CHAPTER IV.

OF THE CONSTRUCTION OF STATE CONSTITUTIONS.

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

Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey. Construction, on the other hand, is the drawing of conclusions, respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter of the text. Interpretation only takes place if the text conveys some meaning or other. But construction is resorted to when, in comparing two different writings of the same individual, or two different enactments by the same legislative body, there is found contradiction where there was evidently no intention of such contradiction one of another, or where it happens that part of a writing or declaration contradicts the rest. When this is the case, and the nature of the document or declaration, or whatever else it may be, is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction,
then resort must be had to construction; so, too, if required to act in cases which have not been foreseen by the framers of those rules, by which we are nevertheless obliged, for some binding reason, faithfully to regulate as well as we can our action respecting the unforeseen case. In common use, however, the word construction is generally employed in the law in a sense embracing all that is properly covered by both when each is used in a sense strictly and technically correct; and we shall so employ it in the present chapter.

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

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

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

1 Lieber, Legal and Political Hermeneutics. See Smith on Stat. and Const. Construction, 600. Bouvier defines the two terms succinctly as follows: "Interpretation, the discovery and representation of the true meaning of any signs used to convey ideas." "Construction, in practice, determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement." Law Dict.
this decision must commonly be made by the person, body, or department upon whom the duty is imposed, or from whom the act is required.

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

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

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1 By the constitutions of Maine, New Hampshire, and Massachusetts, the judges of the Supreme Court are required, when called upon by the governor, council, or either house of the legislature, to give their opinions “upon important questions of law, and upon solemn occasions.” In Rhode Island the governor or either house of the general assembly may call for the opinions of the judges of the Supreme Court upon any question of law. In Massachusetts the justices will not give an opinion on the proper construction of an existing act which the legislature may amend. Opinion of Justices, 148 Mass. 623, 21 N. E. Rep. 439. In Florida the governor may require an opinion on any question affecting his executive powers and duties. A duty with reference to a bill before it becomes a law, is not an executive duty, and as to it the judges cannot advise. Opinion of Justices, 29 Fla. 297, 6 So. 925. [So in South Dakota. Rev. Constitutional Provision, 3 S. D. 548, 54 N. W. 650, 19 L. R. A. 575.] In Missouri, previous to the constitution
visions are not often to be met with, and judicial decisions, especially upon delicate and difficult questions of constitutional law, can seldom be entirely satisfactory when made, as they commonly will be under such calls, without the benefit of argument at the bar, and of that light upon the questions involved which might be afforded by counsel learned in the law, and interested in giving them a thorough investigation.

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

of 1875, the judges were required to give their opinions "upon important questions of constitutional law, and upon solemn occasions;" and the Supreme Court held that while the governor determined for himself, whether the occasion was such as to authorize him to call on the judges for their opinion, they must decide for themselves whether the occasion was such as to warrant the governor in making the call. Opinions of Judges, 49 Mo. 210. By a constitutional amendment of 1888, the Colorado Supreme Court is required to give its opinion upon important questions upon solemn occasions to the governor or either house of the legislature. The intention, it is held, is not "to authorize an ex parte adjudication of individual or corporate rights," nor to exact "a wholesale exposition of all constitutional questions relating to a given subject, in anticipation of the possible introduction or passage of measures bearing upon particular branches of such subject." It appearing that the question was covered by pending litigation, the court refused to answer. In re Irrigation Resolution, 9 Col. 620, 21 Pac. 470. Nor should it give an opinion on provisions which do not affect a pending act. In re Irrigation Resolution, supra. Questions must affect purely public rights. In re Senate Resolution, No. 65, 12 Col. 466, 21 Pac. 478; [Re House Bill, No. 99, 28 Col. 140, 56 Pac. 181; Re Senate Bill, No. 27, 28 Col. 350, 65 Pac. 50.]

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

"It is argued that the legislature cannot give a construction to the constitution relative to private rights secured by it. It is true that the legislature, in consequence of their construction of the constitution, cannot make laws repugnant to it. But every department of government, invested with certain constitutional powers, must, in the first instance, but not exclusively, be the judge of its powers, or it could not act." Parsons, Ch. J., in Kendall v. Inhabitants of Kingston, 5 Mass. 521, 532. The decision of a governor, having jurisdiction to decide in the first instance whether tax exemption is constitutional, must be obeyed by inferior executive officers. State v. Buchanan, 24 W. Va. 362. But a patent commissioner may not refuse to perform a ministerial act on the ground that the statute requiring it is unconstitutional. United States v. Marble, 3 Mackey, 52. Notwithstanding a void provision as to an officer's salary, it is his duty to give the act effect. State v. Kelsey, 44 N. J. L. 1.
The first of these classes is where, by the constitution, a particular question is plainly addressed to the discretion or judgment of some one department or officer, so that the interference of any other department or officer, with a view to the substitution of its own discretion or judgment in the place of that to which the constitution has confided the decision, would be impertinent and intrusive. (a) Under every constitution, cases of this description are to be met with; and, though it will sometimes be found difficult to classify them, there can be no doubt, when the case is properly determined to be one of this character, that the rule must prevail which makes the decision final.

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

1 Whiteman v. Railroad Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; In re State Census, 9 Col. 612, 21 Pac. Rep. 477; [Farrelly v. Cole, 69 Kan. 356, 68 Pac. 492, 44 L. R. A. 464.] In exercising his power to call out the militia in certain exigencies, the President is the exclusive and final judge when the exigency has arisen. Martin v. Mott, 12 Wheat. 19. In People v. Parker, 3 Neb. 409, 19 Am. Rep. 634, it appeared that an officer, assuming to act as governor in the absence of the governor from the State, had issued a proclamation convening the legislature in extraordinary session. The governor returned previous to the time named for the meeting, and issued a second proclamation, revoking the first. Held, that the power of convening the legislature being a discretionary power, it might be recalled before the meeting took place.

It is unquestioned, that, when a case is within the legislative discretion, the courts cannot interfere with its exercise. State v. Hitchcock, 1 Kan. 178; State v. Boone County Court, 60 Mo. 317; Patterson v. Barlow, 60 Pa. St. 54; [Kimball v. Grantsville City, 17 Utah, 308, 57 Pac. 1, 45 L. R. A. 628.] and see cases post, 181. The statement of legislative reasons in the preamble of an act will not affect its validity. Lothrop v. Steadman, 42 Conn. 583.

(a) [Where the constitution empowers the legislature to determine an election contest for offices of governor and lieutenant-governor, the decision of the legislature in any such contest is not subject to review in the courts. Taylor v. Beckham, — Ky. —, 49 L. R. A. 258, 66 S. W. 177. See this case in Supreme Court of the United States, 178 U. S. 518, 20 Sup. Ct. Rep. 890; Dissenting opinion of Harlan, J., 20 Sup. Ct. Rep. 1003. Courts have jurisdiction to review apportionment statutes for abuses of discretion, amounting to violations of the constitution. Carrier v. Rice, 135 N. Y. 478, 31 N. E. 921; State v. Cunningham, 82 Wis. 90, 51 N. W. 724, 35 Am. St. 27; Giddings v. Secretary of State, 93 Mich. 1, 52 N. W. 914. In the last-mentioned case, the question was expressly determined to be a judicial one. But see Fletcher v. Tuttle, 161 Ill. 41, 37 N. E. 683, 42 Am. St. 229, in which case it was held that a bill, which raised the question of the validity of an apportionment act, filed by an elector for the enforcement of his right to the elective franchise, would not lie since the right involved was a purely political one.]
constitution, laws are to take effect at a specified time after their passage, unless the legislature for urgent reasons shall otherwise order, we must perceive at once that the legislature alone is competent to pass upon the urgency of the alleged reasons. And to take a judicial instance: If a court is required to give an accused person a trial at the first term after indictment, unless good cause be shown for continuance, it is obvious that the question of good cause is one for the court alone to pass upon, and that its judgment when exercised is, and must be from the nature of the case, final. And when in these or any similar case the decision is once made, other departments or other officers, whatever may have been their own opinions, must assume the decision to be correct, and are not at liberty to raise any question concerning it, unless some duty is devolved upon them which presents the same question anew.

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

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1 See post, p. 224. In Gillinwater v Mississippi & Atlantic Railroad Co., 13 Ill. 1, it was urged that a certain restriction imposed upon railroad corporations by the general railroad law was a violation of the provision of the constitution which enjoins it upon the legislature "to encourage internal improvements by passing liberal general laws of incorporation for that purpose." The court say of this provision: "This is a constitutional command to the legislature, as obligatory on it as any other of the provisions of that instrument: but it is one which cannot be enforced by the courts of justice. It addresses itself to the legislature alone, and it is not for us to say whether it has obeyed the behest in its true spirit. Whether the provisions of this law are liberal, and tend to encourage internal improvements, is matter of opinion, about which men may differ; and as we have no authority to revise legislative action on the subject, it would not become us to express our views in relation to it. The law makes no provision for the construction of canals and turnpike roads, and yet they are as much internal improvements as railroads, and we might as well be asked to extend what we might consider the liberal provisions of this law to them, because they are embraced in the constitutional provision, as to ask us to disregard such provisions of it as we might regard as illiberal. The argument proceeds upon the idea that we should consider that as done which ought to be done; but that principle has no application here. Like laws upon other subjects within legislative jurisdiction, it is for the courts to say what the law is, not what it should be." It is clear that courts cannot interfere with matters of legislative discretion. Maley v. Marietta, 11 Ohio St. 636. As to self-executing provisions in general, see post, p. 119. [The courts have authority to decide which if either of two contesting bodies is the State senate. Attorney-General v. Rogers, 56 N. J. L. 480, 29 Atl. 178, 23 L. R. A. 354.]
particular legislation which the event seems to call for, and which he specifies in his proclamation. Now, the legislature are to enact laws upon their own view of necessity and expeditious; and they will refuse to pass the desired statute if they regard it as unwise or unimportant. But in so doing they indirectly review the governor's decision, especially if, in refusing to pass the law, they do so on the ground that the specific event was not one calling for action on their part. In such a case it is clear that, while the decision of the governor is final so far as to require the legislature to meet, it is not final in any sense that would bind the legislative department to accept and act upon it when they enter upon the performance of their duty in the making of laws.¹

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

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

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

¹ See Opinions of Judges, 49 Mo. 216.
assuming to act under it, since such body or officer must exercise a delegated authority, and one that must necessarily be subservient to the instrument by which the delegation is made. In any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity. But no mode has yet been devised by which these questions of conflict are to be discussed and settled as abstract questions, and their determination is necessary or practicable only when public or private rights would be affected thereby. They then become the subject of legal controversy; and legal controversies must be settled by the courts.\textsuperscript{1} The courts have thus devolved upon them the duty to pass upon the constitutional validity, sometimes of legislative, and sometimes of executive acts. And as judicial tribunals have authority, not only to judge, but also to enforce their judgments, the result of a decision against the constitutionality of a legislative or executive act will be to render it invalid through the enforcement of the paramount law in the controversy which has raised the question.\textsuperscript{2}

\textsuperscript{1} Governor v. Porter, 5 Humph. 165. The legislature cannot by statute define the words of the constitution for the courts. Westinghausen \textit{v.} People, 44 Mich. 265; Powell \textit{v.} State, 17 Tex.App. 345. Compare People \textit{v.} Supervisors of La Salle, 100 Ill. 405. And see post, 136, note.

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

"Whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one which is peculiar to the American magistrate, but it gives rise to immense political influence. Few laws can escape the searching analysis; for there are few which are not prejudicial to some private interest or other, and none which may not be brought before a court of justice by the choice of parties, or by the necessity of the case. But from the time that a judge has refused to apply any given law in a case, that law loses a portion of its moral sanction. The persons to whose interest it is prejudicial learn that means exist for evading its authority; and similar suits are multiplied until it becomes powerless. One of two alternatives must then be resorted
The same conclusion is reached by stating in consecutive order a few familiar maxims of the law. The administration of public justice is referred to the courts. To perform this duty, the first requisite is to ascertain the facts, and the next to determine the law applicable to such facts. The constitution is the fundamental law of the State, in opposition to which any other law, or any direction or order, must be inoperative and void. If, therefore, such other law, direction, or order seems to be applicable to the facts, but on comparison with the fundamental law the latter is found to be in conflict with it, the court, in declaring what the law of the case is, must necessarily determine its invalidity, and thereby in effect annul it.1 The right and the power of the courts to do this are so plain, and the duty is so generally — we may almost say universally — conceded, that we should not be justified in wearying the patience of the reader in quoting from the very numerous authorities upon the subject.2

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

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

2 "Nor will this conclusion, to use the language of one of our most eminent jurists and statesmen, by any means suppose a superiority of the judicial to the legislative power. It will only be supposing that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that declared by the people in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental. Neither would we, in doing this, be understood as impugning the honest intentions, or sacred regard to justice, which we most cheerfully accord to the legislature. But to be above error is to possess an entire attribute of the Deity; and to spurn its correction is to reduce to the same degraded level the most noble and the meanest of his works." Bates v. Kimball, 2 Chip. 77. See Bailey v. Gentry, 1 Mo. 104, 13 Am. Dec. 481.

"Without the limitations and restraints usually found in written constitutions, the government could have no elements of permanence and durability; and the distribution of its powers, and the vesting their exercise in separate departments, would be an idle ceremony." Brown, J., in People v. Draper, 15 N. Y. 532, 568.

2 1 Kent, 600-507; Marbury v. Madison, 1 Cranch, 137; see post, p. 227-229; Webster on the Independence of the Judiciary, Works, Vol. III. p. 29. In this speech, Mr. Webster has forcibly set forth the necessity of leaving with the courts the power to enforce constitutional restrictions. "It cannot be denied," says he, "that one great object of written constitutions is, to keep the departments of government as distinct as possible; and for this purpose to impose restraints designed to have that
Conclusiveness of Judicial Decisions.

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

In some cases and for some purposes the conclusiveness of a judicial determination is, beyond question, final and absolute. A decision once made in a particular controversy, by the highest court empowered to pass upon it, is conclusive upon the parties to the litigation and their privies, and they are not allowed effect. And it is equally true that there is no department on which it is more necessary to impose restraints than upon the legislature. The tendency of things is almost always to augment the power of that department in its relation to the judiciary. The judiciary is composed of few persons, and those not such as mix habitually in the pursuits and objects which most engage public men. They are not, or never should be, political men. They have often unpleasant duties to perform, and their conduct is often liable to be canvassed and censured where their reasons for it are not known or cannot be understood. The legislature holds the public purse. It fixes the compensation of all other departments; it applies as well as raises all revenue. It is a numerous body, and necessarily carries along with it a great force of public opinion. Its members are public men, in constant contact with one another and with their constituents. It would seem to be plain enough that, without constitutional provisions which should be fixed and certain, such a department, in case of excitement, would be able to encroach on the judiciary.” . . . “The constitution being the supreme law, it follows, of course, that every act of the legislature contrary to that law must be void. But who shall decide this question? Shall the legislature itself decide it? If so, then the constitution ceases to be a legal, and becomes only a moral restraint upon the legislature. If they, and they only, are to judge whether their acts be conformable to the constitution, then the constitution is admonitory or advisory only, not legally binding, because if the construction of it rests wholly with them, their discretion, in particular cases, may be in favor of very erroneous and dangerous constructions. Hence the courts of law necessarily, when the case arises, must decide on the validity of particular acts.” “Without this check, no certain limitations could exist on the exercise of legislative power.” See also, as to the dangers of legislative encroachments, De Tocqueville, Democracy in America, c. 6; Story on Const. (4th ed.) § 632 and note. The legislature though possessing a larger share of power, no more represents the sovereignty of the people than either of the other departments; it derives its authority from the same high source. Bailey v. Philadelphia, &c. Railroad Co., 4 Harr. 389; Whittington v. Polk, 1 H. & J. 236; McCauley v. Brooks, 16 Cal. 11.
afterwards to revive the same or any other questions. The matter in dispute has become res judicata, a thing definitely settled by judicial decision; and the judgment of the court imports absolute verity. Whatever the question involved,—whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment,—the act is the same. The controversy has been adjudged; and, once finally passed upon, it is never to be renewed. 1 It must

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

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

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


² The question whether a judgment, by force of its recitals, shall operate as a technical estoppel, or whether it shall operate as a bar only after the proper parol evidence shall have been given to identify the subject of litigation, is one which our subject does not require us to discuss. The cases are examined fully and with discrimination in Robinson's Practice, Vol. VI., and are also discussed in Bigelow on Esoppel.
matter are to be in like manner concluded, because their controversies are supposed to involve the same question of law, we shall not only be forced into a series of endless inquiries, often resulting in little satisfaction, in order to ascertain whether the question is the same, but we shall also be met by the query, whether we are not concluding parties by decisions which others have obtained in fictitious controversies and by collusion, or have suffered to pass without sufficient consideration and discussion, and which might perhaps have been given otherwise had other parties had an opportunity of being heard.

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


\(^2\) Van Alstine v. Railroad Co., 34 Barb.
All judgments, however, are supposed to apply the existing law to the facts of the case; and the reasons which are sufficient to influence the court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other like cases where no modification of the law has intervened. There would thus be uniform rules for the administration of justice, and the same measure that is meted out to one would be received by all others. And even if the same or any other court, in a subsequent case, should be in doubt concerning the correctness of the decision which has been made, there are consequences of a very grave character to be contemplated and weighed before the experiment of disregarding it should be ventured upon. That state of things, when judicial decisions conflict, so that a citizen is always at a loss in regard to his rights and his duties, is a very serious evil; and the alternative of accepting adjudged cases as precedents in future controversies resting upon analogous facts, and brought within the same reasons, is obviously preferable. Precedents, therefore, become important, and counsel are allowed and expected to call the attention of the court to them, not as concluding controversies, but as guides to the judicial mind. Chancellor *Kent* says: "A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or

28; Taylor v. McCrackin, 2 Blackf. 290; Cook v. Vimont, 6 T. B. Monr. 284. If certain facts were not necessarily included in the issue, a party is not concluded by the judgment as to them. Davis v. Davis, 85 Miss. 498, 4 So. 561; Doonan v. Glynn, 28 W. Va. 716; Lorillard v. Clyde, 99 N. Y. 198, 1 N. E. 514; Belden v. State, 103 N. Y. 1, 8 N. E. 363; Umlauf v. Umlauf, 117 Ill. 680, 6 N. E. 455; Concha v. Concha, 1. R. 11 App. Cas. 541. If the second action involves the same property and more, the judgment is conclusive only as to those issues which were actually tried and determined. Foye v. Patch, 132 Mass. 105. See Metcalf v. Gilmore, 63 N. H. 174. But if the facts were within the issue, the judgment is conclusive as to them, although the question raised in the second action was not actually litigated. Harmon v. Auditor, 123 Ill. 123, 13 N. E. 161; Fairchild v. Lynch, 99 N. Y. 359, 2 N. E. 20; Trayhorn v. Colburn, 60 Md. 277, 7 Atl. 459; Kennedy v. McCarthy, 73 Ga. 346; Shand and Andolfo V. R. R. Co. v. Griffith, 76 Va. 913; Cleveland v. Creviston, 93 Ill. 31; Chouteau v. Gibson, 76 Mo. 38. See, for a further discussion of this doctrine, its meaning and extent, Spencer v. Dearth, 43 Vt. 98, and the very full and exhaustive discussion in Robinson's *Practice*, Vol. VII.
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exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded, and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very urgent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a perplexing uncertainty as to the law.1

1 1 Kent, 475. And see Cro. Jac. 527; Rex v. Cox, 2 Burr. 787; King v. Younger, 5 T. R. 450; Goodtitle v. Otway, 7 T. R. 416; Selby v. Barelson, 3 B. & Ad. 17; Fletcher v. Lord Somers, 3 Bing. 588; Hammond v. Anderson, 4 Bos. & P. 60; Lewis v. Thornton, 6 Munc. 94; Dugan v. Hollins, 13 Md. 119; Anderson v. Jackson, 16 Johns. 382; Goodell v. Jackson, 20 Johns. 693; Bates v. Relyen, 23 Wend. 336; Emerson v. Atwater, 7 Mich. 12; Nelson v. Allen, 1 Yerg. 350; Palmer v. Lawrence, 5 N. Y. 389; Kneeland v. Milwaukee, 15 Wis. 454; Bunn v. Bowers, 30 Miss. 216; Fink v. Darst, 14 Ill. 304; Broom's Maxims, 109. Dr. Lieber thinks the doctrine of the precedent especially valuable in a free country. "Liberty and steady progression require the principle of the precedent in all spheres. It is one of the roots with which the tree of liberty fastens in the soil of real life, and through which it receives the sap of fresh existence. It is the weapon by which interference is warded off. The principle of the precedent is eminently philosophical. The English Constitution could not have developed itself without it. What is called the English Constitution consists of the fundamentals of the British polity, laid down in custom, precedent, decisions, and statutes; and the common law in it is a far greater portion than the statute law. The English Constitution is chiefly a common-law constitution; and this reflex of a continuous society in a continuous law is more truly philosophical than the theoretic and systematic, but lifeless, constitutions of recent France." Civ. Lib. and Self-Gov. See also his chapter on precedents in the Hermeneutics. In Nelson v. Allen, 1 Yerg. 360, 376, where the constitutionality of the "Betterment Law" came under consideration, the court (White, J.) say: "Whatever might be my own opinion upon this question, not to assent to its settlement now, after two solemn decisions of this court, the last made upwards of fourteen years ago, and not only no opposing decision, but no attempt even by any case, during all this time, to call the point again in controversy, forming a complete acquiescence, would be, at the least, inconsistent, perhaps mischievous, and uncalled for by a correct discharge of official duty. Much respect has always been paid to the contemporaneous construction of statutes, and a forbidding caution hath always accompanied any approach towards unsettling it, dictated, no doubt, by easily foreseen consequences attending a sudden change of a rule of property, necessarily introductory at least of confusion, increased litigation, and the disturbance of the peace of society. The most able judges and the greatest names on the bench have held this view of the subject, and occasionally expressed themselves to that effect, either tacitly or openly, intimating that if they had held a part in the first construction they would have been of a different opinion; but the construction having been made, they give their assent thereto. Thus Lord Ellenborough, in 2 East, 302, remarks: 'I think
The doctrine of *stare decisis*, however, is only applicable, in its full force, within the territorial jurisdiction of the courts making the decisions, since there alone can such decisions be regarded as having established any rules. Rulings made under a similar legal system elsewhere may be cited and respected for their reasons, but are not necessarily to be accepted as guides, except in so far as those reasons commend themselves to the judicial mind.\(^1\) Great Britain and the thirteen original States had each substantially the same system of common law originally, and a decision now by one of the higher courts of Great Britain as to what the common law is upon any point is certainly entitled to great respect in any of the States, though not necessarily to be accepted as binding authority any more than the decisions in any one of the other States upon the same point. It gives us the opinions of able judges as to what the law is, but its force as an authoritative declaration must be confined to the country for which the court sits and judges. But an English decision before the Revolution is in the direct line of authority; and where a particular statute or clause of the constitution has been adopted in one State from the statutes or constitution of another, after a judicial construction has been given it in such last-mentioned State, it is but just to regard the construction as having been adopted, as well as the words; and all the mischiefs of disregarding precedents would follow as legitimately here as in any other case.\(^2\)

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\(^2\) Bond v. Appleton, 5 Mass. 472; Rutland v. Mendon, 1 Pick. 154; Commonwealth v. Hartnett, 3 Gray, 460; Turnpike Co. v. People, 2 Barb. 107; Campbell v. Quinlin, 4 Ill. 288; Little v. Smith, 5 Ill. 400; Rigg v. Wilton, 13 Ill. 15; Tyler v. Tyler, 19 Ill. 151; Fisher v. Deer-ing, 60 Ill. 114; Langdon v. Applegate, 5 Ind. 527; Clark v. Jeffersonville, &c. R. R. Co., 44 Ind. 248; Fall v. Hazeltine, 45 Ind. 576; Ingraham v. Regan, 23
It will of course sometimes happen that a court will find a former decision so unfounded in law, so unreasonable in its deductions, or so mischievous in its consequences, as to feel compelled to disregard it. Before doing so, however, it will be well to consider whether the point involved is such as to have become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by any change; for in such a case it may be better that the correction of the error be left to the legislature, which can control its action so as to make it prospective only, and thus prevent unjust consequences.  

Miss. 213, Adams v. Field, 16 Vt. 256; Drennan v. People, 10 Mich. 169; Daniels v. Clegg, 28 Mich. 32; Harrison v. Sager, 27 Mich. 456; Pangborn v. Westlake, 36 Iowa, 548; Attorney-General v. Brunst, 3 Wis. 378; Poertner v. Russell, 33 Wis. 193; Myrick v. Hasey, 27 Me. 9; People v. Coleman, 4 Cal. 46; Bemis v. Becker, 1 Kan. 226; Walker v. Cincinnati, 21 Ohio St. 14; Hess v. Pegg, 7 Nev. 23; Freeze v. Tripp, 79 Ill. 464; In re Toller, 79 Ill. 59; Ex parte Mathews, 52 Ala. 51; Dauville v. Place, 51 Grat. 1; Bradbury v. Davis, 6 Cal. 284. But it does not necessarily follow that the prior decision constraining the law must be inflexibly followed, since the circumstances in the State adopting it may be so different as to require a different construction. Little v. Smith, 5 Ill. 409; Lessee of Gray v. Askew, 5 Ohio, 493; Jamison v. Burton, 43 Iowa, 292. It has very properly been held that the legislature, by enacting, without material alteration, a statute which had been judicially expounded by the highest court of the State, must be presumed to have intended that the same words should be received in the new statute in the sense which had been attributed to them in the old. Grace v. McElroy, 1 Allen, 563; Croman v. Cotting, 104 Mass. 246; Law v. Blanchard, 110 Mass. 272. It is proper to accept and follow the decisions of courts of another State upon the construction and validity of their own statutes. Sidwell v. Evans, 1 Penn. & W. 383; s. c. 21 Am. Dec. 387; Bank of Illinois v. Slou, 16 La. 659. 53 Am. Dec. 223, except when it conflicts with the constitution of the adopting State. Risser v. Hoyt, 53 Mich. 186, 18 N. W. 611.

1 "After an erroneous decision touching rights of property has been followed thirty or forty years, and even a much less time, the courts cannot retract their steps without committing a new error nearly as great as the one at the first." Bronson, J., in Sparrow v. Kingman, 1 N. Y. 246, 260. See also Emerson v. Atwater, 7 Mich. 12; Rotlschild v. Grix, 31 Mich. 150; Loeb v. Mathia, 37 Ind. 306; Pond v. Irwin, 113 Ind. 243, 15 N. E. Rep. 272; Paulson v. Portland, 16 Ore. 450, 19 Pac. Rep. 450; Adams Co. v. Burlington & M. R. R. Co., 55 Iowa, 91, 2 N. W. 1054; Davidson v. Briggs, 61 Iowa, 309, 7 N. W. 471; State v. Whitworth, 8 Lea, 694. Where an old constitution has been construed by the court, a new court after the adoption of a new constitution will follow the old construction without regard to its own views. Emery v. Reed, 65 Cal. 397, 4 Pac. 265.

It is true that when a principle of law, doubtful in its character or uncertain in the subject-matter of its application, has been settled by a series of judicial decisions, and acquiesced in for a considerable time, and important rights and interests have become established under such decisions, courts will hesitate long before they will attempt to overturn the result so long established. But when it is apparently indifferent which of two or more rules is adopted, the one which shall have been adopted by judicial sanction will be adhered to, though it may not, at the moment, appear to be the preferable rule. But when a question involving important public or private rights, extending through all coming time, has been passed upon on a single
Whenever the case is such that judicial decisions which have been made are to be accepted as law, and followed by the courts in future cases, it is equally to be expected that they will be followed by other departments of the government also. Indeed, in the great majority of cases, the officers of other departments have no option; for the courts possess the power to enforce their construction of the law as well as to declare it; and a failure to accept and follow it in one case would only create a necessity for new litigation with similar result. Nevertheless, there are exceptions to this rule which embrace all those cases where new action is asked of another department, which that department is at liberty to grant or refuse for any reasons which it may regard as sufficient. We cannot conceive that, because the courts have declared an expiring corporation to have been constitutionally created, the legislature would be bound to renew its charter, or the executive to sign an act for that purpose, if doubtful of the constitutional authority, even though no other adverse reasons existed.\(^1\) In the enactment of laws the legislature must act upon its own reasons; mixed motives of power, justice, and policy influence its action; and it is always justifiable and laudable to lean against a violation of the constitution. Indeed, cases must sometimes occur when a court should refrain from declaring a statute unconstitutional, because not clearly satisfied that it is so, though, if the judges were to act as legislators upon the question of its enactment, they ought with the occasion, and which decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty, of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny. We are by no means unmindful of the salutary tendency of the rule stare decisis, but at the same time we cannot be unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error and the advantages of review." Per Smith, J., Pratt v. Brown, 3 Wis. 603, 609. And see Kneeland v. Milwaukee, 15 Wis. 454; Taylor v. French, 19 Vt. 49; Bellows v. Parsons, 13 N. H. 256; Hamnel v. Smith, 15 Ohio, 131; Day v. Minson, 14 Ohio St. 488; Green Castle, &c. Co. v. State, 28 Ind. 382; Harrow v. Myers, 29 Ind. 409; Paul v. Davis, 100 Ind. 422; Burks v. Hinton, 77 Va. 1; Mcdal v. McGraw, 19 Ohio St. 55; Linn v. Minor, 4 Nev. 462; Willis v. Owen, 43 Texas, 41, 48; Ram on Legal Judgment, c. 14, § 3. "Common error" does not make law until sanctioned by a superior tribunal, and subsequently treated as law in business affairs. Ocean Beach Ass. v. Brinley, 34 N. J. Eq. 438.

\(^1\) In the celebrated case of the application of the Bank of the United States for a new charter, President Jackson felt himself at liberty to act upon his own view of constitutional power, in opposition to that previously declared by the Supreme Court, and President Lincoln expressed similar views regarding the conclusiveness of the Dred Scott decision upon executive and legislative action. See Story on Const. (4th ed.) § 375, note. It is notorious that while the reconstruction of States was going on, after the late Civil War, Congress took especial pains in some cases to so shape its legislation that the Federal Supreme Court should have no opportunity to question and deny its validity.
same views to withhold their assent, from grave doubts upon that subject. The duty is different in the two cases, and presumptions may control in one which do not exist in the other. But those cases where new legislation is sought stand by themselves, and are not precedents for those which involve only considerations concerning the constitutional validity of existing enactments. The general acceptance of judicial decisions as authoritative, by each and all, can alone prevent confusion, doubt, and uncertainty, and any other course is incompatible with a true government of law.

Construction to be Uniform.

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

1 A constitution forbade the payment of any claim arising against the State under any agreement made without authority of law. It was held that this did not prevent the legislature from awarding pay for work done under an act which after its completion had been declared unconstitutional; that the word "law" did not necessarily mean a constitutional law. Miller v. Dunn, 72 Cal. 462, 14 Pac. 27.
ments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.

The Intent to Govern.

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

3 United States v. Fisher, 2 Cranch, 358; Bosley v. Mattingley, 14 B. Monr. 89; Sturgis v. Crowthers, 4 Wheat. 122; Schooner Paulina's Cargo v. United States, 7 Cranch, 62; Ogden v. Strong, 2 Paine, C. C. 584; United States v. Ragsdale, 1 Hemp. 497; Southwark Bank v. Commonwealth, 26 Penn. St. 446; Ingalls v. Cole, 47 Me. 530; McCluskey v. Cromwell, 11 N. Y. 593; Furman v. New York, 5 Sandf. 16; Newell v. People, 7 N. Y. 9; People v. N. Y. Central R. R. Co., 24 N. Y. 485; Bidwell v. Witteraker, 1 Mich. 409; Alexander v. Worthington, 5 Md. 471; Cantwell v. Owens, 14 Md. 215; Case v. Wildridge, 4 Ind. 51; Spencer v. State, 5 Ind. 41; Pflum v. Flint, 10 Pick. 504; Heirs of Ludlow v. Johnson, 3 Ohio, 553; District Township v. Dubouque, 7 Iowa, 262; Patson v. Yuba, 13 Cal. 176; Ezechiel v. Dixon, 3 Ga. 140; In re Murphy, 23 N. J. 189; Attorney-General v. Detroit & Erin P. R. Co., 2 Mich. 138; Smith v. Thursby, 25 Md. 244; State v. Blasdel, 4 Nev. 241; State v. Doran, 5 Nev. 309; Hyatt v. Taylor, 42 N. Y. 258; Johnson v. Hudson R. R. Co., 49 N. Y. 455; Beardsford v. Virginia, 76 Ill. 34; St. Louis, &c. R. R. Co. v. Clark, 53 Mo. 214; Mundt v. Sheboygan, &c. R. R. Co., 31 Wis. 41; Slack v. Jacobs, 8 W. Va. 612; Hawbecker v. Hawbecker, 43 Md. 516; Ex parte Mayor of Florence, 78 Ala. 419. The remarks of Mr. Justice Bronson in People v. Purdy, 2 Hill, 35, are very forcible in showing the impolicy and danger of looking beyond the instrument itself to ascertain its meaning, when the terms employed are positive and free from all ambiguity. "It is said that the Constitution does not extend to public corpora-
or even probable meanings, when one is plainly declared in the

tions, and therefore a majority vote was sufficient. I do not so read the Constitu-
tion. The language of the clause is: 'The assent of two-thirds of the mem-
bers elected to each branch of the legis-
lature shall be requisite to every bill creat-
ing, continuing, altering, or renewing any
body politic or corporate.' These words
are as broad in their signification as any
which could have been selected for the occa-
sion from our vocabulary, and there is not a syllable in the whole instrument
tending in the slightest degree to limit or
qualify the universality of the language.
If the clause can be so construed that it
shall not extend alike to all corporations,
whether public or private, it may then,
I think, be set down as an established fact
that the English language is too poor for
the framing of fundamental laws which
shall limit the powers of the legislative
branch of the government. No one has,
I believe, pretended that the Constitution,
looking at that alone, can be restricted to
any particular class or description of cor-
porations. But it is said that we may
look beyond the instrument for the pur-
pose of ascertaining the mischief against
which the clause was directed, and thus
restrict its operation. But who shall tell
us what that mischief was? Although
most men in public life are old enough to
remember the time when the Constitution
was framed and adopted, they are not
agreed concerning the particular evils
against which this clause was directed.
Some suppose the clause was intended to
guard against legislative corruption, and
others that it was aimed at monopolies.
Some are of opinion that it only extends
to private without touching public cor-
porations, while others suppose that it
only restricts the power of the legislature
when creating a single corporation, and
not when they are made by the hundred.
In this way a solemn instrument — for so
I think the Constitution should be con-
sidered — is made to mean one thing
by one man and something else by an-
other, until, in the end, it is in danger of
being rendered a mere dead letter; and
that, too, where the language is so plain
and explicit that it is impossible to mean
more than one thing, unless we first lose
sight of the instrument itself, and allow
ourselves to roam at large in the bound-
less fields of speculation. For one, I dare
not venture upon such a course. Written
constitutions of government will soon
come to be regarded as of little value if
their injunctions may be thus lightly over-
looked; and the experiment of setting a
boundary to power will prove a failure.
We are not at liberty to presume that
the framers of the Constitution, or the
people who adopted it, did not under-
stand the force of language." See also
same case, 4 Hill, 381, and State v. King,
44 Mo. 285. Another court has said:
"This power of construction in courts is
a mighty one, and, unrestrained by set-
tled rules, would tend to throw a painful
uncertainty over the effect that might be
given to the most plainly worded statutes,
and render courts, in reality, the legisla-
tive power of the State. Instances are
not wanting to confirm this. Judge-made
law has overrode the legislative depart-
ment. It was the boast of Chief Justice
Pemberton, one of the judges of the despot
Charles II., and not the worst even of
those times, that he had entirely outdone
the Parliament in making law. We think
that system of jurisprudence best and
safest which controls most by fixed rules,
and leaves least to the discretion of the
judge; a doctrine constituting one of the
points of superiority in the common law
over that system which has been admin-
istered in France, where authorities had
no force, and the law of each case was
what the judge of the case saw fit to
make it. We admit that the exercise
of an unlimited discretion may, in a par-
ticular instance, be attended with a salu-
tary result; still history informs us that
it has often been the case that the arbi-
trary discretion of a judge was the law of
a tyrant, and warns us that it may be so
again." Perkins, J., in Spencer v. State,
5 Ind. 41, 46. "Judge-made law," as the
phrase is here employed, is that made by
judicial decisions which construe away
the meaning of statutes, or find meanings
in them the legislature never held. The
phrase is sometimes used as meaning,
simply, the law that becomes established
by precedent. The uses and necessity of
judicial legislation are considered and ex-
plained at length by Mr. Austin, in his
Province of Jurisprudence.
instrument itself, the courts are not at liberty to search for elsewhere.

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

The Whole Instrument to be examined.

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

v. Black, 5 Ind. 508; Bartlett v. Morris, 9 ² Co. Lit. 381 a.
Port. 260; Leonard v. Wiseman, 31 Md. 201, per Bartol, Ch. J.; Way v. Way, 61 ³ Stowell v. Lord Zouch, Plowd. 363; Ill. 406; McAdoo v. Benbow, 63 N. C. 461; Hawkins v. Carrol, 50 Miss. 735; Chance v. Marion County, 64 Ill. 66; Dyer v. Bayne, 54 Md. 87; Broom's 461; Cearfoss v. State, 42 Md. 403; Doug.as v.
Maxims, 521.
to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory.  

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

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


2 Welcott v. Wigton, 7 Ind. 44; People v. Purdy, 2 Hill, 31, per Bronson, J.; Green Castle Township v. Black, 5 Ind. 557; Green v. Weller, 32 Miss. 650.

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

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

This is but saying that no forced or unnatural construction is to be put upon their language; and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to re-declare this fundamental maxim.  

Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government.

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

Way, 64 Ill. 406; Stuart v. Hamilton, 66 Ill. 253; Hale v. Everett, 58 N. H. 9; State v. Brewster, 42 N. J. 125; Carpenter v. People, 8 Col. 116; 5 Pac. 928.

1 State v. Mace, 5 Md. 337; Manly v. State, 7 Md. 135; Green v. Weller, 32 Miss. 650; Greencastle Township v. Black, 5 Ind. 506; People v. N. Y. Central Railroad Co., 34 Barb. 123, and 24 N. Y. 365; Story on Const. § 463. "The true sense in which words are used in a statute is to be ascertained generally by taking them in their ordinary and popular signification, or, if they be terms of art, in their technical signification. But it is also a cardinal rule of exposition, that the intention is to be deduced from the whole and every part of the statute, taken and compared together, from the words of the context, and such a construction adopted as will best effectuate the intention of the lawgiver. One part is referred to in order to help the construction of another, and the intent of the legislature is not to be collected from any particular expression, but from a general view of the whole act. Dwarris, 638, 638, 702, 703. And when it appears that the framers have used a word in a particular sense generally in the act, it will be presumed that it was intended to be used in the same sense throughout the act, unless an intention to give it a different signification plainly appears in the particular part of the act alleged to be an exception to the general meaning indicated. Dwarris, 704 et seq. When words are used to which the legislature has given a plain and definite import in the act, it would be dangerous to put upon them a construction which would amount to holding that the legislature did not mean what it has expressed. It follows from these principles that the statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from all its parts and provisions, the intention thus indicated shall prevail, without resorting to other means of aiding in the construction. And these familiar rules of construction apply with at least as much force to the construction of written constitutions as to statutes; the former being presumed to be framed with much greater care and consideration than the latter." Green v. Weller, 32 Miss. 650, 678. Words reenacted after they have acquired a settled meaning will be understood in that meaning. Fulmer v. Commonwealth, 97 Penn. St. 593. The argument ab inconvenienti cannot be suffered to influence the courts by construction to prevent the evident intention. Chance v. Marion County, 64 Ill. 66.
provisions unless we understand their history; and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense. When the Constitution speaks of an *ex post facto* law, it means a law technically known by that designation; the meaning of the phrase having become defined in the history of constitutional law, and being so familiar to the people that it is not necessary to employ language of a more popular character to designate it. The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words in legal and constitutional history where they have been employed for the protection of popular rights.¹

*The Common Law to be kept in View.*

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

¹ See Jenkins v. Ewin, 8 Hcisk. 476. It is quite possible, however, in applying constitutional maxims, to overlook entirely the reason upon which they rest, and "considering merely the letter, go but skin deep into the meaning." On the great debate on the motion for withdrawing the confidence of Parliament from the ministers, after the surrender of Cornwallis,—a debate which called out the best abilities of Fox and Pitt as well as of the ministry, and necessarily led to the discussion of the primary principle in free government, that taxation and representation shall go together,—Sir James Marriott rose, and with great gravity proceeded to say, that if taxation and representation were to go hand in hand, then Britain had an undoubted right to tax America, because she was represented in the British Parliament. She was represented by the members for the county of Kent, of which the thirteen provinces were a part and parcel; for in their charters they were to hold of the manor of Greenwich in Kent, of which manor they were by charter to be parcel! The opinion, it is said, "raised a very loud laugh," but Sir James continued to support it, and concluded by declaring that he would give the motion a hearty negative. Thus would he have settled a great principle of constitutional right, for which a seven years' bloody war had been waged, by putting it in the form of a meaningless legal fiction. Hansard's Debates, Vol. XXII. p. 1184. Lord Mahon, following Lord Campbell, refers the origin of this wonderful argument to Mr. Harding, a Welsh judge, and nephew of Lord Camden; 7 Mahon's Hist. 189. He was said to have been a good lawyer, but must have read the history of his country to little purpose.
such limitations and restrictions as that instrument imposes. It is a maxim with the courts that statutes in derogation of the common law shall be construed strictly,—a maxim which we fear is sometimes perverted to the overthrow of the legislative intent; but there can seldom be either propriety or safety in applying this maxim to constitutions. When these instruments assume to make any change in the common law, the change designed is generally a radical one; but as they do not go minutely into particulars, as do statutes, it will sometimes be easy to defeat a provision, if courts are at liberty to say that they will presume against any intention to alter the common law further than is expressly declared. A reasonable construction is what such an instrument demands and should receive; and the real question is, what the people meant, and not how meaningless their words can be made by the application of arbitrary rules.

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

1 State v. Noble, 118 Ind. 330, 21 N. E. Rep. 244.
3 Under a clause of the constitution of Michigan which provided that "the real and personal estate of every female acquired before marriage, and all property to which she may afterwards become entitled, by gift, grant, inheritance, or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, or engagements of her husband, and may be devised or bequeathed by her as if she were unmarried," it was held that a married woman could not sell her personal property without the consent of her husband, inasmuch as the power to do so was not expressly conferred, and the clause, being in derogation of the common law, was not to be extended by construction. Brown v. Fifield, 4 Mich. 322. The danger of applying arbitrary rules in the construction of constitutional principles might well, as it seems to us, be illustrated by this case. For while on the one hand it might be contended that, as a provision in derogation of the common law, the one quoted should receive a strict construction, on the other hand it might be insisted with perhaps equal reason that, as a remedial provision, in furtherance of natural right and justice, it should be liberally construed; to effect the beneficial purpose had in view. Thus arbitrary rules, of directly opposite tendency and force, would be contending for the mastery in the same case. The subsequent decisions under the same provision do not appear to have followed this lead. See White v. Zane, 10 Mich. 333; McKee v. Wilcox, 11 Mich. 358; Farr v. Sherman, 11 Mich. 323; Watson v. Thurber, 11 Mich. 457; Burden v. Ampere, 14 Mich. 91; Tong v. Marvin, 15 Mich. 90; Tillman v. Snedkerton, 15 Mich. 447; Devries v. Conklin, 22 Mich. 255; Rankin v. West, 25 Mich. 195. The common law is certainly to be kept in view in the interpretation of such a clause, since otherwise we do not ascertain the evil designed to be remedied, and perhaps are not able fully to understand and explain the terms employed; but it is to be looked at with a view to the real intent, rather than for the purpose of arbitrarily restraining it. See Bishop, Law of Married Women, §§ 18-20 and cases cited; McGinnis v. State, 9 Humph. 43; State v. Lash, 16 N. J. 380, 22 Am. Dec. 397; Cadwallader v. Harris, 70 Ill. 570; Moyer v. State Co., 71 Pa. St. 293.
4 Brown v. Williamson, 8 Miss. 14. If in one place in a statute the meaning of a
Here again, however, great caution must be observed in applying an arbitrary rule; for, as Mr. Justice Story has well observed: "It does not follow, either logically or grammatically, that because a word is found in one connection in the Constitution with a definite sense, therefore the same sense is to be adopted in every other connection in which it occurs. This would be to suppose that the framers weighted only the force of single words, as philologists or critics, and not whole clauses and objects, as statesmen and practical reasoners. And yet nothing has been more common than to subject the Constitution to this narrow and mischievous criticism." 1 Men of ingenious and subtle minds, who seek for symmetry and harmony in language, having found in the Constitution a word used in some sense which falls in with their favorite theory of interpreting it, have made that the standard by which to measure its use in every other part of the instrument. They have thus stretched it, as it were, on the bed of Procrustes, lopping off its meaning when it seemed too large for their purposes, and extending it when it seemed too short. They have thus distorted it to the most unnatural shapes, and crippled where they have sought only to adjust its proportions according to their own opinions." 2 And he gives many instances where, in the national Constitution, it is very manifest the same word is employed in different meanings. So that, while the rule may be sound as one of presumption merely, its force is but slight, and it must readily give way to a different intent appearing in the instrument.

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

word or phrase is clear, it will generally be taken in the same sense throughout the act. Rhodes v. Welby, 45 Ohio St. 234, 20 N. E. Rep. 461.

1 See remarks of Johnson, J., in Ogden v. Saunders, 12 Wheat. 213, 220.

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

(a) [Whether the attempt to amend has sufficiently complied with the constitutional requirements of formality in amending the constitution is a question for the courts, and that the legislature has declared the amendment adopted is immaterial. State v. Powell, 77 Miss. 513, 527 So. 927, 48 L. R. A. 652. That an amendment must be complete and not conditional and dependent, for its force, upon the subsequent acts and discretion of certain officers. see Livermore v. Waite, 102 Cal. 112, 36 Pac. 424, 29 L. R. A. 312, in which an attempted amendment relating to the relocation of the State capital was declared invalid. All preliminary steps prescribed for amendment of constitution must be taken in full compliance with requirements. State v. Tooker, 15 Mont. 8, 37 Pac. 810, 25 L. R. A. 560; State v. Brookhart, 113 Iowa, 250, 84 N. W. 1064.]
the law in those particulars, but to continue it in uninterrupted operation. This is the rule in the case of statutes, and it sometimes becomes important, where rights had accrued before the revision or amendment took place. Its application to the case of an amended or revised constitution would seem to be unquestionable.

Operation to be Prospective.

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


3 In Albright v. State, 10 Ohio St. 588, a question arose under the provision of the constitution that "all laws of a general nature shall have a uniform operation throughout the State." Another clause provided that all laws then in force, not inconsistent with the constitution, should continue in force until amended or repealed. Albright was convicted and sentenced to imprisonment under a crimes act previously in force applicable to Hamilton County only, and the question was, whether that act was not inconsistent with the provision above quoted, and therefore repealed by it. The court held that the provision quoted evidently had regard to future and not to past legislation, and therefore was not repealed. A similar decision was made in State v. Barbee, 8 Ind. 238; Evans v. Phillip, 117 Pa. St. 226, 11 Atl. 630; Pecot v. Police Jury, 41 La. Ann. 765, 6 So. 677. So as to the effect of a provision allowing compensation for property injured, but not taken, in course of public improvements. Folkerson v. Easton, 116 Pa. St. 523, 8 Atl. 669. See also State v. Thompson, 2 Kan. 452; Slack v. Maysville, &c. R. R. Co., 15 B. Monr. 1; State v. Macon County Court, 41 Mo. 453; N. C. Coal Co. v. G. C. Coal & Iron Co., 37 Md. 557. In Matter of Oliver Lee & Co.'s Bank, 21 N. Y. 9, 12, Denin, J., says: "The rule laid down in Dash v. Van Kleeck, 7 Johns. 477, and other cases of that class, by which the courts are admonished to avoid, if possible, such an interpretation as would give a statute a retrospective operation, has but a limited application, if any, to the construction of a constitution. When, therefore, we read in the provision under consideration, that the stockholders of every banking corporation shall be subject to a certain liability, we are to attribute to the language its natural meaning.
Implications.

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

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

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

\(^1\) Story on Const. § 430. See also United States v. Fisher, 2 Crunch, 338; McCulloch v. Maryland, 4 Wheat. 316; Northwestern Fertilizing Co. v. Hyde Park, 70 Ill. 631.

\(^2\) "Feld v. People, 3 Ill. 79, 88. See K. v. Oliver, 25 Ark. 289. In Nevada it has been held that a constitutional provision that the counties shall provide for their paupers will preclude a State asylum for the poor. State v. Hallock, 14 Nev. 202, 33 Am. Rep. 550.

\(^3\) Story on Const. §§ 424-426. See Du Page County v. Jenks, 65 Ill. 275.
shall content ourselves in this place with a reference to the cases collected on this subject and given in another chapter.\footnote{1 See post, pp. 124, 162.}

Another rule of construction is, that when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the Supreme Court of Maryland, that where the constitution defines the qualifications of an officer, it is not in the power of the legislature to change or supersede to them, unless the power to do so is expressly or by necessary implication conferred by the constitution itself.\footnote{2 Other cases recognizing the same principle are referred to in the note.\footnote{3 Minn. 174, 33 N. W. 778; nor add to the constitutional grounds for removing an officer: Lowe v. Commonwealth, 3 Met. (Ky.) 257; Brown v. Greer, 6 Bush, 1, as by enacting that intoxication while discharging his duties shall be deemed misfeasance in office, Com. v. Williams, 79 Ky. 42; but see McCona v. Krug, 16 Ind. 327; nor change the compensation prescribed by the constitution: King v. Hunter, 65 N. C. 608; see also, on these questions, post, p. 388, note; nor provide for the choice of officers a different mode from that prescribed by the constitution: People v. Raymond, 37 N. Y. 423; Devoy v. New York, 36 Barb. 264; 22 How. Tr. 226; People v. Blake, 49 Barb. 9; People v. Albertson, 55 N. Y. 60; Opinions of Justices, 117 Mass. 603; State v. Goldstucker, 40 Wis. 124; see post, p. 388, note. A legislative extension of an elective office is void as applied to incumbents. People v. McKinney, 52 N. Y. 374. [But where the constitution contains no prohibition, the legislature may prescribe the qualifications of voters at municipal elections. Hanna v. Young, 84 Md. 170, 36 Atl. 674, 34 L. R. A. 65. And of officers: State v. McCallister, 38 W. Va. 458, 18 S. E. 770, 24 L. R. A. 343. Where the constitution limits the term, appointee under statute providing for holding during good behavior cannot hold beyond constitutional term. Neumeyer v. Krakel, — Ky. —, 62 S. W. 518 (Apr. 25, 1901).]}

And shall not be changed at the pleasure of the legislature. The term of terms of offices is limited by the constitution. Unless it is shown that the constitution is not clear and certain, it is to be taken as meaning that the legislature shall not have the power to alter the term of office. 

\footnote{1 See post, pp. 124, 162.}

\footnote{2 Thomas v. Owens, 4 Md. 138. And see Barker v. People, 3 Cow. 686; Matter of Dorsey, 7 Port. 293.}

\footnote{3 The legislature cannot alter the constitutional qualifications of v. s: Rison v. Parr, 24 Ark. 161; St. Joseph, &c. R. R. Co. v. Buchanan County Court, 39 Mo. 455; State v. Williams, 5 Wis. 308; State v. Baker, 28 Wis. 71; Monroe v. Collins, 17 Ohio St. 666; State v. Symonds, 57 Me. 148; State v. Staten, 6 Cold. 233; Davies v. McKeeby, 5 Nev. 389; McCafferty v. Guyer, 59 Pa. St. 109; Quinn v. State, 35 Ind. 485; Clayton v. Harris, 7 Nev. 61; Randolph v. Good, 3 W. Va. 551; [Morris v. Powell, 126 Ind. 281, 25 N. E. 221, 9 L. R. A. 286. Nor diminish them: Allison v. Blake, 57 N. J. L. 6, 29 Atl. 417, 25 L. R. A. 450, and note; except in the case of school officers and other officers not provided for in the Constitution. Plummer v. Yost, 144 Ill. 68, 33 N. E. 191, 19 L. R. A. 110; nor of an officer: Feibleman v. State, 98 Ind. 516; nor shorten the constitutional term of an office: Howard v. State, 10 Ind. 301; Cotten v. Ellis, 7 Jones, N. C. 445; State v. Askew, 48 Ark. 82, 2 S. W. 349; nor practically abolish the office by repealing provision for salary: Reid v. Smoutier, 128 Pa. 324, 5 L. R. A. 517, 18 Atl. Rep. 449; nor extend the constitutional term: People v. Bull, 46 N. Y. 57; Goodlin v. Thomau, 10 Kan. 191; State v. Brewster, 44 Ohio St. 589, 6 N. E. 653; [Kahn v. Sutro, 114 Cal. 216, 46 Pac. St., 33 L. R. A. 620; see also Hill v. Slade, 41 Md. 640, 48 Atl. 64 (Nov. 15, 1900); but see Jordan v. Bailey, 37 Minn. 174, 33 N. W. 778; nor add to the constitutional grounds for removing an officer: Lowe v. Commonwealth, 3 Met. (Ky.) 237; Brown v. Greer, 6 Bush, 1, as by enacting that intoxication while discharging his duties shall be deemed misfeasance in office, Com. v. Williams, 79 Ky. 42; but see McCona v. Krug, 16 Ind. 327; nor change the compensation prescribed by the constitution: King v. Hunter, 65 N. C. 608; see also, on these questions, post, p. 388, note; nor provide for the choice of officers a different mode from that prescribed by the constitution: People v. Raymond, 37 N. Y. 423; Devoy v. New York, 36 Barb. 264; 22 How. Tr. 226; People v. Blake, 49 Barb. 9; People v. Albertson, 55 N. Y. 60; Opinions of Justices, 117 Mass. 603; State v. Goldstucker, 40 Wis. 124; see post, p. 388, note. A legislative extension of an elective office is void as applied to incumbents. People v. McKinney, 52 N. Y. 374. [But where the constitution contains no prohibition, the legislature may prescribe the qualifications of voters at municipal elections. Hanna v. Young, 84 Md. 170, 36 Atl. 674, 34 L. R. A. 65. And of officers: State v. McCallister, 38 W. Va. 458, 18 S. E. 770, 24 L. R. A. 343. Where the constitution limits the term, appointee under statute providing for holding during good behavior cannot hold beyond constitutional term. Neumeyer v. Krakel, — Ky. —, 62 S. W. 518 (Apr. 25, 1901).]}

It is not unconstitutional to allow the governor to supply temporary vacancies in offices which under the constitution are elective. Sprague v. Brown, 40 Wis.
The Light which the Purpose to be accomplished may afford in Construction.

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

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612. [But such vacancy does not arise by mere failure to hold the election. Ijams v. Duvall, 85 Md. 252, 38 Atl. 819, 36 L. R. A. 127. Enumeration in constitution of certain modes in which vacancies arise does not prevent legislative certain of other modes. State v. Lansing, 46 Neb. 514, 64 N. W. 1104, 35 L. R. A. 124. Illness of governor which disables him to perform his duties is such vacancy as authorizes the officer designated by the constitution to assume the powers and discharge the duties of the governor until the disability is removed. Barnard v. Taggart, 66 N. H. 362, 29 Atl. 1027, 25 L. R. A. 613. Where the term fixed by statute is unconstitutional, the tenure is at the will of the appointing power. Lewis v. Lewelling, 53 Kan. 201, 36 Pac. 551, 23 L. R. A. 510.]

1 Alexander v. Worthington, 5 Md. 471; District Township v. Dubuque, 7 Iowa, 262. See Smith v. People, 47 N. Y. 330; People v. Potter, 47 N. Y. 375; Wall v. Chadwick, 46 Ill. 28; Sawyer v. Insurance Co., 40 Vt. 697.


3 Baltimore v. State, 15 Md. 376;
especially important to look into it if the constitution is the successor to another, and in the particular in question essential changes have apparently been made. ¹


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

Henry v. Tilson, 19 Vt. 417; Hamilton v. St. Louis County Court, 15 Mo. 8; People v. Gies, 25 Mich. 83; Servis v. Bentley, 52 Miss. 52; Bandel v. Isaac, 13 Md. 262; Story on Const. § 428.


³ Taylor v. Taylor, 10 Minn. 107. And see Eakin v. Rahn, 12 S. & R. 352; Aldridge v. Williams, 3 How. 1; State v. Doran, 5 Nev. 399.
the sense designed to be conveyed. ¹ These proceedings therefore are less conclusive of the proper construction of the instrument than are legislative proceedings of the proper construction of a statute; since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives. The history of the calling of the convention, the causes which led to it, and the discussions and issues before the people at the time of the election of the delegates, will sometimes be quite as instructive and satisfactory as anything to be gathered from the proceedings of the convention. ²

Contemporaneous and Practical Construction.

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

¹ State v. Maer, 5 Md. 337; Manly v. State, 7 Md. 135; Hills v. Chicago, 60 Ill. 86; Beardsden v. Virginia, 76 Ill. 34.

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

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

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

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1 1 Cranch, 299.
2 1 Wheat. 304, 351. See Story on 418.
3 Cohen v. Virginia, 6 Wheat. 264, Const. §§ 405-406.
4 10 Wheat. 51, 63.
the Union so to alter the form of process of execution used in the Supreme Courts of the States in September, 1789, as to subject to execution lands and other property not thus subject by the State laws in force at that time, were constitutional; and Mr. Justice Thompson, in language similar to that of Chief Justice Marshall in the preceding case, says: "If any doubt existed whether the act of 1792 vests such power in the courts, or with respect to its constitutionality, the practical construction given to it ought to have great weight in determining both questions." And Mr. Justice Johnson assigns a reason for this in a subsequent case: "Every candid mind will admit that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption that the contemporaries of the Constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the Constitution, and of the sense put upon it by the people when it was adopted by them." Like views have been expressed by Chief Justice Waite in a recent decision.

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

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

Where
Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers. “Contemporary construction... can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.”

While we conceive this to be the true and only safe rule, we shall be obliged to confess that some of the cases appear, on first reading, not to have observed these limitations. In the case of Stuart v. Laird, above referred to, the practical construction was regarded as conclusive. To the objection that the judges of the Supreme Court had no right to sit as circuit judges, the court say: “It is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at rest, and ought not now to be disturbed.”

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

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

1 Rogers v. Goodwin, 2 Mass. 475. See also Fall v. Hazelrigg, 45 Ind. 576; Scanlan v. Childs, 23 Wis. 593.

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

3 See further, on this subject, the case of Sadler v. Langham, 34 Ala. 311, 334; People v. Allen, 42 N. Y. 378; Brown v. State, 5 Colo. 526; Hahn v. United States, 14 Ct. of Cl. 395; Swift v. United States, 14 Ct. of Cl. 481. Practical acquiescence in a supposed unconstitutional law is entitled to much greater weight when the defect which is pointed out relates to mere forms of expression or enactment than when it concerns the substance of legislation; and if the objection is purely technical, long acquiescence will be conclusive against it. Continental Imp. Co. v. Phelps, 47 Mich. 260, 11 N. W. 167.
when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed. ¹

¹ There are cases which clearly go further than any we have quoted, and which sustain legislative action which they hold to be usurpation, on the sole ground of long acquiescence. Thus in Brigham v. Miller, 17 Ohio, 448, the question was, Has the legislature power to grant divorces? The court say: "Our legislature have assumed and exercised this power for a period of more than forty years, although a clear and palpable assumption of power, and an encroachment upon the judicial department, in violation of the Constitution. To deny this long-exercised power, and declare all the consequences resulting from it void, is pregnant with fearful consequences. If it affected only the rights of property, we should not hesitate; but second marriages have been contracted and children born, and it would bastardize all these, although born under the sanction of an apparent wedlock, authorized by an act of the legislature before they were born, and in consequence of which the relation was formed which gave them birth. On account of these children, and for them only, we hesitate. And in view of this, we are constrained to content ourselves with simply declaring that the exercise of the power of granting divorces, on the part of the legislature, is unwarranted and unconstitutional, an encroachment upon the duties of the judiciary, and a striking down of the dearest rights of individuals, without authority of law. We trust we have said enough to vindicate the Constitution, and feel confident that no department of State has any disposition to violate it, and that the evil will cease." So in Johnson v. Juliet & Chicago Railroad Co., 21 Ill. 202, 207, the question was whether railroad corporations could be created by special law, without a special declaration by way of preamble that the object to be accomplished could not be attained by general law. The court say: "It is now too late to make this objection, since, by the action of the general assembly under this clause, special acts have been so long the order of the day and the ruling passion with every legislature which has convened under the Constitution, until their acts of this description fill a huge and misshapen volume, and important and valuable rights are claimed under them. The clause has been wholly disregarded, and it would now produce far-spread ruin to declare such acts unconstitutional and void. It is now safer and more just to all parties to declare that it must be understood that, in the opinion of the general assembly at the time of passing the special act, its object could not be attained under the general law, and this without any recital by way of preamble, as in the act to incorporate the Central Railroad Company. That preamble was placed there by the writer of this opinion, and a strict compliance with this clause of the Constitution would have rendered it necessary in every subsequent act. But the legislature, in their wisdom, have thought differently, and have acted differently, until now our special legislation and its mischiefs are beyond recovery or remedy." These cases certainly presented very strong motives for declaring the law to be what it was not; but it would have been interesting and useful if either of these learned courts had enumerated the evils that must be placed in the opposite scale when the question is whether a constitutional rule shall be disregarded; not the least of which is, the encouragement of a disposition on the part of legislative bodies to set aside constitutional restrictions, in the belief that, if the unconstitutional law can once be put in force, and large interests enlisted under it, the courts will not venture to declare it void, but will submit to the usurpation, no matter how gross and daring. We agree with the Supreme Court of Indiana, that, in construing constitutions, courts have nothing to do with the argument ab incoeren\textit{t}i\textit{e}; and should not "bind the Constitution to suit the law of the hour;" Greencastle Township v. Black, 5 Ind. 557, 565; and with Roe\textit{r}on, Ch. J., in what he says in Oakley v. Aspinwall, 3 N. Y. 547, 568: "It is highly probable that inconveniences will result from following the Constitution as it is written. But that consideration can have no force with me. It is not for us, but for those who made the instru-
Unjust Provisions.

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

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

1 See post, p. 240, and cases referred to in notes.
should be found in a constitution which should appear at first blush to demand a construction leading to monstrous and absurd consequences, it might not be the duty of the court to question and cross-question such clause closely, with a view to discover in it, if possible, some other meaning more consistent with the general purposes and aims of these instruments. When such a case arises, it will be time to consider it.¹

**Duty in Case of Doubt.**

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

**Directory and Mandatory Provisions.**

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

¹ McMullen v. Hodge, 5 Tex. 34. See Cincinnati, 21 Ohio St. 14; Bailey v. Clarke v. Irwin, 5 Nev. 111; Walker v. Commonwealth, 11 Bush, 668.
this subject will be readily assented to by all; while others are sometimes thought to go to the extent of nullifying the intent of the legislature in essential particulars. It is not our purpose to examine the several cases critically, or to attempt—what we deem impossible—to reconcile them all; but we shall content ourselves with quoting from a few, with a view, if practicable, to ascertaining some line of principle upon which they can be classified.

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

1 Slayton v. Hullings, 7 Ind. 144; King v. Inhabitants of St. Gregory, 2 Ad. & El. 99; King v. Inhabitants of Hipswell, 8 B. & C. 466.
2 District Township v. Dubuque, 7 Iowa, 282. 284.
3 Rex v. Locksdale, 1 Burr. 447.
4 People v. Cook, 14 Barb. 290; s. c. 3 N. Y. 67.
5 People v. Schermerhorn, 19 Barb. 540, 558. If a statute imposes a duty and gives the means of performing that duty, it must be held to be mandatory. Venzie v. China, 50 Me. 518. "It would not perhaps be easy to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory or imperative. Where the words are
ing the validity of proceedings on the sale of land for taxes, laid down the rule that "what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as directory merely."\(^1\) A similar rule has been recognized in a case in Illinois. Commissioners had been appointed to ascertain and assess the damage and recompense due to the owners of land which might be taken, on the real estate of the persons benefited by a certain local improvement, in proportion as nearly as might be to the benefits resulting to each. By the statute, when the assessment was completed, the commissioners were to sign and return the same to the city council within forty days of their appointment. This provision was not complied with, but return was made afterwards, and the question was raised as to its validity when thus made. In the opinion of the court, this question was to be decided by ascertaining whether any advantage would be lost, or right destroyed, or benefit sacrificed, either to the public or to any individual, by holding the provision directory. After remarking that they had held an assessment under the general revenue law, returned after the time appointed by law, as void, because the person assessed would lose the benefit of an appeal from the assessment,\(^2\) they say of the statute before the court: "There are no negative words used declaring that the functions of the commissioners shall cease after the expiration of the forty days, or that they shall not make their return after that time; nor have we been able to discover the least right, benefit, or advantage which the property owner could derive from having the return made within that time, and not after. No time is limited and made dependent on that time, within which the owner of the property may apply to affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may, and often have been, construed to be directory; but negative words, which go to the power or jurisdiction itself, have never, that I am aware of, been brought within that category. 'A clause is directory,' says Tanton, J., 'when the provisions contain mere matter of discretion and no more; but not so when they are followed by words of positive prohibition.' Pears v. Morris, 2 Ad. & El. 96." Per Sharswood, J., in Bladen v. Philadelphia, 60 Pa. St. 494, 466. And see Pittsburg v. Courson, 74 Pa. St. 400; Kennedy v. Sacramento, 10 Fed. Rep. 580. Under a statute providing that a court may appoint three commissioners to determine public rights, "may" is mandatory, and parties cannot agree that less than three shall act. Mamonth v. Leeds, 70 Me. 28.

1 Clark v. Crane, 5 Mich. 160, 164. See also Young v. Joslin, 13 R. I. 675; Shawnee County v. Carter, 2 Kan. 116; [Marx v. Hanthorn, 148 U. S. 173, 13 Sup. Ct Rep. 508.] In Life Association v. Board of Assessors, 49 Mo. 512, it is held that a constitutional provision that "all property subject to taxation ought to be taxed in proportion to its value" is a prohibition against its being taxed in any other mode, and the word ought is mandatory.

2 Wheeler v. Chicago, 24 Ill. 105, 108.
have the assessment reviewed or corrected. The next section requires the clerk to give ten days' notice that the assessment has been returned, specifying the day when objections may be made to the assessment before the common council by parties interested, which hearing may be adjourned from day to day; and the common council is empowered in its discretion to confirm or annul the assessment altogether, or to refer it back to the same commissioners, or to others to be by them appointed. As the property owner has the same time and opportunity to prepare himself to object to the assessment and have it corrected, whether the return be made before or after the expiration of the forty days, the case differs from that of Marsh v. Chesnut,¹ at the very point on which that case turned. Nor is there any other portion of the chapter which we have discovered, bringing it within the principle of that case, which is the well-recognized rule in all the books."²

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

¹ 14 Ill. 223.
² Wheeler v. Chicago, 21 Ill. 105, 108.
³ 21 Pick. 64, 67. We commend in the same connection the views of Lewis, Ch. J., in Corbett v. Bradley, 7 Nev. 108:
"When any requirement of a statute is held to be directory, and therefore not material to be followed, it is upon the assumption that the legislature itself so considered it, and did not make the right conferred dependent upon a compliance with the form prescribed for securing it. It is upon this principle that the courts often hold the time designated in a statute, where a thing is to be done, to be directory. No court certainly has the right to hold any requirement of a law unnecessary to be complied with, unless it be manifest the legislature did not intend to impose the consequence which would naturally follow from a non-compliance, or which would result from holding the requirement mandatory or indispensable. If it be clear that no penalty was intended to be imposed for a non-compliance, then, as a matter of course, it is but carrying out the will of the legislature to declare the statute in that respect to be simply directory. But if there be anything to indicate the contrary, a full compliance with it must be enforced." See also Hurford v. Omaha, 4 Neb. 336.
statutes designed for the information of assessors and officers, and intended to promote method, system, and uniformity in the modes of proceeding, a compliance or non-compliance with which does in no respect affect the rights of taxing citizens. These may be considered directory; officers may be liable to legal animadversion, perhaps to punishment, for not observing them; but yet their observance is not a condition precedent to the validity of the tax."

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

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

1 State v. Lehn, 9 Wis. 270, 292. See further, for the views of this court on the subject here discussed, Wendel v. Durbin, 26 Wis. 390. The general doctrine of the cases above quoted is approved and followed in French v. Edwards, 13 Wall. 506. In Law v. Dunham, 61 Me. 506, a statute is said to be mandatory where public interests or rights are concerned, and the public or third persons have a claim de jure that the power shall be exercised. And see Wiley v. Flournoy, 30 Ark. 609; State Auditor v. Jackson Co. 65 Ala. 142.
2 The following, in addition to those cited, are some of the cases in this country in which statutes have been declared directory only: Odiorne v. Rain, 59 N. H. 504; Pond v. Negus, 3 Mass. 230; Williams v. School District, 21 Pick. 75; City of Lowell v. Hadley, 8 Met. 180; Holland v. Osgood, 8 Vt. 276; Corliss v. Corliss, 8 Vt. 373; People v. Allen, 6 Wend. 486; Marchant v. Langworthy,
employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed. Even as thus laid down and restricted, the doctrine is one to be applied with much circumspection; for it is not to be denied that the courts have sometimes, in their anxiety to sustain the proceedings of careless or incompetent officers, gone very far in substituting a judicial view of what was essential for that declared by the legislature.\(^1\)

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

6 Hill, 616; *Ex parte* Heath, 3 Hill, 42; People *v.* Honey, 12 Wend. 481; Jackson *v.* Young, 6 Cow. 269; Striker *v.* Kelley, 7 Hill, 9; People *v.* Peck, 11 Wend. 601; Matter of Mohawk & Hudson Railroad Co., 10 Wend. 135; People *v.* Runkel, 9 Johns. 147; Gale *v.* Mead, 2 Denio, 169; Doughty *v.* Hope, 3 Denio, 219; Elmdorf *v.* Mayor, &c. of New York, 26 Wend. 692; Thames Manufacturing Co. *v.* Latthrop, 7 Conn. 560; Colt *v.* Eves, 12 Conn. 243; People *v.* Doc, 1 Mich. 461; Parks *v.* Goodwin, 1 Doug. (Mich.) 59; Hickey *v.* Hinsdale, 8 Mich. 267; People *v.* Hartwell, 12 Mich. 508; State *v.* McGinley, 4 Ind. 7; Stayton *v.* Hullings, 7 Ind. 144; New Orleans *v.* St. Rome, 9 La. Ann. 573; Edwards *v.* James, 13 Tex. 52; State *v.* Click, 2 Ala. 26; Savage *v.* Walshe, 26 Ala. 620; Sorehan *v.* Brooklyn, 62 N. Y. 339; People *v.* Tompkins, 64 N. Y. 58; Limestone Co. *v.* Rather, 48 Ala. 433; Webster *v.* French, 12 Ill. 302; McKune *v.* Weller, 11 Ga. 40; State *v.* Co. Commissioners of Baltimore, 29 Md. 610; Fry *v.* Booth, 19 Ohio St. 25; Whalin *v.* Mason, 76 Ill. 49; Hurford *v.* Omaha, 4 Neb. 339; Lackawanna Iron Co. *v.* Little Wolf, 38 Wis. 162; R. R. Co. *v.* Warren Co., 10 Bush, 711; Grant *v.* Spencer, 1 Mont. 135. The list might easily be largely increased.

\(^1\) See upon this subject the remarks of Mr. Sedgwick in his work on Statutory and Constitutional Law, p. 373, and those of Hubbard, J., in Briggs *v.* Georgia, 15 Vt. 61. Also see Dryfus *v.* Dridges, 16 Miss. 247.
modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication.

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

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

2 Wolcott v. Wigton, 7 Ind. 44; per Bronson, J., in People v. Purdy, 2 Hil, 31; Greenac Castle Township v. Black, 5 Ind. 566; Opinions of Judges, 18 Mo. 458. See People v. Lawrence, 36 Barb. 177; State v. Johnson, 26 Ark. 281; State v. Glenn, 18 Nev. 34, 1 Pac. 186. "The essential nature and object of constitutional law being restrictive upon the powers of the several departments of government, it is difficult to comprehend how its provisions can be regarded as merely directory." Nicholson, Ch. J., in Cannon v. Mathes, 8 Heisk. 504, 517. Unless expressly permissive, constitutional provisions are mandatory. Varney v. Justice, 86 Ky. 590, 0 S. W. 437. 3 People v. Supervisors of Chenango, 8 N. Y. 317.
include the authority in which the lawmaking power resides, or the number of votes a bill must receive to become a law. That the power to make law, is vested in the assembly alone, and that no act has any force that was not passed by the number of votes required by the constitution, are nearly, or quite, self-evident propositions. These essentials relate to the authority by which, rather than the mode in which, laws are to be made. Now to secure the careful exercise of this power, and for other good reasons, the constitution prescribes or recognizes certain things to be done in the enactment of laws, which things form a course or mode of legislative procedure. Thus we find, inter alia, the provision before quoted that every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending shall dispense with this rule. This is an important provision without doubt, but, nevertheless, there is much reason for saying that it is merely directory in its character, and that its observance by the assembly is secured by their sense of duty and official oaths, and not by any supervisory power of the courts. Any other construction, we incline to think, would lead to very absurd and alarming consequences. If it is in the power of every court (and if one has the power, every one has it) to inquire whether a bill that passed the assembly was 'fully' and 'distinctly' read three times in each house, and to hold it invalid if, upon any reading, a word was accidentally omitted, or the reading was indistinct, it would obviously be impossible to know what is the statute law of the State. Now the requisition that bills shall be fully and distinctly read is just as imperative as that requiring them to be read three times; and as both relate to the mode of procedure merely, it would be difficult to find any sufficient reason why a violation of one of them would be less fatal to an act than a violation of the other."

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

1 Miller v. State, 3 Ohio St. 475, 483. The provision for three readings on separate days does not apply to amendments made in the progress of the bill through the houses. People v. Wallace, 70 Ill. 660.

2 See People v. Campbell, 8 Ill. 460; McCullough v. State, 11 Ind. 421; Cannon v. Mathes, 8 Ill. 460; Spangler v. Jacoby, 14 Ill. 297; People v. Starne, 35 Ill. 121; Ryan v. Lynch, 68 Ill. 160.
capable of being, and has been, laid down, which can be literally obeyed; and the legislative body cannot suppose or adjudge it to have been done if the fact is otherwise. The requirement has an important purpose, in making legislators proceed in their action with caution and deliberation; and there cannot often be difficulty in ascertaining from the legislative records themselves if the constitution has been violated in this particular. There is, therefore, no inherent difficulty in the question being reached and passed upon by the courts in the ordinary mode, if it is decided that the constitution intends legislation shall be reached through the three readings, and not otherwise.

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

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

1 Pim v. Nicholson, 6 Ohio St. 176, 179. Those provisions which relate to the structure of a bill or the forms to be observed in its passage are generally directory, while those as to the number of members necessary to pass a bill and as to the effect and operation of a bill when passed, are usually mandatory. Ex parte Falk, 42 Ohio St. 638. But the authentication of an act must be by signature, and one which, though passed, is not signed nor enrolled is void. State v. Kiesewetter, 45 Ohio St. 254, 22 N. E. 897.

See also in line with Pim v. Nicholson, supra: Washington v. Page, 4 Cal. 388. In Hill v. Bayland, 40 Miss. 618, a provision requiring of all officers an oath to support the constitution was held not to invalidate the acts of officials who had neglected to take such an oath. And in McPherson v. Leonard, 29 Md. 377, the provision that the style of all laws shall be, "Be it enacted by the General Assembly of Maryland," was held directory. Similar rulings were made in Cape Girardeau v. Riley, 52 Mo. 424; St. Louis v. Foster, 52 Mo. 513; Swann v. Buck, 40 Miss. 298.

Directly the opposite has been held in Nevada. State v. Rogers, 10 Nev. 250. So a requirement that indictments shall conclude, "in favor of the peace and dignity of the people of West Virginia," was held in Lemons v. People, 4 W. Va. 756, 1 Green Cr. R. 556, to be mandatory, and an indictment which complied with it, except in abbreviating the name of the State, was held bad.

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

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

If a constitution provides "that when any bill is presented for an act of incorporation, it shall be continued until another election of members of Assembly shall have taken place and public notice of the pendency thereof given, it does not necessarily follow that the organization under the charter is not as to all practical purposes valid. The provision is directory to the Assembly, and in the absence of any clause forbidding the enactment, does not affect the corporations unless the State itself intervenes. Whitney v. Wyman, 101 U.S. 392, 397. The State may waive conditions, and so long as the State raises no objection it is immaterial to other parties whether it is a corporation de facto or de jure. Ibid." McClintch v. Sturgis, 72 Me. 288, 295.
ing similar provisions as mandatory, and to be enforced by the courts. And we concur fully in what was said by Mr. Justice Emmett in speaking of this very provision, that “it will be found upon full consideration to be difficult to treat any constitutional provision as merely directory and not imperative.” And with what was said by Mr. Justice Lumpkin, as to the duty of the courts: “It has been suggested that the prohibition in the seventeenth section of the first article of the Constitution, ‘Nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof,’ is directory only to the legislative and executive or law-making departments of the government. But we do not so understand it. On the contrary, we consider it as much a matter of judicial cognizance as any other provision in that instrument. If the courts would refuse to execute a law suspending the writ of habeas corpus when the public safety did not require it, a law violatory of the freedom of the press or trial by jury, neither would they enforce a statute which contained matter different from what was expressed in the title thereof.”

Self-executing Provisions.

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

1 People v. Lawrence, 36 Barb. 177, 186; [Muhix v. Mutual Ben. L. Ins. Co., 23 Col. 85, 46 Pac. 1114, 33 L. R. A. 827.]

2 Prothero v. Orr, 19 Ind. 36. See also Opinions of Judges, i. Me. 458; Indiana Central Railroad Co. v. Potts, 7 Ind. 681; People v. Starne, 35 Ill. 121; State v. Miller, 45 Mo. 495; Weaver v. Lapsley, 43 Ala. 224; Nougues v. Douglass, 7 Cal. 65; State v. McCann, 4 Lea. 1.

3 There are also many which merely contemplate the exercise of powers conferred, when the legislature in its discretion shall deem it wise; like the provision that “suits may be brought against the State in such courts as may be by law provided.” Ex parte State, 52 Ala. 231.
legislation is voluntarily enacted. Illustrations may be found in constitutional provisions requiring the legislature to provide by law uniform and just rules for the assessment and collection of taxes; these must lie dormant until the legislation is had; they do not displace the law previously in force, though the purpose may be manifest to do away with it by the legislation required. So, however plainly the constitution may recognize the right to appropriate private property for the general benefit, the appropriation cannot be made until the law has pointed out the cases, and given the means by which compensation may be assured.

A different illustration is afforded by the new amendments to the federal Constitution. The fifteenth amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." To this extent it is self-executing, and of its own force it abolishes all distinctions in suffrage based on the particulars enumerated. But when it further provides that "Congress shall have power to enforce this article by appropriate legislation," it indicates the possibility that the rule may not be found sufficiently comprehensive or particular to protect fully this right to equal suffrage, and that legislation may be found necessary for that purpose. Other provisions are completely self-executing,

1 School Board v. Patten, 62 Mo. 444. See Schulz v. Bordeaux, 64 Miss. 50, 8 So. 201; [State v. Spokane, 24 Wash. 53, 63 Pec. 1116.]
4 Lamb v. Lane, 4 Ohio St. 107. See School Board v. Patten, 62 Mo. 444; Myers v. English, 9 Cal. 341; Gillinwater v. Mississippi, &c. R. R. Co., 13 Ill. 1; Cairo, &c. R. R. Co. v. Trout, 32 Ark. 17.
A provision that all printing shall be done by the lowest bidder under regulations supplied by law is not self-executing. Brown v. Seay, 88 Ala. 122, 5 So. 216.
5 United States v. Reese, 92 U. S. 214. Any constitutional provision is self-executing to this extent, that everything done in violation of it is void. Brien v. Williamson, 8 Miss. 14; [Russell v. Ayer, 120 N. C. 150, 27 S. E. 153, 37 L. R. A. 246.] A provision that "the legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets in this State," was held to be of itself a prohibition of lotteries. Bass v. Nashville, Meigs, 421; Yerger v. Raines, 4 Humph. 259. In State v. Woodward, 89 Ind. 110, it was held that a like provision took away any pre-existing authority to carry them on, but that it needed legislation to make them criminal. All negative or prohibitive provisions in a constitution are self-executing. Law v. People, 87 Ill. 385.
[Where the constitution requires that all public institutions shall be located at the seat of government, the courts have power to determine whether a proposed insane asylum is a public institution, and, if it is found so to be, to enjoin its location elsewhere. State v. Metschon, 32 Oreg. 372, 46 Pac. 791, 41 L. R. A. 692, 63 Pac. 1071. Prohibition of donations...
and manifestly contemplate no legislation whatever to give them full force and operation.¹

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


(a) [The Constitution of the State of Kansas of 1859, art. 12, § 2, provides as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; . . ." The portion italicized is self-executing, and enters as a part of the contractual liability of every person who volun-
The provisions exempting homesteads from forced sale for the satisfaction of debts furnish many illustrations of self-executing provisions, and also of those which are not self-executing. Where, as in California, the constitution declares that "the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families," the dependence of the provision on subsequent legislative action is manifest. But where, as in some other States, the constitution defines the extent, in acres or amount, that shall be deemed to constitute a homestead, and expressly exempts from any forced sale what is thus defined, a rule is prescribed which is capable of enforcement. Perhaps even in such cases, legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it. The provision of a constitution which defines a homestead and exempts it from forced sale is self-executing, at least to this extent, that, though it may admit of supplementary legislation in particulars where in itself it is not as complete as may be desirable, it will override and nullify whatever legislation, either prior or subsequent, would defeat or limit the homestead which is thus defined and secured.

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

familiarly becomes a stockholder in any corporation (except railroad, charitable, and religious corporations, expressly excepted in later part of above section) created under the laws of Kansas. Whitman v. National Bank of Oxford, 176 U. S. 559, 20 Sup. Ct. Rep. 477, aff. 76 Fed. Rep. 697, and 51 U. S. App. 636, 88 Fed. Rep. 288, 28 C. C. A. 494. But see Woodworth v. Bowles, 61 Kan. 599, 60 Pac. 391, in which it is said that the use of the future tense "shall be secured" indicates that the constitutional clause above given is not self-executing. The "double liability clause" of the Minnesota Constitution, which provides that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him" is held to create ex proprio vigore an individual liability on the part of each stockholder. Willis v. Mabon, 48 Minn. 140, sub nom. Willis v. St. Paul Sanitation Co., 60 N. W. 1110, 16 L. R. A. 281, 31 Am. St. 626. So too no supplementary legislation is needed to make effective the provision of the Nebraska Constitution declaring that "every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its "liabilities accruing while he remains such stockholder." Farmers' Loan and T. Co. v. Funk, 49 Neb. 322, 68 N. W. 520. In this connection, see note appended to 44 L. ed. U. S. 688, and another on self-executing constitutional provisions in 10 L. R. A. 281.]
dwell upon those arbitrary rules to which so much attention is sometimes given, and which savor rather of the closet than of practical life. Our observation would lead us to the conclusion that they are more often resorted to as aids in ingenious attempts to make the constitution seem to say what it does not, than with a view to make that instrument express its real intent. All external aids, and especially all arbitrary rules, applied to instruments of this popular character, are of very uncertain value; and we do not regard it as out of place to repeat here what we have had occasion already to say in the course of this chapter, that they are to be made use of with hesitation, and only with much circumspection.  

1 See People v. Cowles, 13 N. Y. 350, per Johnson, J.; Temple v. Mead, 4 Vt. 636, 540, per Williams, J.; People v. Fancher, 50 N. Y. 291. "In construing so important an instrument as a constitution, especially those parts which affect the vital principle of a republican government, the elective franchise, or the manner of exercising it, we are not, on the one hand, to indulge ingenious speculations which may lead us wide from the true sense and spirit of the instrument, nor, on the other, to apply to it such narrow and constrained views as may exclude the real object and intent of those who framed it. We are to suppose that the authors of such an instrument had a thorough knowledge of the force and extent of the words they employ; that they had a beneficial end and purpose in view; and that, more especially in any apparent restriction upon the mode of exercising the right of suffrage, there was some existing or anticipated evil which it was their purpose to avoid. If an enlarged sense of any particular form of expression should be necessary to accomplish so great an object as a convenient exercise of the fundamental privilege or right,—that of election,—such sense must be attributed. We are to suppose that those who were delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to the establishment of the rules for the perpetual security of the rights of person and property, had the wisdom to adapt their language to future as well as existing emergencies, so that words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce. Quid habet in litera habet in cortice is a familiar maxim of the law. The letter killeteth, but the spirit maketh alive, is the more forcible expression of Scripture." Parker, Ch. J., in Henshaw v. Foster, 9 Pick. 312, 316. There are some very pertinent and forcible remarks by Mr. Justice Miller on this general subject in Woodson v. Murdock, 22 Wall. 351, 381.