CHAPTER V.

OF THE POWERS WHICH THE LEGISLATIVE DEPARTMENT MAY EXERCISE.

In considering the powers which may be exercised by the legislative department of one of the American States, it is natural that we should recur to those possessed by the Parliament of Great Britain, after which, in a measure, the American legislatures have been modelled, and from which we derive our legislative usages and customs, or parliamentary common law, as well as the precedents by which the exercise of legislative power in this country has been governed. It is natural, also, that we should incline to measure the power of the legislative department in America by the power of the like department in Britain; and to concede without reflection that whatever the legislature of the country from which we derive our laws can do, may also be done by the department created for the exercise of legislative authority in this country. But to guard against being misled by a comparison between the two, we must bear in mind the important distinction already pointed out, that with the Parliament rests practically the sovereignty of the country, so that it may exercise all the powers of the government if it wills so to do; while on the other hand the legislatures of the American States are not the sovereign authority, and, though vested with the exercise of one branch of the sovereignty, they are nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms, and others by implications which are equally imperative.

"The power and jurisdiction of Parliament, says Sir Edward Coke,¹ is so transcendent and absolute, that it cannot be confined, either for persons or causes, within any bounds. And of this high court it may truly be said: 'Si antiquitatem specetes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.' It hath sovereign and uncontrolled authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or

¹ 4 Inst. 36.
temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the Crown, as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land, as was done in a variety of instances, in the reigns of King Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of Parliaments themselves, as was done by the Act of Union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth, no authority upon earth can undo; so that it is a matter most essential to the liberties of this kingdom that such members be delegated to this important trust as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apothegm of the great Lord Treasurer, Burleigh, 'that England could never be ruined but by a Parliament;' and as Sir Matthew Hale observes: 'This being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should anyway fall upon it, the subjects of this kingdom are left without all manner of remedy.'

The strong language in which the complete jurisdiction of Parliament is here described is certainly inapplicable to any authority in the American States, unless it be to the people of the States when met in their primary capacity for the formation.

1 Bl. Com. 160; Austin on Jurisprudence, Lec. 6; Fischel on English Constitution, b. 7, ch. 7. The British legislature is above the constitution, and moulds and modifies it at discretion as public exigencies and the needs of the time may require. But in the American system such a thing as unlimited power is unknown. Loan Association v. Topeka, 20 Wall. 655, 663; Campbell's Case, 2 Bland Ch. 299, 20 Am. Dec. 360; [Missouri Pac. R. Co. v. Nebraska, Ed of Transp., 164 U. S. 403, 17 Sup. Ct. Rep. 130.] Every American legislature is the creature of the constitution, and strictly subordinate to it. It may participate in making changes as the constitution itself may provide, but not otherwise, and constitutional principles which the British Parliament will deal with as shall seem needful are inflexible laws in America until the people, under the forms provided for constitutional amendments, see fit to change them. Such radical changes, for example, as recently have been made in the Irish land laws, and such forced modification in contracts, would be impossible in the United States without a change in both Federal and State constitutions.
of their fundamental law; and even then there rest upon them the restraints of the Constitution of the United States, which bind them as absolutely as they do the governments which they create. It becomes important, therefore, to ascertain in what respect the State legislatures resemble the Parliament in the powers they exercise, and how far we may extend the comparison without losing sight of the fundamental ideas and principles of the American system.

The first and most notable difference is that to which we have already alluded, and which springs from the different theory on which the British Constitution rests. So long as the Parliament is recognized as rightfully exercising the sovereign authority of the country, it is evident that the resemblance between it and American legislatures in regard to their ultimate powers cannot be traced very far. The American legislatures only exercise a certain portion of the sovereign power. The sovereignty is in the people;¹ and the legislatures which they have created are only to discharge a trust of which they have been made a depositary, but which has been placed in their hands with well-defined restrictions.

Upon this difference it is to be observed, that while Parliament, to any extent it may choose, may exercise judicial authority, one of the most noticeable features in American constitutional law is the care which has been taken to separate legislative, executive, and judicial functions. It has evidently been the intention of the people in every State that the exercise of each should rest with a separate department. The different classes of power have been apportioned to different departments; and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others.

There are two fundamental rules by which we may measure the extent of the legislative authority in the States:—

1. In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion.

¹ Ante, p. 114.
2. But the apportionment to this department of legislative power does not sanction the exercise of executive or judicial functions, except in those cases, warranted by parliamentary usage, where they are incidental, necessary, or proper to the exercise of legislative authority, or where the constitution itself, in specified cases, may expressly permit it. Executive power is so intimately connected with legislative, that it is not easy to draw a line of separation; but the grant of the judicial power to the department created for the purpose of exercising it must be regarded as an exclusive grant, covering the whole power, subject only to the limitations which the constitutions impose, and to the incidental exceptions before referred to. While, therefore, the American legislatures may exercise the legislative powers which the Parliament of Great Britain wields, except as restrictions are imposed, they are at the same time excluded from other functions which may be, and sometimes habitually are, exercised by the Parliament.

"The people in framing the constitution," says Denio, Ch. J., "committed to the legislature the whole lawmaking power of the State, which they did not expressly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. I do not mean that the power must be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument. The first article lays down the ancient limitations which have always been considered essential in a constitutional government, whether monarchial or popular; and there are scattered through the instrument a few other provisions in restraint of legislative authority. But the affirmative prescriptions and the general arrangements of the constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame

1 See post, pp. 131-162, 531, 532. [And even where the power is legislative, if the Constitution has limited its exercise to certain times, the attempt to exercise it at other times is necessarily void. Harmon v. Ballot Com'rs of Jefferson Co., 45 W. Va. 179, 81 S. E. 394, 42 L. R. A. 591; Denney v. State, 144 Ind. 508, 42 N. E. 929, 31 L. R. A. 726. A statute attempting to confer upon a State board authority to adjudge priorities of claimants to the use of public waters is held not to be unconstitutional as conferring judicial power in Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 87 Am. St. 918.]

2 See post, p. 129, note.
of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance; but independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the legislature.”

“It has never been questioned, so far as I know,” says Redfield, Ch. J., “that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American States. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular State in question.”

“I entertain no doubt,” says Comstock, J., “that, aside from the special limitations of the constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. These are, by the constitution, distributed to other departments of the government. It is only the ‘legislative power’ which is vested in the senate and assembly. But where the constitution is silent, and there is no clear usurpation of the powers distributed to other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power. Chief Justice Marshall said: ‘How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.’

1 People v. Draper, 15 N. Y. 532, 543.
3 Fletcher v. Peck, 6 Cranch, 87, 136.
felt the difficulty; but the danger was less apparent than it is now, when theories, alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men, and when too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed. I am reluctant to enter upon this field of inquiry, satisfied, as I am, that no rule can be laid down in terms which may not contain the germ of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of government."  

Other judicial opinions in great number might be cited in support of the same general doctrine; but as there will be occasion to refer to them elsewhere when the circumstances under which a statute may be declared unconstitutional are considered, we refrain from further references in this place.² Nor shall we enter upon a discussion of the question suggested by Chief Justice Marshall, as above quoted;³ since, however interesting it

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¹ Wychehamer v. People, 13 N. Y. 378, 391.
² See post, p. 237, and cases cited in notes.
³ The power to distribute the judicial power, except so far as that has been done by the Constitution, rests with the legislature: Commonwealth v. Hippie, 60 Pa. St. 9; State v. New Brunswick, 42 N. J. 51; State v. Brown, 71 Mo. 454; Jackson v. Nimmo, 3 Lea, 608; see Burke v. St. Paul, M. &c. Ry. Co., 23 Minn. 172, 28 N. W. 190; St. Paul v. Unstedter, 27 Minn. 15, 33 N. W. 115; but when the Constitution has conferred it upon certain specified courts, this must be understood to embrace the whole judicial power, and the legislature cannot vest any portion of it elsewhere. Greenough v. Greenough, 11 Pa. St. 489; State v. Maynard, 14 Ill. 420; Gibson v. Emerson, 7 Ark. 172; Chandler v. Nash, 5 Mich. 409; Succession of Tanner, 22 La. Ann. 50; Gough v. Dorsey, 27 Wis. 119; Van Slyke v. Ins. Co., 39 Wis. 390, 20 Am. Rep. 50; Alexander v. Bennett, 60 N. Y. 291; People v. Young, 72 Ill. 411; In re Cleveland, 51 N. J. L. 311, 17 Atl. 772; Risser v. Hoyt, 63 Mich. 185, 18 N. W. 611; Shonitz v. McPheeeters, 79 Ind. 373. (And when the Constitution gives the court appellate jurisdiction only, except in certain specified cases, the legislature cannot enlarge the original jurisdiction of the court. Klein v. Valerius, 87 Wis. 54, 67 N. W. 1112, 22 L. R. A. 609. Nor can the legislature redistribute the judicial power. Brown v. Circuit Judge, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 228, 13 Am. St. 438; Watson v. Blackstone, 98 Va. 618, 38 S. E. 939. Cannot confer the power of the court upon a single judge thereof. State v. Woolson, 101 Mo. 444, 61 S. W. 252. Congress may provide that the determination by the treasury department of whether an alien is entitled to land shall be final. Nishimura Ekin v. U. S., 142 U. S. 651, 12 Sup. Ct. Rep. 396.) The legislature cannot select persons to assist courts in the performance of their duties and act as a commission of appeal. State v. Noble, 118 Ind. 550, 21 N. E. 244; In re Courts of Appeals, 9 Col. 623, 21 Pac. 471. Courts established by the legislature cannot exercise jurisdiction to the exclusion of that conferred by the Constitution on other courts. Montross v. State, 61 Miss. 426. See State v. Butt, 25 Fla. 258, 5 So. 597. But a general provision in the Constitution for the distribution of the judicial power, not referring to courts-martial, would not be held to forbid such courts by implication. People
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may be as an abstract question, it is made practically unimport-
tant by the careful separation of powers and duties between the

v. Daniell, 60 N. Y. 274. Nor would it be held to embrace administrative functions of a quasi judicial nature, such as the as-
essessment of property for taxation. State v. Commissioners of Ormsby County, 7 Nov. 392, and cases cited. See Auditor of State v. Atchison, &c. R. R. Co., 6 Kan. 500, 7 Am. Rep. 575. But a court may determine whether a proposed local im-
provement shall be undertaken. Bryant v. Robbins, 70 Wis. 258, 35 N. W. 545.

[A judge of a superior court cannot be required or empowered to pass upon and modify or approve a plan for the location of a street railway. Norwalk Street R. Co.'s Appeal, 60 Conn. 576, 37 Atl. 1080, 30 L. R. A. 794; nor a court to determine how a telegraph or telephone company may use the streets of a city. Zanesville v. Zanesville T. & Tel. Co., 63 Ohio, 442, 59 N. E. 100 (Oct. 16, 1900); New York & N. Y. Tel. Co. v. Mayor of Bound B'tw., 86 N. J. L. 108, 48 Atl. 1022. County board cannot determine which rooms in court house shall be occupied by certain judges. Dahnke v. People, 108 Ill. 102, 48 N. E. 137, 30 L. R. A. 197.]

Court during its session has full control over that portion of court house necessary to the convenient transaction of its business. Vigo County v. Stout, 136 Ind. 55, 35 N. E. 683, 22 L. R. A. 978, and note; and may order repairs to court house, although it cannot order the erec-
tion of additions thereto or the rebuilding thereof. White County v. Gwin, 136 Ind. 592, 38 N. E. 237, 22 L. R. A. 402. It is not competent to confer upon the courts the power to tax: Monday v. Rahway, 43 N. J. 338; nor to impose on them admin-
istration duties. Houseman v. Kent Circ. Judge, 68 Mich. 364, 25 N. W. 309. But after thirty-five years of exercise of such power under a statute, it is too late to object. Locke v. Speed, 62 Mich. 408, 28 N. W. 917. [The legislature cannot create a "court of visitation" for the control of corporations and endow it with executive, legislative, and judicial powers. State v. Johnson, 61 Kan. 893, 60 Pac. 1005, 49 L. R. A. 602. Nor can it constitute a board of State auditors, which is a purely executive board, a court of review to pass upon the rightfulness of a convic-
tion of crime, and in case conviction be found wrongful to allow damages for the imprisonment consequent thereupon. Allen v. Board of State Auditors, 122 Mich. 324, 81 N. W. 113, 47 L. R. A. 117, 80 Am. St. 573.] The power to appoint election commissioners not having been expressly conferred on any department, the legisla-
ture may impose the duty of appointment on the county court. People v. Hoffman, 110 Ill. 587, 5 N. E. 596, 8 N. E. 788.

Such appointments are upheld in In re Citizens of Cincinnati, 2 Flipp. 228; Russell v. Cooley, 69 Ga. 215. But in Supervisors of Election, 114 Mass. 247, 19 Am. Rep. 341, a contrary doctrine is laid down. A chief justice cannot be empow-
ered to determine which claimant of an office shall hold it pending a contest. Such power, if executive, cannot be given a judge; if judicial, belongs to a court. In re Cleveland, 51 N. J. L. 311, 17 Atl. 772. The legislature cannot require a court to give its opinions in writing: Vaughn v. Harp, 49 Ark. 100, 4 S. W. 751; nor to write syllabi to its decisions. In re Griffiths, 118 Ind. 63, 20 N. E. 613. [It is held in Illinois that the legislature cannot interfere with the power of the courts to regulate the licensing of attorneys. Re Day, 181 Ill. 73, 54 N. E. 646, 60 L. R. A. 619. See also Re Leach, 184 Ind. 665, 34 N. E. 641, 21 L. R. A. 701. The legislature cannot define what shall be considered a contempt of court. Bradley v. State, 111 Ga. 108, 36 S. E. 630, 60 L. R. A. 601, 78 Am. St. 157; Hale v. State, 55 Ohio St. 210, 46 N. E. 190, 30 L. R. A. 254, and note, 60 Am. St. 691. On the other hand, a court has no power to enjoin a legislative body. State v. Superior Court of Milwaukee Co., 105 Wis. 651, 81 N. W. 1048, 48 L. R. A. 810. But see Roberts v. Louisville, 92 Ky. 66, 17 S. W. 216, 13 L. R. A. 844, and note. Nor has a court power to deter-
mine whether or not a senator of the State legislature whose term has not yet expired, has disqualified himself from further acting as senator. Covington v. Buffett, 90 Md. 569, 45 Atl. 204, 47 L. R. A. 622. Not to establish rules and regu-
lations for the extension of telephone lines. Michigan Tel. Co. v. St. Joseph,
several departments of the government which has been made by each of the State constitutions. Had no such separation been made, the disposal of executive and judicial duties must have devolved upon the department vested with the general authority to make laws; 1 but assuming them to be apportioned already, we are only at liberty to liken the power of the State legislature to that of the Parliament, when it confines its action to an exercise of legislative functions; and such authority as is in its nature either executive or judicial is beyond its constitutional powers, with the few exceptions to which we have already referred.

It will be important therefore to consider those cases where legislation has been questioned as encroaching upon judicial authority; and to this end it may be useful, at the outset, to endeavor to define legislative and judicial power respectively, that we may the better be enabled to point out the proper line of distinction when questions arise in their practical application to actual cases.

The legislative power we understand to be the authority, under the Constitution, to make laws, and to alter and repeal them. Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has prescribed. "The laws of a State," observes Mr. Justice Story, "are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws." 2 "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary


Where the legislature is authorized to regulate the method of procedure in "Courts below the Supreme Court" it has no power over procedure in the Supreme Court. Herndon v. Imperial Fire Ins. Co., 111 N. C. 984, 16 S. E. 465, 18 L. R. A. 547. The legislature can direct a court to appoint certain commissioners and confer upon the commissioners so to be appointed the power to apportion among several cities and towns the cost of a system of sewerage without prescribing any further direction for such apportionment than that it shall be just and equitable. Re Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417. The legislature cannot validate warrants issued under an unconstitutional law. Felix v. Wallace Co. Com'r., 62 Kan. 852, 02 Pac. 667, 84 Am. St. 424. Congress may provide that inspectors of customs may finally determine whether immigrants are entitled to land. Nishinuma Ektu v. United States, 142 U. S. 651, 12 Sup. Ct. Rep. 336.]

1 Calder v. Bull, 2 Root, 250, and 3 Dall. 580; Ross v. Whitman, 6 Cal. 361; Smith v. Judge, 17 Cal. 547; per Patterson, J., in Cooper v. Telfair, 4 Dall. 19; Martin v. Hunter's Lessee, 1 Wheat. 304.

2 Swift v. Tyson, 16 Pet. 18.
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construes the law." 1 And it is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions. 2 And in another case it is said: "The legislative power extends only to the making of laws, and in its exercise it is limited and restrained by the paramount authority of the federal and State constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative." 3 "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government." 4

On the other hand, to adjudicate upon, and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department. 5 "No particular definition of judicial power," says

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2 Bates v. Kimball, 2 Chip. 77. A prospective determination by a court of the validity of school rules, compiled under legislative authority, is not an exercise of judicial power. In re School Law Manual, 63 N. H. 574, 4 Atl. 878. Power to supersede an ordinance upon petition of taxpayers as contrary to law cannot be conferred upon a court: Shephard v. Wheeling, 80 W. Va. 479, 1 S. E. 635; nor to fix the salary of a reporter in advance: Smith v. Strother, 68 Cal. 194, 8 Pac. 852; nor to make upon its own whim a party a competent witness who otherwise would not be. Tillman v. Cocke, 9 Bax. 429.

3 Newland v. Marsh, 19 Ill. 388.


5 Cincinnati, &c. Railroad Co. v. Commissioners of Clinton Co., 1 Ohio St. 77. See also King v. Dedham Bank, 15 Mass. 447; Gordon v. Ingraham, 1 Grant's Cases, 152; People v. Supervisors of New York, 16 N. Y. 426; Beebe v. State, 6 Ind. 501; Greenough v. Greenough, 11 Pa. St. 489; Taylor v. Place, 4 R. I. 524. [It is also a part of the function of the judiciary to determine whether a proposed constitutional amendment has been in fact adopted under the forms prescribed for such case by the constitution, and the legislative declaration that it has been so adopted is null. State v. Powell, 77 Miss. 543, 27 So. 927, 48 L. R. A. 552. But see Worman v. Hagan, 78 Md. 152, 47 Atl. 610, 21 L. R. A. 716, to effect that governor's proclamation of adoption is conclusive. It is also a proper function of a court to require proper authorities to prescribe rules and regulations for extension of telephone lines, and to pass upon the validity of such rules when properly brought in question. Mich. Tel. Co. v. St. Joseph, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. 520.]
Woodbury, J., "is given in the constitution [of New Hampshire], and, considering the general nature of the instrument, none was to be expected. Critical statements of the meanings in which all important words were employed would have swollen into volumes; and when those words possessed a customary signification, a definition of them would have been useless. But 'powers judicial,' 'judiciary powers,' and 'judicatories' are all phrases used in the constitution; and though not particularly defined, are still so used to designate with clearness that department of government which it was intended should interpret and administer the laws. On general principles, therefore, those inquiries, deliberations, orders, and decrees, which are peculiar to such a department, must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore, — to compare the claims of parties with the law of the land before established, — is in its nature a judicial act. But to do the last — to pass new rules for the regulation of new controversies — is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law as 'a rule of civil conduct;' ¹ because no rule

¹ 1 Bl. Com. 44. The distinction between legislative and judicial power lies between a rule and a sentence. Shrader, *Ex parte*, 33 Cal. 279. See Shumway v. Bennett, 29 Mich. 451; Supervisors of Election, 114 Mass 247. The legislature cannot empower election boards to decide whether one by dwelling has forfeited his right to vote or hold office. Commonwealth v. Jones, 10 Bush, 725; Burckett v. McCurry, 10 Bush, 758. But a board may be empowered to recount votes and make a statement of results. If they have no power to investigate frauds, they do not exercise judicial power. Andrews v. Carney, 74 Mich. 278, 41 N. W. 923. Under a constitutional provision allowing the legislature to provide for removal of an election officer for such cause as it deems proper, the power to determine whether the cause exists need not be vested in the courts. People v. Stuart, 74 Mich. 411, 41 N. W. 1091. See Brown v. Duffus, 66 Iowa, 193, 23 N. W. 396. It is not an infringement of judicial power to enact that a jury shall assess the punishment in a murder case. State v. Hockett, 70 Iowa, 442, 30 N. W. 742; nor that persons sentenced to jail may be employed on roads by county commissioners, under regulations to be made by them. Holland v. State, 23 Fla. 128, 1 So. 521.

But it is an invasion of judicial power to provide that in case of doubt a statute shall be construed so as to save a lien given by it. Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513. Power to declare what acts shall be a misdemeanor cannot be conferred on commissioners of vine culture. *Ex parte* Cox, 63 Cal. 21. A county clerk cannot fix the amount of bail. Gregory v. State, 94 Ind. 384.
f conduct can with consistency operate upon what occurred before the rule itself was promulgated.

"It is the province of judicial power, also, to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and to make laws for the benefit and welfare of the State. Nor does the passage of private statutes conflict with these principles; because such statutes, when lawful, are enacted on petition, or by the consent of all concerned; or else they forbear to interfere with past transactions and vested rights." 1

With these definitions and explanations, we shall now proceed to consider some of the cases in which the courts have attempted to draw the line of distinction between the proper functions of the legislative and judicial departments, in cases where it has been claimed that the legislature have exceeded their power by invading the domain of judicial authority.

**Declaratory Statutes.**

Legislation is either introductory of new rules, or it is declaratory of existing rules. "A declaratory statute is one which is passed in order to put an end to a doubt as to what is the com-

1 Failure of a railroad commissioner to require a railway company to station a flagman at a given crossing cannot be made conclusive proof that the omission to station such flagman is not negligence. Grand Trunk R. Co. v. Ives, 144 U. S. 498, 12 Sup. Ct. Rep. 670. An administrative board may be empowered to adjudicate upon priorities of water-rights and to make independent investigations in regard thereto and to declare its findings, provided parties interested in such adjudications are allowed by the statute a reasonable opportunity to appeal therefrom to the regular courts. Farm Investment Company v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747. A ministerial officer may be empowered to investigate land titles, and his findings may be made prima facie evidence. People v. Simon, 176 Ill. 165, 52 N. E. 910, 41 L. R. A. 801, 68 Am. St. 176; for other cases on Torrens Land Registration Acts, see People v. Chase, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105, and State v. Guilbert, 50 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 510, 60 Am. St. 756; also Tyler v. Court of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

The courts have jurisdiction to pass upon the claims of rival bodies to be the State senate, and to determine which, if either, is the constitutional senate. Attorney-General v. Rogers, 50 N. J. L. 480, 23 Atl. 726, 19 Atl. 173, 23 L. R. A. 354.]

1 Merrill v. Sherburne, 1 N. H. 109, 203. See Jones v. Perry, 10 Yerg. 69; Taylor v. Porter, 4 Hill, 140; Ogden v. Blackledge, 2 Cranch, 272; Dash v. Van Kleek, 7 Johns. 477; Wilkinson v. Leland, 2 Pet. 627; Leland v. Wilkinson, 10 Pet. 294; State v. Hopper, 71 Mo. 425. [A statute creating a commission to review a tax assessment to be appointed by the circuit judge of the county is not invalid as vesting judicial power in the commission in the sense in which that term is used in the constitution of Wisconsin. The term as there used has reference alone to judicial power as exercised in the administration of the law in actions and proceedings in courts of law and equity. State ex rel. Ellis v. Thorne, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956.]
mon law, or the meaning of another statute, and which declares what it is and ever has been."¹ Such a statute, therefore, is always in a certain sense retrospective; because it assumes to determine what the law was before it was passed; and as a declaratory statute is important only in those cases where doubts have already arisen, the statute, when passed, may be found to declare the law to be different from what it has already been adjudged to be by the courts. Thus Mr. Fox's Libel Act declared that, by the law of England, juries were judges of the law in prosecutions for libel; it did not purport to introduce a new rule, but to declare a rule already and always in force. Yet previous to the passage of this act the courts had repeatedly held that the jury in these cases were only to pass upon the fact of publication and the truth of the innuendoes; and whether the publication was libellous or not was a question of law which addressed itself exclusively to the court. It would appear, therefore, that the legislature declared the law to be what the courts had declared it was not. So in the State of New York, after the courts had held that insurance companies were taxable to a certain extent under an existing statute, the legislature passed another act, declaring that such companies were only taxable at a certain other rate; and it was thereby declared that such was the intention and true construction of the original statute.² In these cases it will be perceived that the courts, in the due exercise of their authority as interpreters of the laws, have declared what the rule established by the common law or by statute is, and that the legislature has then interposed, put its own construction upon the existing law, and in effect declared the judicial interpretation to be unfounded and unwarrantable. The courts in these cases have clearly kept within the proper limits of their jurisdiction, and if they have erred, the error has been one of judgment only, and has not extended to usurpation of power. Was the legislature also within the limits of its authority when it passed the declaratory statute?

The decision of this question must depend perhaps upon the purpose which was in the mind of the legislature in passing the declaratory statute; whether the design was to give to the rule now declared a retrospective operation, or, on the other hand, merely to establish a construction of the doubtful law for the determination of cases that may arise in the future. It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases, it is

no objection to its validity that it assumes the law to have been in the past what it is now declared to that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts.

1 Union Iron Co. v. Pierce, 4 Biss. 327.

2 In several different cases the courts of Pennsylvania had decided that a testator's mark to his name, at the foot of testamentary paper, but without proof that the name was written by his express direction, was not the signature required by the statute, and the legislature, to use the language of Chief Justice Gibson, "declared, in order to overrule it, that every last will and testament heretofore made, or heretofore to be made, except such as may have been fully adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross, shall be deemed and taken to be valid. How this mandate to the courts to establish a particular interpretation of a particular statute can be taken for anything else than an exercise of judicial power in settling a question of interpretation, I know not. The judiciary had certainly recognized a legislative interpretation of a statute before it had itself acted, and consequently before a purchaser could be misled by its judgment; but he might have paid for a title on the unmistakable meaning of plain words; and for the legislature subsequently to distort or pervert it, and to enact that white meant black, or that black meant white, would in the same degree be an exercise of arbitrary and unconstitutional power." Greenough v. Greenough, 11 Pa. St. 489, 494. The act in this case was held void so far as its operation was retrospective, but valid as to future cases. And see James v. Rowland, 42 Md. 492; Reiser v. Tell Association, 39 Pa. St. 137. The constitution of Georgia entitled the head of a family to enter a homestead, and the courts decided that a single person, having no others dependent upon him, could not be regarded the head of a family, though keeping house with servants. Afterwards, the legislature passed an act, declaring that any single person living habitually as housekeeper to himself should be regarded as the head of a family. Held void as an exercise of judicial power. Calhoun v. McLendon, 42 Ga. 405. The fact that the courts had previously given a construction to the law may show more clearly a purpose in the legislature to exercise judicial authority, but it would not be essential to that end. As is well said in Haley v. Philadelphia, 68 Pa. St. 45, 47: "It would be monstrous to maintain that where the words and intention of an act were so plain that no court had ever been appealed to for the purpose of declaring their meaning, it was therefore in the power of the legislature, by a retrospective law, to put a construction upon them contrary to the obvious letter and spirit. Reiser v. William Tell Fund Association, 39 Pa. St. 137, is an authority in point against such a doctrine. An expository act of assembly is destitute of retroactive force, because it is an act of judicial power, and is in contravention of the ninth section of the ninth article of the Constitution, which declares that no man can be deprived of his property unless 'by the judgment of his peers or the law of the land.' See 8 Am. Rep. 155, 156. And on the force and effect of declaratory laws in general, see Salters v. Tobias, 3 Paige, 338; Postmaster-General v. Early, 12 Wheat. 136; Union Iron Co. v. Pierce, 4 Biss. 327; Planters' Bank v. Black, 19 Miss. 48; Gough v. Pratt, 9 Md. 529; McNichol v. U. S., &c. Agency, 74 Mo. 457; Titusville Iron Works v. Keystone Oil Co., 122 Pa. St. 627, 15 Atl. 917; Steb-
As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force.

"To declare what the law is, or has been is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial." 1

If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but according to the legislative judgment. 2

But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous, and suitable that could have been adopted.

If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, 3 ordering the discharge of offend-
ers, or directing what particular steps shall be taken in the progress of a judicial inquiry. And as a court must act as an

175: Mayor, &c. v. Horn, 26 Md. 194; Weaver v. Lapsley, 43 Ala. 224; Sanders v. Cabaniss, 43 Ala. 173; Moser v. White, 29 Mich. 59; Sydnor v. Palmer, 32 Wis. 406; People v. Friebie, 26 Cal. 135; Lawson v. Jeffries, 47 Miss. 689, 12 Am. Rep. 342; Ratcliffe v. Anderson, 31 Grat. 105, 31 Am. Rep. 716. And see post, pp. 557-561, and notes. It is not competent by legislation to authorize the court of final resort to reopen and rehear cases previously decided. Dorsey v. Dorsey, 37 Md. 64, 11 Am. Rep. 528. The legislature may control remedies, &c., but, when the matter has proceeded to judgment, it has passed beyond legislative control. Oliver v. McClure, 23 Ark. 555; Griffin's Executor v. Cunningham, 20 Grat. 31; Teel v. Yancey, 23 Grat. 640; Hooker v. Hooker, 18 Miss. 699. After an appeal bond was signed by the attorney, the court held bonds so signed bad. A statute validating all prior bonds so signed is void. Andrews v. Benne, 15 R. I. 461, 8 Atl. 510.

1 In State v. Fleming, 7 Humph. 162, a legislative resolve that "no fine, forfeiture, or imprisonment should be imposed or recovered under the act of 1857 [then in force], and that all causes pending in any of the courts for such offence should be dismissed," was held void as an invasion of judicial authority. The legislature cannot declare a forfeiture of a right to act as curators of a college. State v. Adams, 44 Mo. 570. Nor can it authorize the governor or any other State officer to pass upon the validity of State grants and correct errors therein; this being judicial. Hilliard v. Connolly, 7 Ga. 172. Nor, where a corporate charter provides that it shall not be repealed "unless it shall be made to appear to the legislature that there has been a violation by the company of some of its provisions," can there be a repeal before a judicial inquiry into the violation. Flint, &c. Plank Road Co. v. Woodhull, 25 Mich. 99. A legislative act cannot turn divorce nisi into absolute divorce, of its own force. Sparhawk v. Sparhawk, 116 Mass. 315. But to take away by statute a statutory right of appeal is not an exercise of judicial authority. Ex parte McCordale, 7 Wall. 500.

And it has been held that a statute allowing an appeal in a particular case was valid. Prout v. Berry, 2 Gill, 147; State v. Northern Central R. R. Co., 18 Md. 193. A retroactive statute, giving the right of appeal in cases in which it had previously been lost by lapse of time, was sustained in Page v. Mathews's Adm'r, 40 Ala. 547. But in Carleton v. Goodwin's Ex'r, 41 Ala. 153, an act the effect of which would have been to revive discontinued appeals, was held void as an exercise of judicial authority. See cases cited in next note.

1 Opinions of Judges on the Dorr Case, 3 R. I. 299; State v. Hopper, 71 Mo. 425. In the case of Piequet, Appellant, 5 Pick. 64, the judge of probate had ordered letters of administration to issue to an applicant therefor, on his giving bond in the penal sum of $50,000, with sureties within the Commonwealth, for the faithful performance of his duties. He was unable to give the bond, and applied to the legislature for relief. Thereupon a resolve was passed "empowering the judge of probate to grant the letters of administration, provided the petitioner should give bond with his brother, a resident of Paris, France, as surety, and that such bond should be in lieu of any and all bond or bonds by any law or statute in this Commonwealth now in force required," &c. The judge of probate refused to grant the letters on the terms specified in this resolve, and the Supreme Court, while holding that it was not compulsory upon him, also declared their opinion that, if it were so, it would be ineopertive and void. In Bradford v. Brooks, 2 Alb. 284, it was decided that the legislature had no power to revive a commission for proving claims against an estate after it had once expired. See also Ragg's Appeal, 43 Pa. St. 512; Trustees v. Bailey, 10 Fla. 288. In Hill v. Sunderland, 3 VT. 607, and Burch v. Newberry, 10 N. Y. 374, it was held that the legislature had no power to grant to parties a right to appeal after it was gone under the general law. In Burt v. Williams, 24 Ark. 91, it was held that the granting of continuances of pending cases was the exercise of judicial authority, and a legislative act assuming to do this was void. And where, by the general law,
organized body of judges, and, where differences of opinion arise, they can only decide by majorities, it has been held that it would not be in the power of the legislature to provide that, in certain contingencies, the opinion of the minority of a court, vested with power by the Constitution, should prevail, so that the decision of the court in such cases should be rendered against the judgment of its members.¹

Nor is it in the power of the legislature to bind individuals by a recital of facts in a statute, to be used as evidence against the parties interested. A recital of facts in the preamble of a statute may perhaps be evidence, where it relates to matters of a public nature, as that riots or disorders exist in a certain part of the country;² but where the facts concern the rights of individuals, the legislature cannot adjudicate upon them. As private statutes are generally obtained on the application of some party interested, and are put in form to suit his wishes, perhaps their exclusion from being made evidence against any other party would result from other general principles; but it is clear that the recital could have no force, except as a judicial finding of facts; and that such finding is not within the legislative province.³

We come now to a class of cases in regard to which there has been serious contrariety of opinion; springing from the fact, perhaps, that the purpose sought to be accomplished by the statutes is generally effected by judicial proceedings, so that if the statutes are not a direct invasion of judicial authority, they

¹ In Clapp v. Ely, 27 N. J. 622, it was held that a statute which provided that no judgment of the Supreme Court should be reversed by the Court of Errors and Appeals, unless a majority of those members of the court who were competent to sit on the hearing and decision should concur in the reversal, was unconstitutional. Its effect would be, if the court were not full, to make the opinion of the minority in favor of affirmance control that of the majority in favor of reversal, unless the latter were a majority of the whole court. Such a provision in the constitution might be proper and unexceptionable; but if the constitution has created a court of appeals, without any restriction of this character, the ruling of this case is that the legislature cannot impose it. The court was nearly equally divided, standing seven to six. But the decision of a majority of a court is binding as though unanimous. Felge v. Mich. Cent. R. R. Co., 62 Mich. 1, 28 N. W. 685. A statute authorizing an unofficial person to sit in the place of a judge who is disqualified was held void in Van Slyke v. Insurance Co., 30 Wis. 390, 20 Am. Rep. 59. That judicial power cannot be delegated, see Cohen v. Hoff, 3 Brev. 500. Therefore a commission of appeals created by statute cannot decide causes in place of the constitutional Supreme Court. State v. Noble, 118 Ind. 350, 21 N. E. 244.

² Rex v. Sutton, 4 M. & S. 532.

at least cover ground which the courts usually occupy under general laws conferring the jurisdiction upon them. We refer to

Statutes empowering Guardians and other Trustees to sell Lands.

Whenever it becomes necessary or proper to sell the estate of a decedent for the payment of debts, or of a lunatic or other incompetent person for the same purpose, or for future support, or of a minor to provide the means for his education and nurture, or for the most profitable investment of the proceeds, or of tenants in common to effectuate a partition between them, it will probably be found in every State that some court is vested with jurisdiction to make the necessary order, if the facts after a hearing of the parties in interest seem to render it important. The case is eminently one for judicial investigation. There are facts to be inquired into, in regard to which it is always possible that disputes may arise; the party in interest is often incompetent to act on his own behalf, and his interest is carefully to be inquired into and guarded; and as the proceeding will usually be ex parte, there is more than the ordinary opportunity for fraud upon the party interested, as well as upon the authority which grants permission. It is highly and peculiarly proper, therefore, that by general laws judicial inquiry should be provided for these cases, and that such laws should require notice to all proper parties, and afford an opportunity for the presentation of any facts which might bear upon the propriety of granting the applications.

But it will sometimes be found that the general laws provided for these cases are not applicable to some which arise; or, if applicable, that they do not accomplish fully all that in some cases seems desirable; and in these cases, and perhaps also in some others without similar excuse, it has not been unusual for legislative authority to intervene, and by special statute to grant the permission which, under the general law, would be granted by the courts. The power to pass such statutes has often been disputed, and it may be well to see upon what basis of authority, as well as of reason, it rests.

If in fact the inquiry which precedes the grant of authority is in its nature judicial, it would seem clear that such statutes must be ineffectual and void. But if judicial inquiry is not essential, and the legislature may confer the power of sale in such a case upon an ex parte presentation of evidence, or upon the representations of the parties without any proof whatever,
then we must consider the general laws to be passed, not because the cases fall necessarily within the province of judicial action, but because the courts can more conveniently consider, and more properly, safely, and inexpensively pass upon such cases, than the legislative body to which the power primarily belongs.\footnote{1}

The rule upon this subject which appears to be deducible from the authorities, is this: If the party standing in position of trustee applies for permission to convert by a sale the real property into personal, in order to effectuate the purposes of the trust, and to accomplish objects in the interest of the cestui que trust not otherwise attainable, there is nothing in the granting of permission which is in its nature judicial. To grant permission is merely to enlarge the sphere of the fiduciary authority, the better to accomplish the purpose for which the trusteeship exists; and while it would be entirely proper to make the questions which might arise assume a judicial form, by referring them to some proper court for consideration and decision, there is no usurpation of power if the legislature shall, by direct action, grant the permission.

In the case of Rice v. Parkman,\footnote{2} certain minors having become entitled to real estate by descent from their mother, the legislature passed a special statute empowering their father as guardian for them, and, after giving bond to the judge of probate, to sell and convey the lands, and put the proceeds at interest on good security for the benefit of the minor owners. A sale was made accordingly; but the children, after coming of age, brought suit against the party claiming under the sale, insisting that the special statute was void. There was in force at the time this special statute was passed, a general statute, under which license might have been granted by the courts; but it was held that this general law did not deprive the legislature of that full and complete control over such cases which it would have possessed had no such statute existed. “If,” say the court, “the power by which the resolution authorizing the sale in this case was passed were of a judicial nature, it would be very clear that it could be applicable, might also be held to exclude such special authorization.

\footnote{1} There are constitutional provisions in Kentucky, Virginia, Missouri, Oregon, Nevada, Indiana, Maryland, New Jersey, Arkansas, Florida, Illinois, Wisconsin, Texas, West Virginia, Michigan, and Colorado, forbidding special laws licensing the sale of the lands of minors and other persons under legal disability. Perhaps the general provision in some other constitutions, forbidding special laws in cases where a general law could be made applicable, might also be held to exclude such special authorization.

\footnote{2} 16 Mass. 326. See the criticism of this case in Jones v. Perry, 10 Yerg. 69, 30 Am. Dec. 430. That case is out of harmony with the current of authority on the subject here considered. In California it has been held that where a minor has a guardian, it is not competent for the legislature to empower another to sell his lands. Lincoln v. Alexander, 52 Cal. 482, 25 Am. Rep. 639.
not have been exercised by the legislature without violating an express provision of the constitution. But it does not seem to us to be of this description of power; for it was not a case of controversy between party and party, nor is there any decree or judgment affecting the title to property. The only object of the authority granted by the legislature was to transmute real into personal estate, for purposes beneficial to all who were interested therein. This is a power frequently exercised by the legislature of this State, since the adoption of the constitution, and by the legislatures of the province and of the colony, while under the sovereignty of Great Britain, analogous to the power exercised by the British Parliament on similar subjects time out of mind. Indeed it seems absolutely necessary for the interest of those who, by the general rules of law, are incapacitated from disposing of their property, that a power should exist somewhere of converting lands into money. For otherwise many minors might suffer, although having property; it not being in a condition to yield an income. This power must rest in the legislature in this Commonwealth; that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.

"It was undoubtedly wise to delegate this authority to other bodies, whose sessions are regular and constant, and whose structure may enable them more easily to understand the merits of the particular application brought before them. But it does not follow that, because the power has been delegated by the legislature to courts of law, it is judicial in its character. For aught we see, the same authority might have been given to the selectmen of each town, or to the clerks or registers of the counties, it being a more ministerial act, certainly requiring discretion, and sometimes knowledge of law, for its due exercise, but still partaking in no degree of the characteristics of judicial power. It is doubtless included in the general authority granted by the people to the legislature by the constitution. For full power and authority is given from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions (so as the same be not repugnant or contrary to the constitution), as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects thereof. No one imagines that, under this general authority, the legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested. But there seems to be no reason to doubt that, upon his application, or the application of those
who properly represent him, if disabled from acting himself, a beneficial change of his estate, or a sale of it for purposes necessary and convenient for the lawful owner, is a just and proper subject for the exercise of that authority. It is, in fact, protecting him in his property, which the legislature is bound to do, and enabling him to derive subsistence, comfort, and education from property which might otherwise be wholly useless during that period of life when it might be most beneficially employed.

“If this be not true, then the general laws under which so many estates of minors, persons non compos mentis, and others, have been sold and converted into money, are unauthorized by the constitution, and void. For the courts derive their authority from the legislature, and, it not being of a judicial nature, if the legislature had it not, they could not communicate it to any other body. Thus, if there were no power to relieve those from actual distress who had unproductive property, and were disabled from conveying it themselves, it would seem that one of the most essential objects of government—that of providing for the welfare of the citizens—would be lost. But the argument which has most weight on the part of the defendants is, that the legislature has exercised its power over this subject in the only constitutional way, by establishing a general provision; and that, having done this, their authority has ceased, they having no right to interfere in particular cases. And if the question were one of expediency only, we should perhaps be convinced by the argument, that it would be better for all such applications to be made to the courts empowered to sustain them. But as a question of right, we think the argument fails. The constituent, when he has delegated an authority without an interest, may do the act himself which he has authorized another to do; and especially when that constituent is the legislature, and is not prohibited by the constitution from exercising the authority. Indeed, the whole authority might be revoked, and the legislature resume the burden of the business to itself, if in its wisdom it should determine that the common welfare required it. It is not legislation which must be by general acts and rules, but the use of a parental or tutorial power, for purposes of kindness, without interfering with or prejudice to the rights of any but those who apply for specific relief. The title of strangers is not in any degree affected by such an interposition.”

1 In Shumway v. Bennett, 29 Mich. 451, the distinction between judicial and administrative power is pointed out, and it is held that the question of incorporating territory as a village cannot be made a judicial question. A like decision is
A similar statute was sustained by the Court for the Correction of Errors in New York. "It is clearly," says the Chancellor, "within the powers of the legislature, as parens patriae, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs. But even that power cannot constitutionally be so far extended as to transfer the beneficial use of the property to another person, except in those cases where it can legally be presumed the owner of the property would himself have given the use of his property to the other, if he had been in a situation to act for himself, as in the case of a provision out of the estate of an infant or lunatic for the support of an indigent parent or other near relative."

made in State v. Simons, 32 Minn. 540, 21 N. W. 750, and by Chancellor Cooper, in Ex parte Burns, 1 Tenn. Ch. R. 83, though it is said in that case that the organization of corporations which are created by legislative authority may be referred to the courts. See, on the same subject, State v. Armstrong, 3 Sneed, 634; Galesburg v. Hawkins, 75 Ill. 152. Compare Burlington v. Leebrock, 43 Iowa, 252, and Wahoo v. Dickinson, 23 Neb. 426, 35 N. W. 813, where it is held the question of extending, after hearing, the limits of a municipality may be decided by the court. That the courts cannot be clothed with legislative authority, see State v. Young, 29 Minn. 474, 9 N. W. 737. Compare Ex parte Mato, 19 Tex. App. 112. For the distinction between political and judicial power, see further, Dickey v. Reed, 78 Ill. 24; Commonwealth v. Jones, 10 Bush, 725. And see post, pp. 149, 150, and notes. In Huggart’s Appeal, 76 Pa. St. 503, the power of a legislature to authorize a trustee to sell the lands of parties who were sui juris, and might act on their own behalf, was denied, and the case was distinguished from Norris v. Clymer, 2 Pa. St. 277, and others which had followed it. The foreclosure of a mortgage on private property cannot be accomplished by legislative enactment. Ashuelot R. R. Co. v. Elliott, 58 N. H. 451.

Power to try city officers by impeachment may rest in a city council, the judgment extending only to removal and disqualification to hold any corporate office. State v. Judges, 35 La. Ann. 1075.

1 Cochran v. Van Surlay, 20 Wend. 355, 373. See the same case in the Supreme Court, sub nom. Clarke v. Van Surlay, 15 Wend. 436. See also Sydnum v. Williamson, 24 How. 427; Williamson v. Sydnum, 6 Wall. 723; Heirs of Holman v. Bank of Norfolk, 12 Ala. 369; Florentine v. Barton, 2 Wall. 210. In Hoyt v. Sprague, 103 U. S. 613, it was held competent, by special statute, to provide for the investment of the estate of minors in a manufacturing corporation, and that, after the investment was accordingly made, no account could be demanded on their behalf, except of the stock and its dividends. But the legislature cannot empower the guardian of infants to mortgage their lands to pay demands which are not obligations against them or their estate. Burke v. Mechanics’ Savings Bank, 12 R. I. 513. In Brevoort v. Grace, 55 N. Y. 245, the power of the legislature to authorize the sale of lands of infants by special statute was held to extend to the future contingent interests of those not in being, but not to the interests of non-consenting adults, competent to act on their own behalf. In Opinions of the Judges, 4 N. H. 565, 572, the validity of such a special statute, under the constitution of New Hampshire, was denied. The judges say: "The objection to the exercise of such a power by the legislature is, that it is in its nature both legislative and judicial. It is the province of the legislature to prescribe the rule of law, but to apply it to particular cases is the business of the courts of law. And the thirty-eighth article in the Bill of Rights declares that
The same ruling has often been made in analogous cases. In Ohio, a special act of the legislature authorizing commissioners to make sale of lands held in fee tail, by devisees under a will, in order to cut off the entailment and effect a partition between them,—the statute being applied for by the mother of the devisees and the executor of the will, and on behalf of the devisees,—was held not obnoxious to constitutional objection, and to be sustainable on immemorial legislative usage, and on the same ground which would support general laws for the same purpose.1 In a case in the Supreme Court of the United States,

1 in the government of this State the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity. The exercise of such power by the legislature can never be necessary. By the existing laws, judges of probate have very extensive jurisdiction to license the sale of the real estate or minors by their guardians. If the jurisdiction of the judges of probate be not sufficiently extensive to reach all proper cases, it may be a good reason why that jurisdiction should be extended, but can hardly be deemed a sufficient reason for the particular interposition of the legislature in an individual case. If there be a defect in the laws, they should be amended. Under our institutions all men are viewed as equal, entitled to enjoy equal privileges, and to be governed by equal laws. If it be fair and proper that license should be given to one guardian, under particular circumstances, to sell the estate of his ward, it is fair and proper that all other guardians should, under similar circumstances, have the same license. This is the very genius and spirit of our institutions. And we are of opinion that an act of the legislature to authorize the sale of the land of a particular minor by his guardian cannot be easily reconciled with the spirit of the article in the Bill of Rights which we have just cited. It is true that the grant of such a license by the legislature to the guardian is intended as a privilege and a benefit to the ward. But by the law of the land no minor is capable of assenting to a sale of his real estate in such a manner as to bind himself. And no guardian is permitted by the same law to determine when the estate of his ward ought and when it ought not to be sold. In the contemplation of the law, the one has not sufficient discretion to judge of the propriety and expediency of a sale of his estate, and the other is not to be intrusted with the power of judging. Such being the general law of the land, it is presumed that the legislature would be unwilling to rest the justification of an act authorizing the sale of a minor's estate upon any assent which the guardian or the minor could give in the proceeding. The question then is, as it seems to us: Can a ward be deprived of his inheritance without his consent by an act of the legislature which is intended to apply to no other individual? The fifteenth article in the Bill of Rights declares that no subject shall be deprived of his property but by the judgment of his peers or the law of the land. Can an act of the legislature, intended to authorize one man to sell the land of another without his consent be 'the law of the land' within the meaning of the constitution? Can it be the law of the land in a free country? If the question proposed to us can be resolved into these questions, as it appears to us it may, we feel entirely confident that the representatives of the people of this State will agree with us in the opinion we feel ourselves bound to express on the question submitted to us, that the legislature cannot authorize a guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his wards. See also Jones v. Perry, 10 Yerg. 59, 20 Am. Dec. 430; Lincoln v. Alexander, 52 Cal. 482, 28 Am. Rep. 639.

1 Carroll v. Lessee of Olmsted, 16 Ohio, 251.
where an executrix who had proved a will in New Hampshire made sale of lands without authority in Rhode Island, for the purpose of satisfying debts against the estate, a subsequent act of the Rhode Island legislature, confirming the sale, was held not an encroachment upon the judicial power. The land, it was said, descended to the heirs subject to a lien for the payment of debts, and there is nothing in the nature of the act of authorizing a sale to satisfy the lien, which requires that it should be performed by a judicial tribunal, or that it should be performed by a delegate rather than by the legislature itself. It is remedial in its nature, to give effect to existing rights. 1 The case showed the actual existence of debts, and indeed a judicial license for the sale of lands to satisfy them had been granted in New Hampshire before the sale was made. The decision was afterwards followed in a carefully considered case in the same court. 2 In each of these cases it is assumed that the legislature does not by the special statute determine the existence or amount of the debts, and disputes concerning them would be determinable in the usual modes. Many other decisions have been made to the same effect. 3

This species of legislation may perhaps be properly called prerogative remedial legislation. It hears and determines no rights; it deprives no one of his property. It simply authorizes one's real estate to be turned into personal, on the application


2 Thurston v. Thurston, 6 R. I. 206, 302; Williamson v. Williamson, 11 Miss. 715; McComb v. Gilkey, 29 Miss. 140; Boone v. Bowers, 30 Miss. 240; Stewart v. Griffith, 33 Mo. 13; Estep v. Hutchman, 14 S. & R. 435; Snowhill v. Snowhill, 17 N. J. Eq. 30; Dorsey v. Gilbert, 11 G. & J. 87; Norris v. Clymer, 2 Pa. St. 277; Sergeant v. Kuhn, 2 Pa. St. 303; Kerr v. Kitchen, 17 Pa. St. 433; Coleman v. Carr, 1 Miss. 262; Davison v. Johnson, 7 Met. 338; Towe v. Forney, 14 N. Y. 423; Leggett v. Hunter, 19 N. Y. 446; Brevoort v. Grace, 53 N. Y. 245; Gannett v. Leonard, 47 Mo. 205; Kibby v. Chetwood's Adms', 4 T. B. Monr. 97; Shehan's Heirs v. Barnett's Heirs, 6 T. B. Monr. 891; Davis v. State Bank, 7 Ind. 316; Richardson v. Munson, 23 Conn. 94; Ward v. New England, &c. Co., 1 Cliff. 655; Sohier v. Massachusetts, &c. Hospital, 3 Cush. 488; Labran v. Nelligan, 9 Wall. 295. Contra, Brenham v. Story, 39 Cal. 179. In Moore v. Maxwell, 18 Ark. 409, a special statute authorizing the administrator of one who held the mere naked legal title to convey to the owner of the equitable title was held valid. To the same effect is Reformed P. D. Church v. Mott, 7 Paier. 77, 32 Am. Dec. 613. A special act allowing the widow to sell lands of the deceased husband, subject to the approval of the probate judge, is valid. Bruce v. Bradshaw, 69 Ala. 300. In Stanley v. Colt, 5 Wall. 119, an act permitting the sale of real estate which had been devised to charitable uses was sustained,—no diversion of the gift being made. A more doubtful case is that of Linsley v. Hubbard, 44 Conn. 109, 26 Am. Rep. 431, in which it was held competent, on petition of tenant for life, to order a sale of lands for the benefit of all concerned, though against remonstrance of owners of the reversion.
of the person representing his interest, and under such circumstances that the consent of the owner, if capable of giving it, would be presumed. It is in the nature of the grant of a privilege to one person, which at the same time affects injuriously the rights of no other.\(^1\)

But a different case is presented when the legislature assumes to authorize a person who does not occupy a fiduciary relation to the owner, to make sale of real estate, to satisfy demands which he asserts, but which are not judicially determined, or for any other purpose not connected with the convenience or necessity of the owner himself. An act of the legislature of Illinois undertook to empower a party who had applied for it to make sale of the lands pertaining to the estate of a deceased person, in order to raise a certain specified sum of money which the legislature assumed to be due to him and another person, for moneys by them advanced and liabilities incurred on behalf of the estate, and to apply the same to the extinguishment of their claims. Now it is evident that this act was in the nature of a judicial decree, passed on the application of parties adverse in interest to the estate, and in effect adjudging a certain amount to be due them, and ordering lands to be sold for its satisfaction. As was well said by the Supreme Court of Illinois, in adjudging the act void: "If this is not the exercise of a power of inquiry into, and a determination of, facts between debtor and creditor, and that, too, \textit{ex parte} and summary in its character, we are at a loss to understand the meaning of terms; nay, that it is adjudging and directing the application of one person's property to another, on a claim of indebtedness, without notice to, or hearing of, the parties whose estate is divested by the act. That the exercise of such power is in its nature clearly judicial, we think too apparent to need argument to illustrate its truth. It is so self-evident from the facts disclosed that it proves itself."\(^2\)

\(^1\) It would be equally competent for the legislature to authorize a person under legal disability — \textit{e.g.} an infant — to convey his estate, as to authorize it to be conveyed by guardian. McComb \textit{v.} Gilkey, 29 Miss. 146. [See in this connection, Louisville, N. O. \& T. R. Co. \textit{v.} Blythe, 60 Miss. 939, 11 So. 111, 16 L. R. A. 251, and note on constitutionality of private statutes to authorize disposal of property.]

\(^2\) Lane \textit{v.} Dorman, 4 Ill. 228, 242, 30 Am. Dec. 543. In Dubois \textit{v.} McLean, 4 McLean, 468, Judge Pope assumes that the case of Lane \textit{v.} Dorman decides that a special act, authorizing an executor to sell lands of the testator to pay debts against his estate, would be unconstitutional. We do not so understand that decision. On the contrary, another case in the same volume, Edwards \textit{v.} Pope, p. 405, fully sustains the cases before decided, distinguishing them from Lane \textit{v.} Dorman. But that indeed is also done in the principal case, where the court, after referring to similar cases in Kentucky,
A case in harmony with the one last referred to was decided by the Supreme Court of Michigan. Under the act of Congress "for the relief of citizens of towns upon the lands of the United States, under certain circumstances," approved May 28, 1844, and which provided that the trust under said act should be conducted "under such rules and regulations as may be prescribed by the legislative authority of the State," &c., the legislature passed an act authorizing the trustee to give deeds to a person named therein, and those claiming under him; thus undertaking to dispose of the whole trust to the person thus named and his grantees, and authorizing no one else to be considered or to receive any relief. This was very plainly an attempted adjudication upon the rights of the parties concerned; it did not establish regulations for the administration of the trust, but it adjudged the trust property to certain claimants exclusively, in disregard of any rights which might exist in others; and it was therefore declared to be void. It was the case of a special statute, authorizing the guardian of infant heirs to convey their lands in satisfaction of a contract made by their ancestor; and the statute was sustained. Compare this with Jones v. Perry, 10 Term. 99, where an act authorizing a guardian to sell lands to pay the ancestor's debts was held void.

1 Cash, Appellant, 6 Mich. 193. The case of Powers v. Bergen, 6 N. Y. 358, is perhaps to be referred to another principle than that of encroachment upon judicial authority. That was a case where the legislature, by special act, had undertaken to authorize the sale of property, not for the purpose of satisfying liens upon it, or of meeting or in any way providing for the necessities or wants of the owners, but solely, after paying expenses, for the investment of the proceeds. It appears from that case that the executors under the will of the former owner held the lands in trust for a daughter of the testator during her natural life, with a vested remainder in fee in her two children. The special act assumed to empower them to sell and convey the complete fee, and apply the proceeds, first, to the payment of their commissions, costs, and expenses; second, to the discharge of assessments, liens, charges, and incumbrances on the land, of which, however, none were shown to exist; and
whether a corporation has been guilty of abuse of authority under its charter, so as justly to subject it to forfeiture,\(^1\) and whether a widow is entitled to dower in a specified parcel of land,\(^2\) are judicial questions which cannot be decided by the legislature. In these cases there are necessarily adverse parties; the questions that would arise are essentially judicial, and over them the courts possess jurisdiction at the common law; and it is presumable that legislative acts of this character must have been adopted carelessly, and without a due consideration of the proper boundaries which mark the separation of legislative

third, to invest the proceeds and pay over the income, after deducting taxes and charges, to the daughter during her life, and after her decease to convey, assign, or pay over the same to the persons who would be entitled under the will. The court regarded this as an unauthorized interference with private property upon no necessity, and altogether void, as depriving the owners of their property contrary to the "law of the land." At the same time the authority of those cases, where it has been held that the legislature, acting as the guardian and protector of those who are disabled to act for themselves by reason of infancy, lunacy, or other like cause, may constitutionally pass either general or private laws, under which an effectual disposition of their property might be made, was not questioned. The court, cite, with apparent approval, the cases, among others, of Rice v. Parkman, 16 Mass. 326; Cochran v. Van Stuylen, 20 Wend. 365; and Wilkinson v. Leland, 2 Pet. 627. The case of Ervine's Appeal, 16 Pa. St. 256, was similar, in the principles involved, to Powers v. Bergen, and was decided in the same way. See also Kneass's Appeal, 31 Pa. St. 87; Maxwell v. Goetschius, 40 N. J. 383, 20 Am. Rep. 242, and compare with Ker v. Kitchen, 17 Pa. St. 433; Martin's Appeal, 23 Pa. St. 433; Hogan's Appeal, 75 Pa. St. 503; Thurp v. Fleming, 1 Houston, 580. There is no constitutional objection to a statute which transfers the mere legal title of a trustee to the beneficiary. Reformed P. D. Church v. Mott, 7 Paige, 77, 32 Am. Dec. 613.

\(^1\) State v. Noyes, 47 Me. 189; Campbell v. Union Bank, 6 How. (Miss.) 601; Canal Co. v. Railroad Co., 4 G. & J. 1, 22; Regents of University v. Williams, 9 G. & J. 305. In Miners' Bank of Dubuque v. United States, 1 Morris, 482, a clause in a charter authorizing the legislature to repeal it for any abuse or misuser of corporate privileges was held to refer the question of abuse to the legislative judgment. In Erie & North East R. R. Co. v. Casey, 26 Pa. St. 287, on the other hand, it was held that the legislature could not conclude the corporation by its repealing act, but that the question of abuse of corporate authority would be one of fact to be passed upon, if denied, by a jury, so that the act would be valid or void as the jury should find. Compare Flint & Fentonville P. R. Co. v. Woodhull, 26 Mich. 99; 12 Am. Rep. 233, in which it was held that the reservation of a power to repeal a charter for violation of its provisions necessarily presented a judicial question, and the repeal must be preceded by a proper judicial finding. In Carey v. Giles, 9 Ga. 263, the appointment by the legislature of a receiver for an insolvent bank was sustained; and in Hindman v. Piper, 50 Mo. 292, a legislative appointment of a trustee was also sustained in a peculiar case. In Lothrop v. Steadman, 42 Conn. 653, the power of the legislature as an administrative measure to appoint a trustee to take charge of and manage the affairs of a corporation whose charter had been repealed, was affirmed. For a similar principle see Albertson v. Landon, 42 Conn. 209. And see post, p. 520. [And Congress has power to declare the forfeiture of a land grant for breach of condition subsequent. Atl. & Pac. R. Co. v. Mingus, 165 U. S. 413, 17 Sup. Ct. Rep. 348.]

from judicial duties.\(^1\) As well might the legislature proceed to declare that one man is indebted to another in a sum specified, and establish by enactment a conclusive demand against him.\(^2\)

We have elsewhere referred to a number of cases where statutes have been held unobjectionable which validated legal proceedings, notwithstanding irregularities apparent in them.\(^3\) These statutes may as properly be made applicable to judicial as to ministerial proceedings; and although, when they refer to such proceedings, they may at first seem like an interference with judicial authority, yet if they are only in aid of judicial proceedings, and tend to their support by precluding parties from taking advantage of errors which do not affect their substantial rights, they cannot be obnoxious to the charge of usurping judicial power. The legislature does, or may, prescribe the rules under which the judicial power is exercised by the courts; and in doing so it may dispense with any of those formalities which are not essential to the jurisdiction of the court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with by statute after the proceedings have been taken, if the court has failed to observe any of those formalities. But it would not be competent for the legislature to authorize a court to proceed and adjudicate upon the rights of parties, without giving them an opportunity

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\(^1\) The unjust and dangerous character of legislation of this description is well stated by the Supreme Court of Pennsylvania: "When, in the exercise of proper legislative powers, general laws are enacted which bear, may bear, on the whole community, if they are unjust and against the spirit of the Constitution, the whole community will be interested to procure their repeal by a voice potential. And that is the great security for just and fair legislation. But when individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice, at the instigation of an interested party, who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power? They have no refuge but in the courts, the only secure place for determining conflicting rights by due course of law. But if the judiciary give way, and in the language of the Chief Justice in Greenough v. Greenough, in 11 Pa. St. 469, 'confesses itself too weak to stand against the antagonism of the legislature and the bar,' one independent co-ordinate branch of the government will become the subordinate handmaid of another, and a quiet, insidious revolution be effected in the administration of the government, whilst its form on paper remains the same." Ervine's Appeal, 16 Pa. St. 259, 268.

\(^2\) A statute is void which undertakes to make railroad companies liable for the expense of coroners' inquests, and of the burial of persons dying on the cars, or killed by collision or other accident occurring to the cars, irrespective of any question of negligence. Ohio & M. R. R. Co. v. Lackey, 78 Ill. 55, 20 Am. Rep. 259. [But a railroad may be made absolutely liable for loss from fires caused by sparks from its locomotives, regardless of the question of negligence. Matthews v. St. Louis & S. F. R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, and note. See this case affirmed in 165 U. S. 1, 17 Sup. Ct. Rep. 243.]

\(^3\) See part, pp. 530-546.
to be heard before it; and, for the same reason, it would be incompetent for it, by retrospective legislation, to make valid any proceedings which had been had in the courts, but which were void for want of jurisdiction over the parties. Such a legislative enactment would be doubly objectionable: first, as an exercise of judicial power, since, the proceedings in court being void, it would be the statute alone which would constitute an adjudication upon the rights of the parties; and second, because, in all judicial proceedings, notice to parties and an opportunity to defend are essential,—both of which they would be deprived of in such a case.¹ And for like reasons a statute validating proceedings had before an intruder into a judicial office, before whom no one is authorized or required to appear, and who could have jurisdiction neither of the parties nor of the subject-matter, would also be void.²

¹ In McDaniel v. Correll, 19 Ill. 226, it appeared that a statute had been passed to make valid certain legal proceedings by which an alleged will was adjudged void, and which were had against non-resident defendants, over whom the courts had obtained no jurisdiction. The court says: "If it was competent for the legislature to make a void proceeding valid, then it has been done in this case. Upon this question we cannot for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding, than they can take one man's property from him and give it to another. Indeed, to do the one is to accomplish the other. By the decree in this case the will in question was declared void, and, consequently, if effect be given to the decree, the legacies given to those absent defendants by the will are taken from them and given to others, according to our statute of descents. Until the passage of the act in question, they were not bound by the verdict of the jury in this case, and it could not form the basis of a valid decree. Had the decree been rendered before the passage of the act, it would have been as competent to make that valid as it was to validate the antecedent proceedings upon which alone the decree could rest. The want of jurisdiction over the defendants was as fatal to the one as it could be to the other. If we assume the act to be valid, then the legacies which before belonged to the legatees have now ceased to be theirs, and this result has been brought about by the legislative act alone. The effect of the act upon them is precisely the same as if it had declared in direct terms that the legacies bequeathed by this will to these defendants should not go to them, but should descend to the heirs-at-law of the testator, according to our law of descents. This it will not be pretended that they could do directly, and they had no more authority to do it indirectly, by making proceedings binding upon them which were void in law." See, to the same effect, Richards v. Rote, 68 Pa. St. 248; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 650; Lane v. Nelson, 70 Pa. St. 407; Shonk v. Brown, 61 Pa. St. 320; Spragg v. Shriver, 23 Pa. St. 282; Israel v. Arthur, 7 Col. 6.

² In Denny v. Mattoon, 2 Allen, 361, a judge in insolvency had made certain orders in a case pending in another jurisdiction, and which the courts subsequently declared to be void. The legislature then passed an act declaring that they "are hereby confirmed, and the same shall be taken and deemed good and valid in law, to all intents and purposes whatsoever." On the question of the validity of this act the court says: "The precise question is, whether it can be held to operate so as to confer a jurisdiction over parties and proceedings which it has been judicially determined did not exist, and give validity to acts and processes which have been adjudged void. The statement of this question seems to us to suggest the ob-
CONSTITUTIONAL LIMITATIONS.

Legislative Divorces.

There is another class of cases in which it would seem that action ought to be referred exclusively to the judicial tribunals, which may serve to determine, in all cases, whether the limits of constitutional restraint are overstepped by the exercise by one branch of the government of powers exclusively delegated to another, it certainly is practicable to apply to each case as it arises some test by which to ascertain whether this fundamental principle is violated. If, for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in place of the well-settled rules of law the arbitrary will of the legislature, and thereby controlling the action of the tribunal before which the suits are pending, no one can doubt that it would be an unauthorized act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary. It is the exclusive province of courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. The legislature have no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before courts, or to impair or set aside their judgments, or to take cases out of the settled course of judicial proceeding. It is on this principle that it has been held that the legislature have no power to grant a new trial or direct a rehearing of a cause which has been once judicially settled. The right to a review, or to try anew facts which have been determined by a verdict or decree, depends on fixed and well-settled principles, which it is the duty of the court to apply in the exercise of a sound judgment and discretion. These cannot be regulated or governed by legislative action. Taylor v. Place, 4 R. I. 324, 337; Lewis v. Webb, 3 Me. 320; De Chastellux v. Fairchild, 15 Pa. St. 18. A fortiori, an act of the legislature cannot set aside or amend final judgments or decrees. The court further consider the general subject at length, and adjudge the particular enactment under consideration void, both as an

vious and decisive objection to any construction of the statute which would lead to such a conclusion. It would be a direct exercise by the legislature of a power in its nature clearly judicial, from the use of which it is expressly prohibited by the thirteenth article of the Declaration of Rights. The line which marks and separates judicial from legislative duties and functions is often indistinct and uncertain, and it is sometimes difficult to decide within which of the two classes a particular subject falls. All statutes of a declaratory nature, which are designed to interpret or give a meaning to previous enactments, or to confirm the rights of parties either under their own contracts or growing out of the proceedings of courts or public bodies, which lack legal validity, involve in a certain sense the exercise of a judicial power. They operate upon subjects which might properly come within the cognizance of the courts and form the basis of judicial consideration and judgment. But they may, nevertheless, be supported as being within the legitimate sphere of legislative action, on the ground that they do not declare or determine, but only confirm rights; that they give effect to the acts of parties according to their intent; that they furnish new and more efficacious remedies, or create a more beneficial interest or tenure, or, by supplying defects and curing informalities in the proceedings of courts, or of public officers acting within the scope of their authority, they give effect to acts to which there was the express or implied assent of the parties interested. Statutes which are intended to accomplish such purposes do not necessarily invade the province, or directly interfere with the action of judicial tribunals. But if we adopt the broadest and most comprehensive view of the power of the legislature, we must place some limit beyond which the authority of the legislature cannot go without trenching on the clear and well-defined boundaries of judicial power. "Although it may be difficult, if not impossible, to lay down any general rule
but in respect to which the prevailing doctrine seems to be that the legislature has complete control unless specially restrained by the State constitution. The granting of divorces from the bonds of matrimony was not confined to the courts in England, and from the earliest days the Colonial and State legislatures in this country have assumed to possess the same power over the subject, which was possessed by the Parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases. Now it is clear that "the question of divorce involves investigations which are properly of a judicial nature, and the jurisdiction over divorces ought to be confined exclusively to the judicial tribunals, under the limitations to be prescribed by law;" and so strong is the general conviction of this fact, that the people in framing their constitutions, in a majority of the States, have positively forbidden any such special laws.

exercise of judicial authority, and also because, in declaring valid the void proceedings in insolvency against the debtor, under which assignees had been appointed, it took away from the debtor his property, "not by due process of law or the law of the land, but by an arbitrary exercise of legislative will." See, further, Gruhn's Executor v. Cunningham, 20 Grat. 103; State v. Doherty, 60 Me. 504. In proceedings by tenants for life, the estate in remainder was ordered to be sold; there was at the time no authority for ordering such a sale. It was held to be void, and incapable of confirmation. Maxwell v. Goetschius, 40 N. J. 393, 29 Am. Rep. 242.

1 2 Kent, 106. See Levens v. Slenor, 2 Greene (Iowa), 697.

2 The following are constitutional provisions:—Alabama: Divorces from the bonds of matrimony shall not be granted but in the cases by law provided for, and by suit in chancery; but decrees in chancery for divorce shall be final, unless appealed from in the manner prescribed by law, within three months from the date of the enrolment thereof. Arkansas: The General Assembly shall not have power to pass any bill of divorce, but may prescribe by law the manner in which such cases may be investigated in the courts of justice, and divorces granted. California: No divorce shall be granted by the legislature. The provision is the same or similar in Iowa, Indiana, Maryland, Michigan, Minnesota, Nevada, Nebraska, Oregon, New Jersey, Texas, and Wisconsin. Florida: Divorces from the bonds of matrimony shall not be allowed but by the judgment of a court, as shall be prescribed by law. Georgia: The Superior Court shall have exclusive jurisdiction in all cases of divorce, both total and partial. Illinois: The General Assembly shall not pass . . . special laws . . . for granting divorces. Kansas: And power to grant divorces is vested in the District Courts subject to regulations by law. Kentucky: The General Assembly shall have no power to grant divorces, . . . but by general laws shall confer such powers on the courts of justice. Louisiana: The General Assembly shall not pass any local or special law on the following specified objects: . . . Granting divorces. Massachusetts: All causes of marriage, divorce, and alimony . . . shall be heard and determined by the Governor and Council, until the legislature shall by law make other provision. Mississippi: Divorces from the bonds of matrimony shall not be granted but in cases provided for by law, and by suit in chancery. Missouri: The General Assembly shall not pass any local or special law . . . granting divorces. In Colorado the provision is the same. New Hampshire: All causes of marriage, . . . orce, and alimony . . . shall be heard and tried by the Superior Court, until the legislature shall by law make other provision. New York: . . . nor shall any
O f the judicial decisions on the subject of legislative power over divorces there seem to be three classes of cases. The doctrine of the first class seems to be this: The granting of a divorce may be either a legislative or a judicial act, according as the legislature shall refer its consideration to the courts, or reserve it to itself. The legislature has the same full control over the status of husband and wife which it possesses over the other domestic relations, and may permit or prohibit it, according to its own views of what is for the interest of the parties or the good of the public. In dissolving the relation, it proceeds upon such reasons as to it seem sufficient; and if inquiry is made into the facts of the past, it is no more than is needful when any change of the law is contemplated, with a view to the establishment of more salutary rules for the future. The inquiry, therefore, is not judicial in its nature, and it is not essential that there be any particular finding of misconduct or unfitness in the parties. As in other cases of legislative action, the reasons or
the motives of the legislature cannot be inquired into; the relation which the law permitted before is now forbidden, and the parties are absolved from the obligations growing out of that relation which continued so long as the relation existed, but which necessarily cease with its termination. Marriage is not a contract, but a status; the parties cannot have vested rights of property in a domestic relation; therefore the legislative act does not come under condemnation as depriving parties of rights contrary to the law of the land, but, as in other cases within the scope of the legislative authority, the legislative will must be regarded as sufficient reason for the rule which it promulgates.¹

¹ The leading case on this subject is Starr v. Pease, 8 Conn. 541. On the question whether a divorce is necessarily a judicial act, the court say: "A further objection is urged against this act; viz., that by the new constitution of 1818, there is an entire separation of the legislative and judicial departments, and that the legislature can now pass no act or resolution not clearly warranted by that constitution; that the constitution is a grant of power, and not a limitation of powers already possessed; and, in short, that there is no reserved power in the legislature since the adoption of this constitution. Precisely the opposite of this is true. From the settlement of the State there have been certain fundamental rules by which power has been exercised. These rules were embodied in an instrument called by some a constitution, by others a charter. All agree that it was the first constitution ever made in Connecticut, and made, too, by the people themselves. It gave very extensive powers to the legislature, and left too much (for it left everything almost) to their will. The constitution of 1818 proposed to, and in fact did, limit that will. It adopted certain general principles by a preamble called a Declaration of Rights; provided for the election and appointment of certain organs of the government, such as the legislative, executive, and judicial departments; and imposed upon them certain restraints. It found the State sovereign and independent, with a legislative power capable of making all laws necessary for the good of the people, not forbidden by the Constitution of the United States, nor opposed to the sound maxims of legislation; and it left them in the same condition, except so far as limitations were provided. There is now and has been a law in force on the subject of divorces. The law was passed one hundred and thirty years ago. It provides for divorces a vinculo matrimonii in four cases; viz., adultery, fraudulent contract, wilful desertion, and seven years' absence unheard of. The law has remained in substance the same as it was when enacted in 1607. During all this period the legislature has interfered like the Parliament of Great Britain and passed special acts of divorce a vinculo matrimonii; and at almost every session since the Constitution of the United States went into operation, now forty-two years, and for the thirteen years of the existence of the Constitution of Connecticut, such acts have been, in multiplied cases, passed and sanctioned by the constituted authorities of our State. We are not at liberty to inquire into the wisdom of our existing law on this subject; nor into the expediency of such frequent interference by the legislature. We can only inquire into the constitutionality of the act under consideration. The power is not qualified either by the Constitution of the United States or by that of this State. In view of the appalling consequences of declaring the general law of the State or the repeated acts of our legislature unconstitutional and void, consequence easily conceived, but not easily expressed,—such as bastardizing the issue and subjecting the parties to punishment for adultery,—the court should come to the result only on a solemn conviction that their oaths of office and these constitutions imperiously demand it. Feeling myself no such conviction, I cannot
The second class of cases to which we have alluded hold that divorce is a judicial act in those cases upon which the general laws confer on the courts power to adjudicate; and that consequently in those cases the legislature cannot pass special laws, but its full control over the relation of marriage will leave it at liberty to grant divorces in other cases, for such causes as shall appear to its wisdom to justify them. ¹

A third class of cases deny altogether the authority of these special legislative enactments, and declare the act of divorce to be in its nature judicial, and not properly within the province of the legislative power.² The most of these decisions, however, lay more or less stress upon clauses in the constitutions other than those which in general terms separate the legislative and judicial functions, and some of them would perhaps have been differently decided but for those other clauses. But it is safe to say that the general sentiment in the legal profession is against the rightfulness of special legislative divorces; and it is believed that, if the question could originally have been considered by the courts, unembarrassed by any considerations of long acquirence, and of the serious consequences which must result from affirming their unlawfulness, after so many had been granted and new relations formed, it is highly probable that these enactments would have been held to be usurpations of judicial author-


¹ Levis v. Sleator, 2 Greene (Iowa), 604; Opinions of Judges, 16 Me. 479; Adams v. Palmer, 51 Me. 480. See also Townsend v. Griffin, 4 Harr. 440. In a well-reasoned case in Kentucky, it was held that a legislative divorce obtained on the application of one of the parties while suit for divorce was pending in a court of competent jurisdiction would not affect the rights to property of the other, growing out of the relation. Gaines v. Gaines, 9 B. Monr. 295. A statute permitting divorces for offences committed before its passage is not an ex post facto law in the constitutional sense. Jones v. Jones, 2 Overton, 2, 5 Am. Dec. 645.

² Brigham v. Miller, 17 Ohio, 445; Clark v. Clark, 10 N. Ill. 380; Ponder v. Graham, 4 Fla. 23; State v. Fry, 4 Mo. 120; Bryson v. Campbell, 12 Mo. 408; Bryson v. Bryson, 17 Mo. 600; Same v. Same, 44 Mo. 232. See also Jones v. Jones, 12 Pa. St. 330, 334. Under the Constitution of Massachusetts, the power of the legislature to grant divorces is denied. Sparhawk v. Sparhawk, 116 Mass. 315. See clause in constitution, ante, p. 163, note 2. Where a court is given appellate jurisdiction in all cases, it is not competent by statute to forbid its reversing a decree of divorce. Tierney v. Tierney, 1 Wash. Ter. 508. See Nichols v. Griffin, 1 Wash. Ter. 374.
ity, and we should have been spared the necessity for the special constitutional provisions which have since been introduced. Fortunately these provisions render the question now discussed of little practical importance; at the same time that they refer the decision upon applications for divorce to those tribunals which must proceed upon inquiry, and cannot condemn without a hearing.¹

The force of a legislative divorce must in any case be confined to a dissolution of the relation; it can only be justified on the ground that it merely lays down a rule of conduct for the parties to observe towards each other for the future. It cannot inquire into the past, with a view to punish the parties for their offences against the marriage relation, except so far as the divorce itself can be regarded as a punishment. It cannot order the payment of alimony, for that would be a judgment;² it cannot adjudge upon conflicting claims to property between the parties, but it must leave all questions of this character to the courts. Those rights of property which depend upon the continued existence of the relation will be terminated by the dissolution, but only as in any other case rights in the future may be incidentally affected by a change in the law.³

**Legislative Encroachments upon Executive Power.**

If it is difficult to point out the precise boundary which separates legislative from judicial duties, it is still more difficult to discriminate, in particular cases, between what is properly legislative and what is properly executive duty. The authority that makes the laws has large discretion in determining the means through which they shall be executed; and the perform-

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¹ If marriage is a matter of right, then it would seem that any particular marriage that parties might lawfully form they must have a lawful right to continue in, unless by misbehavior they subject themselves to a forfeiture of the right. And if the legislature can annul the relation in one case, without any finding that a breach of the marriage contract has been committed, then it would seem that they might annul it in every case, and even prohibit all parties from entering into the same relation in the future. The recognition of a full and complete control of the relation in the legislature, to be exercised at its will, leads inevitably to this conclusion; so that, under the “rightful powers of legislation” which our constitutions confer upon the legislative department, a relation essential to organized civil society might be abrogated entirely. Single legislative divorces are but single steps towards this barbarism which the application of the same principle to every individual case, by a general law, would necessarily bring upon us. See what is said by the Supreme Court of Missouri in Bryson v. Bryson, 17 Mo. 590, 594.

² Crane v. Megginis, 1 G. & J. 463; Potter’s Dwarris on Statutes, 486; post, p. 684, note.

³ Starr v. Pease, 8 Conn. 541.
1 This is affirmed in the case of Bridges v. Shaler, 6 W. Va. 552. The constitution of that State provides that the governor shall nominate, and by and with the advice and consent of the Senate appoint, all officers whose offices are established by the constitution or shall be created by law, and whose appointment or election is not otherwise provided for, and that no such officer shall be appointed or elected by the legislature. The court decided that this did not preclude the legislature from creating a board of public works of which the State officers should be ex officio the members. The legislature may regulate appointment to statutory offices: People v. Osborne, 7 Col. 605; may provide a board of civil service commissioners to prescribe qualifications of all officers not provided for by the constitution: Opinion of Justices, 158 Mass. 591. [For other cases upon merit system in civil service, see People v. Kipley, 171 Ill. 44, 40 N. E. 220, 41 L. R. A. 757; Chittenden v. Wurster, 165 N. Y. 505, 46 N. E. 557, 37 L. R. A. 809; Re Krymer, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447; Opinion of Justices, 106 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; Newcomb v. Indianapolis, 141 Ind. 451, 40 N. E. 919, 28 L. R. A. 722; Rogers v. Buffalo, 128 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; Neumeyer v. Krakel, — Ky. —, 62 S. W. 518 (April 25, 1901); People v. Mosher, 103 N. Y. 32, 57 N. E. 88, 70 Am. St. 552; People v. Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L. R. A. 390.] May appoint a State board, if constitution does not expressly empower the governor to do so: People v. Freeman, 80 Cal. 233, 22 Pac. 173. See Hovey v. State, 119 Ind. 385, 21 N. E. 800; Biggs v. McBride, 17 Oreg. 610, 21 Pac. 878; State v. Covington, 29 Ohio St. 102. [Appointment of police officers cannot be intrusted to a bipartisan board, elected half by one party in city council and half by another. Ratlbone v. Wirth, 160 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408. But a provision that not more than two of the three members of a civil service commission shall be of the same political party is valid. Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579.]

2 Attorney-General v. Brown, 1 Wis. 613. "Whatever power or duty is expressly given to, or imposed upon, the executive department, is altogether free from the interference of the other branches of the government. Especially is this the case where the subject is committed to the discretion of the chief executive officer, either by the constitution or by the laws. So long as the power is vested in him, it is to be by him exercised, and no other branch of the government can control its exercise." Under the Constitution of Ohio, which forbids the exercise of any appointing power by the legislature, except as therein authorized, it was held that the legislature could not, by law, constitute certain designated persons a State board, with power to appoint commissioners of the State House, and directors of the penitentiary, and to remove such directors for cause. State v. Kennaon, 7 Ohio St. 546. By the Indiana Constitution all officers whose appointment is not otherwise provided for, shall be chosen in such manner as shall be prescribed by law. The power to ordain the "manner" does not give the legislature power to appoint. State v. Denny, 118 Ind. 382, 21 N. E. 252, 274, 4 L. R. A. 79; Evansville v. State, 118 Ind. 426, 21 N. E. 257, 4 L. R. A. 93. And see Davis v. State, 7 Md. 151; also cases referred
cannot exercise or assume except by legislative authority, and

to in preceding note. [O'Conor v. Fond du Lac, 100 Wis. 263, 85 N. W. 327.
The power of appointment to a particular office may be vested in the State geologist. State v. Hyde, 129 Ind. 206, 28 N. E. 188, 13 L. R. A. 79. The governor's power of appointment cannot be indirectly taken away; as by abolishing the office or offices and creating another and attaching to it the duties of the office or offices abolished. Johnson v. State, 50 N. J. L. 585, 37 Atl. 949, 88 L. R. A. 373, 39 Atl. 646.] As to what are public officers, see State v. Stanley, 66 N. C. 59, 8 Am. Rep. 488. An appointment to office was said, in Taylor v. Commonwealth, 3 J. J. Marsh. 401, to be intrinsically an executive act. In a certain sense this is doubtless so, but it would not follow that the legislature could exercise no appointing power, or could confer none on others than the chief executive of the State. Where the constitution contains no negative words to limit the legislative authority in this regard, the legislature in enacting a law must decide for itself what are the suitable, convenient, or necessary agencies for its execution, and the authority of the executive must be limited to taking care that the law is executed by such agencies. See Baltimore v. State, 15 Md. 376; [State v. Henderson, 4 Wyo. 655, 23 Pac. 417, 22 L. R. A. 751; Fox v. McDonald, 101 Ala. 61, 13 So. 416, 21 L. R. A. 829, 46 Am. St. 98; State v. George, 23 Ore. 142, 29 Pac. 556, 16 L. R. A. 737, 29 Am. St. 595. That power to appoint City Commissioners may be given to circuit judges. See Terre Haute v. Evansville and T. H. Ry. Co., 149 Ind. 174, 40 N. E. 77, 37 L. R. A. 189; and see note 16 L. R. A. 757, on the constitutional power of courts or judges to appoint officers. With regard to requirements of merit in appointees and competitive examinations for the ascertainment thereof, see People v. Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 175; Chittenden v. Wurater, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809; Re Keymer, 148 N. Y. 210, 42 N. E. 607, 36 L. R. A. 447; Opinion of Justices, 100 Mass. 659, 44 N. E. 625, 34 L. R. A. 58; People v. Roberts, 148 N. Y. 390, 42 N. E. 1062, 31 L. R. A. 399; Newcomb v. Indianapolis, 141 Ind. 461, 49 N. E. 919, 28 L. R. A. 722; Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; Neumeyer v. Krakel, — Ky. —, 62 S. W. 518; People v. Mosher, 103 N. Y. 32, 57 N. E. 68, 79 Am. St. 562. The mayor of a city may be empowered to appoint the principal executive officers thereof. Catz v. Cleveland, 62 N. J. L. 188, 2 Atl. 17, 7 L. R. A. 431. For other cases on appointing power, see State v. Boucher, 3 N. D. 330, 56 N. W. 142, 21 L. R. A. 539.] Where the governor has power to remove an officer for neglect of duty, he is the sole judge whether the duty has been neglected. State v. Doherty, 25 La. Ann. 119, 13 Am. Rep. 131; [State v. Johnson, 30 Fla. 483, 11 So. 845, 13 L. R. A. 410; and see Trainer v. Wayne Co. Auditors, 89 Mich. 102, 50 N. W. 800, 15 L. R. A. 95, and note on power of summary removal.] The courts cannot review his action if it is taken after a hearing: State v. Hawkins, 44 Ohio St. 98, 5 N. E. 228; but he must afford an opportunity for defence. Dullam v. Willson, 53 Mich. 392, 19 N. W. 112; [State v. Johnson, 29 Fla. 483, 11 So. 845, 15 L. R. A. 410; State v. Smith, 35 Neb. 13, 52 N. W. 700, 15 L. R. A. 701; Biggs v. McBride, 17 Ore. 640, 21 Pac. 878, 5 L. R. A. 116.] Contra, unless the right is expressly secured to the officer. Donahue v. Will Co., 100 Ill. 94, and cases cited. [For a case of removal for gross carelessness in declaring the result of a vote upon a constitutional amendment, see Attorney-General v. Jochim, 90 Mich. 356, 58 N. W. 611, 23 L. R. A. 650, 41 Am. St. 605. Provision for impeachment or removal does not prevent virtual removal by legislature through statute abolishing the office and creating another with same duties and powers. State v. Hyde, 129 Ind. 206, 28 N. E. 188, 13 L. R. A. 70. Power of removal cannot be conferred on court. Gordon v. Moores, 61 Neb. 346, 85 N. W. 298.] If the governor has power to appoint with the consent of Senate, and to remove, he may remove without such consent. Lane v. Com., 103 Pa. St. 481; Harman v. Harwood, 58 Md. 1. See, as to discretionary powers, ante, pp. 73-75, notes. The executive, it has been decided, has power to pardon for contempt of court. State v. Sauvion, 24 La. Ann. 119, 13 Am. Rep. 115; [Sharp v. State, 102 Tenn.
the power which in its discretion it confers it may also in its discretion withhold, or confide to other hands.\footnote{1} Whether in those cases where power is given by the constitution to the governor, the legislature have the same authority to make rules for the exercise of the power that they have to make rules to govern the proceedings in the courts, may perhaps be a question.\footnote{2} It

0, 49 S. W. 752, 43 L. R. A. 788, 73 Am. St. 851.] A general power to pardon may be exercised before as well as after conviction. Lapayre v. United States, 17 Wall. 191; Donihue v. Bowden, 44 Ga. 357; Grubb v. Bullock, 44 Ga. 379; [Torr. v. Richardson, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440.] The President's power to pardon does not extend to the restoration of property which has been judicially forfeited. Knote v. United States, 10 Ct. of Cl. 397, and 35 U. S. 149; Oaborn v. United States, 91 U. S. 474. The pardon may be granted by general proclamation. Carlisle v. United States, 16 Wall. 147; Lapayre v. United States, 17 Wall. 191. The delivery of a pardon to the prison warden makes it operative. \textit{Ex parte Powell}, 73 Ala. 517. One receiving a full pardon from the President cannot afterwards be required by law to establish loyalty as a condition to the assertion of legal rights. Carlisle v. United States, 16 Wall. 147. Nor be prosecuted in the civil action for the same acts for which he is pardoned. United States v. McKee, 4 Dill. 128. Pardon removes all disabilities resulting from conviction, and may be granted after sentence executed. State v. Foley, 15 Nov. 61, 37 Am. Rep. 458; Edwards v. Com., 78 Va. 39; State v. Dodson, 10 S. C. 453; [State v. Martin, 59 Ohio, 312, 52 N. E. 188, 43 L. R. A. 94, 69 Am. St. 762.] But a mere executive order to discharge from custody is not such a pardon. State v. Kirschner, 23 Mo. App. 312. It does not release from the obligation to pay costs of the prosecution. In re Boyd, 31 Kan. 570, 9 Pac. 240; Smith v. State, 6 Len. 627. \[Upon invalidity of legislative pardon, see Singleton v. State, 28 Fla. 257, 21 So. 21, 31 L. R. A. 251, 56 Am. St. 177, and note thereto in L. R. A. Where board of pardons has only advisory power, the governor's pardoning power is in no wise infringed. Rich v. Chamberlain, 104 Mich. 433, 62 N. W. 584, 27 L. R. A. 573.] Statute

authorizing sentence of prisoner for an indefinite term not less than the minimum prescribed by law nor greater than the maximum with authority to the board of prison control to release on parole after expiration of minimum period and to recommit upon violation of parole is void as infringing upon governor's pardoning power. People v. Cummings, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285, and note. Sentence may be suspended after conviction, and such suspension may be withdrawn at any time. It does not encroach upon governor's power to grant pardons and reprieves. People v. Monroe Co. Ct., 141 N. Y. 258, 36 N. E. 386, 23 L. R. A. 850.]\footnote{1} "In deciding this question [as to the authority of the governor], recurrence must be had to the constitution. That furnishes the only rule by which the court can be governed. That is the charter of the governor's authority. All the powers delegated to him by or in accordance with that instrument, he is entitled to exercise, and no others. The constitution is a limitation upon the powers of the legislative department of the government, but it is to be regarded as a grant of powers to the other departments. Neither the executive nor the judiciary, therefore, can exercise any authority or power except such as is clearly granted by the constitution." Field v. People, 3 Ill. 79, 80.\footnote{2} Whether the legislature can constitutionally remit a fine, when the pardoning power is vested in the governor by the constitution, has been made a question; and the cases of Haley v. Clarke, 26 Ala. 439, and People v. Birchin, 12 Cal. 50, are opposed to each other upon the point. If the fine is payable to the State, perhaps the legislature should be considered as having the same right to discharge it that they would have to release any other debtor to the State from his obligation. In Indiana the Supreme Court cannot be invested with power to
would seem that this must depend generally upon the nature of the power, and upon the question whether the constitution, in conferring it, has furnished a sufficient rule for its exercise. Where complete power to pardon is conferred upon the executive, it may be doubted if the legislature can impose restrictions under the name of rules or regulations; but where the governor is made commander-in-chief of the military forces of the State, it is obvious that his authority must be exercised under such proper rules as the legislature may prescribe, because the military forces are themselves under the control of the legislature, and military law is prescribed by that department. There would be this clear limitation upon the power of the legislature

grant reprieves. Butler v. State, 97 Ind. 373. The Secretary of the Treasury may remit penalties for breach of revenue laws. The Laura, 114 U. S. 411, 5 Sup. Ct. Rep. 581. In Michigan a judge cannot by suspending sentence indefinitely practically pardon a prisoner. People v. Brown, 64 Mich. 15, 10 N. W. 571. An act allowing a prisoner to go on parole, but in legal control of prison managers and subject to recall, is valid. State v. Peters, 43 Ohio St. 529, 4 N. E. 81. In Morgan v. Baffington, 21 Mo. 549, it was held that the State auditor was not obliged to accept as conclusive the certificate from the Speaker of the House as to the sum due a member of the House for attendance upon it, but that he might lawfully inquire whether the amount had been actually earned by attendance or not. The legislative rule, therefore, cannot go to the extent of compelling an executive officer to do something else than his duty, under any pretense of regulation. The power to pardon offenders is vested by the several State constitutions in the governor. It is not, however, a power which necessarily inheres in the executive. State v. Dunning, 9 Ind. 20. And several of the State constitutions have provided that it shall be exercised under such regulations as shall be prescribed by law. There are provisions more or less broad to this purport in those of Kansas, Florida, Alabama, Arkansas, Texas, Mississippi, Oregon, Indiana, Iowa, and Virginia. In State v. Dunning, 9 Ind. 20, an act of the legislature requiring the applicant for the remission of a fine or forfeiture to forward to the governor, with his application, the opinion of certain county officers as to the propriety of the remission, was sustained as an act within the power conferred by the constitution upon the legislature to prescribe regulations in these cases. And see Branham v. Lange, 16 Ind. 497. The power to remit is not included in the power to pardon. Ex parte Howard, 17 N. H. 545. Contra, Ex parte Fleming, 00 Miss. 910. It has been decided that to give parties who have been convicted and fined the benefit of the insolvent laws is not an exercise of the pardoning power. Ex parte Scott, 19 Ohio St. 581. And where the constitution provided that "In all criminal and penal cases, except those of treason and impeachment, [the governor] shall have power to grant pardons after conviction, and remit fines and forfeitures," &c., it was held that this did not preclude the legislature from passing an act of pardon and amnesty for parties liable to prosecution, but not yet convicted. State v. Nichols, 26 Ark. 74, 7 Am. Rep. 690. An act approved by the governor vacating a conviction operates as a pardon. People v. Stewart, 1 Idaho, 546. Pardons may be made conditional, and forfeited if the condition is not observed. State v. Smith, 1 Bailey, 283; Lee v. Murphy, 22 Grant. 789; Re Ruhi, 5 Sawyer, 180; Kemoly's Case, 135 Mass. 48; Ex parte Marks, 64 Cal. 29, 28 Pac. 169. But a pardon obtained by fraud is held conclusive, though afterward declared null by the governor. Knapp v. Thomas, 29 Ohio St. 577. [A pardon does not relieve from forfeiture of bail bond. Dale v. Commonwealth, 101 Ky. 612, 42 S. W. 93, 38 L. R. A. 808.]
to prescribe rules for the executive department; that they must not be such as, under pretence of regulation, divest the executive of, or preclude his exercising, any of his constitutional prerogatives or powers. Those matters which the constitution specifically confides to him the legislature cannot directly or indirectly take from his control. And on the other hand the legislature cannot confer upon him judicial authority; such as the authority to set aside the registration of voters in a municipality; 1 or clothe him with any authority, not executive in its nature, which the legislature itself, under the constitution, is restricted from exercising. 2

It may be proper to say here, that the executive, in the proper discharge of his duties under the constitution, is as independent of the courts as he is of the legislature. 3

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1 State v. Staten, 6 Cold. 233.
2 Smith v. Norment, 5 Yerg. 271.
3 It has been a disputed question whether the writ of mandamus will lie to compel the performance of executive duties. In the following cases the power has either been expressly affirmed, or it has been exercised without being questioned. State v. Moffitt, 5 Ohio, 358; State v. Governor, 5 Ohio St. 629; Coltin v. Ellis, 7 Jones (N.C.), 516; Chamberlain v. Sibley, 4 Minn. 309; Magruder v. Governor, 23 Md. 176; Groome v. Gwinn, 43 Md. 572; Tennessee, &c. R. R. Co. v. Moore, 36 Ala. 371; Middleton v. Lowe, 30 Cal. 596; Harpending v. Haight, 39 Cal. 186, 2 Am. Rep. 433; Chunnaceri v. Potts, 2 Mont. 244; Martin v. Ingham, 38 Kan. 641, 17 Pac. 162. See Hatch v. Stoner an, 66 Cal. 632, 6 Pac. 734. In the following cases the power has been denied: Hawkins v. Governor, 1 Ark. 570; Low v. Towns, 8 Ga. 390; State v. Kirkwood, 14 Iowa, 162; Dennett, Petitioner, 32 Me. 510; People v. Bissell, 19 Ill. 229; People v. Yates, 40 Ill. 126; People v. Callom, 100 Ill. 472; State v. Governor, 25 N. J. 351; Mannan v. Smith, 8 R. I. 192; State v. Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; Same v. Same, 24 La. Ann. 351, 13 Am. Rep. 126; People v. Governor, 29 Mich. 320, 18 Am. Rep. 89; State v. Governor, 39 Mo. 388; Vicksburg & M. R. R. Co. v. Lowry, 61 Miss. 102; [Territorial Ins. Asylum v. Wallifey, — Ariz., 22 Pac. 383 (8 July, 1889), 8 L. R. A. 188; Baer v. Taylor, 3 Pick. (Tenn.) 319, 11 S. W. 260; People v. Morton, 166 N. Y. 125, 50 N. E. 791, 66 Am. St. 647.

This last was a case where it was attempted to compel action of governor as member of board of trustees ex officio. See also State ex rel. v. Nash, 65 Ohio, 612, 64 N. E. 565.] Nor can he be enjoined from acting. Smith v. Myers, 103 Ind. 1; Bates v. Taylor, 87 Tenn. 319. See Lacy v. Martin, 39 Kan. 703, 18 Pac. 957; Kilpatrick v. Smith, 77 Va. 347. In Hurstraft's Appeal, 85 Pa. St. 493, 27 Am. Rep. 607, it was decided that the governor was not subject to the subpoena of the grand jury. In Minnesota it seems that officers of the executive department are exempt from judicial process even in the case of ministerial duties. Rice v. Austin, 19 Minn. 103; County Treasurer v. Dike, 20 Minn. 363; Western R. R. Co. v. De Graff, 27 Minn. 1, 6 N. W. 341; State v. Whittcomb, 28 Minn. 50. [See also State v. Stone, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. 705, and Frost v. Thomas, 23 Col. 222, 56 Pac. 599, 77 Am. St. 259. That court will not interfere with the exercise of discretion on the part of a railroad commission where such discretion is authorized by law, see Louisville & N. R. Co. v. Commonwealth, 104 Ky. 226, 46 S. W. 707, 47 S. W. 598, 48 S. W. 416, 43 L. R. A. 541, 549, 550. For effect of clause denying governor power to remove officers for partisan reasons, see People v. Martin, 19 Col. 565, 20 Pac. 643, 24 L. R. A. 201. In Maryland, the proclamation of the governor that a proposed amendment to the Constitution has been
Delegating Legislative Powers.

One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.  

1 duly adopted is not subject to review by any other officer or department. Worman v. Hagan, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716.]  

1 "These are the bounds which the trust that is put in them by the society, and the law of God and nature, have set to the legislative power of every Commonwealth, in all forms of government:—"  

"First. They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.  

"Secondly. These laws also ought to be designed for no other end ultimately but the good of the people.  

"Thirdly. They must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves.  

"Fourthly. The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have."  

Locke on Civil Government, § 142.  

CONSTITUTIONAL LIMITATIONS.

But it is not always essential that a legislative act should be a completed statute which must in any event take effect as law,


[Courts cannot be empowered to pass upon propriety of incorporation of lands into a village. In Application of North Milwaukee, 93 Wis. 610, 67 N. W. 1033, 38 L. R. A. 638. Insurance commissioner cannot be empowered to determine the form of standard insurance contract for the State. Dowling v. Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; Anderson v. Manchester Fire Ass. Co., 59 Minn. 182, 63 N. W. 241, 28 L. R. A. 609; O'Neil v. American Fire Ins. Co., 106 Pa. 72, 30 Atl. 915, 26 L. R. A. 715, 45 Am. St. 650. A statute authorizing a particular officer to pass upon the question of character, to determine the granting of license is not a delegation of legislative power. Delegation of power to determine who are within the operation of the law is not a delegation of legislative power. State v. Thompson, 190 Mo. 333, 60 S. W. 1077, 83 Am. St. 408, 54 L. R. A. 350. So permitting city councils upon petition of specified portion of voters of respective cities to suspend certain penalties of a prohibitory liquor law is not a delegation of legislative powers, nor is it an infringement of the pardoning power of the executive. State v. Forkner, 94 Iowa, 1, 62 N. W. 772, 28 L. R. A. 205. Statute may require railroad to construct cattle-guards when demand therefor is made by owners of lands through which railroad runs. Birmingham R. Co. v. Parsons, 103 Ala. 602, 13 So. 602, 27 L. R. A. 203, 46 Am. St. 92. Elective franchise cannot be conferred upon women upon condition that the statute be approved at a subsequent election. Re Municipal Suffrage to Women, 100 Mass. 580, 36 N. E. 488, 23 L. R. A. 112 and note hereto on power to make a statute contingent on popular approval. Law authorizing release from imprisonment for drunkenness upon entry of recognizance that convict will take the "Jag Cure," and final discharge upon exhibition of certificate of attendance and compliance with rules of the institution is void. Senate of Happy Home Club v. Alpena Co., 90 Mich. 117, 57 N. W. 1101, 28 L. R. A. 144. Where the legislature is directed to regulate the salaries of county clerks in proportion to duties performed, and a statute fixes their salaries, the legislature cannot authorize county boards to allow the clerks deputies. Dougherty v. Austin, 94 Cal. 901, 28 Pac. 834, 29 Pac. 1092, 15 L. R. A. 161, and note on delegation of legislative powers. Municipality cannot be authorized to modify the jurisdiction of courts. Vesta Mills v. Charleston, 60 S. C. 1, 38 S. E. 229. Right of initiative and referendum cannot be conferred on people of a municipality in respect even of municipal affairs. Elliott v. Detroit, 121 Mich. 611, 84 N. W. 820.]

[For other cases denying right to delegate legislative power, see: Bradshaw v. Lankford, 73 Md. 428, 21 Atl. 61, 11 L. R. A. 592, 25 Am. St. 602; Owensboro & N. R. Co. v. Todd, 91 Ky. 175, 15 S. W. 56, 11 L. R. A. 285; Arms v. Ayer, 192 Ill. 901, 61 N. E. 851, 85 Am. St. 367, where it is said, quoting from Dowling v. Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738: "A law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature, so that in form and substance it is a law in all its details is presenti, but which may be left to take effect in futuro, if necessary, upon the ascertainment of any prescribed fact or
at the time it leaves the hands of the legislative department. A statute may be *conditional*, and its taking effect may be made to depend upon some subsequent event. A affirmative legislation may in some cases be adopted, of which the parties interested are at liberty to avail themselves or not at their option. A private act of incorporation cannot be forced upon the corporators; they may refuse the franchise if they so choose. In these cases the legislative act is regarded as complete when it has passed through the constitutional formalities necessary to perfected legislation, notwithstanding its actually going into operation as law may depend upon its subsequent acceptance. We have elsewhere spoken of municipal corporations, and of the powers of legislation which may be and commonly are bestowed upon them, and the bestowal of which is not to be considered as trenching upon the maxim that legislative power must not be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and of England, which has always recognized the propriety and policy of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority. As municipal organizations are more auxiliaries of the State government in the important business of

event." The legislature cannot delegate the power to fix penalties to a Board of Harbor Commissioners. Board of Harbor Commissioners v. Excelsior Redwood Co., 28 Cal. 491, 28 Pac. 375."

1 Brig Aurora v. United States, 7 Cranch, 382; Bull v. Read, 13 Gratt. 73; State v. Parker, 26 Vt. 357; Peck v. Weddell, 17 Ohio St. 271; State v. Kirkley, 29 Md. 85; Walton v. Greenwood, 60 Me. 350; Baltimore v. Chimet, 23 Md. 449. It is not a delegation of legislative power to make the repeal of a charter depend upon the failure of the corporation to make up a deficiency which is to be ascertained and determined by a tribunal provided by the repealing act. Lothrop v. Stedman, 42 Conn. 583. See Crease v. Babcock, 22 Pick. 334, 344. Nor to refer the question of extending municipal boundaries to a court where issues may be formed and disputed facts tried. Burlington v. Leebrock, 43 Iowa, 252; Wahoo v. Dickinson, 23 Neb. 426, 30 N. W. 813. But a court cannot be authorized to create a municipal corporation upon petition of a majority of the inhabitants of the territory to be incorporated. Terr. v. Stewart, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 105.] It is competent to make an act take effect on condition that those applying for it shall erect a station at a place named. State v. New Haven, &c. Co., 45 Conn. 351. Railroad Commissioners may be empowered to fix rates. Georgia R. R., &c. Co. v. Smith, 70 Ga. 694. A commission may be empowered to select a site for a public building. People v. Dunn, 80 Cal. 211, 22 Pac. 140; Terr. v. Scott, 3 Dak. 657, 20 N. W. 401. An act taxing corporations of another State doing business within the State as its corporations are taxed in such other State is not an abandonment of legislative functions. The law is complete; its operation, contingent. Home Ins. Co. v. Swigert, 104 Ill. 653; Phoenix Ins. Co. v. Welch, 29 Kan. 672. Contra, Clark v. Mobile, 67 Ala. 217.

2 Angell and Ames on Corp. § 81.
municipal rule, the legislature may create them at will from its own views of propriety or necessity, and without consulting the parties interested; and it also possesses the like power to abolish them, without stopping to inquire what may be the desire of the corporators on that subject.\footnote{1}

Nevertheless, as the corporators have a special and peculiar interest in the terms and conditions of the charter, in the powers conferred and liabilities imposed, as well as in the general question whether they shall originally be or afterwards remain incorporated at all or not, and as the burdens of municipal government must rest upon their shoulders, and especially as by becoming incorporated they are held, in law, to undertake to discharge the duties the charter imposes, it seems eminently proper that their voice should be heard on the question of their incorporation, and that their decisions should be conclusive, unless, for strong reasons of State policy or local necessity, it should seem important for the State to overrule the opinion of the local majority. The right to refer any legislation of this character to the people peculiarly interested does not seem to be questioned, and the reference is by no means unusual.\footnote{2}

\footnote{1 City of Paterson v. Society, &c., 21 N. J. 355; Cheeny v. Hoosier, 9 B. Monr. 330; Berlin v. Gorham, 34 N. II. 266; State v. Holden, 19 Neb. 249, 27 N. W. 120; Attorney-General v. Weimer, 59 Mich. 560, 26 N. W. 773. The question of a levee tax may lawfully be referred to the voters of the district of territory over which it is proposed to spread the tax, regardless of municipal divisions. Alcorn v. Hanner, 38 Miss. 692. Power to grant an exclusive franchise in aid of navigation may be delegated to a village: Farnum v. Johnson, 62 Wis. 620, 22 N. W. 751; power to determine the penalty to be imposed for infraction of a State law may not: Montross v. State, 61 Miss. 429; nor power to increase its representation on a county board, when the constitution ordains that the legislature shall determine such representation. People v. Riordan, 73 Mich. 508, 41 N. W. 482. And see, in general, Angell and Ames on Corp. § 31 and note; also post, pp. 261-265.}

\footnote{2 Bull v. Reed, 13 Gratt. 78; Corning v. Greene, 23 Barb. 33; Marford v. Unger, 8 Iowa, 82; City of Paterson v. Society, &c., 21 N. J. 355; Gorham v. Springfield, 21 Me. 58; Commonwealth v. Judges of Quarter Sessions, 8 Pa. St. 391; Commonwealth v. Painter, 10 Pa. St. 214; Call v. Chadbourn, 40 Me. 206; State v. Scott, 17 Mo. 521; State v. Wilcox, 45 Mo. 468; Hobart v. Supervisors, &c., 17 Cal. 23; Bank of Chenango v. Brown, 26 N. Y. 467; Steward v. Jefferson, 3 Harr. 335; Burgess v. Pue, 2 Gill. 11; Lafayette, &c. R. R. Co. v. Geiger, 34 Ind. 186; Clarke v. Rogers, 81 Ky. 43. As the question need not be submitted at all, the legislature may submit it to the freeholders alone. People v. Butte, 4 Mont. 174, 1 Pac. 414. The right to refer to the people of several municipalities the question of their consolidation was disputed in Smith v. McCarthy, 56 Pa. St. 350, but sustained by the court. And see Smyth v. Titcomb, 31 Me. 272; Erlinger v. Bounce, 51 Ill. 94; Lammert v. Lidwell, 62 Mo. 188; State v. Wilcox, 45 Mo. 458; Brunswick v. Finney, 54 Ga. 317; Response to House Resolution, 55 Mo. 295; People v. Fleming, 10 Col. 563, 16 Pac. 208; Graham v. Greenville, 67 Tex. 62, 2 S. W. 742. [Such reference is now permitted in Minnesota. Hopkins v. Duluth, 81 Minn. 189, 83 N. W. 536. For a consideration of various questions arising in regard to such a reference, see State v. Denney, 4 Wash. 136, 29 Pac. 501, 16 L. R. A. 214.]}
For the like reasons the question whether a county or township shall be divided and a new one formed, or two townships or school districts formerly one be reunited, or a city charter be revised, or a county seat located at a particular place, or after its location removed elsewhere, or the municipality contract particular debts, or engage in a particular improvement, is

1 State v. Reynolds, 10 Ill. 1. See State v. McNeill, 24 Wis. 149. Response to House Resolution, 55 Mo. 205. For other cases on the same general subject, see People v. Nally, 49 Cal. 478; Pike County v. Barnes, 51 Miss. 305; Brunswick v. Finney, 54 Ga. 317. The question whether a general school law shall be accepted in a particular municipality may be referred to its voters. State v. Wilcox, 45 Mo. 468. The operation of an act creating a municipal court may be made dependent on the approval of the municipal voters. Rutter v. Sullivan, 25 W. Va. 427. A city may be empowered to decide by vote whether it will take control of the public schools in it. Werner v. Galveston, 72 Tex. 22, 7 S. W. 729.

2 Commonwealth v. Judges, &c., 8 Pa. St. 391; Call v. Chadbourne, 46 Me. 208; People v. Nally, 49 Cal. 478; Eringer v. Boneau, 51 Ill. 94.


5 There are many cases in which municipal subscriptions to works of internal improvement, under statutes empowering them to be made, have been sustained; among others, Godlin v. Crump, 8 Leigh, 120; Bridgeport v. Housatonic Railroad Co., 15 Conn. 476; Stavin v. Genoa, 20 Barb. 442, and 23 N. Y. 439; Bank of Rome v. Village of Rome, 18 N. Y. 38; Prettyman v. Supervisors, &c., 19 Ill. 406; Robertson v. Rockford, 21 Ill. 451; Johnson v. Stack, 24 Ill. 75; Bushnell v. Beloit, 10 Wis. 105; Clark v. Janesville, 10 Wis. 190; Stein v. Mobile, 24 Ala. 591; Mayor of Wetumpka v. Winter, 29 Ala. 561; Patterson v. Yuta, 13 Cal. 175; Blanding v. Burr, 13 Cal. 313; Hobart v. Supervisors, &c., 17 Cal. 23; Taylor v. Newberry, 2 Jones Eq. 141; Caldwell v. Justices of Burke, 4 Jones Eq. 323; Louisville, &c. Railroad Co. v. Davidson, 1 Sneed, 637; Nichol v. Mayor of Nashville, 9 Humph. 252; Railroad Co. v. Commissioners v. Clinton Co., 1 Ohio St. 77; Trustees of Aris v. Cherry, 8 Ohio St. 561; Cass v. Dillon, 2 Ohio St. 607; State v. Commissioners of Clinton Co., 6 Ohio St. 289; State v. Van Horn, 7 Ohio St. 327; State v. Trustees of Union, 8 Ohio St. 394; Trustees, &c. v. Shoemaker, 12 Ohio St. 624; State v. Commissioners of Hancock, 12 Ohio St. 690; Powers v. Dougherty Co., 23 Ga. 55; San Antonio v. Jones, 23 Tex. 19; Commonwealth v. McWilliams, 11 Pa. St. 61; Sharpless v. Mayor, &c., 21 Pa. St. 147; Moss v. Reading, 21 Pa. St. 188; Talbot v. Dent, 9 B. Monr. 620; Slack v. Railroad Co., 18 B. Monr. 1; City of St. Louis v. Alexander, 23 Mo. 483; City of Aurora v. West, 9 Ind. 74; Cotton v. Commissioners of Leon, 6 Fla. 610; Copes v. Charleston, 10 Rich. 491; Commissioners of Knox County v. Aspinwall, 21 How. 530, and 21 How. 326; Same v. Wallace, 21 How. 547; Zabriskie v. Railroad Co., 23 How. 381; Amey v. Mayor, &c., 24 How. 364; Gelpke v. Dubuque, 1 Wall. 175; Thomson v. Lee County, 3 Wall. 327; Rogers v. Burlington, 3 Wall. 654; Gibbons v. Mobile & Great Northern Railroad Co., 56 Ala. 410; St. Joseph, &c., Railroad Co. v. Buchanan Co. Court, 39 Mo. 485; State v. Linn Co. Court, 44 Mo. 504; Stewart v. Supervisors of Polk Co., 30 Iowa, 9; John v. C. R. & F. W. R. R. Co., 35 Ind. 599; Leavenworth County v. Miller, 7 Kan. 479; Walker v. Cincinnati, 21 Ohio St. 14; Ex parte Selma, &c. v. R. R. Co., 45 Ala. 960; S. & V. R. R. Co. v. Stockton, 41 Cal. 149. In several of them the power to authorize the municipalities to decide upon such subscriptions has been contested as a delegation of legislative authority, but the courts — even those which hold the subscriptions void on other grounds — do not look upon these cases as being obnoxious to the constitutional principle referred to in the
always a question which may with propriety be referred to the voters of the municipality for decision.¹

The question then arises, whether that which may be done in reference to any municipal organization within the State may not also be done in reference to the State at large. May not any law framed for the State at large be made conditional on an acceptance by the people at large, declared through the ballot-box? If it is not unconstitutional to delegate to a single locality the power to decide whether it will be governed by a particular charter, must it not quite as clearly be within the power of the legislature to refer to the people at large, from whom all power is derived, the decision upon any proposed statute affecting the whole State? And can that be called a delegation of power which consists only in the agent or trustee referring back to the principal the final decision in a case where the principal is the party concerned, and where perhaps there are questions of policy and propriety involved which no authority can decide so satisfactorily and so conclusively as the principal to whom they are referred?

If the decision of these questions is to depend upon the weight of judicial authority up to the present time, it must be held that there is no power to refer the adoption or rejection of a general law to the people of the State, any more than there is to refer it to any other authority. The prevailing doctrine in the courts appears to be, that, except in those cases where, by the constitution, the people have expressly reserved to themselves a power of decision, the function of legislation cannot be exercised by them, even to the extent of accepting or rejecting a law which has been framed for their consideration. “The exercise of this power by the people in other cases is not expressly and in terms prohibited by the constitution, but it is forbidden by necessary

text. [In any event the power must be exercised strictly in accordance with the conditions attached to the legislative permission. Barnum v. Okolona, 148 U. S. 836, 13 Sup. Ct. Rep. 638.]

¹ Whatever powers the legislature may delegate to any public agency for exercise, it may itself resume and exercise. Dyer v. Tuscaloosa Bridge Co., 2 Port. 296, 27 Am. Dec. 665; Attorney-General v. Marr, 55 Mich. 445, 21 N. W. 883; Chicago & N. W. Ry. Co. v. Laughead Co., 56 Wis. 614, 14 N. W. 844; [Brand v. Multnomah Co., 38 Ore. 79, 60 Pac. 300, 50 L. R. A. 389, 84 Am. St. 772.] But this must be understood with the exception of those cases in which the constitution of the State requires local matters to be regulated by local authority. County commissioners may be authorized to provide additional justices of the peace for any precinct above 20,000 inhabitants if “the needs of the precinct ... require.” Pueblo Co. Com’rs v. Smith, 22 Col. 534, 45 Pac. 357, 33 L. R. A. 365. Where local matters are required to be submitted to popular vote, if two or more propositions are submitted at one election, they must be so submitted that they may be voted on separately. Denver v. Hayes. 28 Col. 110, 63 Pac. 311.]
and unavoidable implication. The Senate and Assembly are the only bodies of men clothed with the power of general legislation. They possess the entire power, with the exception above stated. The people reserved no part of it to themselves [with that exception], and can therefore exercise it in no other case.” It is therefore held that the legislature have no power to submit a proposed law to the people, nor have the people power to bind each other by acting upon it. They voluntarily surrendered that power when they adopted the constitution. The government of the State is democratic, but it is a representative democracy, and in passing general laws the people act only through their representatives in the legislature.1

Nor, it seems, can such legislation be sustained as legislation of a conditional character, whose force is to depend upon the happening of some future event, or upon some future change of circumstances. “The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expediency of the law; an event on which the expediency of the law in the opinion of the law-makers depends. On this question of expediency the legislature must exercise its own judgment definitely and finally. When a law is made to take effect upon the happening of such an event, the legislature in effect declare the law inexpedient if the event should not happen, but expedient if it should happen. They appeal to no other man or men to judge for them in relation to its present or future expediency. They exercise that power themselves, and then perform the duty which the Constitution imposes upon them.” But it was held that in the case of the submission of a proposed free-school law to the

1 Per Ruggles, Ch. J., in Barto v. Himrod. 8 N. Y. 483. It is worthy of consideration, however, whether there is anything in the reference of a statute to the people for acceptance or rejection which is inconsistent with the representative system of government. To refer it to the people to frame and agree upon a statute for themselves would be equally impracticable and inconsistent with the representative system; but to take the opinion of the people upon a bill already framed by representatives and submitted to them, is not only practicable, but is in precise accordance with the mode in which the constitution of the State is adopted, and with the action which is taken in many other cases. The representative in these cases has fulfilled precisely those functions which the people as a democracy could not fulfil; and where the case has reached a stage when the body of the people can act without confusion, the representative has stepped aside to allow their opinion to be expressed. The legislature is not attempting in such a case to delegate its authority to a new agency, but the trustee, vested with a large discretionary authority, is taking the opinion of the principal upon the necessity, policy, or propriety of an act which is to govern the principal himself. See Smith v. Jamesville, 26 Wis. 291; Fell v. State, 42 Md. 71, 20 Am. Rep. 83; King v. Reed, 43 N. J. 180.
people, no such event or change of circumstances affecting the expediency of the law was expected to happen. The wisdom or expediency of the School Act, abstractly considered, did not depend on the vote of the people. If it was unwise or inexpedient before that vote was taken, it was equally so afterwards. The event on which the act was to take effect was nothing else than the vote of the people on the identical question which the constitution makes it the duty of the legislature itself to decide. The legislature has no power to make a statute dependent on such a contingency, because it would be confiding to others that legislative discretion which they are bound to exercise themselves, and which they cannot delegate or commit to any other man or men to be exercised.  

1 Per Ruggles, Ch. J., in Barto v. Himrod, 8 N. Y. 483. And see State v. Hayes, 61 N. H. 264; Santo v. State, 2 Iowa, 105; State v. Beneke, 9 Iowa, 203; State v. Swisher, 17 Tex. 441; State v. Field, 17 Mo. 520; Bank of Chenango v. Brown, 26 N. Y. 467; People v. Stout, 26 Barb. 349; State v. Wilcox, 45 Mo. 468; Ex parte Wall, 43 Cal. 279, 313; Brown v. Fleischner, 4 Oreg. 132. The power to tax cannot be delegated except as by the Constitution is permitted. Where the Constitution provided that the General Assembly shall have power to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes respectively, it was held not competent to delegate the power to a school board. Waterhouse v. Public Schools, 9 Bax. 308. But upon this point there is great force in what is said by Redfield, Ch. J., in State v. Parker, 26 Vt. 357: "If the operation of a law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what is the nature of the contingency, so it be an equal and fair one, a moral and legal one, not opposed to sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one. And to us the contingency, upon which the present statute was to be suspended until another legislature should meet and have opportunity of reconsidering it, was not only proper and legal, and just and moral, but highly commendable and creditable to the legislature who passed the statute; for at the very threshold of inquiry into the expediency of such a law lies the other and more important inquiry, Are the people prepared for such a law? Can it be successfully enforced? These questions being answered in the affirmative, he must be a bold man who would even vote against the law; and something more must be he who would, after it had been passed with that assurance, be willing to embarrass its operation or rejoice at its defeat."

"After a full examination of the arguments by which it is attempted to be sustained that statutes made dependent upon such contingencies are not valid laws, and a good deal of study and reflection, I must declare that I am fully convinced — although at first, without much examination, somewhat inclined to the same opinion — that the opinion is the result of false analogies, and so founded upon a latent fallacy. It seems to me that the distinction attempted between the contingency of a popular vote and other future contingencies is without all just foundation in sound policy or sound reasoning, and that it has too often been made more from necessity than choice, — rather to escape from an overwhelming analogy than from any obvious difference in principle in the two classes of cases: for . . . one may find any number of cases in the legislation of Congress, where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries. In some, perhaps, these laws are made by representative bodies, or, it may be, by the people of these States, and in others by the lords of the treasury, or the
The same reasons which preclude the original enactment of a law from being referred to the people would render it equally incompetent to refer to their decision the question whether an existing law should be repealed. If the one is "a plain surrender to the people of the law-making power," so also is the other. It would seem, however, that if a legislative act is, by its terms, to take effect in any contingency, it is not unconstitutional to make the time when it shall take effect depend upon boards of trade, or by the proclamation of the sovereign; and in all these cases no question can be made of the perfect legality of our acts of Congress being made dependent upon such contingencies. It is, in fact, the only possible mode of meeting them, unless Congress is kept constantly in session. The same is true of acts of Congress by which power is vested in the President to levy troops or draw money from the public treasury, upon the contingency of a declaration or an act of war committed by some foreign state, empire, kingdom, prince, or potentate. If these illustrations are not sufficient to show the fallacy of the argument, more would not avail. See also State v. Nayes, 10 Fost. 273; Bull v. Read, 13 Gratt. 78; Johnson v. Rich, 9 Barb. 680; State v. Reynolds, 10 Ill. 1; Robinson v. Bidwell, 22 Cal. 370. In the case of Smith v. Janesville, 26 Wis. 291, Chief Justice Dixon discusses this subject in the following language: "But it is said that the act is void, or at least so much of it as pertains to the taxation of shares in national banks, because it was submitted to a vote of the people, or provided that it should take effect only after approval by a majority of the electors voting on the subject at the next general election. This was no more than providing that the act should take effect on the happening of a certain future contingency, that contingency being a popular vote in its favor. No one doubts the general power of the legislature to make such regulations and conditions as it pleases with regard to the taking effect or operation of laws. They may be absolute, or conditional and contingent; and if the latter, they may take effect on the happening of any event which is future and uncertain. Instances of this kind of legislation are not unfrequent. The law of Congress suspending the writ of habeas corpus during the late rebellion is one, and several others are referred to in the case In re Richard Oliver, 17 Wis. 681. It being conceded that the legislature possesses this general power, the only question here would seem to be, whether a vote of the people in favor of a law is to be excluded from the number of those future contingent events upon which it may be provided that it shall take effect.

A similar question was before this court in a late case (State ex rel. Attorney-General v. O'Neill, Mayor, &c., 24 Wis. 149), and was very elaborately discussed. We came unanimously to the conclusion in that case that a provision for a vote of the electors of the city of Milwaukee in favor of an act of the legislature, before it should take effect, was a lawful contingency, and that the act was valid. That was a law affecting the people of Milwaukee particularly, while this was one affecting the people of the whole State. There the law was submitted to the voters of that city, and here it was submitted to those of the State at large. What is the difference between the two cases? It is manifest, on principle, that there cannot be any. The whole reasoning of that case goes to show that this act must be valid, and so it has been held in the best-considered cases, as will be seen by reference to that opinion. We are constrained to hold, therefore, that this act is and was in all respects valid from the time it took effect, in November, 1869; and consequently that there was no want of authority for the levy and collection of the taxes in question." This decision, though opposed to many others, appears to us entirely sound and reasonable.

1 Geerbrick v. State, 5 Iowa, 401; Rice v. Foster, 4 Harr. 479; Parker v. Commonwealth, 6 Pa. St. 507. The case in 5 Iowa was followed in State v. Weir, 33 Iowa, 134, 11 Am. Rep. 115.
the event of a popular vote being for or against it, — the time of its going into operation being postponed to a later day in the latter contingency. It would also seem that if the question of the acceptance or rejection of a municipal charter can be referred to the voters of the locality specially interested, it would be equally competent to refer to them the question whether a State law establishing a particular police regulation should be of force in such locality or not. Municipal charters refer most questions of local government, including police regulations, to the local authorities; on the supposition that they are better able to decide for themselves upon the needs, as well as the sentiments, of their constituents, than the legislature possibly can be, and are therefore more competent to judge what local regulations are important, and also how far the local sentiment will assist in their enforcement. The same reasons would apply in favor of permitting the people of the locality to accept or reject for themselves a particular police regulation, since this is only allowing them less extensive powers of local government than a municipal charter would confer; and the fact that the rule of law on that subject might be different in different localities, according as the people accepted or rejected the regulation, would not seem to affect the principle, when the same result is brought about by the different regulations which municipal corporations establish for themselves in the exercise of an undisputed authority. It is not to be denied, however, that

1 State v. Parker, 26 Vt. 357. The act under consideration in that case was, by its terms, to take effect on the second Tuesday of March after its passage, unless the people to whose votes it was submitted should declare against it, in which case it should take effect in the following December. The case was distinguished from Barto v. Himrod, 8 N. Y. 483, and the act sustained. At the same time the court express their dissent from the reasoning upon which the New York case rests. In People v. Collins, 3 Mich. 343, the court was equally divided in a case similar to that in Vermont, except that in the Michigan case the law which was passed and submitted to the people in 1853 was not to go into effect until 1870, if the vote of the people was against it.

2 In New Hampshire an act was passed declaring bowling-alleys, situate within twenty-five rods of a dwelling-house, nuisances, but the statute was to be in force only in those towns in which it should be adopted in town meeting. In State v. Noyes, 10 Post. 279, this act was held to be constitutional. "Assuming," say the court, "that the legislature has the right to confer the power of local regulation upon cities and towns, that is, the power to pass ordinances and by-laws, in such terms and with such provisions, in the classes of cases to which the power extends, as they may think proper, it seems to us hardly possible seriously to contend that the legislature may not confer the power to adopt within such municipality a law drawn up and framed by themselves. If they may pass a law authorizing towns to make ordinances to punish the keeping of billiard-rooms, bowling-alleys, and other places of gambling, they may surely pass laws to punish the same acts, subject to be adopted by the town before they can be of force in it." And it seems to us difficult to answer this reasoning, if it be confined to such laws as fall within the proper
there is considerable authority against the right of legislative delegation in these cases.

The legislature of Delaware, in 1847, passed an act to authorize the citizens of the several counties of the State to decide by ballot whether the license to retail intoxicating liquors should be permitted. By this act a general election was to be held; and if a majority of votes in any county should be cast against license, it should not thereafter be lawful for any person to retail intoxicating liquors within such county; but if the majority should be cast in favor of license, then licenses might be granted in the county so voting, in the manner and under the regulations in said act prescribed. The Court of Errors and Appeals of that State held this act void, as an attempted delegation of the trust to make laws, and upon the same reasons which support the cases before cited, where acts have been held void which referred to the people of the State for approval a law of general application. A like decision was made near the same time by the Supreme Court of Pennsylvania, followed afterwards by others in Iowa, Indiana, and California. But the decision in Pennsylvania was afterwards overruled on full discussion and consideration, and that in Indiana must, we think, be deemed overruled also. In other States a like delegation of authority to the local electors has generally been sustained. Such laws are known, in province of local government, and which are therefore usually referred to the judgment of the municipal authorities or their constituency. A similar question arose in Smith v. Village of Adrian, 1 Mich. 495, but was not decided. In Bank of Chenango v. Brown, 26 N. Y. 467, it was held competent to authorize the electors of an incorporated village to determine for themselves what sections of the general act for the incorporation of villages should apply to their village. An act empowering a city, where the legal voters authorize it, to allow Sunday sales of refreshments, is valid. State v. Francis, 95 Mo. 44, 8 S. W. 1. The operation of a park act may be left to the vote of a city. State v. District Court, 33 Minn. 235, 22 N. W. 625. So, of a law vesting control of streets in aldermen instead of street commissioners. State v. Hoagland, 61 N. J. L. 62, 16 Atl. 106. So, of a law creating a new county. People v. McFadden, 81 Cal. 489, 22 Pac. 571. Whether an election to determine upon putting a law in operation shall be called, may be left to the discretion of officers. Johnson v. Martin, 76 Tex. 33, 12 S. W. 821. See, further, People v. Salomon, 51 Ill. 57; Burgess v. Pue, 2 Gill, 11; Hammond v. Gaines, 25 Md. 541.

1 Rice v. Foster, 4 Harr. 479.
4 Maize v. State, 4 Ind. 342; Melsheimer v. State, 11 Ind. 482. See also State v. Field, 17 Mo. 529; Lammert v. Lidwell, 62 Mo. 188; State v. Copeland, 3 R. I. 23.
7 Groesch v. State, 42 Ind. 547. [A majority of voters in a ward or township may be allowed by formal remonstrance to prevent the issuance of license to a particular applicant for the sale of liquors therein. State v. Gerhardt, 146 Ind. 493, 44 N. E. 469, 33 L. R. A. 318.]
common parlance, as Local Option Laws. They relate to subjects which, like the retailing of intoxicating drinks, or the running at large of cattle in the highways, may be differently regarded in different localities, and they are sustained on what seems to us the impregnable ground, that the subject, though not embraced within the ordinary power of the municipalities to make by-laws and ordinances, is nevertheless within the class of police regulations, in respect to which it is proper that the local judgment should control.¹

Irrepealable Laws.

Similar reasons to those which forbid the legislative department of the State from delegating its authority will also forbid its passing any irrepealable law. The constitution, in conferring the legislative authority, has prescribed to its exercise any limitations which the people saw fit to impose; and no other power than the people can superadd other limitations. To say that the legislature may pass irrepealable laws, is to say that it may alter the very constitution from which it derives its authority; since, in so far as one legislature could bind a subsequent one by its enactments, it could in the same degree reduce the legislative power of its successors; and the process might be repeated, until, one by one, the subjects of legislation would be excluded altogether from their control, and the constitutional provision that the legislative power shall be vested in two houses would be to a greater or less degree rendered ineffectual.²


dale, 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69.] Local option, as applied to the sale of liquors, has also been sustained in Canada. Mayor, &c. v. The Queen, 3 Can. Sup. Ct. 606. But the matter cannot be left to an election precipit. It must be submitted to a municipal corporation. Thornton v. Territory, 3 Wash. Ter. 482, 17 Pac. 806.

² "Unlike the decision of a court, a legislative act does not bind a subsequent legislature. Each body possesses the same power, and has the right to exercise the same discretion. Measures, though often rejected, may receive legislative sanction. There is no mode by which a legislative act can be made irrepealable, except it assume the form and substance of a contract. If in any line of legislation a permanent character could be given to acts, the most injurious consequences would result to the country. Its policy would
"Acts of Parliament," says Blackstone, "derogatory from the power of subsequent Parliaments, bind not; so the statute 11 Henry VII. c. 1, which directs that no person for assisting a king de facto shall be attainted of treason by act of Parliament or otherwise, is held to be good only as to common prosecution for high treason, but it will not restrain nor clog any parliamentary attainder. Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority; it acknowledges no superior upon earth, which the prior legislature must have been if its ordinances could bind a subsequent Parliament. And upon the same principle, Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses which endeavor to tie up the hands of succeeding legislatures. 'When you repeal the law itself,' says he, 'you at the same time repeal the prohibitory clause which guards against such repeal.'"¹

Although this reasoning does not in all its particulars apply to the American legislatures, the principle applicable in each case is the same. There is a modification of the principle, however, by an important provision of the Constitution of the United States, forbidding the States passing any laws impairing the obligation of contracts. Legislative acts are sometimes in substance contracts between the State and the party who is to derive some right under them, and they are not the less under the protection of the clause quoted because of having assumed this form. Charters of incorporation, except those of a municipal character,—and which, as we have already seen, create mere agencies of government,—are held to be contracts between the State and the corporators, and not subject to modification or change by the act of the State alone, except as may be authorized by the terms of the charters themselves.² And it now seems to be settled, by the decisions of the Supreme Court of the United States, that a State, by contract to that effect, based upon a consideration, may exempt the property of an individual or corporation from taxation for any specified period, or even

¹ 1 Bl. Comm. 90.
permanently. And it is also settled by the same decisions, that where a charter, containing an exemption from taxes, or an agreement that the taxes shall be to a specified amount only, is accepted by the corporators, the exemption is presumed to be upon sufficient consideration, and consequently binding upon the State.\footnote{Gordon v. Appeal Tax Court, 3 How. 153; New Jersey v. Wilson, 7 Cranch, 164; Piqua Branch Bank v. Knapp, 18 How. 331; Ohio Life Ins. and Trust Co. v. Debolt, 16 How. 416, 432; Dodge v. Woodsey, 18 How. 331; Mechanics' and Traders' Bank v. Debolt, 18 How. 381; Jefferson Branch Bank v. Skelly, 1 Black, 4; Erie R. R. Co. v. Pennsylvania, 21 Wall. 432. See also Hunsaker v. Wright, 30 Ill. 146; Morgan v. Cree, 46 Vt. 773; Spooner v. McConnell, 1 McLean, 317; post, p. 395.}

\textit{Territorial Limitation to State Legislative Authority.}

The legislative authority of every State must spend its force within the territorial limits of the State. The legislature of one State cannot make laws by which people outside the State must govern their actions, except as they may have occasion to resort to the remedies which the State provides, or to deal with property situated within the State. It can have no authority upon the high seas beyond State lines, because there is the point of con-

\footnote{Gordon v. Appeal Tax Court, 3 How. 153; New Jersey v. Wilson, 7 Cranch, 164; Piqua Branch Bank v. Knapp, 18 How. 331; Ohio Life Ins. and Trust Co. v. Debolt, 16 How. 416, 432; Dodge v. Woodsey, 18 How. 331; Mechanics' and Traders' Bank v. Debolt, 18 How. 381; Jefferson Branch Bank v. Skelly, 1 Black, 4; Erie R. R. Co. v. Pennsylvania, 21 Wall. 432. See also Hunsaker v. Wright, 30 Ill. 146; Morgan v. Cree, 46 Vt. 773; Spooner v. McConnell, 1 McLean, 317; post, p. 395. The right of a State legislature to grant away the right of taxation, which is one of the essential attributes of sovereignty, has been strenuously denied. See Debolt v. Ohio Life Ins. and Trust Co., 1 Ohio St. 663; Mechanics' and Traders' Bank v. Debolt, 1 Ohio St. 591; Brewster v. Rough, 10 N. Y. 138; Mott v. Pennsylvania Railroad Co., 30 Pa. St. 9. And see Thorpe v. Rutland and B. Railroad Co., 27 Vt. 140; post, p. 395 and note. In Brick Presbyterian Church v. Mayor, &c. of New York, 5 Cow. 538, it was held that a municipal corporation had no power, as a party, to make a contract which should control or embarrass its discharge of legislative duties. And see post, p. 295. In Coats v. Mayor, &c. of New York, 7 Cow. 355, it was decided that though a municipal corporation grant lands for cemetery purposes, and covenant for their quiet enjoyment, it will not thereby be estopped afterwards to forbid by-law the use of the land for that purpose, when such use becomes or is likely to become a nuisance. In Stone v. Mississippi, 191 U. S. 814, 820, Chief Justice Waite says: "The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must vary with varying circumstances." See also, on the same subject, Morgan v. Smith, 4 Minn. 104; Kincaid's Appeal, 66 Pa. St. 411; 5 Am. Rep. 377; Haunrick v. Rouse, 17 Ga. 56, where it was held that the legislature could not bind its successors not to remove a county seat. Bass v. Ponthroy, 11 Tex. 668; Shaw v. Mason, 21 Ga. 280; Regents of University v. Williams, 9 G. & J. 365; Mott v. Pennsylvania Railroad Co., 30 Pa. St. 9. In Bank of Republic v. Hamilton, 21 Ill. 53, it was held that, in construing a statute, it will not be intended that the legislature designed to abandon its right as to taxation. This subject is considered further, post, pp. 395-401.}
tact with other nations, and all international questions belong to the national government. It cannot provide for the punishment as crimes of acts committed beyond the State boundary, because such acts, if offences at all, must be offences against the sovereignty within whose limits they have been done. But if the consequences of an unlawful act committed outside the State have reached their ultimate and injurious result within it, it seems that the perpetrator may be punished as an offender against such State.

1 Bish. Cr. Law, § 120.
2 State v. Knight, 2 Hayw. 109; People v. Merrill, 2 Park. Cr. R. 590; Adams v. People, 1 N. Y. 173; Tyler v. People, 8 Mich. 320; Murrisesy v. People, 11 Mich. 327; Bromley v. People, 7 Mich. 472; State v. Main, 16 Wis. 308; Watson’s Case, 23 Miss. 593; In re Cary, 28 Kan. 1. See In re Roseluth, 33 Fed. Rep. 657. [The territorial jurisdiction of a State bordering upon the high seas extends one marine league from shore and is subject over that space only to the federal power over navigation. State has full control of the fisheries therein. Manchester v. Massachusetts, 199 U. S. 210, 11 Sup. Ct. Rep. 550.] The Constitution of the United States empowers Congress to exercise exclusive jurisdiction over places purchased by consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. When the United States acquire lands without such consent, the State jurisdiction is as complete as if the lands were owned by private citizens. But the State, in giving consent, may reserve the right to serve State process within the territory: State v. Dimnick, 12 N. II. 194; Commonwealth v. Clary, 8 Mass. 72; United States v. Cornell, 2 Mass. 60; Opinion of Judges, 1 Met. 550; or to tax railroads in it: Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. Rep. 955; and its railroad fencing statutes remain in force. Chicago, R. I., & C. Co. v. McGinn, 114 U. S. 542, 5 Sup. Ct. Rep. 1095. Offences within the purchased territory can only be punished by the United States: United States v. Ames, 1 Wood. & M. 75; Mitchell v. Tibbetts, 17 Pick. 298; even though death ensues out of the territory: Kelly v. United States, 27 Fed. Rep. 010; State v. Kelly, 76 Me. 331; and residents within such territory are not citizens of the State. Commonwealth v. Clary, 8 Mass. 75; Sinks v. Rees, 19 Ohio St. 306. As to jurisdiction over military camps within a State, for military purposes, see United States v. Tierney, 1 Bond, 571; and as to crimes on Indian reservations, United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. Rep. 1109; Ex parte Cross, 20 Neb. 417, 39 N. W. 428; Marion v. State, id. 293, 20 N. W. 911.
3 Tyler v. People, 8 Mich. 820. Murder is committed in the District of Columbia if the fatal blow is struck there, though the death occurs elsewhere. United States v. Guitoua, 1 Mackey, 498. See Hatfield v. Com., 12 S. W. 309 (Ky.). That where a larceny is committed in one State and the property carried by the thief into another, this may be treated as a continuous larceny wherever the property is taken, see Commonwealth v. Cullins, 1 Mass. 116; Commonwealth v. Andrews, 2 Mass. 14, 3 Am. Dec. 17; Commonwealth v. Holdor, 9 Gray, 7; Commonwealth v. White, 123 Mass. 450; State v. Ellis, 3 Conn. 185, 8 Am. Dec. 175; State v. Cummins, 33 Conn. 269; State v. Bartlett, 11 Vt. 505; State v. Bennett, 14 Iowa, 479; People v. Williams, 24 Mich. 156; State v. Main, 16 Wis. 308; Hamilton v. State, 11 Ohio, 435; State v. Scay, 3 Stew. 123, 20 Am. Dec. 66; State v. Johnson, 2 Oreg. 115; Myers v. People, 26 Ill. 173; Watson v. State, 25 Miss. 593; State v. Underwood, 49 Me. 181; Felce v. Commonwealth, 1 Duv. 153; Regina v. Hennessy, 35 U. S. 603. Contea, State v. Brown, 1 Hayw. 109, 1 Am. Dec. 548; People v. Gardner, 2 Johns. 477; Simmons v. Commonwealth, 5 Binn. 617; Simpson v. State, 4 Humph. 455; Beal v. State, 15 Ind. 578; State v. LeBlanch, 31
Upon the principle of comity, however, which is a part of the law of nations, recognized as such by every civilized people, effect is given in one State or country to the laws of another in a great variety of ways, especially upon questions of contract rights to property, and rights of action connected with and dependent upon such foreign laws; without which commercial and business intercourse between the people of different States and countries could scarcely exist. 1 In the making of contracts, the local law enters into and forms a part of the obligation; and if the contract is valid in the State where it is made, (a) any other State will give remedies for its enforcement, unless, according to the standard of such latter State, it is bad for immorality, or is opposed in its provisions to some accepted principle of public policy, or unless its enforcement would be prejudicial to the State or its people. 2 So, though a corporation created by or under the laws of one State has, in strictness, no extra-territorial life or authority, and cannot of right insist upon extending its operations within the limits of another, yet this

N. J. 82; and where the larceny took place in a foreign country: Stanley v. State, 24 Ohio St. 166, 15 Am. Rep. 604; Commonwealth v. Uprichard, 3 Gray, 411.


2 Runyon v. Coster's Lessee, 14 Pet. 122; Merrick v. Van Santvoord, 54 N. Y. 208; Saul v. His Creditors, 5 Mart. x. s. 509, 16 Am. Dec. 212; Greenwood v. Curtis, 6 Mass. 258, 4 Am. Dec. 145. In this last case, Parsons, Ch. J., says the rule that foreign contracts will be enforced in our courts is subject to two exceptions. One is when the Commonwealth or its citizens may be injured by giving legal effect to the contract by a judgment in our courts; and the other is, when the giving of legal effect to the contract would exhibit to the citizens of the State an example pernicious and destructive. The first he illustrates by a contract for an importation forbidden by the local law, and the second by an agreement for an incestuous marriage. Another illustration under the first head is, where enforcing the foreign contract would deprive a home creditor of a lien. Ingraham v. Geyer, 13 Mass. 146. Compare Oliver v. Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 212; Arno v. Currell, 1 La. 528, 20 Am. Dec. 256. If a sale of goods is valid where made though it would not be where the buyer lives and where it is sought to be enforced, it will be upheld in the latter State, unless the seller participates in the reselling there: Feineman v. Sachs, 33 Kan. 621; Parsons Oil Co. v. Bayett, 44 Ark. 230; not if the order was unlawfully solicited in the buyer's State. Jones v. Surprise, 64 N. Y. 213. Gambling contracts as to stocks valid in New York will not be enforced in New Jersey. Flagg v. Baldwin, 38 N. J. Eq. 219. But a contract limiting a carrier's liability, valid in New York where made, will be enforced in Pennsylvania, though invalid if made there. Forepaugh v. Del. L. & W. R. R. Co., 128 Pa. St. 217, 18 Atl. 503.

will be suffered without objection where no local policy forbids; (4) and the corporation may make contracts, and acquire,

(a) [A State may prescribe conditions upon which a foreign corporation may do business within its borders, and for breach of such conditions may exclude the corporation, except where it is doing business of a federal nature. Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. Rep. 518, aff. 19 Tex. Civ. App. 1, 44 S. W. 936. Upon admission or exclusion of foreign corporations, see Cone Export and Commission Co. v. Poole, 41 S. C. 70, 10 S. E. 203, 24 L. R. A. 289 and note; exclusion of foreign corporation as regulation of interstate commerce, note to 24 L. R. A. 311; exclusion, regulation, and taxation of foreign corporations, note to 24 C. C. A. 13; regulation of business of a foreign corporation by State, Boulware v. Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601 and note; and that foreign corporations are amenable to local law, see Talbot v. Fidelity, &c. Co., 74 Md. 636, 22 Atl. 395, 13 L. R. A. 584. A foreign life insurance company which enters a State and does business therein is bound to observe the laws of that State, and its contracts thus made will be interpreted according to the laws of that State even though the parties expressly stipulate that the contract shall be interpreted according to the laws of another State. N. Y. Life Ins. Co. v. Cravens, 178 U. S. 359, 20 Sup. Ct. Rep. 902, aff. 148 Mo. 683, 60 S. W. 610, 71 Am. St. 628. A State has power to prescribe the conditions under which a foreign insurance corporation may do business within its borders, and to provide and enforce penalties for breach of those conditions. Noble v. Mitchell, 161 U. S. 307, 17 Sup. Ct. Rep. 110. And the State may penalize any act done within its borders looking toward the formation of contract relations with a foreign corporation which it has forbidden to do business within its borders. Hooper v. California, 155 U. S. 648, 15 Sup. Ct. Rep. 297; but it cannot prevent the doing within its borders by its citizens of acts otherwise lawful which are reasonably necessary to the enjoyment of contracts which such citizens have made without its borders, even though they be made with foreign corporations which the State has forbidden to do business within its borders. Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. 427. And a requirement that before doing business within the State the foreign corporation shall surrender a right which it derives from the Constitution and laws of the United States is void. Southern Pac. Co. v. Denton, 146 U. S. 292, 13 Sup. Ct. Rep. 44. If State taxes its own corporations upon their entire capital, the foreign corporation doing business in the State cannot object to being taxed upon its entire capital, even though it uses only a very small fraction of its capital within the State. Horn Silver Mining Co. v. New York, 143 U. S. 305, 12 Sup. Ct. Rep. 408, aff. 106 N. Y. 76, 11 N. E. 155. A foreign corporation does business in a particular State not by right but by comity, and its license to do so may be revoked at pleasure. State v. Standard Oil Co., 61 Neb. 28, 84 N. W. 413, 87 Am. St. 449. A railroad corporation whose road lies entirely within one State, but is a link in a through route traversing several States, over which through route Interstate commerce is carried on, is engaged in interstate commerce, and no State can exact of it a license before permitting it to open an office within the borders of the State, in which office it transacts only business relating to its interstate commerce. McCall v. California, 136 U. S. 104, 10 Sup. Ct. Rep. 881; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. Rep. 555. For note upon exclusion of foreign corporations as an interference with interstate commerce, see 24 L. R. A. 311. License for current year may be revoked for refusal to pay unpaid license fees for previous years. Travelers' Ins. Co. v. Fricko, 59 Wis. 367, 74 N. W. 872, 78 N. W. 407, 41 L. R. A. 557. The exclusion of a foreign corporation cannot operate to prevent the performance of contracts lawfully entered into before the order of exclusion was passed, nor impair the right to enforce the obligations arising through such performance. Bedford v. E. B'gs & Loan Ass'n, 161 U. S. 227, 21 Sup. Ct. Rep. 507. Upon right to sue in foreign State, see Cone E. & C. Co. v. Poole, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289, and note therein on recognition or exclusion of foreign corporations. On power of a State to prevent foreign corporations operating within its borders from violating its]
hold, and convey property as it would have a right to do in the State of its origin. Real estate, however, it can only take, hold, and transmit in accordance with the rules prescribed by


the law of the State in which the estate is situate;¹ and the principle of comity is never so far extended as to give force and effect to the penal laws of one political society within the territory of another, even though both belong to one political system.² The question whether a statute giving a right of action for a death occurring within a State can be enforced in another State has given rise to much discussion. In several States it is held that the remedy is purely local, and that the action can only be brought in the State where the killing takes place. But in several the rule is that an action will lie in another State, if the statutes of the latter are substantially like those of the State where the death is caused.³

Other Limitations of Legislative Authority.

Besides the limitations of legislative authority to which we have referred, others exist which do not seem to call for special remark. Some of these are prescribed by constitutions,⁴ but


² Only a State can raise the question whether a foreign corporation can rightfully acquire land for its business purposes. Barnes v. Suddard, 117 Ill. 237, 7 N. E. 477. Failure of such corporation to comply with statutory conditions precedent to doing business does not avoid a conveyance to it so that a private person can attack it collaterally. Frits v. Palmer, 132 U. S. 382, 10 Sup. Ct. Rep. 33. "Compare Keomen v. Chicago, B. & Q. R. R. Co., 27 Neb. 697, 43 N. W. 423.


CONSTITUTIONAL LIMITATIONS. [CH. V.

others spring from the very nature of free government. The

be made by a general law, but shall pass
general laws providing, so far as it may
decem necessary, for the cases enumerated
in this section, and for all other cases
where a general law can be made appli-
cable." Art. 4, § 27. We should suppose
that so stringent a provision would, in
some of these cases, lead to the passage
of general laws of doubtful utility in or-
der to remedy the hardships of particular
cases; but the constitution adopted in
1875 is still more restrictive. Art. 4, § 53.
As to when a general law can be made
applicable, see Thomas v. Board of Com-
misGioners, 5 Ind. 4; State v. Squires, 26
Iowa, 310; Johnson v. Railroad Co., 23
17S, it was held that the constitutional
provision, that "in all cases where a gen-
eral law can be made applicable, no special
law shall be enacted," left a discretion
with the legislature to determine the cases
in which special laws should be passed.
See, to the same effect, Marks v. Trustees
of Purdue University, 37 Ind. 152; State
v. Tucker, 46 Ind. 355, overruling Thomas
v. Board of Commissioners, supra ; John-
son v. Comర’r’S Wells Co., 107 Ind. 15;
State v. County Court of Boone, 50 Mo.
317, 11 Am. Rep. 415; State v. Robbins,
51 Mo. 82; Hall v. Bray, 61 Mo. 258;
St. Louis v. Shields, 62 Mo. 247; Carpen-
ter v. People, 8 Col. 116, 5 Pac. 828;
Richman v. Supervisors, 77 Iowa, 513,
42 N. W. Rep. 422; Davis v. Gaines, 48
23; Darling v. Rogers, 7 Kan. 595; Ex
parte Fritz, 9 Iowa, 30; [Bank of Com-
erce v. Wiltse, 103 Ind. 469, 63 N. E.
950, 56 N. E. 224, 47 L. R. A. 409; State
v. Kolzen, 130 Ind. 434, 29 N. E. 595, 14
L. R. A. 566, and note; Richman v. Mus-
catine County, 77 Iowa, 513, 42 N. W. 422,
4 L. R. A. 445, 14 Am. St. 308; People v.
Levee Dist. No. 6, 131 Cal. 30, 63 Pac.
342. But see Silberman v. Hay, 50 Ohio
St. 582, 53 N. E. 255, 44 L. R. A. 204,
holding that right of trial by jury is gen-
eral, and that a law relating thereto and
expressly made applicable to a single
county is void. Gambling cannot be
made a crime everywhere except "within
the limits or enclosure of a regular race-
course." State v. Walsh, 130 Mo. 400, 37
S. W. 1112, 35 L. R. A. 231; see also
State v. Elizabeth, 60 N. J. L. 71, 28 Atl.
51, 23 L. R. A. 526.] Where the legisla-
ture is forbidden to pass special or local
laws regulating county or township busi-
ness, a special act allowing and ordering
payment of a particular claim is void,
even though the claim, being merely an
equitable one, cannot be audited by any
existing board. Williams v. Bidlman, 7
Nov. 68. See Darling v. Rogers, 7 Kan.
592; [Dean v. Sparta County, 59
S. C. 110, 37 S. E. 220; Uffert v. Vogt,
65 N. J. App. 377, 621, 47 Atl. 225, 48
Atl. 574; Black v. Gloucester City, —
N. J. L. —, 48 Atl. 1112 (April 29, 1901).
Special tax liens cannot be provided for
certain towns only. Burnet v. Dean, 60
N. J. Eq. 9, 46 Atl. 532.] Such a pro-
vision does not prevent a special act to
locate a county seat. State v. Sumter
Co., 10 Fla. 518. [But one arbitrarily
classifying counties is special. Edmunds
v. Herbrandson, 2 N. D. 270, 50 N. W.
670, 14 L. R. A. 725. So is one chang-
ing ward boundaries in a single city. State
v. Newkirk, 58 N. J. L. 4, 20 Atl. 886, 10
L. R. A. 700.] A statute is not special
because it is not universal in operation
by reason of earlier special laws not af-
fected by the constitutional provision.
630. [And a law which gives to any city
having a special charter the option to
adopt the provisions of a general act is
not special. Adams v. Beloit, 105 Wis.
363, 81 N. W. 809, 47 L. R. A. 441.] An
act creating a criminal court for a parti-
cular county is not in conflict with legis-
lation. Efret v. State, 33 Ind. 201. See
Matter of Boyle, 9 Wis. 201. Nor one al-
lowing recovery from railroad of $5,000
in case of death. Carroll v. Missouri P.
Ry. Co., 88 Mo. 239. [But one provid-
ing for interchange of judges in a single
county is. Ashbrook v. Schamb, 160 Mo.
87, 60 S. W. 1085.] A Sunday law mak-
ing it a misdemeanor for a baker to en-
gage in the business of baking on Sunday
is a special law, and unconstitutional in
California. Ex parte Westernfield, 55 Cal.
550, 36 Am. Rep. 47. Where special acts
confering corporate powers are prohib-
ited, the State cannot specially authori-
sate a school district to issue bonds to erect
a school-house. School District v. Insur-
ance Co., 103 U. S. 707. [See, for an-
latter must depend for their enforcement upon legislative wis-
other example, Grey v. Newark Plank-
Road Co., 65 N. J. L. 61, 608, 46 Atl. 806, 48 Atl. 657.] The provision does not
forbid legalizing bonds of a city void
from want of power to issue them: Read
Rep. 208; nor in Tennessee does it cover
municipal corporations: Stat. v. Wilson,
12 Lea, 246; [Burnett v. Maloney, 97
Tenn. 307, 37 S. W. 889, 34 L. R. A.
541.] nor in Wisconsin a commission cre-
ated under the police power to establish
drains. State v. Stewart, 74 Wis. 520, 43
N. W. 947; [applies to counties in Ne-
braska: Schweiss v. First Judicial Distr.
Ct., 23 Nev. 226, 46 Pac. 289, 34 L. R. A.
602.] A constitutional provision that
requires all laws of a general nature to
have uniform operation throughout the
State is complied with in a statute applica-
tible to all cities of a certain class hav-
ing less than one hundred thousand in-
habitants, though in fact there be but
one city in the State of that class. Wol-
ker v. Potter, 18 Ohio St. 55; Wheeler v.
Magee, 55 Pa. St. 401. Contra, Divine
v. Commissioners, 84 Ill. 500. And see
Desmond v. Dunn, 65 Cal. 24; Evre v.
Board of Education, 55 Cal. 489; Van
Riper v. Parsons, 40 N. J. 123, 20 Am.
Rep. 210; State v. Trenton, 42 N. J.
486; State v. Hammer, 42 N. J. 335;
Worthley v. Steen, 43 N. J. L. 542; Bum-
sted v. Govern, 47 N. J. L. 305, 1 Atl.
855; Van Giesen v. Bloomfield, id. 442, 2
Atl. 249; Highstown v. Glenn, id. 100;
New Brunswick v. Fitzgerald, 48 N. J.
457, 8 Atl. 729; State v. Houghland, 51
N. J. L. 62, 16 Atl. 160; McCarthy v.
of Scranton Sch. Dist., 113 Pa. St. 176,
6 Atl. 168; Wilkes-Barre v. Meyers, id.
235; Reading v. Savage, 124 Pa. St. 328,
16 Atl. 788; Ex parte Falk, 42 Ohio St.
628; State v. Pugh, 43 Ohio St. 98, 1
N. E. 349; State v. Hawkins, 44 Ohio St.
98, 5 N. E. 225; State v. Anderson, id.
247, 6 N. E. 571; Ewing v. Hobilitzelle,
85 Mo. 44; Kelly v. Meckes, 87 Mo. 396;
State v. Co. Court, 89 Mo. 237, 1 S. W.
397; State v. Pond, 93 Mo. 406, 6 S. W.
409; State v. Donovan, 20 Nev. 75, 15
Pac. 783; Darrow v. People, 8 Col. 417, 8
Pac. 691; People v. Benshaw, 76 Cal.
436, 18 Pac. 413. And on the general
subject, see further, Bourland v. Hil-
dreth, 26 Cal. 161; Brooks v. Hyde, 37
Cal. 368; McAunich v. Mississippi & &
R. R. Co., 20 Iowa, 388; Rice v. State, 3
Kan. 141; Jackson v. Shaw, 29 Cal. 207;
Gentile v. State, 29 Ind. 400; State v.
Parkinson, 6 Nev. 15; Ensworth v. Albin,
40 Mo. 460; People v. Wallace, 70 Ill.
680; State v. Camden Common Pleas, 41 N. 
J. 495; O'Kane v. Treat, 25 Ill. 557; Com-
monwealth v. Patton, 88 Pa. St. 208; Cox
v. State, 8 Tex. App. 254; State v. Mon-
ahan, 60 Mo. 556; State v. Clark, 23 Minn.
422; Speight v. People, 87 Ill. 505; [Mor-
ris v. Stout, 110 Iowa, 650, 78 N. W. 412,
60 L. R. A. 97; Re Hennesberger, 155
N. Y. 420, 50 N. E. 01, 42 L. R. A. 132;
West Chicago Park Comm'r v. McMullen,
134 Ill. 170, 25 N. E. 676, 10 L. R. A.
215; Lodi Twp. v. State, 51 N. J. L. 402,
18 Atl. 749, 6 L. R. A. 56; State v. Souns-
ers' Point, 52 N. J. L. 32, 18 Atl. 694,
6 L. R. A. 57; Terr. v. School Dist., 10
Okl. 550, 64 Pac. 241; State v. Thomas,
25 Mont. 226, 64 Pac. 503; Longough v.
Soto, 129 Cal. 610, 62 Pac. 184; Fox v.
Mokawk & H. R. I. Society, 105 N. Y.
517, 50 N. E. 333. Where the legis-
lation shows the legislative intent to be
the substitution of isolation for classifica-
tion, it is invalid. State v. Jones, 06 Ohio,
455, 64 N. E. 424; State v. Beacom, 06 Ohio,
491, 64 N. E. 427. See also upon the
general question, Con. v. Moir, 190 Pa.
534, 49 Atl. 351, 53 Am. St. 801.]

[Insane persons having no dependents
nor persons who could take from them
under the law of succession may have
their expenses while in the asylum
charged upon their estates, while the
expenses of other insane persons in
the same asylum are paid out of the
public funds. Bon Homme Co. v. Berndt,
13 S. D. 305, 83 N. W. 333, 60 L. R. A.
351. Where the Constitution provides
that "corporations other than banking
shall not be created by special act," the
extension of an old special charter of
such other corporation is equally pro-
hibited. Bank of Commerce v. Wiltse,
165 Ind. 460, 53 N. E. 950, 55 N. E. 224,
47 L. R. A. 493. And where the grant
of any special privileges, immunities, or
franchises whatever is prohibited, certain
named societies cannot be empowered to
appoint designated State officers, e.g]
dom, discretion, and conscience. 1 The legislature is to make laws for the public good, and not for the benefit of individuals. It has control of the public moneys, and should provide for disbursing them only for public purposes. Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes; not those implied restrictions which, resting in theory only, the people have been

members of a State board of inspectors of the business of licensed commission merchants. Lasher v. People, 183 Ill. 226, 55 N. E. 663, 47 L. R. A. 802, 75 Am. St. 103. Nor can the number of deputies for certain county officers be prescribed for some counties and left to the discretion of the county court in others. Weaver v. Davidson County, 104 Tenn. 315, 59 S. W. 1105. Where classification of cities is permitted, it must be for city purposes only. Re Washington St., 192 Pa. 257, 19 Atl. 219, 1 L. R. A. 193 and note. Statute providing for cure of inebriates at public expense in counties having fifty thousand population or more is void for arbitrariness. Murray v. Ramsey County Comrs, 81 Minn. 529, 84 N. W. 193, 51 L. R. A. 828. Bicycle tax levied in certain counties only is void, although proceeds form a special fund for construction of bicycle paths. Ellis v. Frazier, 38 Ore. 462, 63 Pac. 642. As to what differences should underlie a classification, see Cobb v. Bord, 40 Minn. 479, 42 N. W. 296. [All classification must be reasonable. An exemption of ex-soldiers and marines, honorably dismissed from the service of the United States, from a peddler's license tax is void. State v. Garbroski, 111 Iowa, 496, 82 N. W. 959, 82 Am. St. 521. If special legislation is prohibited, a classification such that one class has but one member and, because the classification is based upon a past fact, can never have more, is void. Campbell v. Indianapolis, 155 Ind. 186, 57 N. E. 920. And see Knout v. People, 185 Ill. 20, 57 N. E. 22. An arbitrary exemption from a license tax of all dealers whose business is less than a thousand dollars a year, others having no equal exemption, is void as class legislation. Com. v. Clark, 195 Pa. 633, 49 Atl. 280, 60 Am. St. 634. See also Barnet v. Dean, — N. J. App. —, 49 Atl. 559 (June 17, 1901).] Where the legislature, for urgent reasons, may suspend the rules and allow a bill to be read twice on the same day, what constitutes a case of urgency is a question for the legislative discretion. Hull v. Miller, 4 Neb. 503. The legislature's power over its own proceedings cannot be controlled by a statute requiring notice in advance of the session, in case of petition affecting private interests. Opinion of Court, 63 N. H. 625. [Where the Constitution provides that no county seat shall be changed except by approval of two-thirds of voters voting thereon, the legislature may intensify the requirement, and require the approval of two-thirds of all the voters in the county. State v. White, 102 Mo. 533, 63 S. W. 104.]

1 Walker v. Cincinnati, 21 Ohio St. 14, 41. [But see The Stratton Claimants v. The Morris Claimants, 89 Tenn. 497, 16 S. W. 87, 12 L. R. A. 70.]
satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.\(^1\)

\(^1\) State v. McCann, 21 Ohio St. 198, 212; Adams v. Howe, 14 Mass. 340, 7 Am. Dec. 216; State v. Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; Mount v. Richey, 90 Ind. 29. See cases, post, pp. 233, 237. [But to be legislative it must possess the characteristic of generality. It must be a rule and not merely an arbitrary order. The classification must be real, and reasonable in its basis. See Dibrell v. Lauier, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70, in which a statute based upon a flagrantly arbitrary classification was declared void. The decision of the question of whether a tax is for a public purpose is for the courts when there is a manifest attempt on the part of the legislature to authorize a levy for a purpose not public. Dodge v. Mission Township, 49 C. C. A. 661, 107 Fed. 827.]