 17 Mich. 427; People v. Board, &c. of Nankin, 15 Mich. 156; Lewis v. Commissioners, 16 Kan. 102; Paceheco v. Beck, 52 Cal. 3; State v. Hill, 20 Neb. 119, 29 N. W. 258. And they may be compelled to make a legal and proper canvass after they have made one which was illegal and unwarranted. State v. County Comrs', 23 Kan. 264; State v. Hill, 110 Neb. 58, 4 N. W. 614; Stewart v. Peyton, 77 Ga. 608; Simon v. Durham, 10 Oreg. 52. And if they have finished their work before the time allowed has elapsed, and while they still have the returns, they may be compelled to reconsider their action. State v. Berg, 76 Mo. 136. [Upon canvassing boards, their powers and duties, see People v. Rice, 129 N. Y. 449, 29 N. E. 355, 14 L. R. A. 613.]
selves have once performed and fully completed their duty, they have no power afterwards to reconsider their determination and come to a different conclusion.1

Contesting Elections.

As the election officers perform for the most part ministerial functions only, their returns, and the certificates of election which are issued upon them, are not conclusive in favor of the officers who would thereby appear to be chosen, but the final decision must rest with the courts.2 This is the general rule, and the exceptions are of those cases where the law under which the canvass is made declares the decision conclusive, or where a special statutory board is established with powers of final decision.3 What-

1 Hadley v. Mayor, &c., 33 N. Y. 603; State v. Warren, 1 Houston, 39; State v. Harrison, 58 Mo. 540; Swain v. McRae, 60 N. C. 111; State v. Lamberton, 37 Minn. 362, 34 N. W. 396; Myers v. Chalmers, 60 Miss. 772; People v. Readon, 3 N. Y. Supp. 500; People v. Board Canvasers, 40 Hun, 390. Compare Alderson v. Comrs., 32 W. Va. 464, 9 S. E. 603. If they recount and give the certificate to another, such action is a mere nullity. Bowen v. Hixon, 45 Mo. 340; People v. Robertson, 27 Mich. 116; Opinions of Justices, 117 Mass. 599; State v. Donewirth, 21 Ohio St. 216.


But see State v. Dortch, 41 La. 846, 6 So. 777. In Georgia the governor’s decision upon the election of officers commissioned by him is conclusive. Corbett v. McDaniel, 77 Ga. 644. A chief justice cannot be empowered to decide, pending a legal determination of a contest, which claimant shall hold the office ad interim. If the power is executive it cannot be conferred on a judicial officer; if judicial, it belongs to a court. In re Cleveland, 51 N. J. L. 310, 18 Atl. 67. An illegal election may be contested and set aside, even though but one person was voted for. Ex parte Ellyson, 20 Grat. 10. The customary remedy is by writ of quo warranto, issued either on the relation of some citizen who shows an interest of his own in the question involved, or on relation of the Attorney-General in the interest of the State. State v. Tuttle, 53 Wis. 46, 9 N. W. 791. Statutory provision for contesting elections does not abrogate the remedy by quo warranto. People v. Londoner, 13 Col. 303, 22 Pac. 704, differing from State v. Francis, 88 Mo. 557. [Upon election contests in Indiana, see English v. Dickery, 128 Ind. 174, 27 N. E. 495, 13 L. R. A. 46, and note. As to notice to contestee, see Bowler v. Elshenbrinck, 1 S. D. 677, 48 N. W. 136, 12 L. R. A. 705, and note.]

ever may be the office, an election to it is only made by the candidate receiving the requisite majority or plurality of the legal votes cast;¹ and whoever, without such election, intrudes into an office, whether with or without the formal evidences of title, may be ousted on the proper judicial inquiry.² The general doctrine is here stated; but in one important case it was denied that it could apply to the office of chief executive of the State. The case was one in which the incumbent was a candidate for re-election, and a majority of votes was cast for his opponent. Certain spurious returns were, however, transmitted to the State canvassers, which, together with the legal returns, showed a plurality for the incumbent, and he was accordingly declared chosen. Proceedings being taken against him by quo warranto in the Supreme Court, he objected to the jurisdiction, on the ground that the three departments of the State government, the legislative, the executive, and the judicial, were equal, co-ordinate, and independent of each other, and that each department must be and is the ultimate judge of the election and qualification of its own member or members, subject only to impeachment and ap-

canvass of votes for Governor in 1792, where the election of John Jay to that office was defeated by the rejection of votes cast for him for certain irregularities, which, under the more recent judicial decisions, ought to have been overlooked, see Hammond's Political History of New York, ch. 3. The law then in force made the decision of the State canvassers final and conclusive. The Louisiana Returning Board cases will readily occur to the mind; but those must be regarded as standing by themselves, because the legislative provisions under which they were had were unlike any others known to our history, and assumed to confer extraordinary and irresponsible powers. [For the procedure in Nebraska where the legislature in joint session determines contests over election of officers of the executive department, see State v. Elder, 31 Neb. 169, 47 N. W. 710, 10 L. R. A. 796, and re-election of executive officers, Re Election of Executive Officers, 31 Neb. 292, 47 N. W. 923, 10 L. R. A. 803.]

¹ In some cases it is provided by law, that, if there is a tie vote, the two persons receiving an equal and the highest number shall cast lots, and the election shall be thereby determined. The drawing of lots, however, would not preclude an inquiry, at the suit of the State, into previous irregularities. People v. Robertson, 27 Mich. 116. [And where the Constitution provides a mode of procedure to be followed in case of tie votes for certain officers, but makes none for justices of the peace, and does not authorize the legislature to provide for such case, there is no election in case of tie vote for justice of the peace, and the old incumbent holds over. State v. Kramer, 160 Mo. 89, 51 S. W. 716, 47 L. R. A. 551.]

² Whether jury trial in the case of contested elections is matter of right, seems to be made a question. That it is, see State v. Burnett, 2 Ala. 140; People v. Cicott, 10 Mich. 283; dictum, People v. Albany, &c. R. R. Co., 57 N. Y. 161. That it is not, is held in Ewing v. Filley, 43 Pa. St. 394; Commonwealth v. Leech, 44 Pa. St. 332; State v. Johnson, 26 Ark. 281; Whent v. Smith, 60 Ark. 265, 7 S. W. 101; Williamson v. Lane, 52 Tex. 255; State v. Lewis, 51 Conn. 113. [State v. Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. 39.] It is, however, conceded in Pennsylvania that, in a proceeding to forfeit an office, jury trial is of right. See also cases, p. 509, note 2, ante.
peal to the people; that the question, who is rightfully entitled to the office of governor, could in no case become a judicial question; and that as the Constitution provides no means for ousting a successful usurper of either of the three departments of the government, that power rests exclusively with the people, to be exercised by them whenever they think the exigency requires it. There is a basis of truth in this argument; the executive of the State cannot be subordinated to the judiciary, and may, in general, refuse obedience to writs by which this may be attempted. But when the question is, who is the executive of the State, the judges have functions to perform, which are at least as important as those of any other citizens, and the fact that they are judges can never be a reason why they should submit to a usurpation. A successful usurpation of the executive office can only be accomplished with the acquiescence of the other departments; and the judges, for the determination of their own course, must, in some form, inquire into or take notice of the facts. In a controversy of such momentous import, the most formal and deliberate inquiry that the circumstances will admit of is alone excusable; and, when made and declared, the circumstances must be extraordinary in which it will not be effectual. In the case referred to, the usurper, though the candidate of a party embracing half the voters of the State, found himself utterly stripped of power by the decision of the court against him; public support fell away from him, and success in his usurpation became an impossibility. The decision guided and determined the popular sentiment, and perhaps saved the State from disorder, violence, and anarchy.

Where, however, the question arises collaterally, and not in a direct proceeding to try the title to the office, the correctness of the decision of the canvassers cannot be called in question, but must be conclusively presumed to be correct; and where the

1 Attorney-General v. Barstow, 4 Wis. 507.
2 See ante, p. 162.
3 Some attention to conflicts between the several departments of government was given by the author in an essay on Checks and Balances in Government, published in the "International Review" for 1870. A question like that above mentioned could not arise in respect to the presidency, as Congress must canvass and declare the result. In some recent cases, in which the office of governor was in question, though the decision was placed by the constitution in the hands of the legislature, the final result was only determined by popular acquiescence. The difficulty was that the legislative authority was as much in dispute as the executive. The cases of South Carolina and Louisiana are here specially referred to.
4 Morgan v. Quackenbush, 22 Barb. 72; Hadley v. Mayor, &c., 33 N. Y. 603; Howard v. McDiarmid, 26 Ark. 100. And see Hulsemann v. Rens, 41 Pa. St. 390, where it was held that the court could not interfere summarily to set aside a certificate of election, where it did not appear that the officers had acted corruptly, notwithstanding it was shown to be based in part upon forged returns.
election was to a legislative office, the final decision, as well by parliamentary law as by constitutional provisions, rests with the legislative body itself, and the courts, as we have heretofore seen, cannot interfere. 2

The most important question which remains to be mentioned relates to the evidence which the courts are at liberty to receive, and the facts which it is proper to spread before the jury for their consideration when an issue is made upon an election for trial at law.

The questions involved in every case are, first, has there been an election? and second, was the party who has taken possession of the office the successful candidate at such election, by having received a majority of the legal votes cast? 3 These are questions which involve mixed considerations of law and fact, and the proper proceeding in which to try them in the courts is by quo warranto, when no special statutory tribunal is created for the purpose. 4

Upon the first question, we shall not add to what we have already said. When the second is to be considered, it is to be constantly borne in mind that the point of inquiry is the will of the electors as manifested by their ballots; and to this should all the evidence be directed, and none that does not bear upon it should be admissible.

We have already seen that the certificates or determinations of the various canvassing boards, though conclusive in collateral inquiries, do not preclude an investigation by the courts into the facts which i. v certify. They are prima facie evidence, however, even in the courts; 5 and this is so, notwithstanding altera-

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1 See ante, p. 189, note 1. See also Commonwealth v. Meeser, 44 Pa. St. 341.
2 In Maine, where there were two conflicting bodies, each claiming the right to exercise the legislative power, the judiciary asserted and enforced the right to decide between them. Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325. It is to be observed, however, that the governor had already recognized the same body in whose favor the court decided, and had approved the act whose validity came in question in the court.
3 See cases cited, p. 935, note. Also State v. The Judge, 13 Ala. 503; People v. Robertson, 27 Mich. 116; Commonwealth v. Kumminger, 74 Pa. St. 470; Dobyns v. Weadon, 50 Ind. 298. The right to the office comes from the ballots, and not from the commission. State v. Draper, 50 Mo. 353. Where the officers acted fraudulently in the conduct of an election, their returns may be rejected, and the result be arrived at from other proofs exclusively. Supervisors v. Davis, 63 Ill. 405. Where returns are lost or defective, parol evidence of what the vote was is admissible: Wheat v. Smith, 50 Ark. 236, 7 S. W. 161; Dixon v. Orr, 40 Ark. 238, 4 S. W. 774, if ballots cannot, from possible tampering, be admitted. Stemper v. Higgins, 28 Minn. 222, 37 N. W. 95.
4 People v. Matteson, 17 Ill. 167; People v. Cowan, 50 Ill. 100. If the proceeding is commenced before the term which is in contest has expired, it may be continued to a conclusion afterwards. State v. Pierce, 35 Wis. 13.
5 Marshall v. Kerou, 2 Swan, 68; Mor-
tions appear; the question of their fairness in such a case being for the jury. But back of this *prima facie* case the courts may go, and the determinations of the State board may be corrected by those of the district boards, and the latter by the ballots themselves when the ballots are still in existence, and have been kept as required by law. If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all, or, if received, that it should be left to the jury to determine, upon all the circumstances of the case, whether they constitute more reliable evidence than the inspectors' certificate, which is usually prepared immediately on the close of the election, and upon actual count of the ballots as then made by the officers whose duty it is to do so.

Something has already been said regarding the evidence which can be received where the elector's ballot is less complete and perfect in its expression of intention than it should have been. There can be no doubt under the authorities that, whenever a question may arise as to the proper application of a ballot, any evidence is admissible with a view to explain and apply it which would be admissible under the general rules of evidence for the purpose of explaining and appraising other written instruments. But the rule, as it appears to us, ought not to go further. The evidence ought to be confined to proof of the concomitant circumstances; such circumstances as may be proved in support or explanation of a contract, where the parties themselves would not be allowed to give testimony as to their actual intention, when unfortunately the intention was ineffectually expressed.

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2. People v. Van Cleve, 1 Mich. 302; People v. Higgins, 3 Mich. 233; State v. Clerk of Passaic, 25 N. J. 354; State v. Judge, &c., 13 Ala. 805; People v. Cook, 14 Barb. 259, 8 N. Y. 67; People v. Cicott, 10 Mich. 285; Attorney-General v. Ely, 4 Wis. 429; Owens v. State, 64 Tex. 500. Ballots which should have been destroyed under the law cannot be used on a recount. State v. Bate, 70 Wis. 400, 36 N. W. 17. The ballot is always the best evidence of the voter's action. Wheat v. Ragsdale, 27 Ind. 191; People v. Holden, 28 Cal. 123; Scarle v. Clark, 34 Kan. 49, 7 Pac. 630.
3. People v. Sackett, 14 Mich. 320. But see People v. Higgins, 3 Mich. 233. Burden of showing that ballots offered are genuine is on the party offering them. Powell v. Holman, 60 Ark. 85, 6 S. W. 505; Fenton v. Scott, 17 Ore. 189, 20 Pac. 95; Coplan v. Beard, 67 Cal. 308, 7 Pac. 738, which see as to what is sufficient proof that they have not been tampered with.
5. People v. Peuse, 27 N. Y. 45, 84, per Denno, Ch. J., commenting upon previous New York cases. See also Attorney-General v. Ely, 4 Wis. 420.
And we have seen that no evidence is admissible as to how parties intended to vote who were wrongfully prevented or excluded from so doing. Such a case is one of wrong without remedy, so far as candidates are concerned. There is more difficulty, however, when the question arises whether votes which have been cast by incompetent persons, and which have been allowed in the canvass, can afterwards be inquired into and rejected because of the want of qualification.

If votes were taken \textit{viva voce}, so that it could always be determined with absolute certainty how every person had voted, the objections to this species of scrutiny after an election had been held would not be very formidable. But when secret balloting is the policy of the law, and no one is at liberty to inquire how any elector has voted, except as he may voluntarily have waived his privilege, and when consequently the avenues to correct information concerning the votes cast are carefully guarded against judicial exploration, it seems exceedingly dangerous to permit any question to be raised upon this subject. For the evidence voluntarily given upon any such question will usually come from those least worthy of credit, who, if they have voted without legal right in order to elect particular candidates, will be equally ready to testify falsely, if their testimony can be made to help the same candidates; especially when, if they give evidence that they voted the opposing ticket, there can usually be no means, as they will well know, of showing the evidence to be untrue. Moreover, to allow such scrutiny is to hold out strong temptation to usurpation of office, without pretence or color of right; since the nature of the case, and the forms and proceedings necessary to a trial, are such that, if an issue may be made on the right of every individual voter, it will be easy, in the case of important elections, to prolong a contest for the major part if not the whole of an official term, and to keep perpetually before the courts the same excitements, strifes, and animosities which characterize the hustings, and which ought, for the peace of the community, and the safety and stability of our institutions, to terminate with the close of the polls.

1 See \textit{ante}, p. 933.
2 It has been decided in Wisconsin that where an unqualified person is called to prove that he voted at an election, and declines to testify, the fact of his having voted may be proved, and then his declarations may be put in evidence to show how he voted. State v. Olin, 23 Wis. 399. This may give the incompetent voter a double vote. First, he votes for the ticket of his choice, and then, on a contest, he declares he voted the other way, and a deduction is made from the opposite vote accordingly. See Beardstown v. Virginia, 70 Ill. 34.
3 This is one reason, perhaps, why in the case of State officers a statutory tribunal is sometimes provided with powers of summary and final decision.
Upon this subject there is very little judicial authority, though legislative bodies, deriving their precedents from England, where the system of open voting prevailed, have always been accustomed to receive such evidence, and have indeed allowed a latitude of inquiry which makes more to depend upon the conscience of the witnesses, and of legislative committees, in some cases, than upon the legitimate action of the voters. The question of the right to inquire into the qualifications of those who had voted at an election, on a proceeding in the nature of a quo warranto, was directly presented in one case to the Supreme Court of New York, and the court was equally divided upon it. On error to the Court of Appeals, a decision in favor of the right was rendered with the concurrence of five judges, against three dissentients. The same question afterwards came before the Supreme Court of Michigan, and was decided the same way, though it appears from the opinions that the court were equally divided in their views. To these cases we must refer for the full discussion of the reasons influencing the several judges; but future decisions alone can give the question authoritative settlement.

1 People v. Penne, 30 Barb. 688.
2 People v. Penne, 29 N. Y. 45.
3 People v. Circuit, 10 Mich. 283. See further the case of State v. Hilman, 24 Wis. 422, where it was decided that those who had voted illegally might be compelled to testify for whom they voted. The question was discussed but briefly, and as one of privilege merely.
4 Considerable stress was laid by the majority of the New York Court of Appeals on the legislative practice, which, as it seems to us, is quite too loose in these cases to constitute a safe guide. Some other rulings in that case also seem more latitudinarian than is warranted by sound principle and a due regard to the secret ballot system which we justly esteem so important. Thus, Selden, J., says: "When a voter refuses to disclose or fails to remember for whom he voted, I think it is competent to resort to circumstantial evidence to raise a presumption in regard to that fact. Such is the established rule in election cases before legislative committees, which assume to be governed by legal rules of evidence (Cush. Leg. Assem., §§ 199 and 200); and within that rule it was proper, in connection with the other circumstances stated by the witness Loftis, to ask him for whom he intended to vote; not, however, on the ground that his intention, as an independent fact, could be material, but on the ground that it was a circumstance tending to raise a presumption for whom he did vote." Now as, in the absence of fraud or mistake, you have arrived at a knowledge of how the man voted, when you have ascertained how, at the time, he intended to vote, it is difficult to discover much value in the elector's privilege of secrecy under this ruling. And if "circumstances" may be shown to determine how he probably voted, in cases where he insists upon his constitutional right to secrecy, then, as it appears to us, it would be better to abolish altogether the secret ballot than to continue longer a system which falsely promises secrecy, at the same time that it gives to party spies and informers full license to invade the voter's privilege in secret and surreptitious ways, and which leaves jurors, in the absence of any definite information, to act upon their guesses, surmises, and vague conjectures as to the contents of a ballot.

Upon the right to inquire into the qualifications of those who have voted, in a proceeding by quo warranto to test the right to a public office, reference is made to the very full discussions by Justices Christianey and Campbell, taking different
views, in People v. Cicott, 16 Mich. 283, 294, 311. The question of the effect of votes cast by unqualified voters arose in Rasmussen v. Baker, 7 Wyo. 117, 60 Pac. 819, 38 L. R. A. 773. The Constitution of Wyoming provides that "no person shall have the right to vote who shall not be able to read the Constitution of this State." At an election held Nov. 3, 1896, to elect a county treasurer, fifty-four votes in one precinct and fifty in another were cast for the defendant B, by naturalized citizens of Finnish birth. These voters were incapable of reading the Constitution in English, but could read a Finnish translation of it. Held, that they were unqualified, and that their votes were void.]