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No. 96267-7

SUPREME COURT OF THE STATE OF WASHINGTON

JOSE MARTINEZ-CUEVAS and PATRICIA AGUILAR,
individually and on behalf of all others similarly situated,
Petitioners,

v.

DERUYTER BROTHERS DAIRY, INC.,
GENEVA S. DERUYTER, and JACOBUS N. DERUYTER,
Respondents,

and

WASHINGTON STATE DAIRY FEDERATION
and WASHINGTON FARM BUREAU,
Intervenor-Respondents.

On Appeal from the Yakima County Superior Court
No. 16-2-03417-8

PETITIONERS' OPENING BRIEF

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I. INTRODUCTION

Washington has a long and proud history of being a pioneer in the protection of employment rights. Farmworkers Jose Martinez-Cuevas, Patricia Aguilar, and the milkers alongside whom they worked ("the Workers") have been on the wrong side of that history. For 60 years, since the Minimum Wage Act ("MWA") was first adopted in 1959, the legislature has excluded farm workers from overtime protection granted to virtually all other workers. The exclusion of farmworkers from fair labor standards in Washington and in our nation is the legacy of racially motivated exclusions of the New Deal era.[1]

This legislative fiat is unconstitutional under the Washington Constitution's privileges and immunities clause. The agricultural exemption from overtime protection grants an immunity to one of our state's most dangerous industries and deprives farmworkers of the right to health and safety protection enshrined in our Constitution. The exclusion also violates our Constitution's guarantee of equal protection of the law as it deprives farmworkers of overtime protection while granting the protection to virtually all other workers.

[1] *See* CP 982 (Marc Linder, *Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States* 175 (1992)).

It is time for Washington farmworkers to be fully integrated into our long and proud history of protecting workers. The Workers respectfully ask this Court to reverse the trial court's order denying their motion for partial summary judgment in part, declare the agricultural exemption, RCW 49.46.130(2)(g), is unconstitutional as a matter of law, and remand for entry of judgment in favor of the Workers.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to grant the Workers' motion for summary judgment because the agricultural exemption from providing overtime protection to farmworkers violates article I, section 12 of the Washington State Constitution.

2. The trial court erred in misstating the standard for determining whether the legislature had a "reasonable ground" for granting a privilege or immunity.

3. The trial court erred in concluding that the "reasonable ground" test for the Workers' privileges or immunities challenge presented an issue of disputed fact for trial.

4. The trial court erred in concluding the Workers' equal protection challenge presented issues of fact.

III. STATEMENT OF THE CASE

A. Factual Background

Jose Martinez-Cuevas and Patricia Aguilar are farmworkers whom Defendant DeRuyter Brothers Dairy, Inc. employed as milkers in Outlook, Washington. CP 697 ¶ 1; CP 738 ¶ 1. Mr. Martinez and Ms. Aguilar represent a class of workers who performed similar jobs. CP 47 ¶ 6. The Workers used mechanized equipment to milk approximately 3,000 cows per shift, on an around-the-clock schedule, with three daily shifts, seven days a week. CP 56 ¶¶ 34, 37 & 38; CP 83 ¶ 1; CP 849.

1. The agricultural industry demands workers regularly work overtime hours, as the Workers did here.

The agricultural industry routinely requires farmworkers to work in excess of forty hours a week. *See* CP 275 (national report recognizing agricultural work "involves long hours under difficult conditions"); CP 297 (study documenting dairy workers average 62 hours per week). Discovery in this case revealed that Class members worked over forty hours per week almost 85 percent of the time. CP 79 ¶ 9; *see also* CP 848 (DeRuyter audit revealing average nine-hour days and 216 hours per month). It is undisputed the Workers did not receive overtime pay for this work.

2. Agriculture is a dangerous industry, and overtime work makes it more dangerous.

Agriculture consistently ranks among the most hazardous industries. CP 179, 184 & 198. According to the United States Department of Labor, agricultural industries have the highest fatal work injury rate of all industries, more than double the rate for mining and related industries. CP 209 & 219. The injury rate for agricultural workers also significantly exceeds the rate for all other workers, and the fall-related injury rate is far higher than the rate for mining and manufacturing industries. CP 233 & 237.

Farmworkers also "face an exceptionally wide range of acute and chronic health exposures at work . . . [as the work] involves long hours under difficult conditions and repetitive exposure to musculoskeletal strains and sprains, respiratory hazards, toxic chemicals, psychological stresses, and a variety of zoonotic diseases." CP 275; *see* CP 185-89 & 236-240. Acute and chronic exposures to pesticides have deleterious health effects, including associations with certain cancers, respiratory disease, and neurological conditions. CP 186 & 277. Working conditions, including lack of access to water and bathrooms and exposure to unsafe chemicals and organisms, also have disproportionate negative health effects for farmworkers ranging from heat stroke to urinary tract infections

and exposure to communicable diseases. CP 185-87, 237- 40, 297 & 301-02.

Work in the dairy industry is particularly dangerous. CP 297, 309-10. In 2015, the injury rate in Washington dairies was 121 percent higher than the rate for all state industries combined and 19 percent higher than the agricultural sector as a whole.[2] CP 152. Consistent with this state data, the injury rate at the DeRuyter facility was approximately 11 percent, significantly exceeding the injury rate for all industries in Washington. CP 157. Both Mr. Martinez and Ms. Aguilar suffered injuries while working for DeRuyter. CP 698 & 738.

Studies show overtime work results in increased injury rates, illness, and mortality. CP 314 ("A growing body of evidence suggests that long working hours adversely affect the health and wellbeing of workers."). Indeed, working in a job with overtime results in a 61 percent higher injury hazard rate. CP 318. Overwork also causes psychological stress, which when combined with fatigue from working long hours and days, results in farmworkers being less able to attend to the hazardous conditions in their work environments. *See* CP 279.

[2] These were the most recent statistics available from the Department of Labor and Industries when the Workers filed their motion for summary judgment in March 2018. *See* CP 152.

3. Lack of overtime protection in agriculture has a disproportionate effect on impoverished communities of color.

The most recent comprehensive Washington farmworker survey documents that 99.80 percent of farmworkers identify as Mexican/ Mexican American, Mexican (Indigenous), or Central American. CP 460. A Dairy Federation official confirmed that in the Yakima Valley the work force was close to 99 percent "Hispanic." CP 659. Other surveys have confirmed these demographics nationally. CP 296 (100 percent of worker survey respondents in New York dairies were Mexican or Central American). The Workers' observations confirm that virtually all their co-workers were Latinx. CP 698 ¶ 11 & 738 ¶ 5.

Furthermore, average farmworker household earnings have hovered around 88 percent of the federal poverty level. CP 450. This is consistent with national data, which when properly analyzed, show average farmworker family incomes are well below poverty guidelines. *See* CP 196, 449 (median household size in Washington is 4.34 compared to 5 nationally), 561 (showing range of Washington wages substantially equivalent to California), & 565-67 (agricultural economists documenting real average wage of $17,500 in California).

B. Procedural Background

Mr. Martinez and Ms. Aguilar filed this class action on behalf of approximately 300 milkers employed at the DeRuyter dairy facility. CP 3

& 69 ¶ 9. The parties reached a class settlement of the non-overtime wage claims, which the trial court approved. CP 45-52. These claims addressed DeRuyter's failure to provide proper rest and meal periods and failure to pay for work performed before and after the Workers' scheduled shifts. CP 37-38 & 47 ¶ 9. The parties stipulated to class certification of the Workers' remaining overtime claims. CP 67. Prior to summary judgment, the Washington State Dairy Federation and Washington Farm Bureau ("Industry Groups") intervened in the case. CP 73-74.

On March 1, 2018, the Workers filed a motion for summary judgment to establish that the MWA's agricultural exemption from overtime protection, RCW 49.46.130(2)(g), violates article I, section 12 of the Washington Constitution. The Workers asserted the provision violates our state's constitution both by granting an impermissible privilege or immunity to the agricultural industry and by denying farmworkers equal protection under the law. CP 91-122.

On May 31, 2018, the Yakima County Superior Court issued a letter ruling. CP 1129-31. On July 27, 2018, the court entered an order granting in part and denying in part the Workers' motion for summary judgment, incorporating its letter ruling into the order. CP 1202-14. The court correctly concluded the agricultural overtime exemption grants a

privilege or immunity in contravention of article I, section 12 of the Washington Constitution. But the court went on to say:

> The second part of the test is to determine whether there is a "reasonable basis" for granting the identified privilege or immunity. This issue is simply not amendable [sic] to decision in the context of a CR 56 motion. The level of scrutiny must be determined by reference to issues of legislative intent and legislative history and a determination whether a suspect class is implicated. And at the very least, this Court must determine whether there is a reasonable ground, actual and not hypothetical, for the distinction drawn by the legislature.

CP 1214. On this basis, the court granted in part and denied in part Plaintiffs' Motion for Summary Judgment. CP 1203 ¶ 1 & 1214. The court also denied the Industry Groups' Cross Motion for Summary Judgment. *Id*. ¶ 2. The court certified the summary judgment order for discretionary review. CP 1204 ¶ 5.

IV. ARGUMENT

A. Summary of Argument

The Washington Constitution mandates the legislature pass laws to protect workers in "employments dangerous to life or deleterious to health." Const. art. II, § 35. Our legislature passed such a law, the MWA, which this Court has recognized as necessary to protect workers from long hours of work injurious to health. The Washington legislature, however, has failed to provide the MWA's health and safety protection of overtime to farmworkers who labor in one of our state's most dangerous industries:

agriculture. RCW 49.46.130(2)(g). The Workers present a facial challenge to this exemption, which violates article I, section 12 of the Washington Constitution.

The agricultural exemption violates the privileges and immunities clause of article I, section 12. Under the recognized two-part test for alleged violations of this clause, the exemption is unconstitutional because: (1) it is a grant of positive favoritism to the agricultural industry that deprives farmworkers of the fundamental right to be protected by necessary health and safety laws for persons engaged in dangerous work guaranteed by article II, section 35; and (2) the legislature had no reasonable ground to grant the agricultural industry this immunity from complying with the overtime protection of the MWA.

The trial court correctly concluded the Workers met the first part of the test because the agricultural exemption grants a privilege or immunity. But the court erred by conflating the *reasonable ground* test of privileges analysis with the *rational basis* test of equal protection analysis. It also erred by concluding the second part of the privileges test would require weighing of facts, when the only "facts" alleged to be in dispute related to legislative history, which courts routinely analyze as a matter of law. Under the more exacting reasonable ground standard, the legislature did not have a reasonable ground to exempt the agricultural industry from

providing overtime protection to farmworkers performing dangerous jobs that serves the legislature's stated goal of worker health and safety. While not necessary to the determination that the exemption does not meet the reasonable ground test, the racist origins of the exemption bolster this conclusion. The Workers demonstrate they meet both parts of the test and therefore the agricultural exemption violates the privileges or immunities clause of article I, section 12.

The exclusion of farmworkers from overtime protection also violates the equal protection guarantee of article I, section 12 under any level of scrutiny. Because the exemption is based on the racially motivated exclusion of farmworkers from the federal Fair Labor Standards Act ("FLSA") and because it excludes a workforce made up almost entirely of Latinx workers, strict scrutiny is the appropriate level of review. In the alternative, because the health and safety protection of overtime is an important right, and farmworkers constitute a semi-suspect class, intermediate scrutiny is appropriate. Under either standard, the state lacks a sufficiently important interest to justify the distinction made. Even under rational basis review, the differential treatment of farmworkers from other workers, including those in similarly dangerous jobs, is so attenuated from the worker health and safety purpose as to render the distinction arbitrary

and irrational. Moreover, the classification is based on historical prejudice, and thus is not rational as a matter of law.

For these reasons, this Court should hold as a matter of law that the agricultural exemption from overtime protection, RCW 49.46.130(2)(g), violates article I, section 12 of the Washington Constitution.

B. Standards of Review and Nature of Challenge

The constitutionality of a statute is reviewed de novo. *Schroeder v. Weighall*, 179 Wn.2d 566, 571, 316 P.3d 482 (2014). This Court reviews "a trial court's order on cross motions for summary judgment and related evidentiary rulings de novo." *Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014) (citations omitted). An order granting summary judgment may be affirmed on any legal basis supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989).

The Workers present a facial challenge to the agricultural exemption from overtime, RCW 49.46.130(2)(g). No set of circumstances exists in which this provision can be constitutionally applied to any farmworker. *See City of Redmond v. Moore*, 151 Wn.2d 64, 669, 91 P.3d 875 (2004). In the alternative, the Workers challenge the exemption as-applied to the specific context of their work at DeRuyter and the similar context of the dairy industry as a whole. *See id*.

C. The agricultural exemption from overtime violates the privileges and immunities clause.

Article I, section 12 of the Washington Constitution provides that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." The agricultural exemption from overtime protection violates article I, section 12 because it grants a privilege or immunity to the agricultural industry which does not belong equally to other employers of workers in dangerous industries.

This Court has recognized its duty "to resolve constitutional questions first under the provisions of our own state constitution before turning to federal law." *State v. Gregory*, 192 Wn.2d 1, 14, 427 P.3d 621 (2018). The Court has also "consistently recognized that the text and aims of article I, section 12 differ from that of the federal equal protection clause." *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 775-76, 317 P.3d 1009 (2014). Article I, section 12 is "more protective than the federal equal protection clause and require[s] a very different analysis in certain situations." *Schroeder*, 179 Wn.2d at 572. "Privileges" analysis applies where a law implicates a "privilege" or "immunity." *Id.*

The purpose and intent of the privileges or immunities clause is to secure equality of treatment by prohibiting undue favoritism. *Ockletree*, 179 Wn.2d at 776. "[W]hen the State's police power is manipulated to serve private interests at the expense of the common good, such legislation must be condemned as unreasonable and unlawful." *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 608, 192 P.3d 306 (2008) (citing *Ralph v. City of Wenatchee*, 34 Wn.2d 638, 644, 209 P.2d 270 (1949)).

This Court applies a two-part test for privileges or immunities challenges under article I, section 12. First, the Court "ask[s] whether a challenged law grants a 'privilege' or 'immunity' for purposes of our state constitution." *Schroeder*, 179 Wn.2d at 573. If the answer is yes, the Court then asks whether there is a "reasonable ground" for granting that privilege or immunity. *Id.*

In applying this test, the trial court correctly found the agricultural exemption implicates a fundamental right of state citizenship, and therefore that it grants a privilege or immunity in contravention of article I, section 12. CP 1214. The trial court also correctly found that whether the exemption implicates a fundamental right is a question of law. CP 1213. Although the trial court correctly concluded as a matter of law that the agricultural exemption implicated a fundamental right, it based its conclusion on a right not posited by the Workers: the right to work and

earn a wage. CP 1213. Both the Washington Constitution's explicit right to protection of workplace safety and health laws for persons engaged in dangerous work and the right to work and earn a wage qualify as fundamental rights of state citizenship. Thus, this Court has two alternative bases to affirm the trial court's conclusion that RCW 49.46.130(2)(g) implicates a privilege or immunity in contravention of article I, section 12.

However, the trial court incorrectly formulated the standard governing the second part of the "privileges" test and erred in finding it would require weighing of facts, rather than making a determination of law. CP 1214; *see infra* IV.C.2.[3]

For the reasons articulated below, the Workers request this Court hold as a matter of law that RCW 49.46.130(2)(g) grants a privilege or immunity, the legislature had no reasonable ground for granting the agricultural industry the exemption from overtime protection, and the exemption violates article I, section 12 of the Washington Constitution.

[3] The only "facts" the trial court found needed to be weighed to determine whether the legislature had reasonable grounds were "issues of legislative intent and legislative history." CP 1214. These are not issues of fact. *See BNSF Ry. Co. v. Clark*, 192 Wn.2d 832, 837, 434 P.3d 50 (2019) (analyzing legislative history for the purpose of statutory interpretation).

1. The trial court correctly found the exemption grants a privilege or immunity.

The benefits triggering privilege or immunity analysis are benefits implicating fundamental rights of state citizenship. *Schroeder*, 179 Wn.2d at 573 (citing *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)). This Court has consistently looked to early cases to identify such fundamental rights, citing often to *Vance*. *See id.* at 572-73; *Ockletree*, 179 Wn.2d at 778.

Two concepts from *Vance* are pertinent to the privileges and immunities analysis, both of which can be traced from Washington case law to the venerable treatise by Thomas M. Cooley.[4] The first allows declarations of unconstitutionality where express guarantees of a state constitution are implicated, as distinct from challenges based on the "spirit" of the constitution. *See Vance*, 29 Wash. at 458-59 (citing *Smith v. Seattle*, 25 Wash. 300, 308, 65 P. 612 (1900) (relying on two cases that cite to Cooley's treatise)); App. Ex. A at 8, 13, 15-17. The second concept allows challenges under the privileges or immunities clause in situations that implicate "fundamental rights which belong to the citizens of the state by reason of such citizenship." *See Vance*, 29 Wash. at 458 (citing Cooley,

[4] Thomas M. Cooley & Alexis C. Angell, *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (6th ed. 1890) (Chapters VII, XI, and XIV attached in Appendix Exs. A-C).

Constitutional Limitations (6th ed.) 597[5]). Here, the explicit guarantee of article II, section 35 of the Washington Constitution falls squarely within the first concept in *Vance*. The right to work and earn a wage falls squarely within the second concept in *Vance*.

a. *The exemption implicates a fundamental right of state citizenship: the explicit guarantee of protection for workers in dangerous jobs in article II, section 35*.

Consistent with *Vance*, the Workers' constitutional challenge is based on an express guarantee of the Washington Constitution:

> § 35 Protection of employees.
>
> The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same.

Const. art. II, § 35. This constitutional protection for workers—which scholars have linked to the framers' central concern about corporate favoritism—was intended to provide for the protection of labor and to require the legislature to enact workplace health and safety laws like the overtime law. *See* CP 132-36 & 48 (referencing Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 7-11, 82 (2d ed. 2013)); *Ockletree*, 179 Wn.2d at 775 (recognizing the privileges or immunities clause and the Washington Constitution were "passed during a

[5] It appears the page number referenced in *Vance* is incorrect, as the referenced material is found on page 490. *See* App. Ex. B at 99.

period of distrust toward laws that served special interests" and concerns about the reach of corporate interests) & at 790-91 (Stephens, J., dissenting) (noting framers' concerns with legislature corruption and corporate abuses). The fundamental right for workers in dangerous jobs to be protected by health and safety laws is both explicit in the constitution and may be said "to have been had in mind by the framers of that organic law." *Ockletree*, 179 Wn.2d at 778 (quoting *Vance*, 29 Wash. at 458-59).

In 1959, the Washington Legislature adopted the Washington Minimum Wage and Hour Act, which provided overtime protections. Laws of 1959, ch. 294, § 3 (App. Ex. F at 189). The legislature excluded farmworkers from both minimum wage and overtime protections by eliminating them from the definition of "employee." *Id.* § 1(5)(a) (App. Ex. F at 187-88). It was not until 1989, and only by initiative due to agricultural industry roadblocks in the legislative arena, that farmworkers gained coverage under the MWA's minimum hourly wage provision, RCW 49.46.020. Laws of 1989, ch. 1, § 1 (Initiative Measure No. 518, approved November 8, 1988); *see also* CP 700-01 (describing legislative process leading up to the initiative). However, the legislature's exemption of farmworkers from overtime protections remains. RCW 49.46.130(2)(g).

The legislature's stated purpose for enacting the MWA is to protect "the immediate and future health, safety, and general welfare of the people

of this state." RCW 49.46.005(1). This Court has recognized that overtime is a health and safety protection. *Anfinson v. FedEx Ground Package, Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012) (stating "minimum wage laws have a remedial purpose of protecting against the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health") (citations and internal quotation marks omitted)). The right to overtime protection is so central to Washington's worker health and safety system that employees cannot waive the right. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861, 864, 93 P.3d 108 (2004).

This Court has recognized that farmworkers "are engaged in an extremely dangerous occupation." *Macias v. Dep't of Labor & Indus.*, 100 Wn.2d 263, 274, 668 P.2d 1278 (1983). The undisputed facts of this case support this Court's prior ruling: agriculture in Washington continues to be a dangerous industry. *See supra* Section III.A.2. The injury rate at the DeRuyter facility, consistent with other dairies statewide, was 121 percent higher than the injury rate for all state industries combined. *Id*.

Because article II, section 35 of the Washington Constitution explicitly guarantees workers in dangerous industries the protections of workplace health and safety laws like RCW 49.46.130, the exemption in RCW 49.46.130(2)(g) implicates a fundamental right of state citizenship.

The Workers here, who regularly worked over 40 hours per week in an extremely dangerous industry, are precisely the type of workers article II, section 35 was designed to protect. Thus, the Court need not look further than this enumerated and fundamental constitutional protection to strike down the agricultural exemption under the privileges and immunities clause.

The conclusion that the right to health and safety protections for workers in dangerous jobs is fundamental is also bolstered by this Court's early article I, section 12 jurisprudence on the broader categories of unenumerated rights that are considered "fundamental." As set forth above, *Vance* and Washington's other early cases rely on the Cooley treatise as a source for the fundamental rights encompassed by state privileges and immunities clauses. *See Vance*, 29 Wash. at 458. The Court in *Vance* includes a list of fundamental rights quoted nearly verbatim from Cooley:

> the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from.

Vance, 29 Wash. at 458 (citing Cooley, *Constitutional Limitations* (6th ed.) 597); *cf.* App. Ex. B at 99; *see supra* n.5. Cooley in turn relies on an earlier federal case, *Corfield v. Coryell*, 6 F. Cas. 546, 551-52, 4

Wash. C.C. 371 (Cir. Ct. E.D. Pa. 1823) (No. 3230), which provides a more encompassing list of fundamental rights than abbreviated in *Vance*:

> Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental . . . .

Corfield, 6 F. Cas. at 551-52 (cited in Cooley at 490, App. Ex. B at 99 & Ex. C at 131); *see also Andersen v. King Cnty.*, 158 Wn.2d 1, 60-61, 138 P.3d 963 (2006) (J.M. Johnson, J., dissenting) (citing full list from *Corfield* as "the classic statement of the law on privileges and immunities") & at 122-23 (Chambers, J., concurring in dissent) (citing *Corfield* for the rights encompassed by the privileges or immunities clause); *Ockletree*, 179 Wn.2d at 794 (Stephens, J., dissenting) (citing *Corfield*).

Workplace safety and health legislation for dangerous industries under article II, section 35, including RCW 49.46.130, implicates multiple

fundamental rights listed in *Corfield*, including "protection by the government," "the enjoyment of life and liberty, "the right to acquire and possess property of every kind," and the right "to pursue and obtain . . . safety." *Corfield*, 6 F. Cas. at 551-52; *cf. Ockletree*, 179 Wn.2d at 794-97 (Stephens, J., dissenting) (concluding the right to be free from discriminatory employment practices is as fundamental as the "commercial rights" addressed by early cases); *Macias*, 100 Wn.2d at 274-75 (holding the legislature's exclusion of farmworkers from workers' compensation coverage violated the equal protection clause, and that the privileges or immunities clause "independently supports the conclusion"). Thus, this Court's jurisprudence further supports the Workers' position that this Court should hold the exemption in RCW 49.46.130(2)(g) implicates the fundamental right of protection by workplace health and safety laws for dangerous industries, as guaranteed by article II, section 35.

b. *The agricultural overtime exemption also implicates the fundamental right to work and earn a wage*.

The trial court concluded the overtime exemption implicated the fundamental right to work and earn a wage. CP 1213. The court recognized that RCW 49.46.130(2)(g) "treats a class of workers in a significantly different fashion than other wage earners engaged in the

business of selling their labor." CP 1213-14. Like the right to protection of generally applicable workplace safety and health laws for dangerous industries based on article II, section 35 of the Washington Constitution, the right to work and earn a wage is also a fundamental right of state citizenship implicated by the overtime exemption.

In concluding the fundamental right burdened by RCW 49.46.130(2) is "the right to work and earn a wage," the trial court quoted the *State v. Vance* list of "fundamental rights of state citizenship" and reasoned that these rights "are primarily economic in nature; to conduct business, acquire, own and sell property, access the courts, collect debts, etc. . . By the same token, the right to work [sell your labor and earn a wage] also must be counted among the other 'fundamental rights.'" CP 1213.

The trial court's conclusion that the right to work and earn a wage is a fundamental right is consistent with *Vance* and *Corfield*. Justice William O. Douglas recognized the right to work is "the most precious liberty that man possesses." *Barsky v. Bd. of Regents*, 347 U.S. 442, 472, 74 S. Ct. 650, 98 L. Ed. 829 (1954) (Douglas, J., dissenting).[6] He eloquently explained:

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[6] This Court's decisions in the Fourteenth Amendment due process context concluding the right to pursue an occupation is not "fundamental" are not dispositive of the scope of the Workers' fundamental rights under article I, section 12. *Compare Fields v. Dep't of Early Learning*, -- Wn.2d --, 434 P.3d 999, 1004 (2019), *with Ockletree*, 179 Wn.2d at 793 (Stephens, J., dissenting) ("fundamental rights" under the privileges or

> Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on Politics, 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

Id.

This Court should affirm the trial court's conclusions that the right to work and earn a wage is a fundamental right under article I, section 12 and that RCW 49.46.130(2)(g) implicates that right by treating agricultural workers differently than other wage earners engaged in the business of selling their labor.

2. There is no reasonable ground for the agricultural exemption as a matter of law.

The article I, section 12 reasonable ground test is different from and more exacting than rational basis review under equal protection jurisprudence. *Schroeder*, 179 Wn.2d at 574; *Ockletree*, 179 Wn.2d at

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immunities clause of the Washington Constitution are not limited "to those deserving heightened scrutiny under federal law" because they are "more prosaic than the 'fundamental rights' guaranteed by due process."); *see also Vance*, 29 Wash. at 458 (citing Cooley at 597 which refers to rights protected by Article IV of the U.S. Constitution as the source of "privileges"). The right to work and earn a wage falls within the broader scope of fundamental rights under the privileges or immunities clause of the state constitution. *See* Clark Neily, *Judicial Engagement Means No More Make-Believe Judging*, 19 Geo. Mason L. Rev. 1053, 1069-70 n.71 (2012) (noting the U.S. Supreme court has recognized the fundamental right to pursue a calling under Article IV privileges and immunities and also found the same right not to be fundamental under the 14th Amendment due process clause).

783, 797 (Stephens, J., dissenting) (recognizing that if the reasonable ground test did not require more than rational basis review, "there would be no reason to confine its scope to laws concerning a fundamental right of state citizenship") (citation and internal quotation marks omitted). The trial court framed the second part of the test as whether there is a "reasonable *basis*" for granting the identified privilege or immunity, conflating the reasonable ground test with equal protection rational basis analysis. CP 1213-14 (emphasis added).

The difference between these two standards is important. Under the reasonable ground prong of the privileges or immunities test, courts must make a legal determination by "scrutiniz[ing] *the legislative distinction to determine whether it in fact serves the legislature's stated goal*." *Schroeder*, 179 Wn.2d at 574 (emphasis added). Under the equal protection rational basis standard, a classification merely "must be rationally related to a legitimate state interest." *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1988).

The reasonable ground test involves an interpretation of law (not fact) because courts must "tak[e] a statute as they find it." *Ockletree*, 179 Wn.2d at 797 (Stephens, J., dissenting). "Under the reasonable ground test a court will not hypothesize facts to justify a legislative distinction." *Schroeder*, 179 Wn.2d at 574. The basis to justify the legislative

distinction must be found in the legislation or legislative history itself. *Id.* "To meet the reasonable ground requirement, distinctions must rest on real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act." *Ockletree*, 179 Wn.2d at 783.

a. *The exemption does not serve the stated health and safety goal of the legislation*.

There is no reasonable ground for exempting agriculture from overtime protection because the exemption does not serve the legislature's stated goal of protecting health and safety. *See Schroeder*, 179 Wn.2d at 574; RCW 49.46.005(1). This Court has recognized that goal as the purpose of the overtime protection of the MWA. *Anfinson*, 174 Wn.2d at 870. There is no indication the legislature considered the health and safety of farmworkers when excluding them from the MWA protections.[7] In fact, affording overtime protection to workers in dangerous industries and excluding farmworkers is entirely inconsistent with the health and safety goal of the MWA. *See Schroeder*, 179 Wn.2d at 487 ("If we are to uphold [the statute in question], that law must be justified in fact as well as in theory."). Once the legislature chose to protect some workers in dangerous jobs, it was obligated to extend that protection to all workers in dangerous

[7] The only reference to farm worker health and safety found in the legislative history concerning the MWA is a 1975 letter from a Toppenish Farm Worker Health Center doctor advocating against the exclusion because of the impact on a farm worker's "entire life, including his health." CP 661 ¶ 10 & 694.

jobs, including farmworkers, unless it had a reasonable ground to exclude them. *See Andersen*, 158 Wn.2d at 123-24 (Chambers, J., concurring in dissent) (recognizing the privileges or immunities "clause protects all of us from privileges granted on unequal terms"). The agricultural exemption fails the reasonable ground test because the exclusion of farmworkers from overtime protection does not bear a natural, reasonable, and just relation to the goal of the MWA's overtime provision—protecting worker health and safety.

b. *The racist origins of the agricultural exemption provide important context for the reasonable ground analysis*.

Because the Workers have demonstrated they meet both parts of the privileges analysis, an examination of the racist origins of the agricultural exemption is not necessary to this Court's determination that the exemption violates article I, section 12.[8] However, courts should not turn a blind eye to exclusionary and discriminatory traditions that have long been enshrined in our legal system. *See State v. Saintcalle*, 178 Wn.2d 34, 75-76, 108-10, 309 P.3d 326 (2013) (González, J., concurring)

[8] The only questions of "fact" alleged by DeRuyter and the Industry Groups at summary judgment related to the racist history of the agricultural exemption at its origins on the federal level. *See* CP 750-55. Treating the legislative history as adjudicative facts would lead to the absurd result of a trial on issues courts routinely determine as a matter of law. It is appropriate when undergoing constitutional analysis for courts to take judicial notice of "legislative facts" even where the underlying studies or "facts" are "not necessarily indisputably true but . . . more likely [true] than not true." *State v. Gregory*, 192 Wn.2d at 22 (internal quotation marks and citations omitted). *See supra* n.3.

(exposing historical and racially exclusionary roots of peremptory challenges and urging Court to end racial discrimination that underlies their use); *McCreary Cnty. v. ACLU*, 545 U.S. 844, 866, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (rejecting contention that purpose should be inferred only from the latest in a series of governmental actions because precedent forbids courts from "turn[ing] a blind eye to the context in which [a] policy arose").[9]

The MWA's exemption of farmworkers from overtime protections was modeled after the FLSA. *Compare* Laws of 1959, ch. 294, § 1(5)(a), *with* 29 U.S.C. §§ 203(f) & 213(a)(5)-(6) (App. Ex. F at 187-88 & Ex. G at 192 & 201)[10]; *see also Anfinson*, 174 Wn.2d at 867-70 (recognizing MWA definition of "employee" was based on the FLSA); *Peterson v. Hagan*, 56 Wn.2d 48, 56, 351 P.2d 127 (1960) ("The 1959 act . . . follows the pattern of the Federal Fair Labor Standards Act."). When Congress enacted the FLSA in 1938, it excluded farmworkers from the protection of

[9] *See also Timbs v. Indiana*, -- U.S. --, 139 S. Ct. 682, 688, 203 L. Ed. 2d 11 (2019) (considering the lineage of the Excessive Fines Clause and continued historical abuses when "Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy" to conclude the protection from such fines was incorporated into the Due Process Clause of the Fourteenth Amendment); *id.* at 693-98 (Thomas, J., concurring in judgment) (elaborating further on the English origins and subsequent American abuses aimed at the perpetuation of the plantation system).

[10] The current FLSA agricultural exemption from overtime is found at 29 U.S.C. § 213(b)(12)-(13).

the FLSA, just as it had excluded them from other New Deal laws passed during the same era.[11]

To pass New Deal legislation, President Roosevelt needed the votes of Southern Democrats, who voted as a bloc to maintain the economic and social subordination of black farmworkers and Southern racial inequality. *See* CP 934-39, 981-82; CP 1017; Perea, 72 Ohio St. L.J. at 102-03, 114-17. Indeed, Congress tailored New Deal legislation to avoid disturbing the south's "racial civilization" by excluding agricultural and domestic labor, the principal occupational categories of blacks at the time. CP 1017. This was a "compromise" which left even the most heinous aspects of regional repression, such as lynching, beyond the rule of law. *Id.*; Perea, 72 Ohio St. L.J. at 103. "Aware of, yet remaining indifferent to the exclusion of blacks, once again Congress acquiesced in southern racism by excluding most blacks from the FLSA. Once again, the device was exclusion by proxy by excluding agricultural employees." *Id.* at 117. Southern lawmakers were explicit about their racist beliefs and fear

[11] *See* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 4, 31 & 155-56 (1st ed. 2017) (the exclusion of farmworkers was motivated by racism and capitulation to the commitment to white supremacy); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act,* 72 Ohio St. L.J. 95, 96 n.1 (2011).

that the culture of white supremacy would be disrupted when enacting the FLSA.

> We may rest assured, therefore, that when we turn over to a Federal bureau of board the power to fix wages, it will prescribe the same wage for the Negro that it prescribes for the white man. Now, such a plan might work in some sections of the United States but those of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it.

82 Cong. Rec. 1404 (1937) (Rep. Wilcox of Florida) (App. Ex. D at 179); *see also* 82 Cong. Rec. App. 442 (1937) (Rep. Cox of Georgia expressing fear that federal interference in the form of the FLSA would disrupt "the standards and customs which shall determine the relationships of our various groups of people in the South") (App. Ex. E at 183-85).

In adopting the FLSA's agricultural exemption, the Washington legislature incorporated this racist history into the MWA, apparently without question or debate. As Justice González recognized in *Saintcalle*, where exclusionary practices are brought into our laws without question or record of substantive debate, this Court has a special role in examining those origins, especially where an exclusion is rooted in racism and continues to perpetuate racial discrimination. 178 Wn.2d at 109-11 (González, J., concurring). This case calls upon the Court to play that

special role, where our legislature passed a law drawn from a federal statute demonstrably infected by racial bias.

In *Saintcalle,* Justice González examined the historical origins of peremptory challenges, first adopted in England, and then adopted in Washington when "racial minorities and women were completely ineligible for jury service." *Id.* at 75 & 108-09. Justice González called for the abolishment of peremptory challenges because, among other evils, such juror challenges continue to propagate racial discrimination today. *Id.* at 116. Similarly, the agricultural exemption, rooted in the racism of the New Deal era, continues to propagate its legacy of discrimination today by excluding Washington farmworkers (over 99 percent of whom identify as Latinx) from overtime protection.[12] The racist origins of the MWA's agricultural exemption from overtime protection bolster the conclusion that there is no reasonable ground for the exemption which bears a natural, reasonable, and just relation to MWA's purpose of protecting the health and safety of workers. This Court should find the agricultural exemption

[12] *See* William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 Ky. L.J. 1, 5-6 (2011-12) (recognizing that the exclusion of African Americans from New Deal opportunities originated in traditional racism to preserve the racial order of the Jim Crow South and that once set in motion, the structure of exclusion and discrimination endured "as powerful as ever, even if no longer deliberately racist"); Ian F. Haney Lopez, *Institutional Racism; Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717, 1843-44 (2000) (examining institutionalized racism which progresses, unquestioned, as the greatest source of ongoing harm to people of color, in the context of the near total exclusion of Mexican Americans from grand juries even though decisionmakers lacked conscious discriminatory intent).

from overtime protection violates article I, section 12 of the Washington Constitution and therefore is unconstitutional.

D. The exclusion of farmworkers from overtime violates the equal protection promise of article I, section 12 under any level of scrutiny.

Article I, section 12 of the Washington Constitution also guarantees equal protection of the law. Here, under any level of scrutiny, by excluding farmworkers from overtime protections, the MWA fails to provide equal protection of the law and therefore violates article I, section 12 of the Washington Constitution.[13] In its order on summary judgment, the trial court did not independently analyze the Workers' alternative equal protection arguments. The court, however, stated that "[t]he level of scrutiny must be determined by reference to issues of legislative intent and legislative history and a determination of whether a suspect class is implicated." CP 1214. The court found these issues to present "material facts proffered by both the Plaintiffs and the Defendants which are divergent and that will require the Court to weigh the same" and therefore denied summary judgment to both parties. CP 1214.

The trial court erred in concluding that the level of scrutiny and whether the exemption burdens a suspect class were questions of fact. The

[13] Should the Court find for the Workers under the "privileges" analysis, this Court need not reach the Workers' equal protection arguments. *But see Schroeder*, 179 Wn.2d at 577-79.

determination of the applicable level of scrutiny and whether a law withstands such scrutiny are questions of law. *See Schroeder*, 179 Wn.2d at 571, 577-79 (reviewing constitutionality of statute based on article I, section 12 challenge de novo); *United States v. Baker*, 63 F.3d 1478, 1490 (9th Cir. 1995) ("Equal protection claims are questions of law which we review de novo."); *State v. Schmidt*, 323 P.3d 647, 655 (Alaska 2014) ("Identifying the applicable level of scrutiny in an equal protection case is a question of law."). This Court should hold as a matter of law that the exclusion of farmworkers from overtime protection in RCW 49.46.130(2)(g) fails to provide equal protection of the law under any level of scrutiny.

1. The exclusion of farmworkers is subject to and fails strict scrutiny.

"A facially neutral law . . . warrants strict scrutiny" if "it can be proved that the law was motivated by a racial purpose or object, or if it is unexplainable on grounds other than race." *Hunt v. Cromartie*, 526 U.S. 541, 546, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999) (internal quotations omitted); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 265-66, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (requiring proof of discriminatory purpose or "a clear pattern, unexplainable on grounds other than race, emerges from the effect of state

action" to apply strict scrutiny to a facially neutral law); *Macias*, 100 Wn.2d at 269-71. "Strict scrutiny requires that the infringement is narrowly tailored to serve a compelling state interest." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006). "Few laws survive [strict] scrutiny." *Witt v. Dep't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008).

Strict scrutiny is the appropriate level of review. The Washington legislature incorporated the FLSA's exclusion of farmworkers when enacting the MWA. *Supra* Section IV.C.2.b. In doing so, the legislature also incorporated the racist underpinnings of the FLSA's overtime exemption, which relied on race in determining workers' eligibility for fair labor standards, including overtime. *Id.* The purposeful racial discrimination underlying the FLSA's exclusion applies equally to the MWA's and warrants strict scrutiny.[14]

In addition, there is a clear pattern, unexplainable on grounds other than race, which justifies strict scrutiny. *See Arlington Heights*, 429 U.S. at 265-66; *Macias*, 100 Wn.2d at 269-71. As distinguished from the 73 percent of Latinx individuals affected by the exclusion of farmworkers

[14] If the Court finds that the Workers' right to necessary workplace health and safety enactments or the right to work and earn a wage are "fundamental" for equal protection purposes, strict scrutiny will also apply. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010).

from workers' compensation in *Macias*, here, close to 100% of people affected by the exclusion today are Latinx. *See supra* Section III.A.3. This constitutes the pattern of "dramatic impact" acknowledged to trigger strict scrutiny. *See Macias*, 100 Wn.2d at 271.

The original basis for the FLSA's agricultural overtime exemption was to perpetuate the racial hierarchy of the South. This is not a "compelling state interest" that could justify the exclusion of farmworkers from overtime protection. The vestiges of this history are manifest today in the exclusion of a workforce that is comprised almost entirely of people of color.[15] The exclusion of farmworkers from the health and safety protection of overtime is not narrowly tailored to serve a compelling state interest and therefore deprives farmworkers of equal protection of the law.

2. In the alternative, the exclusion burdens an important right and a semi-suspect class and fails intermediate scrutiny.

This Court applies intermediate scrutiny to laws that burden both "an important right and a semi-suspect class not accountable for its status." *Schroeder*, 179 Wn.2d at 578 (citations and internal quotation marks omitted). "Under the intermediate scrutiny test, the challenged law

[15] "Because prejudice spawns prejudice . . . a history of unequal treatment requires sensitivity to the prospect that its vestiges endure." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 472 n.24, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (Marshall, J., concurring in part and dissenting in part).

must be seen as furthering a substantial interest of the state." *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987) (citations and internal quotation marks omitted). The exclusion of farmworkers from overtime protection fails intermediate scrutiny because it burdens an important right and a semi-suspect class—poor, Latinx workers who have been unable to make political gains in the legislature—and does not further any substantial state interest.

The exclusion of farmworkers from overtime protection burdens an important right. As "fundamental rights of state citizenship," privileges or immunities for purposes of an article I, section 12 reasonable ground analysis are also "important rights" for the purposes of equal protection analysis. *Schroeder*, 179 Wn.2d at 578; *see supra* Section IV.C.1. Even if this Court were to rule the exemption does not implicate a fundamental right, overtime protection for workers in dangerous jobs is certainly an important right. *See Anfinson*, 174 Wn.2d at 870 (recognizing remedial purpose of overtime is to protect against long hours of work injurious to health); *Parrish v. W. Coast Hotel Co.*, 185 Wn. 581, 584, 55 P.2d 1083 (1936) (recognizing importance of minimum wage statutes in protecting the public interest, as well as the wage earner). Excluding farmworkers from this protection burdens their article II, section 35 right to necessary workplace health and safety enactments. Additionally, the right to work

and earn a wage are important employment protections. This Court has recognized other employment protections as important rights. *See Griffin v. Eller*, 130 Wn.2d 58, 65, 922 P.2d 788 (1996) (employment protections afforded by the law against discrimination are important).

The exclusion also burdens a semi-suspect class not accountable for its status. Farmworkers in Washington are overwhelmingly Latinx and continue to earn poverty wages. *Supra* Section III.A.3.; *see also Macias*, 100 Wn.2d at 271, 274 (finding farmworkers' mean family income, adjusted for inflation today, were well below the poverty level even for a family of two); Daniel Rothenberg, *With These Hands: The Hidden World of Migrant Farmworkers Today* 54 (1998) ("The continued poverty and marginalization of farmworkers draws attention to the profound structural inequities that define our nation's farm labor system."). This Court recognizes that the poor are a semi-suspect class. *Schaaf*, 109 Wn.2d at 17 (citing *State v. Phelan*, 100 Wn.2d 508, 514, 671 P.2d 1212 (1983)). Farmworkers' average level of formal education is eighth grade and almost 100 percent speak a primary language other than English. CP 460 & 578.

In addition, Washington farmworkers have faced historical and ongoing exclusions from basic worker protections afforded other workers. Where farmworkers have gained access to some of the rights afforded to

other workers, it has been through judicial intervention. *See Lopez Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 659, 355 P.3d 258 (2015) (extending right to paid rest breaks to agricultural piece-rate workers); *Rios v. Washington Dep't of Labor & Indus.*, 145 Wn.2d 483, 508, 39 P.3d 961 (2002) (concluding Department of Labor and Industries' failure to protect farmworkers from pesticides through rulemaking was arbitrary); *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 748-49, 888 P.2d 147 (1995) (recognizing dairy workers' right to organize under state law). Farmworkers have been unable to rectify their exclusion from MWA protections through the legislative process. *See* CP 105-07, 660-94 & 1052-53 (describing 1975 effort to remove minimum wage and overtime exclusion and related legislative history); 700-01 (documenting 1988 failed legislative effort to include farmworkers and need for action by initiative); & 720-29 ("*The State of the State for Washington Latinos*" documenting dramatic under-representation in political office, racially polarized voting, and racial disparities in education, housing, employment and health care). The combination of these factors—race, poverty, educational and linguistic barriers, and barriers to political remedies—demonstrate that farmworkers "may well constitute the type of discrete and insular minority whose interests are a central concern in [this Court's] state equal protection cases." *Schroeder*, 179 Wn.2d at 579.

For the same reason there is no "compelling state interest" justifying the agricultural exemption under strict scrutiny, there is no "substantial state interest." *Supra* Section IV.D.1. Because the exclusion of farmworkers burdens both an important right and a semi-suspect class and there is no substantial state interest that would justify their exclusion from the health and safety protection of overtime, MWA's agricultural exemption fails intermediate scrutiny.

3. Even under rational basis review, the exclusion of farmworkers is unconstitutional.

Under rational basis review, a classification "must be rationally related to a legitimate state interest and will be upheld unless the classification rests on grounds wholly irrelevant to the achievement of a legitimate state objective." *DeYoung*, 136 Wn.2d at 144. However, the "rational basis standard is not without teeth." *Andersen*, 158 Wn.2d at 136 (Fairhurst, J., dissenting) (citing *DeYoung*, 136 Wn.2d at 144); *see also Fields v. Dep't of Early Learning*, 434 P.3d at 1008 (McCloud, J., concurring) ("Although rational basis review is the most relaxed form of judicial scrutiny, it is not toothless") (internal citations and quotation marks omitted); *Rodriguez v. Brand W. Dairy*, 378 P.3d 13, 27-32 (N.M. 2016) (applying New Mexico's rational basis review and finding five separate rationales not sufficient to justify the exclusion of farm and ranch

workers from workers' compensation). Even economic statutes may be deemed unconstitutional under rational basis review. *Andersen*, 158 Wn.2d at 136 (Fairhurst, J., dissenting); *see also Amunrud*, 158 Wn.2d at 229 (noting this Court "has been a historical, long-standing leader in protecting individual's rights, especially those of the economically powerless"); *Yakima Cnty. Deputy Sheriff's Assn. v. Bd. of Comm'rs*, 92 Wn.2d 831, 842, 601 P.2d 936 (1979) (Utter, J., concurring) (where the nature of a right at stake is one of constitutional import it's appropriate for courts to "grant less deference"). Here the agricultural exemption excludes a class of workers, farmworkers, from the protection of overtime without any relation to the health and safety purpose of the MWA.

Under rational basis review this Court applies a three-part test. That test involves whether the legislative distinction: (1) treats all members of the class alike; (2) has a rational basis for treating differently those within and outside the class; and (3) is rationally related to the purpose of the legislation. *DeYoung*, 136 Wn.2d at 144. The relevant class is all workers, RCW 49.46.130(1), and the statute excludes farmworkers from the overtime protection that the vast majority of other workers receive. Even if the class is workers in dangerous occupations, the overtime law does not treat all members of *that class* alike. Instead, it excludes farmworkers from the overtime protection that other workers in

dangerous industries receive.

There is no rational basis for treating those within or outside the class differently. Office workers who work in relatively safe environments receive overtime protection, while farmworkers who face the risk of serious injury on a daily basis due to the nature of the agricultural industry, do not. Workers employed in dangerous occupations like construction and factory work receive overtime, while farmworkers, though working in equally or even more dangerous occupations, do not. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-34, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973) (no rational basis to deny food stamps to some households because the make-up of those households was irrelevant to the purpose of providing nutrition to low-income households).

Moreover, the differential treatment is not related to the worker health and safety purpose of the MWA. Even under the rational basis test, "the relationship of a classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational." *DeYoung*, 136 Wn.2d at 149. "A discriminatory classification that is based on prejudice or bias is not rational as a matter of law." *Miguel v. Guess*, 112 Wn.App. 536, 553, 51 P.3d 89 (2002); *see also City of Cleburne*, 473 U.S. at 446-50 (applying rational basis review and invalidating zoning ordinance based on underlying irrational prejudice against persons with mental

disabilities); *Andersen*, 158 Wn.2d at 141 (Fairhurst, J., dissenting) ("When no rational basis supports a discriminatory statute, this court may *presume* that the statute is motivated by animus.") (emphasis added).

Here, the exclusion of farmworkers from overtime protection is based on the prejudice and bias rooted in the racist history of the FLSA and is therefore not rational as a matter of law. The agricultural exemption was included in the FLSA to preserve a racial structure that subjugated African-Americans. *See supra* Section IV.C.2.b. The Washington legislature's unquestioning importation of the FLSA exemption carried with it the same irrational underpinnings as did Congress's original racially-motivated decision.

That the Washington legislature may not have consciously considered the racist origins of the FLSA exemption does not "cure" the taint of the original law. Farmworkers in Washington continue to be excluded from overtime protection based on the vestiges of the desire to deprive people of color of equal workplace protections. The exclusion of farmworkers is so attenuated from the worker health and safety purpose of the MWA that it renders the distinction arbitrary and irrational. The agricultural overtime exemption therefore fails the rational basis test.

E. The Workers are entitled to attorneys' fees under RCW 49.48.030.

RCW 49.48.030 provides for the award of attorneys' fees "[i]n any action in which any person is successful in recovering judgment for wages or salary owed." This remedial statute "must be construed liberally in favor of the employee." *Bates v. City of Richland*, 112 Wn. App. 919, 939, 51 P.3d 816 (2002) (citing *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002)). "Washington courts have interpreted RCW 49.48.030 broadly." *Int'l Ass'n of Fire Fighters*, 146 Wn.2d at 35. An award of attorneys' fees under RCW 49.48.030 is appropriate even when employees "are not recovering a money judgment, but are establishing their rights to receive payment" by reason of employment. *Abels v. Snohomish Cnty. Pub. Util. Dist. No. 1*, 69 Wn. App. 542, 557-58, 849 P.2d 1258 (1993) (holding that workers established a right to vacation pay upon retirement, therefore the case involved the payment of compensation for employment and thus fell within the broad definition of "compensation due to an employee by reason of employment" warranting an award of fees).

Here, the Workers seek to establish "their rights to receive payment" for overtime hours based on the overtime premium. *See Abels*, 69 Wn. App. at 557-58. If this Court issues an opinion that requires agricultural employers to pay overtime to farmworkers, the Court will be

establishing the Workers' rights to receive payment by reason of employment. Therefore, the Workers will be entitled to attorneys' fees under RCW 49.48.030.

The Workers respectfully request that the Court award them reasonable attorneys' fees incurred pursuant to RCW 49.48.030 and RAP 18.1(a) in an amount to be determined upon filing an affidavit of fees and expenses. *See* RAP 18.1.

V. CONCLUSION

The Workers respectfully ask this Court to declare the agricultural exemption, RCW 49.46.130(2)(g), unconstitutional and remand for entry of judgment in favor of the Workers.

RESPECTFULLY DATED this 15th day of April, 2019.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury and in accordance with the laws of the State of Washington that on April 15, 2019, I electronically filed the foregoing PETITIONERS' OPENING BRIEF with the Clerk of the Court using the Washington State Appellate Courts' Portal, which will send notification of such filing to the following:

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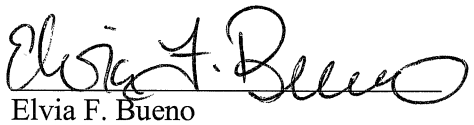

Elvia F. Bueno

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No. 96267-7

SUPREME COURT OF THE STATE OF WASHINGTON

JOSE MARTINEZ-CUEVAS and PATRICIA AGUILAR,
individually and on behalf of all others similarly situated,
Petitioners,

v.

DERUYTER BROTHERS DAIRY, INC.,
GENEVA S. DERUYTER, and JACOBUS N. DERUYTER,
Respondents,

and

WASHINGTON STATE DAIRY FEDERATION
and WASHINGTON FARM BUREAU,
Intervenor-Respondents.

On Appeal from the Yakima County Superior Court
No. 16-2-03417-8

APPENDIX TO PETITIONERS' OPENING BRIEF

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INDEX TO APPENDIX TO PETITIONERS' OPENING BRIEF

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Thomas M. Cooley & Alexis C. Angell, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (6th ed. 1890), Ch. VII……	A (pp. 1-33)
Cooley, Ch. XI…….....	B (pp. 34-118)
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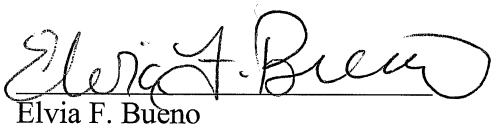

Elvia F. Bueno

EXHIBIT A

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CHAPTER VII.

OF THE CIRCUMSTANCES UNDER WHICH A LEGISLATIVE ENACTMENT MAY BE DECLARED UNCONSTITUTIONAL.

In the preceding chapters we have examined somewhat briefly the legislative power of the State, and the bounds which expressly or by implication are set to it, and also some of the conditions necessary to its proper and valid exercise. In so doing it has been made apparent that, under some circumstances, it may become the duty of the courts to declare that what the legislature has assumed to enact is void, either from want of constitutional power to enact it, or because the constitutional forms or conditions have not been observed. In the further examination of our subject, it will be important to consider what the circumstances are under which the courts will feel impelled to exercise this high prerogative, and what precautions should be observed before assuming to do so.

It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility. The legislative and judicial are co-ordinate departments of the government, of equal dignity; each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of power which, by the constitution, is not conferred upon it. The constitution apportions the powers of government, but it does not make any one of the three departments subordinate to another, when exercising the trust committed to it.[1] The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the constitution as the paramount law, whenever a legis-

[1] Bates *v.* Kimball, 2 Chip. 77; Bailey *v.* Philadelphia, &c. R. R. Co., 4 Harr. 389; Whittington *v.* Polk, 1 H. & J. 236; Hawkins *v.* Governor, 1 Ark. 570; People *v.* Governor, 29 Mich. 320; s. c. 18 Am. Rep. 89.

lative enactment comes in conflict with it.[1] But the courts sit, not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the legislature has failed to keep within its constitutional limits, that they are at liberty to disregard its action; and in doing so, they only do what every private citizen may do in respect to the mandates of the courts when the judges assume to act and to render judgments or decrees without jurisdiction. "In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law."[2]

Nevertheless, in declaring a law unconstitutional, a court must necessarily cover the same ground which has already been covered by the legislative department in deciding upon the propriety of enacting the law, and they must indirectly overrule the decision of that co-ordinate department. The task is therefore a delicate one, and only to be entered upon with reluctance and hesitation. It is a solemn act in any case to declare that that body of men to whom the people have committed the sovereign function of making the laws for the commonwealth have deliberately disregarded the limitations imposed upon this delegated authority, and usurped power which the people have been careful to withhold; and it is almost equally so when the act which is adjudged to be unconstitutional appears to be chargeable rather to careless and improvident action, or error in judgment, than to intentional disregard of obligation. But the duty to do this in a proper case, though at one time doubted, and by some persons persistently denied, it is now generally agreed that the courts cannot properly decline, and in its performance they seldom fail of proper support if they proceed with due caution and circumspection, and under a proper sense as well of their own responsibility, as of the respect due to the action and judgment of the lawmakers.[3]

[1] Rice *v.* State, 7 Ind. 332; Bloodgood *v.* Mohawk & Hudson Railroad Co., 18 Wend. 9.

[2] Lindsay *v.* Commissioners, &c., 2 Bay, 38, 61; People *v.* Rucker, 5 Col. 5.

[3] There are at least two cases in American judicial history where judges have been impeached as criminals for refusing to enforcce unconstitutional enactments. One of these — the case of Trevett *v.* Weedon, decided by the Superior Court of Rhode Island in 1786 — is particularly interesting as being the first well authenticated case in which a legislative enactment was held to be void because of conflict with the State constitu-

I. In view of the considerations which have been suggested, the rule which is adopted by some courts, that they will not de-

tion. Mr. Arnold, in his history of Rhode Island, Vol. II. c. 24, gives an account of this case; and the printed brief in opposition to the law, and in defence of the impeached judges, is in possession of the present writer. The act in question was one which imposed a heavy penalty on any one who should refuse to receive on the same terms as specie the bills of a bank chartered by the State, or who should in any way discourage the circulation of such bills. The penalty was made collectible on summary conviction, without jury trial; and the act was held void on the ground that jury trial was expressly given by the colonial charter, which then constituted the constitution of the State. Although the judges were not removed on impeachment, the legislature refused to re-elect them when their terms expired at the end of the year, and supplanted them by more pliant tools, by whose assistance the paper money was forced into circulation, and public and private debts extinguished by means of it. Concerning the other case, we copy from the Western Law Monthly, "Sketch of Hon. Calvin Pease," Vol. V. p. 3, June, 1863: "The first session of the Supreme Court [of Ohio] under the constitution was held at Warren, Trumbull County, on the first Tuesday of June, 1803. The State was divided into three circuits. . . . The Third Circuit of the State was composed of the counties of Washington, Belmont, Jefferson, Columbiana, and Trumbull. At this session of the legislature, Mr. Pease was appointed President Judge of the Third Circuit in April, 1803, and though nearly twenty-seven years old, he was very youthful in his appearance. He held the office until March 4, 1810, when he sent his resignation to Governor Huntingdon. . . . During his term of service upon the bench many interesting questions were presented for decision, and among them the constitutionality of some portion of the act of 1805, defining the duties of justices of the peace; and he decided that so much of the fifth section as gave justices of the peace jurisdiction exceeding $20, and so much of the twenty-ninth section as prevented plaintiffs from recovering costs in actions commenced by original writs in the Court of Common Pleas, for sums between $20 and $50, were repugnant to the Constitution of the United States and of the State of Ohio, and therefore null and void. . . . The clamor and abuse to which this decision gave rise was not in the least mitigated or diminished by the circumstance that it was concurred in by a majority of the judges of the Supreme Court, Messrs. Huntingdon and Tod. . . . At the session of the legislature of 1807–8, steps were taken to impeach him and the judges of the Supreme Court who concurred with him; but the resolutions introduced into the House were not acted upon during the session. But the scheme was not abandoned. At an early day of the next session, and with almost indecent haste, a committee was appointed to inquire into the conduct of the offending judges, and with leave to exhibit articles of impeachment, or report otherwise, as the facts might justify. The committee without delay reported articles of impeachment against Messrs. Pease and Tod, but not against Huntingdon, who in the mean time had been elected governor of the State. . . . The articles of impeachment were preferred by the House of Representatives on the 23d day of December, 1808. He was summoned at once to appear before the senate as a high court of impeachment, and he promptly obeyed the summons. The managers of the prosecution on the part of the House were Thomas Morris, afterwards senator in Congress from Ohio, Joseph Sharp, James Pritchard, Samuel Marrett, and Othniel Tooker. . . . Several days were consumed in the investigation, but the trial resulted in the acquittal of the respondent." Sketch of Hon. George Tod, August number of same volume: "At the session of the legislature of 1808–9, he was impeached for concurring in decisions made by Judge Pease, in the counties of Trumbull and Jefferson, that certain provisions of the act of the legislature, passed in 1805, defining the duties of justices of the peace, were in conflict with the Constitution of the United States and of the State of Ohio, and therefore void. These decisions of the courts of Common Pleas and of the Supreme Court, it was insisted,

cide a legislative act to be unconstitutional by a majority of a bare quorum of the judges only, — less than a majority of all, — but will instead postpone the argument until the bench is full, seems a very prudent and proper precaution to be observed before entering upon questions so delicate and so important. The benefit of the wisdom and deliberation of every judge ought to be had under circumstances so grave. Something more than private rights are involved; the fundamental law of the State is in question, as well as the correctness of legislative action; and considerations of courtesy, as well as the importance of the question involved, should lead the court to decline to act at all, where they cannot sustain the legislative action, until a full bench has been consulted, and its deliberate opinion is found to be against it. But this is a rule of propriety, not of constitutional obligation; and though generally adopted and observed, each court will regulate, in its own discretion, its practice in this particular.[1]

were not only an assault upon the wisdom and dignity, but also upon the supremacy of the legislature, which passed the act in question. This could not be endured; and the popular fury against the judges rose to a very high pitch, and the senator from the county of Trumbull in the legislature at that time, Calvin Cone, Esq., took no pains to soothe the offended dignity of the members of that body, or their sympathizing constituents, but pressed a contrary line of conduct. The judges must be brought to justice, he insisted vehemently, and be punished, so that others might be terrified by the example, and deterred from committing similar offences in the future. The charges against Mr. Tod were substantially the same as those against Mr. Pease. Mr. Tod was first tried, and acquitted. The managers of the impeachment, as well as the result, were the same in both cases."

[1] Briscoe *v.* Commonwealth Bank of Kentucky, 8 Pet. 118. It has been intimated that inferior courts should not presume to pass upon constitutional questions, but ought in all cases to treat statutes as valid. Ortman *v.* Greenman, 4 Mich. 291. But no tribunal can exercise judicial power unless it is to decide according to its judgment; and it is difficult to discover any principle of justice which can require a magistrate to enter upon the execution of a statute when he believes it to be invalid, especially when he must thereby subject himself to prosecution, without any indemnity in the law if it proves to be invalid. Undoubtedly when the highest courts in the land hesitate to declare a law unconstitutional, and allow much weight to the legislative judgment, the inferior courts should be still more reluctant to exercise this power, and a becoming modesty would at least be expected of those judicial officers who have not been trained to the investigation of legal and constitutional questions. But in any case a judge or justice, being free from doubt in his own mind, and unfettered by any judicial decision properly binding upon him, must follow his own sense of duty upon constitutional as well as upon any other questions. See Miller *v.* State, 3 Ohio St.475; Pim *v.* Nicholson, 6 Ohio St. 176; Mayberry *v.* Kelly, 1 Kan. 116. In the case last cited it is said: "It is claimed by counsel for the plaintiff in error, that the point raised by the instruction is, that inferior courts and ministerial officers have no right to judge of the constitutionality of a law passed by a legislature. But is this law? If so, a court created to interpret the law must disregard the constitution in forming its opinions. The constitution is law, — the fundamental law, — and must as much be taken into consideration by a justice of the peace as by any other tribunal. When two laws apparently conflict, it is the duty of all courts to construe them. If the conflict is irreconcilable, they must decide which is to prevail; and the con-

II. Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. "While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extra-judicial disquisition is entitled."[1] In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable.[2]

III. Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it.[3] On this ground it has been held that the objection that a legislative act was unconstitutional, because divesting the rights of remainder-men against their will, could not be successfully urged by the owner of the particular estate, and could only be made on behalf of the remainder-men themselves.[4] And a party who has assented to his property being taken under a statute cannot afterwards object that the statute is in violation of a provision in the constitution designed for the protection of private property.[5]

stitution is not an exception to this rule of construction. If a law were passed in open, flagrant violation of the constitution, should a justice of the peace regard the law, and pay no attention to the constitutional provision? If that is his duty in a plain case, is it less so when the construction becomes more difficult?"

[1] Hoover *v.* Wood, 9 Ind. 286, 287; Ireland *v.* Turnpike Co., 19 Ohio St. 369; Smith *v.* Speed, 50 Ala. 276; Allor *v.* Auditors, 43 Mich. 76; Board of Education *v.* Mayor of Brunswick, 72 Ga. 353. See People *v.* Kenney, 96 N. Y. 294.

[2] *Ex parte* Randolph, 2 Brock. 447; Frees *v.* Ford, 6 N. Y. 176, 178; Cumberland, &c. R. R. Co. *v.* County Court, 10 Bush, 564; White *v.* Scott, 4 Barb. 56; Mobile & Ohio Railroad Co. *v.* State, 29 Ala. 573.

[3] People *v.* Rensselaer, &c. R. R. Co., 15 Wend. 113; s. c. 30 Am. Dec. 33; Smith *v.* Inge, 80 Ala. 283.

[4] Sinclair *v.* Jackson, 8 Cow. 543. See also Smith *v.* McCarthy, 56 Pa. St. 359; Antoni *v.* Wright, 22 Gratt. 857; Marshall *v.* Donovon, 10 Bush, 681.

[5] Embury *v.* Conner, 3 N. Y. 511; Baker *v.* Braman, 6 Hill, 47; Mobile & Ohio Railroad Co. *v.* State, 29 Ala. 586; Haskell *v.* New Bedford, 108 Mass. 208.

The statute is assumed to be valid, until some one complains whose rights it invades. "*Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law in the conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only is it necessary to go, in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose." [1]

IV. Nor can a court declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution.) It is true there are some reported cases, in which judges have been understood to intimate a doctrine different from what is here asserted; but it will generally be found, on an examination of those cases, that what is said is rather by way of argument and illustration, to show the unreasonableness of putting upon constitutions such a construction as would permit legislation of the objectionable character then in question, and to induce a more cautious and patient examination of the statute, with a view to discover in it, if possible, some more just and reasonable legislative intent, than as laying down a rule by which courts would be at liberty to limit, according to their own judgment and sense of justice and propriety, the extent of legislative power in directions in which the constitution had imposed no restraint. Mr. Justice *Story*, in one case, in examining the extent of power granted by the charter of Rhode Island, which authorized the General Assembly to make laws in the most ample manner, "so as such laws, &c., be not contrary and repugnant unto, but as near as may be agreeable to, the laws of England, considering the nature

[1] Wellington, Petitioner, 16 Pick. 87, 96. And see Hingham, &c. Turnpike Co. *v.* Norfolk Co., 6 Allen, 353; De Jarnette *v.* Haynes, 23 Miss. 600; Sinclair *v.* Jackson, 8 Cow. 543, 579; Heyward *v.* Mayor, &c. of New York, 8 Barb. 486; Matter of Albany St., 11 Wend. 149; Williamson *v.* Carlton, 51 Me. 449; State *v.* Rich, 20 Miss. 393; Jones *v.* Black, 48 Ala. 540; Com. *v.* Wright, 79 Ky. 22; Burnside *v.* Lincoln Co. Ct., 86 Ky. 423.

and constitution of the place and people there," expresses himself thus: "What is the true extent of the power thus granted must be open to explanation as well by usage as by construction of the terms in which it is given. In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offence. Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island, as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that that great event could have left the people of that State subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them — a power so repugnant to the common principles of justice and civil liberty — lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention." "We know of no case in which a legislative act to transfer the property of A. to B. without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced."[1] The

[1] Wilkinson *v.* Leland, 2 Pet. 627, 657. See also what is said by the same judge in Terrett *v.* Taylor, 9 Cranch, 43. "It is clear that statutes passed against plain and obvious principles of common right and common reason are absolutely null and void, so far as they are calculated to operate against those principles." Ham *v.* McClaws, 1 Bay, 98. But the question in that case was one of construction; whether the court should give to a statute a construction which would make it operate against common right and common reason. In Bowman *v.* Middleton, 1 Bay, 282, the court held an act which divested a man of his freehold and passed it over to another, to be void "as against common right as well as against Magna Charta." In Regents of University *v.* Williams, 9 Gill & J. 365; s. c. 31 Am. Dec. 72, it was said that an act was void as opposed to fundamental principles of right and justice inherent in the nature and spirit of the social compact. But the court had already decided that the act was opposed, not only to the constitution of the State, but to that of the United States also. See Mayor, &c. of Baltimore

question discussed by the learned judge in this case is perceived to have been, What is the scope of a grant of legislative power to be exercised in conformity with the laws of England? Whatever he says is pertinent to that question; and the considerations he suggests are by way of argument to show that the power to do certain unjust and oppressive acts was not covered by the grant of legislative power. It is not intimated that if they were within the grant, they would be impliedly prohibited because unjust and oppressive.

In another case, decided in the Supreme Court of New York, one of the judges, in considering the rights of the city of New York to certain corporate property, used this language: "The inhabitants of the city of New York have a vested right in the City Hall, markets, water-works, ferries, and other public property, which cannot be taken from them any more than their individual dwellings or storehouses. Their rights, in this respect, rest *not merely upon the constitution*, but upon the great principles of eternal justice which lie at the foundation of all free governments." [1] The great principles of eternal justice which affected the particular case had been incorporated in the constitution; and it therefore became unnecessary to consider what would otherwise have been the rule; nor do we understand the court as intimating any opinion upon that subject. It was sufficient for the case, to find that the principles of right and justice had been recognized and protected by the constitution, and that the people had not assumed to confer upon the legislature a power to deprive the city of rights which did not come from the constitution, but from principles antecedent to and recognized by it.

So it is said by *Hosmer*, Ch. J., in a Connecticut case: "With those judges who assert the omnipotence of the legislature in all cases where the constitution has not interposed an explicit restraint, I cannot agree. Should there exist — what I know is not only an incredible supposition, but a most remote improbability — a case of direct infraction of vested rights, too palpable to be questioned and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact, and within the control of the judiciary. If, for example, a law were made without any cause to deprive a person of his property, or to

v. State, 15 Md. 376. In Godcharles *v.* Wigeman, 113 Pa. St. 431, a statute forbidding payments in store orders was held void as preventing persons *sui juris* from making their own contracts. A similar rule was laid down in State *v.* Fire Creek, &c. Co., 10 S. E. Rep. 288 (W. Va.), where mining companies were forbidden to sell to employees merchandise at a higher rate than they sold it to others.

[1] Benson *v.* Mayor, &c. of New York, 10 Barb. 223, 244.

subject him to imprisonment, who would not question its legality, and who would aid in carrying it into effect? On the other hand, I cannot harmonize with those who deny the power of the legislature to make laws, in any case, which, with entire justice, operate on antecedent legal rights. A retrospective law may be just and reasonable, and the right of the legislature to enact one of this description I am not speculatist enough to question."[1] The cases here supposed of unjust and tyrannical enactments would probably be held not to be within the power of any legislative body in the Union. One of them would be clearly a bill of attainder; the other, unless it was in the nature of remedial legislation, and susceptible of being defended on that theory, would be an exercise of judicial power, and therefore in excess of legislative authority, because not included in the apportionment of power made to that department. No question of implied prohibition would arise in either of these cases; but if the grant of power had covered them, and there had been no express limitation, there would, as it seems to us, be very great probability of unpleasant and dangerous conflict of authority, if the courts were to deny validity to legislative action on subjects within their control, on the assumption that the legislature had disregarded justice or sound policy. The moment a court ventures to substitute its own judgment for that of the legislature, in any case where the constitution has vested the legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference.[2]

The rule of law upon this subject appears to be, that, except

[1] Goshen *v.* Stonington, 4 Conn. 209, 225.

[2] "If the legislature should pass a law in plain and unequivocal language, within the general scope of their constitutional powers, I know of no authority in this government to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to the principles of natural justice; for this would be vesting in the court a latitudinarian authority which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well-being of society, or at least not in harmony with the structure of our ideas of natural government." Per *Rogers*, J., in Commonwealth *v.* McCloskey, 2 Rawle, 374. "All the courts can do with odious statutes is to chasten their hardness by construction. Such is the imperfection of the best human institutions, that, mould them as we may, a large discretion must at last be reposed somewhere. The best and in many cases the only security is in the wisdom and integrity of public servants, and their identity with the people. Governments cannot be administered without committing powers in trust and confidence." Beebe *v.* State, 6 Ind. 501, 528, per *Stuart*, J. And see Johnston *v.* Commonwealth, 1 Bibb, 603; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194; State *v.* Kruttschnitt, 4 Nev. 178; Walker *v.* Cincinnati, 21 Ohio St. 14; Hills *v.* Chicago, 60 Ill. 86; Ballentine *v.* Mayor, &c., 15 Lea, 633; State *v.* Traders' Bank, 6 Sou. Rep. 582 (La.).

where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights.[1] The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power.[2] Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them.[3]

[1] Bennett *v.* Bull, Baldw. 74; Walker *v.* Cincinnati, 21 Ohio St. 14. "If the act itself is within the scope of their authority, it must stand, and we are bound to make it stand, if it will upon any intendment. It is its effect, not its purpose, which must determine its validity. Nothing but a clear violation of the constitution — a clear usurpation of power prohibited — will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." Pennsylvania R. R. Co. *v.* Riblet, 66 Pa. St. 164, 169. See Weber *v.* Reinhard, 73 Pa. St. 370; Chicago, &c. R. R. Co. *v.* Smith, 62 Ill. 268; People *v.* Albertson, 55 N. Y. 50, per *Allen*, J.; Martin *v.* Dix, 52 Miss. 52, 64, per *Chalmers*, J.; Bennett *v.* Boggs, Baldw. 60, 74; United States *v.* Brown, 1 Deady, 566; Commonwealth *v.* Moore, 25 Gratt. 951; Danville *v.* Pace, 25 Gratt. 1, 8; Reithmiller *v.* People, 44 Mich. 280; Munn *v.* Illinois, 94 U. S. 113; Eastman *v.* State, 109 Ind. 278.

[2] *Perkins*, J., in Madison & Indianapolis Railroad Co. *v.* Whiteneck, 8 Ind. 217; Bull *v.* Read, 13 Gratt. 78, per *Lee*, J. So in Canada it is held that an act within the scope of legislative power cannot be objected to as contrary to reason and justice. *Re* Goodhue, 19 Ch'y (Ont.), 366; Toronto, &c. R. Co. *v.* Crookshank, 4 Q. B. (Ont.) 318.

[3] Sill *v.* Village of Corning, 15 N. Y. 297; Varick *v.* Smith, 5 Paige, 136; Cochran *v.* Van Surlay, 20 Wend. 365; Morris *v.* People, 3 Denio, 381; Wynehamer *v.* People, 13 N. Y. 378; People *v.* Supervisors of Orange, 17 N. Y. 235; Dow *v.* Norris, 4 N. H. 16; Derby Turnpike Co. *v.* Parks, 10 Conn. 522, 543; Hartford Bridge Co. *v.* Union Ferry Co, 29 Conn. 210; Holden *v.* James, 11 Mass. 396; Adams *v.* Howe, 14 Mass. 340; s. c. 7 Am. Dec. 216; Norwich *v.* County Commissioners, 13 Pick. 60; Dawson *v.* Shaver, 1 Blackf. 206; Beauchamp *v.* State, 6 Blackf. 299; Doe *v.* Douglass, 8 Blackf. 10; Maize *v.* State, 4 Ind. 342; Stocking *v.* State, 7 Ind. 327; Beebe *v.* State, 6 Ind. 501; Newland *v.* Marsh, 19 Ill. 376, 384; Chicago, &c. R. R. Co. *v.* Smith, 62 Ill. 268; Gutman *v.* Virginia Iron Co., 5 W. Va. 22; Osburn *v.* Staley, 5 W. Va. 85; Yancy *v.* Yancy, 5 Heisk. 353; Bliss *v.* Commonwealth, 2 Litt. 90; State *v.* Ashley, 1 Ark. 513; Campbell *v.* Union Bank, 7 Miss. 625; Tate's Ex'r *v.* Bell, 4 Yerg. 202; s. c. 26 Am. Dec. 221; Andrews *v.* State, 3 Heisk. 165; s. c. 8 Am. Rep. 8; Railroad *v.* Hicks, 9 Bax. 446; Whittington *v.* Polk, 1 Harr. & J. 236: Norris *v.* Abingdon Academy, 7 Gill & J. 7; Harri-

V. If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the constitution. The principles of republican government are not a set of inflexible rules, vital and active in the constitution, though unexpressed, but they are subject to variation and modification from motives of policy and public necessity; and it is only in those particulars in which experience has demonstrated any departure from the settled practice to work injustice or confusion, that we shall discover an incorporation of them in the constitution in such form as to make them definite rules of action under all circumstances. It is undoubtedly a maxim of republican government, as we understand it, that taxation and representation should be inseparable; but where the legislature interferes, as in many cases it may do, to compel taxation by a municipal corporation for local purposes, it is evident that this maxim is applied in the case in a much restricted and very imperfect sense only, since the representation of the locality taxed is but slight in the body imposing the tax, and the burden may be imposed, not only against the protest of the local representative, but against the general opposition of the municipality. The property of women is taxable, notwithstanding they are not allowed a voice in choosing representatives.[1] The maxim is not entirely lost sight of in such cases, but its application in the particular case, and the determination how far it can properly and justly be made to yield to considerations of policy and expediency, must rest exclusively with the lawmaking power, in the absence of any definite constitutional provisions so embodying the maxim as to make it a limitation upon legislative authority.[2]

son *v.* State, 22 Md. 468; State *v.* Lyles, 1 McCord, 238; Myers *v.* English, 9 Cal. 341; *Ex parte* Newman, 9 Cal. 502; Hobart *v.* Supervisors, 17 Cal. 23; Crenshaw *v.* Slate River Co., 6 Rand. 245; Lewis *v.* Webb, 3 Me. 326; Durham *v.* Lewiston, 4 Me. 140; Lunt's Case, 6 Me. 412; Scott *v.* Smart's Ex'rs, 1 Mich. 295; Williams *v.* Detroit, 2 Mich. 560; Tyler *v.* People, 8 Mich. 320; Weimer *v.* Bunbury, 30 Mich. 201; Cotton *v.* Commissioners of Leon County, 6 Fla. 610; State *v.* Robinson, 1 Kan. 17; Santo *v.* State, 2 Iowa, 165, Morrison *v.* Springer, 15 Iowa, 304; Stoddart *v.* Smith, 5 Binn. 355; Moore *v.* Houston, 3 S. & R. 169; Braddee *v.* Brownfield, 2 W. & S. 271; Harvey *v.* Thomas, 10 Watts, 63; Commonwealth *v.* Maxwell, 27 Pa. St. 444; Lewis's Appeal, 67 Pa. St. 153; Butler's Appeal, 73 Pa. St. 448; Carey *v.* Giles, 9 Ga. 253; Macon & Western Railroad Co. *v.* Davis, 13 Ga. 68; Franklin Bridge Co. *v.* Wood, 14 Ga. 80; Boston *v.* Cummins, 16 Ga. 102; Van Horne *v.* Dorrance, 2 Dall. 309; Calder *v.* Bull, 3 Dall. 386; Cooper *v.* Telfair, 4 Dall. 14; Fletcher *v.* Peck, 6 Cranch, 87.

[1] Wheeler *v.* Wall, 6 Allen, 558; Smith *v.* Macon, 20 Ark. 17.

[2] "There are undoubtedly fundamental principles of morality and justice which no legislature is at liberty to disregard,

It is also a maxim of republican government that local concerns shall be managed in the local districts, which shall choose their own administrative and police officers, and establish for themselves police regulations; but this maxim is subject to such exceptions as the legislative power of the State shall see fit to make; and when made, it must be presumed that the public interest, convenience, and protection are subserved thereby.[1] The State may interfere to establish new regulations against the will of the local constituency; and if it shall think proper in any case to assume to itself those powers of local police which should be executed by the people immediately concerned, we must suppose it has been done because the local administration has proved imperfect and inefficient, and a regard to the general well-being has demanded the change. In these cases the maxims which have prevailed in the government address themselves to the wisdom of the legislature, and to adhere to them as far as possible is doubtless to keep in the path of wisdom; but they do not constitute restrictions so as to warrant the other departments in treating the exceptions which are made as unconstitutional.[2]

but it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the legislature. . . This court can know nothing of public policy except from the constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must in general be addressed to the legislature. Questions of policy there are concluded here." *Chase*, Ch. J., in License Tax Cases, 5 Wall. 462, 469. "All mere questions of expediency, and all questions respecting the just operation of the law within the limits prescribed by the constitution, were settled by the legislature when it was enacted." *Ladd*, J., in Perry *v.* Keene, 56 N. H. 514, 530. And see remarks of *Ryan*, Ch. J., in Attorney-General *v.* Chicago, &c. R. R. Co., 35 Wis. 425, 580.

[1] People *v.* Draper, 15 N. Y. 532. See *post*, pp. 226–228.

[2] In People *v.* Mahaney, 13 Mich. 481, 500, where the Metropolitan Police Act of Detroit was claimed to be unconstitutional on various grounds, the court say: "Besides the specific objections made to the act as opposed to the provisions of the constitution, the counsel for respondent attacks it on 'general principles,' and especially because violating fundamental principles of our system, — that governments exist by the consent of the governed, and that taxation and representation go together. The taxation under the act, it is said, is really in the hands of a police board, a body in the choice of which the people of Detroit have no voice. This argument is one which might be pressed upon the legislative department with great force, if it were true in point of fact. But as the people of Detroit are really represented throughout, the difficulty suggested can hardly be regarded as fundamental. They were represented in the legislature which passed the act, and had the same proportionate voice there with the other municipalities in the State, all of which receive from that body their powers of local government, and such only as its wisdom shall prescribe within the constitutional limit. They were represented in that body when the present police board were appointed by it, and the governor, who is hereafter to fill vacancies, will be chosen by the State at large, including their city. There is nothing in the maxim that taxation and representation go together which requires that the body paying the tax shall alone

VI. Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a *spirit* supposed to pervade the constitution, but not expressed in words. "When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the *spirit* of the constitution which is not even mentioned in the instrument."[1] "It is difficult," says Mr. Senator Verplanck, "upon any general principles, to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written constitution give that authority. There are indeed many *dicta* and some great authorities holding that acts contrary to the first principles of right are void. The principle is unquestionably sound as the governing rule of a legislature in relation to its own acts, or even those of a preceding legislature. It also affords a safe rule of construction for courts, in the interpretation of laws admitting of any doubtful construction, to presume that the legislature could not have intended an unequal and unjust operation of its statutes. Such a construction ought never to be given to legislative language if it be susceptible of any other more conformable to justice; but if the words be positive and without ambiguity, I can find no authority for a court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority, by a permanent and paramount law, settled by the deliberate wisdom of the nation, that I can find a safe and solid ground for the

be consulted in its assessment; and if there were, we should find it violated at every turn in our system. The State legislature not only has a control in this respect over inferior municipalities, which it exercises by general laws, but it sometimes finds it necessary to interpose its power in special cases to prevent unjust or burdensome taxation, as well as to compel the performance of a clear duty. The constitution itself, by one of the clauses referred to, requires the legislature to exercise its control over the taxation of municipal corporations, by restricting it to what that body may regard as proper bounds. And municipal bodies are frequently compelled most unwillingly to levy taxes for the payment of claims, by the judgments or mandates of courts in which their representation is quite as remote as that of the people of Detroit in this police board. It cannot therefore be said that the maxims referred to have been entirely disregarded by the legislature in the passage of this act. But as counsel do not claim that, in so far as they have been departed from, the constitution has been violated, we cannot, with propriety, be asked to declare the act void on any such general objection." And see Wynehamer *v.* People, 13 N. Y. 378, per *Selden*, J.; Benson *v.* Mayor, &c. of Albany, 24 Barb. 248 *et seq.*; Baltimore *v.* State, 15 Md. 376; People *v.* Draper, 15 N. Y. 532; White *v.* Stamford, 37 Conn. 578.

[1] People *v.* Fisher, 24 Wend. 215, 220; State *v.* Staten, 6 Cold. 238; Walker *v.* Cincinnati, 21 Ohio St. 14; State *v.* Smith, 44 Ohio St. 348; People *v.* Rucker, 5 Col. 455; Whallon *v.* Ingham Circ. Judge, 51 Mich. 503; Wooten *v.* State, 5 Sou. Rep. 39 (Fla.).

authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too undefined either for its own security or the protection of private rights. It is therefore a most gratifying circumstance to the friends of regulated liberty, that in every change in their constitutional polity which has yet taken place here, whilst political power has been more widely diffused among the people, stronger and better-defined guards have been given to the rights of property." And after quoting certain express limitations, he proceeds: "Believing that we are to rely upon these and similar provisions as the best safeguards of our rights, as well as the safest authorities for judicial direction, I cannot bring myself to approve of the power of courts to annul any law solemnly passed, either on an assumed ground of its being contrary to natural equity, or from a broad, loose, and vague interpretation of a constitutional provision beyond its natural and obvious sense." [1]

The accepted theory upon this subject appears to be this: In every sovereign State there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power rests in the Parliament; in the American States it resides in the people themselves as an organized body politic. But the people, by creating the Constitution of the United States, have delegated this power as to certain subjects, and under certain restrictions, to the Congress of the Union; and that portion they cannot resume, except as it may be done through amendment of the national Constitution. For the exercise of the legislative power, subject to this limitation, they create, by their State constitution, a legislative department upon which they confer it; and granting it in general terms, they must be understood to grant the whole legislative power which they possessed, except so far as at the same time they saw fit to impose restrictions. While, therefore, the Parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American States possess the same power, except, *first*, as it may have been limited by the Constitution of the United States; and, *second*, as it may have been limited by the constitution of the State. A legislative act cannot, therefore, be declared void, unless its conflict with one of these two instruments can be pointed out.[2]

[1] Cochran *v.* Van Surlay, 20 Wend. 365, 381, 383. See also People *v.* Gallagher, 4 Mich. 244; Benson *v.* Mayor, &c. of Albany, 24 Barb. 248; Grant *v.* Courter, 24 Barb. 232; Wynehamer *v.* People, 13 N. Y. 378, per *Comstock*, J.; 13 N. Y. 453, per *Selden*, J.; 13 N. Y. 477, per *Johnson*, J.

[2] People *v.* New York Central Railroad Co., 34 Barb. 123; Gentry *v.* Grif-

It is to be borne in mind, however, that there is a broad difference between the Constitution of the United States and the constitutions of the States as regards the powers which may be exercised under them. The government of the United States is one of *enumerated* powers; the governments of the States are possessed of all the general powers of legislation. When a law of Congress is assailed as void, we look in the national Constitution to see if the grant of specified powers is broad enough to embrace it; but when a State law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the State we are able to discover that it is prohibited. We look in the Constitution of the United States for *grants* of legislative power, but in the constitution of the State to ascertain if any *limitations* have been imposed upon the complete power with which the legislative department of the State was vested in its creation. Congress can pass no laws but such as the Constitution authorizes either expressly or by clear implication; while the State legislature has jurisdiction of all subjects on which its legislation is not prohibited.[1] "The lawmaking power of the State," it is said in one case, "recognizes no restraints, and is bound by none, except such as are imposed by the constitution. That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law. Its object is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute. These limitations are created and imposed by express words, or arise by necessary implication. The leading feature of the constitution is the separation and distribution of the powers of the government. It takes care to separate the executive, legislative, and judicial powers, and to define their limits. The executive can do no legislative act, nor the legislature any executive act, and neither can exercise judicial authority."[2]

It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disre-

fith, 27 Tex. 461; Danville *v.* Pace, 25 Gratt. 1; s. c. 18 Am. Rep. 663; Davis *v.* State, 3 Lea, 377. And see the cases cited, *ante*, p. 201, note 3.

[1] Sill *v.* Village of Corning, 15 N. Y. 297; People *v.* Supervisors of Orange, 27 Barb. 575; People *v.* Gallagher, 4 Mich. 244; Sears *v.* Cottrell, 5 Mich. 250; People *v.* New York Central Railroad Co., 24 N. Y. 497, 504; People *v.* Toynbee, 2 Park. Cr. R. 490; State *v.* Gutierrez, 15 La. Ann. 190; Walpole *v.* Elliott, 18 Ind. 258; Smith *v.* Judge, 17 Cal. 547; Commonwealth *v.* Hartman, 17 Pa. St 118; Kirby *v.* Shaw, 19 Pa. St. 258; Weister *v.* Hade, 52 Pa. St. 474; Danville *v.* Pace 25 Gratt. 1, 9; s. c. 18 Am. Rep. 663.

[2] Sill *v.* Corning, 15 N. Y. 297, 303.

garded, or some express command which has been disobeyed.[1] Prohibitions are only important where they are in the nature of exceptions to a general grant of power; and if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done. If in one department was vested the whole power of the government, it might be essential for the people, in the instrument delegating this complete authority, to make careful and particular exception of all those cases which it was intended to exclude from its cognizance; for without such exception the government might do whatever the people themselves, when met in their sovereign capacity, would have power to do. But when only the legislative power is delegated to one department, and the judicial to another, it is not important that the one should be expressly forbidden to try causes, or the other to make laws. The assumption of judicial power by the legislature in such a case is unconstitutional, because, though not expressly forbidden, it is nevertheless inconsistent with the provisions which have conferred upon another department the power the legislature is seeking to exercise.[2] And for similar reasons a legislative act which should undertake to make a judge the arbiter in his own controversies would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government.[3] It could not be necessary to forbid the judiciary to render judgment without suffering the party to make defence; because it is implied in judicial authority that there shall be a hearing before condemnation.[4] Taxation cannot be arbitrary, because its very definition includes apportionment, nor can it be for a purpose not public, because that would be a contradiction in terms.[5] The right of local self-government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican government.[6]

[1] A remarkable case of evasion to avoid the purpose of the constitution, and still keep within its terms, was considered in People *v.* Albertson, 55 N. Y. 50. In Taylor *v.* Commissioners of Ross County, 23 Ohio St. 22, the Supreme Court of Ohio found itself under the necessity of declaring that that which was forbidden by the constitution could no more be done indirectly than directly.

[2] *Ante*, pp. 104–133, and cases cited.

[3] *Post*, pp. 506–509 and cases cited.

[4] *Post*, pp. 431–433. On this subject in general, reference is made to those very complete recent works, Bigelow on Estoppel, and Freeman on Judgments.

[5] *Post*, ch. 14. And see Curtis *v.* Whipple, 24 Wis. 350; Tyson *v.* School Directors, 51 Pa. St. 9; Freeland *v.* Hastings, 10 Allen, 570; Opinions of Judges, 58 Me. 590; People *v.* Batchellor, 53 N. Y. 128; Lowell *v.* Boston, 111 Mass. 454.

[6] People *v.* Mayor, &c. of Chicago, 51 Ill. 17; People *v* Hurlbut, 24 Mich. 44;

The bills of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void. If the act proceeded upon the assumption that such other person was justly entitled to the estate, and therefore it was transferred, it would be void, because judicial in its nature; and if it proceeded without reasons, it would be equally void, as neither legislative nor judicial, but a mere arbitrary fiat.[1] There is no difficulty in saying that any such act, which under pretence of exercising one power is usurping another, is opposed to the constitution and void. It is assuming a power which the people, if they have not granted it at all, have reserved to themselves. The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments. The Parliament of Great Britain, indeed, as possessing the sovereignty of the country, has the power to disregard fundamental principles, and pass arbitrary and unjust enactments; but it cannot do this rightfully, and it has the power to do so simply because there is no written constitution from which its authority springs or on which it depends, and by which the courts can test the validity of its declared will. The rules which confine the discretion of Parliament within the ancient landmarks are rules for the construction of the powers of the American legislatures; and however proper and prudent it may be expressly to prohibit those things which are not understood to be within the proper attributes of legislative power, such prohibition can never be regarded as essential, when the extent of the power apportioned to the legislative department is found upon examination not to be broad enough to cover the obnoxious authority. The absence of such prohibition cannot, by implication, confer power.

State *v.* Denny, 21 N. E. Rep. 274 (Ind.), See cases *post*, pp. 227, 282.

[1] Bowman *v.* Middleton, 1 Bay, 252; Wilkinson *v.* Leland, 2 Pet. 627; Terrett *v.* Taylor, 9 Cranch, 43; Ervine's Appeal, 16 Pa. St. 256. "It is now considered an universal and fundamental proposition in every well regulated and properly administered government, whether embodied in a constitutional form or not, that private property cannot be taken for strictly private purposes at all, nor for public without a just compensation; and that the obligation of contracts cannot be abrogated or essentially impaired. These and other vested rights of the citizen are held sacred and inviolable, even against the plenitude of power of the legislative department." *Nelson*, J., in People *v.* Morris, 13 Wend. 325, 328. See Bank of Michigan *v.* Williams, 5 Wend. 478.

Nor, where fundamental rights are declared by the constitution, is it necessary at the same time to prohibit the legislature, in express terms, from taking them away. The declaration is itself a prohibition, and is inserted in the constitution for the express purpose of operating as a restriction upon legislative power.[1] Many things, indeed, which are contained in the bills of rights to be found in the American constitutions, are not, and from the very nature of the case cannot be, so certain and definite in character as to form rules for judicial decisions; and they are declared rather as guides to the legislative judgment than as marking an absolute limitation of power. The nature of the declaration will generally enable us to determine without difficulty whether it is the one thing or the other. If it is declared that all men are free, and no man can be slave to another, a definite and certain rule of action is laid down, which the courts can administer; but if it be said that "the blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue," we should not be likely to commit the mistake of supposing that this declaration would authorize the courts to substitute their own view of justice for that which may have impelled the legislature to pass a particular law, or to inquire into the moderation, temperance, frugality, and virtue of its members, with a view to set aside their action, if it should appear to have been influenced by the opposite qualities. It is plain that what in the one case is a rule, in the other is an admonition addressed to the judgment and the conscience of all persons in authority, as well as of the people themselves.

So the forms prescribed for legislative action are in the nature of limitations upon its authority. The constitutional provisions which establish them are equivalent to a declaration that the legislative power shall be exercised under these forms, and shall not be exercised under any other. A statute which does not observe them will plainly be ineffectual.[2]

Statutes unconstitutional in Part.

It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the

[1] Beebe *v.* State, 6 Ind. 501. This principle is very often acted upon when not expressly declared.

[2] See *ante*, p. 155 *et seq.*

constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable object, by means repugnant to the Constitution of the United States or of the State.[1] A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional.[2] Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to

[1] Commonwealth *v.* Clapp, 5 Gray, 97. "A law that is unconstitutional is so because it is either an assumption of power not legislative in its nature, or because it is inconsistent with some provision of the federal or State Constitution." *Woodworth*, J., in Commonwealth *v.* Maxwell, 27 Pa. St. 444, 456.

[2] Commonwealth *v.* Clapp, 5 Gray, 97. See to the same effect, Fisher *v.* McGirr, 1 Gray, 1; Warren *v.* Mayor, &c. of Charlestown, 2 Gray, 84; Wellington, Petitioner, 16 Pick. 87; Commonwealth *v.* Hitchings, 5 Gray, 482; Commonwealth *v.* Pomeroy, 5 Gray, 486; State *v.* Copeland, 3 R. I. 33; State *v.* Snow, 3 R. I. 64; Armstrong *v.* Jackson, 1 Blackf. 374; Clark *v.* Ellis, 2 Blackf. 8; McCulloch *v.* State, 11 Ind. 424; People *v.* Hill, 7 Cal. 97; Lathrop *v.* Mills, 19 Cal. 513; Rood *v.* McCargar, 49 Cal. 117; Supervisors of Knox Co. *v.* Davis, 63 Ill. 405; Myers *v.* People, 67 Ill. 503; Thomson *v.* Grand Gulf Railroad Co., 3 How. (Miss.) 240; Campbell *v.* Union Bank, 7 Miss. 625; Mobile & Ohio Railroad Co. *v.* State, 29 Ala. 573; South & N. Ala. R. R. Co. *v.* Morris, 65 Ala. 193; Santo *v.* State, 2 Iowa, 165; State *v.* Cox, 3 Eng. 436; Mayor, &c. of Savannah *v.* State, 4 Ga. 26; Exchange Bank *v.* Hines, 3 Ohio St. 1; Robinson *v.* Bank of Darien, 18 Ga. 65; State *v.* Wheeler, 25 Conn. 290; People *v.* Lawrence, 36 Barb. 177; Williams *v.* Payson, 14 La. Ann. 7; Ely *v.* Thompson, 3 A. K. Marsh. 70; Davis *v.* State, 7 Md. 151; State *v.* Commissioners of Baltimore, 29 Md. 521; Hagerstown *v.* Dechert, 32 Md. 369; Berry *v.* Baltimore, &c. R. R. Co., 41 Md. 446; s. c. 20 Am. Rep. 69; State *v.* Clarke, 54 Mo. 17; Lowndes Co. *v.* Hunter, 49 Ala. 507; Isom *v.* Mississippi, &c. R. R. Co., 36 Miss. 300; Bank of Hamilton *v.* Dudley's Lessee, 2 Pet. 492; Turner *v.* Com'rs, 27 Kan. 314; *In re* Groffs, 21 Neb. 647; State *v.* Tuttle, 53 Wis. 45; People *v.* Hall, 8 Col. 485. "To the extent of the collision and repugnancy, the law of the State must yield; and to that extent, and no further, it is rendered by such repugnancy inoperative and void." Commonwealth *v.* Kimball, 24 Pick. 359, 361, per *Shaw*, Ch. J.; Norris *v.* Boston, 4 Met. 282; Eckhart *v.* State, 5 W. Va. 515. Where the portions are separable action under the statute will be presumed to have been taken without reference to the invalid provisions, and will be upheld so far as it is within the valid portions. Donnersberger *v.* Prendergast, 128 Ill 229.

declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other.[1] The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance.[2] If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion.[3] And if they are so mutually connected with

[1] Commonwealth *v.* Hitchings, 5 Gray, 482. See People *v.* Briggs, 50 N. Y. 553. Although a proviso is ineffectual because unconstitutional, it cannot be disregarded when the intention of the legislature is in question. Commonwealth *v.* Potts, 79 Pa. St. 164.

[2] Commonwealth *v.* Hitchings, 5 Gray, 482; Willard *v.* People, 5 Ill. 461; Eells *v.* People, 5 Ill. 498; Robinson *v.* Bidwell, 22 Cal. 379; State *v.* Easterbrook, 3 Nev. 173; Hagerstown *v.* Dechert, 32 Md. 369; People *v.* Kenney, 96 N. Y. 294.

[3] Santo *v.* State, 2 Iowa, 165. But perhaps the doctrine of sustaining one part of a statute when the other is void was carried to an extreme in this case. A prohibitory liquor law had been passed which was not objectionable on constitutional grounds, except that the last section provided that "the question of prohibiting the sale and manufacture of intoxicating liquor" should be submitted to the electors of the State, and if it should appear "that a majority of the votes cast as aforesaid, upon said question of prohibition, shall be for the prohibitory liquor law, then this act shall take effect on the first day of July, 1855." The court held this to be an attempt by the legislature to shift the exercise of legislative power from themselves to the people, and therefore void; but they also held that the remainder of the act was complete without this section, and must therefore be sustained on the rule above given. The reasoning of the court by which they are brought to this conclusion is ingenious; but one cannot avoid feeling, especially after reading the dissenting opinion of Chief Justice *Wright*, that by the decision the court gave effect to an act which the legislature did not design should take effect unless the result of the unconstitutional submission to the people was in its favor. See also Weir *v.* Cram, 37 Iowa, 649. For a similar ruling, see Maize *v.* State, 4 Ind. 342; overruled in Meshmeier *v.* State, 11 Ind. 482. And see State *v.* Dombaugh, 20 Ohio St. 167, where it was held competent to construe a part of an act held to be valid by another part adjudged unconstitutional, though the court considered it "quite

and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.[1]

It has accordingly been held, where a statute submitted to the voters of a county the question of the removal of their county seat, and one section imposed the forfeiture of certain vested rights in case the vote was against the removal, that this portion of the act being void, the whole must fall, inasmuch as the whole was submitted to the electors collectively, and the threatened forfeiture would naturally affect the result of the vote.[2]

And, where a statute annexed to the city of Racine certain lands previously in the township of Racine, but contained an express provision that the lands so annexed should be taxed at a different and less rate than other lands in the city; the latter provision being held unconstitutional, it was also held that the whole statute must fail, inasmuch as such provision was clearly intended as a compensation for the annexation.[3]

probable" that if the legislature had supposed they were without power to adopt the void part of the act, they would have made an essentially different provision by the other. See also People *v.* Bull, 46 N. Y. 57, where part of an act was sustained which probably would not have been adopted by the legislature separately. It must be obvious, in any case where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in support of the remainder that are allowable in support of a complete act when some cause of invalidity is suggested to the whole of it. In the latter case, we know the legislature designed the whole act to have effect, and we should sustain it if possible; in the former, we do not know that the legislature would have been willing that a part of the act should be sustained if the remainder were held void, and there is generally a presumption more or less strong to the contrary. While, therefore, in the one case the act should be sustained unless the invalidity is clear, in the other the whole should fall unless it is manifest the portion not opposed to the constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part which was void.

[1] Warren *v.* Mayor, &c. of Charlestown, 2 Gray, 84; State *v.* Commissioners of Perry County, 5 Ohio St. 497; State *v.* Pugh, 43 Ohio St. 98; Slauson *v.* Racine, 13 Wis. 398; Allen County Commissioners *v.* Silvers, 22 Ind. 491; State *v.* Denny, 21 N. E. Rep. (Ind.) 274; Eckhart *v.* State, 5 W. Va. 515; Allen *v.* Louisiana, 103 U. S. 80; Tillman *v.* Cocke, 9 Bax. 429; Jones *v.* Jones, 104 N. Y. 234; Meyer *v.* Berlandi, 39 Minn. 438. Where a statute made the same provision for taxing telegraph messages sent to points within and to points without the State, and was void as to the latter, it was held wholly void. Western Union Tel. Co. *v.* State, 62 Tex. 630.

[2] State *v.* Commissioners of Perry County, 5 Ohio St. 497. And see Jones *v.* Robbins, 8 Gray, 329; Monroe *v.* Collins, 17 Ohio St. 666, 684; Taylor *v.* Commissioners of Ross County, 23 Ohio St. 22, 84.

[3] Slauson *v.* Racine, 13 Wis. 398, followed in State *v.* Dousman, 28 Wis. 541.

And where a statute, in order to obtain a jury of six persons, provided for the summoning of twelve jurors, from whom six were to be chosen and sworn, and under the constitution the jury must consist of twelve, it was held that the provision for reducing the number to six could not be rejected and the statute sustained, inasmuch as this would be giving to it a construction and effect different from that the legislature designed; and would deprive the parties of the means of obtaining impartial jurors which the statute had intended to give.[1]

On the other hand, — to illustrate how intimately the valid and invalid portions of a statute may be associated, — a section of the criminal code of Illinois provided that "if any person shall harbor or secrete any negro, mulatto, or person of color, the same being a slave or servant, owing service or labor to any other persons, whether they reside in this State or in any other State, or Territory, or district, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them in a lawful manner, every person so offending shall be deemed guilty of a misdemeanor," &c., and it was held that, although the latter portion of the section was void within the decision in Prigg *v.* Pennsylvania,[2] yet that the first portion, being a police regulation for the preservation of order in the State, and important to its well-being, and capable of being enforced without reference to the rest, was not affected by the invalidity of the rest.[3]

A legislative act may be entirely valid as to some classes of cases, and clearly void as to others.[4] A general law for the punishment of offences, which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in the future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control. A law might be void as violating the obligation of existing contracts, but valid as to all contracts which should be entered into subsequent to its passage, and which therefore would have no legal force except such as the law itself would allow.[5] In any such case the unconstitutional law must operate

[1] Campau *v.* Detroit, 14 Mich. 266. See Commonwealth *v.* Potts, 79 Pa. St. 164.

[2] 16 Pet. 539.

[3] Willard *v.* People, 5 Ill. 461; Eells *v.* People, 5 Ill. 498. See Hagerstown *v.* Dechert, 32 Md. 369.

[4] Moore *v.* New Orleans, 32 La. Ann. 726. A law forbidding the sale of liquors may be void as to imported liquors and valid as to all others. Tiernan *v.* Rinker, 102 U. S. 123; State *v.* Amery, 12 R. I. 64.

[5] Mundy *v.* Monroe, 1 Mich. 68; Cargill *v.* Power, 1 Mich. 369. In People *v.* Rochester, 50 N. Y. 525, certain commis-

as far as it can,[1] and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the constitution forbids. If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others.

Waiving a Constitutional Objection.

There are cases where a law in its application to a particular case must be sustained, because the party who makes objection has, by prior action, precluded himself from being heard against it.[2] Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will. On this ground it has been held that an act appropriating the private property of one person for the private purposes of another, on compensation made, was valid if he whose property was taken assented thereto; and that he did assent and waive the constitutional privilege, if he received the compensation awarded, or brought an action to recover it.[3] So if an act providing for the appropriation of property for a public use shall authorize more to be taken than the use requires, although such act would be void without the owner's assent, yet with it all objection on the ground of unconstitutionality is removed.[4] And where parties were authorized by statute to erect a dam across a river, provided they should first execute

sioners were appointed to take for a city hall either lands belonging to the city or lands of individuals. The act made no provision for compensation. The commissioners elected to take lands belonging to the city. Held, that the act was not wholly void for the omission to provide compensation in case the lands of individuals had been selected.

[1] Baker *v.* Braman, 6 Hill, 47; Regents of University *v.* Williams, 9 Gill & J. 365, s. c. 31 Am. Dec. 72; *Re* Middletown, 82 N. Y. 196. The case of Sadler *v.* Langham, 34 Ala. 311, appears to be opposed to this principle, but it also appears to us to be based upon cases which are not applicable.

[2] One waives right to object to law under which a grand jury is made up, by pleading in bar to the indictment. United States *v.* Gale, 109 U. S. 65. An officer who has acted and received money under an act cannot contest its constitutionality. People *v.* Bunker, 70 Cal. 212.

[3] Baker *v.* Braman, 6 Hill, 47. So, if one has started the machinery to set going a local improvement act. Dewhurst *v.* Allegheny, 95 Pa. St. 437.

[4] Embury *v.* Conner, 3 N. Y. 511. And see Heyward *v.* Mayor, &c. of New York, 8 Barb. 486; Mobile & Ohio Railroad Co. *v.* State, 29 Ala. 573; Detmold *v.* Drake, 46 N. Y. 318. For a waiver in tax cases resting on a similar principle, see Motz *v.* Detroit, 18 Mich. 495; Ricketts *v.* Spraker, 77 Ind. 371.

a bond to the people conditioned to pay such damages as each and every person might sustain in consequence of the erection of the dam, the damages to be assessed by a justice of the peace, and the dam was erected and damages assessed as provided by the statute, it was held, in an action on the bond to recover those damages, that the party erecting the dam and who had received the benefit of the statute, was precluded by his action from contesting its validity, and could not insist upon his right to a common-law trial by jury.[1] In these and the like cases the statute must be read with an implied proviso that the party to be affected shall assent thereto; and such consent removes all obstacle, and lets the statute in to operate the same as if it had in terms contained the condition.[2] Under the terms of the statutes which exempt property from forced sale on execution, to a specified amount or value, it is sometimes necessary that the debtor, or some one in his behalf, shall appear and make selection or otherwise participate in the setting off of that to which he is entitled; and where this is the case, the exemption cannot be forced upon him if he declines or neglects to claim it.[3] In Pennsylvania and Alabama it has been decided that a party may, by executory agreement entered into at the time of contracting a debt, and as a part of the contract, waive his rights under the exemption laws and preclude himself from claiming them as against judgments obtained for such debt;[4] but in other States it is held, on what seems to be the better reason, that, as the exemption is granted on grounds of general policy, an executory agreement to waive it must be deemed contrary to the policy of the law, and for that reason void.[5] In criminal cases the doctrine

[1] People *v.* Murray, 5 Hill, 468. See Lee *v.* Tillotson, 24 Wend. 337.

[2] Embury *v.* Conner, 3 N. Y. 511. And see Matter of Albany St., 11 Wend. 149; Chamberlain *v.* Lyell, 3 Mich. 448; Beecher *v.* Baldy, 7 Mich. 488; Mobile & Ohio Railroad Co. *v.* State, 29 Ala. 573; Detmold *v.* Drake, 46 N. Y. 318; Haskell *v.* New Bedford, 108 Mass. 208; Wanser *v.* Atkinson, 43 N. J. 571.

[3] See Barton *v.* Brown, 68 Cal. 11; Butler *v.* Shiver, 79 Ga. 172. In some States the officer must make the selection when the debtor fails to do so, and in some the debtor, if a married man, is precluded from waiving the privilege except with the consent of his wife, given in writing. See Denny *v.* White, 2 Cold. 283; Ross *v.* Lister, 14 Tex. 469; Vanderhurst *v.* Bacon, 38 Mich. 669; s. c. 31 Am. Rep. 328; Gilman *v.* Williams, 7 Wis. 329. She need not assent as to exemption of stock in trade. Charpentier *v.* Bresnahan, 62 Mich. 360.

[4] Case *v.* Dunmore, 23 Pa. St. 93; Bowman *v.* Smiley, 31 Pa. St. 225; Shelly's Appeal, 36 Pa. St. 373; O'Nail *v.* Craig, 56 Pa. St. 161; Thomas's Appeal, 69 Pa. St. 120; Bibb *v.* Janney, 45 Ala. 329; Brown *v.* Leitch, 60 Ala. 313; s. c. 31 Am. Rep. 42; Neely *v.* Henry, 63 Ala. 261. And see Hoisington *v.* Huff, 24 Kan. 379.

[5] Maxwell *v.* Reed, 7 Wis. 582; Kneetle *v.* Newcomb, 22 N. Y. 249; Recht *v.* Kelly, 82 Ill. 147; s. c. 25 Am. Rep. 301; Moxley *v.* Ragan, 10 Bush, 156; s. c. 19 Am. Rep. 61; Denny *v.* White, 2 Cold. 283; Branch *v.* Tomlinson, 77 N. C. 388; Carter's Admr. *v.* Carter, 20 Fla. 558;

that a constitutional privilege may be waived must be true to a very limited extent only. A party may consent to waive rights of property, but the trial and punishment for public offences are not within the province of individual consent or agreement.[1]

Judicial Doubts on Constitutional Questions.

It has been said by an eminent jurist, that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt.[2] A reasonable doubt must be solved in favor of the legislative action, and the act be sustained.[3]

"The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful

Cleghorn *v.* Greeson, 77 Ga. 343. A woman cannot by ante-nuptial agreement release the special allowance made to her as widow by statute; it being against public policy. Phelps *v.* Phelps, 72 Ill. 545.

[1] See *post*, 390. And as to the waiver of the right to jury trial in civil cases, *post*, pp. 505, 506.

[2] Wellington, Petitioner, 16 Pick 87, per *Shaw*, Ch. J. Alexander *v.* People, 7 Col. 155; Crowley *v.* State, 11 Oreg. 512. A law will be upheld unless its unconstitutionality is so clear "as to leave no doubt on the subject." Kelly *v.* Meeks, 87 Mo. 396; Robinson *v.* Schenck, 102 Ind. 307. If an act may be valid or not according to the circumstances, a court would be bound to presume that such circumstances existed as would render it valid. Talbot *v.* Hudson, 16 Gray, 417.

[3] Cooper *v.* Telfair, 4 Dall. 14; Dow *v.* Norris, 4 N. H. 16; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194; Carey *v.* Giles, 9 Ga. 253; Macon & Western Railroad Co. *v.* Davis, 13 Ga. 68; Franklin Bridge Co. *v.* Wood, 14 Ga. 80; Kendall *v.* Kingston, 5 Mass. 524; Foster *v.* Essex Bank, 16 Mass. 245; Norwich *v.* County Commissioners of Hampshire, 13 Pick. 60; Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 210; Rich *v.* Flanders, 39 N. H. 304; Eason *v.* State, 11 Ark. 481; Hedley *v.* Commissioners of Franklin Co., 4 Blackf. 116; Stocking *v.* State, 7 Ind. 326; La Fayette *v.* Jenners, 10 Ind. 74; *Ex parte* McCollum, 1 Cow. 550; Coutant *v.* People, 11 Wend. 511; Clark *v.* People, 26 Wend. 559; Morris *v.* People, 3 Denio, 376; N. Y., &c. R. R. Co. *v.* Van Horn, 57 N. Y. 473; Baltimore *v.* State, 15 Md. 376; Cotton *v.* Commissioners of Leon Co., 6 Fla. 610; Cheney *v.* Jones, 14 Fla. 587; Lane *v.* Dorman, 4 Ill. 238; s. c. 36 Am. Dec. 543; Newland *v.* Marsh, 19 Ill. 376; Farmers' and Mechanics' Bank *v.* Smith, 3 S. & R. 63; Weister *v.* Hade, 52 Pa. St. 474; Sears *v.* Cottrell, 5 Mich. 251; Tyler *v.* People, 8 Mich. 320; Allen County Commissioners *v.* Silvers, 22 Ind. 491; State *v.* Robinson, 1 Kan. 17; Eyre *v.* Jacob, 14 Gratt. 422; Gormley *v.* Taylor, 44 Ga. 76; State *v.* Cape Girardeau, &c. R. R. Co., 48 Mo. 468; Oleson *v.* Railroad Co., 36 Wis. 383; Newsom *v.* Cocke, 44 Miss. 352; Slack *v.* Jacob, 8 W. Va. 612; Commonwealth *v.* Moore, 25 Gratt. 951.

of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." [1] Mr. Justice *Washington* gives a reason for this rule, which has been repeatedly recognized in other cases which we have cited. After expressing the opinion that the particular question there presented, and which regarded the constitutionality of a State law, was involved in difficulty and doubt, he says: "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt." [2]

The constitutionality of a law, then, is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the constitution upon their action, have adjudged that it is so. They are a co-ordinate department of the government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must, therefore, be supposed that their own doubts of the constitutionality of their action have been deliberately solved in its favor, so that the courts may with some confidence repose upon their conclusion, as one based upon their best judgment. For although it is plain, upon the authorities, that the courts should sustain legislative action when not clearly satisfied of its invalidity, it is equally plain in reason that the legislature should abstain from adopting such action if not fully assured of their authority to do so. Respect for the instrument under which they exercise their power should impel the legislature in every case to solve their doubts in its favor, and it is only because we are to presume they do so, that courts are

[1] Fletcher *v.* Peck, 6 Cranch, 87, 128, per *Marshall*, Ch. J.

[2] Ogden *v.* Saunders, 12 Wheat. 213. See Adams *v.* Howe, 14 Mass. 340; s. c. 7 Am. Dec. 216; Kellogg *v.* State Treasurer, 44 Vt. 356, 359; Slack *v.* Jacob, 8 W. Va. 612.

warranted in giving weight in any case to their decision. If it were understood that legislators refrained from exercising their judgment, or that, in cases of doubt, they allowed themselves to lean in favor of the action they desired to accomplish, the foundation for the cases we have cited would be altogether taken away.[1]

As to what the doubt shall be upon which the court is to act, we conceive that it can make no difference whether it springs from an endeavor to arrive at the true interpretation of the constitution, or from a consideration of the law after the meaning of the constitution has been judicially determined. It has sometimes been supposed that it was the duty of the court, first, to interpret the constitution, placing upon it a construction that must remain unvarying, and then test the law in question by it; and that any other rule would lead to differing judicial decisions, if the legislature should put one interpretation upon the constitution at one time and a different one at another. But the decided cases do not sanction this rule,[2] and the difficulty suggested is rather imaginary than real, since it is but reasonable to expect that, where a construction has once been placed upon a constitutional provision, it will be followed afterwards, even though its original adoption may have sprung from deference to legislative action rather than from settled convictions in the judicial mind.[3]

The duty of the court to uphold a statute when the conflict between it and the constitution is not clear, and the implication which must always exist that no violation has been intended by the legislature, may require it in some cases, where the meaning of the constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. For as a conflict between the statute and the constitution is not to be implied, it would seem to follow, where the meaning of the constitution is clear, *that the court, if possible, must give the statute such a construction as will enable it to have effect.* This is only saying, in another form of words, that the court must construe the statute in accordance with the legislative intent; since it is always to be presumed the legislature designed the statute to take effect, and not to be a nullity.

The rule upon this subject is thus stated by the Supreme Court of Illinois: "Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution and

[1] See upon this subject what is said in Osburn *v.* Staley, 5 W. Va. 85; Tate *v.* Bell, 4 Yerg. 202; s. c. 26 Am. Dec. 221.

[2] Sun Mutual Insurance Co. *v.* New York, 5 Sandf. 10; Clark *v.* People, 26 Wend. 599; Baltimore *v.* State, 15 Md. 376.

[3] People *v.* Blodgett, 13 Mich. 127.

give it the force of law, such construction will be adopted by the courts. Therefore, acts of the legislature, in terms retrospective, and which, literally interpreted, would invalidate and destroy vested rights, are upheld by giving them prospective operation only; for, applied to, and operating upon, future acts and transactions only, they are rules of property under and subject to which the citizen acquires property rights, and are obnoxious to no constitutional limitation; but as retroactive laws, they reach to and destroy *existing* rights, through force of the legislative will, without a hearing or judgment of law. So will acts of the legislature, having elements of limitation, and capable of being so applied and administered, although the words are broad enough to, and do, literally read, strike at the right itself, be construed to limit and control the remedy; for as such they are valid, but as weapons destructive of vested rights they are void; and such force only will be given the acts as the legislature could impart to them." [1]

The Supreme Court of New Hampshire, a similar question being involved, recognizing their obligation "so to construe every act of the legislature as to make it consistent, if it be possible, with the provisions of the constitution," proceed to the examination of a statute by the same rule, "without stopping to inquire what construction might be warranted by the natural import of the language used." [2]

And it is said by *Harris*, J., delivering the opinion of the majority of the Court of Appeals of New York: "A legislative act is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumption." [3] And this after all is only the application of the familiar rule, that in the exposition of a statute it is the duty of the court to seek to ascertain and carry out the intention of the legislature in its enactment, and to give full effect to such intention; and they are bound so to construe the statute, if practicable, as to

[1] Newland *v.* Marsh, 19 Ill. 376, 384. See also Bigelow *v.* West Wisconsin R. R. Co., 27 Wis. 478; Attorney-General *v.* Eau Claire, 37 Wis. 400; Coleman *v.* Yesler, 1 Wash. Ter. 591; Singer Mfg. Co. *v.* McCollock, 24 Fed. Rep. 667.

[2] Dow *v.* Norris, 4 N. H. 16, 18. See Dubuque *v.* Illinois Cent. R. R. Co., 39 Iowa, 56.

[3] People *v.* Supervisors of Orange, 17 N. Y. 235, 241. See also Boisdere *v.* Citizens' Bank, 9 La. 506; s. c. 29 Am. Dec. 453. It is the duty of the court to adopt a construction of a statute which, without doing violence to the fair meaning of words, brings it into harmony with the constitution. Grenada Co. Supervisors *v.* Brogden, 112 U. S. 261.

give it force and validity, rather than to avoid it, or render it nugatory.[1]

The rule is not different when the question is whether any portion of a statute is void, than when the whole is assailed. The excess of power, if there is any, is the same in either case, and is not to be applied in any instance.

And on this ground it has been held that where the repealing clause in an unconstitutional statute repeals all inconsistent acts, the repealing clause is to stand and have effect, notwithstanding the invalidity of the rest.[2] But other cases hold that such repealing clause is to be understood as designed to repeal all conflicting provisions, in order that those of the new statute can have effect; and that if the statute is invalid, nothing can conflict with it, and therefore nothing is repealed.[3] Great caution is necessary in some cases, or the rule which was designed to ascertain and effectuate the legislative intent will be pressed to the extreme of giving effect to part of a statute exclusively, when the legislative intent was that the part should not stand except as a component part of the whole.

Inquiry into Legislative Motives.

From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised.[4] If evidence was required, it must be supposed that it was before the legislature when the act was passed;[5] and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equiv-

[1] Clarke *v.* Rochester, 24 Barb. 446. See Marshall *v.* Grimes, 41 Miss. 27; Morrell *v.* Fickle, 3 Lea, 79.

[2] Meshmeier *v.* State, 11 Ind. 482; Ely *v.* Thompson, 3 A. K. Marsh. 70.

[3] Shepardson *v.* Milwaukee & Beloit Railroad Co., 6 Wis. 605; State *v.* Judge of County Court, 11 Wis. 50; Tims *v.* State, 26 Ala. 165; Sullivan *v.* Adams, 3 Gray, 476; Devoy *v.* Mayor, &c. of New York, 35 Barb. 264; Campau *v.* Detroit, 14 Mich. 276; Childs *v.* Shower, 18 Iowa, 261; Harbeck *v.* New York, 10 Bosw. 356; People *v.* Fleming, 7 Col. 230; Portland *v.* Schmidt, 13 Oreg. 17.

[4] People *v.* Lawrence, 36 Barb. 177; People *v.* New York Central Railroad Co., 34 Barb. 123; Baltimore *v.* State, 15 Md. 376; Goddin *v.* Crump, 8 Leigh, 154.

[5] De Camp *v.* Eveland, 19 Barb. 81; Lusher *v.* Scites, 4 W. Va. 11.

alent to such finding.[1] And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegation were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon.[2] The reasons are the

[1] Johnson *v.* Joliet & Chicago Railroad Co., 23 Ill. 202. The Constitution of Illinois provided that "corporations not possessing banking powers or privileges may be formed under general laws, but shall not be created by special acts, except for municipal purposes, and in cases where, in the judgment of the General Assembly, the objects of the corporation cannot be attained under general laws." A special charter being passed without any legislative declaration that its object could not be attained under a general law, the Supreme Court sustained it, but placed their decision mainly on the ground that the clause had been wholly disregarded, "and it would now produce far-spread ruin to declare such acts unconstitutional and void." It is very clearly intimated in the opinion, that the legislative practice, and this decision sustaining it, did violence to the intent of the constitution. A provision in the Constitution of Indiana that "no act shall take effect until the same shall have been published and circulated in the several counties of this State, by authority, except in case of emergency," adds the words, "which emergency shall be declared in the preamble, or in the body of the law;" thus clearly making the legislative declaration necessary. Carpenter *v.* Montgomery, 7 Blackf. 415; Mark *v.* State, 15 Ind. 98; Hendrickson *v.* Hendrickson, 7 Ind. 13.

[2] Sunbury & Erie Railroad Co. *v.* Cooper, 33 Pa. St. 278; *Ex parte* Newman, 9 Cal. 502; Baltimore *v.* State, 15 Md. 376; Johnson *v.* Higgins, 3 Met. (Ky.) 566. "The courts cannot impute to the legislature any other than public motives for their acts." People *v.* Draper, 15 N. Y. 532, 545, per *Denio*, Ch. J. "We are not made judges of the motives of the legislature, and the court will not usurp the inquisitorial office of inquiring into the *bona fides* of that body in discharging its duties." *Shankland*, J., in the same case, p. 555. "The powers of the three departments are not merely equal; they are exclusive in respect to the duties assigned to each. They are absolutely independent of each other. It is now proposed that one of the three powers shall institute an inquiry into the conduct of another department, and form an issue to try by what motives the legislature were governed in the enactment of a law. If this may be done, we may also inquire by what motives the executive is induced to approve a bill or withhold his approval, and in case of withholding it corruptly, by our mandate compel its approval. To institute the proposed inquiry would be a direct attack upon the independence of the legislature, and a usurpation of power subversive of the constitution" Wright *v.* Defrees, 8 Ind. 298, 302, per *Gookins*, J. "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the constitution." Per *Chase*, Ch. J., in *Ex parte*, McCardle, 7 Wall. 506, 514. The same doctrine is restated by Mr. Justice *Hunt*, in Doyle *v.* Continental Ins. Co., 94 U. S. 535. Courts cannot inquire into legislative motives "except as they may be disclosed on the face of the acts or be inferrible from their operation considered with reference to the condition of the country and existing legislation." Soon Hing *v.* Crowley, 113 U. S. 703. The rule applies to the legislation of municipalities. Brown *v.* Cape Girardeau, 90 Mo. 377. And see McCulloch *v.* State, 11 Ind. 424; Bradshaw *v.* Omaha, 1 Neb. 16; Lyon *v.* Morris, 15 Ga. 480; People *v.* Flagg, 46 N. Y. 401; Slack *v.* Jacob, 8 W. Va. 612, 635; State *v.* Cardozo, 5 S. C. 297; Humboldt County *v.* Churchill County Comm'rs, 6 Nev. 30; Flint, &c. Plank Road Co. *v.* Woodhull, 25 Mich. 99; State *v.* Fagan, 22 La. Ann. 545; State *v.* Hays, 49 Mo. 604; Luehrman *v.* Taxing District, 2 Lea, 425; Kountze *v.* Omaha, 5 Dill. 443. In Jones *v.* Jones, 12 Pa. St. 350, the general principle was recognized, and it was decided not to be competent to declare a legislative divorce

same here as those which preclude an inquiry into the motives of the governor in the exercise of a discretion vested in him exclusively. He is responsible for his acts in such a case, not to the courts, but to the people.[1]

Consequences if a Statute is Void.

When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made.[2] And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force.

void for fraud. It was nevertheless held competent to annul it, on the ground that it had been granted (as shown by parol evidence) for a cause which gave the legislature no jurisdiction. The legislature was regarded as being for the purpose a court of limited jurisdiction. In Attorney-General *v.* Supervisors of Lake Co., 33 Mich. 289, it is decided that when supervisors and people, having full authority over the subject, have acted upon the question of removal of a county seat, no question of motive can be gone into to invalidate their action.

[1] Attorney-General *v.* Brown, 1 Wis. 513; Wright *v.* Defrees, 8 Ind. 298.

[2] Strong *v.* Daniel, 5 Ind. 348; Sumner *v.* Beeler, 50 Ind. 341; Astrom *v.* Hammond, 3 McLean, 107; Woolsey *v.* Commercial Bank, 6 McLean, 142; Detroit *v.* Martin, 34 Mich. 170; Kelly *v.* Bemis, 4 Gray, 83; Hover *v.* Barkhoof, 44 N. Y. 113; Clark *v.* Miller, 54 N. Y. 528; Meagher *v.* Storey Co., 5 Nev. 244; *Ex parte* Rosenblatt, 19 Nev. 439. In People *v.* Salomon, 54 Ill. 46, a ministerial officer was severely censured for presuming to disregard a law as unconstitutional. The court found the law to be valid, but they could not have found otherwise without justifying the officer. In Texas it has been held that an unconstitutional act has the force of law for the protection of officers acting under it. Sessums *v.* Botts, 34 Tex. 335. In Iowa, a magistrate who had issued a warrant, and the officer who had served it, for the destruction of liquors, under a city ordinance which the city had no power to adopt, were held to be protected, notwithstanding this want of power in the city. Henke *v.* McCord, 55 Iowa, 378. The warrant seems to have been considered "fair on its face;" but can process ever be fair on its face when it commands that which is illegal? If a decision adjudging a statute unconstitutional is afterwards overruled, the statute is to be considered as having been in force for the whole period. Pierce *v.* Pierce, 46 Ind. 86.

EXHIBIT B

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A

TREATISE

ON THE

CONSTITUTIONAL LIMITATIONS

WHICH REST UPON

THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION.

BY

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SIXTH EDITION,

WITH LARGE ADDITIONS, GIVING THE RESULTS OF THE RECENT CASES,

BY ALEXIS C. ANGELL,

OF THE DETROIT BAR.

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CHAPTER XI.

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

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

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

[2] The following are the constitutional provisions in the several States: —

Alabama: "That, in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself, or be deprived of his life, liberty, or property, but by due course of law." Art. 1, § 7. — *Arkansas:* "That no person shall . . . be deprived of his life, liberty, or property, without due process of law." Art. 1, § 9. — *California:* Similar to that of Alabama. Art. 1, § 8. — *Connecticut:* Same as Alabama, Art. 1, § 9. — *Delaware:* Like that of Alabama, substituting for "course of law," "the judgment of his peers, or the law of the land." Art. 1,

appear in the several provisions, no change in language, it is thought, has in any case been made with a view to essential change in legal effect; and the differences in phraseology will not, therefore, be of importance in our discussion. Indeed, the language employed is generally nearly identical, except that the phrase "due process [or course] of law" is sometimes used, sometimes "the law of the land," and in some cases both; but the meaning is the same in every case.[1] And, by the fourteenth amendment, the guaranty is now incorporated in the Constitution of the United States.[2]

§ 7. — *Florida:* Similar to that of Alabama. Art. 1, § 9. — *Georgia:* "No person shall be deprived of life, liberty, or property, except by due process of law." Art. 1, § 3. — *Illinois:* "No person shall be deprived of life, liberty, or property, without due process of law." Art. 1. § 2. — *Colorado:* The same. Art. 1, § 25 — *Iowa:* The same. Art. 1, § 9 — *Kentucky:* "Nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land." Art. 13, § 12 — *Maine:* "Nor be deprived of his life, liberty, property, or privileges, but by the judgment of his peers, or the law of the land." Art. 1, § 6. — *Maryland:* "That no man ought to be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Declaration of Rights, § 23. — *Massachusetts:* "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Declaration of Rights, Art. 12. — *Michigan:* "No person shall . . . be deprived of life, liberty, or property, without due process of law." Art. 6, § 32 — *Minnesota:* Like that of Michigan. Art. 1, § 7. — *Mississippi:* The same. Art. 1, § 2. — *Missouri:* Same as Delaware. Art. 1, § 18. — *Nevada:* "Nor be deprived of life, liberty, or property, without due process of law." Art. 1, § 8. — *New Hampshire:* Same as Massachusetts. Bill of Rights, Art. 15. — *New York:* Same as Nevada. Art. 1, § 6. — *North Carolina:* "That no person ought to be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." Declaration of Rights, § 17. — *Pennsylvania:* Like Delaware. Art. 1, § 9 — *Rhode Island:* Like Delaware. Art. 1, § 10. — *South Carolina:* Like that of Massachusetts, substituting "person" for "subject." Art. 1, § 14 — *Tennessee:* "That no man shall be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." Art. 1, § 8. — *Texas:* "No citizen of this State shall be deprived of life, liberty, property, or privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land." Art. 1, § 16. — *West Virginia:* "No person, in time of peace, shall be deprived of life, liberty, or property, without due process of law." Art. 2, § 6. Under each of the remaining constitutions, equivalent protection to that which these provisions give is believed to be afforded by fundamental principles recognized and enforced by the courts.

[1] 2 Inst. 50; Bouv. Law Dic. "Due process of Law," "Law of the land;" State *v.* Simons, 2 Speers, 767; Vanzant *v.* Waddell, 2 Yerg. 260; Wally's Heirs *v.* Kennedy, 2 Yerg. 554; s. c. 24 Am. Dec. 511; Greene *v.* Briggs, 1 Curt. 311; Murray's Lessee *v.* Hoboken Land Co., 18 How. 272, 276, per *Curtis*, J.; Parsons *v.* Russell, 11 Mich. 113, 129, per *Manning*, J.; Ervine's Appeal, 16 Pa. St. 256; Banning *v.* Taylor, 24 Pa. St. 289, 292; State *v.* Staten, 6 Cold. 244; Huber *v.* Reily, 53 Pa. St. 112.

[2] See *ante*, p. 14.

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

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

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."[1]

The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry" and "render judgment only after trial." It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. "The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction

[1] Dartmouth College *v.* Woodward, 4 Wheat. 519; Works of Webster, Vol. V. p. 487. And he proceeds: "If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."

would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.'"[1] When the law of the land is spoken of, "undoubtedly a pre-existing rule of conduct" is intended, "not an *ex post facto* rescript or decree made for the occasion. The design" is "to exclude arbitrary power from every branch of the government; and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute."[2] There are nevertheless many cases in which the title to property may pass from one person to another, without the intervention of judicial proceedings, properly so called;

[1] Per *Bronson*, J., in Taylor *v.* Porter, 4 Hill, 140, 145. See also Jones *v.* Perry, 10 Yerg. 59; s. c. 30 Am. Dec. 430; Ervine's Appeal, 16 Pa. St. 256; Arrowsmith *v.* Burlingim, 4 McLean, 489; Lane *v.* Dorman, 4 Ill. 238; Reed *v.* Wright, 2 Greene (Iowa), 15; Woodcock *v.* Bennett, 1 Cow. 711; Kinney *v.* Beverley, 2 H. & M. 536, Commonwealth *v.* Byrne, 20 Gratt. 165; Rowan *v.* State, 30 Wis. 129; s. c. 11 Am. Rep. 559. "Those terms, 'law of the land,' do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken, imprisoned, disseised of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed, and be deprived of his property, his liberty, and his life, without crime? Yet all this he may suffer if an act of the assembly simply denouncing those penalties upon particular persons, or a particular class of persons, be in itself a law of the land within the sense of the Constitution; for what is in that sense the law of the land must be duly observed by all, and upheld and enforced by the courts. In reference to the infliction of punishment and divesting the rights of property, it has been repeatedly held in this State, and it is believed in every other of the Union, that there are limitations upon the legislative power, notwithstanding these words; and that the clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode, and usages of the common law, as derived from our forefathers, are not effectually 'laws of the land' for those purposes." Hoke *v.* Henderson, 4 Dev. 15; s. c. 25 Am. Dec. 677. In Bank of Michigan *v.* Williams, 5 Wend. 478, 486, Mr. Justice *Sutherland* says, vested rights "are protected under general principles of paramount, and, in this country, of universal authority." Mr. Broom says: "It is indeed an essential principle of the law of England, 'that the subject hath an undoubted property in his goods and possessions; otherwise there shall remain no more industry, no more justice, no more valor; for who will labor? who will hazard his person in the day of battle for that which is not his own?' The Banker's Case, by *Turnor*, 10. And therefore our customary law is not more solicitous about anything than 'to preserve the property of the subject from the inundation of the perogative.' Ibid." Broom's Const. Law, 228.

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

and in preceding pages it has been shown that special legislative acts designed to accomplish the like end, are allowable in some cases. The necessity for "general rules," therefore, is not such as to preclude the legislature from establishing special rules for particular cases, provided the particular cases range themselves under some general rule of legislative power; nor is there any requirement of judicial action which demands that, in every case, the parties interested shall have a hearing in court.[1]

On the other hand, we shall find that general rules may sometimes be as obnoxious as special, if they operate to deprive individual citizens of vested rights. While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, that condemns it as unknown to the law of the land. Mr. Justice *Edwards* has said in one case: "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."[2] And we have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principle we are considering, than the following, from an opinion by Mr. Justice *Johnson* of the Supreme Court of the United States: "As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, — that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained

[1] See Wynehamer *v.* People, 13 N. Y. 378, 432, per *Selden*, J. In Janes *v.* Reynolds, 2 Tex. 250, Chief Justice *Hemphill* says: "The terms 'law of the land' . . are now, in their most usual acceptation, regarded as general public laws, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals." And see Vanzant *v.* Waddell, 2 Yerg. 260, per *Peck*, J.; Hard *v.* Nearing, 44 Barb. 472. Nevertheless there are many cases, as we have shown, *ante*, pp 116, 128, in which private laws may be passed in entire accord with the general public rules which govern the State; and we shall refer to more cases further on.

[2] Westervelt *v.* Gregg, 12 N. Y. 202, 209 See, also, State *v.* Staten, 6 Cold. 233; McMillen *v.* Anderson, 95 U. S. 37; Pearson *v.* Yewdall, 95 U. S. 294; Pennoyer *v.* Neff, 95 U. S. 714; Davidson *v.* New Orleans, 96 U. S. 97; and cases in notes pp. 15, 16, *ante*, in which the true meaning of due process of law is considered. Also San Mateo County *v.* Southern Pacific R R. Co., 13 Fed. Rep. 722.

by the established principles of private rights and distributive justice."[1]

The principles, then, upon which the process is based are to determine whether it is "due process" or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.[2] When the government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession;[3] but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.[4]

[1] Bank of Columbia *v.* Okely, 4 Wheat. 235, 244. "What is meant by 'the law of the land'? In this State, taking as our guide Zylstra's Case, 1 Bay, 382; White *v.* Kendrick, 1 Brev. 469; State *v.* Coleman & Maxcy, 1 McMull. 502, there can be no hesitation in saying that these words mean the common law and the statute law existing in this State at the adoption of our constitution. Altogether they constitute a body of law prescribing the course of justice to which a free man is to be considered amenable for all time to come." Per *O'Neill*, J., in State *v.* Simons, 2 Speers, 761, 767. See, also, State *v.* Doherty, 60 Me. 509. It must not be understood from this, however, that it would not be competent to change either the common law or the statute law, so long as the principles therein embodied, and which protected private rights, were not departed from.

[2] Hurtado *v.* California, 110 U. S. 516.

[3] Vanzant *v.* Waddell, 2 Yerg. 260; Lenz *v.* Charlton, 23 Wis. 478; Pennoyer *v.* Neff, 95 U. S. 714.

[4] See Wynehamer *v.* People, 13 N. Y. 378, 432, per *Selden*, J.; Kalloch *v.* Superior Court, 56 Cal. 229; Baltimore *v.* Scharf, 54 Md. 499. In State *v.* Allen, 2 McCord, 56, the court, in speaking of process for the collection of taxes, say: "We think that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative 'law of the land.'" To the same effect are *In re* Hackett, 53 Vt. 354; Weimer *v.* Bunbury, 30 Mich. 201. And see Hard *v.* Nearing, 44 Barb. 472; New Orleans *v.* Cannon, 10 La. Ann. 764; McCarrol *v.* Weeks, 5 Hayw. 246; Sears

Private rights may be interfered with by either the legislative, executive, or judicial department of the government. The executive department in every instance must show authority of law for its action, and occasion does not often arise for an examination of the limits which circumscribe its powers. The legislative department may in some cases constitutionally authorize interference, and in others may interpose by direct action. Elsewhere we shall consider the police power of the State, and endeavor to show how completely all the property, as well as all the people within the State, are subject to control under it, within certain limits, and for the purposes for which that power is exercised. The right of eminent domain and the right of taxation will also be discussed separately, and it will appear that under each the law of the land sanctions divesting individuals of their property against their will, and by somewhat summary proceedings. In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid; and in other cases property can only be taken for the support of the government, and each citizen can only be required to contribute his proportion to that end. But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment.[1] The purpose must be public, and must have

v. Cottrell, 5 Mich. 250; Gibson v. Mason, 5 Nev. 283. The fourteenth amendment has not enlarged the meaning of the words "due process of law." Whatever was such in a State before that amendment, is so still. Hence, a statute is good which allows execution on judgments against a town to be levied on the goods of individual inhabitants. Eames v. Savage, 77 Me. 212. Taking property under the taxing power is due process of law. Davidson v. New Orleans, 96 U. S. 97; Kelly v. Pittsburgh, 104 U. S. 78; High v. Shoemaker, 22 Cal. 363. See, also, Cruikshanks v. Charleston, 1 McCord, 360; State v. Mayhew, 2 Gill, 487; Harper v. Commissioners, 23 Ga. 566; Myers v. Park, 8 Heisk. 550. So is the seizure and sale under proceedings prescribed by law, of stray beasts. Knoxville v. King, 7 Lea, 441; Hamlin v. Mack, 33 Mich. 103; Stewart v. Hunter, 16 Oreg. 62. That the owner should have notice of the sale, see Varden v. Mount, 78 Ky. 86. An act allowing an agent of a humane society to condemn and kill an animal and fix its value conclusively without notice is not due process of law. King v. Hayes, 80 Me. 206. But a health officer may be empowered to kill a diseased beast, if the owner may afterwards contest the existence of conditions which made the beast a nuisance, and obtain redress, if such conditions are not shown to have existed. Newark & S. O. Co. v. Hunt, 50 N. J. L. 308. It is no violation of this principle to exclude from the State debauched women who are being imported for improper purposes. Matter of Ah Fook, 49 Cal. 403.

[1] Lebanon Sch. Dist. v. Female Sem.,

reference to the needs or convenience of the public, and no reason of general public policy will be sufficient to validate other transfers when they concern existing vested rights.[1]

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

The chief restriction upon this class of legislation is, that vested rights must not be disturbed; but in its application as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. The right to private property is a sacred right; not, as has been justly said, "introduced as the result of princes' edicts, concessions, and charters, but it was the old fundamental law, springing from the original frame and constitution of the realm."[2]

12 Atl. Rep. 857 (Pa.); People *v.* O'Brien, 111 N. Y. 1. The latter case is with reference to the transfer to a receiver of the assets of a dissolved corporation. It is not competent to provide that the claimant or purchaser of property, for the seizure or sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer, and confined to his action on the bond as his only remedy. Foule *v.* Mann, 53 Iowa, 42; Sunberg *v.* Babcock, 61 Iowa, 601. See, also, Ehlers *v.* Stoeckle, 37 Mich. 261. *Contra*, Hein *v.* Davidson, 96 N. Y. 175. Compare Dodd *v.* Thomas, 69 Mo. 364. A lien may be created by statute in favor of a laborer for a contractor, as against the owner of logs, between whom and the laborer there is no privity of contract. Reilly *v.* Stephenson, 62 Mich. 509. But such laborer may not enforce a lien in spite of any contract between the contractor and owner, or of payment by the latter. John Spry Lumber Co. *v.* Sault Sav. Bank, 43 N. W. Rep. 778 (Mich.). Nor can the owner's failure to enjoin the labor be made conclusive evidence of his assent to it. Meyer *v.* Berlandi, 39 Minn. 448. A mechanic's lien may be made applicable to buildings in process of erection. Colpetzer *v.* Trinity Church, 37 N. W. Rep. 931 (Neb.).

[1] Taylor *v.* Porter, 4 Hill, 140; Osborn *v.* Hart, 24 Wis. 89, 91; s. c. 1 Am. Rep. 161. In Matter of Albany Street, 11 Wend. 149, s. c. 25 Am. Dec. 618, it is intimated that the clause in the Constitution of New York, withholding private property from public use except upon compensation made, of itself implies that it is not to be taken *in invitum* for individual use. And see Matter of John & Cherry Streets, 19 Wend. 659. A different opinion seems to have been held by the Supreme Court of Pennsylvania, when they decided in Harvey *v.* Thomas, 10 Watts, 63, that the legislature might authorize the laying out of private ways over the lands of unwilling parties, to connect the coal-beds with the works of public improvement, the constitution not in terms prohibiting it. See note to p. 653, *post*.

[2] Arg. Nightingale *v.* Bridges, Show. 138. See also Case of Alton Woods, 1 Rep. 45 *a*; Alcock *v.* Cooke, 5 Bing. 340; Bowman *v.* Middleton, 1 Bay, 252; Kennebec Purchase *v.* Laboree, 2 Me. 275;

But as it is a right which rests upon equities, it has its reasonable limits and restrictions; it must have some regard to the general welfare and public policy; it cannot be a right which is to be examined, settled, and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds, which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all.[1]

And it may be well at this point to examine in the light of the reported cases the question, What is a vested right in the constitutional sense? and when we have solved that question, we may be the better able to judge under what circumstances one may be justified in resisting a change in the general laws of the State affecting his interests, and how far special legislation may control his rights without coming under legal condemnation. In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws;[2] but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense.[3] In many cases the courts, in

s. c. 11 Am. Dec. 79; *ante*, p. 49 and note, p. 208 and note. Any one may acquire and hold any species of property, and the acquisition cannot be taxed as a privilege. But the use may be regulated to prevent injury to others. Stevens *v.* State, 2 Ark. 291; s. c. 35 Am. Dec. 72.

[1] The evidences of a man's rights — the deeds, bills of sale, promissory notes, and the like — are protected equally with his lands and chattels, or rights and franchises of any kind; and the certificate of registration and right to vote may be properly included in the category. State *v.* Staten, 6 Cold. 233. See Davies *v.* McKeeby, 5 Nev. 369.

[2] The interest acquired in the practice of learned professions, that is, "the right to continue their prosecution," is property which cannot be arbitrarily taken away. *Field*, J., in Dent *v.* West Virginia, 129 U. S. 114. The office of an attorney is property, and he cannot be deprived of it except for professional misconduct or proved unfitness. The public discussion of the official conduct of a judge is not professional misconduct, unless it is designed to acquire an influence over the conduct of the judge in the exercise of his judicial functions by the instrumentality of popular prejudice. *Ex parte* Steinman, 95 Pa. St. 220. But see State *v.* McClaugherty, 10 S. E. Rep. 407 (W. Va.).

[3] "A person has no property, no vested interest, in any rule of the common law . . . Rights of property, which have been created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may

the exercise of their ordinary jurisdiction, cause the property vested in one person to be transferred to another, either through the exercise of a statutory power, or by the direct force of their judgments or decrees, or by means of compulsory conveyances. If in these cases the courts have jurisdiction, they proceed in accordance with "the law of the land;" and the right of one man is devested by way of enforcing a higher and better right in another. Of these cases we do not propose to speak: constitutional questions cannot well arise concerning them, unless they are attended by circumstances of irregularity which are supposed to take them out of the general rule. All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they become devested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order. What we desire to reach in this connection is the true meaning of the term "vested rights" when employed for the purpose of indicating the interests of which one cannot be deprived by the mere force of legislative enactment, or by any other than the recognized modes of transferring title against the consent of the owner, to which we have alluded.

Interests in Expectancy.

First, it would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.[1] Acts of the legislature, as has been well said by Mr. Justice *Woodbury*, cannot be regarded as opposed to fundamental axioms of legislation, "unless they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may

be changed at the will, or even at the whim of the legislature, unless prevented by constitutional limitations." *Waite*, Ch. J., in Munn *v.* Illinois, 94 U. S. 113, 134. See Railroad Co. *v* Richmond, 96 U. S. 521; Transportation Co *v.* Chicago, 99 U. S. 635; Newton *v.* Commissioners, 100 U. S. 548; *post*, 473, note. The State may take away rights in a public fishery by appropriating the water to some other use. Howes *v.* Grush, 131 Mass. 207.

[1] Weidenger *v.* Spruance, 101 Ill. 278. See Wanser *v.* Atkinson, 43 N. J. 571.

always revoke before an interest is perfected in the donee."[1] And Chancellor *Kent*, in speaking of retrospective statutes, says that while such a statute, "affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void," yet that "this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights."[2]

And it is because a mere expectation of property in the future is not considered a vested right, that the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner. No one is heir to the living; and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the statute of descents. But this promise is no more than a declaration of the legislature as to its present view of public policy as regards the proper order of succession,—a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. The expectation is not property; it cannot be sold or mortgaged; it is not subject to debts; and it is not in any manner taken notice of by the law until the moment of the ancestor's death, when the statute of descents comes in, and for reasons of general public policy transfers the estate to persons occupying particular relations to the deceased in preference to all others. It is not until that moment that there is any vested right in the person who becomes heir, to be protected by the Constitution. An anticipated interest in property cannot be said to be vested in any person so long as the owner of the interest in possession has full power, by virtue of his ownership, to cut off the expectant right by grant or devise.[3]

[1] Merrill *v.* Sherburne, 1 N. H. 199, 213; s. c. 8 Am. Dec. 52. See Rich *v.* Flanders, 39 N. H. 304. And cases *ante*, p. 343, note 2.

[2] 1 Kent, Com. 455. See Briggs *v.* Hubbard, 19 Vt. 86; Bridgeport *v.* Housatonic R. R. Co., 15 Conn. 475; Baugher *v.* Nelson, 9 Gill, 299; Gilman *v.* Cutts, 23 N. H. 376, 382; Foule *v.* Mann, 53 Iowa, 42.

[3] *In re* Lawrence, 1 Redfield, Sur. Rep. 310. But after property has once vested under the laws of descent, it cannot be devested by any change in those laws. Norman *v.* Heist, 5 W. & S. 171. And the right to change the law of descents in

If this be so, the nature of estates must, to a certain extent, be subject to legislative control and modification.[1] In this country estates tail have been very generally changed into estates in fee-simple, by statutes the validity of which is not disputed.[2] Such statutes operate to increase and render more valuable the interest which the tenant in tail possesses, and are not therefore open to objection by him.[3] But no other person in these cases has any vested right, either in possession or expectancy, to be affected by such change; and the expectation of the heir presumptive must be subject to the same control as in other cases.[4]

The cases of rights in property to result from the marriage relation must be referred to the same principle. At the common law the husband immediately on the marriage succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent alteration in the law could not take them away.[5] But other interests were merely in expectancy. He could have a right as tenant by the courtesy initiate in the wife's estates of inheritance the moment a child was born of the marriage, who might by possibility become heir to such estates. This right would be property, subject to conveyance and to be taken for debts; and must therefore be regarded as a vested right, no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed. But while this interest remains in expectancy merely, — that is to say, until it becomes initiate, — the legislature must have full right to modify or even to abolish it.[6] And the same rule will

the case of the estate of a person named without his consent being had, was denied in Beall *v.* Beall, 8 Ga. 210. See *post*, pp. 465, 466, and notes.

[1] Smith on Stat. and Const. Construction, 412.

[2] De Mill *v.* Lockwood, 3 Blatch. 56. The legislature may by special act confirm a conveyance in fee simple by a tenant in tail. Comstock *v.* Gay, 51 Conn. 45.

[3] On the same ground it has been held in Massachusetts that statutes converting existing estates in joint tenancy into estates in common were unobjectionable. They did not impair vested rights, but rendered the tenure more beneficial. Holbrook *v.* Finney, 4 Mass. 565; s. c. 3 Am. Dec. 243; Miller *v.* Miller, 16 Mass. 59; Annable *v.* Patch, 3 Pick. 360; Burghardt *v.* Turner, 12 Pick. 533. Moreover, such statutes do no more than either tenant at the common law has a right to do, by conveying his interest to a stranger. See Bombaugh *v.* Bombaugh, 11 S. & R. 192; Wildes *v.* Vanvoorhis, 15 Gray, 139.

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

[5] Westervelt *v.* Gregg, 12 N. Y. 202. See Mr. Bishop's criticism of this case — which, however, does not reach the general principle above stated — in 2 Bishop, Law of Married Women, § 46, and note. Rights under an ante-nuptial contract, which become vested by the marriage, cannot be impaired by subsequent legislation. Desnoyer *v.* Jordan, 27 Minn. 295.

[6] Hathon *v.* Lyon, 2 Mich. 93; Tong

apply to the case of dower; though the difference in the requisites of the two estates are such that the inchoate right to dower does not become property, or anything more than a mere expectancy at any time before it is consummated by the husband's death.[1] In neither of these cases does the marriage alone give a

v. Marvin, 15 Mich. 60. And see the cases cited in the next note. The right of a tenant by the courtesy initiate is vested, and it cannot be taken away to the injury of the husband's creditors. Wyatt v. Smith, 25 W. Va. 813. See Hershizer v. Florence, 39 Ohio St. 516. But see to the contrary, Breeding v. Davis, 77 Va. 639; Alexander v. Alexander, 7 S. E. Rep. 335 (Va.).

[1] When dower is duly assigned it becomes a right not to be devested by subsequent legislation. Talbot v. Talbot, 14 R. I. 57. The law in force at the death of the husband is the measure of the right of the widow to dower. Noel v. Ewing, 9 Ind. 37; May v. Fletcher, 40 Ind. 575; Lucas v. Sawyer, 17 Iowa, 517; Sturdevant v. Norris, 30 Iowa, 65; Melizet's Appeal, 17 Pa. St. 449; Barbour v. Barbour, 46 Me. 9; Magee v. Young, 40 Miss. 164; Bates v. McDowell, 58 Miss. 815; Walker v. Deaver, 5 Mo. App. 139; Guerin v. Moore, 25 Minn. 462; Morrison v. Rice, 35 Minn. 436; Ware v. Owens 42 Ala. 212; Pratt v. Tefft, 14 Mich. 191; Bennett v. Harms, 51 Wis. 251. But if we apply this rule universally, we shall run into some absurdities, and most certainly in some cases encounter difficulties which will prove insurmountable. Suppose the land has been sold by the husband without relinquishment of dower, and the dower right is afterwards by statute enlarged, will the wife obtain the enlarged dower at the expense of the purchaser? Or suppose it is diminished; will the purchaser thereby acquire an enlarged estate which he never bought or paid for? These are important questions, and the authorities furnish very uncertain and unsatisfactory answers to them. In Illinois it is held that though the estate is contingent, the right to dower, when marriage and seisin unite, is vested and absolute, and is as completely beyond legislative control as is the principal estate. Russell v. Rumsey, 35 Ill. 362; Steele v. Gellatly, 41 Ill. 39. See Lawrence v. Miller, 2 N. Y. 245. But it is also held that after marriage a new right corresponding to dower may be conferred upon the husband, and that his homestead right depends on the law in force at the wife's death. Henson v. Moore, 104 Ill. 403. In North Carolina before 1867, the wife had dower only in the lands of which the husband died seised; the statute then restored the common-law right to dower. Held to be inapplicable to lands which the husband had previously acquired. Sutton v. Asken, 66 N. C. 172; s. c. 8 Am. Rep. 500; Hunting v. Johnson, 66 N. C. 189; Jenkins v. Jenkins, 82 N. C. 202; O'Kelly v. Williams, 84 N. C. 281. In Iowa it is held that when the law of dower is changed after the husband has conveyed lands subject to the inchoate right, the dower is to be measured by the law in force when the conveyance was made. Davis v. O'Ferrall, 4 Greene (Iowa), 168; Young v. Wolcott, 1 Iowa, 174; O'Ferrall v. Simplot, 4 Iowa, 381; Moore v. Kent, 37 Iowa, 20; Craven v. Winter, 38 Iowa, 471. In Indiana, on the other hand, a statute enlarging the right of dower to one-third of the land in fee simple was so applied as to deprive the widow, in cases where the husband had previously conveyed, of both the statutory dower and the dower at the common law, thereby enlarging the estate of the purchaser. Strong v. Clem, 12 Ind. 37; Logan v. Walton, 12 Ind. 839; Bowen v. Preston, 48 Ind. 367; Taylor v. Sample, 51 Ind. 423. See May v. Fletcher, 40 Ind. 575. A provision that upon a judicial sale of the husband's property the inchoate dower right shall vest does not apply to a mechanic's lien resting on the whole property before the act passed. Buser v. Shepard, 107 Ind. 417. In Missouri it is held that the widow takes dower according to the law in force at the husband's death, except as against those who had previously acquired specific rights in the estate, and as to them her right must depend on the law in force at the time their rights originated. Kennedy v.

vested right. It gives only a capacity to acquire a right. The same remark may be made regarding the husband's expectant interest in the after-acquired personalty of the wife; it is subject to any changes in the law made before his right becomes vested by the acquisition.[1]

Change of Remedies.

Again: *the right to a particular remedy is not a vested right.* This is the general rule; and the exceptions are of those peculiar cases in which the remedy is part of the right itself.[2] As a general rule, every State has complete control over the remedies which it offers to suitors in its courts.[3] It may abolish one class of courts and create another. It may give a new and additional remedy for a right or equity already in existence.[4] And it may

Insurance Co., 11 Mo. 204. In Williams *v.* Courtney, 77 Mo. 587, it is held that, marriage and seisin concurring, dower cannot be barred by a guardian's sale of the husband's property. In Massachusetts doubt is expressed of the right of the legislature to cut off the inchoate right of dower. Dunn *v.* Sargent, 101 Mass. 336, 340. But in Hamilton *v.* Hirsch, 2 Wash. Terr. 223, such power is affirmed.

[1] Westervelt *v.* Gregg, 12 N. Y. 202; Norris *v.* Beyea, 13 N. Y. 273; Kelly *v.* McCarthy, 3 Bradf. 7. And see Plumb *v.* Sawyer, 21 Conn. 351; Clark *v.* McCreary, 12 S. & M. 347; Jackson *v.* Lyon 9 Cow. 664; *ante*, pp. 347–355. On the point whether the husband can be regarded as having an interest in the wife's choses in action, before he has reduced them to possession, see Bishop, Law of Married Women, Vol. II. §§ 45, 46. If the wife has a right to personal property subject to a contingency, the husband's contingent interest therein cannot be taken away by subsequent legislation. Dunn *v.* Sargent, 101 Mass. 336. It is competent to provide by statute that married women shall hold their property free from claims of husbands, and to make the law apply to those already married. Rugh *v.* Ottenheimer, 6 Oreg. 231; s. c. 25 Am. Rep. 513. See Pritchard *v.* Citizens' Bank, 8 La. 130; s. c. 23 Am. Dec. 132. But vested rights belonging to the husband *jure uxoris* cannot thus be devested. Hershizer *v.* Florence, 39 Ohio St. 516; Koehler *v.* Miller, 21 Ill. App. 557.

[2] See *ante*, p. 351, and cases cited. It has been held in some cases that the giving of a lien by statute does not confer a vested right, and it may be taken away by a repeal of the statute. See *ante*, 347, note 2.

[3] Rosier *v.* Hale, 10 Iowa, 470; Smith *v.* Bryan, 34 Ill. 364; Lord *v.* Chadbourne, 42 Me. 429; Rockwell *v.* Hubbell's Adm'rs, 2 Doug. (Mich.) 197; Cusic *v.* Douglas, 3 Kan. 123; Holloway *v.* Sherman, 12 Iowa, 282; McCormick *v.* Rusch, 15 Iowa, 127; McArthur *v.* Goddin, 12 Bush, 274; Grundy *v.* Commonwealth, 12 Bush, 350; Briscoe *v.* Anketell, 28 Miss. 361.

[4] Hope *v.* Johnson, 2 Yerg. 125; Foster *v.* Essex Bank, 16 Mass. 245; s. c. 9 Am. Dec. 168; Paschall *v.* Whitsett, 11 Ala. 472; Commonwealth *v.* Commissioners, &c., 6 Pick. 501; Whipple *v.* Farrar, 3 Mich. 436; United States *v.* Samperyac, 1 Hemp. 118; Sutherland *v.* De Leon, 1 Tex. 250; Anonymous, 2 Stew. 228. See also Lewis *v.* McElvain, 16 Ohio, 347; Trustees, &c. *v.* McCaughey, 2 Ohio St. 152; Hepburn *v.* Curts, 7 Watts, 300; Schenley *v.* Commonwealth, 36 Pa. St. 29; Bacon *v.* Callender, 6 Mass. 303; Brackett *v.* Norcross, 1 Me. 92; Ralston *v.* Lothain, 18 Ind. 303; White School House *v.* Post, 31 Conn. 241; Van Rensselaer *v.* Hayes, 19 N. Y. 68; Van Rensselaer *v.* Ball, 19 N. Y. 100; Sedgwick Co. *v.* Bunker, 16 Kan. 498; Danville *v.* Pace, 25 Gratt. 1. Thus it may give a legal remedy where before there was only one in equity. Bartlett *v.* Lang, 2 Ala. 401.

abolish old remedies and substitute new; or even without substituting any, if a reasonable remedy still remains.[1] If a statute providing a remedy is repealed while proceedings are pending, such proceedings will be thereby determined, unless the legislature shall otherwise provide;[2] and if it be amended instead of repealed, the judgment pronounced in such proceedings must be according to the law as it then stands.[3] And any rule or regulation in regard to the remedy which does not, under pretence of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of legislation.[4]

But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference.[5] Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away.[6] And every man is entitled to a

In Bolton *v.* Johns, 5 Pa. St. 145, the extreme ground was taken that the legislature might give a lien on property for a prior debt, where no contract would be violated in doing so. In Towle *v.* Eastern Railroad, 18 N. H. 546, the power of the legislature to give retrospectively a remedy for consequential damages caused by the taking of property for a public use was denied. On the ground that the remedy only is affected, a judgment against a principal on an existing bond may be made conclusive on the surety. Pickett *v.* Boyd, 11 Lea, 498. So a resale on mortgage foreclosure, if the purchase price is inadequate, may be allowed as to an existing mortgage· Chaffe *v.* Aaron, 62 Miss. 29; and a foreclosure of a tax lien, if the title fails. Schoenheit *v.* Nelson, 16 Neb. 235.

[1] Stocking *v.* Hunt, 3 Denio, 274; Van Rensselaer *v.* Read, 26 N. Y. 558; Lennon *v.* New York, 55 N. Y. 361; Parker *v.* Shannohouse, 1 Phil. (N. C.) 209. An existing remedy may be modified and the modified remedy made applicable to existing rights. Phelps' Appeal, 98 Pa. St. 546.

[2] Bank of Hamilton *v.* Dudley, 2 Pet. 492; Ludlow *v.* Johnson, 3 Ohio, 553; s. c. 17 Am. Dec. 609; Yeaton *v.* United States, 5 Cranch, 281; Schooner Rachel *v.* United States, 6 Cranch, 329. If an act is repealed without any saving of rights, no judgment can afterwards be taken under it. State *v.* Passaic, 36 N. J. 382; Menard County *v.* Kincaid, 71 Ill. 587; Musgrove *v.* Vicksburg, &c. R. R. Co., 50 Miss. 677; Abbott *v.* Commonwealth, 8 Watts, 517; s. c. 34 Am. Dec. 492. But it is well said in Pennsylvania that before a statute should be construed to take away the remedy for a prior injury, it should clearly appear that it embraces the very case. Chalker *v.* Ives, 55 Pa. St. 81. And see Newsom *v.* Greenwood, 4 Oreg. 119.

[3] See cases cited in last note. Also Commonwealth *v.* Duane, 1 Binney, 601; s. c. 2 Am. Dec. 497; United States *v.* Passmore, 4 Dall. 372; Patterson *v.* Philbrook, 9 Mass. 151; Commonwealth *v.* Marshall, 11 Pick. 350; Commonwealth *v.* Kimball, 21 Pick. 373; Hartung *v.* People, 22 N. Y. 95; State *v.* Daley, 29 Conn. 272; Rathbun *v.* Wheeler, 29 Ind. 601; State *v.* Norwood, 12 Md. 195; Bristol *v.* Supervisors, &c., 20 Mich. 95; Sumner *v.* Miller, 64 N. C. 688.

[4] See *ante*, pp. 347–355; Lennon *v.* New York, 55 N. Y. 361. The right to a particular mode of procedure is not a vested right. A statute allowing attorney's fees may affect pending causes. Drake *v.* Jordan, 73 Iowa, 707.

[5] It is not incompetent, however, to compel the party instituting a suit to pay taxes on the legal process as a condition. Harrison *v.* Willis, 7 Heisk. 35; s. c. 19 Am. Rep. 604.

[6] Dash *v.* Van Kleeck, 7 Johns. 477; s. c. 5 Am. Dec. 291; Streubel *v.* Milwaukee & M. R. R. Co., 12 Wis. 67; Clark *v.* Clark, 10 N. H. 380; Westervelt

certain remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice, or to submit to conditions not imposed upon his fellows as a means of obtaining it.[1] Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law.[2] Even Congress, it has

v. Gregg, 12 N. Y. 202; Thornton *v.* Turner, 11 Minn. 339; Ward *v.* Barnard, 1 Aik. 121; Keith *v.* Ware, 2 Vt. 174; Lyman *v.* Mower, 2 Vt. 517; Kendall *v.* Dodge, 3 Vt. 360; State *v.* Auditor, &c., 33 Mo. 287; Griffin *v.* Wilcox, 21 Ind. 370; Norris *v.* Doniphan, 4 Met. (Ky.) 385; Terrill *v.* Rankin, 2 Bush, 453; Williar *v.* Baltimore, &c. Association, 45 Md. 546; Dunlap *v.* Toledo, &c. Ry. Co., 50 Mich. 470. The legislature cannot interfere with the enforcement of a judgment by enactments subsequent to it. Strafford *v.* Sharon, 17 Atl. Rep. 793 (Vt.). An act of the Dominion Parliament of Canada, assuming to authorize a railroad company to issue bonds in substitution for others previously issued, and at a lower rate of interest, and declaring that the holders should be deemed to assent, was held void, because opposed to the fundamental principles of justice. Gebhard *v.* Railroad Co., 17 Blatch. 416. An equitable title to lands, of which the legal title is in the State, is under the same constitutional protection that the legal title would be. Wright *v.* Hawkins, 28 Tex. 452. Where an individual is allowed to recover a sum as a penalty, the right may be taken away at any time before judgment. Pierce *v.* Kimball, 9 Me. 54; s. c. 23 Am. Dec. 537; Oriental Bank *v.* Freeze, 18 Me. 109; Engle *v.* Schurtz, 1 Mich. 150; Confiscation Cases, 7 Wall. 454; Washburn *v.* Franklin, 35 Barb. 599; Welch *v.* Wadsworth, 30 Conn. 149; O'Kelly *v.* Athens Manuf. Co., 36 Ga. 51; United States *v.* Tynen, 11 Wall. 88; Chicago & Alton R. R. Co. *v.* Adler, 56 Ill. 344; Van Inwagen *v.* Chicago, 61 Ill. 31, Lyon *v.* Morris, 15 Ga. 480; *post*, p. 472. See also Curtis *v.* Leavitt, 17 Barb. 309, and 15 N. Y. 9; Coles *v.* Madison County, Breese, 115; s. c. 12 Am. Dec. 161; Parmelee *v.* Lawrence, 48 Ill. 331; *post*, pp. 461, 462. The legislature may remit penalties accruing to a county. State *v.* Baltimore, &c. R. R. Co., 12 Gill & J. 399; s. c. 38 Am. Dec. 317. Whether claims arising in tort are protected against State legislation by the federal Constitution, see State *v.* New Orleans, 32 La. Ann. 709; Langford *v.* Fly, 7 Humph. 585; Parker *v.* Savage, 6 Lea, 406; Griffin *v.* Wilcox, 21 Ind. 370; Johnson *v.* Jones, 44 Ill. 142; Drehman *v.* Stifel, 41 Mo. 184; 8 Wall. 595. See cases *ante*, p. 351, note 3.

[1] Thus, a person cannot be precluded by test oaths from maintaining suits. McFarland *v.* Butler, 8 Minn. 116; *ante*, p. 350, note. Before attacking a tax deed, payment of taxes and value of improvements may be required. Coats *v.* Hill, 41 Ark. 149. See Coonradt *v.* Myers, 31 Kan. 30; Lombard *v.* Antioch College, 60 Wis. 459. But free recourse to the courts is denied, if a deposit of double the amount of the purchase-money and all taxes, &c., is required before suit. Lassiter *v.* Lee, 68 Ala. 287. See *post*, pp. 452, 453, note.

[2] Griffin *v.* Mixon, 38 Miss. 424. See next note. Also Rison *v.* Farr, 24 Ark. 161; Woodruff *v.* Scruggs, 27 Ark. 26; Hodgson *v.* Millward, 3 Grant's Cas. 406; Ieck *v.* Anderson, 57 Cal. 251, a case of forfeiting nets for illegal fishing; Boorman *v.* Santa Barbara, 65 Cal. 313, a case of assessing benefits upon lands for improvements without notice. But no constitutional principle is violated by a statute which allows judgment to be entered up against a defendant who has been served with process, unless within a certain number of days he files an affidavit of merits. Hunt *v.* Lucas, 97 Mass. 404. Nor by an ordinance allowing a city, on default of the owner, to build a sidewalk and charge the property with the

been held, has no power to protect parties assuming to act under the authority of the general government, during the existence of a civil war, by depriving persons illegally arrested by them of all redress in the courts.[1] And if the legislature cannot confiscate property or rights, neither can it authorize individuals to assume at their option powers of police, which they may exercise in the condemnation and sale of property offending against their regulations, or for the satisfaction of their charges and expenses in its management and control, rendered or incurred without the consent of its owners.[2] And a statute which authorizes a party

expense, if when sued on the tax bill, he has his day in court. Kansas City *v.* Huling, 87 Mo. 203. An act subjecting a prisoner's property from the time of his arrest to a lien for the fine and costs, is valid. Silver Bow Co. *v.* Strombaugh, 22 Pac. Rep. 453 (Mont.).

[1] Griffin *v.* Wilcox, 21 Ind. 370. In this case the act of Congress of March 3, 1863, which provided "that any order of the President or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts, to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress" was held to be unconstitutional. The same decision was made in Johnson *v.* Jones, 44 Ill. 142. It was said in the first of these cases that "this act was passed to deprive the citizens of all redress for illegal arrests and imprisonment; it was not needed as a protection for making such as are legal, because the common law gives ample protection for making legal arrests and imprisonments." And it may be added that those acts which are justified by military or martial law are equally legal with those justified by the common law. So in Hubbard *v.* Brainerd, 35 Conn. 563, it was decided that Congress could not take away a vested right to sue for and recover back an illegal tax which had been paid under protest to a collector of the national revenue. See also Bryan *v.* Walker, 64 N. C. 141. Nor can the right to have a void tax sale set aside be made conditional on the payment of the illegal tax. Wilson *v.* McKenna, 52 Ill. 43, and other cases cited, *post*, p. 454, note. The case of Norris *v.* Doniphan, 4 Met. (Ky.) 385, may properly be cited in this connection. It was there held that the act of Congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," in so far as it undertook to authorize the confiscation of the property of citizens as a punishment for treason and other crimes, by proceedings *in rem* in any district in which the property might be, without presentment and indictment by a grand jury, without arrest or summons of the owner, and upon such evidence of his guilt only as would be proof of any fact in admiralty or revenue cases, was unconstitutional and void, and therefore that Congress had no power to prohibit the State courts from giving the owners of property seized the relief they would be entitled to under the State laws. A statute which makes a constitutional right to vote depend upon an impossible condition is void. Davies *v.* McKeeby, 5 Nev. 369. See further, State *v.* Staten, 6 Cold. 233; Rison *v.* Farr, 24 Ark. 161; Hodgson *v.* Millward, 3 Grant, 406. Where no express power of removal is conferred on the executive, he cannot declare an office forfeited for misbehavior; but the forfeiture must be declared in judicial proceedings. Page *v.* Hardin, 8 B. Monr. 648; State *v.* Prichard, 36 N. J. 101. The legislature cannot declare the forfeiture of an official salary for misconduct. *Ex parte* Tully, 4 Ark. 220; s. c. 38 Am. Dec. 33.

[2] The log-driving and booming corporations, which were authorized to be formed under a general law in Michigan, were empowered, whenever logs or lumber were put into navigable streams without adequate force and means provided

to seize the property of another, without process or warrant, and to sell it without notification to the owner, for the punishment of a private trespass, and in order to enforce a penalty against the owner, can find no justification in the Constitution.[1]

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

[1] A statute of New York authorized any person to take into his custody and possession any animal which might be trespassing upon his lands, and give notice of the seizure to a justice or commissioner of highways of the town, who should proceed to sell the animal after posting notice. From the proceeds of the sale, the officer was to retain his fees, pay the person taking up the animal fifty cents, and also compensation for keeping it, and the balance to the owner, if he should claim it within a year. In Rockwell *v.* Nearing, 35 N. Y. 307, 308, *Porter*, J., says of this statute: "The legislature has no authority either to deprive the citizen of his property for other than public purposes, or to authorize its seizure without process or warrant, by persons other than the owner, for the mere punishment of a private trespass. So far as the act in question relates to animals trespassing on the premises of the captor, the proceedings it authorizes have not even the mocking semblance of due process of law. The seizure may be privately made; the party making it is permitted to conceal the property on his own premises; he is protected, though the trespass was due to his own connivance or neglect; he is permitted to take what does not belong to him without notice to owner, though that owner is near and known; he is allowed to sell, through the intervention of an officer, and

Limitation Laws.

Notwithstanding the protection which the law gives to vested rights, it is possible for a party to debar himself of the right to assert the same in the courts, by his own negligence or laches. If one who is dispossessed "be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession merely, both to punish his neglect(*nam leges vigilantibus, non dormientibus subveniunt*), and also because it is presumed that the supposed wrong-doer has in such a length of time procured a legal title, otherwise he would sooner have been sued." [1] Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no rights in the premises. Such a statute is a statute of repose.[2] Every government is under obligation to its citizens to afford them all needful legal remedies ;[3] but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time.[4]

without even the form of judicial proceedings, an animal in which he has no interest by way either of title, mortgage, pledge, or lien ; and all to the end that he may receive compensation for detaining it without the consent of the owner, and a fee of fifty cents for his services as an informer. He levies without process, condemns without proof, and sells without execution." And he distinguishes these proceedings from those in distraining cattle *damage feasant*, which are always remedial, and under which the party is authorized to detain the property in pledge for the payment of his damages. See also opinion by *Morgan*, J., in the same case, pp. 314–317, and the opinions of the several judges in Wynehamer *v.* People, 13 N. Y. 395, 419, 434, and 468. Compare Campbell *v.* Evans, 45 N. Y. 356 ; Cook *v.* Gregg, 46 N. Y. 439 ; Grover *v.* Huckins, 26 Mich. 476 ; Campau *v.* Langley, 39 Mich. 451 ; s. c. 33 Am. Rep. 414.

[1] 3 Bl. Com. 188; Broom, Legal Maxims, 857.

[2] Such a statute was formerly construed with strictness, and the defence under it was looked upon as unconscionable, and not favored; but Mr. Justice *Story* has well said, it has often been matter of regret in modern times that the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute ; that instead of being viewed in an unfavorable light as an unjust and discreditable defence, it had not received such support as would have made it what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses. Bell *v.* Morrison, 1 Pet. 351, 360. See Leffingwell *v.* Warren, 2 Black, 599 ; Toll *v.* Wright, 37 Mich. 93.

[3] Call *v.* Hagger, 8 Mass. 423.

[4] Beal *v.* Nason, 14 Me. 344 ; Bell *v.* Morrison, 1 Pet. 351 ; Stearns *v.* Gittings, 23 Ill. 387 ; State *v.* Jones, 21 Md. 432 See Biddle *v.* Hooven, 120 Pa. St. 221.

When the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title.[1] It is vested as completely and perfectly, and is as safe from legislative interference as it would have been had it been perfected in the owner by grant, or by any species of assurance.[2]

[1] Brent *v.* Chapman, 5 Cranch, 358; Newby's Adm'rs *v.* Blakey, 3 H. & M. 57; Parish *v.* Eager, 15 Wis. 532; Bagg's Appeal, 43 Pa. St. 512; Leffingwell *v.* Warren, 2 Black, 599; Bicknell *v.* Comstock, 113 U. S. 149. See cases cited in next note.

[2] Although there is controversy on this point, we consider the text fully warranted by the following cases: Holden *v.* James, 11 Mass. 396; Wright *v.* Oakley, 5 Met. 400; Lewis *v.* Webb, 3 Me. 326; Atkinson *v.* Dunlap, 50 Me. 111; Davis *v.* Minor, 2 Miss. 183; s. c. 28 Am. Dec. 325; Hicks *v.* Steigleman, 49 Miss. 377; Knox *v.* Cleveland, 13 Wis 245; Sprecker *v.* Wakeley, 11 Wis. 432; Pleasants *v.* Rohrer, 17 Wis. 577; Moor *v.* Luce, 29 Pa. St. 260; Morton *v.* Sharkey, McCahon, 113; McKinney *v.* Springer, 8 Blackf. 506; Bradford *v.* Brooks, 2 Aik. 284; s. c. 16 Am. Dec. 715; Stipp *v.* Brown, 2 Ind. 647; Briggs *v.* Hubbard, 19 Vt. 86; Wires *v.* Farr, 25 Vt. 41; Woart *v.* Winnick, 3 N. H. 473; s. c. 14 Am. Dec. 384; Rockport *v.* Walden, 54 N. H. 167; s. c. 20 Am. Rep. 131; Thompson *v.* Caldwell, 3 Lit. 137; Couch *v.* McKee, 6 Ark. 495; Reynolds *v.* Baker, 6 Cold. 221; Trim *v.* McPherson, 7 Cold. 15; Girdner *v.* Stephens, 1 Heisk. 280; s. c. 2 Am. Rep. 700; Yancy *v.* Yancy, 5 Heisk. 353; s. c. 13 Am. Rep. 5; Bradford *v.* Shine's Ex'rs, 13 Fla. 393; s. c. 7 Am. Rep. 239; Lockhart *v.* Horn, 1 Woods, 628; Horbach *v.* Miller, 4 Neb. 31; Pitman *v.* Bump, 5 Oreg. 17; Thompson *v.* Read, 41 Iowa, 48; Reformed Church *v.* Schoolcraft, 65 N. Y. 134; Union Savings Bank *v.* Taber, 13 R. I. 683; McDuffee *v.* Sinnott, 119 Ill. 449. In some cases an inclination has been manifested to distinguish between the case of property adversely possessed, and a claim not enforced; and while it is conceded that the title to the property cannot be disturbed after the statute has run, it is held that the claim, under new legislation, may still be enforced; the statute of limitations pertaining to the remedy only, and not barring the right. So it was held in Jones *v.* Jones, 18 Ala. 248, where the remedy on the claim in dispute had been barred by the statute of another State where the debtor then resided. And see Bentinck *v.* Franklin, 38 Tex. 458. In Campbell *v.* Holt, 115 U. S. 620, a similar ruling was made, though against vigorous dissent. It was held that one has no property in the bar of the statute as a defence to a promise to pay a debt, and that such bar may be removed by a statute in such case after it has become complete. But this last-mentioned doctrine is rejected in an opinion of much force by *Dixon*, Ch. J., in Brown *v.* Parker, 28 Wis. 21, 28. To like effect is McCracken Co. *v.* Merc. Trust Co., 84 Ky. 344. And see Rockport *v.* Walden, 54 N. H. 167; s. c. 20 Am. Rep. 131; McMerty *v.* Morrison, 62 Mo. 140; Goodman *v.* Munks, 8 Port. (Ala.) 84; Harrison *v.* Stacy, 6 Rob. (La.) 15; Baker *v.* Stonebraker's Adm'r, 36 Mo. 338; Shelby *v.* Guy, 11 Wheat. 361. The law of the forum governs as to limitations. Barbour *v.* Erwin, 14 Lea, 716; Stirling *v.* Winter, 80 Mo. 141. See Chevrier *v.* Robert, 6 Mont. 319; Thompson *v.* Reed, 75 Me. 404. But the statute of limitations may be suspended for a period as to demands not already barred. Wardlaw *v.* Buzzard, 15 Rich. 158; Caperton *v.* Martin, 4 W. Va. 138; s. c. 6 Am. Rep. 270; Bender *v.* Craw-

All limitation laws, however, must proceed on the theory that the party, by lapse of time and omissions on his part, has forfeited his right to assert his title in the law.[1] Where they relate to property, it seems not to be essential that the adverse claimant should be in actual possession;[2] but one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no steps to enforce. It has consequently been held that a statute which, after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims.[3]

All statutes of limitation, also, must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing right of claimants without affording this opportunity: if it should attempt to do so,

ford, 33 Tex. 745; s. c. 7 Am. Rep. 270; Pearsall *v.* Kenan, 79 N. C. 472; s. c. 28 Am. Rep. 336. A class of cases may be excepted from the operation of the statute, though barred when such excepting act was passed. Sturm *v.* Fleming, 8 S. E. Rep. 263 (W. Va.). The legislature may compel a county to pay a claim barred by the general statute. Caldwell Co. *v.* Harbert, 68 Tex. 321.

[1] Stearns *v.* Gittings, 23 Ill. 387, per *Walker*, J.; Sturges *v.* Crowninshield, 4 Wheat. 122, 207, per *Marshall*, Ch. J. Pearce *v.* Patton, 7 B. Monr. 162; Griffin *v.* McKenzie, 7 Ga. 163; Colman *v.* Holmes, 44 Ala. 124.

[2] Stearns *v.* Gittings, 23 Ill. 387; Hill *v.* Kricke, 11 Wis. 442.

[3] Groesbeck *v.* Seeley, 13 Mich. 329. In Case *v.* Dean, 16 Mich. 12, it was held that this statute could not be enforced as a limitation law in favor of the party in possession, inasmuch as it did not proceed on the idea of limiting the time for bringing suit, but by a conclusive rule of evidence sought to pass over the property to the claimant under the statutory sale in all cases, irrespective of possession. See also Baker *v.* Kelly, 11 Minn. 480; Eldridge *v.* Kuehl, 27 Iowa, 160, 173; Monk *v.* Corbin, 58 Iowa, 503; Farrar *v.* Clark, 85 Ind. 449; Dingey *v.* Paxton, 60 Miss. 1038. The case of Leffingwell *v.* Warren, 2 Black, 599, is *contra*. That case follows Wisconsin decisions. In the leading case of Hill *v.* Kricke, 11 Wis. 442, the holder of the original title was not in possession; and what was decided was that it was not necessary for the holder of the tax title to be in possession in order to claim the benefit of the statute; ejectment against a claimant being permitted by law when the lands were unoccupied. See also Barrett *v.* Holmes, 102 U. S. 651. To stop the running of the statute it is not necessary that the owner should be in continuous possession. Smith *v.* Sherry, 54 Wis. 114. This circumstance of possession or want of possession in the person whose right is to be extinguished seems to us of vital importance. How can a man justly be held guilty of laches in not asserting claims to property, when he already possesses and enjoys the property? The old maxim is, "That which was originally void cannot by mere lapse of time be made valid;" and if a void claim by force of an act of limitation can ripen into a conclusive title as against the owner in possession, the policy underlying that species of legislation must be something beyond what has been generally supposed.

it would be not a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action;[1] though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.[2]

Alterations in the Rules of Evidence.

It must also be evident that *a right to have one's controversies determined by existing rules of evidence is not a vested right.* These

[1] So held of a statute which took effect some months after its passage, and which, in its operation upon certain classes of cases, would have extinguished adverse claims unless asserted by suit before the act took effect. Price *v.* Hopkin, 13 Mich. 318. See also Koshkonong *v.* Burton, 104 U. S. 668; King *v.* Belcher, 30 S. C. 381; People *v.* Turner, 22 N. E. Rep. 1022 (N. Y.); Call *v.* Hagger, 8 Mass. 423; Proprietors, &c. *v.* Laboree, 2 Me. 294; Society, &c. *v.* Wheeler, 2 Gall. 141; Blackford *v.* Peltier, 1 Blackf. 36; Thornton *v.* Turner, 11 Minn. 336; State *v.* Messenger, 27 Minn. 119; Osborn *v.* Jaines, 17 Wis. 573; Morton *v.* Sharkey, McCahon (Kan.), 113; Berry *v.* Ransdell, 4 Met. (Ky.) 292; Ludwig *v.* Stewart, 32 Mich. 27; Hart *v.* Bostwick, 14 Fla. 162. In the case last cited it was held that a statute which only allowed thirty days in which to bring action on an existing demand was unreasonable and void. And see what is said in Auld *v.* Butcher, 2 Kan. 135. Compare Davidson *v.* Lawrence, 49 Ga. 335; Kimbro *v.* Bank of Fulton, 49 Ga. 419. In Terry *v.* Anderson, 95 U. S. 628, a statute which as to the demand sued upon limited the time to ten and a half months was held not unreasonable. In Krone *v.* Krone, 37 Mich. 308, the limitation which was supported was to one year where the general law gave six. In Pereless *v.* Watertown, 6 Biss. 79, Judge *Hopkins*, U. S. District Judge, decided that a limitation of one year for bringing suits on municipal securities of a class generally sold abroad was unreasonable and void. But a statute giving a new remedy against a railroad company for an injury, may limit to a short time, *e. g.* six months, the time for bringing suit. O'Bannon *v.* Louisville, &c. R. R. Co, 8 Bush, 348. So the remedy by suit against stockholders for corporate debts, it is held, may be limited to one year. Adamson *v.* Davis, 47 Mo. 268. It is always competent to extend the time for bringing suit before it has expired. Keith *v.* Keith, 26 Kan. 27. A statute fixing a time for taking out a sheriff's deed after sale applies to a prior sale if a reasonable time is left. Ryhiner *v.* Frank, 105 Ill. 326.

[2] Stearns *v.* Gittings, 23 Ill. 387; Call *v.* Hagger, 8 Mass. 423; Smith *v.* Morrison, 22 Pick. 430; Price *v.* Hopkin, 13 Mich. 318; De Moss *v.* Newton, 31 Ind. 219. But see Berry *v.* Ransdell, 4 Met. (Ky.) 292.

It may be remarked here, that statutes of limitation do not apply to the State unless they so provide expressly. Gibson *v.* Choteau, 13 Wall. 92; State *v.* Piland, 81 Mo. 519; State *v.* School Dist., 34 Kan. 237. And State limitation laws do not apply to the United States. United States *v.* Hoar, 2 Mas. 311; People *v.* Gilbert, 18 Johns. 227; Rabb *v.* Supervisors, 62 Miss. 589; United States *v.* Nashville, &c. Ry. Co., 118 U. S. 120. Nor to suits for the infringement of patents. May *v.* Logan Co, 30 Fed. Rep. 250. And it has been held that the right to maintain a public nuisance cannot be acquired under the statute. State *v.* Franklin Falls Co., 49 N. H. 240.

rules pertain to the remedies which the State provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature;[1] and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those States in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective even though some of the controversies upon which it may act were in progress before. It has accordingly been held in New Hampshire that a statute which removed the disqualification of interest, and allowed parties in suits to testify, might lawfully apply to existing causes of action.[2] So may a statute which modifies the common-law rule excluding parol evidence to vary the terms of a written contract;[3] and a statute making the protest of a promissory note evidence of the facts therein stated.[4] These and the like cases will sufficiently illustrate the general rule, that the whole subject is under the control of the legislature, which prescribes such rules for the trial and determination as well of existing as of future rights and controversies as in its judgment will most completely subserve the ends of justice.[5]

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

[1] Kendall *v.* Kingston, 5 Mass. 524; Ogden *v.* Saunders, 12 Wheat. 213, 349; per *Marshall*, Ch. J.; Fales *v.* Wadsworth, 23 Me. 553; Karney *v.* Paisley, 13 Iowa, 89; Commonwealth *v.* Williams, 6 Gray, 1; Hickox *v.* Tallman, 38 Barb. 608; Webb *v.* Den, 17 How. 576; Pratt *v.* Jones, 25 Vt. 303. See *ante*, p. 349 and note.

[2] Rich *v.* Flanders, 39 N. H. 304. A very full and satisfactory examination of the whole subject will be found in this case. To the same effect is Southwick *v.* Southwick, 49 N. Y. 510. And see Cowan *v.* McCutchen, 43 Miss. 207; Carothers *v.* Hurly, 41 Miss. 71. The right to testify existing when a contract is made may be taken away. Goodlett *v.* Kelly, 74 Ala. 213.

[3] Gibbs *v.* Gale, 7 Md. 76.

[4] Fales *v.* Wadsworth, 23 Me. 553.

[5] Per *Marshall*, Ch. J., in Ogden *v.* Saunders, 12 Wheat. 213, 249; Webb *v.* Den, 17 How. 576; Delaplaine *v.* Cook, 7 Wis. 44; Kendall *v.* Kingston, 5 Mass. 524; Towler *v.* Chatterton, 6 Bing. 258; Himmelman *v.* Carpentier, 47 Cal. 42.

dence that all the proceedings have been regular, and that the purchaser has acquired under them a complete title.[1] The burden of proof is thereby changed from one party to the other; the legal presumption which the statute creates in favor of the purchaser being sufficient, in connection with the deed, to establish his case, unless it is overcome by countervailing testimony. Statutes making defective records evidence of valid conveyances are of a similar nature; and these usually, perhaps always, have reference to records before made, and provide for making them competent evidence where before they were merely void.[2] But they divest no title, and are not even retrospective in character. They merely establish what the legislature regards as a reasonable and just rule for the presentation by the parties of their rights before the courts in the future.

But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretence of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial;[3] and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law. A statute, therefore,

[1] Hand *v.* Ballou, 12 N. Y. 541; Forbes *v.* Halsey, 26 N.Y. 53; Delaplaine *v.* Cook, 7 Wis. 44; Allen *v.* Armstrong, 16 Iowa, 508; Adams *v.* Beale, 19 Iowa, 61; Amberg *v.* Rogers, 9 Mich. 332; Lumsden *v.* Cross, 10 Wis. 282; Lacey *v.* Davis, 4 Mich. 140; Wright *v.* Dunham, 13 Mich. 414; Abbott *v.* Lindenbower, 42 Mo. 162; s. c. 46 Mo. 291. The rule once established may be abolished, even as to existing deeds. Hickox *v.* Tallman, 38 Barb. 608; Strode *v.* Washer, 16 Pac. Rep. 926 (Or.); Gage *v.* Caraher, 125 Ill. 447.

[2] See Webb *v.* Den, 17 How. 576.

[3] Tift *v.* Griffin, 5 Ga. 185; Lenz *v.* Charlton, 23 Wis. 478; Conway *v.* Cable, 37 Ill. 82; *ante*, p. 443, note; *post*, pp. 469–471 and notes.

which should make a tax-deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property.[1] And a statute which should make the certificate or opinion of an officer conclusive evidence of the illegality of an existing contract would be equally nugatory;[2] though perhaps if parties should enter into a contract in view of such a statute then existing, its provisions might properly be regarded as assented to and incorporated in their contract, and therefore binding upon them.[3]

[1] Groesbeck *v.* Seeley, 13 Mich. 329; Case *v.* Dean, 16 Mich. 12; White *v.* Flynn, 23 Ind. 46; Corbin *v.* Hill, 21 Iowa, 70; Abbott *v.* Lindenbower, 42 Mo. 162; s. c. 46 Mo. 291; Dingey *v.* Paxton, 60 Miss. 1038. And see the well-reasoned case of McCready *v.* Sexton, 29 Iowa, 356; Little Rock, &c. R. R. Co. *v.* Payne, 33 Ark. 816; s. c. 34 Am. Rep. 55. Also Wright *v.* Cradlebaugh, 3 Nev. 341. As to how far the legislature may make the tax-deed conclusive evidence that mere irregularities have not intervened in the proceedings, see Smith *v.* Cleveland, 17 Wis. 556; Allen *v.* Armstrong, 16 Iowa, 508. It may be conclusive as to matters not essential and jurisdictional. Matter of Lake, 40 La. Ann. 142; Ensign *v.* Barse, 107 N. Y. 329. Undoubtedly the legislature may dispense with mere matters of form in the proceedings as well after they have taken place as before; but this is quite a different thing from making tax-deeds conclusive on points material to the interest of the property owner. See further, Wantlan *v.* White, 19 Ind. 470; People *v.* Mitchell, 45 Barb. 212; McCready *v.* Sexton, *supra*. It is not competent for the legislature to compel an owner of land to redeem it from a void tax sale as a condition on which he shall be allowed to assert his title against it. Conway *v.* Cable, 37 Ill. 82; Hart *v.* Henderson, 17 Mich. 218; Wilson *v.* McKenna, 52 Ill. 43; Reed *v.* Tyler, 56 Ill. 288; Dean *v.* Borchsenius, 30 Wis. 236. But it seems that if the tax purchaser has paid taxes and made improvements, the payment for these may be made a condition precedent to a suit in ejectment against him. Pope *v.* Macon, 23 Ark. 644. See cases *ante*, 444, note 1. In Wright *v.* Cradlebaugh, 3 Nev. 341, 349, *Beatty*, Ch. J., says: "We apprehend that it is beyond the power of the legislature to restrain a defendant in any suit from setting up a good defence to an action against him. The legislature could not directly take the property of A. to pay the taxes of B. Neither can it indirectly do so by depriving A. of the right of setting up in his answer that his separate property has been jointly assessed with that of B., and asserting his right to pay his own taxes without being incumbered with those of B. . . . Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the usages of the common law or the provisions of the constitution, would be a protection to him or his property." See Taylor *v.* Miles, 5 Kan. 498; s. c. 7 Am. Rep. 558.

[2] Young *v.* Beardsley, 11 Paige, 93. See also Howard Co. *v.* State, 22 N. E. Rep. 255 (Ind.). But a provision that six months after the passage of the act certain tax-deeds made on past sales should be conclusive evidence, has been upheld. People *v.* Turner, 22 N. E. Rep. 1022 (N. Y.). An act to authorize persons whose sheep are killed by dogs, to present their claim to the selectmen of the town for allowance and payment by the town, and giving the town after payment an action against the owner of the dog for the amount so paid, is void, as taking away trial by jury, and as authorizing the selectmen to pass upon one's rights without giving him an opportunity to be heard. East Kingston *v.* Towle, 48 N. H. 57; s. c. 2 Am. Rep. 174.

[3] See *post*, p. 496, note.

Retrospective Laws.

Regarding the circumstances under which a man may be said to have a vested right to a defence against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected.[1] In both cases the demand is gone, and to restore it would be to create a new contract for the parties, — a thing quite beyond the power of legislation.[2] So he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment.[3] But there are many cases in which, by existing laws, defences based upon mere informalities are allowed in suits upon contracts, or in respect to legal proceedings, in some of which a regard to substantial justice would warrant the legislature in interfering to take away the defence if it possesses the power to do so.

In regard to these cases, we think investigation of the authorities will show that *a party has no vested right in a defence based upon an informality not affecting his substantial equities.* And this brings us to a particular examination of a class of statutes which is constantly coming under the consideration of the courts, and which are known as *retrospective laws*, by reason of their reaching back to and giving to a previous transaction some different legal effect from that which it had under the law when it took place.

[1] *Ante*, p. 448, note, and cases cited.

[2] Albertson *v.* Landon, 42 Conn. 209.

[3] In Medford *v.* Learned, 16 Mass. 215, it was held that where a pauper had received support from the parish, to which by law he was entitled, a subsequent legislative act could not make him liable by suit to refund the cost of the support. This case was approved and followed in People *v.* Supervisors of Columbia, 43 N. Y. 130. See *ante*, p. 444 and note; Towle *v.* Eastern R. R., 18 N. H. 547. A right of action may not be given against a husband to a creditor of the wife upon her contract. Addoms *v.* Marx, 50 N. J. L. 253. A railroad company cannot be made responsible for the coroner's inquest and burial of persons dying on the cars, or killed by collision or other accident occurring to the cars, &c., irrespective of any wrong or negligence of the company or its servants. Ohio & M. R. R. Co. *v.* Lackey, 78 Ill. 55. Absolute liability, irrespective of negligence, cannot be imposed on a railroad company for stock killing. Cottrel *v.* Union Pac. Ry. Co., 21 Pac. Rep. 416 (Idaho); Bielenberg *v.* Montana N. Ry. Co., 20 Pac. Rep. 314 (Mont.). In Atchison, &c. R. R. Co. *v.* Baty, 6 Neb. 37; s. c. 29 Am. Rep. 356, it is held incompetent to make a railroad company liable to double the value of stock accidentally injured or destroyed on the railroad track. But the contrary was held in Missouri Pac. Ry. Co. *v.* Humes, 115 U. S. 512. In such cases attorney's fees may be allowed. Peoria, D. & E. Ry. Co. *v.* Duggan, 109 Ill. 537. But see Wilder *v.* Chicago & W. M. Ry. Co., 38 N. W. Rep. 289 (Mich.). See cases on above points, *post*, 713, note, 1.

There are numerous cases which hold that retrospective laws are not obnoxious to constitutional objection, while in others they have been held to be void. The different decisions have been based upon diversities in the facts which make different principles applicable. There is no doubt of the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, *eo nomine*, by the State constitution, and provided further that no other objection exists to them than their retrospective character.[1] Nevertheless, legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.[2] And some of the States have deemed it just and wise to forbid such laws altogether by their constitutions.[3]

[1] Thornton *v.* McGrath, 1 Duvall, 349; Aldridge *v.* Railroad Co., 2 Stew. & Port. 199; s. c. 23 Am. Dec. 307; State *v.* Squires, 26 Iowa, 340; Beach *v.* Walker, 6 Conn. 190; Schenley *v.* Commonwealth, 36 Pa. St. 57; Shonk *v.* Brown, 61 Pa. 320; Lane *v.* Nelson, 79 Pa. St. 407.

[2] Dash *v.* Van Kleeck, 7 Johns. 477; s. c. 5 Am. Dec. 291; Sayre *v.* Wisner, 8 Wend. 661; Watkins *v.* Haight, 18 Johns. 138; Bay *v.* Gage, 36 Barb. 447; Norris *v.* Beyea, 13 N. Y. 273; Drake *v.* Gilmore, 52 N. Y. 389; Quackenbush *v.* Danks, 1 Denio, 128; Hapgood *v.* Whitman, 13 Mass. 464; Medford *v.* Learned, 16 Mass. 215; Gerry *v.* Stoneham, 1 Allen, 319; Kelley *v.* Boston, &c. R. R. Co., 135 Mass. 448; Perkins *v.* Perkins, 7 Conn. 558; s. c. 18 Am. Dec. 120; Plumb *v.* Sawyer, 21 Conn. 351; Hubbard *v.* Brainerd, 35 Conn. 563; Sturgis *v.* Hull, 48 Vt. 302; Briggs *v.* Hubbard, 19 Vt. 86; Hastings *v.* Lane, 15 Me. 134; Torrey *v.* Corliss, 32 Me. 333; Atkinson *v.* Dunlop, 50 Me. 111; Rogers *v.* Greenbush, 58 Me. 395; Guard *v.* Rowan, 3 Ill. 499; Garrett *v.* Doe, 2 Ill. 335; Thompson *v.* Alexander, 11 Ill. 54; Conway *v.* Cable, 37 Ill. 82; *In re* Tuller, 79 Ill. 99; Knight *v.* Begole, 56 Ill. 122; McHaney *v.* Trustees of Schools, 68 Ill. 140; Hatcher *v.* Toledo, &c. R. R. Co., 62 Ill. 477; Harrison *v.* Metz, 17 Mich. 377; Thomas *v.* Collins, 58 Mich. 64; Danville *v.* Pace, 25 Gratt. 1; Cumberland, &c. R. R. Co. *v.* Washington Co. Court, 10 Bush, 564; State *v.* Barbee, 3 Ind. 258; State *v.* Atwood, 11 Wis. 422; Bartruff *v.* Remey, 15 Iowa, 257; Knoulton *v.* Redenbaugh, 40 Iowa, 114; Allbyer *v.* State, 10 Ohio St. 588; Colony *v.* Dublin, 32 N. H. 432; *Ex parte* Graham, 13 Rich. 277; Garrett *v.* Beaumont, 24 Miss. 377; Clark *v.* Baltimore, 29 Md. 277; Williams *v.* Johnson, 30 Md. 500; State *v.* The Auditor, 41 Mo. 25; State *v.* Ferguson, 62 Mo. 77; Merwin *v.* Ballard, 66 N. C. 398; Tyson *v.* School Directors, 51 Pa. St. 9; Haley *v.* Philadelphia, 68 Pa. St. 45; s. c. 8 Am. Rep. 153; Baldwin *v.* Newark, 38 N. J. 158; Warshung *v.* Hunt, 47 N. J. L. 256; McGeehan *v.* State Treasurer, 37 La. Ann. 156; State *v.* Pinckney, 22 S. C. 484; Richmond *v.* Supervisors, 83 Va. 204. This doctrine applies to amendments of statutes. Ely *v.* Holton, 15 N. Y. 595. If no vested right is disturbed, a retroactive effect may be given a statute, though the language does not render it necessary, provided such is the clear intent. People *v.* Spicer, 99 N. Y. 225.

[3] See the provision in the Constitution of New Hampshire, considered in Woart *v.* Winnick, 3 N. H. 473; s. c. 14 Am. Dec. 384; Clark *v.* Clark, 10 N. H. 380; Willard *v.* Harvey, 24 N. H. 344; Rich *v.* Flanders, 39 N. H. 304; and Simpson *v.* Savings Bank, 56 N. H. 466; and that in the Constitution of Texas, in De Cordova *v.* Galveston, 4 Tex. 470; and that in the Constitution of Missouri, in State *v.* Hernan, 70 Mo. 441; State *v.* Greer, 78 Mo. 188. The provision covers only civil, not criminal cases. State *v.* Johnson, 81 Mo.

A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden. Of this class are the statutes to cure irregularities in the assessment of property for taxation and the levy of taxes thereon;[1] irregularities in the

60. A statute, passed after a municipality has levied a tax, may annul it before it becomes due and put the right to levy it in another body. State *v.* St. Louis, &c. Ry. Co., 79 Mo. 420. The Constitution of Ohio provides that "the General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; provided, however, that the General Assembly may, by general laws, authorize the courts to carry into effect the manifest intention of parties and officers, by curing omissions, defects, and errors in instruments and proceedings, arising out of their want of conformity with the laws of this State, and upon such terms as shall be just and equitable." Under this clause it was held competent for the General Assembly to pass an act authorizing the courts to correct mistakes in deeds of married women previously executed, whereby they were rendered ineffectual. Goshorn *v.* Purcell, 11 Ohio St. 641. Under a provision in the Constitution of Tennessee that no retrospective law shall be passed, it has been held that a statute passed after a death cannot allow for the first time a recovery for the loss suffered by the children of deceased from the death. Railroad *v.* Pounds, 11 Lea, 127. But a law authorizing a bill to be filed by slaves, by their next friend, to emancipate them, although it applied to cases which arose before its passage, was held not a retrospective law within the meaning of this clause. Fisher's Negroes *v.* Dobbs, 6 Yerg. 119. So of a law making a judgment against the principal conclusive upon the surety. Pickett *v.* Boyd, 11 Lea, 498. An act for the payment of bounties for past services was held not retrospective, in State *v.* Richland, 20 Ohio St. 369. See further, Society *v.* Wheeler, 2 Gall. 105; Officer *v.* Young, 5 Yerg. 320; s. c. 26 Am. Dec. 268. Under like provision in the Colorado Constitution a statute is void which allows a writ of error on a judgment in respect to which an appeal was barred. Willoughby *v.* George, 5 Col. 80. Legislation may be ordered to take immediate effect notwithstanding retrospective laws are forbidden. Thomas *v.* Scott, 23 La. Ann. 689.

That the legislature cannot retrospectively construe statutes and bind parties thereby, see *ante*, p. 110 *et seq.*

[1] Butler *v.* Toledo, 5 Ohio St. 225; Strauch *v.* Shoemaker, 1 W. & S. 166; McCoy *v.* Michew, 7 W. & S. 386; Montgomery *v.* Meredith, 17 Pa. St. 42; Dunden *v.* Snodgrass, 18 Pa. St. 151; Williston *v.* Colkett, 9 Pa. St. 38; Boardman *v.* Beckwith, 18 Iowa, 292; The Iowa R. R. Land Co. *v.* Soper, 39 Iowa, 112; Lennon *v.* New York, 55 N. Y. 361; Smith *v.* Hard, 59 Vt. 13. Officers may be authorized to extend inquiries over years preceding; no new liability is imposed upon the taxpayer. Sturges *v.* Carter, 114 U. S. 511. It is not unconstitutional to prohibit the vacating of assessments for irregularities. Astor *v.* New York, 62 N. Y. 580. The limit of power in validating assessments is very clearly shown by *McKinstry*, J., in People *v.* Lynch, 51 Cal. 15. And see Walter *v.* Bacon, 8 Mass. 468; Locke *v.* Dane, 9 Mass 360; Patterson *v.* Philbrook, 9 Mass. 151; Trustees *v.* McCaughy, 2 Ohio St. 152. Compare Forster *v.* Forster, 129 Mass. 559. Acts of officers void for jurisdictional defects cannot be validated. Houseman *v.* Kent Circ. Judge, 58 Mich. 364; Bartlett *v.* Wilson, 59 Vt. 23. Nor can irregularities be cured after a suit is brought to recover money received by a township on a sale of land for an illegal tax. Daniells *v.* Watertown, 61 Mich. 514. The right to provide for a reassessment of taxes irregularly levied is undoubted. See Brevoort *v.* Detroit, 24 Mich. 322; State *v.* Newark, 34 N. J. 236; Musselman *v.* Logansport, 29 Ind. 533; Street Railroad Co. *v.* Morrow, 87 Tenn. 406; Redwood Co. *v.* Winona &c. Co. 40 Minn. 512. But,

organization or elections of corporations;[1] irregularities in the votes or other action by municipal corporations, or the like, where a statutory power has failed of due and regular execution through the carelessness of officers, or other cause;[2] irregular proceedings in courts, &c.[3]

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

A few of the decided cases will illustrate this principle. In Kearney *v.* Taylor[4] a sale of real estate belonging to infant tenants in common had been made by order of court in a partition suit, and the land bid off by a company of persons, who proposed subdividing and selling it in parcels. The sale was confirmed in their names, but by mutual arrangement the deed was made to one only, for convenience in selling and conveying. This deed failed to convey the title, because not following the sale. The legislature afterwards passed an act providing that, on proof being made to the satisfaction of the court or jury before which such deed was offered in evidence that the land was sold fairly and without fraud, and the deed executed in good faith and for a sufficient consideration, and with the consent of the persons reported as purchasers, the deed should have the same effect as though it had been made to the purchasers. That this act was unobjectionable in principle was not denied; and it cannot be

of course, if the vice is in the nature of the tax itself, it will continue and be fatal, however often the process of assessment may be repeated. See *post*, p. 470.

[1] Syracuse Bank *v.* Davis, 16 Barb. 188; Mitchell *v.* Deeds, 49 Ill. 416; People *v.* Plank Road Co., 86 N. Y. 1.

[2] See Menges *v.* Wertman, 1 Pa. St. 218; Yost's Report, 17 Pa. St. 524; Bennett *v.* Fisher, 26 Iowa, 497; Allen *v.* Archer, 49 Me. 346; Commonwealth *v.* Marshall, 69 Pa. St. 328; State *v.* Union, 33 N. J. 350; State *v.* Guttenberg, 38 N. J. 419; Mut. Ben. Life Ins. Co. *v.* Elizabeth, 42 N. J. 235; Rogers *v.* Stephens, 86 N. Y. 623; Unity *v.* Burrage, 103 U. S. 447. By the Constitution of Missouri, the legislature is forbidden to legalize the unauthorized or invalid acts of any officer or agent of the State, or of any county or municipality. Art. 4 § 53.

[3] Lane *v.* Nelson, 79 Pa. St. 407; Tilton *v.* Swift, 40 Iowa, 78; Supervisors *v.* Wisconsin Cent. R. R. Co., 121 Mass. 460; Cookerly *v.* Duncan, 87 Ind. 332; Muncie Nat. Bank *v.* Miller, 91 Ind. 441; Johnson *v.* Com'rs Wells Co., 107 Ind. 15. See cases *post*, 471, note 2.

[4] 15 How. 494. And see Boyce *v.* Sinclair, 3 Bush, 261; Weed *v.* Donovan, 114 Mass. 181.

doubted that a prior statute, authorizing the deed to be made to one for the benefit of all and with their assent, would have been open to no valid objection.[1]

In certain Connecticut cases it was insisted that sales made of real estate on execution were void, because the officer had included in the amount due, several small items of fees not allowed by law. It appeared, however, that, after the sales were made, the legislature had passed an act providing that no levy should be deemed void by reason of the officer having included greater fees than were by law allowable, but that all such levies, not in other respects defective, should be valid and effectual to transmit the title of the real estate levied upon. The liability of the officer for receiving more than his legal fees was at the same time left unaffected. In the leading case the court say: "The law, undoubtedly, is retrospective; but is it unjust? All the charges of the officer on the execution in question are perfectly reasonable, and for necessary services in the performance of his duty; of consequence they are eminently just, and so is the act confirming the levies. A law, although it be retrospective, if conformable to entire justice, this court has repeatedly decided is to be recognized and enforced." [2]

In another Connecticut case it appeared that certain marriages had been celebrated by persons in the ministry who were not empowered by the State law to perform that ceremony, and that the marriages were therefore invalid. The legislature had afterwards passed an act declaring all such marriages valid, and the court sustained the act. It was assailed as an exercise of the judicial power; but this it clearly was not, as it purported to settle no controversies, and merely sought to give effect to the desire of the parties, which they had ineffectually attempted to carry out by means of the ceremony which proved insufficient. And while it was not claimed that the act was void in so far as it made effectual the legal relation of matrimony between the parties, it was nevertheless insisted that rights of property dependent upon that relation could not be affected by it, inasmuch as, in order to give such rights, it must operate retrospectively. The

[1] See Davis *v.* State Bank, 7 Ind. 316; and Lucas *v.* Tucker, 17 Ind. 41, for decisions under statutes curing irregular sales by guardians and executors. In many of the States general laws will be found providing that such sales shall not be defeated by certain specified defects and irregularities.

[2] Beach *v.* Walker, 6 Conn. 190, 197. See Booth *v.* Booth, 7 Conn. 350; Mather *v.* Chapman, 6 Conn. 54; Norton *v.* Pettibone, 7 Conn. 319; Welch *v.* Wadsworth, 30 Conn. 149; Smith *v.* Merchand's Ex'rs, 7 S. & R. 260; Underwood *v.* Lilly, 10 S. & R. 97; Bleakney *v.* Bank of Greencastle, 17 S. & R. 64; Menges *v.* Wertman, 1 Pa. St. 218; Weister *v.* Hade, 52 Pa. St. 474; Ahl *v.* Gleim, 52 Pa. St. 432; Selsby *v.* Redlon, 19 Wis. 17; Parmelee *v.* Lawrence, 48 Ill. 331.

court in disposing of the case are understood to express the opinion that, if the legislature possesses the power to validate an imperfect marriage, still more clearly does it have power to affect incidental rights. "The man and the woman were unmarried, notwithstanding the formal ceremony which passed between them, and free in point of law to live in celibacy, or contract marriage with any other persons at pleasure. It is a strong exercise of power to compel two persons to marry without their consent, and a palpable perversion of strict legal right. At the same time the retrospective law thus far directly operating on vested rights is admitted to be unquestionably valid, because it is manifestly just." [1]

It is not to be inferred from this language that the court understood the legislature to possess power to select individual members of the community, and force them into a relation of marriage with each other against their will. That complete control which the legislature is supposed to possess over the domestic relations can hardly extend so far. The legislature may perhaps divorce parties, with or without cause, according to its own view of justice or public policy; but for the legislature to marry parties against their consent, we conceive to be decidedly against "the law of the land." The learned court must be understood as speaking here with exclusive reference to the case at bar, in which the legislature, by the retrospective act, were merely removing a formal defect in certain marriages which the parties had assented to, and which they had attempted to form. Such an act, unless special circumstances conspired to make it otherwise, would certainly be "manifestly just," and therefore might well be held "unquestionably valid." And if the marriage was rendered valid, the legal incidents would follow of course. In a Pennsylvania case the validity of certain grading and paving assessments was involved, and it was argued that they were invalid for the reason that the city ordinance under which they had been made was inoperative, because not recorded as required by law. But the legislature had passed an act to validate this ordinance, and had declared therein that the omission to record the ordi-

[1] Goshen *v.* Stonington, 4 Conn. 209, 221, per *Hosmer*, J.; s. c. 10 Am. Dec. 121. And see State *v.* Adams, 65 N. C. 537, where it was held that the act validating the previous marriages of slaves was effectual, and a subsequent marriage in disregard of it would be bigamy. The legislature may remove after a marriage a disability created by its former action. Baity *v.* Cranfil, 91 N. C. 293. That the legislature may legitimize children, see Andrews *v.* Page, 3 Heisk. 653. The power to validate void marriages held not to exist in the legislature where, by the constitution, the whole subject was referred to the courts. White *v.* White, 105 Mass. 325.

nance should not affect or impair the lien of the assessments against the lot owners. In passing upon the validity of this act, the court express the following views: "Whenever there is a right, though imperfect, the constitution does not prohibit the legislature from giving a remedy. In Hepburn *v.* Curts,[1] it was said, 'The legislature, provided it does not violate the constitutional provisions, may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings.' What more has been done in this case? . . . While (the ordinance) was in force, contracts to do the work were made in pursuance of it, and the liability of the city was incurred. But it was suffered to become of no effect by the failure to record it. Notwithstanding this, the grading and paving were done, and the lots of the defendants received the benefit at the public expense. Now can the omission to record the ordinance diminish the equitable right of the public to reimbursement? It is at most but a formal defect in the remedy provided, — an oversight. That such defects may be cured by retroactive legislation need not be argued."[2]

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

By statute of Ohio, all bonds, notes, bills, or contracts negotiable or payable at any unauthorized bank, or made for the purpose of being discounted at any such bank, were declared to be void. While this statute was in force a note was made for the purpose of being discounted at one of these institutions, and was actually discounted by it. Afterwards the legislature passed an act, reciting that many persons were indebted to such bank, by bonds, bills, notes, &c., and that owing, among other things, to doubts of its right to recover its debts, it was unable to meet its own obligations, and had ceased business, and for the purpose of winding up its affairs had made an assignment to a trustee;

[1] 7 Watts, 300.

[2] Schenley *v.* Commonwealth, 36 Pa. St. 29, 57. See also State *v.* Newark, 27 N. J. 185; Den *v.* Downam, 13 N. J. 135; People *v.* Seymour, 16 Cal. 332; Grim *v.* Weissenburg School District, 57 Pa. St. 433; State *v.* Union, 33 N. J. 350. The legislature has the same power to ratify and confirm an illegally appointed corporate body that it has to create a new one. Mitchell *v.* Deeds, 49 Ill. 416.

therefore the said act authorized the said trustee to bring suits on the said bonds, bills, notes, &c., and declared it should not be lawful for the defendants in such suits "to plead, set up, or insist upon, in defence, that the notes, bonds, bills, or other written evidences of such indebtedness are void on account of being contracts against or in violation of any statute law of this State, or on account of their being contrary to public policy." This law was sustained as a law "that contracts may be enforced," and as in furtherance of equity and good morals.[1] The original invalidity was only because of the statute, and that statute was founded upon reasons of public policy which had either ceased to be of force, or which the legislature regarded as overborne by countervailing reasons. Under these circumstances it was reasonable and just that the makers of such paper should be precluded from relying upon such invalidity.[2]

By a statute of Connecticut, where loans of money were made, and a bonus was paid by the borrower over and beyond the interest and bonus permitted by law, the demand was subject to a deduction from the principal of all the interest and bonus paid. A construction appears to have been put upon this statute by business men which was different from that afterwards given by the

[1] Lewis *v.* McElvain, 16 Ohio, 347. But where an act is forbidden by statute under penalty, and therefore illegal, the mere repeal of the statute will not legalize it. Roby *v.* West, 4 N. H. 285; s. c. 17 Am. Dec. 423.

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

courts; and a large number of contracts of loan were in consequence subject to the deduction. The legislature then passed a "healing act," which provided that such loans theretofore made should not be held, by reason of the taking of such bonus, to be usurious, illegal, or in any respect void; but that, if otherwise legal, they were thereby confirmed, and declared to be valid, as to principal, interest, and bonus. The case of Goshen *v.* Stonington[1] was regarded as sufficient authority in support of this act; and the principle to be derived from that case was stated to be "that where a statute is expressly retroactive, and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote justice, then, both as a matter of right and of public policy affecting the peace and welfare of the community, the law should be sustained."[2]

After the courts of the State of Pennsylvania had decided that the relation of landlord and tenant could not exist in that State under a Connecticut title, a statute was passed which provided that the relation of landlord and tenant "shall exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this Commonwealth, on the trial of any case now pending or hereafter to be brought within this Commonwealth, any law or usage to the contrary notwithstanding." In a suit which was pending and had been once tried before the statute was passed, the statute was sustained by the Supreme Court of that State, and afterwards by the Supreme Court of the United States, into which last-mentioned court it had been removed on the allegation that it violated the obligation of contracts. As its purpose and effect was to remove from contracts which the parties had made a legal impediment to their enforcement, there would seem to be no doubt, in the light of the other authorities we have referred to, that the conclusion reached was the only just and proper one.[3]

[1] 4 Conn. 209, 224; s. c. 10 Am. Dec. 121. See *ante*, pp. 458, 459.

[2] Savings Bank *v.* Allen, 28 Conn. 97, 102. See also Savings Bank *v.* Bates, 8 Conn. 505; Andrews *v.* Russell, 7 Blackf. 474; Grimes *v.* Doe, 8 Blackf. 371; Thompson *v.* Morgan, 6 Minn. 292; Parmelee *v.* Lawrence, 48 Ill. 331. In Curtis *v.* Leavitt, 17 Barb. 309, and 15 N. Y. 9, and in Woodruff *v.* Scruggs, 27 Ark. 26, s. c. 11 Am. Rep. 777, a statute forbidding the interposition of the defence of usury was treated as a statute repealing a penalty. See further, Lewis *v.* Foster, 1 N. H. 61; Wilson *v.* Hardesty, 1 Md. Ch. 66; Welch *v.* Wadsworth, 30 Conn. 149; Wood *v.* Kennedy, 19 Ind. 68; Washburn *v.* Franklin, 35 Barb. 599; Parmelee *v.* Lawrence, 48 Ill. 331; Danville *v.* Pace, 25 Gratt. 1. The case of Gilliland *v.* Phillips, 1 S. C. 152, is *contra;* but it discusses the point but little, and makes no reference to these cases. The legislature may impose interest at an increased rate on a debt past due, when the act takes effect. Cummings *v.* Howard, 63 Cal. 503.

[3] Satterlee *v.* Mathewson, 16 S. & R. 169, and 2 Pet. 380. And see Watson *v.* Mercer, 8 Pet. 88; Gross *v.* U.S. Mtge. Co.,

In the State of Ohio, certain deeds made by married women were ineffectual for the purposes of record and evidence, by reason of the omission on the part of the officer taking the acknowledgment to state in his certificate that, before and at the time of the grantor making the acknowledgment, he made the contents known to her by reading or otherwise. An act was afterwards passed which provided that "any deed heretofore executed pursuant to law, by husband and wife, shall be received in evidence in any of the courts of this State, as conveying the estate of the wife, although the magistrate taking the acknowledgment of such deed shall not have certified that he read or made known the contents of such deed before or at the time she acknowledged the execution thereof." This statute, though with some hesitation at first, was held to be unobjectionable. The deeds with the defective acknowledgments were regarded by the legislature and by the court as being sufficient for the purpose of conveying at least the grantor's equitable estate; and if sufficient for this purpose, no vested rights would be disturbed, or wrong be done, by making them receivable in evidence as conveyances.[1]

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

108 U. S. 477; Lessee of Dulany *v.* Tilghman, 6 G. & J. 461; Payne *v.* Treadwell, 16 Cal. 220; Maxey *v.* Wise, 25 Ind. 1.

[1] Chestnut *v.* Shane's Lessee, 16 Ohio, 599, overruling Connell *v.* Connell, 6 Ohio, 358; Good *v.* Zercher, 12 Ohio, 364; Meddock *v.* Williams, 12 Ohio, 377; and Silliman *v.* Cummins, 13 Ohio, 116. Of the dissenting opinion in the last case, which the court approve in 16 Ohio, 609–610, they say: "That opinion stands upon the ground that the act operates only upon that class of deeds where enough had been done to show that a court of chancery ought, in each case, to render a decree for a conveyance, assuming that the certificate was not such as the law required. And where the title in equity was such that a court of chancery ought to interfere and decree a good legal title, it was within the power of the legislature to confirm the deed, without subjecting an indefinite number to the useless expense of unnecessary litigation." See also Lessee of Dulany *v.* Tilghman, 6 G. & J. 461; Journeay *v.* Gibson, 56 Pa. St. 57; Grove *v.* Todd, 41 Md. 633; s. c. 20 Am. Rep. 76; Montgomery *v.* Hobson, Meigs, 437. But the legislature, it has been declared, has no power to legalize and make valid the deed of an insane person. Routsong *v.* Wolf, 35 Mo. 174. In Illinois it has been decided that a deed of release of dower executed by a married woman, but not so acknowledged as to be effectual, cannot be validated by retrospective statute, because to do so would be to take from the woman a vested right. Russell *v.* Rumsey, 35 Ill. 362.

[2] Lessee of Walton *v.* Bailey, 1 Binn. 470; Underwood *v.* Lilly, 10 S. & R. 97; Barnet *v.* Barnet, 15 S. & R. 72; s. c. 16 Am. Dec. 516; Tate *v.* Stooltzfoos, 16 S. & R. 35; s. c. 16 Am. Dec. 546; Watson *v.* Mercer, 8 Pet. 88; Carpenter *v.* Pennsylvania, 17 How. 456; Davis *v.* State Bank, 7 Ind. 316; Estate of Sticknoth, 7 Nev. 227; Ferguson *v.* Williams, 58 Iowa, 717; Johnson *v.* Taylor, 60 Tex. 360; Johnson *v.* Richardson, 44 Ark. 365; Goshorn *v.* Purcell, 11 Ohio St 641. In the last case the court say: "The act of the mar-

to go beyond the mere confirmation of a contract, and to be at least technically objectionable, as depriving a party of property without an opportunity for trial, inasmuch as they proceed upon the assumption that the title still remained in the grantor, and that the healing act was required for the purpose of devesting him of it, and passing it over to the grantee.[1] Apparently, therefore, there would seem to be some force to the objection that such a statute deprives a party of vested rights. But the objection is more specious than sound. If all that is wanting to a valid contract or conveyance is the observance of some legal formality, the party may have a legal right to avoid it; but this right is coupled with no equity, even though the case be such that no remedy could be afforded the other party in the courts. The right which the healing act takes away in such a case is *the right in the party to avoid his contract*, — a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect.[2] As the point is put by Chief Justice *Parker* of Massachusetts, a party cannot have a vested right to do wrong;[3] or, as stated by the Supreme Court of New Jersey, "Laws curing defects which would otherwise operate to frustrate what must be presumed to be the desire of the party affected, cannot be considered as taking away vested rights. Courts do not regard rights as vested contrary to the justice and equity of the case."[4]

ried woman may, under the law, have been void and inoperative; but in justice and equity it did not leave her right to the property untouched. She had capacity to do the act in a form prescribed by law for her protection. She intended to do the act in the prescribed form. She attempted to do it, and her attempt was received and acted on in good faith. A mistake subsequently discovered invalidates the act; justice and equity require that she should not take advantage of that mistake; and she has therefore no just right to the property. She has no right to complain if the law which prescribed forms for her protection shall interfere to prevent her reliance upon them to resist the demands of justice." Similar language is employed in the Pennsylvania cases. See further, Dentzel *v.* Waldie, 30 Cal. 138; Skellenger *v.* Smith, 1 Wash. Ter. 369.

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

[2] In Gibson *v.* Hibbard, 13 Mich. 214, a check, void at the time it was given for want of a revenue stamp, was held valid after being stamped as permitted by a subsequent act of Congress. A similar ruling was made in Harris *v.* Rutledge, 19 Iowa, 387. The case of State *v.* Norwood, 12 Md. 195, is still stronger. The curative statute was passed after judgment had been rendered against the right claimed under the defective instrument, and it was held that it must be applied by the appellate court. See *post*, p. 469.

[3] Foster *v.* Essex Bank, 16 Mass. 245. See also Lycoming *v.* Union, 15 Pa. St. 166, 170. There is no vested right in the statutory defence that a contract was made on Sunday. Berry *v.* Clary, 77 Me. 482.

[4] State *v.* Newark, 25 N. J. 185, 197. Compare Blount *v.* Janesville, 31 Wis. 648; Brown *v.* New York, 63 N. Y. 239; Hughes *v.* Cannon, 2 Humph. 594. A

The operation of these cases, however, must be carefully restricted to the parties to the original contract, and to such other persons as may have succeeded to their rights with no greater equities. A subsequent *bona fide* purchaser cannot be deprived of the property which he has acquired, by an act which retrospectively deprives his grantor of the title which he held when the purchase was made. Conceding that the invalid deed may be made good as between the parties, yet if, while it remained invalid, and the grantor still retained the legal title to the land, a third person has purchased and received a conveyance, with no notice of any fact which should preclude his acquiring an equitable as well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to devest him of the title he has acquired. The position of the case is altogether changed by this purchase. The legal title is no longer separated from equities, but in the hands of the second purchaser is united with an equity as strong as that which exists in favor of him who purchased first. Under such circumstances even the courts of equity must recognize the right of the second purchaser as best, and as entitled to the usual protection which the law accords to vested interests.[1]

If, however, a grantor undertakes to convey more than he possesses, or contrary to the conditions or qualifications which, for the benefit of others, are imposed upon his title, or in fraud of the rights of others whose representative or agent he is, so that the defect in his conveyance consists not in any want of due formality, nor in any disability imposed by law, it is not in the power

law merely taking away an unconscionable defence is valid. Read *v.* Plattsworth, 107 U. S. 568. In New York, &c. R. R. Co. *v.* Van Horn, 57 N. Y. 473, the right of the legislature to validate a void contract was denied on the ground that to validate it would be to take the property of the contracting party without due process of law. The cases which are *contra* are not examined in the opinion, or even referred to.

[1] Brinton *v.* Seevers, 12 Iowa, 389; Southard *v.* Central R. R. Co., 26 N. J. 13; Thompson *v.* Morgan, 6 Minn. 292; Meighen *v.* Strong, 6 Minn. 177; Norman *v.* Heist, 5 W. & S. 171; Greenough *v.* Greenough, 11 Pa. St. 489; Les Bois *v.* Bramell, 4 How. 449; McCarthy *v.* Hoffman, 23 Pa. St. 507; Sherwood *v.* Fleming, 25 Tex. 408; Wright *v.* Hawkins, 28 Tex. 452. See Fogg *v.* Holcomb, 64 Iowa, 621; McGehee *v.* McKenzie, 43 Ark. 156. The legislature cannot validate an invalid trust in a will, by act passed after the death of the testator, and after title vested in the heirs. Hilliard *v.* Miller, 10 Pa. St. 326. See Snyder *v.* Bull, 17 Pa. St. 54; McCarthy *v.* Hoffman, 23 Pa. St. 507; Bolton *v.* Johns, 5 Pa. St. 145; State *v.* Warren, 28 Md. 338. The cases here cited must not be understood as establishing any different principle from that laid down in Goshen *v.* Stonington, 4 Conn. 209, where it was held competent to validate a marriage, notwithstanding the rights of third parties would be incidentally affected. Rights of third parties are liable to be incidentally affected more or less in any case in which a defective contract is made good; but this is no more than might happen in enforcing a contract or decreeing a divorce. See *post*, p. 473. Also Tallman *v.* Janesville, 17 Wis. 71.

of the legislature to validate it retrospectively; and we may add, also, that it would not have been competent to authorize it in advance. In such case the rights of others intervene, and they are entitled to protection on the same grounds, though for still stronger reasons, which exist in the case of the *bona fide* purchasers above referred to.[1]

We have already referred to the case of contracts by municipal corporations which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action. If the contract is one which the legislature might originally have authorized, the case falls within the principle above laid down, and the right of the legislature to confirm it must be recognized.[2]

[1] In Shonk *v.* Brown, 61 Pa. St. 327, the facts were that a married woman held property under a devise, with an express restraint upon her power to alienate. She nevertheless gave a deed of the same, and a legislative act was afterwards obtained to validate this deed. Held void. *Agnew*, J.: "Many cases have been cited to prove that this legislation is merely confirmatory and valid, beginning with Barnet *v.* Barnet, 15 S. & R. 72, and ending with Journeay *v.* Gibson, 56 Pa. St. 57. The most of them are cases of the defective acknowledgments of deeds of married women. But there is a marked difference between them and this. In all of them there was a power to convey, and only a defect in the mode of its exercise. Here there is an absolute want of power to convey in any mode. In ordinary cases a married woman has both the title and the power to convey or to mortgage her estate, but is restricted merely in the manner of its exercise. This is a restriction it is competent for the legislature to remove, for the defect arises merely in the form of the proceeding, and not in any want of authority. Those to whom her estate descends, because of the omission of a prescribed form, are really not injured by the validation. It was in her power to cut them off, and in truth and conscience she did so, though she failed at law. They cannot complain, therefore, that the legislature intervenes to do justice. But the case before us is different. [The grantor] had neither the right nor the power during coverture to cut off her heirs. She was forbidden by the law of the gift, which the donor impressed upon it to suit his own purposes. Her title was qualified to this extent. Having done an act she had no right to do, there was no moral obligation for the legislature to enforce. Her heirs have a right to say, . . . 'The legislature cannot take our estate and vest it in another who bought it with notice on the face of his title that our mother could not convey to him.'" "The true principle on which retrospective laws are supported was stated long ago by *Duncan*, J., in Underwood *v.* Lilly, 10 S. & R. 101; to wit, where they impair no contract, or disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, which do not vary existing obligations contrary to their situation when entered into and when prosecuted." In White Mountains R. R. Co *v.* White Mountains R. R. Co. of N. H., 50 N. H. 50, it was decided that the legislature had no power, as against non-assenting parties, to validate a fraudulent sale of corporate property. In Alter's Appeal, 67 Pa. St. 341, s. c. 5 Am. Rep. 433, the Supreme Court of Pennsylvania declared it incompetent for the legislature, after the death of a party, to empower the courts to correct a mistake in his will which rendered it inoperative, — the title having already passed to his heirs. But where it was not known that the decedent left heirs, it was held competent, as against the State, to cure defects in a will after the death, and thus prevent an escheat. Estate of Sticknoth, 7 Nev. 223.

[2] See Shaw *v.* Norfolk R. R. Corp., 5 Gray, 162, in which it was held that the legislature might validate an unauthorized assignment of a franchise. Also May *v.* Holdridge, 23 Wis. 93, and cases cited,

This principle is one which has very often been acted upon in the case of municipal subscriptions to works of internal improvement, where the original undertaking was without authority of law, and the authority given was conferred by statute retrospectively.[1]

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

in which statutes authorizing the reassessment of irregular taxes were sustained. In this case, *Paine*, J., says: "This rule must of course be understood with its proper restrictions. The work for which the tax is sought to be assessed must be of such a character that the legislature is authorized to provide for it by taxation. The method adopted must be one liable to no constitutional objection. It must be such as the legislature might originally have authorized had it seen fit. With these restrictions, where work of this character has been done, I think it competent for the legislature to supply a defect of authority in the original proceedings, to adopt and ratify the improvement, and provide for a reassessment of the tax to pay for it." And see Brewster *v.* Syracuse, 19 N. Y. 116; Kunkle *v.* Franklin, 13 Minn. 127; Boyce *v.* Sinclair, 3 Bush, 261; Dean *v.* Borchsenius, 30 Wis. 236; Stuart *v.* Warren, 37 Conn. 225. A city ordinance may be validated retrospectively. Truchelut *v.* Charleston, 1 N. & McC. 227; Morris *v.* State, 62 Tex. 728. Otherwise where the city had no power to annex territory as it tried to do. Strosser *v.* Fort Wayne, 100 Ind. 443.

[1] See, among other cases, McMillan *v.* Boyles, 6 Iowa, 304; Gould *v.* Sterling, 23 N. Y. 456; Thompson *v.* Lee County, 3 Wall. 327; Bridgeport *v.* Housatonic R. R. Co., 15 Conn. 475; Board of Commissioners *v.* Bright, 18 Ind. 93; Gibbons *v.* Mobile, &c. R. R. Co., 36 Ala. 410.

[2] In Hasbrouck *v.* Milwaukee, 13 Wis. 37, it appeared that the city of Milwaukee had been authorized to contract for the construction of a harbor, at an expense not to exceed $100,000. A contract was entered into by the city providing for a larger expenditure; and a special legislative act was afterwards obtained to ratify it. The court held that the subsequent legislative ratification was not sufficient, *proprio vigore*, and without evidence that such ratification was procured with the assent of the city, or had been subsequently acted upon or confirmed by it, to make the contract obligatory upon the city. The court say, per *Dixon*, Ch. J.: "The question is, can the legislature, by recognizing the existence of a previously void contract, and authorizing its discharge by the city, or in any other way, coerce the city against its will into a performance of it, or does the law require the assent of the city, as well as of the legislature, in order to make the obligation binding and efficacious? I must say that, in my opinion, the latter act, as well as the former, is necessary for that purpose, and that without it the obligation cannot be enforced. A contract void for want of capacity in one or both of the contracting parties to enter into it is as no contract; it is as if no attempt at an agreement had ever been made. And to admit that the legislature, of its own choice, and against the wishes of either or both of the contracting parties, can give it life and vigor, is to admit that it

Nor is it important in any of the cases to which we have referred, that the legislative act which cures the irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance.

is within the scope of legislative authority to devest settled rights of property, and to take the property of one individual or corporation and transfer it to another." This reasoning is of course to be understood in the light of the particular case before the court; that is to say, a case in which the contract was to do something not within the ordinary functions of local government. See the case explained and defended by the same eminent judge in Mills *v.* Charlton, 29 Wis. 400. Compare Fisk *v.* Kenosha, 26 Wis. 23, 33; Knapp *v.* Grant, 27 Wis. 147; and Single *v.* Supervisors of Marathon, 38 Wis. 363, in which the right to validate a contract which might originally have been authorized was fully affirmed. And see Marshall *v.* Silliman, 61 Ill. 218, 225, opinion by Chief Justice *Lawrence*, in which, after referring to Harward *v.* St. Clair, &c. Drainage Co., 51 Ill. 130; People *v.* Mayor of Chicago, 51 Ill. 17; Hessler *v.* Drainage Com'rs, 53 Ill. 105; and Lovingston *v.* Wider, 53 Ill. 302, it is said, "These cases show it to be the settled doctrine of this court, that, under the constitution of 1848, the legislature could not compel a municipal corporation to incur a debt for merely local purposes, against its own wishes, and this doctrine, as already remarked, has received the sanction of express enactment in our existing constitution. That was the effect of the curative act under consideration, and it was therefore void." The cases of Guilford *v.* Supervisors of Chenango, 18 Barb. 615, and 13 N. Y. 143; Brewster *v.* Syracuse, 19 N. Y. 116; and Thomas *v.* Leland, 24 Wend. 65, especially go much further than is necessary to sustain the text. See also Bartholomew *v.* Harwinton, 33 Conn. 408; People *v.* Mitchell, 35 N. Y. 551; Barbour *v.* Camden, 51 Me 608; Weister *v.* Hade, 52 Pa. St. 474; State *v.* Sullivan, 43 Ill. 412; Johnson *v.* Campbell, 49 Ill. 316 In Brewster *v.* Syracuse, parties had constructed a sewer for the city at a stipulated price which had been fully paid to them. The charter of the city forbade the payment of extra compensation to contractors in any case. The legislature afterwards passed an act empowering the Common Council of Syracuse to assess, collect, and pay over the further sum of $600 in addition to the contract price; and this act was held constitutional. In Thomas *v.* Leland, certain parties had given bond to the State, conditioned to pay into the treasury a certain sum of money as an inducement to the State to connect the Chenango Canal with the Erie at Utica, instead of at Whitestown as originally contemplated, — the sum mentioned being the increased expense in consequence of the change. Afterwards the legislature, deeming the debt thus contracted by individuals unreasonably partial and onerous, passed an act, the object of which was to levy the amount on the owners of real estate in Utica. This act seemed to the court unobjectionable. "The general purpose of raising the money by tax was to construct a canal, a public highway, which the legislature believed would be a benefit to the city of Utica as such; and independently of the bond, the case is the ordinary one of local taxation to make or improve a highway. If such an act be otherwise constitutional, we do not see how the circumstance that a bond had before been given securing the same money can detract from its validity. Should an individual volunteer to secure a sum of money, in itself properly leviable, by way of tax on a town or county, there would be nothing in the nature of such an arrangement which would preclude the legislature from resorting, by way of tax, to those who are primarily and more justly liable. Even should he pay the money, what is there in the constitution to preclude his being reimbursed by a tax?" Here, it will be perceived, the corporation was compelled to assume an obligation which it had not even attempted to incur, but which private persons, for considerations which seemed to them sufficient, had taken upon their own shoulders. We have expressed doubts of the correctness of this decision, *ante*, p. 285, note, where a number of cases are cited, bearing upon the point.

The bringing of suit vests in a party no right to a particular decision;[1] and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered.[2] It has been held that a statute allowing amendments to indictments in criminal cases might constitutionally be applied to pending suits;[3] and even in those States in which retrospective laws are forbidden, a cause must be tried under the rules of evidence existing at the time of the trial, though different from those in force when the suit was commenced.[4] And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered.[5]

But the healing statute must in all cases be confined to validating acts which the legislature might previously have authorized.

[1] Bacon *v.* Callender, 6 Mass. 303; Butler *v.* Palmer, 1 Hill, 324; Cowgill *v.* Long, 15 Ill. 202; Miller *v.* Graham, 17 Ohio St. 1; State *v.* Squires, 26 Iowa, 340; Patterson *v.* Philbrook, 9 Mass. 151.

[2] Watson *v.* Mercer, 8 Pet. 88; Mather *v.* Chapman, 6 Conn. 54; People *v.* Supervisors, &c., 20 Mich. 95; Satterlee *v.* Matthewson, 16 S. & R. 169, and 2 Pet. 380, Excelsior Mfg. Co. *v.* Keyser, 62 Miss. 155; Phenix Ins. Co. *v.* Pollard, 63 Miss. 641; M'Lane *v.* Bonn, 70 Iowa, 752; Johnson *v.* Richardson, 44 Ark. 365. See cases, p. 464, note 1, *ante*. A statute giving a wife a right to recover in her own name for personal injury, may apply to a pending action. McLimans *v.* Lancaster, 63 Wis. 596, following Weldon *v.* Winslow, L. R. 13 Q. B. D. 784. But an act which is penal as to a plaintiff cannot apply to a pending suit. Powers *v.* Wright, 62 Miss. 35. After an appeal bond was signed by an attorney, the court held such bonds void, and then the legislature attempted to validate all existing bonds so signed. This was held bad as against the appellee in the case. Andrews *v.* Beane, 15 R. I. 451. See Thweatt *v.* Bank, 81 Ky. 1.

[3] State *v.* Manning, 14 Tex. 402.

[4] Rich *v.* Flanders, 39 N. H. 304.

[5] State *v.* Norwood, 12 Md. 195. *Contra*, Wright *v.* Graham, 42 Ark. 140. In Yeaton *v.* United States, 5 Cranch, 281, a vessel had been condemned in admiralty, and pending an appeal the act under which the condemnation was declared was repealed. The court held that the cause must be considered as if no sentence had been pronounced; and if no sentence had been pronounced, then, after the expiration or repeal of the law, no penalty could be enforced or punishment inflicted for a violation of the law committed while it was in force, unless some special provision of statute was made for that purpose. See also Schooner Rachel *v.* United States, 6 Cranch, 329; Commonwealth *v.* Duane, 1 Binney, 601; United States *v.* Passmore, 4 Dall. 372; Commonwealth *v.* Marshall, 11 Pick. 350; Commonwealth *v.* Kimball, 21 Pick. 373; Hartung *v.* People, 22 N. Y. 95; Union Iron Co. *v.* Pierce, 4 Biss. 327; Norris *v.* Crocker, 13 How. 429; Insurance Co. *v.* Ritchie, 5 Wall. 541; *Ex parte* McCardle, 7 Wall. 506; United States *v.* Tynen, 11 Wall. 88; Engle *v.* Shurts, 1 Mich. 150. In the McCardle Case the appellate jurisdiction of the United States Supreme Court in certain cases was taken away while a case was pending. Per *Chase*, Ch. J.: "Jurisdiction is power to declare the law; and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle." But where a State has jurisdiction of a subject, *e. g.* pilotage, until Congress establishes regulations, and penalties are incurred under a State act, and afterwards Congress legislates on the subject, this does not repeal, but only suspends the State law; and a penalty previously incurred may still be collected. Sturgis *v.* Spofford, 45 N. Y. 446. And see People *v.* Hobson, 48 Mich. 27.

It cannot make good retrospectively acts or contracts which it had and could have no power to permit or sanction in advance.[1] There lies before us at this time a volume of statutes of one of the States, in which are contained acts declaring certain tax-rolls valid and effectual, notwithstanding the following irregularities and imperfections: a failure in the supervisor to carry out separately, opposite each parcel of land on the roll, the taxes charged upon such parcel, as required by law; a failure in the supervisor to sign the certificate attached to the roll; a failure in the voters of the township to designate, as required by law, in a certain vote by which they had assumed the payment of bounty moneys, whether they should be raised by tax or loan; corrections made in the roll by the supervisor after it had been delivered to the collector; the including by the supervisor of a sum to be raised for township purposes without the previous vote of the township, as required by law; adding to the roll a sum to be raised which could not lawfully be levied by taxation without legislative authority; the failure of the supervisor to make out the roll within the time required by law; and the accidental omission of a parcel of land which should have been embraced by the roll. In each of these cases, except the last, the act required by law, and which failed to be performed, might by previous legislation have been dispensed with; and perhaps in the last case there might be question whether the roll was rendered invalid by the omission referred to, and, if it was, whether the subsequent act could legalize it.[2] But if township officers should assume to do acts under the power of taxation which could not lawfully be justified as an exercise of that power, no subsequent legislation could make them good. If, for instance, a part of the property in a taxing district should be assessed at one rate, and a part at another, for a burden resting equally upon all, there would be no such apportionment as is essential to taxation, and the roll would be beyond the reach of curative legislation.[3] And if persons or property

[1] Kimball *v.* Rosendale, 42 Wis. 407; Maxwell *v.* Goetschius, 40 N. J. 383; s. c. 29 Am. Rep. 242.

[2] See Weeks *v.* Milwaukee, 10 Wis. 242; Dean *v.* Gleason, 16 Wis. 1; *post*, p. 633, note.

[3] This is clearly shown by *McKinstry*, J., in People *v.* Lynch, 51 Cal. 15. And see Billings *v.* Detten, 15 Ill. 218, Conway *v.* Cable, 37 Ill. 82, and Thames Manufacturing Co. *v.* Lathrop, 7 Conn. 550, for cases where curative statutes were held not effectual to reach defects in tax proceedings. As to what defects may or may not be cured by subsequent legislation, see Allen *v.* Armstrong, 16 Iowa, 508; Smith *v.* Cleveland, 17 Wis. 556, and Abbott *v.* Lindenbower, 42 Mo. 162. In Tallman *v.* Janesville, 17 Wis. 71, the constitutional authority of the legislature to cause an irregular tax to be reassessed in a subsequent year, where the rights of *bona fide* purchasers had intervened, was disputed; but the court sustained the authority as "a salutary and highly beneficial feature of our systems of taxation," and "not to be abandoned because in some instances it produces individual

should be assessed for taxation in a district which did not include them, not only would the assessment be invalid, but a healing statute would be ineffectual to charge them with the burden.[1] In such a case there would be a fatal want of jurisdiction; and even in judicial proceedings, if there was originally a failure of jurisdiction, no subsequent law can confer it.[2]

Statutory Privileges and Exemptions.

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

hardships." Certainly *bona fide* purchasers, as between themselves and the State, must take their purchases subject to all public burdens justly resting upon them. The case of Conway *v.* Cable is instructive. It was there held, among other things, — and very justly, as we think, — that the legislature could not make good a tax sale effected by fraudulent combination between the officers and the purchasers. The general rule is undoubted, that a sale for illegal taxes cannot be validated. Silsbee *v.* Stockel, 44 Mich. 561; Brady *v.* King, 53 Cal. 44; Harper *v.* Rowe, 53 Cal. 233 In Miller *v.* Graham, 17 Ohio St. 1, a statute validating certain ditch assessments was sustained, notwithstanding the defects covered by it were not mere irregularities; but that statute gave the parties an opportunity to be heard as to these defects.

[1] See Wells *v.* Weston, 22 Mo. 384; People *v.* Supervisors of Chenango, 11 N. Y. 563; Hughey's Lessee *v.* Horrel, 2 Ohio, 231; Covington *v.* Southgate, 15 B. Monr. 491; Morford *v.* Unger, 8 Iowa, 82; *post*, pp. 615, 616.

[2] So held in McDaniel *v.* Correll, 19 Ill. 226, where a statute came under consideration which assumed to make valid certain proceedings in court which were void for want of jurisdiction of the persons concerned. A void appeal bond cannot be validated so as to give to an appellate court jurisdiction which has failed by reason of such defective bond. Andrews *v.* Beane, 15 R. I. 451. See also Israel *v* Arthur, 7 Col. 5; Yeatman *v.* Day, 79 Ky. 186; Roche *v.* Waters, 18 Atl. Rep. 866 (Md.); Denny *v.* Mattoon, 2 Allen, 361; Nelson *v.* Rountree, 23 Wis. 367; Griffin's Ex'r *v.* Cunningham, 20 Gratt. 31, 109, per *Joynes*, J.; Richards *v.* Rote, 68 Pa. St. 248; State *v.* Doherty, 60 Me. 504; Pryor *v.* Downey, 50 Cal. 388; s. c. 19 Am. Rep. 656. If land is assessed for taxation in a town where it does not lie, it is not competent to make the tax-deed evidence of title. Smith *v.* Sherry, 54 Wis. 114. Compare Walpole *v.* Elliott, 18 Ind. 258, in which there was not a failure of jurisdiction, but an irregular exercise of it.

law, and performed the service demanded by it, could not protect him against further calls, when public policy or public necessity was thought to require them.[1] In like manner, exemptions from taxation are always subject to recall, when they have been granted merely as a privilege, and not for a consideration received by the public; as in the case of exemption of buildings for religious or educational purposes, and the like.[2] So, also, are exemptions of property from execution.[3] So, a license to carry on a particular trade for a specified period, may be recalled before the period has elapsed.[4] So, as before stated, a penalty given by statute may be taken away by statute at any time before judgment is recovered.[5] So, an offered bounty may be recalled, except as to so much as was actually earned while the offer was a continuing one; and the fact that a party has purchased property or incurred expenses in preparation for earning the bounty cannot preclude the recall.[6] A franchise granted by the State with a reservation of a right of repeal must be regarded as a mere privilege while it is suffered to continue, but the legislature may take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchises granted to them solely upon the faith of the sovereign grantor.[7] A statutory right to have

[1] Commonwealth *v.* Bird, 12 Mass. 443; Swindle *v.* Brooks, 34 Ga. 67; Mayer, *Ex parte*, 27 Tex. 715; Bragg *v.* People, 78 Ill. 328; Moore *v.* Cass, 10 Kan. 288; Murphy *v.* People, 37 Ill. 447; State *v.* Miller, 2 Blackf. 35; State *v.* Quimby, 51 Me. 395; State *v.* Wright, 53 Me. 328; State *v.* Forshner, 43 N. H. 89; Dunlap *v.* State, 76 Ala. 460; *Ex parte* Thompson, 20 Fla. 887. And see Dale *v.* The Governor, 3 Stew. 387.

[2] See *ante*, pp. 337, 338, and notes. All the cases concede the right in the legislature to recall an exemption from taxation, when not resting upon contract. The subject was considered in People *v.* Roper, 35 N. Y. 629, in which it was decided that a limited immunity from taxation, tendered to the members of voluntary military companies, might be recalled at any time. It was held not to be a contract, but "only an expression of the legislative will for the time being, in a matter of mere municipal regulation." And see Christ Church *v.* Philadelphia, 24 How. 300; Lord *v.* Litchfield, 36 Conn. 116; East Saginaw Salt Mfg. Co. *v.* East Saginaw, 19 Mich. 259; s. c. in error, 13 Wall. 373.

[3] Bull *v.* Conroe, 13 Wis. 233.

[4] See *ante*, pp. 340–342, notes.

[5] Oriental Bank *v.* Freeze, 18 Me. 109. The statute authorized the plaintiff, suing for a breach of a prison bond, to recover the amount of his judgment and costs. This was regarded by the court as in the nature of a penalty; and it was therefore held competent for the legislature, even after breach, to so modify the law as to limit the plaintiff's recovery to his actual damages. See *ante*, p. 443, note 2, and cases cited.

[6] East Saginaw Salt Mfg. Co. *v.* East Saginaw, 19 Mich, 259; s. c. 2 Am. Rep. 82, and 13 Wall. 373. But as to so much of the bounty as was actually earned before the change in the law, the party earning it has a vested right which cannot be taken away. People *v.* Auditor-General, 9 Mich. 327. And it has been held competent in changing a county seat to provide by law for compensation, through taxation, to the residents of the old site. Wilkinson *v.* Cheatham, 43 Ga. 258.

[7] Per *Smith*, J., in Pratt *v.* Brown, 3 Wis. 603, 611. See *post*, pp. 710–712.

cases reviewed on appeal may be taken away, by a repeal of the statute, even as to causes which had been previously appealed.[1] A mill-dam act which confers upon the person erecting a dam the right to maintain it, and flow the lands of private owners on paying such compensation as should be assessed for the injury done, may be repealed even as to dams previously erected.[2] These illustrations must suffice under the present head.

Consequential Injuries.

It is a general rule that no one has a vested right to be protected against consequential injuries arising from a proper exercise of rights by others.[3] This rule is peculiarly applicable to injuries resulting from the exercise of public powers. Under the police power the State sometimes destroys, for the time being, and perhaps permanently, the value to the owner of his property, without affording him any redress. The construction of a new way or the discontinuance of an old one may very seriously affect the value of adjacent property; the removal of a county or State capital will often reduce very largely the value of all the real estate of the place from whence it was removed; but in neither case can the parties whose interests would be injuriously affected, enjoin the act or claim compensation from the public.[4] The general laws of the State may be so changed as to transfer, from one town to another, the obligation to support certain individuals, who may become entitled to support as paupers, and the constitution will present no impediment.[5] The granting of a charter to a new corporation may sometimes render valueless the franchise of an existing corporation; but unless the State by contract has precluded itself from such new grant, the incidental injury can constitute no obstacle.[6] But indeed it seems idle to specify instances,

[1] *Ex parte* McCardle, 7 Wall. 506. See State *v.* Slevin, 16 Mo. App. 541. And that the right to an appeal, if not expressly given by constitution, need not be provided for. Kundinger *v.* Saginaw, 59 Mich. 325; Minneapolis *v.* Wilkin, 30 Minn. 140; La Croix *v.* Co. Com'rs, 50 Conn. 321. Time may be shortened during a period of disability, in which one may bring an appeal after such disability is removed. Rupert *v.* Martz, 116 Ind. 72.

[2] Pratt *v.* Brown, 3 Wis. 603. But if the party maintaining the dam had paid to the other party for the permanent flowing of his land a compensation assessed under the statute, it might be otherwise.

[3] For the doctrine *damnum absque injuria*, see Broom's Maxims, 185; Sedgwick on Damages, 30, 112; Cooley on Torts, 93.

[4] See *ante*, p. 253, and cases cited in note. Also Wilkinson *v.* Cheatham, 43 Ga. 258; Fearing *v.* Irwin, 55 N. Y. 486; Newton *v.* Commissioners, 100 U. S. 548; Howes *v.* Grush, 131 Mass. 207; Heller *v.* Atchison, &c. R. R. Co., 28 Kan. 625.

[5] Goshen *v.* Richmond, 4 Allen, 458; Bridgewater *v.* Plymouth, 97 Mass. 382.

[6] The State of Massachusetts granted to a corporation the right to construct a toll-bridge across the Charles River, under a charter which was to continue for forty years, afterwards extended to seventy, at

inasmuch as all changes in the laws of the State are liable to inflict incidental injury upon individuals, and, if every citizen was entitled to remuneration for such injury, the most beneficial and necessary changes in the law might be found impracticable of accomplishment.

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

In former times sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government.[1] But the ideas which

the end of which period the bridge was to become the property of the Commonwealth. During the term the corporation was to pay 200*l.* annually to Harvard College. Forty-two years after the bridge was opened for passengers, the State incorporated a company for the purpose of erecting another bridge over the same river, a short distance only from the first, and which would accommodate the same passengers. The necessary effect would be to decrease greatly the value of the first franchise, if not to render it altogether worthless. But the first charter was not exclusive in its terms; no contract was violated in granting the second; the resulting injury was incidental to the exercise of an undoubted right by the State, and as all the vested rights of the first corporation still remained, though reduced in value by the new grant, the case was one of damage without legal injury. Charles River Bridge *v.* Warren Bridge, 7 Pick. 344, and 11 Pet. 420. See also Turnpike Co. *v.* State, 3 Wall. 210; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35; Hollister *v.* Union Co., 9 Conn. 436; s. c. 25 Am. Dec. 36; English *v.* New Haven, &c. Co., 32 Conn. 240; Binghamton Bridge Case, 27 N. Y. 87, and 3 Wall. 51; Lehigh Valley Water Co's. App., 102 Pa. St. 515; Rockland Water Co. *v.* Camden & R. W. Co., 80 Me. 544; Montjoy *v.* Pillow, 64 Miss. 705.

[1] Montesq. Sp. of the Laws, B. 7. Such laws, though common in some countries, have never been numerous in England. See references to the legislation of this character, 4 Bl. Com. 170. Some of these statutes prescribed the number of courses permissible at dinner or other meal, while others were directed to restraining extravagance in dress. See Hallam, Mid. Ages, c. 9, pt. II.; and as to Roman sumptuary laws, Encyc. Metrop. Vol. X. p. 110. Adam Smith said of such laws,

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

But cases may sometimes present themselves in which improvements actually made by one man upon the land of another, even though against the will of the owner, ought on grounds of strict equity to constitute a charge upon the land improved. If they have been made in good faith, and under a reasonable expectation on the part of the person making them, that he was to reap the benefit of them, and if the owner has stood by and suffered them

"It is the highest impertinence and presumption in kings and ministers to pretend to watch over the economy of private people, and to restrain their expense, either by sumptuary laws, or by prohibiting the importation of foreign luxuries." Wealth of Nations, B. 2, c. 3. As to prohibitory liquor laws, see *post*, pp. 716–720.

[1] The Kentucky statute referred to was declared unconstitutional in Gaines *v.* Buford, 1 Dana, 484. See also Violett *v.* Violett, 2 Dana, 325.

to be made, but afterwards has recovered the land and appropriated the improvements, it would seem that there must exist against him at least a strong equitable claim for reimbursement of the expenditures, and perhaps no sufficient reason why provision should not be made by law for their recovery.

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

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

[1] Revised Statutes of Vermont of 1839, p. 216.

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

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

[1] Brown *v.* Storm, 4 Vt. 37. This class of legislation was also elaborately examined and defended by *Trumbull*, J., in Ross *v.* Irving, 14 Ill. 171, and in some of the other cases referred to in the succeeding note. See also Bright *v.* Boyd, 1 Story, 478; s. c. 2 Story, 605.

[2] Whitney *v.* Richardson, 31 Vt. 300, 306. For other cases in which similar laws have been held constitutional, see Armstrong *v.* Jackson, 1 Blackf. 374; Fowler *v.* Halbert, 4 Bibb, 54; Withington *v.* Corey, 2 N. H. 115; Bacon *v.* Callender, 6 Mass. 303; Pacquette *v.* Pickness, 19 Wis. 219; Childs *v.* Shower, 18 Iowa, 261; Scott *v.* Mather, 14 Tex. 235; Saun-

Betterment laws, then, recognize the existence of an equitable right, and give a remedy for its enforcement where none had existed before. It is true that they make a man pay for improvements which he has not directed to be made; but this legislation presents no feature of officious interference by the government with private property. The improvements have been made by one person in good faith, and are now to be appropriated by another. The parties cannot be placed *in statu quo*, and the statute accomplishes justice as nearly as the circumstances of the case will admit, when it compels the owner of the land, who, if he declines to sell, must necessarily appropriate the betterments made by another, to pay the value to the person at whose expense they have been made. The case is peculiar; but a statute cannot be void as an unconstitutional interference with private property which adjusts the equities of the parties as nearly as possible according to natural justice.[1]

ders *v.* Wilson, 19 Tex. 194; Brackett *v.* Norcross, 1 Me. 89; Hunt's Lessee *v.* McMahan, 5 Ohio, 132; Longworth *v.* Worthington, 6 Ohio, 9; Stump *v.* Hornback, 94 Mo. 26. See further, Jones *v.* Carter, 12 Mass. 314; Coney *v.* Owen, 6 Watts, 435; Steele *v.* Spruance, 22 Pa. St. 256; Lynch *v.* Brudie, 63 Pa. St. 206; Dothage *v.* Stuart, 35 Mo. 251; Fenwick *v.* Gill, 38 Mo. 510; Howard *v.* Zeyer, 18 La. Ann. 407; Pope *v.* Macon, 23 Ark. 644; Marlow *v.* Adams, 24 Ark. 100; Ormond *v.* Martin, 37 Ala. 598; Love *v.* Shartzer, 31 Cal. 487; Griswold *v.* Bragg, 48 Conn. 577; s. c. 18 Blatch. 202; Kidd *v.* Guild, 48 Mich. 307. For a contrary ruling, see Nelson *v.* Allen, 1 Yerg. 360, in which, however, Judge *Catron* in a note says the question was really not involved. Mr. Justice *Story* held, in Society, &c. *v.* Wheeler, 2 Gall. 105, that such a law could not constitutionally be made to apply to improvements made before its passage; but this decision was made under the New Hampshire Constitution, which forbade retrospective laws. The principles of equity upon which such legislation is sustained would seem not to depend upon the time when the improvements were made. See Davis's Lessee *v.* Powell, 13 Ohio, 308. In Childs *v.* Shower, 18 Iowa, 261, it was held that the legislature could not constitutionally make the value of the improvements a personal charge against the owner of the land, and authorized a personal judgment against him. The same ruling was had in McCoy *v.* Grandy, 3 Ohio St. 463. A statute had been passed authorizing the occupying claimant at his option, after judgment rendered against him for the recovery of the land, to demand payment from the successful claimant of the full value of his lasting and valuable improvements, or to pay to the successful claimant the value of the land without the improvements, and retain it. The court says: "The occupying claimant act, in securing to the occupant a compensation for his improvements as a condition precedent to the restitution of the lands to the owner, goes to the utmost stretch of the legislative power touching this subject. And the statute . . . providing for the transfer of the fee in the land to the occupying claimant, without the consent of the owner, is a palpable invasion of the right of private property, and clearly in conflict with the Constitution."

[1] In Harris *v.* Inhabitants of Marblehead, 10 Gray, 40, it was held that the betterment law did not apply to a town which had appropriated private property for the purposes of a school-house, and erected the house thereon. The law, it was said, did not apply "where a party is taking land by force of the statute, and is bound to see that all the steps are regular. If it did, the party taking the land might in fact compel a sale of the land, or compel the party to buy the school-house, or any other building erected

Unequal and Partial Legislation.

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

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

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

upon it." But as a matter of constitutional authority, we see no reason to doubt that the legislature might extend such a law even to the cases of this description.

[1] This doctrine was applied in Ferguson *v.* Landram, 5 Bush, 230, to parties who had obtained a statute for the levy of a tax to refund bounty moneys, which statute was held void as to other persons. And see Motz *v.* Detroit, 18 Mich. 495; Dewhurst *v.* Allegheny, 95 Pa. St. 437; Andrus *v.* Board of Police, 6 Sou. Rep. 603 (La.). A man may be bound by his assent to an act changing the rules of descent in his particular case, though it would be void if not assented to. Beall *v.* Beall, 8 Ga. 210.

[2] See *ante*, pp. 149–151, notes, and cases cited. To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all persons within the territorial limits described in the act. State *v.* County Commissioners of Baltimore, 29 Md. 516. See Pollock *v.* McClurken, 42 Ill. 370; Haskel *v.* Burlington, 30 Iowa, 232; Unity *v.* Burrage, 103 U. S. 447. Liquor sales may be forbidden in the country and permitted in the towns. State *v.* Berlin, 21

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

S. C. 292; Howell *v.* State, 71 Ga. 324. See Marmet *v.* State, 45 Ohio St. 63. Compare Hatcher *v.* State, 12 Lea, 368. An act may be made a misdemeanor in certain counties only. Davis *v.* State, 68 Ala. 58; State *v.* Moore, 10 S. E. Rep. 143 (N. C.). But a law is void which makes pool selling innocent under certain circumstances, while it is generally an offence. Daly *v.* State, 13 Lea, 228.

[1] See the Iowa R. R. Land Co. *v.* Soper, 39 Iowa, 112; Matter of Goodell, 39 Wis. 232; s. c. 20 Am. Rep. 42; Commonwealth *v.* Hamilton Mfg. Co., 120 Mass. 383.

[2] The constitutional requirement of equal protection of the laws does not make necessary the same local regulations, municipal powers, or judicial organization or jurisdiction. Missouri *v.* Lewis, 101 U. S. 22. See Strauder *v.* W. Virginia, 100 U. S. 303; Virginia *v.* Rives, 100 U. S. 313; *Ex parte* Virginia, 100 U. S. 339.

[3] The prohibition of special legislation for the benefit of individuals does not preclude laws for the benefit of particular classes; as, for example, mechanics and other laborers. Davis *v.* State, 3 Lea, 376. But under it peculiar provisions as to liens cannot be made applicable to but two counties. Woodard *v.* Brien, 14 Lea, 520. A statute exempting from taxation property to the amount of $500 of widows and maids held unconstitutional because unequal. State *v.* Indianapolis, 69 Ind. 375; s. c. 35 Am. Rep. 223; Warner *v.* Curran, 75 Ind. 309.

It is not competent to except from right to recover for injury from defective sidewalk all who do not reside in States where similar injuries constitute right of action. Pearson *v.* Portland, 69 Me. 278; s. c. 31 Am. Rep. 276. The rule of non-liability of the master to a servant for injury suffered through a fellow-servant's negligence may be abrogated as to railroad companies. Missouri Pac Ry. Co. *v.* Mackey, 33 Kan. 298. A police regulation, affecting all railroads, to enforce a quicker delivery of freight is valid. Little Rock, &c. Ry. Co. *v.* Hanniford, 49 Ark. 291. So one forbidding burying an animal killed by a train. Bannon *v.* State, 49 Ark. 167. An at-

or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge.

But a statute would not be constitutional which should proscribe a class or a party for opinion's sake,[1] or which should

torney fee, as a penalty, may be allowed for non-compliance with fencing law if animal is so killed. Peoria, D. & E. Ry. Co. *v.* Duggan, 109 Ill. 537. *Contra*, Wilder *v.* Chicago, &c. Ry. Co., 38 N. W. Rep. 289 (Mich.); South, &c. R. R. Co. *v.* Morris, 65 Ala. 193; as class legislation.

[1] The sixth section of the Metropolitan Police Law of Baltimore (1859) provided that "no Black Republican, or indorser or supporter of the Helper book, shall be appointed to any office" under the Board of Police which it established. This was claimed to be unconstitutional, as introducing into legislation the principle of proscription for the sake of political opinion, which was directly opposed to the cardinal principles on which the Constitution was founded. The court dismissed the objection in the following words: "That portion of the sixth section which relates to Black Republicans, &c., is obnoxious to the objection urged against it, if we are to consider that class of persons as proscribed on account of their political or religious opinions. But we cannot understand, officially, who are meant to be affected by the proviso, and therefore cannot express a judicial opinion on the question." Baltimore *v.* State, 15 Md. 376, 468. See also p. 484. This does not seem to be a very satisfactory disposition of so grave a constitutional objection to a legislative act. That courts may take judicial notice of the fact that the electors of the country are divided into parties with well-known designations cannot be doubted; and when one of these is proscribed by a name familiarly applied to it by its opponents, the inference that it is done because of political opinion seems to be too conclusive to need further support than that which is found in the act itself. And we know no reason why courts should decline to take notice of these facts of general notoriety, which, like the names of political parties, are a part of the public history of the times A statute requiring causes in which the venue has been changed to be remanded on the affidavits of three unconditional Union men, that justice can be had in the courts where it originated, held void, on the principles stated in the text, in Brown *v.* Haywood, 4 Heisk. 357

It has been decided that State laws forbidding the intermarriage of whites and blacks are such police regulations as are entirely within the power of the States, notwithstanding the provisions of the new amendments to the federal Constitution. State *v.* Jackson, 80 Mo. 175; State *v* Gibson, 36 Ind. 389; s. c. 10 Am. Rep. 42; State *v.* Hairston, 63 N. C. 451; State *v.* Kenney, 76 N. C. 251; s. c. 22 Am. Rep. 683; Ellis *v.* State, 42 Ala. 525; Green *v.* State, 58 Ala. 190; s. c. 29 Am. Rep. 739; Kinney's Case, 30 Gratt. 858; Frasher *v.* State, 3 Tex. App. 263; s. c. 30 Am. Rep. 131; Lonas *v.* State, 3 Heisk. 287; s. c. 1 Green, Cr. R. 452; *Ex rel.* Hobbs & Johnson, 1 Woods, 537; *Ex parte* Kinney, 3 Hughes, 9; *Ex parte* Francois, 3 Woods, 367. It is also said colored children may be required to attend separate schools, if impartial provision is made for their instruction. State *v.* Duffy, 7 Nev. 342; s. c. 8 Am. Rep. 713; Cory *v.* Carter, 48 Ind. 327; Ward *v.* Flood, 48 Cal. 36; State *v.* McCann, 21 Ohio St. 198; People *v.* Gallagher, 93 N. Y. 438; Bertonneau *v.* School Directors, 3 Woods, 177. But some States forbid this. People

select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt.[1]

The legislature may suspend the operation of the general laws of the State; but when it does so the suspension must be general, and cannot be made for individual cases or for particular localities.[2] Privileges may be granted to particular individuals when by so doing the rights of others are not interfered with; disabilities may be removed; the legislature as *parens patriæ*, when not forbidden, may grant authority to the guardians or trustees of

v. Board of Education, 18 Mich. 400; Clark *v.* Board of Directors, 24 Iowa, 266; Dove *v.* School District, 41 Iowa, 689; Chase *v.* Stephenson, 71 Ill. 383; People *v.* Board of Education of Quincy, 101 Ill. 308; Board of Education *v.* Tinnon, 26 Kan. 1; Pierce *v.* Union Dist., 46 N. J. L.76; Kaine *v.* Com., 101 Pa. St. 490. See Dawson *v.* Lee, 83 Ky. 49. And when separate schools are not established for colored children, they are entitled to admission to the other public schools. State *v.* Duffy, *supra*. Where separate schools are allowed, property of whites cannot be taxed for white schools alone, and of negroes for negro schools. Puitt *v.* Com'rs, 94 N. C. 709; Claybrook *v.* Owensboro, 16 Fed. Rep. 297.

[1] Lin Sing *v.* Washburn, 20 Cal. 534; Brown *v.* Haywood, 4 Heisk. 357. A San Francisco ordinance required every male person imprisoned in the county jail to have his hair cut to an uniform length of one inch. This was held invalid, as being directed specially against the Chinese. Ah Kow *v.* Nunan, 5 Sawyer, 552. See Yick Wo *v.* Hopkins, 118 U. S. 356. In Louisiana an ordinance forbidding the sale of goods on Sunday, but excepting from its operation those keeping their places of business closed on Saturday, was held partial and therefore unconstitutional. Shreveport *v.* Levy, 26 La. Ann. 671; s. c. 21 Am. Rep. 553. A Sunday closing law is not unequal because it excepts certain business as necessary. Lieberman *v.* State, 42 N. W. Rep. 419 (Neb.). A liquor seller may not be forbidden to sign the bond of another liquor seller. Kuhn *v.* Common Council, 70 Mich. 534. Nor may the right to sell liquor, where a lawful business, be made dependent on the caprice or private judgment of the board which approves the sellers' bond. People *v.* Haug, 37 N. W. Rep. 21 (Mich.). Keeping open after legal hours cannot be declared a breach of the peace for which an arrest may be made without a warrant. *Id.* There is no reason, however, why the law should not take notice of peculiar views held by some classes of people, which unfit them for certain public duties, and excuse them from the performance of such duties; as Quakers are excused from military duty, and persons denying the right to inflict capital punishment are excluded from juries in capital cases. These, however, are in the nature of exemptions, and they rest upon considerations of obvious necessity.

[2] The statute of limitations cannot be suspended in particular cases while allowed to remain in force generally. Holden *v.* James, 11 Mass. 396; Davison *v.* Johonnot, 7 Met. 388. See *ante*, p. 448, note. The general exemption laws cannot be varied for particular cases or localities. Bull *v.* Conroe, 13 Wis. 233, 244. The legislature, when forbidden to grant divorces, cannot pass special acts authorizing the courts to grant divorces in particular cases for causes not recognized in the general law. Teft *v.* Teft, 3 Mich. 67; Simonds *v.* Simonds, 103 Mass. 572. See, for the same principle, Alter's Appeal, 67 Pa. St. 341. The authority in emergencies to suspend the civil laws in a part of the State only, by a declaration of martial law, we do not call in question by anything here stated. Nor in what we have here said do we have any reference to suspensions of the laws generally, or of any particular law, under the extraordinary circumstances of rebellion or war.

incompetent persons to exercise a statutory control over their estates for their assistance, comfort, or support, or for the discharge of legal or equitable liens upon their property; but every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough."[1] This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.[2]

[1] Locke on Civil Government, § 142; State *v.* Duffy, 7 Nev. 349; Strauder *v.* W. Virginia, 100 U. S. 303; Bernier *v.* Russell, 89 Ill. 60.

[2] In Lewis *v.* Webb, 3 Me. 326, the validity of a statute granting an appeal from a decree of the Probate Court in a particular case came under review. The court say: "On principle it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality. Can it be supposed for a moment that, if the legislature should pass a general law, and add a section by way of proviso, that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? And how does the supposed case differ from the present? A resolve passed after the general law can produce only the same effect as such proviso. In fact, neither can have any legal operation." See also Durham *v.* Lewiston, 4 Me. 140; Holden *v.* James, 11 Mass. 396; Piquet, Appellant, 5 Pick. 65; Budd *v.* State, 3 Humph. 483; Van Zant *v.* Waddell, 2 Yerg. 260; People *v.* Frisbie, 26 Cal. 135; Davis *v.* Menasha, 21 Wis. 491; Lancaster *v.* Barr, 25 Wis. 560; Brown *v.* Haywood, 4 Heisk. 357; Wally's Heirs *v.* Kennedy, 2 Yerg. 554; s. c. 24 Am. Dec. 511. In the last case it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law; the mass of the community and those who made the law, by another; whereas the like general law affecting the whole community equally could not have been passed." Special burdens cannot be laid upon a particular class in the community. Millett *v.* People, 117 Ill. 294. Miners and manufacturers alone cannot be forbidden to pay in store orders. State *v.* Goodwill, 10 S. E. Rep. 285 (W. Va.). See, also, Godcharles *v.* Wigeman, 113 Pa. St. 431; State *v.* Fire Creek, &c. Co., 10 S. E. Rep. 288 (W. Va.). Recovery against newspaper publishers for libel cannot be limited to actual damage provided a retraction is published and the libel was published in good faith. Park *v.* Detroit

Special courts cannot be created for the trial of the rights and obligations of particular parties;[1] and those cases in which legislative acts granting new trials or other special relief in judicial proceedings, while they have been regarded as usurpations of judicial authority, have also been considered obnoxious to the objection that they undertook to suspend general laws in special cases. The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, — like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their "pursuit of happiness;"[2] and those who should claim a

Free Press Co., 40 N. W. Rep. 731 (Mich.). Otherwise in Minnesota. Allen *v.* Pioneer Press Co., 40 Minn. 117. See further, Officer *v.* Young, 5 Yerg. 320; Griffin *v.* Cunningham, 20 Gratt. 31 (an instructive case); Dorsey *v.* Dorsey, 37 Md. 64; s. c. 11 Am. Rep. 528; Trustees *v.* Bailey, 10 Fla. 238; Lawson *v.* Jeffries, 47 Miss. 686; s. c. 12 Am. Rep. 342; Arnold *v.* Kelley, 5 W. Va. 446; *ante*, pp. 113–115. But an act was sustained in Minnesota which gave one individual a right of appeal from the legal tribunal and denied it to others. Dike *v.* State, 38 Minn. 366. And physicians who have not a diploma and have not practised a certain time in the State may be required to take out a license. State *v.* Green, 112 Ind. 462; People *v.* Phippen, 37 N. W. Rep. 888. *Contra* in New Hampshire, State *v.* Pennoyer, 18 Atl. Rep. 878; State *v.* Hinman, *id.* 194. See further cases, p. 745, note 4, *post*.

[1] As, for instance, the debtors of a particular bank. Bank of the State *v.* Cooper, 2 Yerg. 599; s. c. 24 Am. Dec. 517. Compare Durkee *v.* Janesville, 28 Wis. 464, in which it was declared that a special exemption of the city of Janesville from the payment of costs in any proceeding against it to set aside a tax or tax sale was void. And see Memphis *v.* Fisher, 9 Bax. 240. In Matter of Nichols, 8 R. I. 50, a special act admitting a tort debtor committed to jail to take the poor debtor's oath and be discharged, was held void. The legislature cannot confer upon a corporation privileges or exemptions which it could not confer constitutionally upon a private person. Gordon *v.* Building Association, 12 Bush, 110. As to what is not a violation of this principle, see United States *v.* Union Pac. R. R. Co., 98 U. S. 569.

[2] Burlamaqui (Politic. Law, c. 3, § 15) defines *natural liberty* as the right which nature gives to all mankind of disposing of their persons and property after the

right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived.

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

The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so; and, as a rule of construction, it is to be presumed they were probably not contemplated or

manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and so as not to interfere with an equal exercise of the same rights by other men. See 1 Bl. Com. 125. Lieber says: "Liberty of social man consists in the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of, or in the most efficient protection of his rights, claims, interests, as a man or citizen, or of his humanity manifested as a social being." Civil Liberty and Self-Government. "Legal Liberty," says Mackintosh, in his essay on the Study of the Law of Nature and of Nations, "consists in every man's security against wrong."

[1] In the Case of Monopolies, Darcy *v.* Allain, 11 Rep. 84, the grant of an exclusive privilege of making playing cards was adjudged void, inasmuch as "the sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; *for the end* of all these monopolies is for the private gain of the patentees." And see Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19; State *v.* Cincinnati, &c. Gas Co., 18 Ohio St. 262. Compare with these, State *v.* Milwaukee Gas Light Co., 29 Wis. 454. On this ground it has been denied that the State can exercise the power of taxation on behalf of corporations who undertake to make or to improve the thoroughfares of trade and travel for their own benefit. The State, it is said, can no more tax the community to set one class of men up in business than another; can no more subsidize one occupation than another; can no more make donations to the men who build and own railroads in consideration of expected incidental benefits, than it can make them to the men who build stores or manufactories in consideration of similar expected benefits. People *v.* Township Board of Salem, 20 Mich. 452. See further, as to monopolies, Chicago *v.* Rumpff, 45 Ill. 90; Gale *v.* Kalamazoo, 23 Mich. 344. In State *v.* Mayor, &c. of Newark, 35 N. J. 157, s. c. 10 Am. Rep. 223, the doctrine of the text was applied to a case in which by statute the property of a society had been exempted from "taxes and assessments;" and it was held that only the ordinary public taxes were meant, and the property might be subjected to local assessments for municipal purposes. State grants are not exclusive unless made so in express terms. Tuckahoe Canal Co. *v.* Railroad Co., 11 Leigh, 42; s. c. 36 Am. Dec. 374; Gaines *v.* Coates, 51 Miss. 335; Wright *v.* Nagle, 101 U. S. 791. Where monopolies are forbidden, it is nevertheless competent to give exclusive rights to a water company to supply a city for a term of years. Memphis *v.* Water Co., 5 Heisk. 495. A corporation formed under a general law allowing formation of gas companies cannot as part of its corporate purposes include the purchase and holding of shares of existing gas companies, thus creating a monopoly. People *v.* Chicago Gas Trust Co., 22 N. E. Rep. 798 (Ill.). See People *v.* Refining Co., 7 N. Y. Supp. 406.

designed. It has been held that a statute requiring attorneys to render services in suits for poor persons without fee or reward, was to be confined strictly to the cases therein prescribed, and if by its terms it expressly covered civil cases only, it could not be extended to embrace defences of criminal prosecutions.[1] So where a constitutional provision confined the elective franchise to "*white* male citizens," and it appeared that the legislation of the State had always treated of negroes, mulattoes, and *other colored persons* in contradistinction to white, it was held that although quadroons, being a recognized class of colored persons, must be excluded, yet that the rule of exclusion would not be carried further.[2] So a statute making parties witnesses against themselves cannot be construed to compel them to disclose facts which would subject them to criminal punishment.[3] And a statute which authorizes summary process in favor of a bank against debtors who have by express contract made their obligations payable at such bank, being in derogation of the ordinary principles of private right, must be subject to strict construction.[4] These cases are only illustrations of a rule of general acceptance.[5]

There are unquestionably cases in which the State may grant privileges to specified individuals without violating any constitutional principle, because, from the nature of the case, it is impossible they should be possessed and enjoyed by all;[6] and if it is important that they should exist, the proper State authority must be left to select the grantees.[7] Of this class are grants of the franchise to be a corporation.[8] Such grants, however, which con-

[1] Webb *v.* Baird, 6 Ind. 13.

[2] People *v.* Dean, 14 Mich. 406. See Bailey *v.* Fiske, 34 Me. 77; Monroe *v.* Collins, 17 Ohio St. 665. The decisions in Ohio were still more liberal, and ranked as white persons all who had a preponderance of white blood. Gray *v.* State, 4 Ohio, 353; Jeffres *v.* Ankeny, 11 Ohio, 372; Thacker *v.* Hawk, 11 Ohio, 376; Anderson *v.* Millikin, 9 Ohio St. 568. But see Van Camp *v.* Board of Education, 9 Ohio St. 406. Happily all such questions are now disposed of by constitutional amendments. It seems, however, in the opinion of the Supreme Court of California, that these amendments do not preclude a State denying to a race, *e. g.* the Chinese, the right to testify against other persons. People *v.* Brady, 40 Cal. 198; s. c. 6 Am. Rep. 604.

[3] Broadbent *v.* State, 7 Md. 416. See Knowles *v.* People, 15 Mich. 408.

[4] Bank of Columbia *v.* Okely, 4 Wheat. 235.

[5] See 1 Bl. Com. 89 and note.

[6] Mason *v.* Bridge Co., 17 W. Va. 396. But a franchise is not necessarily exclusive so long as there is nothing to prevent granting like power to another corporation. Matter of Union Ferry Co., 98 N. Y. 139.

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

[8] That proper grants of this sort are not to be regarded as partial legislation, see Tipton *v.* Locomotive Works, 103 U. S. 523; s. c. 1 Am. & Eng. R. R. Cas. 517; North and S. Ala. R. R. Co. *v.* Morris, 65 Ala. 193.

fer upon a few persons what cannot be shared by the many, and which, though supposed to be made on public grounds, are nevertheless frequently of great value to the corporators, and therefore sought with avidity, are never to be extended by construction beyond the plain terms in which they are conferred. No rule is better settled than that charters of incorporation are to be construed strictly against the corporators.[1] The just presumption in every such case is, that the State has granted in express terms all that it designed to grant at all. "When a State," says the Supreme Court of Pennsylvania, "means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power which belongs to her, it is so easy to say so, that we will never believe it to be meant when it is not said. . . . In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending [its privileges], let the legislature see to it, but let it be remembered that nothing but plain English words will do it."[2] This is sound doctrine, and should be vigilantly observed and enforced.

[1] Providence Bank *v.* Billings, 4 Pet. 514; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 544; Perrine *v.* Chesapeake & Delaware Canal Co., 9 How. 172; Richmond, &c. R. R. Co. *v.* Louisa R. R. Co., 13 How. 71; Bradley *v.* N. Y. & N. H. R. R. Co., 21 Conn. 294; Parker *v.* Sunbury & Erie R. R. Co., 19 Pa. St. 211; Wales *v.* Stetson, 2 Mass. 143; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87, and 3 Wall. 51; State *v.* Krebs, 64 N. C. 604.

[2] Pennsylvania R. R. Co. *v.* Canal Commissioners, 21 Pa. St. 9, 22. And see Commonwealth *v.* Pittsburg, &c. R. R. Co., 24 Pa. St. 159; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87, 93, per *Wright*, J.; Baltimore *v.* Baltimore, &c. R. R. Co., 21 Md. 50; Tuckahoe Canal Co. *v.* Railroad Co., 11 Leigh, 42; s. c. 36 Am. Dec. 374; Richmond *v.* Richmond & Danville R. R. Co., 21 Gratt. 604; Holyoke Co. *v.* Lyman, 15 Wall. 500; Delancey *v.* Insurance Co., 52 N. H. 581; Spring Valley Water Works *v.* San Francisco, 52 Cal. 111; Gaines *v.* Coates, 51 Miss. 335. We quote from the Supreme Court of Connecticut in Bradley *v.* N. Y. & N. H. R. R. Co., 21 Conn. 294, 306: "The rules of construction which apply to general legislation, in regard to those subjects in which the public at large are interested, are essentially different from those which apply to private grants to individuals, of powers or privileges designed to be exercised with special reference to their own advantage, although involving in their exercise incidental benefits to the community generally. The former are to be expounded largely and beneficially for the purposes for which they were enacted, the latter liberally, in favor of the public, and strictly as against the grantees. The power in the one case is original and inherent in the State or sovereign power, and is exercised solely for the general good of the community; in the other it is merely derivative, is special if not exclusive in its character, and is in derogation of common right, in the sense that it confers privileges to which the members of the community at large are not entitled. Acts of the former kind, being dictated solely by a regard to the benefit of the public generally, attract none of that prejudice or jealousy towards them which naturally would arise towards those of the other description, from the consideration that the latter were obtained with a view to the benefit of particular individuals, and the apprehension that

And this rule is not confined to the grant of a corporate franchise, but it extends to all grants of franchises or privileges by the State to individuals, in the benefits of which the people at large cannot participate. "Private statutes," says *Parsons*, Ch. J., "made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words or from necessary implication." [1] And the grant of ferry rights, or the right to erect a toll-bridge, and the like, is not only to be construed strictly against the grantees, but it will not be held to exclude the grant of a similar and competing privilege to others, unless the terms of the grant render such construction imperative.[2]

their interests might be promoted at the sacrifice or to the injury of those of others whose interests should be equally regarded. It is universally understood to be one of the implied and necessary conditions upon which men enter into society and form governments, that sacrifices must sometimes be required of individuals for the general benefit of the community, for which they have no rightful claim to specific compensation; but, as between the several individuals composing the community, it is the duty of the State to protect them in the enjoyment of just and equal rights. A law, therefore, enacted for the common good, and which there would ordinarily be no inducement to pervert from that purpose, is entitled to be viewed with less jealousy and distrust than one enacted to promote the interests of particular persons, and which would constantly present a motive for encroaching on the rights of others."

[1] Coolidge *v.* Williams, 4 Mass. 140. See also Dyer *v.* Tuscaloosa Bridge Co., 2 Port. (Ala.) 296; s. c. 27 Am. Dec. 655; Grant *v.* Leach, 20 La. Ann. 329. In Sprague *v.* Birdsall, 2 Cow. 419, it was held that one embarking upon the Cayuga Lake six miles from the bridge of the Cayuga Bridge Co., and crossing the lake in an oblique direction, so as to land within sixty rods of the bridge, was not liable to pay toll under a provision in the charter of said company which made it unlawful for any person to cross within three miles of the bridge without paying toll. In another case arising under the same charter, which authorized the company to build a bridge across the lake *or* the outlet thereof, and to rebuild in case it should be destroyed or carried away by the ice, and prohibited all other persons from erecting a bridge within three miles of the place where a bridge should be erected by the company, it was held, after the company had erected a bridge across the lake and it had been carried away by the ice, that they had no authority afterwards to rebuild across the *outlet* of the lake, two miles from the place where the first bridge was built, and that the restricted limits were to be measured from the place where the first bridge was erected. Cayuga Bridge Co. *v.* Magee, 2 Paige, 116; s. c. 6 Wend. 85. In Chapin *v.* The Paper Works, 30 Conn. 461, it was held that statutes giving a preference to certain creditors over others should be construed with reasonable strictness, as the law favored equality. In People *v.* Lambier, 5 Denio, 9, it appeared that an act of the legislature had authorized a proprietor of lands lying in the East River, which is an arm of the sea, to construct wharves and bulkheads in the river, in front of his land, and there was at the time a public highway through the land, terminating at the river. Held, that the proprietor could not, by filling up the land between the shore and the bulkhead, obstruct the public right of passage from the land to the water, but that the street was, by operation of law, extended from the former terminus over the newly made land to the water. Compare Commissioners of Inland Fisheries *v.* Holyoke Water Power Co., 104 Mass. 446; s. c. 6 Am. Rep. 247; Kingsland *v.* Mayor, &c., 35 Hun, 458; Detroit *v.* Backus, 49 Mich. 110.

[2] Mills *v.* St. Clair County, 8 How.

The Constitution of the United States contains provisions which are important in this connection. One of these is, that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States,[1] and all persons born or naturalized in the United States, and subject to its jurisdiction, are declared to be citizens thereof, and of the State wherein they reside.[2] The States are also forbidden to make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States,[3] or to deprive any person of life, liberty,

569; Mohawk Bridge Co. *v.* Utica & S. R. R. Co., 6 Paige, 554; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87; s. c. 3 Wall. 51; Montjoy *v.* Pillow, 64 Miss. 705. See cases, *ante*, p. 473, note 6. Compare Hackett *v.* Wilson, 12 Oreg. 25. A ferry franchise may be limited to carrying one way, and another granted for carrying the other. Power *v.* Athens, 99 N. Y. 592. An exclusive ferry franchise over a river within certain limits does not prevent carrying up and down the river from a point within the limits. Broadnax *v.* Baker, 94 N. C. 675. See Hunter *v.* Moore, 44 Ark. 184.

[1] Const. of United States, art. 4, § 2 See *ante*, pp. 24, 25.

[2] Const. of United States, 14th Amendment.

[3] "The line of distinction between the privileges and immunities of citizens of the United States and those of citizens of the several States must be traced along the boundary of their respective spheres of action, and the two classes must be as different in their nature as are the functions of the respective governments. A citizen of the United States, as such, has the right to participate in foreign and inter-state commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, and to pass from State to State, and into foreign countries, because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws. Story on Const. 4th ed. § 1937. These, therefore, are among the privileges of citizens of the United States. So every citizen may petition the federal authorities which are set over him, in respect to any matter of public concern; may examine the public records of the federal jurisdiction; may visit the seat of government without being subjected to the payment of a tax for the privilege: Crandall *v.* Nevada, 6 Wall. 35; may be purchaser of the public lands on the same terms with others; may participate in the government if he comes within the conditions of suffrage, and may demand the care and protection of the United States when on the high seas or within the jurisdiction of a foreign government. Slaughter House Cases, 16 Wall. 36. The privileges suggest the immunities. Wherever it is the duty of the United States to give protection to a citizen against any harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to federal citizenship.

"One very plain and unquestionable immunity is exemption from any tax, burden, or imposition under State laws, as a condition to the enjoyment of any right or privilege under the laws of the United States. A State, therefore, cannot require one to pay a tax as importer, under the laws of Congress, of foreign merchandise: Ward *v.* Maryland, 12 Wall. 163; nor impose a tax upon travellers passing by public conveyances out of the State: Crandall *v.* Nevada, 6 Wall. 35; nor impose conditions to the right of citizens of other States to sue its citizens in the federal courts. Insurance Co. *v.* Morse, 20 Wall. 445. These instances sufficiently indicate the general rule. Whatever one may claim as of right under the Constitution and laws of the United States by virtue of his citizenship, is a privilege of a citizen of the United States. Whatever the Constitution and laws of the United States entitle him to exemption from, he may claim an immunity in respect to. Slaughter House Cases, 16 Wall. 36. And such a right or privilege is abridged whenever the State law interferes with any legitimate opera-

or property, without due process of law, or to deny to any person within their jurisdiction the equal protection of the laws.[1] Although the precise meaning of "privileges and immunities" is not very conclusively settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to, and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights; and the right to be exempt, in property and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to.[2] To this extent, at least, discriminations could not be made by State laws against them. But it is unquestionable that many other rights and privileges may be made — as they usually are — to depend upon actual residence: such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like. And the constitutional provisions are not violated by a statute which allows process by attachment against a debtor not a resident of the State, notwithstanding such process is not admissible against a resident.[3] The protection by due process of law has already been considered. It was not within the power of the States before the adoption of the fourteenth amendment, to deprive citizens of the equal protection of the laws; but there were servile classes not thus shielded, and when these were made freemen, there were some who disputed their claim to citizenship, and some State laws were in force which established discriminations against them. To settle doubts and preclude all such laws,

tion of the federal authority which concerns his interest, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the federal Constitution or Laws." Cooley, Principles of Const. Law, 246. See United States *v.* Reese, 92 U. S. 214; United States *v.* Cruikshank, 92 U. S. 542; Hall *v.* De Cuir, 95 U. S. 485; Kirkland *v.* Hotchkiss, 100 U. S. 491.

[1] Const. of United States, 14th Amendment. See cases pp. 14-16, *ante*. The fourteenth amendment is violated by a statute which allows the overseers of the poor to commit paupers and vagrants to the work-house without trial. Portland *v.* Bangor, 65 Me. 120; Dunn *v.* Burleigh, 62 Me. 24. It does not confer the right of suffrage upon females. Van Valkenburgh *v.* Brown, 43 Cal. 43; Bradwell *v.* State, 16 Wall. 130; Minor *v.* Happersett, 21 Wall. 162. See *ante*, pp. 481, 482, notes.

Granting licenses for the sale of intoxicating drinks to males only does not violate a constitutional provision which forbids the grant of special privileges or immunities. Blair *v.* Kilpatrick, 40 Ind. 315.

[2] Corfield *v.* Coryell, 4 Wash. 380; Campbell *v.* Morris, 3 H. & McH. 554; Crandall *v.* State, 10 Conn. 339; Oliver *v.* Washington Mills, 11 Allen, 268.

[3] Campbell *v.* Morris, 3 H. & McH. 554; State *v.* Medbury, 3 R. I. 138. And see generally the cases cited, *ante*, p. 25, note. Exemption from garnishment does not apply to a non-resident debtor except by express provision. Kile *v.* Montgomery, 73 Ga. 337.

the fourteenth amendment was adopted; and the same securities which one citizen may demand, all others are now entitled to.

Judicial Proceedings.

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

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

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

It is a maxim in the law that consent can never confer jurisdiction:[2] by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and upon considerations of general public policy defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties.

Accordingly, where a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought

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

[2] Coffin *v.* Tracy, 3 Caines, 129; Blin *v.* Campbell, 14 Johns. 432; Cuyler *v.* Rochester, 12 Wend. 165; Dudley *v.* Mayhew, 3 N. Y. 9; Preston *v.* Boston, 12 Pick. 7; Chapman *v.* Morgan, 2 Greene, (Iowa), 374; Thompson *v.* Steamboat Morton, 2 Ohio St. 26; Gilliland *v.* Administrator of Sellers, 2 Ohio St. 223; Dicks *v.* Hatch, 10 Iowa, 380; McCall *v.* Peachey, 1 Call, 55; Bents *v.* Graves, 3 McCord, 280; Overstreet *v.* Brown, 4 McCord, 79; Green *v.* Collins, 6 Ired. 139; Bostwick *v.* Perkins, 4 Ga. 47; Georgia R. R., &c. *v.* Harris, 5 Ga. 527; State *v.* Bonney, 34 Me. 223; Little *v.* Fitts, 33 Ala. 343; Ginn *v.* Rogers, 9 Ill. 131; Neill *v.* Keese, 5 Tex. 23; Ames *v.* Boland, 1 Minn. 365; Brady *v.* Richardson, 18 Ind. 1; White *v.* Buchanan, 6 Cold. 32; Andrews *v.* Wheaton, 23 Conn. 112; Collamer *v.* Page, 35 Vt. 387.

to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all. Consent is sometimes implied from failure to object; but there can be no waiver of rights by laches in a case where consent would be altogether nugatory.[1]

In regard to private controversies, the law always encourages voluntary arrangements;[2] and the settlements which the parties may make for themselves, it allows to be made for them by arbitrators mutually chosen. But the courts of a country cannot have those controversies referred to them by the parties which the law-making power has seen fit to exclude from their cognizance. If the judges should sit to hear such controversies, they would not sit as a court; at the most they would be arbitrators only, and their action could not be sustained on that theory, unless it appeared that the parties had designed to make the judges their arbitrators, instead of expecting from them valid judicial action as an organized court. Even then the decision could not be binding as a judgment, but only as an award; and a mere neglect by either party to object to the want of jurisdiction could not make the decision binding upon him either as a judgment or as an award. Still less could consent in a criminal case bind the defendant; since criminal charges are not the subject of arbitration, and any infliction of criminal punishment upon an individual, except in pursuance of the law of the land, is a wrong done to the State, whether the individual assented or not. Those cases in which it has been held that the constitutional right of trial by jury cannot be waived are strongly illustrative of the legal view of this subject.[3]

If the parties cannot confer jurisdiction upon a court by consent, neither can they by consent empower any individual other

[1] Bostwick *v.* Perkins, 4 Ga. 47; Hill *v.* People, 16 Mich. 351; White *v.* Buchanan, 6 Cold. 32; Collins *v.* Collins, 37 Pa. St. 387; Green *v.* Creighton, 18 Miss. 159.

[2] Moore *v.* Detroit Locomotive Works, 14 Mich. 266; Coyner *v.* Lynde, 10 Ind. 282.

[3] Brown *v.* State, 8 Blackf. 561; Work *v.* Ohio, 2 Ohio St. 296; Cancemi *v.* People, 18 N. Y. 128; People *v.* Smith, 9 Mich. 193; Hill *v.* People, 16 Mich. 351; Whorton *v.* Morange, 62 Ala. 201; Fleishman *v.* Walker, 91 Ill. 318; Shissler *v.* People, 93 Ill. 472. See also State *v.* Turner, 1 Wright, 20.

than the judge of the court to exercise its powers. Judges are chosen in such manner as shall be provided by law; and a stipulation by parties that any other person than the judge shall exercise his functions in their case would be nugatory, even though the judge should vacate his seat for the purposes of the hearing.[1]

Sometimes jurisdiction of the subject-matter will depend upon considerations of locality, either of the thing in dispute or of the parties. At law certain actions are local, and others are transitory. The first can only be tried where the property which is the subject of the controversy, or in respect to which the controversy has arisen, is situated. The United States courts take cognizance of certain causes by reason only of the fact that the parties are residents of different States or countries.[2] The question of jurisdiction in these cases is sometimes determined by the common law, and sometimes is matter of statutory regulation. But there is a class of cases in respect to which the courts of the several States of the Union are constantly being called upon to exercise authority, and in which, while the jurisdiction is conceded to rest on considerations of locality, there has not, unfortunately, at all times been entire harmony of decision as to what shall confer jurisdiction. We refer now to suits for divorce from the bonds of matrimony.

The courts of one State or country have no general authority to grant divorce, unless for some reason they have control over the particular marriage contract which is sought to be annulled. But what circumstance gives such control? Is it the fact that the marriage was entered into in such country or State? Or that the alleged breach of the marriage bond was within that jurisdiction? Or that the parties resided within it either at the time of the marriage or at the time of the offence? Or that the parties now reside in such State or country, though both marriage and offence may have taken place elsewhere? Or must marriage, offence, and residence, all or any two of them, combine to confer the authority? These are questions which have frequently demanded the thoughtful attention of the courts, who have sought to establish a rule at once sound in principle, and that shall protect as far as possible the rights of the parties, one or the other

[1] Winchester *v.* Ayres, 4 Greene (Iowa), 104. See *post*, 504, note.

[2] See a case where a judgment of a United States court was treated as of no force, because the court had not jurisdiction in respect to the plaintiff. Vose *v.* Morton, 4 Cush. 27. As to third persons, a judgment against an individual may sometimes be treated as void, when he was not suable in that court or in that manner, notwithstanding he may have so submitted himself to the jurisdiction as to be personally bound. See Georgia R. R. &c. *v.* Harris, 5 Ga. 527; Hinchman *v.* Town, 10 Mich. 508.

of whom, unfortunately, under the operation of any rule which can be established, it will frequently be found has been the victim of gross injustice.

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

[1] There are a number of cases in which this subject has been considered. In Inhabitants of Hanover *v.* Turner, 14 Mass. 227, instructions to a jury were sustained, that if they were satisfied the husband, who had been a citizen of Massachusetts, removed to Vermont merely for the purpose of procuring a divorce, and that the pretended cause for divorce arose, if it ever did arise, in Massachusetts, and that the wife was never within the jurisdiction of the court of Vermont, then and in such case the decree of divorce which the husband had obtained in Vermont must be considered as fraudulently obtained, and that it could not operate so as to dissolve the marriage between the parties. See also Vischer *v.* Vischer, 12 Barb. 640; and McGiffert *v.* McGiffert, 31 Barb. 69. In Chase *v.* Chase, 6 Gray, 157, the same ruling was had as to a foreign divorce, notwithstanding the wife appeared in and defended the foreign suit. In Clark *v.* Clark, 8 N. H. 21, the court refused a divorce on the ground that the alleged cause of divorce (adultery), though committed within the State, was so committed while the parties had their domicile abroad. This decision was followed in Greenlaw *v.* Greenlaw, 12 N. H. 200. The court say: "If the defendant never had any domicile in this State, the libellant could not come here, bringing with her a cause of divorce over which this court had jurisdiction. If at the time of the [alleged offence] the domicile of the parties was in Maine, and the facts furnished no cause for a divorce there, she could not come here and allege those matters which had already occurred, as a ground for a divorce under the laws of this State. Should she under such circumstances obtain a decree of divorce here, it must be regarded as a mere nullity elsewhere." In Frary *v.* Frary, 10 N. H. 61, importance was attached to the fact that the *marriage* took place in New Hampshire; and it was held that the court had jurisdiction of the wife's application for a divorce, notwithstanding the offence was committed in Vermont, but during the time of the wife's residence in New Hampshire. See also Kimball *v.* Kimball, 13 N. H 222; Batchelder *v.* Batchelder, 14 N. H. 380; Payson *v.* Payson, 34 N. H. 518; Hopkins *v.* Hopkins, 35 N. H. 474; Foss *v.* Foss, 58 N. H. 283; Norris *v.* Norris, 64 N. H. 523. See Trevino *v.* Trevino, 54 Tex. 261. In Wilcox *v.* Wilcox, 10 Ind. 436, it was held that the residence of the libellant at the time of the application for a divorce was sufficient to confer jurisdiction, and a decree dismissing the bill because the cause for divorce arose out of the State was reversed. And see Tolen

But to render the jurisdiction of a court effectual in any case, it is necessary that the thing in controversy, or the parties in-

v. Tolen, 2 Blackf. 407. Compare Jackson *v.* Jackson, 1 Johns. 424; Barber *v.* Root, 10 Mass. 260; Borden *v.* Fitch, 15 Johns. 121; Bradshaw *v.* Heath, 13 Wend. 407. In any of these cases the question of actual residence will be open to inquiry whenever it becomes important, notwithstanding the record of proceedings is in due form, and contains the affidavit of residence required by the practice. Leith *v.* Leith, 39 N. H. 20. And see McGiffert *v.* McGiffert, 31 Barb. 69; Todd *v.* Kerr, 42 Barb. 317; Hoffman *v.* Hoffman, 46 N. Y. 30; People *v.* Dawell, 25 Mich. 247; Reed *v.* Reed, 52 Mich. 117; Gregory *v.* Gregory, 78 Me. 187; Neff *v.* Beauchamp, 74 Iowa, 92; Chaney *v.* Bryan, 15 Lea, 589. In a purely collateral civil action, jurisdiction is conclusively presumed. Waldo *v.* Waldo, 52 Mich. 94. And see Van Orsdal *v.* Van Orsdal, 67 Iowa, 35. The Pennsylvania cases agree with those of New Hampshire, in holding that a divorce should not be granted unless the cause alleged occurred while the complainant had domicile within the State. Dorsey *v.* Dorsey, 7 Watts, 349; Hollister *v.* Hollister, 6 Pa. St. 449; McDermott's Appeal, 8 W. & S. 251. And they hold also that the injured party in the marriage relation must seek redress in the forum of the defendant, unless where such defendant has removed from what was before the common domicile of both. Calvin *v.* Reed, 35 Pa. St. 375; Elder *v.* Reel, 62 Pa. St. 308; s. c. 1 Am. Rep. 414. If a divorce is procured on publication in another State from that of the husband's domicile, where the offence was committed, it is a nullity in the latter State. Flower *v.* Flower, 42 N. J. Eq. 152. See Cook *v.* Cook, 56 Wis. 195. If one is in good faith a resident, his motive in coming to the State is immaterial. Colburn *v.* Colburn, 70 Mich. 647; Gregory *v.* Gregory, 76 Me. 535. But residence must be actual, not merely legal. Tipton *v.* Tipton, 87 Ky. 243. For cases supporting to a greater or less extent the doctrine stated in the text, see Harding *v.* Alden, 9 Greenl. 140; Ditson *v.* Ditson, 4 R. I. 87; Pawling *v.* Bird's Ex'rs, 13 Johns. 192; Kerr *v.* Kerr, 41 N. Y. 272; Harrison *v.* Harrison, 19 Ala. 499; Thompson *v.* State, 28 Ala. 12; Cooper *v.* Cooper, 7 Ohio, 594; Mansfield *v.* McIntyre, 10 Ohio, 28; Smith *v.* Smith, 4 Greene (Iowa), 266; Yates *v.* Yates, 13 N. J. Eq. 280; Maguire *v.* Maguire, 7 Dana, 181; Waltz *v.* Waltz, 18 Ind. 449; Hull *v.* Hull, 2 Strob. Eq. 174; Manley *v.* Manley, 4 Chand. 97; Hubbell *v.* Hubbell, 3 Wis. 662; Gleason *v.* Gleason, 4 Wis. 64; Hare *v.* Hare, 10 Tex. 355; D'Auvilliers *v.* De Livaudais, 32 La. Ann. 605; Gettys *v.* Gettys, 3 Lea, 260; Smith *v.* Smith, 19 Neb. 706. And see Story, Confl. Laws, § 230 *a;* Bishop on Mar. and Div. (1st ed.) § 727 *et seq.;* Ibid. (4th ed.) Vol. II. § 155 *et seq.* The cases of Hoffman *v.* Hoffman, 46 N. Y. 30; s. c. 7 Am. Rep. 299; Elder *v.* Reel, 62 Pa. St. 308; s. c. 1 Am. Rep. 414; People *v.* Dawell, 25 Mich. 247; Strait *v.* Strait, 3 McArthur, 415; State *v.* Armington, 25 Minn. 29; Sewall *v.* Sewall, 122 Mass. 156; s. c. 23 Am. Rep. 299; Hood *v.* State, 56 Ind. 263; s. c. 26 Am. Rep. 21; Litowich *v.* Litowich, 19 Kan. 451; s. c. 27 Am. Rep. 145, are very explicit in declaring that where neither party is domiciled within a particular State, its courts can have no jurisdiction in respect to their marital *status,* and any decree of divorce made therein must be nugatory. A number of the cases cited hold that the wife may have a domicile separate from the husband, and may therefore be entitled to a divorce, though the husband never resided in the State. These cases proceed upon the theory that, although in general the domicile of the husband is the domicile of the wife, yet that if he be guilty of such act or dereliction of duty in the relation as entitles her to have it partially or wholly dissolved, she is at liberty to establish a separate jurisdictional domicile of her own. Ditson *v.* Ditson, 4 R. I. 87; Harding *v.* Alden, 9 Me. 140; Maguire *v.* Maguire, 7 Dana, 181; Hollister *v.* Hollister, 6 Pa. St. 449; Derby *v.* Derby, 14 Ill. App. 645. The doctrine in New York seems to be, that a divorce obtained in another State, without personal service of process or appearance of the defendant, is absolutely void: Vischer *v.* Vischer, 12

terested, be subjected to the process of the court. Certain cases are said to proceed *in rem*, because they take notice rather of the thing in controversy than of the persons concerned; and the process is served upon that which is the object of the suit, without specially noticing the interested parties; while in other cases the parties themselves are brought before the court by process. Of the first class, admiralty proceedings are an illustration; the court acquiring jurisdiction by seizing the vessel or other thing to which the controversy relates. In cases within this class, notice to all concerned is required to be given, either personally or by some species of publication or proclamation; and if not given, the court which had jurisdiction of the property will have none to render judgment.[1] Suits at the common law, however, proceed against the parties whose interests are sought to be affected; and only those persons are concluded by the adjudication who are served with process, or who voluntarily appear.[2] Some

Barb. 640; McGiffert *v.* McGiffert, 31 Barb. 69; Todd *v.* Kerr, 42 Barb. 317; People *v.* Baker, 76 N. Y. 78; s. c. 32 Am. Rep. 274; Cross *v.* Cross, 108 N. Y. 628; though there is actual notice. O'Dea *v.* O'Dea, 101 N. Y. 23. So in Ontario, Magurn *v.* Magurn, 11 Ont. App. 178. See Cox *v.* Cox, 19 Ohio St. 502; s. c. 2 Am. Rep. 415. An appearance by defendant afterwards for the purposes of a motion to set aside the decree, which motion was defeated on technical grounds, will not affect the question. Hoffman *v.* Hoffman, 46 N. Y. 30; s. c. 7 Am. Rep. 299.

Upon the whole subject of jurisdiction in divorce suits, no case in the books is more full and satisfactory than that of Ditson *v.* Ditson, 4 R. I. 87, which reviews and comments upon a number of the cases cited, and particularly upon the Massachusetts cases of Barber *v.* Root, 10 Mass. 260; Inhabitants of Hanover *v.* Turner, 14 Mass. 227; Harteau *v.* Harteau, 14 Pick. 181; and Lyon *v.* Lyon, 2 Gray, 367. The divorce of one party divorces both. Cooper *v.* Cooper, 7 Ohio, 594. And will leave both at liberty to enter into new marriage relations, unless the local statute expressly forbids the guilty party from contracting a second marriage. See Commonwealth *v.* Putnam, 1 Pick. 136; Baker *v.* People, 2 Hill, 325. A party who has gone into another State and procured a divorce will not be heard to allege his own fraud to impeach it. Elliott *v.* Wohlfrom, 55 Cal. 384. A divorce good at the place of domicile will be sustained in England though the cause would not sustain a divorce there. Harvey *v.* Farnie, L. R. 8 App. Cas. 43; Turner *v.* Thompson, L. R. 13 P. D. 37.

[1] Doughty *v.* Hope, 3 Denio, 594. See Matter of Empire City Bank, 18 N. Y. 199; Nations *v.* Johnson, 24 How. 204, 205; Blackwell on Tax Titles, 213.

[2] Jack *v.* Thompson, 41 Miss. 49. As to the right of an attorney to notice of proceedings to disbar him, see notes to pp. 410, 411, and 498. "Notice of some kind is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicatory power. It is of the essence of a cause. Without it there cannot be parties, and without parties there may be the form of a sentence, but no judgment obligating the person." See Bragg's Case, 11 Coke, 99 *a*; Rex *v.* Chancellor of Cambridge, 1 Str. 567; Cooper *v.* Board of Works, 14 C. B. N. S. 194; Meade *v.* Deputy Marshal, 1 Brock. 324; Goetcheus *v.* Mathewson, 61 N. Y. 420; Underwood *v.* McVeigh, 23 Gratt. 409; McVeigh *v.* United States, 11 Wall. 259; Littleton *v.* Richardson, 34 N. H. 179; Black *v.* Black, 4 Bradf. Sur. Rep. 174, 205; Mead *v.* Larkin, 66 Ala. 87. Succession of Townsend, 36 La. Ann. 447. Where, however, a statute provides for the taking of a certain security, and au-

cases also partake of the nature both of proceedings *in rem* and of personal actions, since, although they proceed by seizing property, they also contemplate the service of process on defendant parties. Of this class are the proceedings by foreign attachment, in which the property of a non-resident or concealed debtor is seized and retained by the officer as security for the satisfaction of any judgment that may be recovered against him, but at the same time process is issued to be served upon the defendant, and which must be served, or some substitute for service had, before judgment can be rendered.

In such cases, as well as in divorce suits, it will often happen that the party proceeded against cannot be found in the State, and personal service upon him is therefore impossible, unless it is allowable to make it wherever he may be found abroad. But any such service would be ineffectual. No State has authority to invade the jurisdiction of another, and by service of process compel parties there resident or being to submit their controversies to the determination of its courts; and those courts will consequently be sometimes unable to enforce a jurisdiction which the State possesses in respect to the subjects within its limits, unless a substituted service is admissible. A substituted service is provided by statute for many such cases; generally in the form of a notice, published in the public journals, or posted, as the statute may direct; the mode being chosen with a view to bring it home, if possible, to the knowledge of the party to be affected, and to give him an opportunity to appear and defend. The right of the legislature to prescribe such notice, and to give it effect as process, rests upon the necessity of the case, and has been long recognized and acted upon.[1]

thorizes judgment to be rendered upon it on motion, without process, the party entering into the security must be understood to assent to the condition, and to waive process and consent to judgment. Lewis *v.* Garrett's Adm'r, 6 Miss. 434; People *v.* Van Eps, 4 Wend. 387; Chappee *v.* Thomas, 5 Mich. 53; Gildersleeve *v.* People, 10 Barb. 35; People *v.* Lott, 21 Barb. 130; Pratt *v.* Donovan, 10 Wis. 378; Murray *v.* Hoboken Land Co., 18 How. 272; Philadelphia *v.* Commonwealth, 52 Pa. St. 451; Whitehurst *v.* Coleen, 53 Ill. 247.

[1] "It may be admitted that a statute which should authorize any debt or damages to be adjudged against a person upon purely *ex parte* proceedings, without a pretence of notice, or any provision for defending, would be a violation of the constitution, and be void; but where the legislature has presented a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of opinion that the courts have not the power to pronounce the proceeding illegal." *Denio*, J., in Matter of Empire City Bank, 18 N. Y. 199, 215. See also, per *Morgan*, J., in Rockwell *v.* Nearing, 35 N. Y. 302, 314; Nations *v.* Johnson, 24 How. 195; Beard *v.* Beard, 21 Ind. 321; Mason *v.* Messenger, 17 Iowa, 261; Cupp *v.* Commissioners of Seneca Co., 19 Ohio St. 173; Campbell *v.* Evans, 45 N. Y. 356; Happy *v.* Mosher, 48 N. Y. 313; Jones *v.* Driskell, 94 Mo.

But such notice is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of, the authority of the court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits, and therefore under the control, of the State; but the notice cannot be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceedings, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another State or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings.[1] Where a party has property in a State, and

190; Palmer *v.* McCormick, 28 Fed. Rep. 541; Traylor *v.* Lide, 7 S. W. Rep. 58 (Tex.). If an absent defendant returns pending publication, he need not be personally served. Duché *v.* Voisin, 18 Abb. N. C. 358. Jurisdiction cannot be acquired by ordering goods of a non-resident for the mere purpose of attaching them. Copas *v.* Anglo-Am. Prov. Co., 41 N. W. Rep. 690 (Mich.). In Burnham *v.* Commonwealth, 1 Duv. 210, a personal judgment against the absconding officers of the provisional government was sustained. But in the case of constructive notice, if the party appears, he has a right to be heard, and this cannot be denied him, even though he be a rebel. McVeigh *v.* United States, 11 Wall. 259, 267.

[1] Pawling *v.* Willson, 13 Johns. 192; Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369; Curtis *v.* Gibbs, 1 Penn. 399; Miller's Ex'r *v.* Miller, 1 Bailey, 242; Cone *v.* Cotton, 2 Blackf. 82; Kilburn *v.* Woodworth, 5 Johns. 37; Robinson *v.* Ward's Ex'r, 8 Johns. 86; Hall *v.* Williams, 6 Pick. 232; Bartlet *v.* Knight, 1 Mass. 401; St. Albans *v.* Bush, 4 Vt. 58; Fenton *v.* Garlick, 6 Johns. 194; Bissell *v.* Briggs, 9 Mass. 462; s. c. 6 Am. Dec. 88; Denison *v.* Hyde, 6 Conn. 508; Aldrich *v.* Kinney, 4 Conn. 380; s. c. 10 Am. Dec. 151; Hoxie *v.* Wright, 2 Vt. 263; Prosser *v.* Warner, 47 Vt. 667; s. c. 19 Am. Rep. 132; Newell *v.* Newton, 10 Pick. 470; Starbuck *v.* Murray, 5 Wend. 148; s. c. 21 Am. Dec. 172; Armstrong *v.* Harshaw, 1 Dev. 187; Bradshaw *v.* Heath, 13 Wend. 407; Bates *v.* Delavan, 5 Paige, 299; Webster *v.* Reid, 11 How. 437; Gleason *v.* Dodd, 4 Met. 333; Green *v.* Custard, 23 How. 484; Eliot *v.* McCormick, 144 Mass. 10. A personal judgment on such service when sued on is no basis for recovery. Needham *v.* Thayer, 147 Mass. 536; Eastman *v.* Dearborn, 63 N. H. 364. But see Everhart *v.* Holloway, 55 Iowa, 179. A personal judgment cannot be based on service by publication or personal service out of the State. Denny *v.* Ashley, 20 Pac. Rep. 331 (Col.). Service by publication may suffice for a decree of partition of land, but not to create a personal demand for costs. Freeman *v.* Alderson, 119 U. S. 185. So if notice is served in another State. Cloyd *v.* Trotter, 118 Ill. 391. A judgment *in personam* declaring bonds void does not bind a non-resident holder where the only notice was constructive by publication. Pana *v.* Bowler, 107 U. S. 529. In *Ex parte* Heyfron, 8 Miss. 127, it was held that an attorney could not be stricken from the rolls without notice of the proceeding, and opportunity to be heard. And see *ante*, p. 410, note. Leaving notice with one's family is not equivalent to personal service. Rape *v.*

resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.

The same rule applies in divorce cases. The courts of the State where the complaining party resides have jurisdiction of the subject-matter; and if the other party is a non-resident, they must be authorized to proceed without personal service of process. The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the *status* of the complaining party, and thereby terminating the marriage;[1] and it might be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, if they were then within its jurisdiction. But a decree on this subject could only be absolutely binding on the parties while the children remained within the jurisdiction; if they acquire a domicile in another State or country, the judicial tribunals of that State or country would have authority to determine the question of their guardianship there.[2]

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

Heaton, 9 Wis. 329. At least after defendant has himself left the State. Amsbaugh *v.* Exchange Bank, 33 Kan. 100. And see Bimeler *v.* Dawson, 5 Ill. 536.

[1] Hull *v.* Hull, 2 Strob. Eq. 174; Manley *v.* Manley, 4 Chand. 97; Hubbell *v.* Hubbell, 3 Wis. 662; Mansfield *v.* McIntyre, 10 Ohio, 28; Ditson *v.* Ditson, 4 R. I. 87; Harrison *v.* Harrison, 19 Ala. 499; Thompson *v.* State, 28 Ala. 12; Harding *v.* Alden, 9 Me. 140; s. c. 23 Am. Dec. 549; Maguire *v.* Maguire, 7 Dana, 181; Hawkins *v.* Ragsdale, 80 Ky. 353. It is immaterial in these cases whether notice was actually brought home to the defendant or not. And see Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369. But see *contra*, People *v.* Baker, 76 N. Y. 78; O'Dea *v.* O'Dea, 101 N. Y. 23; Magurn *v.* Magurn, 11 Ont. App. 178; Flower *v.* Flower, 42 N. J. Eq. 152.

[2] This must be so on general principles, as the appointment of guardians for minors is of local force only. See Morrell *v.* Dickey, 1 Johns. Ch. 153; Woodworth *v.* Spring, 4 Allen, 321; Potter *v.* Hiscox, 30 Conn. 508; Kraft *v.* Wickey, 4 G. & J. 322; s. c. 23 Am. Dec. 569. In Kline *v.* Kline, 57 Iowa, 386, an order awarding custody of children was held inoperative when at the time the children were in another State; and in People *v.* Allen, 40 Hun, 611, an order made where all parties resided was held binding in another State. The case of Townsend *v.* Kendall, 4 Minn. 412, appears to be *contra*, but some reliance is placed by the court on the statute of the State which allows the foreign appointment to be recognized for the purposes of a sale of the real estate of a ward.

law for the seizure and appropriation of such property, under the decree of the court, to the use of the complainant; but the legal tribunals elsewhere would not recognize a decree for alimony or for costs not based on personal service or appearance. The remedy of the complainant must generally, in these cases, be confined to a dissolution of the marriage, with the incidental benefits springing therefrom, and to an order for the custody of the children, if within the State.[1]

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

[1] See Jackson *v.* Jackson, 1 Johns. 424; Harding *v.* Alden, 9 Me. 140; s. c. 23 Am. Dec. 549; Holmes *v.* Holmes, 4 Barb. 295; Crane *v.* Meginnis, 1 Gill & J. 463; Maguire *v.* Maguire, 7 Dana, 181; s. c. 19 Am. Dec. 237; Townsend *v.* Griffin, 4 Harr. 440; Sowders *v.* Edmunds, 76 Ind. 123. In Beard *v.* Beard, 21 Ind. 321, *Perkins*, J., after a learned and somewhat elaborate examination of the subject, expresses the opinion that the State may permit a personal judgment for alimony in the case of a resident defendant, on service by publication only, though he conceded that there would be no such power in the case of non-residents. Upon a California divorce a wife is not entitled to dower in Oregon lands, which in such case is allowed in Oregon, although the California court had jurisdiction. Barrett *v.* Failing, 111 U. S. 523.

[2] See Dakin *v.* Hudson, 6 Cow. 221; Cleveland *v.* Rogers, 6 Wend. 438; People *v.* Koeber, 7 Hill, 39; Shelden *v.* Wright, 5 N. Y. 497; Clark *v.* Holmes, 1 Doug. (Mich.) 390; Cooper *v.* Sunderland, 3 Iowa, 114; Wall *v.* Trumbull, 16 Mich. 228; Denning *v.* Corwin, 11 Wend. 647; Bridge *v.* Ford, 4 Mass. 641; Smith *v.* Rice, 11 Mass. 507; Barrett *v.* Crane, 16 Vt. 246; Tift *v.* Griffin, 4 Ga. 185; Jennings *v.* Stafford, 1 Ired. 404; Perrine *v.* Farr, 22 N. J. 356; State *v.* Metzger, 26 Mo. 65; Owen *v.* Jordan, 27 Ala. 608; Hill *v.* Pride, 4 Call. 107; Sullivan *v.* Blackwell, 28 Miss. 737. If without the aid of parol evidence a justice's judgment is void, it cannot be aided by filing a transcript of it in a court of general jurisdiction. Barron *v.* Dent, 17 S. C. 75. If a court of general jurisdiction exercises special powers in a proceeding not after the course of the common law,

There is also another difference between these two classes of tribunals in this, that the jurisdiction of the one may be disproved under circumstances where it would not be allowed in the case of the other. A record is not commonly suffered to be contradicted by parol evidence; but wherever a fact showing want of jurisdiction in a court of general jurisdiction can be proved without contradicting its recitals, it is allowable to do so, and thus defeat its effect.[1] But in the case of a court of special and limited authority, it is permitted to go still further, and to show a want of jurisdiction even in opposition to the recitals contained in the record.[2] This we conceive to be the general rule, though there are apparent exceptions of those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts, which must be passed upon by the courts themselves, and in respect to which the decision of the court once rendered, if there was any evidence whatever on which to base it, must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions.[3]

the essential jurisdictional facts must appear of record. Furgeson *v.* Jones, 20 Pac. Rep. 842 (Oreg.).

[1] See this subject considered at some length in Wilcox *v.* Kassick, 2 Mich. 165. The record cannot be contradicted by parol. Littleton *v.* Smith, 119 Ind. 230; Turner *v.* Malone, 24 S. C. 398; Boyd *v.* Roane, 49 Ark. 397; Harris *v.* McClanahan, 11 Lea, 181. General recitals may be contradicted by more specific ones in the same record. Cloud *v.* Pierce City, 86 Mo. 457. And see Adams *v.* Cowles, 95 Mo. 501; Rape *v.* Heaton, 9 Wis. 329; Bimeler *v.* Dawson, 5 Ill. 536; Webster *v.* Reid, 11 How. 437.

[2] Sheldon *v.* Wright, 5 N. Y. 497; Dyckman *v.* Mayor, &c. of N. Y., 5 N. Y. 434; Clark *v.* Holmes, 1 Doug. (Mich.) 390; Cooper *v.* Sunderland, 3 Iowa, 114; Sears *v.* Terry, 26 Conn. 273; Brown *v.* Foster, 6 R. I. 564; Fawcett *v.* Fowlis, 1 Man. & R. 102. But see Facey *v.* Fuller, 13 Mich. 527, where it was held that the entry in the docket of a justice that the parties appeared and proceeded to trial was conclusive. And see Selin *v.* Snyder, 7 S. & R. 172.

[3] Britain *v.* Kinnaird, 1 B. & B. 432. Conviction under the Bumboat Act. The record was fair on its face, but it was insisted that the vessel in question was not a "boat" within the intent of the act. *Dallas*, Ch. J.: "The general principle applicable to cases of this description is perfectly clear: it is established by all the ancient, and recognized by all the modern decisions; and the principle is, that a conviction by a magistrate, who has jurisdiction over the subject-matter, is, if no defects appear, on the face of it, conclusive evidence of the facts stated in it. Such being the principle, what are the facts of the present case? If the subject-matter in the present case were a boat, it is agreed that the boat would be forfeited; and the conviction stated it to be a boat. But it is said that in order to give the magistrate jurisdiction, the subject-matter of his conviction must be a boat; and that it is competent to the party to impeach the conviction by showing that this was not a boat. I agree, that if he had not jurisdiction, the conviction signifies nothing. Had he then jurisdiction in this case? By the act of Parliament he is empowered to search for and seize gunpowder in any boat on the river Thames. Now, allowing, for the sake of argument, that 'boat' is a word of technical meaning, and somewhat different from a vessel, still, it was a matter of fact to be made out before the magistrate, and on which he was to draw his own conclusion. But it is said that a jurisdiction limited as to person

When it is once made to appear that a court has jurisdiction both of the subject-matter and of the parties, the judgment which it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly, or erred in its application of the law

place, and subject-matter is stinted in its nature, and cannot be lawfully exceeded. I agree: but upon the inquiry before the magistrate, does not the person form a question to be decided by evidence? Does not the place, does not the subject-matter, form such a question? The possession of a boat, therefore, with gunpowder on board, is part of the offence charged; and how could the magistrate decide but by examining evidence in proof of what was alleged? The magistrate, it is urged, could not give himself jurisdiction by finding that to be a fact which did not exist. But he is bound to inquire as to the fact, and when he has inquired, his conviction is conclusive of it. The magistrates have inquired in the present instance, and they find the subject of conviction to be a boat. Much has been said about the danger of magistrates giving themselves jurisdiction; and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns, and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it. It is urged that the party is without remedy; and so he is, without civil remedy, in this and many other cases; his remedy is by proceeding criminally; and if the decision were so gross as to call a ship of seventy-four guns a boat, it would be good ground for a criminal proceeding. Formerly the rule was to intend everything against a stinted jurisdiction: that is not the rule now; and nothing is to be intended but what is fair and reasonable, and it is reasonable to intend that magistrates will do what is right." *Richardson*, J., in the same case, states the real point very clearly: "Whether the vessel in question were a boat or no was a fact on which the magistrate was to decide; and the fallacy lies in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction. If a fact decided as this has been might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction. Suppose the case for a conviction under the game laws of having partridges in possession; could the magistrate, in an action of trespass, be called on to show that the bird in question was really a partridge? and yet it might as well be urged, in that case, that the magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game without being duly qualified to do so; after the conviction had found that the offender kept a dog of that description, could he, in a civil action, be allowed to dispute the truth of the conviction? In a question like the present we are not to look to the inconvenience, but at the law; but surely if the magistrate acts *bona fide*, and comes to his conclusion as to matters of fact according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action; and the more so, as he might have been compelled by a *mandamus* to proceed on the investigation. Upon the general principle, therefore, that where the magistrate has jurisdiction his conviction is conclusive evidence of the facts stated in it, I think this rule must be discharged." See also Basten *v.* Carew, 3 B. & C. 648; Fawcett *v.* Fowlis, 7 B. & C. 394; Ashcroft *v.* Bourne, 3 B. & Ad. 684; Mather *v.* Hodd, 8 Johns. 44; Mackaboy *v.* Commonwealth, 2 Virg. Cas. 270; *Ex parte* Kellogg, 6 Vt. 509; State *v.* Scott, 1 Bailey, 294; Facey *v.* Fuller, 13 Mich. 527; Wall *v.* Trumbull, 16 Mich. 228; Sheldon *v.* Wright, 5 N. Y. 497; Wanzer *v.* Howland, 10 Wis. 16; Ricketts *v.* Spraker, 77 Ind. 371; Fanning *v.* Krapfl, 68 Iowa, 244; Schee *v.* La Grange, 42 N. W. Rep. 616 (Iowa); Sims *v.* Gay, 109 Ind. 501; Epping *v.* Robinson, 21 Fla. 36; Freeman on Judgments, § 523, and cases cited.

to the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void.[1] An irregularity may be defined as the failure to observe that particular course of proceeding which, conformably with the practice of the court, ought to have been observed in the case;[2] and if a party claims to be aggrieved by this, he must apply to the court in which the suit is pending to set aside the proceedings, or to give him such other redress as he thinks himself entitled to; or he must take steps to have the judgment reversed by removing the case for review to an appellate court, if any such there be. Wherever the question of the validity of the proceedings arises in any collateral suit, he will be held bound by them to the same extent as if in all respects the court had proceeded according to law. An irregularity cannot be taken advantage of collaterally; that is to say, in any other suit than that in which the irregularity occurs, or on appeal or process in error therefrom. And even in the same proceeding an irregularity may be waived, and will commonly be held to be waived if the party entitled to complain of it shall take any subsequent step in the case inconsistent with an intent on his part to take advantage of it.[3]

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

[1] *Ex parte* Kellogg, 6 Vt. 509; Edgerton *v.* Hart, 8 Vt. 208; Carter *v.* Walker, 2 Ohio St. 339; White *v.* Crow, 110 U. S. 183; Fox *v.* Cottage, &c. Ass., 81 Va. 677; King *v.* Burdett, 28 W. Va. 601; Levan *v.* Millholland, 114 Pa. St. 49; Weiss *v.* Guerineau, 109 Ind. 438; Rosenheim *v.* Hartsock, 90 Mo. 357; Head *v.* Daniels, 38 Kan. 1; Spillman *v.* Williams, 91 N. C. 483; Freeman on Judgments, § 135. See Matthews *v.* Densmore, 109 U. S. 216; Bonney *v.* Bowman, 63 Miss. 166. Compare Seamster *v.* Blackstock, 83 Va. 232. Even if a court, after acquiring jurisdiction, were to render judgment without trial or an opportunity for hearing, the judgment would not be void, but only erroneous. Clark *v.* County Court, 55 Cal. 199.

A judge cannot perform any judicial act when he is beyond the limits of his State; not even the granting of a *certiorari*. Buchanan *v.* Jones, 12 Ga. 612.

[2] "The doing or not doing that in the conduct of a suit at law, which, conformably to the practice of the court, ought or ought not to be done." Bouv. Law. Dic. See Dick *v.* McLaurin, 63 N. C. 185.

[3] Robinson *v.* West, 1 Sandf. 19; Malone *v.* Clark, 2 Hill, 657; Wood *v.* Randall, 5 Hill, 264; Baker *v.* Kerr, 13 Iowa, 384; Loomis *v.* Wadhams, 8 Gray, 557; Warren *v.* Glynn, 37 N. H. 340. A strong instance of waiver is where, on appeal from a court having no jurisdiction of the subject-matter to a court having general jurisdiction, the parties going to trial without objection are held bound by the judgment. Randolph Co. *v.* Ralls, 18 Ill. 29; Wells *v.* Scott, 4 Mich. 347; Tower *v.* Lamb, 6 Mich. 362. If an objection to proceeding with a jury of less than twelve is overruled, it is not waived by moving for judgment on the findings of such jury. Eshelman *v.* Chicago, &c. Ry. Co., 67 Iowa, 296.

But a party in any case has a right to demand that the judgment of the court be given upon his suit, and he cannot be bound by a delegated exercise of judicial power, whether the delegation be by the courts or by legislative act devolving judicial duties on ministerial officers.[1] Proceedings in any such case would be void; but they must be carefully distinguished from those cases in which the court has itself acted, though irregularly. All the State constitutions preserve the right of trial by jury, for civil as well as for criminal cases, with such exceptions as are specified, and which for the most part consist in such cases as are of small consequence, and are triable in inferior courts. The constitutional provisions do not extend the right; they only secure it in the cases in which it was a matter of right before.[2] But in doing

[1] Hall *v.* Marks, 34 Ill. 358; Chandler *v.* Nash, 5 Mich. 409. It is not competent to provide by statute that the judge may call a member of the bar to sit in his place in a special case. "The legislature has no power to authorize a district judge to place his judicial robe upon the shoulders of any man." Winchester *v.* Ayres, 4 Greene (Iowa), 104. See Wright *v.* Boon, 2 Greene (Iowa), 458; Michales *v.* Hine, 3 Greene (Iowa), 470; Smith *v.* Frisbie, 7 Iowa, 486. To allow it would be to provide a mode for choosing judges different from that prescribed by the Constitution. State *v.* Phillips, 27 La. Ann. 663; State *v.* Fritz 27 La. Ann. 689. Even the consent of parties would not give the judge this authority. Hoagland *v.* Creed, 81 Ill. 506; Andrews *v.* Beck, 23 Tex. 455; Haverly I. M. Co. *v.* Howcutt, 6 Col. 574. In Missouri there is statutory provision for a special judge. State *v.* Hosmer, 85 Mo. 553. Under the Tennessee statute a special judge can act only in civil cases. Neil *v.* State, 2 Lea, 674. It is competent to send a case to referees or to a master for investigation of accounts. Underwood *v.* McDuffee, 15 Mich. 361; Hard *v.* Burton, 79 Ill. 504. All the issues in a case involving accounts may be referred. Huston *v.* Wadsworth, 5 Col. 213. But it is not competent to give the referee powers of final decision. Johnson *v.* Wallace, 7 Ohio, 342; King *v.* Hopkins, 57 N. H. 334; St. Paul, &c. R. R. Co. *v.* Gardner, 19 Minn. 132; s. c. 18 Am. Rep. 334. A decree for the payment of money must specify the precise amount to be paid, and not leave it to subsequent computation. Aldrich *v.* Sharp, 4 Ill. 261; Smith *v.* Trimble, 27 Ill. 152. For the general principle that judicial power cannot be delegated, see further, Gough *v.* Dorsey, 27 Wis. 119; Milwaukee Industrial School *v.* Supervisors, 40 Wis. 328; Allor *v.* County Auditors, 43 Mich. 76; Ward *v.* Farwell, 97 Ill. 593. A justice having power to issue writs as the commencement of suit, cannot issue them in blank to be filled up by parties or by ministerial officers. Pierce *v.* Hubbard. 10 Johns. 405; Craighead *v.* Martin, 25 Minn. 41. But a writ will not necessarily be quashed because filled up by an unauthorized person. Kinne *v.* Hinman, 58 N. H. 363. The clerk of a court of record may be authorized to enter up judgment in vacation against a defendant whose indebtedness is admitted of record: Lathrop *v.* Snyder, 17 Wis. 110; but not in other cases. See Grattan *v.* Matteson, 54 Iowa, 229; Keith *v.* Kellogg, 97 Ill. 147. Such an entry not authorized or approved by the court is void. Balm *v.* Nunn, 63 Ia. 641; Mitchell *v.* St. John, 98 Ind. 598. For the distinction between judicial and ministerial action, see Flournoy *v.* Jeffersonville, 17 Ind. 169; People *v.* Bennett, 29 Mich. 451.

[2] Backus *v.* Lebanon, 11 N. H. 19; Opinions of Judges, 41 N. H. 550; Dane Co. *v.* Dunning, 20 Wis. 210; Stilwell *v.* Kellogg, 14 Wis. 461; Mead *v.* Walker, 17 Wis. 189; Commissioners *v.* Seabrook, 2 Strob. 560; Tabor *v.* Cook, 15 Mich. 322; Lake Erie, &c. R. R. Co. *v.* Heath, 9 Ind. 558; Byers *v.* Commonwealth, 42 Pa. St. 89; State *v.* Peterson, 41 Vt. 504; *In re* Hackett, 53 Vt. 354; Buffalo,

this, they preserve the historical jury of twelve men,[1] with all its incidents, unless a contrary purpose clearly appears. The party is therefore entitled to examine into the qualifications and impartiality of jurors;[2] and to have the proceedings public;[3] and no conditions can be imposed upon the exercise of the right that shall impair its value and usefulness.[4] It has been held, however, in many cases, that it is competent to deny to parties the privilege of a trial in a court of first instance, provided the right is allowed on appeal.[5] It is undoubtedly competent to create new

&c. R. R. Co. *v.* Ferris, 26 Tex. 588; Sands *v.* Kimbark, 27 N. Y. 147; Howell *v.* Fry, 19 Ohio St. 556; Guile *v.* Brown, 38 Conn. 237; Howe *v.* Plainfield, 37 N. J. 145; Commissioners *v.* Morrison, 22 Minn. 178. These provisions do not apply to equitable causes or proceedings: Flaherty *v.* McCormick, 113 Ill. 538; State *v.* Churchill, 48 Ark. 426; Mahan *v.* Cavender, 77 Ga. 118; *In re* Burrows, 33 Kan. 675; Eikenberry *v.* Edwards, 67 Iowa, 619; McKinsey *v.* Squires, 9 S. E. Rep. 55 (W. Va.); not even to enjoining and abating a building as a liquor nuisance: Carleton *v.* Rugg, 149 Mass. 550; nor to special statutory drainage proceedings: Lipes *v.* Hand, 104 Ind. 503; nor to proceedings to determine lunacy: County of Black Hawk *v.* Springer, 58 Iowa, 417; Crocker *v.* State, 60 Wis. 553; nor to summary landlord and tenant proceedings: Frazee *v.* Beattie, 26 S. C. 348; nor to a hearing as to damages on default in tort: Seeley *v.* Bridgeport, 53 Conn. 1; nor to insolvency proceedings. Weston *v.* Loyhed, 30 Minn. 221; *contra*, Risser *v.* Hoyt, 53 Mich. 185. Nor do they prevent a court from denying a new trial unless plaintiff remits a part of the verdict. Arkansas V. L. &c. Co. *v.* Mann, 130 U. S. 69. Nor summary distress for rent if a jury may be had by replevying property seized. Blanchard *v.* Raines, 20 Fla. 467. They do prevent making the findings of appraisers conclusive evidence of value, ownership, and injury, where stock is killed by a railroad. Graves *v.* Nor. Pac. R. R. Co., 5 Mont. 556. That notwithstanding jury trial is preserved, the jurisdiction of justices to try petty cases without jury may be extended, see Beers *v.* Beers, 4 Conn. 535; s. c. 10 Am. Dec. 186; Keddie *v.* Moore, 2 Murph. 41; s. c. 5 Am. Dec. 518.

[1] See *ante*, p. 389. And see the general examination of the subject historically in Hagany *v.* Cohnen, 29 Ohio St. 82; and Copp *v.* Henniker, 55 N. H. 179. A statute allowing less than twelve to sit if a juror is sick is bad. Eshelman *v.* Chicago, &c. Ry. Co., 67 Iowa, 296. But a jury of six may be allowed in inferior courts. Higgins *v.* Farmers' Ins. Co., 60 Iowa, 50. One of less than twelve may act in statutory highway proceedings. McManus *v.* McDonough, 107 Ill. 95.

[2] Palmore *v.* State, 29 Ark. 249; Paul *v.* Detroit, 32 Mich. 108.

[3] Watertown Bank &c. *v.* Mix, 51 N. Y. 558.

[4] Greene *v.* Briggs, 1 Curt. C. C. 311; Lincoln *v.* Smith, 27 Vt. 328; Norristown, &c. Co. *v.* Burket, 26 Ind. 53; State *v.* Gurney, 37 Me. 156; Copp *v.* Henniker, 55 N. H. 179. It is not inadmissible, however, to require of a party demanding a jury that he shall pay the jury fee. Randall *v.* Kehlor, 60 Me. 37; Conners *v.* Burlington &c. Ry. Co., 74 Iowa, 383; Conneau *v.* Geis, 73 Cal. 176.

[5] Emerick *v.* Harris, 1 Binn. 416; Biddle *v.* Commonwealth, 13 S. & R. 405; McDonald *v.* Schell, 6 S. & R. 240; Keddie *v.* Moore, 2 Murph. 41; Wilson *v.* Simonton, 1 Hawks, 482; Monford *v.* Barney, 8 Yerg. 444; Beers *v.* Beers, 4 Conn. 535; s. c. 10 Am. Dec. 186; State *v.* Brennan's Liquors, 25 Conn. 278; Curtis *v.* Gill, 34 Conn. 49; Reckner *v.* Warner, 22 Ohio St. 275; Jones *v.* Robbins, 8 Gray, 329; Hapgood *v.* Doherty, 8 Gray, 373; Flint River, &c. Co. *v.* Foster, 5 Ga. 194; State *v.* Beneke, 9 Iowa, 203; Lincoln *v.* Smith, 27 Vt. 328, 360; Steuart *v.* Baltimore, 7 Md. 500; Commonwealth *v.* Whitney, 108 Mass. 5; Maxwell *v.* Com'rs Fulton Co., 119 Ind. 20; Helverstine *v.* Yantes, 11 S. W. Rep. 811 (Ky.); Beasley *v.* Beckley, 28 W. Va.

tribunals without common-law powers, and to authorize them to proceed without a jury; but a change in the forms of action will not authorize submitting common-law rights to a tribunal in which no jury is allowed.[1] In any case, we suppose a failure to award a jury on proper demand would be an irregularity merely, rendering the proceedings liable to reversal, but not making them void.

There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord *Coke* has laid it down that "even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*."[2]

This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause.[3] Nor is it essential that the

81; State *v.* Fitzpatrick, 11 Atl. Rep. 773 (R. I.). But the recognizance to the lower court on appeal must not be burdened with unreasonable conditions. Liquors of McSorley, 15 R. I. 608. Compare *In re* Marron, 60 Vt. 199. But that this could not be admissible in criminal cases was held in Matter of Dana, 7 Benedict, 1, by Judge *Blatchford*, who very sensibly remarks, "In my judgment the accused is entitled, not to be first convicted by a court, and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury." On a charge of criminal conspiracy, a prisoner has a right to jury trial, "from the first moment and in whatever court he is put on trial for the offence charged." Callan *v.* Wilson, 127 U. S 540. If in a lower court one has had a jury trial and appeals to a higher *nisi prius* court, he cannot be deprived of a jury there. McGinty *v.* Carter, 48 N. J. L. 113. That the right to jury trial in civil cases may be waived by failure to demand it, see Gleason *v.* Keteltas, 17 N. Y. 491; Baird *v.* Mayor, 74 N. Y. 382; Garrison *v.* Hollins, 2 Lea, 684; Foster *v.* Morse, 132 Mass. 354. That it is competent to provide that the failure to file an affidavit of defence shall entitle the plaintiff to judgment, see Hoffman *v.* Locke, 19 Pa. St. 57; Lawrance *v.* Born, 86 Pa. St 225; Dortic *v.* Lockwood, 61 Ga. 293.

[1] See Rhines *v.* Clark, 51 Pa. St. 96. Compare Haines *v.* Levin, 51 Pa. St. 412; Haine's Appeal, 73 Pa. St. 169. Whether jury trial is of right in *quo warranto* cases, see State *v.* Allen, 5 Kan. 213; State *v.* Johnson, 26 Ark. 281; Williamson *v.* Lane, 52 Tex. 335; State *v.* Vail, 53 Mo. 97; State *v.* Lupton, 64 Mo. 415; s. c. 27 Am. Rep. 253; People *v.* Cicott, 16 Mich. 283; People *v.* Railroad Co., 57 N. Y. 161; Royal *v.* Thomas, 28 Gratt. 130; s. c. 26 Am. Rep. 335; and cases, p. 786, note 2, *post*.

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

[3] Washington Ins. Co. *v.* Price, Hopk. Ch. 2; Sigourney *v.* Sibley, 21 Pick. 101;

judge be a party named in the record; if the suit is brought or defended in his interest, or if he is a corporator in a corporation which is a party, or which will be benefited or damnified by the judgment, he is equally excluded as if he were the party named.[1] Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the Vice-Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord *Campbell* observing: "It is of the last importance that the maxim that 'no man is to be a judge in his own cause' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." "We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."[2]

It is matter of some interest to know whether the legislatures of the American States can set aside this maxim of the common law, and by express enactment permit one to act judicially when interested in the controversy. The maxim itself, it is said, in some cases, does not apply where, from necessity, the judge must proceed in the case, there being no other tribunal authorized to act;[3] but we prefer the opinion of Chancellor *Sandford* of New

Freeman on Judgments, § 144. A judge of probate cannot act upon an estate of which he is executor: Bedell *v.* Bailey, 58 N. H. 62; or creditor, Burks *v.* Bennett, 62 Tex. 277. Compare Matter of Hancock, 91 N. Y. 284. A justice may sit, although he has received for collection the note in suit. Moon *v.* Stevens, 53 Mich. 144.

[1] Washington Ins. Co. *v.* Price, Hopk. Ch. 1; Dimes *v.* Proprietors of Grand Junction Canal, 3 House of Lords Cases, 759; Pearce *v.* Atwood, 13 Mass. 324; Kentish Artillery *v.* Gardiner, 15 R. I. 296; Peck *v.* Freeholders of Essex, 20 N. J. 457; Commonwealth *v* McLane, 4 Gray, 427; Dively *v.* Cedar Falls, 21 Iowa, 565; Clark *v.* Lamb, 2 Allen, 396; Stockwell *v.* White Lake, 22 Mich. 341; Petition of New Boston, 49 N. H. 328. If the property of a judge from its situation will be affected like complainant's by his ruling he cannot sit. North Bloomfield G. M. Co. *v.* Keyser, 58 Cal. 315. As to disqualification by relationship, see Russell *v.* Belcher, 76 Me. 501; Patterson *v.* Collier, 76 Ga. 419; Jordan *v.* Moore, 65 Tex. 363; Hume *v.* Commercial Bank, 10 Lea, 1.

[2] Dimes *v.* Proprietors of Grand Junction Canal, 3 House of Lords Cases, 759, 793.

[3] Ranger *v.* Great Western R., 5 House of Lords Cases, 72, 88; Stuart *v.* Mechanics' & Farmers' Bank, 19 Johns. 496.

York, that in such a case it belongs to the power which created such a court to provide another in which this judge may be a party; and whether another tribunal is established or not, he at least is not entrusted with authority to determine his own rights, or his own wrongs.[1]

It has been held that where the interest was that of corporator in a municipal corporation, the legislature might provide that it should constitute no disqualification where the corporation was a party. But the ground of this ruling appears to be, that the interest is so remote, trifling, and insignificant, that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of an individual.[2] And where penalties are imposed, to be recovered only in a municipal court, the judges or jurors in which would be interested as corporators in the recovery, the law providing for such recovery must be regarded as precluding the objection of interest.[3] And it is very common, in a certain class of cases, for the law to provide that certain township and county officers shall audit their own accounts for services rendered the public; but in such case there is no adversary party, unless the State, which passes the law, or the municipalities, which are its component parts and subject to its control, can be regarded as such.

But except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people of the State, when framing their constitution, may possibly establish so great an anomaly, if they see fit;[4] but if the legislature is entrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower one party to a controversy to decide it for himself is not

[1] Washington Insurance Co. *v.* Price, Hopk. Ch. 1. This subject was considered in Hall *v.* Thayer, 105 Mass. 219, and an appointment by a judge of probate of his wife's brother as administrator of an estate of which her father was a principal creditor was held void. And see People *v.* Gies, 25 Mich. 83.

[2] Commonwealth *v.* Reed, 1 Gray, 475; Justices *v.* Fennimore, 1 N. J. 190; Commissioners *v.* Little, 3 Ohio, 289; Minneapolis *v.* Wilkin, 30 Minn. 140. See Foreman *v.* Marianna, 43 Ark. 324, case of annexing territory; Sauls *v.* Freeman, 4 Sou. Rep. 525 (Fla.), case of changing county seat.

[3] Commonwealth *v.* Ryan, 5 Mass. 90; Hill *v.* Wells, 6 Pick. 104; Commonwealth *v.* Emery, 11 Cush. 406; State *v.* Craig, 80 Me. 85; *In re* Guerrero, 69 Cal. 88.

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

within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.[1]

Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in an appellate court; and the suit may there be dismissed on that ground.[2] The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party.[3]

Mere formal acts necessary to enable the case to be brought before a proper tribunal for adjudication, an interested judge may do;[4] but that is the extent of his power.

[1] See Ames *v.* Port Huron Log-Driving and Booming Co., 11 Mich. 139; Hall *v.* Thayer, 105 Mass. 219; State *v.* Crane, 36 N. J. 394; Cypress Pond Draining Co. *v.* Hooper, 2 Met. (Ky.) 350; Scuffletown Fence Co. *v.* McAllister, 12 Bush, 312; Reams *v.* Kearns, 5 Cold. 217. No power to make a municipal corporation party and judge in the same controversy can constitutionally be given. Lanfear *v.* Mayor, 4 La. 97; s. c. 23 Am. Dec. 477.

[2] Richardson *v.* Welcome, 6 Cush. 332; Dimes *v.* Proprietors of Grand Junction Canal, 3 H. L. Cas. 759. And see Sigourney *v.* Sibley, 21 Pick. 101; Oakley *v.* Aspinwall, 3 N. Y. 547. But it is held in Pettigrew *v.* Washington Co., 43 Ark. 33, that after judgment it is too late to object that relationship to a party disqualified a judge.

[3] In Queen *v.* Justices of Hertfordshire, 6 Q. B. 753, it was decided that, if any one of the magistrates hearing a case at sessions was interested, the court was improperly constituted, and an order made in the case should be quashed. It was also decided that it was no answer to the objection that there was a majority in favor of the decision without reckoning the interested party, nor that the interested party withdrew before the decision, if he appeared to have joined in discussing the matter with the other magistrates. See also The Queen *v.* Justices of Suffolk, 18 Q. B. 416; The Queen *v.* Justices of London, 18 Q. B. 421; Peninsula R. R. Co. *v.* Howard, 20 Mich. 18.

[4] Richardson *v.* Boston, 1 Curtis, C. C. 250; Washington Insurance Co. *v.* Price, Hopk. Ch. 1; Buckingham *v.* Davis, 9 Md 324; Heydenfeldt *v.* Towns, 27 Ala. 423; State *v.* Judge, 37 La. Ann. 253. If the judge who renders judgment in a cause had previously been attorney in it, the judgment is a nullity. Reams *v.* Kearns, 5 Cold. 217; Slaven *v.* Wheeler, 58 Tex. 23. So though the case in suit is not precisely the one in which he has been consulted. Newcome *v.* Light, 58 Tex. 141.

EXHIBIT C

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CHAPTER XIV.

THE POWER OF TAXATION.

THE power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life than through the exactions made under it.

Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes.[1] The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the constitution among the powers to be exercised by it or not. No constitutional government can exist without it, and no arbitrary government without regular and steady taxation could be anything but an oppressive and vexatious despotism, since the only alternative to taxation would be a forced extortion for the needs of government from such persons or objects as the men in power might select as victims. Chief Justice *Marshall* has said of this power: "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to

[1] Blackwell on Tax Titles, 1. A tax is a contribution imposed by government on individuals for the service of the State. It is distinguished from a subsidy as being certain and orderly, which is shown in its derivation from Greek, *τάξις, ordo*, order or arrangement. Jacob, Law Dic.; Bouvier, Law Dic. "The revenues of a State are a portion that each subject gives of his property in order to secure, or to have, the agreeable enjoyment of the remainder." Montesquieu, Spirit of the Laws, b. 12, c. 30. In its most enlarged sense the word "taxes" embraces all the regular impositions made by government upon the person, property, privileges, occupations, and enjoyments of the people for the purpose of raising public revenue. See Perry *v.* Washburn, 20 Cal. 318, 350; Loan Association *v.* Topeka, 20 Wall. 655, 664; Van Horn *v.* People, 46 Mich. 183.

which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse." [1]

The same eminent judge has said in another case: "The power of legislation, and consequently of taxation, operates on all persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all for the benefit of all. It resides in the government as part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused; but the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally." [2] And again, the same judge says, it is "unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power." [3] The like general views have been frequently expressed in other cases.[4]

The Constitution of the United States declares that "the Congress shall have power to levy and collect taxes, duties, imposts, and excises to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts,

[1] McCulloch v. Maryland, 4 Wheat. 316, 428.

[2] Providence Bank v. Billings, 4 Pet. 514, 561.

[3] McCulloch v. Maryland, 4 Wheat. 316, 430. See Kirtland v. Hotchkiss, 100 U. S. 491; Board of Education v. McLandsborough, 36 Ohio St. 227; State v. Board of Education, 38 Ohio St. 3.

[4] Kirby v. Shaw, 19 Pa. St. 258; Sharpless v. Mayor, &c., 21 Pa. St. 147; Weister v. Hade, 52 Pa. St. 474; Wingate v. Sluder, 6 Jones (N. C.), 552; Herrick v. Randolph, 13 Vt. 525; Armington v. Barnet, 15 Vt. 745; Thomas v. Leland, 24 Wend. 65; People v. Mayor, &c. of Brooklyn, 4 N. Y. 419; Portland Bank v. Apthorp, 12 Mass. 252; Western Union Telegraph Co. v. Mayer, 28 Ohio St. 521.

and excises shall be uniform throughout the United States."[1] The duties, imposts, and excises here specified are merely different kinds of taxes; the first two terms being commonly applied to the levies made by governments on the importation and exportation of commodities, while the term "excises" is applied to the taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges. "No tax or duty shall be laid on articles exported from any State;"[2] but this provision of the Constitution is not violated by a requirement that an article intended for exportation shall be stamped, as a protection against fraud.[3] Direct taxes, when laid by Congress, must be apportioned among the several States according to the representative population.[4] The term "direct taxes," as employed in the Constitution, has a technical meaning, and embraces capitation and land taxes only.[5] These are express limitations, imposed by the Constitution upon the federal power to tax; but there are some others which are implied, and which under the complex system of American government have the effect to exempt some subjects otherwise taxable from the scope and reach, according to circumstances, of either the federal power to tax or the power of the several States. One of the implied limitations is that which precludes the States from taxing the agencies whereby the general government performs its functions. The reason is that, if they possessed this authority, it would be within their power to impose taxation to an extent that might cripple, if not wholly defeat, the operations of the national authority within its proper and constitutional sphere of action. "That the power to tax," says Chief Justice *Marshall*, "involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, — are propositions not to be denied." And referring to the argument that confidence in the good faith of the State governments must forbid our indulging the anticipation of such consequences, he adds: "But all inconsistencies are to be reconciled by the magic of the word, — confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would

[1] Const. U. S. Art. 1, § 8, cl. 1.
[2] Const. U. S. Art. 1, § 9, cl. 5.
[3] Pace *v.* Burgess, 92 U. S. 372.
[4] Const. U. S. Art. 1, § 2; Art. 1, § 9, cl. 4.
[5] Hylton *v.* United States, 3 Dall. 171; Pacific Ins. Co. *v.* Soule, 7 Wall. 433; Veazie Bank *v.* Fenno, 8 Wall. 533; Springer *v.* United States, 102 U. S. 586.

be an abuse, to presume which would banish that confidence which is essential to all government. But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why then should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence." [1]

It follows as a logical result from this doctrine that if the Congress of the Union may constitutionally create a Bank of the United States, as an agency of the national government in the accomplishment of its constitutional purposes, any power of the States to tax such bank, or its property, or the means of performing its functions, unless with the consent of the United States, is precluded by necessary implication.[2] For the like rea-

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 431. The case involved the right of the State of Maryland to impose taxes upon the operations, within its limits, of the Bank of the United States, created by authority of Congress. "If," continues the Chief Justice, "we apply the principle for which the State of Maryland contends to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy in fact to the States. If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States" In Veazie Bank *v.* Fenno, 8 Wall. 533, followed and approved in National Bank *v.* United States, 101 U. S. 1, it was held competent for Congress, in aid of the circulation of the national banks, to impose restraints upon the circulation of the State banks in the form of taxation. Perhaps no other case goes so far as this, in holding that taxation may be imposed for other purposes than the raising of revenue, though the levy of duties upon imports with a view to incidental protection to domestic manufactures is upon a similar principle.

[2] McCulloch *v.* Maryland, 4 Wheat. 316; Osborn *v.* United States Bank, 9 Wheat. 738; Dobbins *v.* Commissioners of Erie Co., 16 Pet. 435. But the doctrine which exempts the instrumentalities of the general government from the influence of State taxation, being founded on the implied necessity for the use of such instruments by the government, such legislation as does not impair the usefulness or capability of such instruments to serve the government is not within the rule of prohibition. National Bank *v.* Commonwealth, 9 Wall. 353; Thompson *v.* Pacific R. R. Co., 9 Wall. 579.

sons a State is prohibited from taxing an officer of the general government for his office or its emoluments; since such a tax, having the effect to reduce the compensation for the services provided by the act of Congress, would to that extent conflict with such act, and tend to neutralize its purpose.[1] So the States may not impose taxes upon the obligations or evidences of debt issued by the general government upon the loans made to it, unless such taxation is permitted by law of Congress, and then only in the manner such law shall prescribe, — any such tax being an impediment to the operations of the government in negotiating loans, and, in greater or less degree in proportion to its magnitude, tending to cripple and embarrass the national power.[2] The tax upon the national securities is a tax upon the exercise of the power of Congress "to borrow money on the credit of the United States." The exercise of this power is interfered with to the extent of the tax imposed under State authority; and the liability of the certificates of stock or other securities to taxation by a State, in the hands of individuals, would necessarily affect their value in market, and therefore affect the free and unrestrained exercise of the power. "If the right to impose a tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State or corporation may prescribe."[3]

[1] Dobbins *v.* Commissioners of Erie Co., 16 Pet. 435. On similar grounds it is held in Canada that a provincial legislature has no power to impose a tax on the official income of an officer of the Dominion government. Leprohon *v.* Ottawa, 40 U. C. Rep. 486; s. c. on appeal, 2 Ont. App. Rep. 552.

[2] Weston *v.* Charleston, 2 Pet. 449; Bank of Commerce *v.* New York City, 2 Black, 620; Bank Tax Case, 2 Wall. 200; Van Allen *v.* Assessors, 3 Wall. 573; People *v.* Commissioners, 4 Wall. 244; Bradley *v.* People, 4 Wall. 459; The Banks *v.* The Mayor, 7 Wall. 16; Bank *v.* Supervisors, 7 Wall. 26; State *v.* Rogers, 79 Mo. 283. For a kindred doctrine see State *v.* Jackson, 33 N. J. 450.

[3] Weston *v.* Charleston, 2 Pet. 449, 466; Bank of Commerce *v.* New York City, 2 Black, 620; Bank Tax Case, 2 Wall. 200; Society for Savings *v.* Coite, 6 Wall. 594. Revenue stamps are not taxable. Palfrey *v.* Boston, 101 Mass. 329. Nor United States treasury notes. Montgomery County *v.* Elston, 32 Ind. 27. Nor the premium on United States bonds. People *v.* Com'rs of Taxes, 90 N. Y. 63. In People *v.* United States, 93 Ill. 30; s. c. 34 Am. Rep. 155, it was decided that property of the United States, held for any purpose whatever, was not subject to State taxation. Citing McGoon *v.* Scales, 9 Wall. 23; Railway Co. *v.* Prescott, 16 Wall. 603. Lands within a State belonging to the United States by purchase or failure of owner to pay direct taxes are exempt from State taxation while so owned. Van Brocklin *v.* Tennessee, 117 U. S. 151. The Central Pacific & Southern Pacific Railroad Companies derive many of their franchises from the United States. These cannot be taxed by a State without the consent of Congress. California *v.* Central Pacific R. R. Co., 127 U. S. 1. But land is taxable though the title is still in the United States, if the real owner is entitled to a patent. Wis. Centr. Ry. Co. *v.* Comstock, 71 Wis. 88. The property

If the States cannot tax the means by which the national government performs its functions, neither, on the other hand and for the same reasons, can the latter tax the agencies of the State governments. "The same supreme power which established the departments of the general government determined that the local governments should also exist for their own purposes, and made it impossible to protect the people in their common interests without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the constitution which limits them, and independent of other agencies, except as thereby made dependent. There is nothing in the Constitution [of the United States] which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds. And any such interference by the indirect means of taxation is quite as much beyond the power of the national legislature as if the interference were direct and extreme."[1] It has therefore been held that the law of Congress requiring judicial process to be stamped could not constitutionally be applied to the process of the State courts; since otherwise Congress might impose such restrictions upon the State courts as would put an end to their effective action, and be equivalent practically to abolishing them altogether.[2] And a similar ruling has been made in other analogous cases.

of the Western Union Telegraph Co., a New York corporation, lying in Massachusetts, cannot escape taxation there as an agency of the federal government, although it has the right to use post roads. W. U. Tel. Co. *v.* Massachusetts, 125 U. S. 530. That taxation cannot be evaded by turning funds temporarily into United States notes just before the time for assessment, see Shotwell *v.* Moore, 129 U. S. 590.

[1] Fifield *v.* Close, 15 Mich. 505. "In respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and for the sake of self preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can only exist at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" Per *Nelson*, J., in Collector *v.* Day, 11 Wall. 113, 124. See also Ward *v.* Maryland, 12 Wall. 418, 427; Railroad Co. *v.* Peniston, 18 Wall. 5, Freedman *v.* Sigel, 10 Blatch. 327.

[2] Warren *v.* Paul, 22 Ind. 276; Jones *v.* Estate of Keep, 19 Wis. 369; Fifield *v.* Close, 15 Mich. 505; Union Bank *v.* Hill, 3 Cold. 325; Smith *v.* Short, 40 Ala. 385; Moore *v.* Quirk, 105 Mass. 49; s. c. 7 Am. Rep. 499.

It has been repeatedly decided that the act of Congress which provided that

Strong as is the language employed to characterize the taxing power in some of the cases which have considered this subject, subsequent events have demonstrated that it was by no means extravagant. An enormous national debt has not only made imposts necessary which in some cases reach several hundred per cent of the original cost of the articles upon which they are imposed, but the systems of State banking which were in force when the necessity for contracting that debt first arose, have been literally taxed out of existence by burdens avowedly imposed for that very purpose.[1] If taxation is thus unlimited in its operation upon the objects within its reach, it cannot be extravagant to say that the agencies of government are necessarily excepted from it, since otherwise its exercise might altogether destroy the government through the destruction of its agencies. That which was predicted as a possible event has been demonstrated by actual facts to be within the compass of the power; and if considerations of policy were important, it might be added that, if the States possessed the authority to tax the agencies of the national government, they would hold within their hands a constitutional weapon which factious and disappointed parties would be able to wield with terrible effect when the policy of the national government did not accord with their views; while, on the other hand, if the

certain papers not stamped should not be received in evidence must be limited in its operation to the federal courts. Carpenter *v.* Snelling, 97 Mass. 452; Green *v.* Holway, 101 Mass. 243; s. c. 3 Am. Rep. 339; Clemens *v.* Conrad, 19 Mich. 170; Haight *v.* Grist, 64 N. C. 739; Griffin *v.* Ranney, 35 Conn. 239; People *v.* Gates, 43 N. Y. 40; Bowen *v.* Byrne, 55 Ill. 467; Hale *v.* Wilkinson, 21 Gratt. 75; Atkins *v.* Plympton, 44 Vt. 21; Bumpass *v.* Taggart, 26 Ark. 398; s. c. 7 Am. Rep. 623; Sammons *v.* Holloway, 21 Mich. 162; s. c. 4 Am. Rep. 465; Duffy *v.* Hobson, 40 Cal. 240; Sporrer *v.* Eifler, 1 Heisk. 633; McElvain *v.* Mudd, 44 Ala. 48; s. c. 4 Am. Rep. 106; Burson *v.* Huntington, 21 Mich. 415; s. c. 4 Am. Rep. 497; Davis *v.* Richardson, 45 Miss. 499; s. c. 7 Am. Rep. 732; Hunter *v.* Cobb, 1 Bush, 239; Craig *v.* Dimock, 47 Ill. 308; Moore *v.* Moore, 47 N. Y. 467; s. c. 7 Am. Rep. 466. Several of these cases have gone still farther, and declared that Congress cannot preclude parties from entering into contracts permitted by the State laws, and that to declare them void was not a proper penalty for the enforcement of tax laws. Congress cannot make void a tax deed issued by a State. Sayles *v.* Davis, 22 Wis. 225. Nor require a stamp upon the official bonds of State officers. State *v.* Garton, 32 Ind. 1. Nor tax the salary of a State officer. Collector *v.* Day, 11 Wall. 113; Freedman *v.* Sigel, 10 Blatch. 327. Nor forbid the recording of an unstamped instrument under the State laws. Moore *v.* Quirk, 105 Mass. 49; s. c. 7 Am. Rep. 499. "Power to tax for State purposes is as much an exclusive power in the States, as the power to lay and collect taxes to pay the debts and provide for the common defence and general welfare of the United States is an exclusive power in Congress." *Clifford*, J., Ward *v.* Maryland, 12 Wall. 418, 427. In United States *v.* Railroad Co., 17 Wall. 322, it was decided that a municipal corporation of a State, being a portion of the sovereign power, was not subject to taxation by Congress upon its shares of stock in a railroad company.

[1] The constitutionality of this taxation was sustained by a divided court in Veazie Bank *v.* Fenno, 8 Wall. 533.

national government possessed a corresponding power over the agencies of the State governments, there would not be wanting men who, in times of strong party excitement, would be willing and eager to resort to this power as a means of coercing the States in their legislation upon the subjects remaining under their control.

There are other subjects which are or may be removed from the sphere of State taxation by force of the Constitution of the United States, or of the legislation of Congress under it. That instrument declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."[1] This prohibition has led to some difficulty in its practical application. Imports, as such, are not to be taxed generally; but it was not the purpose of the Constitution to exclude permanently from the sphere of State taxation all property brought into the country from abroad; and the difficulty encountered has been met with in endeavoring to indicate with sufficient accuracy for practical purposes the point of time at which articles imported cease to be regarded as imports within the meaning of the prohibition. In general terms it has been said that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but that while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.[2] And in the application of this rule it was declared that a State law which, for revenue purposes, required an importer to take a license and pay fifty dollars before he should be permitted to sell a package of imported goods, was equivalent to laying a duty upon imports. It has also been held in another case, that a stamp duty imposed by the legislature of California upon bills of lading for gold or silver, transported from that State to any port or place out of the State,

[1] Const. U. S. art. 1, § 10, cl. 2. The provision has no application to articles transported merely from one State to another. Brown *v.* Houston, 33 La. Ann. 843; s. c. 39 Am. Rep. 284; affirmed, 114 U. S. 622. See State *v.* Pittsburg, &c. Co., 6 Sou. Rep. 220 (La.). But an inspection law applicable only to lime manufactured in Maine, is held a regulation of commerce. Higgins *v.* Lime, 130 Mass. 1. A State tax on alien passengers is a tax on commerce though levied in aid of an inspection law. People *v.* Compagnie &c., 107 U. S. 59. But a like impost under federal law is valid. Head Money Cases, 112 U. S. 580.

[2] Brown *v.* Maryland, 12 Wheat. 419, 441, per *Marshall*, Ch. J.

was in effect a tax upon exports, and the law was consequently void.[1]

Congress also is vested with power to regulate commerce. This power is not so far exclusive as to preclude State legislation on matters either local in their nature or operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide; such as harbor pilotage, beacons, buoys, the improvement of navigable waters within the State, and the examination as to their fitness of railroad employees, provided such legislation does not conflict with the regulations made by federal law.[2] Except as to such matters the power of Congress over commerce with foreign nations and among the several States is exclusive. If Congress has made no express regulations with regard to such commerce, its inaction is equivalent to a declaration that it shall be free.[3] The States, therefore, can enforce no regulations which make foreign or inter-state commerce subject to the payment of tribute to them.[4] Duties of tonnage the States

[1] Almy *v.* California, 24 How. 169. See what is said of this case in Woodruff *v.* Parham, 8 Wall. 123, 137. And compare Jackson Iron Co. *v.* Auditor-General, 32 Mich. 488. See also Brumagim *v.* Tillinghast, 18 Cal. 265; Garrison *v.* Tillinghast, 18 Cal. 404; *Ex parte* Martin, 7 Nev. 140; Turner *v.* State, 55 Md. 240; Turner *v.* Maryland, 107 U. S. 38. In the last two cases a law requiring an inspection of tobacco going out of the State is sustained. The States cannot discriminate in taxation between the productions of different States. Welton *v.* Missouri, 91 U. S. 275; Tiernan *v.* Rinker, 102 U. S. 123.

[2] Cooley *v.* Board of Wardens, 12 How. 299; Wilson *v.* Blackbird Creek Marsh Co., 2 Pet. 245; Gilman *v.* Philadelphia, 3 Wall. 713; *Ex parte* McNiel, 13 Wall. 236; Henderson *v.* New York, 92 U. S. 259; Wilson *v.* McNamee, 102 U. S. 572; Mobile *v.* Kimball, 102 U. S. 691; Escanaba Co. *v.* Chicago, 107 U. S. 678; Huse *v.* Glover, 119 U. S. 543; Willamette Iron B. Co. *v.* Hatch, 125 U. S. 1; Smith *v.* Alabama, 124 U. S. 465; Nashville, C. & St. L. Ry. Co. *v.* State, 128 U. S. 96. A statute discriminating as to pilotage in favor of vessels from certain States is bad. Spraigue *v.* Thompson, 118 U. S. 90. Until Congress acts, State quarantine regulations are valid, and an examination fee may be charged graded by the kind of vessel. Morgan's S. S. Co. *v.* Louisiana, 118 U. S. 455. See Train *v.* Boston Disinfecting Co., 144 Mass. 523.

[3] Welton *v.* Missouri, 91 U. S. 275; Brown *v.* Houston, 114 U. S. 622; Walling *v.* Michigan, 116 U. S. 446; Robbins *v.* Shelby Taxing Dist. 120 U. S. 489; Phila. S. S. Co. *v.* Pennsylvania, 122 U. S. 326.

[4] In Brown *v.* Maryland, 12 Wheat. 419, 441, it was held that a license fee of fifty dollars, required by the State of an importer before he should be permitted to sell imported goods, was unconstitutional, as coming directly in conflict with the regulations of Congress over commerce. So a tax on the amount of an auctioneer's sales was held inoperative so far as it applied to sales of imported goods made by him in the original packages for the importer. Cook *v.* Pennsylvania, 97 U. S. 566. So is any tax which discriminates against imported goods. Tiernan *v.* Rinker, 102 U. S. 123. After property brought from another State has become part of the property in a State, it may be taxed like other property there: Brown *v.* Houston, 114 U. S. 622; but not, if it is taxed by reason of its being so brought. Welton *v.* Missouri, 91 U. S. 275. See Phila. S. S. Co. *v.* Pennsylvania, 122 U. S. 326. A tax upon receipts from the transportation of goods from one State to another by rail is bad. Case of State Freight Tax, 15 Wall. 232;

are also forbidden to lay.[1] The meaning of this seems to be that vessels must not be taxed as vehicles of commerce, according to capacity;[2] but it is admitted they may be taxed like other property.[3]

It is also believed that that provision in the Constitution of the United States, which declares that "the citizens of each State

Fargo *v.* Michigan, 121 U. S. 230. So is one upon the gross receipts from transportation by sea between different States, or to and from foreign countries: Phila. S. S. Co. *v.* Pennsylvania, 122 U. S. 326; impairing the force of Case of Tax on Railway Gross Receipts, 15 Wall. 284; one upon gross receipts of car companies derived from inter-state business; State *v.* Woodruff, &c. Co., 114 Ind. 155. See Central R. R. Co. *v.* Board of Assessors, 49 N. J. L. 1. So is a privilege tax upon cars used as instruments of inter-state commerce. Pickard *v.* Pullman &c. Co., 117 U. S. 34. So is the tax upon the capital stock of a foreign ferry corporation engaged in such commerce, which lands and receives passengers and freight within the State. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196. So is one on all telegraph messages sent out of a State. Telegraph Co. *v.* Texas, 105 U. S. 460. See Ratterman *v.* W. U. Tel. Co., 127 U. S. 411. A State may not exact, as a condition of doing business, a license from a company, a large part of whose business is the transmission of inter-state telegrams. Leloup *v.* Port of Mobile, 127 U. S. 640. That is not domestic commerce which in going between ports of the same State passes more than a marine league from shore. Pacific Coast S. S. Co. *v.* Board R. R. Com'rs, 18 Fed. Rep. 10. Compare Com. *v.* Lehigh Valley R. R. Co., 129 Pa. St. 308. For further discussion of this subject, see New York *v.* Miln, 11 Pet. 102; License Cases, 5 How. 504; Lin Sing *v.* Washburn, 20 Cal. 534; Erie Railway Co. *v.* New Jersey, 31 N. J. 531, reversing same case in 30 N. J.; Pennsylvania R. R. Co. *v.* Commonwealth, 3 Grant, 128; Hinson *v.* Lott, 40 Ala. 123; Commonwealth *v.* Erie R. R., 62 Pa. St. 286; Osborne *v.* Mobile, 44 Ala. 493; s. c. in error, 16 Wall. 479; State *v.* Philadelphia, &c. R. R. Co., 45 Md. 361; Walcott *v.* People, 17 Mich. 68. In Crandall *v.* Nevada, 6 Wall. 35, it was held that a State law imposing a tax of one dollar on each person leaving the State by public conveyance was not void as coming in conflict with the control of Congress over commerce, though set aside on other grounds. Logs belonging to a non-resident are liable to be taxed though intended for transportation to another State, and partially prepared for it by being deposited at the place of shipment. Coe *v.* Errol, 116 U. S 517. See Com'rs Brown Co. *v.* Standard Oil Co., 103 Ind. 302. On the subject of inter-state commerce, see further, pp. 717, 720–725, 737, *post.* Cooley on Taxation, 61–64.

[1] Const. of U. S. art. 1, § 10, cl. 2.

[2] Cannon *v.* New Orleans, 20 Wall. 577; Huse *v.* Glover, 119 U. S. 543. See Steamship Co. *v.* Port Wardens, 6 Wall. 31; State Tonnage Tax Cases, 12 Wall. 204; Inman Steamship Co. *v.* Tinker, 94 U. S. 238; Lott *v.* Morgan, 41 Ala. 246; Johnson *v.* Drummond, 20 Gratt. 419; State *v.* Charleston, 4 Rich. 286; Johnson *v.* Loper, 46 N. J. L. 321. A license tax upon the business of running a ferry between two States is not a tonnage tax. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365. But such tax upon running towboats between New Orleans and the Gulf is a regulation of commerce. Moran *v.* New Orleans, 112 U. S. 69. Tolls based on tonnage may be charged for the use of improved waterways. Huse *v.* Glover, 119 U. S. 543. Port dues may not be laid unless services are rendered. Harbor Com'rs *v.* Pashley, 19 S. C. 315; Webb *v.* Dunn, 18 Fla. 721.

[3] See above cases. Also Peete *v.* Morgan, 19 Wall. 581; Transportation Co. *v.* Wheeling, 99 U. S. 273. Wharfage charges are not forbidden by the above clause of the Constitution: Marshall *v.* Vicksburg, 15 Wall. 146; Packet Co. *v.* Keokuk, 95 U. S. 80; Packet Co. *v.* St. Louis, 100 U. S. 423; Vicksburg *v.* Tobin, 100 U. S. 430; and they may be measured by tonnage. Packet Co. *v.* Catlettsburg, 105 U. S. 559; Transportation Co. *v.* Parkersburg, 107 U. S. 691.

shall be entitled to all the privileges and immunities of the citizens of the several States,"[1] will preclude any State from imposing upon the property which citizens of other States may own, or the business which they may carry on within its limits, any higher burdens by way of taxation than are imposed upon corresponding property or business of its own citizens. This is the express decision of the Supreme Court of Alabama,[2] following in this particular the *dictum* of an eminent federal judge at an early day,[3] and the same doctrine has been recently affirmed by the federal Supreme Court.[4] As the States are forbidden to pass any laws impairing the obligation of contracts, they are of course precluded from levying any taxes which would have that effect. Therefore, as was shown in a previous chapter, if the State by any valid contract has obligated itself not to tax particular property, or not to tax beyond a certain rate, a tax in disregard of the obligation is void.[5] It is also held that to tax in one State contracts owned

[1] Art. 4, § 2. A license tax may not be imposed upon one who contracts with or induces laborers to leave a State. Joseph *v.* Randolph, 71 Ala. 499.

[2] Wiley *v.* Parmer, 14 Ala. 627.

[3] *Washington*, J., in Corfield *v.* Coryell, 4 Wash. C. C. 371, 380. And see Campbell *v.* Morris, 3 H. & McH. 554; Ward *v.* Morris, 4 H. & McH. 340; and other cases cited, *ante*, p. 24, note. See also Oliver *v.* Washington Mills, 11 Allen, 268.

[4] Ward *v.* Maryland, 12 Wall. 419, 430; Case of State Tax on Foreign Held Bonds, 15 Wall. 300. Compare Machine Co. *v.* Gage, 100 U. S. 676. A State cannot impose, for the privilege of doing business within its limits, a license tax upon travelling agents from other States, offering for sale or selling merchandise, when none is imposed upon its own people. McGuire *v.* Parker, 32 La. Ann. 832. Or a heavier license tax upon non-residents than upon residents carrying on the same business. Ward *v.* Maryland, 12 Wall. 418; State *v.* Wiggin, 64 N. H. 508. Nor a license tax upon those dealing in goods, wares, and merchandise not the product of the State, while imposing none on similar traders selling the products of the State. Welton *v.* Missouri, 91 U. S. 275; Walling *v.* Michigan, 116 U. S. 446; *Ex parte* Thomas, 71 Cal. 204. See Graffty *v.* Rushville, 107 Ind. 502; Marshallstown *v.* Blum, 58 Iowa, 184; Pacific Junction *v.* Dyer, 64 Iowa, 38; State *v.* Pratt, 59 Vt. 502. Compare People *v.* Lyng, 42 N. W. Rep. 139 (Mich.); reversed in U. S. Sup. Ct. April, 1890. Nor charge vessels loaded with the products of other States larger fees for the use of the public wharves than are charged vessels loaded with products of the same State. Guy *v.* Baltimore, 100 U. S. 434. See further Woodruff *v.* Parham, 8 Wall. 123; Cook *v.* Pennsylvania, 97 U. S. 566. "The negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is inter-state commerce," and a statute imposing a privilege license upon all persons selling by sample within a Tennessee taxing district is void as applied to the drummer for an Ohio house, as interfering with such commerce, and this although Tennessee and foreign drummers are put on the same footing. Robbins *v.* Shelby Taxing District, 120 U. S. 489; Corson *v.* Maryland, *Id.* 502; Asher *v.* Texas, 128 U. S. 129; State *v.* Agee, 83 Ala. 110; State *v.* Bracco, 9 S. E. Rep. 404 (N. C.); Simmons Hardware Co. *v.* McGuire, 39 La. Ann. 848; Fort Scott *v.* Pelton, 39 Kan. 764; *Ex parte* Rosenblatt, 19 Nev. 459. But a license tax upon agents of foreign express companies is not an interference with such commerce. Crutcher *v.* Com., 12 S. W. Rep. 141 (Ky.). See, also, State *v.* Richards, 9 S. E. Rep. 245 (W. Va.).

[5] See *ante*, p. 338, and cases cited in note.

in another impairs their obligation, even though they are made and are payable in the State imposing the tax, and are secured by mortgage in that State.[1]

Having thus indicated the extent of the taxing power,[2] it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast, that everything which may be done under pretence of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government.

In the first place, taxation having for its only legitimate object the raising of money for public purposes and the proper needs of

[1] State Tax on Foreign Held Bonds, 15 Wall. 300; Street Railroad Co. *v.* Morrow, 87 Tenn. 406. See also Mayor of Baltimore *v.* Hussey, 67 Md. 112; Railroad Co. *v.* Com'rs, 91 N. C. 454; Railroad Co. *v.* Jackson, 7 Wall. 262; Oliver *v.* Washington Mills, 11 Allen, 268. The stock of a foreign corporation is not taxable, though its property is used within the State by its licensees. Com. *v.* Amer Bell Tel. Co., 129 Pa. St. 217; People *v.* Amer. Bell Tel. Co., 22 N. E. Rep. 1057 (N. Y.). Compare Catlin *v.* Hull, 21 Vt. 152; Jenkins *v.* Charleston, 5 S. C. 393; Mumford *v.* Sewall, 11 Oreg. 67 A State may tax its citizen upon the public debt of another State held by him, though exempt from taxes in such State. Bonaparte *v.* Tax Court, 104 U. S. 592. A foreign corporation having a railroad and doing business in a State, may, as a condition of doing business, be required, like a domestic corporation, to collect a tax upon its loans held by residents of the State. Com. *v.* New York, L. E. & W. R. R. Co., 129 Pa. St. 463.

[2] A State may, if it see fit, tax the property owned, held, and used by itself or its municipalities for public purposes; but this would so obviously be unwise and impolitic that the intent to do so is never assumed, but public property is always, by implication of law, exempt from the operation of the general terms of tax laws. People *v.* Salomon, 51 Ill. 37; Trustees of Industrial University *v.* Champaign Co., 76 Ill. 184; Directors of Poor *v.* School Directors, 42 Pa. St. 21; People *v.* Austin, 47 Cal. 353; People *v.* Doe, 36 Cal. 220, Wayland *v* County Com'rs, 4 Gray, 500; Worcester Co. *v.* Worcester, 116 Mass. 193; State *v.* Gaffney, 34 N. J. 133; Camden *v.* Camden Village Corp., 77 Me. 530; Erie Co. *v* Erie, 113 Pa. St. 360. But city waterworks may be taxed for county purposes. Erie Co. *v.* Com'rs Water-Works, *Id.* 368. The same rule applies to special city assessments. Green *v.* Hotaling, 44 N. J. L. 347; Polk Co. Savings Bank *v.* State, 69 Iowa, 24; Harris Co. *v.* Boyd, 70 Tex. 237. But see *contra*, Adams Co. *v.* Quincy, 22 N. E. Rep. 624 (Ill.). And the exemption extends to lands acquired by a city outside its limits to supply itself with water. West Hartford *v.* Water Com'rs, 44 Conn. 360; Rochester *v.* Rush, 80 N. Y. 302. So of a ferry landing in Brooklyn owned by New York city, to which the ferry privilege belongs. People *v.* Assessors, 111 N. Y. 505. See Black *v.* Sherwood, 84 Va. 906. But not so of land taken by a city in payment of the defalcation of an officer. People *v.* Chicago, 124 Ill. 636.

government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized. In this place, however, we do not use the word *public* in any narrow and restricted sense, nor do we mean to be understood that whenever the legislature shall overstep the legitimate bounds of their authority, the case will be such that the courts can interfere to arrest their action. There are many cases of unconstitutional action by the representatives of the people which can be reached only through the ballot-box; and there are other cases where the line of distinction between that which is allowable and that which is not is so faint and shadowy that the decision of the legislature must be accepted as final, even though the judicial opinion might be different. But there are still other cases where it is entirely possible for the legislature so clearly to exceed the bounds of due authority that we cannot doubt the right of the courts to interfere and check what can only be looked upon as ruthless extortion, provided the nature of the case is such that judicial process can afford relief. An unlimited power to make any and every thing lawful which the legislature might see fit to call taxation, would be, when plainly stated, an unlimited power to plunder the citizen.[1]

It must always be conceded that the proper authority to determine what should and what should not constitute a public burden is the legislative department of the State. This is not only true for the State at large, but it is true also in respect to each municipality or political division of the State; these inferior corporate existences having only such authority in this regard as the legislature shall confer upon them.[2] And in determining this question, the legislature cannot be held to any narrow or technical rule. Not only are certain expenditures absolutely essential to the continued existence of the government and the performance

[1] Tyson *v.* School Directors, 51 Pa. St. 9; Morford *v.* Unger, 8 Iowa, 82; Talbot *v.* Hudson, 16 Gray, 417; Hansen *v.* Vernon, 27 Iowa, 28; Allen *v.* Jay, 60 Me. 124; s. c. 11 Am. Rep. 185; Ferguson *v.* Landram, 5 Bush, 230; People *v.* Township Board of Salem, 20 Mich. 452; Washington Avenue, 69 Pa. St. 352; s. c. 8 Am. Rep. 255. "It is the clear right of every citizen to insist that no unlawful or unauthorized exaction shall be made upon him under the guise of taxation. If any such illegal encroachment is attempted, he can always invoke the aid of the judicial tribunals for his protection, and prevent his money or other property from being taken and appropriated for a purpose and in a manner not authorized by the Constitution and laws." Per *Bigelow*, Ch. J. in Freeland *v.* Hastings, 10 Allen, 570, 575. See Hooper *v.* Emery, 14 Me. 375; People *v.* Sup'rs of Saginaw, 26 Mich. 22; Weismer *v.* Douglas, 64 N. Y. 91; s. c. 21 Am. Rep. 586.

[2] Litchfield *v.* Vernon, 41 N. Y. 123. A law may determine absolutely the amount of tax to be raised for a local improvement, and the property upon which it is to be apportioned. Spencer *v.* Merchant, 100 N. Y. 585; affirmed, 125 U. S. 345. See *ante*, p. 283, and cases cited in note 1, p. 601.

of its ordinary functions, but as a matter of policy it may sometimes be proper and wise to assume other burdens which rest entirely on considerations of honor, gratitude, or charity. The officers of government must be paid, the laws printed, roads constructed, and public buildings erected; but with a view to the general well-being of society, it may also be important that the children of the State should be educated, the poor kept from starvation,[1] losses in the public service indemnified, and incentives held out to faithful and fearless discharge of duty in the future, by the payment of pensions to those who have been faithful public servants in the past. There will therefore be necessary expenditures, and expenditures which rest upon considerations of policy only, and, in regard to the one as much as to the other, the decision of that department to which alone questions of State policy are addressed must be accepted as conclusive.

Very strong language has been used by the courts in some of the cases on this subject. In a case where was questioned the validity of the State law confirming township action which granted gratuities to persons enlisting in the military service of the United States, the Supreme Court of Connecticut assigned the following reasons in its support: —

"In the first place, if it be conceded that it is not competent for the legislative power to make a gift of the common property, or of a sum of money to be raised by taxation, where no possible public benefit, direct or indirect, can be derived therefrom, such exercise of the legislative power must be of an extraordinary character to justify the interference of the judiciary; and this is not that case.

"Second. If there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice, and the determination of the legislature is conclusive. And such is this case. Such gifts to unfortunate classes of society, as the indigent blind, the deaf and dumb, or insane, or grants to particular colleges or schools, or grants of pensions, swords, or other mementos for past services, involving the general good indirectly and in slight degree, are frequently made and never questioned.

"Third. The government of the United States was constituted by the people of the State, although acting in concert with

[1] Taxes cannot be levied to donate to benevolent and charitable societies, which are controlled by private individuals, and over which the public authorities have no supervision and control. So held in an able opinion in St. Mary's Industrial School *v.* Brown, 45 Md. 310. But a city may be allowed to pay a part of the expense of an orphanage to which its magistrates may commit poor children. Shepherd's Fold *v.* Mayor, &c. New York, 96 N. Y. 137.

the people of other States, and the general good of the people of this State is involved in the maintenance of that general government. In many conceivable ways the action of the town might not only mitigate the burdens imposed upon a class, but render the service of that class more efficient to the general government, and therefore it must be presumed that the legislature found that the public good was in fact thereby promoted.

"And fourth. It is obviously possible, and therefore to be intended, that the General Assembly found a clear equity to justify their action." [1]

And the Supreme Court of Wisconsin has said: "To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable; so clear and palpable as to be perceptible by every mind at the first blush. . . . It is not denied that claims founded in equity and justice, in the largest sense of those terms, or in gratitude or charity, will support a tax. Such is the language of the authorities." [2]

But we think it is plain, as has been said by the Supreme Court of Wisconsin, that "the legislature cannot . . . in the form of a

[1] Booth *v.* Woodbury, 32 Conn. 118, 128. See to the same effect Speer *v.* School Directors of Blairville, 50 Pa. St. 150. The legislature is not obliged to consult the will of the people concerned in ordering the levy of local assessments for the public purposes of the local government. Cheaney *v.* Hooser, 9 B. Monr. 330; Slack *v.* Maysville, &c. R. R. Co., 13 B. Monr. 1; Cypress Pond Draining Co. *v.* Hooper, 2 Met. (Ky.) 350; Spencer *v.* Merchant, 100 N. Y. 585; 125 U. S. 345. Compare People *v.* Common Council of Detroit, 28 Mich. 228. The legislature cannot delegate to parties concerned the authority to levy taxes for the benefit of their own estates, and of those of others interested with them but not consenting. Scuffletown Fence Co. *v.* McAllister, 12 Bush, 312.

[2] Brodhead *v.* City of Milwaukee, 19 Wis. 624, 652. See Mills *v.* Charleton, 29 Wis. 411; s. c. 9 Am. Rep. 578; Spring *v.* Russell, 7 Me. 273; Williams *v.* School District, 33 Vt. 271. Taxation to supply natural gas to a city is valid. Fellows *v.* Walker, 39 Fed. Rep. 651. It is not competent for a city to levy taxes to loan to persons who have suffered from a fire. Lowell *v.* Boston, 111 Mass. 454; s. c. 15 Am. Rep. 39, and note p. 56; Feldman *v.* City Council of Charleston, 23 S. C. 57. Or to supply farmers, whose crops have been destroyed, with provisions, and grain for seed and feed. State *v.* Osawkee, 14 Kan. 418. Or to aid manufacturing enterprises: Allen *v.* Jay, 60 Me. 124; s. c. 11 Am. Rep. 185; Commercial Bank *v.* Iola, 2 Dill. 353; Loan Association *v.* Topeka, 20 Wall. 655; Opinions of Judges, 58 Me. 590; Coates *v.* Campbell, 37 Minn. 498; Mather *v.* Ottawa, 114 Ill. 659; Parkersburg *v.* Brown, 106 U. S. 487; Cole *v.* La Grange, 113 U. S. 1; though it be under pretence of sanitary improvements. Clee *v.* Sanders, 42 N. W. Rep. 154 (Mich.). Power to tax in aid of a water grist mill, recognized in Nebraska: Traver *v.* Merrick Co., 14 Neb. 327; cannot cover a steam mill, Osborn *v.* Adams Co., 109 U. S. 1. Taxation to pay a subscription to a private corporation is not for a public purpose. Weismer *v.* Douglas, 64 N. Y. 91; s. c. 21 Am. Rep. 586. A city cannot be empowered to erect a dam, with the privilege afterwards at discretion to devote it to either a public or private purpose; but the public purpose must appear. Attorney-General *v.* Eau Claire, 37 Wis. 400.

tax, take the money of the citizens and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute."[1] Or, as stated by the Supreme Court of Pennsylvania, "the legislature has no constitutional right to . . . lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of the legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them."[2] And by the same court, in a still later case, where the question was whether the legislature could lawfully require a municipality to refund to a bounty association the sums which they had advanced to relieve themselves from an impending military conscription, "such an enactment would not be legislation at all. It would be in the nature of judicial action, it is true, but wanting the justice of notice to parties to be affected by the hearing, trial, and all that gives sanction and force to regular judicial proceedings; it would much more resemble an imperial rescript than constitutional legislation: first, in declaring an obligation where none was created or previously existed; and next, in decreeing payment, by directing the money or property of the people to be sequestered to make the payment. The legislature can exercise no such despotic functions."[3]

[1] Per *Dixon*, Ch. J., in Brodhead *v.* Milwaukee, 19 Wis. 624, 652. See also Lumsden *v.* Cross, 10 Wis. 282; Opinions of Judges, 58 Me. 590; Moulton *v.* Raymond, 60 Me. 121; *post*, p. 606 and note.

[2] Per *Black*, Ch. J., in Sharpless *v.* Mayor, &c., 21 Pa. St. 147, 168. See Opinions of Judges, 58 Me. 590.

[3] Tyson *v.* School Directors of Halifax, 51 Pa. St. 922. See also Grim *v.* Weisenburg School District, 57 Pa. St. 433. The decisions in Miller *v.* Grandy, 13 Mich. 540; Crowell *v.* Hopkinton, 45 N. H. 9; and Shackford *v.* Newington, 46 N. H. 415, so far as they hold that a bounty law is not to be held to cover moneys before advanced by an individual without any pledge of the public credit, must be held referable, we think, to the same principle. And see cases, *ante*, p. 280, note 2. Compensation for money voluntarily contributed for levee purposes by allowing such sums as a credit on future levee taxes is not allowable. Those incidentally benefited cannot be compelled to refund money thus spent. Davis *v.* Gaines, 48 Ark. 370. We are aware that there are some cases the doctrine of which seems opposed to those we have cited, but perhaps a careful examination will enable us to harmonize them all. One of these is Guilford *v.* Supervisors of Chenango, 18 Barb. 615,

A like doctrine has been asserted by the Supreme Court of Michigan in a recent case. That State is forbidden by its consti-

and 13 N. Y. 143. The facts in that case were as follows: Cornell and Clark were formerly commissioners of highways of the town of Guilford, and as such, by direction of the voters of the town, had sued the Butternut and Oxford Turnpike Road Company. They were unsuccessful in the action, and were, after a long litigation, obliged to pay costs. The town then refused to reimburse them these costs. Cornell and Clark sued the town, and, after prosecuting the action to the court of last resort, ascertained that they had no legal remedy. They then applied to the legislature, and procured an act authorizing the question of payment or not by the town to be submitted to the voters at the succeeding town meeting. The voters decided that they would not tax themselves for any such purpose. Another application was then made to the legislature, which resulted in a law authorizing the county judge of Chenango County to appoint three commissioners, whose duty it should be to hear and determine the amount of costs and expenses incurred by Cornell and Clark in the prosecution and defence of the suits mentioned. It authorized the commissioners to make an award, which was to be filed with the county clerk, and the board of supervisors were then required, at their next annual meeting, to apportion the amount of the award upon the taxable property of the town of Guilford, and provide for its collection in the same manner as other taxes are collected. The validity of this act was affirmed. It was regarded as one of those of which *Denio*, J., says, "The statute book is full, perhaps too full, of laws awarding damages and compensation of various kinds to be paid by the public to individuals who had failed to obtain what they considered equitably due to them by the decision of administrative officers acting under the provisions of former laws. The courts have no power to supervise or review the doings of the legislature in such cases." It is apparent that there was a strong equitable claim upon the township in this case for the reimbursement of moneys expended by public officers under the direction of their constituents, and perhaps no principle of constitutional law was violated by the legislature thus changing it into a legal demand and compelling its satisfaction. Mr. Sedgwick criticises this act, and says of it that it "may be called taxation, but in truth it is the reversal of a judicial decision." Sedg. on Stat. and Const. Law, 414. There are very many claims, however, resting in equity, which the courts would be compelled to reject, but which it would be very proper for the legislature to recognize, and provide for by taxation. Brewster *v.* City of Syracuse, 19 N. Y. 116. Another case, perhaps still stronger than that of Guilford *v.* The Supervisors, is Thomas *v.* Leland, 24 Wend. 65. Persons at Utica had given bond to pay the extraordinary expense that would be caused to the State by changing the junction of the Chenango Canal from Whitesborough to Utica, and the legislature afterwards passed an act requiring the amount to be levied by a tax on the real property of the city of Utica. The theory of this act may be stated thus: The canal was a public way. The expense of constructing all public ways may be properly charged on the community especially or peculiarly benefited by it. The city of Utica was specially and peculiarly benefited by having the canal terminate there; and as the expense of construction was thereby increased, it was proper and equitable that the property to be benefited should pay this difference, instead of the State at large. The act was sustained by the courts, and it was well remarked that the fact that a bond had been before given securing the same money could not detract from its validity. Whether this case can stand with some others, and especially with that of Hampshire *v.* Franklin, 16 Mass. 76, we have elsewhere expressed a doubt, and it must be conceded that, for the legislature in any case to compel a municipality to assume a burden, on the ground of local benefit or local obligation, against the will of the citizens, is the exercise of an arbitrary power little in harmony with the general features of our republican system, and only to be justified, if at all, in extreme cases. The general idea of our tax system is, that those

tution to engage in works of public improvement, except in the expenditure of grants of land or other property made to it for this purpose. The State, with this prohibition in force, entered into a contract with a private party for the construction by such party of an improvement in the Muskegon River, for which the State was to pay the contractor fifty thousand dollars, from the Internal Improvement Fund. The improvement was made, but the State officers declined to draw warrants for the amount, on the ground that the fund from which payment was to have been made was exhausted. The State then passed an act for the levying of tolls upon the property passing through the improvement sufficient to pay the contract price within five years. The court held this act void. As the State had no power to construct or pay for such a work from its general fund, and could not constitutionally have agreed to pay the contractors from tolls, there was no theory on which the act could be supported, except it was that the State had misappropriated the Internal Improvement Fund, and therefore ought to provide payment from some other source. But if the State had misappropriated the fund, the burden of reimburse-

shall vote the burdens who are to pay them; and it would be intolerable that a central authority should have power, not only to tax localities, for local purposes of a public character which they did not approve, but also, if it so pleased, to compel them to assume and discharge private claims not equitably chargeable upon them. See the New York cases above referred to criticised in State *v.* Tappan, 29 Wis. 664, 680; s. c. 9 Am. Rep. 622. The legislature may require a county to pay for a road: Wilcox *v.* Deer Lodge Co., 2 Mont. 574; and may apportion to a township such part of the cost as the length of it in the township bears to its total length. Mahoney *v.* Comry, 103 Pa. St. 362. See also Shaw *v.* Dennis, 10 Ill. 405. The cases of Cheaney *v.* Hooser, 9 B. Monr. 330; Sharp's Ex. *v.* Dunavan, 17 B. Monr. 223; Maltus *v.* Shields, 2 Met. (Ky.) 553, will throw some light on this general subject. The case of Cypress Pond Draining Co. *v.* Hooper, 2 Met. (Ky.) 350, is also instructive. The Cypress Pond Draining Company was incorporated to drain and keep drained the lands within a specified boundary, at the cost of the owners, and was authorized by the act to collect a tax on each acre, not exceeding twenty-five cents per acre, for that purpose, for ten years, to be collected by the sheriff. With the money thus collected, the board of managers, six in number, named in the act, was required to drain certain creeks and ponds within said boundary. The members of the board owned in the aggregate 3,840 acres, the larger portion of which was low land, subject to inundation, and of little or no value in its then condition, but which would be rendered very valuable by the contemplated draining. The corporate boundary contained 14,621 acres, owned by sixty-eight persons. Thirty-four of these, owning 5,975 acres, had no agency in the passage of the act, and no notice of the application therefor, gave no assent to its provisions, and a very small portion of their land, if any, would be benefited or improved in value by the proposed draining; and they resisted the collection of the tax. As to these owners the act of incorporation was held unconstitutional and inoperative. See also the City of Covington *v.* Southgate, 15 B. Monr. 491; Lovingston *v.* Wider, 53 Ill. 302; Curtis *v.* Whipple, 24 Wis. 350; People *v.* Flagg, 46 N. Y. 401; People *v.* Batchellor, 53 N. Y. 128; s. c. 13 Am. Rep. 480; People *v.* Common Council of Detroit, 28 Mich. 228. The author has considered the subject of this note at some length in his treatise on taxation, c. 21.

ment would fall upon the State at large; it could not lawfully be imposed upon a single town or district, or upon the commerce of a single town or district. The burden must be borne by those upon whom it justly rests, and to recognize in the State a power to compel some single district to assume and discharge a State debt would be to recognize its power to make an obnoxious district or an obnoxious class bear the whole burden of the State government. An act to that effect would not be taxation, nor would it be the exercise of any legitimate legislative authority.[1] And it may be said of such an act, that, so far as it would operate to make those who would pay the tolls pay more than their proportion of the State obligation, it was in effect taking their property for the private benefit of other citizens of the State, and was obnoxious to all the objections against the appropriation of private property for private purposes which could exist in any other case.

And the Supreme Court of Iowa has said: "If there be such a flagrant and palpable departure from equity in the burden imposed; if it be imposed for the benefit of others, or for purposes

[1] Ryerson *v.* Utley, 16 Mich. 269. See also People *v.* Springwells, 25 Mich. 153; Anderson *v.* Hill, 54 Mich. 477. "Uniformity in taxation implies equality in the burden of taxation." Bank *v.* Hines, 3 Ohio St. 1, 15. "This equality in the burden constitutes the very substance designed to be secured by the rule." Weeks *v.* City of Milwaukee, 10 Wis. 242, 258. See also Sanborn *v.* Rice, 9 Minn. 273; State *v.* Haben, 22 Wis. 660. The reasoning of these cases seems not to have been satisfactory to the New York Court of Appeals. See Gordon *v.* Cornes, 47 N. Y. 608, in which an act was sustained which authorized "and required" the village of Brockport to levy a tax for the erection of a State Normal School building at that place. No recent case, we think, has gone so far as this. Compare State *v.* Tappan, 29 Wis. 664; s. c. 9 Am. Rep. 622; Mayor of Mobile *v.* Dargan, 45 Ala. 310; Livingston County *v.* Weider, 64 Ill. 427; Burr *v.* Carbondale, 76 Ill. 455. "There can be no doubt that, as a general rule, where an expenditure is to be made for a public object, the execution of which will be substantially beneficial to every portion of the Commonwealth alike, and in the benefits and advantages of which all the people will equally participate, if the money is to be raised by taxation, the assessment would be deemed to come within that class which was laid to defray one of the general charges of government, and ought therefore to be imposed as nearly as possible with equality upon all persons resident and estates lying within the Commonwealth. . . . An assessment for such a purpose, if laid in any other manner, could not in any just or proper sense be regarded as 'proportional' within the meaning of the Constitution." Merrick *v.* Inhabitants of Amherst, 12 Allen, 500, 504, per *Bigelow*, Ch. J. This case holds that local taxation for a State purpose may be permitted in consideration of local benefits, and only differs in principle from Gordon *v.* Cornes, in that the one *permitted* what the other *required*. The case of Marks *v.* Trustees of Purdue University, 37 Ind. 155, follows Merrick *v.* Amherst, and Burr *v.* Carbondale, 76 Ill. 455; Hensley Township *v.* People, 84 Ill. 544, and Livingston County *v.* Darlington, 101 U. S. 407, are to the same effect. Taxation not levied according to the principles upon which the right to tax is based is an unlawful appropriation of private property to public uses. City of Covington *v.* Southgate, 15 B. Monr. 491; People *v.* Township Board of Salem, 20 Mich. 452; Tide Water Co. *v.* Costar, 18 N. J. Eq. 518; Hammett *v.* Philadelphia, 65 Pa. St. 146; s. c. 3 Am. Rep. 615.

in which those objecting have no interest, and are therefore not bound to contribute, it is no matter in what form the power is exercised, — whether in the unequal levy of the tax, or in the regulation of the boundaries of the local government, which results in subjecting the party unjustly to local taxes, — it must be regarded as coming within the prohibition of the constitution designed to protect private rights against aggression however made, and whether under color of recognized power or not." [1]

When, therefore, the legislature assumes to impose a pecuniary burden upon the citizen in the form of a tax, two questions may always be raised: First, whether the purpose of such burden may properly be considered public on any of the grounds above indicated; [2] and second, if public, then whether the burden is one which should properly be borne by the district upon which it is imposed. If either of these questions is answered in the negative, the legislature must be held to have assumed an authority not conferred in the general grant of legislative power, and which is therefore unconstitutional and void. "The power of taxation," says an eminent writer, "is a great governmental attribute, with which the courts have very wisely shown extreme unwillingness to interfere; but if abused, the abuse should share the fate of all other usurpations." [3] In the case of burdens thus assumed by the legislature on behalf of the State, it is not always that a speedy and safe remedy can properly be afforded in the courts. It would certainly be a very dangerous exercise of power for a court to attempt to stay the collection of State taxes because an illegal demand was included in the levy; and indeed, as State taxes are not usually levied for the purpose of satisfying specific demands, but a gross sum is raised which it is calculated will be sufficient for the wants of the year, the question is not usually one of the unconstitutionality of taxation, but of the misappropriation of moneys which have been raised by taxation. But if the State should order a city, township, or village to raise money by taxation to establish one of its citizens in business, or for any other object equally removed from the proper sphere of government, or should undertake to impose the whole burden of the govern-

[1] Morford *v.* Unger, 8 Iowa, 82, 92. See Durant *v.* Kauffman, 34 Iowa, 194.

[2] Though the legislature first decides that the use is public, the decision is not conclusive. They cannot make that a public purpose which is not so in fact. Gove *v.* Epping, 41 N. H. 539; Crowell *v.* Hopkinton, 45 N. H. 9; Freeland *v.* Hastings, 10 Allen, 570; Hooper *v.* Emery, 14 Me. 375; Allen *v.* Jay, 60 Me. 124; s. c. 11 Am. Rep. 185; Tyler *v.* Beacher, 44 Vt. 651; s. c. 8 Am. Rep. 398; Ferguson *v.* Landram, 5 Bush, 230; Kelly *v.* Marshall, 69 Pa. St. 319; People *v.* Flagg, 46 N. Y. 401; Curtis *v.* Whipple, 24 Wis. 350; Loan Association *v.* Topeka, 20 Wall. 655.

[3] Sedgwick on Const. and Stat. Law, 414.

ment upon a fraction of the State, the usurpation of authority would not only be plain and palpable, but the proper remedy would also be plain, and no court of competent jurisdiction could feel at liberty to decline to enforce the paramount law.[1]

In the second place, it is of the very essence of taxation that it be levied with equality and uniformity, and to this end, that there should be some system of apportionment.[2] Where the burden is

[1] Loan Association *v.* Topeka, 20 Wall. 655.

[2] The legislature cannot itself make an assessment directly or by placing a value on certain property. *In re* House Bill, 9 Col. 635; Slaughter *v.* Louisville, 8 S. W. Rep. 917 (Ky.); *Ex parte* Low, 24 W. Va. 620. That it is not essential to provide for the taxation of all property, see Mississippi Mills *v.* Cook, 56 Miss. 40; that it is competent to provide for taxing railroad corporations in a different way from individuals: State Railroad Tax Cases, 92 U. S. 575; State Board *v.* Central R. R. Co., 48 N. J. L. 146; Cincinnati, N. O & T. Ry Co. *v.* Com., 81 Ky. 492; Franklin Co. *v.* Railroad, 12 Lea, 521; Central Ia. Ry. Co. *v.* Board, 67 Iowa, 199. But some railroads may not be taxed on gross receipts while others are taxed on capital. Worth *v.* Wilmington, &c. R. R. Co., 89 N. C. 291; nor may they alone be taxed to raise a fund to pay railroad commissioners: Atchison, T. & S. F. R. R. Co. *v.* Howe, 32 Kan. 737; nor may the *assessed* value of other real property be made the standard of value of railroad property Williams *v.* State Board, 18 Atl. Rep. 750 (N. J.). See California *v.* Central Pac. R. R. Co., 127 U. S. 1, Santa Clara Co. *v.* South. Pac. R. R. Co., 118 U. S. 394. That property may be classified for taxation, Coal Run Co. *v.* Finlen, 124 Ill. 666; People *v.* Henderson, 21 Pac. Rep. 144 (Cal.); Fahey *v.* State, 27 Tex. App. 146. Corporate and individual obligations may be put in different classes. Com. *v.* Del. Div. Canal Co., 123 Pa. St. 594. That the rule of uniformity must be applied to all subjects of taxation within the district and class: Marsh *v.* Supervisors, 42 Wis. 502; Pfiffleo *v.* Hiles, 42 Wis. 527; Bureau Co. *v.* Railroad Co., 44 Ill. 229; Cummings *v.* National Bank, 101 U. S. 153; that it is not competent to add a percentage to the list for refusal or neglect to make oath to the tax list: McCormick *v.* Fitch, 14 Minn. 252, but see *Ex parte* Lynch, 16 S. C. 32; that it is competent to permit a deduction for debts from the assessment: Wetmore *v.* Multnomah Co., 6 Oreg. 463; *contra*, Exchange Bank *v.* Hines, 3 Ohio St. 1; that where property is required to be taxed by value, it is not competent to tax a corporation on its property and also on its capital stock: State *v.* Cumberland, &c. R. R. Co., 40 Md. 22; that a statute making a portion only of a certain kind of property taxable is unconstitutional: Pike *v.* State, 5 Ark. 204; that occupation taxes are no violation of the rule of uniformity; Youngblood *v.* Sexton, 32 Mich. 406; *Ex parte* Robinson, 12 Nev. 263; Gatlin *v.* Tarboro, 78 N. C. 119; that foreign insurance companies may be required to pay different taxes from others; State *v.* Lathrop, 10 La. Ann. 398; Commonwealth *v.* Germania L. I. Co., 11 Phila. 553; *Ex parte* Cohn, 13 Nev. 424; see San Francisco *v.* Liverpool, &c. Co., 74 Cal. 113. They may be required to pay such taxes as companies of the taxing State are made to pay in the home States of such companies. Home Ins. Co. *v.* Swigert, 104 Ill. 653; Phœnix Ins. Co. *v.* Welch, 29 Kan. 672; People *v.* Fire Ass., 92 N. Y. 311; State *v.* Ins. Co., 115 Ind. 257. Taxation for roads upon the citizens only of a township is unequal: Marion, &c. Ry. Co. *v.* Champlin, 37 Kan. 682. So is the exemption from such taxes of all property in incorporated villages, Com'rs *v.* Owen, 7 Col. 467. But uniformity provisions do not apply to the distribution of a road fund. Holton *v.* Com'rs Mecklenburg Co., 93 N. C. 439. And see Weber *v.* Reinhard, 73 Pa. St 370; s. c. 13 Am. Rep. 747; Louisville, &c. R. R. Co. *v.* State, 25 Ind. 177; Whitney *v.* Ragsdale, 33 Ind. 107; Francis *v.* Railroad Co., 19 Kan. 303; Primm *v.* Belleville, 59 Ill. 142; Wis. Cent. R. R. Co. *v.* Taylor Co., 52 Wis. 37; State *v.*

common, there should be common contribution to discharge it.[1] Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and as all are alike protected, so all alike should bear the burden, in proportion to the interests secured. Taxes by the poll are justly regarded as odious and are seldom resorted to for the collection of revenue; and when taxes are levied upon property there must be an apportionment with reference to a uniform standard, or they degenerate into mere arbitrary exactions.[2] In this particular the State constitutions have been very specific, though in providing for equality and uniformity they have done little more than to state in concise language a principle of constitutional law which, whether declared or not, would inhere in the power to tax.

Taxes may assume the form of duties, imposts, and excises; and those collected by the national government are very largely of this character. They may also assume the form of license fees, for permission to carry on particular occupations, or to enjoy special franchises.[3] They may be specific; such as are often

Estabrook, 3 Neb. 173; Murray *v.* Lehman, 61 Miss. 283; Graham *v.* Com'rs Chautauqua Co., 31 Kan. 473; Dunham *v.* Cox, 44 N. J. Eq. 273.

The following are special cases: A tax on drays, &c., proportioned to the number of animals employed in drawing them, contravenes the constitutional requirement of uniformity in license taxes. State *v.* Endom, 23 La. Ann. 663. See New Orleans *v.* Home Ins. Co., 23 La. An. 449. A railroad company cannot be taxed according to the length of its road. State *v.* South Car. R. R. Co., 4 S. C. 376. A tax on cotton cannot be proportioned to the weight regardless of grades. Sims *v.* Jackson, 22 La. Ann. 440. Income is not property for the purposes of taxation. Waring *v* Savannah 60 Ga. 93. A collateral inheritance tax is not a property tax. Schoolfield's Exec. *v.* Lynchburg 78 Va. 366. A tax on the franchises of a coal company may be proportioned to the coal mined. Kittanning Coal Co. *v.* Commonwealth, 79 Pa. St. 100. The keepers of private markets may be charged a license tax though none is imposed on those who sell in the public markets. New Orleans *v.* Dubarry, 33 La. Ann. 481; s. c. 39 Am. Rep. 273.

[1] 2 Kent, 231; Sanborn *v.* Rice, 9 Minn. 273; Ryerson *v.* Utley, 16 Mich. 269; Oliver *v.* Washington Mills, 11 Allen, 268; Tidewater Co. *v.* Costar, 18 N. J. Eq. 518.

[2] A tax on negro polls and negroes' property alone, to be applied to the education of negro children alone, is bad. Puitt *v.* Com'rs Gaston Co., 94 N. C. 709.

[3] As to taxes on business and franchises, see Cooley on Taxation, c. 18. Offices, posts of profit, and occupations are proper subjects of taxation. Brown's App., 111 Pa. St. 72. That all occupations may be taxed when no restraints are imposed by the Constitution, see State *v.* Hayne, 4 Rich. 403; Ould *v.* Richmond, 23 Gratt. 464; s. c. 14 Am. Rep. 139; Commonwealth *v.* Moore, 25 Gratt. 951; Cousins *v.* State, 50 Ala. 113; s. c. 20 Am. Rep. 290; Stewart *v.* Potts, 49 Miss. 749; Morrill *v.* State, 38 Wis. 428; s. c. 20 Am. Rep. 12; Albrecht *v.* State, 8 Tex. App. 216; s. c. 34 Am. Rep. 737; Young *v.* Thomas, 17 Fla. 169; s. c. 35 Am. Rep. 93; Richmond & D. R. R. Co. *v.* Reidsville, 101 N. C. 404. Such a tax may be based on the average amount of a merchant's stock. Newton *v.* Atchison, 31 Kan. 151. See Danville *v.* Shelton, 76 Va. 325. A city may be empowered to impose a license upon the business of a foreign insurance company, as well as a tax upon its net income: St.

levied upon corporations, in reference to the amount of capital stock, or to the business done, or profits earned by them. Or they may be direct; upon property, in proportion to its value, or upon some other basis of apportionment which the legislature shall regard as just, and which shall keep in view the general idea of uniformity. The taxes collected by the States are mostly

Joseph *v.* Ernst, 95 Mo. 360; or an occupation tax upon saloons, in addition to the license to sell. State *v.* Bennett, 19 Neb. 191. A privilege tax on private carriages in addition to an *ad valorem* tax is invalid. Livingston *v.* Paducah, 80 Ky. 656. An occupation tax must not be so unreasonable as to be prohibitory. Caldwell *v.* Lincoln, 19 Neb. 569. See Mankato *v.* Fowler, 32 Minn. 364; W. U. Tel. Co. *v.* Philadelphia, 12 Atl. Rep. 144 (Pa.); Jackson *v.* Newman, 59 Miss. 385; People *v.* Russell, 49 Mich. 617; *Ex parte* Gregory, 20 Tex. App. 210; Kneeland *v.* Pittsburgh, 11 Atl. Rep. 657 (Pa.), as to what is a reasonable license, tax, or fee. But revenue cannot be raised in the form of license fees under an authority to require licenses to be taken out for mere police purposes. *Ante*, 243 and note; Burlington *v.* Bumgardner, 42 Iowa, 673, and cases cited. As to when a power to license can be made use of as a means of raising revenue, see *Ex parte* Frank, 52 Cal. 606; s. c. 28 Am. Rep. 642; Pleuler *v.* State, 11 Neb. 547; U. S. Dist. Co. *v.* Chicago, 112 Ill. 19; *In re* Guerrero, 69 Cal. 88; Flanagan *v.* Plainfield, 44 N. J. L. 118. It is no valid objection to a tax on business that its operation will not be uniform. Youngblood *v.* Sexton, 32 Mich. 406; Adler *v.* Whitbeck, 44 Ohio St. 539. But see Pullman P. C. Co. *v.* State, 64 Tex. 274; Banger's App., 109 Pa. St. 79. It should operate uniformly upon each class taxed. Smith *v.* Louisville, 6 S. W. Rep. 911 (Ky.); St Louis *v.* Bowler, 94 Mo. 630; Braun *v.* Chicago, 110 Ill. 186. Further as to taxes on occupations, see Boye *v.* Girardey, 28 La. Ann. 717; Hodgson *v.* New Orleans, 21 La. Ann. 301; New Orleans *v.* Kaufman, 29 La. Ann. 283; s. c. 29 Am. Rep. 328; Texas B. & I. Co. *v.* State, 42 Tex. 636.

In the following cases license fees were held not to be taxes, but merely police regulations: Required of foreign corporations doing business in the State: People *v.* Thurber, 13 Ill. 554; Walker *v.* Springfield, 94 Ill. 364. Of dealers in intoxicating liquors: Burch *v.* Savannah, 42 Ga. 596; Durach's Appeal, 62 Pa. St. 491; East St. Louis *v.* Wehrung, 46 Ill. 392; Lovingston *v.* Trustees, 99 Ill. 564; Baker *v.* Panola Co., 30 Tex. 86; East St. Louis *v.* Trustees, 102 Ill. 489; Rochester *v.* Upman, 19 Minn. 108; State *v.* Cassidy, 22 Minn. 312; s. c. 21 Am. Rep. 765; State *v.* Klein, 22 Minn. 328; Pleuler *v.* State 11 Neb. 547. Of auctioneers: Goshen *v.* Kern, 63 Ind. 468. Of a street railway company: Johnson *v.* Philadelphia, 60 Pa. St. 445. But see New York *v.* Railway Co., 32 N. Y. 261. Of insurance companies: Fire Department *v.* Helfenstein, 16 Wis. 136. Of gas companies for inspection: Cincinnati Gas Co. *v.* State, 18 Ohio St. 237. Of proprietors of theatres: Boston *v.* Schaffer, 9 Pick. 415. For building licenses: Welch *v.* Hotchkiss, 39 Conn. 140.

The fee exacted in granting a ferry license is not a tax, but is paid for the franchise. Chilvers *v.* People, 11 Mich. 43. See Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560.

The exaction of license fees under the police power is no violation of the constitutional requirement of uniform taxation. State *v.* Cassidy, 22 Minn. 312; s. c. 21 Am. Rep. 765; Walters *v.* Duke, 31 La. Ann. 668. An act sustained which imposed a smaller license tax on proprietors of bars on steamboats than on those of bars on land. State *v.* Rolle, 30 La. Ann. 991. The exemption from taxation of the Louisiana Savings Bank held not to exclude a city license tax on the business. New Orleans *v.* Savings Bank, 31 La. Ann. 637. An exemption of all property in a town from parish taxes does not prevent the imposition of a license. Morehouse Parish *v.* Brigham, 6 Sou. Rep. 257 (La.). For instances of license fees held to be taxes and not warranted by statute, see *ante*, 243, note.

of the latter class, and it is to them that the constitutional principles we shall have occasion to discuss will more particularly apply.

As to all taxation apportioned upon property, there must be taxing districts, and within these districts the rule of absolute uniformity must be applicable.[1] A State tax is to be apportioned through the State, a county tax through the county, a city tax through the city;[2] while in the case of local improvements, benefiting in a special and peculiar manner some portion of the State or of a county or city, it is competent to arrange a special taxing district, within which the expense shall be apportioned. School districts and road districts are also taxing districts for the peculiar purposes for which they exist, and villages may have special powers of taxation distinct from the townships of which they form a part. Whenever it is made a requirement of the State constitution that taxation shall be upon property according to value, such a requirement implies an assessment of valuation by public officers at such regular periods as shall be provided by law, and a taxation upon the basis of such assessment until the period arrives for making it anew.[3] Thus, the Constitutions of Maine

[1] If the proper rule of uniformity is established by the legislature, but the taxing officers purposely evade it and assess unequal taxes, the collection will be enjoined. Merrill *v.* Humphrey, 24 Mich. 170; Lefferts *v.* Supervisors, 21 Wis. 688; Mason *v.* Lancaster, 4 Bush, 406; Fuller *v.* Gould, 20 Vt. 643; Cummings *v.* National Bank, 101 U. S. 153, and cases cited.

The constitutional requirement that property shall be assessed for taxation by uniform rules, and according to true value, does not make it necessary to tax all property, and it is satisfied by such regulations as impose the same percentage of actual value upon such property as is made taxable, in the township for township purposes, in the county for county purposes, &c. Stratton *v.* Collins, 43 N. J. 563.

[2] An act requiring a school-district tax when collected to be distributed between the district collecting it and others is void, as being in effect a local tax for a general purpose. Bromley *v.* Reynolds, 2 Utah, 525. See State *v.* Fuller, 39 N. J. 576; McBean *v.* Chandler, 9 Heisk. 349. A State tax must be apportioned uniformly through the State, a county tax through the county, a city tax through the city. East Portland *v.* Multnomah Co., 6 Oreg. 62; Exchange Bank *v.* Hines, 3 Ohio St. 1, 15; Pine Grove *v.* Talcott, 19 Wall. 666, 675; Fletcher *v.* Oliver, 25 Ark. 289; Chicago, &c. R. R. Co. *v.* Boone Co., 44 Ill. 240. For peculiar cases see State *v.* New Orleans, 15 La. Ann. 354; Kent *v.* Kentland, 62 Ind. 291: s. c. 30 Am. Rep. 182; Com'rs of Ottawa Co. *v.* Nelson, 19 Kan. 234; s. c. 27 Am. Rep. 101; Cleveland *v.* Heisley, 41 Ohio St. 670. The whole burden of expense for fire protection, police, &c., cannot be imposed upon an area within a city. Morgan *v.* Elizabeth, 44 N. J. L. 571.

[3] Where a tax is to be assessed by the value of property, or in proportion to benefits, the right of the owner to be heard in some stage of the proceedings would seem to be clear; and it has been expressly affirmed in some cases. See Philadelphia *v.* Miller, 49 Pa. St. 440; Stewart *v.* Trevor, 56 Pa. St. 374; Butler *v.* Supervisors of Saginaw, 26 Mich. 22; Thomas *v.* Gain, 35 Mich. 155; Cleghorn *v.* Postlewaite, 43 Ill. 428; Darling *v.* Gunn, 50 Ill 424; Kuntz *v.* Sumption, 117 Ind. 1; Redwood Co. *v.* Winona, &c. Co., 40 Minn. 512. Chauvin *v.* Valiton, 20 Pac. Rep. 658 (Mont.); *post* 617, note. The statutes generally provide for a hearing before some board, either on some

and Massachusetts require that there shall be a valuation of estates within the Commonwealth to be made at least every ten years;[1] the Constitution of Michigan requires the annual assessments which are made by township officers to be equalized by a State board, which reviews them for that purpose every five years;[2] and the Constitution of Rhode Island requires the legislature "from time to time" to provide for new valuations of property for the assessment of taxes in such manner as they may deem best.[3] Some other constitutions contain no provisions upon this subject; but the necessity for valuation is nevertheless implied, though the mode of making it, and the periods at which it shall be made, are left to the legislative discretion.

There are some kinds of taxes, however, that are not usually assessed according to the value of property, and some which could not be thus assessed. And there is probably no State which does not levy other taxes than those which are imposed upon property.[4] Every burden which the State imposes upon its citizens with a view to a revenue, either for itself or for any of the municipal governments, or for the support of the governmental machinery in any of the political divisions, is levied under the power of taxation, whether imposed under the name of tax, or under some other designation. The license fees which are sometimes required to be paid by those who follow particular employments are, when imposed for purposes of revenue, taxes;[5] the tolls upon persons or property, for making use of the works of public improvement owned and controlled by the State, are a species of tax; stamp duties when imposed are taxes; and it is not uncommon, as we have already stated, to require that corporations shall pay a certain sum annually, assessed according to the amount or value of their capital stock, or some other standard; this mode being regarded by the State as most convenient and suitable for the taxa-

day and at some place fixed by the statute, or after notice publicly given. That such statutes are mandatory, and an assessment made in disregard of them void, see Thames Manuf. Co. *v.* Lathrop, 7 Conn. 550; Philips *v.* Stevens Point, 25 Wis. 594; Walker *v.* Chapman, 22 Ala. 116; Sioux City, &c. R. R. Co. *v.* Washington Co., 3 Neb. 30; Leavenworth Co. *v.* Lang, 8 Kan. 284; Griswold *v.* School District, 24 Mich. 262. On the general right to notice in tax cases, see the opinion of Mr. Justice Field in the case of San Mateo County *v.* Sou. Pac. R. R. Co., 13 Fed. Rep. 722; where the right is strongly affirmed.

[1] Constitution of Maine, art. 9, § 7; Constitution of Mass., Part 2, c. 1, § 1, art. 4.

[2] Constitution of Mich., art. 14, § 13.

[3] Constitution of Rhode Island, art. 4, § 15.

[4] See Bright *v.* McCulloch, 27 Ind. 223; Ould *v.* Richmond, 23 Gratt. 464; s. c. 14 Am. Rep. 139; Youngblood *v.* Sexton, 32 Mich. 406; s. c. 20 Am. Rep. 654; Albrecht *v.* State, 8 Tex. App. 216; s. c. 34 Am. Rep. 737.

[5] See Ould *v.* Richmond, 23 Gratt. 464; s. c. 14 Am. Rep. 139; Wilmington *v.* Macks, 86 N. C. 88; Lightburne *v.* Taxing District, 4 Lea, 219.

tion of such organizations. It is evident, therefore, that the express provisions, which are usual in State constitutions, that taxation upon property shall be according to value, do not include every species of taxation; and that all special cases like those we have here referred to are, by implication, excepted.

But in addition to these cases, there are others where taxes are levied directly upon property, which are nevertheless held not to be within the constitutional provisions. Assessments for the opening, making, improving, or repairing of streets, the draining of swamps, and the like local works, have been generally made upon property, with some reference to the supposed benefits which the property would receive therefrom. Instead, therefore, of making the assessment include all the property of the municipal organization in which the improvement is made, a new and special taxing district is created, whose bounds are confined to the limits within which property receives a special and peculiar benefit, in consequence of the improvement. Even within this district the assessment is sometimes made by some other standard than that of value; and it is evident that if it be just to create the taxing district with reference to special benefits, it would be equally just and proper to make the taxation within the district have reference to the benefit each parcel of property receives, rather than to its relative value. The opening or paving of a street may increase the value of all property upon or near it; and it may be just that all such property should contribute to the expense of the improvement: but it by no means follows that each parcel of the property will receive from the improvement a benefit in proportion to the previous value. One lot upon the street may be greatly increased in value, another at a little distance may be but slightly benefited; and if no constitutional provision interferes, there is consequently abundant reason why the tax levied within the taxing district should have reference, not to value, but to benefit.

It has been objected, however, to taxation upon this basis, that inasmuch as the district upon which the burden is imposed is compelled to make the improvement for the benefit of the general public, it is, to the extent of the tax levied, an appropriation of private property for the public use; and as the persons taxed, as a part of the public, would be entitled of right to the enjoyment of the improvement when made, such right of enjoyment could not be treated as compensation for the exaction which is made of them exclusively, and such exaction would therefore be opposed to those constitutional principles which declare the inviolability of private property. But those principles have no reference to

the taking of property under legitimate taxation. When the Constitution provides that private property shall not be taken for public use without just compensation made therefor, it has reference to an appropriation thereof under the right of eminent domain. Taxation and eminent domain indeed rest substantially on the same foundation, as each implies the taking of private property for the public use on compensation made; but the compensation is different in the two cases. When taxation takes money for the public use, the taxpayer receives, or is supposed to receive, his just compensation in the protection which government affords to life, liberty, and property, in the public conveniences which it provides, and in the increase in the value of possessions which comes from the use to which the government applies the money raised by the tax;[1] and these benefits amply support the individual burden.

But if these special local levies are *taxation*, do they come under the general provisions on the subject of taxation to be found in our State constitutions? The Constitution of Michigan directs that "the legislature shall provide an uniform rule of taxation, except on property paying specific taxes; and taxes shall be levied upon such property as shall be prescribed by law;"[2] and again: "All assessments hereafter authorized shall be on property at its cash value."[3] In the construction of these provisions the first has been regarded as confiding to the discretion of the legislature the establishment of the rule of uniformity by which taxation was to be imposed; and the second as having reference to the annual valuation of property for the purposes of taxation, which it is customary to make in that State, and not to the actual levy of a tax. A local tax, therefore, levied in the city of Detroit, to meet the expense of paving a public street, and which was levied, not in proportion to the value of property, but according to an arbitrary scale of supposed benefit, has been held not invalid under the constitutional provision.[4]

So the Constitution of Illinois declares that "the General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some

[1] People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; Williams *v.* Mayor, &c. of Detroit, 2 Mich. 560; Scovill *v.* Cleveland, 1 Ohio St. 126; Northern Indiana R. R. Co. *v.* Connelly, 10 Ohio St. 159; Washington Avenue, 69 Pa. St. 352; s. c. 8 Am. Rep. 255; White *v.* People, 94 Ill. 604.

[2] Art. 14, § 11.

[3] Art. 14, § 12.

[4] Williams *v.* Mayor, &c. of Detroit, 2 Mich. 560. And see Woodbridge *v.* Detroit, 8 Mich. 274; State *v.* Stout, 61 Ind. 143; Taylor *v.* Boyd, 63 Tex. 533.

person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise,"[1] &c. The charter of the city of Peoria provided that, when a public street was opened or improved, commissioners should be appointed by the county court to assess upon the property benefited the expense of the improvement in proportion to the benefit. This provision was held to be constitutional, on the ground that assessments of this character were not such taxation as was contemplated by the general terms which the constitution employed.[2] Like decisions have been made in other States in regard to similar assessments.[3]

[1] Art. 9, § 2.

[2] City of Peoria *v.* Kidder, 26 Ill. 351. See also Canal Trustees *v.* Chicago, 12 Ill. 403. In Chicago *v.* Larned, 34 Ill. 203, it was decided that, while taxation for these local assessments might constitutionally be made in proportion and to the extent of the benefits received, it could not under the Constitution of 1848 be made on the basis of frontage. This case was followed in Wright *v.* Chicago, 46 Ill. 44. The contrary is held under the Constitution of 1870. White *v.* People, 94 Ill. 604; Craw *v.* Tolono, 96 Ill. 255; s. c. 36 Am. Rep. 143.

[3] People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; Matter of Mayor, &c. of New York, 11 Johns. 77; Sharp *v.* Spier, 4 Hill, 76; Livingston *v.* Mayor, &c. of New York, 8 Wend. 85; Matter of Furman St., 17 Wend. 649; Louisville *v.* Hyatt, 2 B. Monr. 177; s. c. 36 Am. Dec. 594; Nichols *v.* Bridgeport, 23 Conn. 189; Schenley *v.* City of Alleghany, 25 Pa. St. 128; Wray *v.* Pittsburg, 46 Pa. St. 365; Hammett *v.* Philadelphia, 65 Pa. St. 146; s. c. 3 Am. Rep. 615; Washington Avenue, 69 Pa. St. 353; s. c. 8 Am. Rep. 255; McBride *v.* Chicago, 22 Ill. 574; Chicago *v.* Larned, 34 Ill. 203; Murphy *v.* People, 120 Ill. 234; Springfield *v.* Green, *Id.* 269; City of Lexington *v.* McQuillan's Heirs, 9 Dana, 513; Burnes *v.* Atchison, 2 Kan. 454; Hines *v.* Leavenworth, 3 Kan. 186; St. Joseph *v.* O'Donoghue, 31 Mo. 345; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495; St. Joseph *v.* Anthony, 30 Mo. 537; Farrar *v.* St. Louis, 80 Mo. 379; Burnet *v.* Sacramento, 12 Cal. 76; Yeatman *v.* Crandell, 11 La. Ann. 220; Wallace *v.* Shelton, 14 La. Ann. 498; Richardson *v.* Morgan, 16 La. Ann. 429; Hill *v.* Higdon, 5 Ohio St. 243; Marion *v.* Epler, 5 Ohio St. 250; Reeves *v.* Treasurer of Wood Co., 8 Ohio St 333; Northern Ind. R. R. Co. *v.* Connelly, 10 Ohio St. 159; Baker *v.* Cincinnati, 11 Ohio St. 534; Maloy *v.* Marietta, 11 Ohio St. 636; State *v.* Dean, 23 N. J. 335; State *v.* Mayor, &c. of Jersey City, 24 N. J. 662; Bond *v.* Kenosha, 17 Wis. 284; City of Fairfield *v.* Ratcliff, 20 Iowa, 396; Municipality No. 2 *v.* White, 9 La. Ann. 447; Cumming *v.* Police Jury, 9 La. Ann. 503; Northern Liberties *v.* St. John's Church, 13 Pa. St. 103; McGehee *v.* Mathis, 21 Ark. 40; Goodrich *v.* Winchester, &c. Turnpike Co., 26 Ind. 119; Emery *v.* Gas Co., 28 Cal. 345; Palmer *v.* Stumph, 29 Ind. 329; Dorgan *v.* Boston, 12 Allen, 223; Anderson *v.* Kerns Draining Co., 14 Ind. 199; Macon *v.* Patty, 57 Miss. 378; s. c. 34 Am. Rep. 451; Cain *v.* Commissioners, 86 N. C. 8; Norfolk *v.* Ellis, 26 Gratt 224; Wilkins *v.* Detroit, 46 Mich. 120; Vasser *v.* George, 47 Miss. 713; Roundtree *v.* Galveston, 42 Tex. 612; Richmond & A. R. R.Co. *v.* Lynchburg, 81 Va. 473. For a special case, see Cincinnati Gas, &c. Co. *v.* State, 18 Ohio St. 237. In Alabama a decision has been made the other way. The constitution provides that "all taxes levied on property in this State shall be assessed in exact proportion to the value of such property; *provided, however*, that the General Assembly may levy a poll-tax not to exceed one dollar and fifty cents on each poll, which shall be applied exclusively in aid of the public-school fund." This, it was decided, would preclude the levy of a local assessment for the improvement of a street by the foot front. Mayor of Mobile *v.* Dargan, 45 Ala. 310 In Colorado only improvements within the domain of the police power can be paid for by special

But whatever may be the basis of the taxation, the requirement that it shall be uniform is universal. It applies as much to these local assessments as to any other species of taxes. The difference is only in the character of the uniformity, and in the basis on which it is established.[1] But to render taxation uniform in any case, two things are essential. The first of these is that each taxing district should confine itself to the objects of taxation within its limits. Otherwise there is, or may be, duplicate taxation, and of course inequality. Assessments upon real estate not lying within the taxing districts would be void,[2] and assessments for personal property made against persons not residing in the district would also be void, unless made with reference to the actual presence of the property in such district.[3]

In Wells *v.* City of Weston,[4] the Supreme Court of Missouri deny the right of the legislature to subject property located in one taxing district to assessment in another, upon the express ground that it is in substance the arbitrary taxation of the property of one class of citizens for the benefit of another class. The case was one where the legislature sought to subject real estate

assessment. Expense of sewers may be, but not that of gutters and curbs. Pueblo *v.* Robinson, 21 Pac. Rep. 899; Wilson *v.* Chilcott, *Id.* 901. The cases of Weeks *v.* Milwaukee, 10 Wis. 242, and Lumsden *v.* Cross, 10 Wis. 282, recognize the fact that these local burdens are generally imposed under the name of *assessments* instead of *taxes*, and that therefore they are not covered by the general provisions in the constitution of the State on the subject of taxation. And see Bond *v.* Kenosha, 17 Wis. 284; Hale *v.* Kenosha, 29 Wis. 599. An exemption of church property from taxation will not preclude its being assessed for improving streets in front of it. See *post*, p. 632, note.

[1] In the case of assessments which are to be made on the basis of benefits, provision is usually made for a hearing. As to the right to this, see p. 617, note.

[2] But sometimes when a parcel of real estate lies partly in two districts, authority is given by law to assess the whole in one of these districts, and the whole parcel may then be considered as having been embraced within the district where taxed, by an enlargement of the district bounds to include it. Saunders *v.* Springstein, 4 Wend. 429. It is as competent to provide for the repairing of a street by special assessment on adjoining land, as for the original paving. See Willard *v.* Presbury, 14 Wall. 676; Gurnee *v.* Chicago, 40 Ill. 165; Bradley *v.* McAtee, 7 Bush, 667; Sheley *v.* Detroit, 45 Mich. 431; Blount *v.* Janesville, 31 Wis. 648; Municipality *v.* Dunn, 10 La. Ann. 57; Jeliff *v.* Newark, 49 N. J. L. 239; Estes *v.* Owen, 90 Mo. 113. *Contra*, Hammett *v.* Philadelphia, 65 Pa. St. 146; Orphan Asylum's Appeal, 111 Pa. St. 135; Williamsport *v.* Beck, 128 Pa. St. 147. The expense of sewer repairs properly payable by a city cannot be imposed on adjoining owners by calling the work street improvement. Clay *v.* Grand Rapids, 60 Mich. 451.

[3] People *v.* Supervisors of Chenango, 11 N. Y. 563; Mygatt *v.* Washburn, 15 N. Y. 316; Brown *v.* Smith, 24 Barb. 419; Hartland *v.* Church, 47 Me. 169; Lessee of Hughey *v.* Horrell, 2 Ohio, 231.

[4] 22 Mo. 384. To the same effect is *In re* Flatbush, 60 N. Y. 398. Compare case of State Tax on Foreign Held Bonds, 17 Wall. 300; St. Charles *v.* Nolle, 51 Mo. 122; s. c. 11 Am. Rep. 440; People *v.* Townsend, 56 Cal. 633; State Treasurer *v.* Auditor-General, 46 Mich. 224. The case of Langhorne *v.* Robinson, 20 Gratt. 661, is *contra*.

lying outside the limits of a city to taxation for city purposes, on the theory that it received some benefit from the city government, and ought to contribute to its support. In Kentucky [1] and Iowa [2] decisions have been made which, while affirming the same principle as the case above cited, go still further, and declare that it is not competent for the legislature to increase the limits of a city, in order to include therein farming lands, occupied by the owner for agricultural purposes, and not required for either streets or houses, or other purposes of a town, where the purpose is merely to increase the city revenue by taxation. The courts admit that the extension of the limits of a city or town, so as to include its actual enlargement, as manifested by houses and population, is to be deemed a legitimate exercise of the taxing power, but they declare that an indefinite or unreasonable extension, so as to embrace lands or farms at a distance from the local government, does not rest upon the same authority. And although it may be a delicate as well as a difficult duty for the judiciary to interpose, the court had no doubt but strictly there are limits beyond which the legislative discretion cannot go. "It is not every case of injustice or oppression which may be reached; and it is not every case which will authorize a judicial tribunal to inquire into the minute operation of laws imposing taxes, or defining the boundaries of local jurisdictions. The extension of the limits of the local authority may in some cases be greater than is necessary to include the adjacent population, or territory laid out into city lots, without a case being presented in which the courts would be called upon to apply a nice and exact scrutiny as to its practical operation. It must be a case of flagrant injustice and palpable wrong, amounting to the taking of private property without such compensation in return as the taxpayer is at liberty to consider a fair equivalent for the tax." This decision has been subsequently recognized and followed as authority, in the last-named State.[3]

[1] City of Covington *v.* Southgate, 15 B. Monr. 491; Arbegust *v.* Louisville, 2 Bush, 271; Swift *v.* Newport, 7 Bush, 37.

[2] Morford *v.* Unger, 8 Iowa, 82.

[3] Langworthy *v.* Dubuque, 13 Iowa, 86; Fulton *v.* Davenport, 17 Iowa, 404; Buell *v.* Ball, 20 Iowa, 282. These cases were cited and followed in Bradshaw *v.* Omaha, 1 Neb. 16. These cases, however, do not hold the legislative act which enlarges the city limits to be absolutely void, but only hold that they will limit the exercise of the taxing power as nearly as practicable to the line where the extension of the boundaries ceases to be beneficial to the proprietor in a municipal point of view. For this purpose they enter into an inquiry of fact, whether the lands in question, in view of their relative position to the growing and improved parts of the town, and partaking more or less of the benefits of municipal government, are proper subjects of municipal taxation; and if not, they enjoin the collection of such taxes. It would seem as if there must be great practical difficulties — if not some of principle — in making this disposition of such a case. They

The second essential is that there should be uniformity in the manner of the assessment, and approximate equality in the amount of exactions within the district; [1] and to this end that all the objects of taxation within the district should be embraced. The correctness of this principle will be conceded, but whether in practice it has been applied or not, it may not always be easy to determine.

"With the single exception of specific taxes," says *Christiancy*, J., in Woodbridge *v.* Detroit,[2] "the terms 'tax' and 'assessment' both, I think, when applied to property, and especially to lands, always include the idea of some ratio or rule of apportionment, so that, of the whole sum to be raised, the part paid by one piece of property shall bear some known relation to, or be affected by, that paid by another. Thus, if one hundred dollars are to be raised from tracts A, B, and C, the amount paid by A will reduce by so much that to be paid by B and C; and so of the others. In the case of specific taxes, as well as duties and imposts, though the amount paid by one is not affected by that paid by another, yet there is a known and fixed relation of one to the other, a uniform rate by which it is imposed upon the whole species or class of property or persons to which the specific tax applies; and this is so of duties and imposts, whether specific or *ad valorem*. To compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and

have nevertheless been followed repeatedly in Iowa. Davis *v.* Dubuque, 20 Iowa, 458; Deeds *v.* Sanborn, 26 Iowa, 410; Durant *v.* Kauffman, 34 Iowa, 194. There are decisions adverse to these. See Stiltz *v.* Indianapolis, 55 Ind. 515; Martin *v.* Dix, 52 Miss. 53; s. c. 24 Am. Rep. 661; Giboney *v.* Cape Girardeau, 58 Mo. 141; New Orleans *v.* Cazelear, 27 La. Ann. 156. Compare Weeks *v* Milwaukee, 10 Wis. 242; Kelly *v.* Pittsburgh, 85 Pa. St. 170; Hewitt's Appeal, 88 Pa. St. 55; Stoner *v.* Flournoy, 28 La. Ann. 850; Norris *v.* Waco, 57 Tex. 635; Washburn *v.* Oshkosh, 60 Wis. 453. That the legislature cannot annex to a village territory not contiguous for the purpose of increasing its revenues, see Smith *v.* Sherry, 50 Wis. 210.

[1] See Davis *v.* Gaines, 48 Ark. 370; State *v.* Dist. Court, 33 Minn. 235; Warren *v.* Chicago, 118 Ill. 329. Where an assessment is to be made by benefits, property owners have an absolute right to be heard, and a law for making it without provision for a hearing is void. Stuart *v.* Palmer, 74 N. Y. 183; s. c. 30 Am. Rep. 289; Baltimore *v.* Scharf, 54 Md. 499; Davidson *v.* New Orleans, 96 U. S. 97; Spencer *v.* Merchant, 125 U. S. 345; Campbell *v.* Dwiggins, 83 Ind. 473; Gilmore *v.* Hentig, 33 Kan. 156; Brown *v.* Denver, 7 Col. 305; Boorman *v.* Santa Barbara, 65 Cal. 313; Gatch *v.* Des Moines, 63 Iowa, 718; Trustees *v.* Davenport, 65 Iowa, 633. See Waples, Proceedings in Rem, 64; *ante*, 610, note. *Contra*, Baltimore *v.* Johns Hopkins Hosp., 56 Md. 1; Cleveland *v.* Tripp, 13 R. I. 50; Davis *v.* Lynchburg, 6 S. E. Rep. 230 (Va.). Notice is unnecessary if only a mathematical calculation is involved. Amery *v.* Keokuk, 72 Iowa, 701. If an opportunity for a hearing is given at some step of the proceedings it is enough; as in judicial proceedings to enforce the assessment. Hagar *v.* Reclamation Dist., 111 U. S. 701.

[2] 8 Mich. 274, 301. See also Chicago *v.* Larned, 34 Ill. 203; Creote *v.* Chicago, 56 Ill. 422.

without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is, it seems to me, to lay a forced contribution, not a tax, duty, or impost, within the sense of these terms, as applied to the exercise of powers by any enlightened or responsible government."

In the case of Knowlton *v.* Supervisors of Rock County,[1] an important and interesting question arose, involving the very point now under discussion. The Constitution of Wisconsin provides that "the rule of taxation shall be uniform," which, if we are correct in what we have already stated, is no more than an affirmance of a settled principle of constitutional law. The city of Janesville included within its territorial limits, not only the land embraced within the recorded plat of the village of Janesville and its additions, but also a large quantity of the adjacent farming or agricultural lands. Conceiving the owners of these lands to be greatly and unequally burdened by taxation for the support of the city government, the legislature passed an act declaring that "in no case shall the real and personal property within the territorial limits of said city, and not included within the territorial limits of the recorded plat of the village of Janesville, or of any additions to said village, which may be used, occupied, or reserved for agricultural or horticultural purposes, be subject to an annual tax to defray the current expenses of said city, exceeding one-half of one per cent; nor for the repair and building of roads and bridges, and the support of the poor, more than one-half as much on each dollar's valuation shall be levied for such purposes as on the property within such recorded plats, nor shall the same be subject to any tax for any of the purposes mentioned in § 3 of c. 5 of [the city charter]; nor shall the said farming or gardening

[1] 9 Wis. 410. A tax case of much more than ordinary interest and importance is that of San Mateo County *v.* The Southern Pacific R. R. Co., 13 Fed. Rep. 722, Justice Field delivering an elaborate opinion, in the conclusions of which Judge Sawyer concurred. The suit was brought for the recovery of a tax assessed upon the franchises, roadway, road-bed, rails, and rolling-stock of the defendant. By the Constitution of the State the real estate of private individuals is valued for taxation, with a deduction of all mortgages and other liens, but the value of the property of railroads is to be assessed without any such deduction. It was held by these eminent judges that this discrimination in taxation between the property of natural persons and railroad corporations was an unwarrantable departure from the rule of equality and uniformity in taxation; that the provision which establishes the discrimination is not due process of law, and is therefore opposed to the fourteenth amendment to the Constitution of the United States, which is equally effectual to protect against an unwarranted exercise of the taxing power as against any other unlawful deprivation of property. It was also affirmed that the State has no power, by its constitution or otherwise, to withdraw corporations from the guaranties of the Federal Constitution.

land be subject to any tax, other than before mentioned, for any city purpose whatsoever." Under the charter the property of the city was liable to an annual tax of one per centum to defray the current expenses of the city; and also an additional tax of such sum as the common council might deem necessary for the repair and building of roads and bridges, and for the support of the poor. Thus it will be perceived that the legislature within the same taxing district, — if the whole city is to be considered one district only, — undertook to provide that a portion of the property should be taxed at one rate in proportion to value, and another portion at a much lower rate; while from taxation for certain proper local purposes the latter class was exempted altogether.

"It was contended in argument," say the court, "that as those provisions fixed one uniform rate without the recorded plats, and another within them, thus taxing all the property without alike, and all within alike, they do not infringe the constitution. In other words, that for the purpose of taxation, the legislature have the right arbitrarily to divide up and classify the property of the citizens, and, having done so, they do not violate the constitutional rule of uniformity, provided all the property within a given class is rated alike.

"The answer to this argument is, that it creates different *rules* of taxation, to the number of which there is no limit, except that fixed by legislative discretion, while the constitution establishes but one fixed, unbending, uniform rule upon the subject. It is believed that if the legislature can, by classification, thus arbitrarily, and without regard to value, discriminate in the same municipal corporation between personal and real property within, and personal and real property without a recorded plat, they can also by the same means discriminate between lands used for one purpose and those used for another, such as lands used for growing wheat and those used for growing corn, or any other crop; meadow-lands and pasture-lands, cultivated and uncultivated lands; or they can classify by the description, such as odd-numbered lots and blocks and even-numbered ones, or odd and even numbered sections. Personal property can be classified by its character, use, or description, or, as in the present case, by its location, and thus the rules of taxation may be multiplied to an extent equal in number to the different kinds, uses, descriptions, and locations of real and personal property. We do not see why the system may not be carried further, and the classification be made by the character, trade, profession, or business of the owners. For certainly this rule of uniformity can as well be applied

to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the constitution operative only to the extent of prohibiting the legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the legislature, 'You shall not discriminate between single individuals or corporations; but you may divide the citizens up into different classes, as the followers of different trades, professions, or kinds of business, or as the owners of different species or descriptions of property, and legislate for one class, and against another, as much as you please, provided you serve all of the favored or unfavored classes alike;' thus affording a direct and solemn constitutional sanction to a system of taxation so manifestly and grossly unjust that it will not find an apologist anywhere, at least outside of those who are the recipients of its favor. We do not believe the framers of that instrument intended such a construction, and therefore cannot adopt it." [1]

The principle to be deduced from the Iowa and Wisconsin cases, assuming that they do not in any degree conflict, seems to be this: The legislature cannot arbitrarily include within the limits of a village, borough, or city, property and persons not properly chargeable with its burdens, and for the sole purpose of increasing the corporate revenues by the exaction of the taxes. But whenever the corporate boundaries are established, it is to be understood that whatever property is included within those limits has been thus included by the legislature, because it justly belongs there, as being within the circuit which is benefited by the local government, and which ought consequently to contribute to its burdens. The legislature cannot, therefore, after having already, by including the property within the corporation, declared its opinion that such property should contribute to the local government, immediately turn about and establish a basis of taxation

[1] Per *Dixon*, Ch. J., 9 Wis. 410, 421. Besides the other cases referred to, see, on this same general subject, Lin Sing *v.* Washburn, 20 Cal. 534; State *v.* Merchants' Ins. Co., 12 La. Ann. 802; Adams *v.* Somerville, 2 Head, 363; McComb *v.* Bell, 2 Minn. 295; Attorney-General *v.* Winnebago Lake & Fox River P. R. Co., 11 Wis. 35; Weeks *v.* Milwaukee, 10 Wis. 242; O'Kane *v.* Treat, 25 Ill. 557; Philadelphia Association, &c. *v.* Wood, 39 Pa. 73; Sacramento *v.* Crocker, 16 Cal. 119. There was a provision in the charter of Covington that a street might be paved with the Nicholson pavement at the expense of the adjoining owners, when the owners of the larger part of the frontage should petition therefor. An amendatory act authorized it as to a portion of a certain street without such a petition; thus permitting a special improvement on that street, at the expense of the owners of adjoining lots, on a different principle from that adopted for the city generally. In Howell *v.* Bristol, 8 Bush, 493, this amendment was held inconsistent with the fundamental principles of taxation, and consequently void.

which assumes that the property is not in fact urban property at all, but is agricultural lands, and should be assessed accordingly. The rule of apportionment must be uniform throughout the taxing district, applicable to all alike; but the legislature have no power to arrange the taxing districts arbitrarily, and without reference to the great fundamental principle of taxation, that the burden must be borne by those upon whom it justly rests. The Kentucky and Iowa decisions hold that, in a case where they have manifestly and unmistakably done so, the courts may interfere and restrain the imposition of municipal burdens on property which does not properly belong within the municipal taxing district at all. It must be manifest, however, that the effect of the decisions in the States last referred to is to establish judicially two or more districts within a municipality where the legislature has established one only; and as this is plainly a legislative function, it would seem that the legislature must be at least as competent to establish them directly as any court can be to do the same thing indirectly. And in Missouri, Kentucky, and Pennsylvania, no difficulty has been found in sustaining legislation which discriminated in taxation between "rural" lands and others within the same city.[1]

This rule of uniformity has perhaps been found most difficult of application in regard to those cases of taxation which are commonly known under the head of assessments, and which are made either for local improvement and repair, or to prevent local causes resulting in the destruction of health or property. In those cases where it has been held that such assessments were not covered by the constitutional provision that taxation should be laid upon property in proportion to value, it has, nevertheless, been decided that the authority to make them must be referred to the taxing power, and not to the police power of the State, under which sidewalks have sometimes been ordered to be constructed. Apportionment of the burden was therefore essential, though it need not be made upon property in proportion to its value. But the question then arises: What shall be the rule of apportionment? Can a

[1] Benoist *v.* St. Louis, 19 Mo. 179; Henderson *v.* Lambert, 8 Bush, 607; Parkland *v.* Gains, 11 S. W. Rep. 649 (Ky.); Serrill *v.* Philadelphia, 38 Pa. St. 355. And see Gillette *v.* Hartford, 31 Conn. 351. In Missouri such land, though taxed at a different rate, must be valued like other land. State *v.* O'Brien, 89 Mo. 631. In Utah it is denied that such land within the limits, but outside the city as built, can be subjected to city taxes. Terr. *v.* Daniels, 22 Pac. Rep. 159. Agricultural land in tracts of ten acres or more brought within a city may be exempted from city taxes: Leicht *v.* Burlington, 73 Iowa, 29; if brought in after the passage of an act allowing it. Perkins *v.* Burlington, 77 Iowa, 553. Under Indiana statutes such land may not be taxed for general purposes above township rates, but is liable for special assessments. Dickerson *v.* Franklin, 112 Ind. 178.

street be ordered graded and paved, and the expense assessed exclusively upon the property which, in the opinion of the assessors, shall be peculiarly benefited thereby, in proportion to such benefit? Or may a taxing district be created for the purpose, and the expense assessed in proportion to the area of the lots? Or may the street be made a taxing district, and the cost levied in proportion to the frontage? Or may each lot-owner be required to grade and pave in front of his lot? These are grave questions, and they have not been found of easy solution.

The case of The People *v.* The Mayor, &c. of Brooklyn,[1] is a leading case, holding that a statute authorizing a municipal corporation to grade and improve streets, and to assess the expense among the owners and occupants of lands benefited by the improvement, in proportion to the amount of such benefit, is a constitutional and valid law. The court in that case concede that taxation cannot be laid without apportionment, but hold that the basis of apportionment in these cases is left by the constitution with the legislature. The application of any one rule or principle of apportionment to all cases would be manifestly oppressive and unjust. Taxation is sometimes regulated by one principle, and sometimes by another; and very often it has been apportioned without reference to locality, or to the taxpayer's ability to contribute, or to any proportion between the burden and the benefit. "The excise laws, and taxes on carriages and watches, are among the many examples of this description of taxation. Some taxes affect classes of inhabitants only. All duties on imported goods are taxes on the class of consumers. The tax on one imported article falls on a large class of consumers, while the tax on another affects comparatively a few individuals. The duty on one article consumed by one class of inhabitants is twenty per cent of its value, while on another, consumed by a different class, it is forty per cent. The duty on one foreign commodity is laid for the purpose of revenue mainly, without reference to the ability of its consumers to pay, as in the case of the duty on salt. The duty on another is laid for the purpose of encouraging domestic manufactures of the same article, thus compelling the consumer to pay a higher price to one man than he could otherwise have bought the article for from another. These discriminations may be impolitic, and in some cases unjust; but if the power of taxation upon importations had not been transferred by the people of this State to the federal government there could have been no pretence for declaring them to be unconstitutional in State legislation.

[1] 4 N. Y. 419, 427; reversing same case, 6 Barb. 209.

"A property tax for the general purposes of the government, either of the State at large or of a county, city, or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burden according to the benefit more nearly than any other inflexible rule of general taxation. A rich man derives more benefit from taxation, in the protection and improvement of his property, than a poor man, and ought therefore to pay more. But the amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty; and for that reason a property tax is adopted, instead of an estimate of benefits. In local taxation, however, for special purposes, the local benefits may in many cases be seen, traced, and estimated to a reasonable certainty. At least this has been supposed and assumed to be true by the legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned, and whose determination of this matter, being within the scope of its lawful power, is conclusive."

The reasoning of this case has been generally accepted as satisfactory, and followed in subsequent cases.[1]

[1] Scoville *v.* Cleveland, 1 Ohio St. 126; Hill *v.* Higdon, 5 Ohio St. 243; Marion *v.* Epler, 5 Ohio St. 250; Maloy *v.* Marietta, 11 Ohio St. 636; City of Peoria *v.* Kidder, 26 Ill. 351; Reeves *v.* Treasurer of Wood Co., 8 Ohio St. 333; Garrett *v.* St. Louis, 25 Mo. 505; Uhrig *v.* St. Louis, 44 Mo. 458; Bradley *v.* McAtee, 7 Bush, 667; s. c. 3 Am. Rep. 309; Jones *v.* Boston, 104 Mass. 461; Sessions *v.* Crunkilton, 20 Ohio St. 349; State *v.* Fuller, 34 N. J. 227; Holton *v.* Milwaukee, 31 Wis. 27; McMasters *v.* Commonwealth, 3 Watts, 292; Allentown *v.* Henry, 73 Pa. St. 404; Weber *v.* Reinhard, 73 Pa. St. 370; s. c. 13 Am. Rep. 747; Livingston *v.* New York, 8 Wend. 85; s. c. 22 Am. Dec. 622; Wright *v.* Boston, 9 Cush. 233; Jones *v.* Boston, 104 Mass. 461; Nichols *v.* Bridgeport, 23 Conn. 189; Cone *v.* Hartford, 28 Conn. 363; Alexander *v.* Baltimore, 5 Gill, 383; Howard *v.* The Church, 18 Md 451; Hoyt *v.* East Saginaw, 19 Mich. 39; Sheley *v.* Detroit, 45 Mich. 431; Burnett *v.* Sacramento, 12 Cal. 76; La Fayette *v.* Fowler, 34 Ind. 140. The right to assess by benefits has been denied in South Carolina. State *v.* Charleston, 12 Rich. 702. The legislation in Ohio on the subject has authorized the cities and villages, in opening and improving streets, to assess the expense either upon the lots abutting on the street in proportion to the street front, or upon the lands in proportion to their assessed value. In a case where the former mode was resorted to, and an assessment made upon property owned by the Northern Indiana Railroad Company for its corporate purposes, *Peck*, J., thus states and answers an objection to the validity of the tax: "But it is said that assessments, as distinguished from general taxation, rest solely upon the idea of *equivalents*, — a compensation proportioned to the special benefits derived from the improvement, and that, in the case at bar, the railroad company is not, and in the nature of things cannot be, in any degree benefited by the improvement. It is quite true that the right to impose such special taxes is based upon a presumed equivalent; but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation, must be *uniform*, affecting all the owners and all the property abutting on the street alike. One rule cannot be applied to one owner, and a different rule to another owner. One could not be assessed ten per cent, another five, another three, and another left

On the other hand, and on the like reasoning, it has been held equally competent to make the street a taxing district, and assess the expense of the improvement upon the lots in proportion to the frontage.[1] Here also is apportionment by a rule

altogether unassessed because he was not in fact benefited. It is manifest that the actual benefits resulting from the improvement may be as various almost as the number of the owners, and the uses to which the property may be applied. No general rule, therefore, could be laid down which would do equal and exact justice to all. The legislature have not attempted so vain a thing, but have prescribed two different modes in which the assessment may be made, and left the city authorities free to adopt either The mode adopted by the council becomes the statutory equivalent for the benefits conferred, although in fact the burden imposed may greatly preponderate. In such case, if no fraud intervene, and the assessment does not substantially exhaust the owner's interest in the land his remedy would seem to be to procure, by a timely appeal to the city authorities, a reduction of the special assessment, and its imposition, in whole or in part, upon the public at large." Northern Indiana R. R. Co. *v.* Connelly, 10 Ohio St. 159, 165. And see Howell *v.* Bristol, 8 Bush, 493. It is competent to provide for assessing benefits upon the owner instead of the land. *In re* Centre St., 115 Pa. St. 247. As to repaving, see *ante*, 615, note. The legislative determination that certain land is benefited is conclusive. Only the question of apportionment remains open. Spencer *v.* Merchant, 125 U. S. 345; Pacific Bridge Co. *v.* Kirkham, 64 Cal. 519. The finding of benefits by a common council is conclusive unless palpably unjust. Paulson *v.* Portland, 16 Oreg. 450; Little Rock *v.* Katzenstein, 12 S. W. Rep. 198 (Ark.); Pueblo *v.* Robinson, 21 Pac. Rep. 899 (Col.). In ordering a local assessment the common council may determine that the benefits to property within the district will equal the cost of the improvement. Cook *v.* Slocum, 27 Minn. 509. If a council has made an assessment district, a jury in apportioning benefits must impose some on each parcel in it. Rentz *v.* Detroit, 48 Mich. 544. *Contra*, Kansas City *v.* Baird, 98 Mo. 215. But a wholly arbitrary apportionment that could not possibly be just would be void. Thomas *v.* Gain, 35 Mich. 155. A council cannot be empowered to impose expense as it may "deem equitable and just." Barnes *v.* Dyer, 56 Vt. 419.

[1] Williams *v.* Detroit, 2 Mich. 560; Northern Indiana R. R. Co. *v.* Connelly, 10 Ohio St. 159; Lumsden *v.* Cross, 10 Wis. 282. And see St. Joseph *v.* O'Donoghue, 31 Mo. 345; Burnett *v.* Sacramento, 12 Cal. 76; Scoville *v.* Cleveland, 1 Ohio St 126; Hill *v.* Higdon, 5 Ohio St. 243; Ernst *v.* Kunkle, 5 Ohio St. 520; Hines *v.* Leavenworth, 3 Kan. 186; Magee *v.* Commonwealth, 46 Pa. St. 358; Wray *v.* Pittsburg, 46 Pa. St. 365; Palmer *v.* Stumph, 29 Ind. 329; White *v.* People, 94 Ill. 604; Wilbur *v.* Springfield, 123 Ill. 395; Davis *v.* Lynchburg, 6 S. E. Rep. 230 (Va.); Farrar *v.* St. Louis, 80 Mo. 379; Taylor *v.* Boyd, 63 Tex. 533; O'Reilley *v.* Kingston, 114 N. Y. 439; although the assessment exceeds the value of a long, shallow strip assessed. McCormick's Est. *v.* Harrisburg, 18 Atl. Rep. 126 (Pa.). In Hammett *v.* Philadephia, 65 Pa. St. 146; s. c. 3 Am. Rep. 615, while the cases here cited are approved, it is denied that a street already laid out and in good condition can be taken and improved for a public drive or carriage-way at the expense of the adjacent owners; this not being an improvement for local but for general purposes. See Washington Avenue, 69 Pa. St. 352; s. c. 8 Am. Rep. 255; Orphan Asylum's Appeal, 111 Pa. St. 135; Williamsport *v.* Beck, 128 Pa. St. 147. But a borough may cause a sidewalk to be relaid at the cost of an abutter. Smith *v.* Kingston, 120 Pa. St. 357. Compare Allen *v.* Drew, 44 Vt. 174 (case of water-rents); Willard *v.* Presbury, 14 Wall. 676; Hoyt *v.* East Saginaw, 19 Mich. 39; s. c. 2 Am. Rep. 76; La Fayette *v.* Fowler, 34 Ind. 140; Chambers *v.* Satterlee, 40 Cal. 497; Bradlee *v.* McAtee, 7 Bush, 667; s. c. 3 Am. Rep. 309. In Washington Avenue, 69 Pa. St. 352; s. c. 8 Am. Rep. 255, it is denied that this principle can be applied to the country and to farming lands.

which approximates to what is just, but which, like any other rule that can be applied, is only an approximation to absolute equality. But if, in the opinion of the legislature, it is the proper rule to apply to any particular case, the courts must enforce it.

But a very different case is presented when the legislature undertakes to provide that each lot upon a street shall pay the whole expense of grading and paving the street along its front. For while in such a case there would be something having the outward appearance of apportionment, it requires but slight examination to discover that it is a deceptive semblance only, and that the measure of equality which the constitution requires is entirely wanting. If every lot-owner is compelled to construct the street in front of his lot, his tax is neither increased nor diminished by the assessment upon his neighbors; nothing is divided or apportioned between him and them; and each particular lot is in fact arbitrarily made a taxing district, and charged with the whole expenditure therein, and thus apportionment avoided. If the tax were for grading the street simply, those lots which were already at the established grade would escape altogether, while those on either side, which chanced to be above and below, must bear the whole burden, though no more benefited by the improvement than the others.[1] It is evident, therefore, that a law for making assessments on this basis could not have in view such distribution of burdens in proportion to benefits as ought to be a cardinal idea in every tax-law.[2] It would be nakedly an arbitrary command of the law to each lot-owner to construct the street in front of his lot at his own expense, according to a prescribed standard; and a power to issue such com-

Agnew, J., says: "To apply it to the country, or to farm lands, would lead to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law; so that at the very first blush every one would pronounce it palpably unreasonable and unjust." The able opinion in this case is a very satisfactory and very thorough examination of the principles on which local assessments are supported. The cases of Seely *v.* Pittsburg, 82 Pa. St. 360; Craig *v.* Philadelphia, 89 Pa. St. 265; Philadelphia *v.* Rule, 93 Pa. St. 15, and Scranton *v.* Penn Coal Co., 105 Pa. St 445, are in principle similar. The rule of assessment by frontage is not sanctioned in Arkansas: Peay *v.* Little Rock, 32 Ark. 31; Monticello *v.* Banks, 48 Ark. 251; nor in Tennessee. McBean *v.* Chandler, 9 Heisk, 349.

[1] In fact, lots above and below an established grade are usually less benefited by the grading than the others; because the improvement subjects them to new burdens, in order to bring the general surface to the grade of the street, which the others escape.

[2] The case of Warren *v.* Henley, 31 Iowa, 31, is opposed to the reasoning of the text; but the learned judge who delivers the opinion concedes that he is unable to support his conclusions on the authorities within his reach.

mand could never be exercised by a constitutional government, unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as that to keep the sidewalks free from obstruction and fit for passage. But any such idea is clearly inadmissible.[1]

[1] All lots in the district must be assessed, not simply those in front of which work has been done. Diggins *v.* Brown, 76 Cal. 318. See City of Lexington *v.* McQuillan's Heirs, 9 Dana, 513, and opinions of *Campbell* and *Christiancy*, JJ., in Woodbridge *v.* Detroit, 8 Mich. 274. The case of Weeks *v.* Milwaukee, 10 Wis. 258, seems to be *contra*. We quote from the opinion of the court by *Paine*, J. After stating the rule that uniformity in taxation implies equality in the burden, he proceeds: "The principle upon which these assessments rest is clearly destructive of this equality It requires every lot-owner to build whatever improvements the public may require on the street in front of his lot, without reference to inequalities in the value of the lots, in the expense of constructing the improvements, or to the question whether the lot is injured or benefited by their construction. Corner lots are required to construct and keep in repair three times as much as other lots; and yet it is well known that the difference in value bears no proportion to this difference in burden. In front of one lot the expense of building the street may exceed the value of the lot; and its construction may impose on the owner additional expense, to render his lot accessible. In front of another lot of even much greater value, the expense is comparatively slight. These inequalities are obvious; and I have always thought that the principle of such assessments was radically wrong. They have been very extensively discussed, and sustained upon the ground that the lot should pay because it receives the benefit. But if this be true, that the improvements in front of a lot are made for the benefit of the lot only, then the right of the public to tax the owner at all for that purpose fails; because the public has no right to tax the citizen to make him build improvements for his own benefit merely. It must be for a public purpose; and it being once established that the construction of streets is a public purpose that will justify taxation, I think it follows, if the matter is to be settled on principle, that the taxation should be equal and uniform, and that to make it so the whole taxable property of the political division in which the improvement is made should be taxed by a uniform rule for the purpose of its construction.

"But in sustaining these assessments when private property was wanted for a street, it has been said the State could take it, because the use of a street was a public use; in order to justify a resort to the power of taxation, it is said the building of a street is a public purpose. But then, having got the land to build it on, and the power to tax by holding it a public purpose, they immediately abandon that idea, and say that it is a private benefit, and make the owner of the lot build the whole of it. I think this is the same in principle as it would be to say that the town in which the county seat is located should build the county buildings, or that the county where the capital is should construct the public edifices of the State, upon the ground that, by being located nearer, they derived a greater benefit than others. If the question, therefore, was, whether the system of assessment could be sustained upon principle, I should have no hesitation in deciding it in the negative. I fully agree with the reasoning of the Supreme Court of Louisiana in the case of Municipality No. 2 *v.* White, 9 La. Ann. 447, upon this point.

"But the question is not whether this system is established upon sound principles, but whether the legislature has power, under the constitution, to establish such a system. As already stated, if the provision requiring the rule of taxation to be uniform was the only one bearing upon the question, I should answer this also in the negative. But there is another provision which seems to me so important, that it has changed the result to which I should otherwise have arrived. That provision is § 3 of art. 11,

In many other cases, besides the construction, improvement, and repair of streets, may special taxing districts be created, with a view to local improvements. The cases of drains to relieve swamps, marshes, and other low lands of their stagnant water, and of levees to prevent lands being overflowed by rivers, will at once suggest themselves. In providing for such cases, however, the legislature exercises another power besides the power of taxation. On the theory that the drainage is for the sole purpose of benefiting the lands of individuals, it might be difficult to defend such legislation. But if the stagnant water causes or threatens

and is as follows: 'It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, *assessment*, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations.'

"It cannot well be denied that if the word 'assessment,' as used in this section, had reference to this established system of special taxation for municipal improvements, that then it is a clear recognition of the existence and legality of the power." And the court, having reached the conclusion that the word *did* have reference to such an established system, sustained the assessment, adding: "The same effect was given to the same clause in the Constitution of Ohio, by the Supreme Court of that State, in a recent decision in the case of Hill *v.* Higdon, 5 Ohio, N. S. 243. And the reasoning of Chief Justice *Ranney* on the question I think it impossible to answer."

If the State of Wisconsin had any settled and known practice, designated as assessments, under which each lot-owner was compelled to construct the streets in front of his lot, then the constitution as quoted may well be held to recognize such practice. In this view, however, it is still difficult to discover any "restriction" in a law which perpetuates the arbitrary and unjust custom, and which still permits the whole expense of making the street in front of each lot to be imposed upon it. The only restriction which the law imposes is, that its terms exclude uniformity, equality, and justice, which surely could not be the restriction the constitution designed. Certainly the learned judge shows very clearly that such a law is unwarranted as a legitimate exercise of the taxing power; and as it cannot be warranted under any other power known to constitutional government, the authority to adopt it should not be found in doubtful words. The case of Hill *v.* Higdon, referred to, is different. There the expense of improving the street was assessed upon the property abutting on the street, in proportion to the foot front. The decision there was, that the constitutional provision that "laws shall be passed taxing by a uniform rule all moneys, &c., and also all real and personal property, according to its true value in money," had no reference to these local assessments, which might still be made, as they were before the constitution was adopted, with reference to the benefits conferred. The case, therefore, showed a rule of apportionment which was made applicable throughout the taxing district, to wit, along the street so far as the improvement extended. The case of State *v.* City of Portage, 12 Wis. 562, holds that a law authorizing the expense of an improvement to be assessed upon the abutting lots, in proportion to their front or size, would not justify and sustain city action which required the owner of each lot to bear the expense of the improvement in front of it.

It has been often contended that taxation by frontage was in effect a taking of property for the public use, but the courts have held otherwise. People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; Allen *v.* Drew, 44 Vt. 174; Warren *v.* Henley, 31 Iowa, 31; Washington Avenue, 69 Pa. St. 352; s. c. 8 Am. Rep. 255; White *v.* People, 94 Ill. 604.

disease, it may be a nuisance, which, under its power of police, the State would have authority to abate. The laws for this purpose, so far as they have fallen under our observation, have proceeded upon this theory. Nevertheless, when the State incurs expense in the exercise of its police power for this purpose, it may be proper to assess that expense upon the portion of the community specially and peculiarly benefited. The assessment is usually made with reference to the benefit to property; and it is difficult to frame or to conceive of any other rule of apportionment that would operate so justly and so equally in these cases. There may be difficulty in the detail; difficulty in securing just and impartial assessments; but the principle of such a law would not depend for its soundness upon such considerations.[1]

[1] See Reeves *v.* Treasurer of Wood Co., 8 Ohio St. 333; Sessions *v.* Crunkhinton, 20 Ohio St. 349; French *v.* Kirkland, 1 Paige, 117; Phillips *v.* Wickham, 1 Paige, 590; Anderson *v.* Kerns Co., 14 Ind. 199; O'Reiley *v.* Kankakee Co., 32 Ind. 169; Draining Co. Case, 11 La. Ann. 338; Hagar *v.* Supervisors of Yolo, 47 Cal. 222; Davidson *v.* New Orleans, 96 U. S. 97. In Woodruff *v.* Fisher, 17 Barb. 224, *Hand*, J., speaking of one of these drainage laws, says. "If the object to be accomplished by this statute may be considered a public improvement, the power of taxation seems to have been sustained upon analogous principles. [Citing People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; Thomas *v.* Leland, 24 Wend. 65; and Livingston *v.* Mayor, &c. of New York, 8 Wend. 85; s. c. 22 Am. Dec. 622.] But if the object was merely to improve the property of individuals, I think the statute would be void, although it provided for compensation. The water privileges on Indian River cannot be taken or affected in any way solely for the private advantage of others, however numerous the beneficiaries. Several statutes have been passed for draining swamps, but it seems to me that the principle above advanced rests upon natural and constitutional law. The professed object of this statute is to promote public health. And one question that arises is, whether the owners of large tracts of land in a state of nature can be taxed to pay the expense of draining them, by destroying the dams, &c., of other persons away from the drowned lands, and for the purposes of public health. This law proposes to destroy the water power of certain persons against their will, to drain the lands of others, also, for all that appears, against their will; and all at the expense of the latter, for this public good. If this taxation is illegal, no mode of compensation is provided, and all is illegal." "The owners of these lands could not be convicted of maintaining a public nuisance because they did not drain them; even though they were the owners of the lands upon which the obstructions are situated. It does not appear by the act or the complaint that the sickness to be prevented prevails among inhabitants on the wet lands, nor whether these lands will be benefited or injured by draining; and certainly, unless they will be benefited, it would seem to be partial legislation to tax a certain tract of land, for the expense of doing to it what did not improve it, merely because, in a state of nature, it may be productive of sickness. Street assessments are put upon the ground that the land assessed is improved, and its value greatly enhanced." The remarks of *Green*, J., in Williams *v.* Mayor, &c. of Detroit, 2 Mich. 560, 567, may be here quoted: "Every species of taxation, in every mode, is in theory and principle based upon an idea of compensation, benefit, or advantage to the person or property taxed, either directly or indirectly. If the tax is levied for the support of the government and general police of the State, for the education and moral instruction of the citizens, or the construction of works of internal improvement, he is supposed to receive a just compensation in the security which the govern-

Sewers in cities and populous districts are a necessity, not only that the streets may be kept clean and in repair, but to prevent the premises of individuals from becoming nuisances. The expense of these is variously assessed. It may unquestionably be made by benefits and by frontage under proper legislation.[1] In certain classes of cases, it has been customary to call upon the citizen to appear in person and perform service for the State, in the nature of police duties. The burden of improving and repairing the common highways of the country, except in the urban districts, is generally laid upon the people in the form of an assessment of labor. The assessment may be upon each citizen, in proportion to his property; or, in addition to the property assessment, there may be one also by the poll. But though the public burden assumes the form of labor, it is still taxation, and must therefore be levied on some principle of uniformity. But it is a peculiar species of taxation; and the general terms "tax" or "taxation," as employed in the State constitutions, would not generally be understood to include it. It has been decided that the clause in the Constitution of Illinois, that "the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession," did not prevent the levy of poll-taxes in

ment affords to his person and property, the means of enjoying his possessions, and their enhanced capacity to contribute to his comfort and gratification, which constitute their value."

It has been held incompetent, however, for a city which has itself created a nuisance on the property of a citizen, to tax him for the expense of removing or abating it. Weeks *v.* Milwaukee, 10 Wis. 258.

In Egyptian Levee Co. *v.* Hardin, 27 Mo. 495, it was held that a special assessment for the purpose of reclaiming a district from inundation might properly be laid upon land in proportion to its area, and that the constitutional provision that taxation should be levied on property in proportion to its valuation did not preclude this mode of assessment. The same ruling was made in Louisiana cases. Crowley *v.* Copley, 2 La. Ann. 329; Yeatman *v.* Crandall, 11 La. Ann. 220; Wallace *v.* Shelton, 14 La. Ann. 498; Bishop *v.* Marks, 15 La. Ann. 147; Richardson *v.* Morgan, 16 La. Ann. 429. So with reference to assessments for irrigating arid lands. Turlock Irrig. Dist. *v.* Williams, 76 Cal. 360. And see McGehee *v.* Mathis, 21 Ark. 40; Jones *v.* Boston, 104 Mass. 461; Daily *v.* Swope, 47 Miss. 367; Alcorn *v.* Hamer, 38 Miss. 652; Boro *v.* Phillips Co., 4 Dill. 216.

[1] In England it is made by benefits. In this country different methods are adopted. See Wright *v.* Boston, 9 Cush. 233; Leominster *v.* Conant, 139 Mass. 384; Cone *v.* Hartford, 28 Conn. 363; St. Louis *v.* Oeters, 36 Mo. 456; Rutherford *v.* Hamilton, 97 Mo. 543; Stroud *v.* Philadelphia, 61 Pa. St. 255; Philadelphia *v.* Tryon, 35 Pa. St. 401; Warner *v.* Grand Haven, 30 Mich. 24. It may be made according to the value of the lots: Mason *v.* Spencer, 35 Kan. 512; Snow *v.* Fitchburg, 136 Mass. 183; or by area. Keese *v.* Denver, 10 Col. 112. It would not be competent, however, to make the assessment for a city sewer by the area upon both in and out lots, as this, from the nature of the case, could not possibly be equal. Thomas *v.* Gain, 35 Mich. 155. Street sprinkling may be paid for according to the frontage upon the street sprinkled. State *v.* Reis, 38 Minn. 371.

highway labor. "The framers of the constitution intended to direct a uniform mode of taxation on property, and not to prohibit any other species of taxation, but to leave the legislature the power to impose such other taxes as would be consonant to public justice, and as the circumstances of the country might require. They probably intended to prevent the imposition of an arbitrary tax on property, according to kind and quantity, and without reference to value. The inequality of that mode of taxation was the object to be avoided. We cannot believe they intended that all the public burdens should be borne by those having property in possession, wholly exempting the rest of the community, who, by the same constitution, were made secure in the exercise of the rights of suffrage, and all the immunities of the citizen." [1] And in another case, where an assessment of highway labor is compared with one upon adjacent property for widening a street, — which had been held not to be taxation, as that term was understood in the constitution, — it is said: "An assessment of labor for the repair of roads and streets is less like a tax than is such an assessment. The former is not based upon, nor has it any reference to, property or values owned by the person of whom it is required, whilst the latter is based alone upon the property designated by the law imposing it. Nor is an assessment a capitation tax, as that is a sum of money levied upon each poll. This rate, on the contrary, is a requisition for so many days' labor, which may be commuted in money. No doubt, the number of days levied, and the sum which may be received by commutation, must be uniform within the limits of the district or body imposing the same. This requisition for labor to repair roads is not a tax, and hence this exemption is not repugnant to the constitution." [2]

It will be apparent from what has already been said, that it is not essential to the validity of taxation that it be levied according to the rules of abstract justice.[3] It is only essential that the legislature keep within its proper sphere of action, and do not impose burdens under the name of taxation which are not taxes in fact; and its decision as to what is proper, just, and politic, must

[1] Sawyer *v.* City of Alton, 4 Ill. 127, 130; State *v.* Halifax, 4 Dev 345; Amenia *v.* Stamford, 6 Johns. 92 Draining Co. Case, 11 La. Ann. 338, 372.

[2] Town of Pleasant *v.* Kost, 29 Ill. 490, 494.

[3] Frellsen *v.* Mahan, 21 La. Ann. 79; People *v.* Whyler, 41 Cal. 351; Warren *v.* Henley, 31 Iowa, 31. In this last case, *Beck*, J., criticises the position taken *ante*, pp. 625, 626, that the cost of a local improvement cannot be imposed on the adjoining premises irrespective of any apportionment, and appears to suppose our views rest upon the injustice of such a proceeding. This is not strictly correct; it may or may not be just in any particular case; but taxation necessarily implies apportionment, and even a just burden cannot be imposed as a tax without it.

then be final and conclusive. Absolute equality and strict justice are unattainable in tax proceedings. The legislature must be left to decide for itself how nearly it is possible to approximate so desirable a result. It must happen under any tax law that some property will be taxed twice, while other property will escape taxation altogether.[1] Instances will also occur where persons will be taxed as owners of property which has ceased to exist. Any system adopted for taking valuations of property must fix upon a certain time for that purpose, and a party becomes liable to be taxed upon what he possesses at the time the valuing officer calls upon him. Yet changes of property from person to person are occurring while the valuation is going on, and the same parcel of property may be found by the assessor in the hands of two different persons, and be twice assessed, while another parcel in the transfer from hand to hand fails to be assessed at all. So the man who owns property when the assessment is taken may have been deprived of it by accident or other misfortune before the tax becomes payable; but the tax is nevertheless a charge against him. And when the valuation is made but once in a series of years, the occasional hardships and inequalities in consequence of relative changes in the value of property from various causes, becomes sometimes very glaring. Nevertheless, no question of constitutional law is raised by these inequalities and hardships, and the legislative control is complete.[2]

[1] Duplicate taxation must occasionally take place, however carefully the law may have been framed to avoid it. A tax cannot be set aside on that ground merely. Augusta Bank *v.* Augusta, 36 Me. 255. It is customary to tax corporations on their capital stock, or on their property, and also the corporators on their shares; and this is entirely admissible. Farrington *v.* Tennessee, 95 U. S. 679; Sturges *v.* Carter, 114 U. S. 511; Belo *v.* Commissioners, 82 N. C. 415; s. c. 33 Am. Rep. 688; Bradley *v.* Bander, 36 Ohio St. 28; s. c. 38 Am. Rep. 547; Cook *v.* Burlington, 59 Iowa, 251; Lee *v.* Sturges, 19 N. E. Rep. 560 (Ohio). The tax on the shares may be collected from the corporation out of dividends. Street Railroad Co. *v.* Morrow, 87 Tenn. 406. But it is said the intent to tax both stock and shares must be clear. Penn. Co. *v.* Com., 15 Atl. Rep. 456 (Pa.). So land may be taxed at its full value, and also the mortgage upon it. People *v.* Board of Supervisors, 38 N. W. Rep. 639 (Mich.).

[2] In Shaw *v.* Dennis, 10 Ill. 405, objection was taken to an assessment made for a local improvement under a special statute, that the commissioners, in determining who should be liable to pay the tax, and the amount each should pay, were to be governed by the last assessment of taxable property in the county. It was insisted that this was an unjust criterion, for a man might have disposed of all the taxable property assessed to him in the last assessment before this tax was actually declared by the commissioners. The court, however, regarded the objection as more refined than practical, and one that, if allowed, would at once annihilate the power of taxation. "In the imposition of taxes, exact and critical justice and equality are absolutely unattainable. If we attempt it, we might have to divide a single year's tax upon a given article of property among a dozen

The legislature must also, except when an unbending rule has been prescribed for it by the constitution, have power to select in its discretion the subjects of taxation.[1] The rule of uniformity requires an apportionment among all the subjects of taxation within the districts; but it does not require that everything which the legislature might make taxable shall be made so in fact. Many exemptions are usually made from taxation from reasons the cogency of which is at once apparent. The agencies of the national government, we have seen, are not taxable by the States; and the agencies and property of States, counties, cities, boroughs, towns, and villages, are also exempted by law, because, if any portion of the public expenses was imposed upon them, it must in some form be collected from the citizens before it can be paid. No beneficial object could therefore be accomplished by any such assessment. The property of educational and religious institutions is also generally exempted from taxation by law upon very similar considerations, and from a prevailing belief that it is the policy and the interest of the State to encourage them.[2] If

different individuals who owned it at different times during the year, and then be almost as far from the desired end as when we started. The proposition is Utopian. The legislature must adopt some practical system; and there is no more danger of oppression or injustice in taking a former valuation than in relying upon one to be made subsequently." And see People *v.* Worthington, 21 Ill. 171.

[1] Wisconsin Cent. R. R. Co. *v.* Taylor County, 52 Wis. 37; Stratton *v.* Collins, 43 N. J 563; New Orleans *v.* People's Bank, 32 La. Ann. 82; New Orleans *v.* Fourchy, 30 La. Ann. pt. 1, 910; Gibbons *v.* Dist. Columbia, 116 U. S. 404; University *v.* Skidmore, 87 Tenn. 155. But if provision for certain exemptions is made by the constitution, no others are valid. Le Duc *v.* Hastings, 39 Minn. 110.

[2] As in the case of other special privileges, exemptions from taxation are to be strictly construed. Trustees of M. E. Church *v.* Ellis, 38 Ind. 3; State *v.* Mills, 34 N. J. 177; Nashville, &c. R. R. Co. *v.* Hodges, 7 Lea, 663; Railway Co. *v.* Philadelphia, 101 U. S. 528; Morris *v.* Royal Arch Masons, 68 Tex. 698; Yazoo & M. V. R. R. Co. *v.* Thomas, 65 Miss. 553; People *v.* Davenport, 91 N. Y. 574. Commonwealth's Appeal, 127 Pa. St. 435; Third Cong. Soc. *v.* Springfield, 147 Mass. 396; *ante*, 338; and many other cases cited in Cooley on Taxation, 146. The local authorities cannot be authorized by the legislature to make exemptions. Farnsworth Co. *v.* Lisbon, 62 Me. 451; Wilson *v.* Supervisors of Sutter, 47 Cal. 91; State *v.* Hannibal, &c. R. R. Co. 75 Mo. 208; Austin *v.* Gas Co., 69 Tex. 180. See Brewer Brick Co. *v.* Brewer, 62 Me. 62; s. c. 16 Am. Rep. 395; State *v.* Hudson, &c. Com'rs, 37 N. J. 12; Augusta Factory *v.* Augusta, 10 S. E. Rep. 359 (Ga.). Compare Danville *v.* Shelton, 76 Va. 325. But they may doubtless be authorized to decide upon the facts what persons or property come within the rules of exemption prescribed by the legislature. It has been generally held that an exemption from taxation would not exempt the property from being assessed for a local improvement. Matter of Mayor &c., 11 Johns. 77; Baltimore *v.* Cemetery Co., 7 Md. 517; La Fayette *v.* Orphan Asylum, 4 La. Ann. 1; Pray *v.* Northern Liberties, 31 Pa. St. 69; Le Fever *v.* Detroit, 2 Mich. 586; Lockwood *v.* St. Louis, 24 Mo. 20; Broadway Baptist Church *v.* McAtee, 8 Bush, 508; s. c. 8 Am. Rep. 480; Universalist Society *v.* Providence, 6 R. I. 235; Patterson *v.* Society, &c., 24 N. J. 385; Cincinnati College *v.* State, 19 Ohio, 110; Brewster

the State may cause taxes to be levied from motives of charity or gratitude, so for the like reasons it may exempt the objects of charity and gratitude from taxation.[1] Property is sometimes released from taxation by contract between the State and corporations, and specified occupations are sometimes charged with specific taxes in lieu of all taxation of their property. A broad field is here opened to legislative discretion. As matter of State policy it might also be deemed proper to make general exemption of sufficient of the tools of trade or other means of support, to enable the poor man, not yet a pauper, to escape becoming a public burden. There is still ample room for apportionment after all such exemptions have been made. The constitutional requirement of equality and uniformity only extends to such objects of taxation as the legislature shall determine to be properly subject to the burden.[2] The power to determine the persons and the objects to be taxed is trusted exclusively to the legislative department;[3] but over all those objects the burden must be spread or it will be unequal and unlawful as to such as are selected to make the payment.[4]

v. Hough, 10 N. H. 138; Seymour *v.* Hartford, 21 Conn. 481; Palmer *v.* Stumph, 29 Ind. 329; Peoria *v.* Kidder, 26 Ill. 351; Hale *v.* Kenosha, 29 Wis. 599; Seamen's Friend Society *v.* Boston, 116 Mass. 181; Orange, &c. R. R. Co. *v.* Alexandria, 17 Gratt. 176; Lima *v.* Cemetery Ass., 42 Ohio St. 128; State *v.* Kansas City, 89 Mo. 34; Chicago *v.* Baptist Union, 115 Ill. 245. *Contra*, Trustees M. E. Ch. *v.* Atlanta, 76 Ga. 181, and see Swan Point Cem. *v.* Tripp, 14 R. I. 199. Land held in trust for the State is exempt. People *v.* Trustees of Schools, 118 Ill. 52. The customary constitutional inhibition of any law respecting an establishment of religion, &c., is not violated by an exemption of church property from taxation. Trustees of Griswold College *v.* State, 46 Iowa, 275; s. c. 26 Am. Rep. 138.

[1] But it is not competent to grant exemptions from taxation based on sex or age, — *e. g.*, widows, maids, and female minors, — and an act attempting to make such exemptions is void. State *v.* Indianapolis, 69 Ind. 375; s. c. 35 Am. Rep. 223.

[2] State *v.* North, 27 Mo. 464; People *v.* Colman, 3 Cal. 46; Durach's Appeal, 62 Pa. St. 491; Brewer Brick Co. *v.* Brewer, 62 Me. 62; s. c. 16 Am. Rep. 395.

[3] Wilson *v.* Mayor, &c. of New York, 4 E. D. Smith, 675; Hill *v.* Higdon, 5 Ohio St. 243; State *v.* Parker, 33 N. J. 313; State *v.* County Court, 19 Ark. 360. Classes of property as well as classes of persons may be exempted. Butler's Appeal, 73 Pa. St. 448; Sioux City *v.* School District, 55 Iowa, 150. Notwithstanding a requirement that "the rule of taxation shall be uniform," the legislature may levy specific State taxes on corporations, and exempt them from municipal taxation. So held on the ground of *stare decisis*. Kneeland *v.* Milwaukee, 15 Wis. 454. See Ill. Cent. R. R. Co. *v.* McLean Co., 17 Ill. 291; New Orleans *v.* Savings Bank, 31 La. Ann. 826; Hunsaker *v.* Wright, 30 Ill. 146; Portland *v.* Water Co., 67 Me. 135.

[4] In the case of Weeks *v.* Milwaukee, 10 Wis. 242, a somewhat peculiar exemption was made. It appears that several lots in the city upon which a new hotel was being constructed, of the value of from $150,000 to $200,000, were purposely omitted to be taxed, under the direction of the Common Council, "in view of the great public benefit which the construction of the hotel would be to the city." *Paine*, J., in delivering the opinion of the court, says: "I have no doubt this exemption originated in motives of generosity and public spirit. And perhaps the

In some of the States it has been decided that the particular provisions inserted in their constitutions to insure uniformity are so worded as to forbid exemptions. Thus the late Constitution of Illinois provided that "the General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property."[1] Under this it was held that exemption by the legislature of persons residing in a city from a tax levied to repair roads beyond

same motives should induce the taxpayers of the city to submit to the slight increase of the tax thereby imposed on each, without questioning its strict legality. But they cannot be compelled to. No man is obliged to be more generous than the law requires, but each may stand strictly upon his legal rights. That this exemption was illegal, was scarcely contested. I shall therefore make no effort to show that the Common Council had no authority to suspend or repeal the general law of the State, declaring what property shall be taxable and what exempt. But the important question presented is, whether, conceding it to have been entirely unauthorized, it vitiates the tax assessed upon other property. And upon this question I hink the following rule is established, both by reason and authority. Omissions of this character, arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws is entrusted, do not necessarily vitiate the whole tax. But intentional disregard of those laws, in such manner as to impose illegal taxes on those who are assessed, does. The first part of the rule is necessary to enable taxes to be collected at all. The execution of these laws is necessarily entrusted to men, and men are fallible, liable to frequent mistakes of fact and errors of judgment. If such errors, on the part of those who are attempting in good faith to perform their duties, should vitiate the whole tax, no tax could ever be collected. And therefore, though they sometimes increase improperly the burdens of those paying taxes, that part of the rule which holds the tax not thereby avoided is absolutely essential to a continuance of government. But it seems to me clear that the other part is equally essential to the just protection of the citizen. If those executing these laws may deliberately disregard them, and assess the whole tax upon a part only of those who are liable to pay it, and have it still a legal tax, then the laws afford no protection, and the citizen is at the mercy of those officers, who, by being appointed to execute the laws, would seem to be thereby placed beyond legal control. I know of no considerations of public policy or necessity that can justify carrying the rule to that extent. And the fact that in this instance the disregard of the law proceeded from good motives ought not to affect the decision of the question. It is a rule of law that is to be established; and, if established here because the motives were good, it would serve as a precedent where the motives were bad, and the power usurped for purposes of oppression." pp. 263–265. See also Henry *v.* Chester, 15 Vt. 460; State *v.* Collector of Jersey City, 24 N. J. 108; Insurance Co. *v.* Yard, 17 Pa. St. 331; Williams *v.* School District, 21 Pick. 75; Hersey *v.* Supervisors of Milwaukee, 16 Wis. 185; Crosby *v.* Lyon, 37 Cal. 242; Primm *v.* Belleville, 59 Ill. 142; Adams *v.* Beman, 10 Kan. 37; Brewer Brick Co. *v.* Brewer, 62 Me. 62, s. c. 16 Am. Rep. 395. But it seems that an omission of property from the tax-roll by the assessor, unintentionally, through want of judgment and lack of diligence and business habits, will not invalidate the roll. Dean *v.* Gleason, 16 Wis. 1; Ricketts *v.* Spraker, 77 Ind. 371. In Scofield *v.* Watkins, 22 Ill 66, and Merritt *v.* Farris, 22 Ill. 303, it appears to be decided that even in the case of intentional omissions the tax-roll would not be invalidated, but the parties injured would be left to their remedy against the assessor. See also Dunham *v.* Chicago, 55 Ill. 359; State *v.* Maxwell, 27 La. Ann. 722; New Orleans *v.* Fourchy, 30 La. Ann. pt. 1, 910. Compare Francis *v.* Railroad Co., 19 Kan. 303.

[1] Art. 9, § 2, of the old Constitution.

the city limits, by township authority, — the city being embraced within the township which, for that purpose, was the taxing district, — was void.[1] It is to be observed of these cases, however, that they would have fallen within the general principle laid down in Knowlton *v.* Supervisors of Rock Co.,[2] and the legislative acts under consideration might, if that case were followed, have been declared void on general principles, irrespective of the peculiar wording of the constitution. These cases, notwithstanding, as well as others in Illinois, recognize the power in the legislature to *commute* for a tax, or to contract for its release for a consideration. The Constitution of Ohio provides[3] that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money." Under this section it was held not competent for the legislature to provide that lands within the limits of a city should not be taxed for any city purpose, except roads, unless the same were laid off into town lots and recorded as such, or into out-lots not exceeding five acres each.[4] Upon this case we should make the same remark as upon the Illinois cases above referred to. The Constitution of California provides that "all property in the State shall be taxed in proportion to its value;" and this is held to preclude all exemptions of private property when taxes are laid for either general or local purposes.[5]

It is, moreover, essential to valid taxation that the taxing officers be able to show legislative authority for the burden they assume to impose in every instance. Taxes can only be voted by the people's representatives. They are in every instance an appropriation by the people to the government, which the latter is to expend in furnishing the people protection, security, and such facilities for enjoyment as it properly pertains to government to provide. This principle is a chief corner-stone of Anglo-Saxon liberty; and it has operated not only as an important check on government, in preventing extravagant expenditures, as well as unjust and tyrannical action, but it has been an important guaranty of the right of private property. Property is secure from the lawless grasp of the government, if the means of existence of

[1] O'Kane *v.* Treat, 25 Ill. 557; Hunsaker *v.* Wright, 30 Ill. 146. See also Trustees *v.* McConnell, 12 Ill. 138; Madison County *v.* People, 58 Ill. 456; Dunham *v.* Chicago, 55 Ill. 357; Louisville, &c. R. R. Co. *v.* State, 8 Heisk. 663, 744.

[2] 9 Wis. 410. See *ante*, p. 618.

[3] Art. 12, § 2.

[4] Zanesville *v.* Auditor of Muskingum County, 5 Ohio St. 589. See also Fields *v.* Com'rs of Highland Co., 36 Ohio St. 476.

[5] People *v.* McCreery, 34 Cal. 432; Crosby *v.* Lyon, 37 Cal. 242; People *v.* Eddy, 43 Cal. 331; s. c. 13 Am. Rep. 143

the government depend upon the voluntary grants of those who own the property. Our ancestors coupled their grants with demands for the redress of grievances: but in modern times the surest protection against grievances has been found to be to vote specific taxes for the specific purposes to which the people's representatives are willing they shall be devoted;[1] and the persons exercising the functions of government must then become petitioners if they desire money for other objects. And then these grants are only made periodically. Only a few things, such as the salaries of officers, the interest upon the public debt, the support of schools, and the like, are provided for by permanent laws; and not always is this done. The government is dependent from year to year on the periodical vote of supplies. And this vote will come from representatives who are newly chosen by the people, and who will be expected to reflect their views regarding the public expenditures. State taxation, therefore, is not likely to be excessive or onerous, except when the people, in times of financial ease, excitement, and inflation, have allowed the incurring of extravagant debts, the burden of which remains after the excitement has passed away.

But it is as true of the political divisions of the State as it is of the State at large, that legislative authority must be shown for every levy of taxes.[2] The power to levy taxes by these divisions comes from the State. The State confers it, and at the same time exercises a parental supervision by circumscribing it. Indeed, on general principles, the power is circumscribed by the rule that the taxation by the local authorities can only be for local purposes.[3] Neither the State nor the local body can authorize the imposition of a tax on the people of a county or town for an object in which the people of the county or town are not concerned. And by some of the State constitutions it is expressly required that the State, in creating municipal corporations, shall restrict

[1] Hoboken *v.* Phinney, 29 N. J. 65.

[2] State *v.* Charleston, 2 Speers, 623; Columbia *v.* Guest, 3 Head, 413; Bangs *v.* Snow, 1 Mass. 181; Clark *v.* Davenport, 14 Iowa, 494; Burlington *v.* Kellar, 18 Iowa, 59; Mays *v.* Cincinnati, 1 Ohio St. 268; Richmond *v.* Daniel, 14 Gratt. 385; Simmons *v.* Wilson, 66 N. C. 336; Lott *v.* Ross, 38 Ala. 156; Lisbon *v.* Bath, 21 N. H. 319; Daily *v.* Swope, 47 Miss. 367. The same rule applies to laying special assessments. Augusta *v.* Murphey, 79 Ga 101; Vaughn *v.* Ashland, 71 Wis. 502. Without express authority a city cannot tax its own bonds. Macon *v.* Jones, 67 Ga. 489. Where a city has power to issue securities, it has implied power to tax to meet them, unless there is a clear limitation upon its power so to do. Quincy *v.* Jackson, 113 U. S. 332. And, if a city is dissolved, the legislature may tax for like purpose, although thus it lays a higher tax than it has the right, under ordinary circumstances, to impose. Hare *v.* Kennerly, 83 Ala. 608.

[3] Foster *v.* Kenosha, 12 Wis. 616. See *ante*, p. 263.

their power of taxation over the subjects within their control. These requirements, however, impose an obligation upon the legislature which only its sense of duty can compel it to perform.[1] It is evident that if the legislature fail to enact the restrictive legislation, the courts have no power to compel such action. Whether in any case a charter of incorporation could be held void on the ground that it conferred unlimited powers of taxation, is a question that could not well arise, as a charter is probably never granted which does not impose some restrictions; and where that is the case, it must be inferred that those were all the restrictions the legislature deemed important, and that therefore the constitutional duty of the legislature has been performed.[2]

[1] In Hill *v.* Higdon, 5 Ohio St. 243, 248, *Ranney*, J., says of this provision: "A failure to perform this duty may be of very serious import, but lays no foundation for judicial correction." And see Maloy *v.* Marietta, 11 Ohio St. 636.

[2] The Constitution of Ohio requires the legislature to provide by general laws for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, &c. The general law authorizing the expense of grading and paving streets to be assessed on the grounds bounding and abutting on the street, in proportion to the street front, was regarded as being passed in attempted fulfilment of the constitutional duty, and therefore valid. The chief restriction in the case was, that it did not authorize assessment in any other or different mode from what had been customary. Northern Indiana R. R. Co. *v.* Connelly, 10 Ohio St. 159. The statute also provided that no improvement or repair of a street or highway, the cost of which was to be assessed upon the owners, should be directed without the concurrence of two-thirds of the members elected to the municipal council, or unless two-thirds of the owners to be charged should petition in writing therefor. In Maloy *v.* Marietta, 11 Ohio St. 636, 639, *Peck*, J., says: "This may be said to be a very imperfect protection; and in some cases will doubtless prove to be so; but it is calculated and designed, by the unanimity or the publicity it requires, to prevent any flagrant abuses of the power. Such is plainly its object; and we know of no rights conferred upon courts thus to interfere with the exercise of a legislative discretion which the constitution has delegated to the law-making power." And see Weeks *v.* Milwaukee, 10 Wis. 242. The Constitution of Michigan requires the legislature, in providing for the incorporation of cities and villages, to "restrict their power of taxation," &c. The Detroit Metropolitan Police Law made it the duty of the Board of Police to prepare and submit to the city controller, on or before the first day of May in each year, an estimate in detail of the cost and expense of maintaining the police department, and the Common Council was required to raise the same by general tax. These provisions, it was claimed, were in conflict with the constitution, because no limit was fixed by them to the estimates that might be made. In People *v.* Mahaney, 13 Mich. 481, 498, the court say: "Whether this provision of the constitution can be regarded as mandatory in a sense that would make all charters of municipal corporations and acts relating thereto which are wanting in this limitation invalid, we do not feel called upon to decide in this case, since it is clear that a limitation upon taxation is fixed by the act before us. The constitution has not prescribed the character of the restriction which shall be imposed, and from the nature of the case it was impossible to do more than to make it the duty of the legislature to set some bounds to a power so liable to abuse. A provision which, like the one complained of, limits the power of taxation to the actual expenses as estimated by the governing board, after first limiting the power of the board to incur expense within narrow limits, is as much a *restriction* as if it confined the

When, however, it is said to be essential to valid taxation that there be legislative authority for every tax that is laid, it is not meant that the legislative department of the State must have passed upon the necessity and propriety of every particular tax; but those who assume to seize the property of the citizen for the satisfaction of the tax must be able to show that that particular tax is authorized, either by general or special law. The power inherent in the government to tax lies dormant until a constitutional law has been passed calling it into action, and is then vitalized only to the extent provided by the law. Those, therefore, who act under such a law should be careful to keep within its limits, lest they remove from their acts the shield of its protection. While we do not propose to enter upon any attempt to point out the various cases in which a failure to obey strictly the requirements of the law will render the proceedings void, — in regard to which a diversity of decision would be met with, — we think we shall be safe in saying that, in cases of this description, which propose to dispossess the citizen of his property against his will, not only will any excess of taxation beyond what the law allows render the proceedings void, but any failure to comply with such requirements of the law as are made for the protection of the owner's interest will also render them void.

There are several reported cases in which the taxes levied were slightly in excess of legislative power, and in which it was urged in support of the proceedings, that the law ought not to take notice of such unimportant matters; but the courts have held that an excess of jurisdiction is never unimportant. In one case in Maine, the excess was eighty-seven cents only in a tax of $225.75, but it was deemed sufficient to render the proceedings void. Said *Mellen*, Ch. J., delivering the opinion of the court: "It is contended that the sum of eighty-seven cents is such a trifle as to fall within the range of the maxim *de minimis*, &c.; but if not, that still this small excess does not vitiate the assessment. The maxim is so vague in itself as to form a very unsafe ground of proceeding or judging; and it may be almost as difficult to apply it as a rule in pecuniary concerns as to the interest which a witness has in the event of a cause; and in such case it cannot apply. Any interest excludes him. The assessment was therefore unauthorized and void. If the line which the legisla-

power to a certain percentage upon taxable property, or to a sum proportioned to the number of inhabitants in the city. Whether the restriction fixed upon would as effectually guard the citizen against abuse as any other which might have been established was a question for the legislative department of the government, and does not concern us on this inquiry."

ture has established be once passed, we know of no boundary to the discretion of the assessors."[1] The same view has been taken by the Supreme Court of Michigan, by which the opinion is expressed that the maxim *de minimis lex non curat* should be applied with great caution to proceedings of this character, and that the excess could not be held unimportant and overlooked where, as in that case, each dollar of legal tax was perceptibly increased thereby.[2] Perhaps, however, a slight excess, not the result of intention, but of erroneous calculations, may be overlooked, in view of the great difficulty in making all such calculations mathematically correct, and the consequent impolicy of requiring entire freedom from all errors.[3]

What method shall be devised for the collection of a tax, the legislature must determine, subject only to such rules, limitations, and restraints as the constitution of the State may have imposed.[4] Very summary methods are sanctioned by practice and precedent.[5] Wherever a tax is invalid because of excess of authority, or because the requisites in tax proceedings which the law has provided for the protection of the taxpayer are not complied with, any sale of property based upon it will be void also. The owner

[1] Huse *v.* Merriam, 2 Me. 375. See Joyner *v.* School District, 3 Cush. 567; Kemper *v.* McClelland, 19 Ohio, 308; School District *v.* Merrills, 12 Conn. 437; Elwell *v.* Shaw, 1 Me. 339; Wells *v.* Burbank, 17 N. H. 393; Kinsworthy *v.* Mitchell, 21 Ark. 145.

[2] Case *v.* Dean, 16 Mich. 12. And see Commonwealth *v.* Savings Bank, 5 Allen, 428; Bucknall *v.* Story, 33 Cal. 67; Drew *v.* Davis, 10 Vt. 506; Wells *v.* Burbank, 17 N. H. 393; Axtell *v.* Gerlach, 67 Cal. 483.

[3] This was the view taken by the Supreme Court of Wisconsin in Kelley *v.* Corson, 8 Wis. 182, where an excess of $8.61 in a tax of $6,654.57 was held not to be fatal; it appearing not to be the result of intention, and the court thinking that an accidental error no greater than this ought to be disregarded. See also O'Grady *v.* Barnhisel, 23 Cal. 287; State *v.* Newark, 25 N. J. 399; Havard *v.* Day, 62 Miss. 748. In Iowa the statute requires a sale to be upheld if any portion of the tax was legal. See Parker *v.* Sexton, 29 Iowa, 421. If a part of a tax only is illegal, the balance will be sustained if capable of being distinguished. O'Kane *v.* Treat, 25 Ill. 557; People *v.* Nichols, 49 Ill 517. See State *v.* Plainfield, 38 N. J. L. 93.

[4] The following methods are resorted to: Suit at law; arrest of the person taxed, distress of goods, and sale if necessary; detention of goods, in the case of imports, until payment is made; sale or leasing of land taxed; imposition of penalties for non-payment; forfeiture of property; making payment a condition precedent to the exercise of some legal right, such as the institution of a suit, or voting at elections, or to the carrying on of a business; requiring stamps on papers, documents, manufactured articles, &c. In Prentice *v.* Weston, 111 N. Y. 460, it is held not an unwarrantable interference with private property to forbid cutting of timber on land on which a tax remains unpaid, when the chief value of the land lay in the timber. A village occupation tax cannot be enforced by fine and imprisonment. State *v.* Green, 42 N. W. Rep. 912 (Neb.).

[5] See Henderson's Distilled Spirits, 14 Wall. 44; Weimer *v.* Bunbury, 30 Mich. 201; Lydecker *v.* Palisade Land Co., 33 N. J. Eq. 415; Springer *v.* United States, 102 U. S. 586; *In re* Hackett, 53 Vt. 354; Adler *v.* Whitbeck, 44 Ohio St. 539; *ante*, 434, note.

is not deprived of his property by "the law of the land," if it is taken to satisfy an illegal tax. And if property is sold for the satisfaction of several taxes, any one of which is unauthorized, or for any reason illegal, the sale is altogether void.[1] And the general rule is applicable here, that where property is taken under statutory authority in derogation of common right, every requisite of the statute having a semblance of benefit to the owner must be complied with, or the proceeding will be ineffectual.[2]

[1] This has been repeatedly held. Elwell *v.* Shaw, 1 Me. 339; Lacy *v.* Davis, 4 Mich. 140; Bangs *v.* Snow, 1 Mass. 180; Thurston *v.* Little, 3 Mass. 429; Dillingham *v.* Snow, 5 Mass. 547; Stetson *v.* Kempton, 13 Mass. 283; Libby *v.* Burnham, 15 Mass. 144; Hayden *v.* Foster, 13 Pick. 492; Torrey *v.* Millbury, 21 Pick. 64; Alvord *v.* Collin, 20 Pick. 418; Drew *v.* Davis, 10 Vt. 506; Doe *v.* McQuilkin, 8 Blackf. 335; Kemper *v.* McClelland, 19 Ohio, 308; Peterson *v.* Kittredge, 65 Miss. 33. This is upon the ground that, the sale being based upon both the legal and the illegal tax, it is manifestly impossible afterwards to make the distinction, so that the act shall be partly a trespass and partly innocent. But when a party asks relief in equity before a sale against the collection of taxes, a part of which are legal, he will be required first to pay that part, or at least to so distinguish it from the rest that process of injunction can be so framed as to leave the legal taxes to be enforced; and failing in this, his bill will be dismissed. Conway *v.* Waverley, 15 Mich. 257; Palmer *v.* Napoleon, 16 Mich. 176; Hersey *v.* Supervisors of Milwaukee, 16 Wis. 185; Bond *v.* Kenosha, 17 Wis. 284; Myrick *v.* La Crosse, 17 Wis. 442; Roseberry *v.* Huff, 27 Ind. 12; Montgomery *v.* Wasem, 116 Ind. 343; Com'rs Allegany Co. *v.* Union Min. Co., 61 Md. 545; Brown *v.* School Dist., 12 Oreg. 345; Gage *v.* Caraher, 125 Ill. 447. Compare Solomon *v.* Oscoda, 43 N. W. Rep. 990 (Mich.).

As to the character and extent of the irregularities which should defeat the proceedings for the collection of taxes, we could not undertake to speak here. We think the statement in the text, that a failure to comply with any such requirements of the law as are made for the protection of the owner's interest will prove fatal to a tax sale, will be found abundantly sustained by the authorities, while many of the cases go still further in making irregularities fatal. It appears to us that where the requirement of the law which has failed of observance was one which had regard simply to the due and orderly conduct of the proceedings, or to the protection of the public interest, as against the officer, so that to the taxpayer it is immaterial whether it was complied with or not, a failure to comply ought not to be recognized as a foundation for complaint by him. But those safeguards which the legislature has thrown around the estates of citizens to protect them against unequal, unjust, and extortionate taxation, the courts are not at liberty to do away with by declaring them non-essential. To hold the requirement of the law in regard to them directory only, and not mandatory, is in effect to exercise a dispensing power over the laws. Mr. Blackwell, in his treatise on Tax Titles, has collected the cases on this subject industriously, and perhaps we shall be pardoned for saying also with a perceptible leaning against that species of conveyance. As illustrating how far the courts will go, in some cases, to sustain irregular taxation, where officers have acted in good faith, reference is made to Kelley *v.* Corson, 11 Wis. 1; Hersey *v.* Supervisors of Milwaukee, 16 Wis. 185. See also Mills *v.* Gleason, 11 Wis. 470, where the court endeavors to lay down a general rule as to the illegalities which should render a tax roll invalid. A party bound to pay a tax, or any portion thereof, cannot get title to the land by neglecting payment and allowing a sale to be made at which he becomes the purchaser. McMinn *v.* Whelan, 27 Cal. 300. See Butler *v.* Porter, 13 Mich. 292; Cooley on Taxation, 500 *et seq.*

[2] See *ante*, pp. 88–93. Also Newell *v.* Wheeler, 48 N. Y. 486; Westfall *v.*

Preston, 49 N. Y. 349, 353; Stratton *v.* Collins, 43 N. J. 563; Cooley on Taxation, c. 15.

It should be stated that in Iowa, under legislation favorable to tax titles, the courts go further in sustaining them than in perhaps any other State. Reference is made to the following cases: Eldridge *v.* Keuhl, 27 Iowa, 160; McCready *v.* Sexton, 29 Iowa, 356; Hurley *v.* Powell, 31 Iowa, 64; Rima *v.* Cowan, 31 Iowa, 125; Thomas *v.* Stickle, 32 Iowa, 71; Henderson *v.* Oliver, 32 Iowa, 512; Bulkley *v.* Callanan, 32 Iowa, 461; Ware *v.* Little, 35 Iowa, 234; Jeffrey *v.* Brokaw, 35 Iowa, 505; Genther *v.* Fuller, 36 Iowa, 604; Leavitt *v.* Watson, 37 Iowa, 93; Phelps *v.* Meade, 41 Iowa, 470. It may be useful to compare these cases with Kimball *v.* Rosendale, 42 Wis. 407, and Silsbee *v.* Stockle, 44 Mich. 561.

EXHIBIT D

war basis as between employer and employee. I believe the time is here when we must have the employer and the employee and the consumer, and, if you please, the Government, get together and recognize the truth that all industry is a service to society; that profit is what the people are willing to pay the investor for that service; that wages are what the people are willing to pay for what a man does who works. On that rational American basis this problem can be solved without eternally mixing it up with unworkable legislation that no one short of omniscience can understand, and no one short of omnipotence can administer.

Mr. WELCH. Mr. Chairman, will the gentleman yield?

Mr. EATON. Yes.

Mr. WELCH. It has been stated that there are thousands of women employed in this country who are paid less than $5 per week. This statement has been questioned by some Members of Congress. Does the gentleman know whether there are women in this section of the country who are being paid these starvation wages?

Mr. EATON. Mr. Chairman, Dick told me that he was going to spring that on me. That is in New Jersey. We have a minimum-wage law in New Jersey 2 years old, providing that minimum wages shall be $17 a week, and, according to a recent report, we have 34,000 or 35,000 women working for $5 a week right now. I am against that condition with all my heart. I think it is a social cancer, a social evil, a disgrace to our great State.

Mrs. NORTON. Then the gentleman admits that the State cannot enforce that law?

Mr. EATON. No; I do not admit that, because, then, I would turn my back on the very foundation of our American civilization. [Applause.]

That law is 2 years old, and the reason given why our State has not enforced it is that it had to spend millions and millions of dollars for relief, and could not afford to spend the money to enforce that law. Now, of course, when we get a Republican house and senate we are going to change all that. [Laughter.]

Mrs. NORTON. Will the gentleman yield further?

Mr. EATON. I yield.

Mrs. NORTON. I want to remind the gentleman that New Jersey has been under Republican rule since that law was enacted.

Mr. HARTLEY. Mr. Chairman, will the gentleman yield?

Mr. EATON. I yield.

Mr. HARTLEY. Under whose department in the State of New Jersey is the enforcement of that minimum-wage law?

Mr. EATON. The labor department and law department.

Mr. HARTLEY. And a Democratic labor commissioner and a Democratic attorney general of the State?

Mr. EATON. I did not wish to unveil those horrors before you, but it is a fact. [Laughter and applause.]

Mr. CRAWFORD. Mr. Chairman, will the gentleman yield?

Mr. EATON. I yield.

Mr. CRAWFORD. I desire to get the gentleman's expert opinion. Does the gentleman believe that it is more practical and an easier matter for the State to administer an act with such broad provisions than for the Federal Government to do so?

Mr. EATON. I certainly do. For instance, they talk about differentials. The southern people are told they will only have 10 or 15 cents or dollars, or whatever it is, and we in the industrial North will have 40. That means that all the sweatshops will move at once from New Jersey right down into Georgia and the deep South and make themselves at home, and the South will be swamped instead of being relieved and enriched. I sum up my reasons for opposing this legislation in a few words:

First. It is an invasion of State rights and State duties.

Second. It further slows down business by increased bureaucratic interference.

Third. It will deepen the present depression by increasing uncertainty and fear.

Fourth. It will restrict production and thus raise the cost of living to the worker.

Fifth. It will sound the death knell of organized labor by substituting the commands of a Federal bureaucrat for collective bargaining.

Sixth. It will tend to fix all wages at the dead level of 40 cents an hour.

The CHAIRMAN. The time of the gentleman from New Jersey has expired.

Mrs. NORTON. Mr. Chairman, I yield 20 minutes to the gentleman from Tennessee [Mr. McREYNOLDS].

Mr. McREYNOLDS. Mr. Chairman, I yield 10 minutes of that time to the gentleman from Florida [Mr. WILCOX].

Mr. WILCOX. Mr. Chairman, regardless of what amendments may be offered or what substitutes may be submitted, the fact remains that the bill under consideration by the House at this time is the bill that was reported on the 6th day of August by the Committee on Labor.

I regard the wage and hour bill, in its present form as reported to the House, the most serious threat to representative democracy which has been proposed in this generation. It proposes a bureaucratic control of business and industry and a dictatorship over labor which, if enacted, must ultimately result in a destruction of the right of collective bargaining and which may easily reduce labor to a state of economic slavery.

It proposes the establishment of a Federal bureau or board with autocratic and dictatorial power beyond any ever attempted in any government of free people. It would place in the hands of a little group of Federal bureaucrats the power to regulate the earnings of millions of American citizens. And since, in the words of one of its sponsors, the bill, as drawn, is only a modest beginning, the Federal bureau once established will soon be extended to cover every business, every industry, and every man who works for a living in America.

Once this bill is enacted private enterprise in America will be subject to the whims and caprice of a governmental agency and labor will have sold its birthright without receiving in return the proverbial mess of pottage.

When we set up a board with power and authority to regulate the wages and hours of employment and with power to thus control the working men and women of this country we will have taken a very definite step toward complete regimentation of the people.

The board provided for in the bill will not only have potential power to bankrupt private business and wreck individual enterprise but, what is of vastly more serious importance, it will also have within its hands the power to destroy labor. By the exercise of discretionary power it may reward one business and punish another; it may establish high rates of pay and low hours of employment for one group of workmen and low rates of pay and long hours of employment for those not in favor with the board; it may prefer one section of the country over another; and it may, if it so desires, by the prescription of more attractive terms, force the removal of industries from those sections which may have incurred the displeasure of the bureaucrats. It could control elections, make and unmake political administrations, and direct the lives of the people. Set up such an institution and you have the makings of a dictatorship which, when once installed, may never be removed except by revolution.

I believe, as you do, in decent wages and decent working conditions; and I also believe in representative government; in the right of men to govern themselves without dictation; in the right of men to work out their own problems; and in the right of laboring people to bargain collectively for the improvement of their condition. And because I believe in these things I do not believe in this measure, which ultimately will place 45,000,000 wage earners under the domination of five Federal bureaucrats in Washington.

I want to discuss this bill primarily from the standpoint of its effect upon the workingman. In doing so I do not mean to minimize the evil that will be done to business, industry, and agriculture; but, because the sponsors of the measure have contended that it is designed to elevate the standard of living of the underpaid and underprivileged

classes, I want to view it from their angle. I believe that my unbroken record of support of all labor legislation and my recognized attitude of sympathy for the problems of labor qualify me to discuss the bill from that viewpoint.

Now, it is most remarkable that a measure purporting to be in the interest of the underpaid working people of the country should exempt from its operation so many groups and classes of workmen. It does not extend its alleged benefits to all working people. In fact, it specifically says that it shall not apply to certain groups.

The framers of this bill have been very careful to provide that it shall not apply to agricultural labor. God knows if there is any class or group of people in America who are underpaid and whose very existence is made unsafe and uncertain both by man and by nature it is that group who must depend upon agriculture for a livelihood. And yet under this bill there is no board to say to the farmer that he can go to work at 8 in the morning and quit at 4 in the afternoon and loaf on Saturday and be guaranteed a minimum income. No. He must go to work with the crack of dawn and labor into the night 6 days a week and take his chances on the weather for his crop, and after it is made he still has no assurance that it will yield him a living because he still must depend upon the uncertainties of a man-made market.

During the recent debate on the farm bill it was shown that the average income of American farmers is $359 per annum, or a little less than $7 per week, while the average income of our southern cotton farmers is only $200 per annum, a little less than $4 per week. But is he given a $16-a-week minimum guaranty in this bill? He is not. On the other hand, he will find that everything he buys will cost him more than it did before. When he buys clothing for his family, implements for his farm, or fertilizer for his crops, he is the fellow who will pay the bill out of his meager $7 a week.

And then the measure says that it shall not apply to those who are engaged in the canning or packing of fish, fruits, or vegetables. It does not apply to retail merchants or their employees. It is supposed to exempt all persons not engaged in interstate commerce. It leaves out those who gin cotton but includes those who spin the cotton into thread.

Why, if this is a good law, are these and other groups of workers left out? Why have you omitted 40,000,000 workers from the bill if it is a good thing for labor?

Why extend the benefits of a good law to one class of our people and deny them to another class? And, on the other hand, if it is a bad law for one class, then why is it not a bad law for the others?

There can be no rational justification for discrimination for or against any group if the Federal Government is going into this business.

Now, one of two things is true; either the legislation deliberately, purposely, and intentionally discriminates against certain classes of working people, or the sponsors, realizing that the proposal would be a bad law, have undertaken to minimize its bad effects by making it applicable to only a very small number of people. But if it is so bad that some must be left out, then why make it apply to any?

I am not disposed to believe that the sponsors of this legislation would deliberately withhold the benefit of a good law, if they really believed it to be good, from such an enormous group of people as are exempted from this bill. I am driven, therefore, to the conclusion that the sponsors realize that it is a bad law and that they have exempted these people so as to make it applicable to just as few as possible. But the question arises as to whether these people are actually exempted; and, if so, whether they will remain exempted from the provisions of the bill once it becomes a law.

In the first place, let me remind you that although the Federal Government has no jurisdiction except over interstate commerce and those people who are engaged in interstate commerce, nevertheless, this bill provides that any enterprise whose products may come into competition with products shipped in interstate commerce will be subject to the provisions of the law. Therefore, any little neighborhood industry whose products may compete with similar products which have been shipped in interstate commerce will find itself subject to the regulations of this act, and its employees will receive their orders from a five-man board sitting in Washington.

Again, the regulation of wages and hours in one business on one side of the street will be impossible where a business on the other side of the same street in the same community is unregulated. It is not reasonable to believe that the turpentine industry will remain unregulated when the sawmill industry in the same locality is regulated. Such a situation will create such confusion and such disorder that Congress will find it necessary to amend, enlarge, and extend the act so as to cover industries and businesses which are now specifically exempt. Those who are now exempted, therefore, may be lulled into a sense of security in thinking that their wages and their hours of employment will not be regulated under the terms and provisions of this bill; but, once the measure is enacted and once this board is established, it will be a matter of only a few years until the exemptions will be removed and the powers of the board will be extended to cover every man and every woman who works for a living in America.

In the past 40 years organized labor has accomplished much for the welfare of the American workman. It has increased his pay, shortened his hours of employment, and secured more decent working conditions for him. But I would remind you that these things have been accomplished by negotiation, by collective bargaining, and not by Federal law. Organized labor has been able to adjust its differences with capital when it could sit down at the table and negotiate for better working conditions; but, once the Federal Government assumes control, once a Federal bureau is given the power of regulation, organized labor will find it has surrendered its power of collective bargaining and has subjected itself to the dictation and control of the Government. The enactment of this statute, therefore, means the beginning of the end for organized labor and means the substitution therefor of Government control and bureaucratic dictation.

I do not mean to say that all labor will be brought immediately under the terms of this bill; nor do I mean to indicate that the Federal Government will immediately displace collective bargaining. Unfortunately the results will not be immediately discernible. If they were, we would have nothing to fear, because the American people would not stand for it. But the passage of this bill is the entering wedge; it is the establishment of bureaucratic control over labor; and by the gradual extension of authority and the gradual assumption of more power, this Federal bureau will within 5, and certainly not more than 10, years become the autocrat of business, industry, and labor in this country.

Another danger that I see in the enactment of this legislation lies in the fact that the establishment of minimum wages is likely to result also in the establishment of maximum wages. The danger of this is recognized in the measure itself because it contains a provision which requires that the five-man board shall exercise due caution to prevent the minimum wage from becoming the maximum. Thus even the framers of the bill understand that they are trying an extremely dangerous experiment and that they are gambling with the welfare of the workmen. They know that in establishing a minimum wage there is a strong possibility of at the same time fixing a top wage beyond which the workman cannot go.

In dealing with the question of whether this measure is actually in the interests of the workmen we should not overlook the fact that in every section of the country there are small industries working only a limited number of people and which do not operate on a sufficiently large scale to permit more than one shift of workmen per day. Suppose such a plant should be required to operate not more than 40 hours per week. This would not result in giving more men a job, but would result simply in requiring the plant to remain idle for 1 day out of each week and this in turn would result not only in the loss of 1 day's output for the plant but also in the loss of 1 day's pay each week to the

workman. I am persuaded that the workman would prefer to work 6 days per week and get 6 days' pay rather than be forced to work only 5 days per week and lose 1 day's pay.

Then there is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as Florida people are permitted to handle the matter, this delicate and perplexing problem can be adjusted; but the Federal Government knows no color line and of necessity it cannot make any distinction between the races. We may rest assured, therefore, that when we turn over to a Federal bureau or board the power to fix wages, it will prescribe the same wage for the Negro that it prescribes for the white man. Now, such a plan might work in some sections of the United States but those of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge. There just is not any sense in intensifying this racial problem in the South, and this bill cannot help but produce such a result.

Many of our northern friends may honestly think that by forcing a uniform wage scale upon the South they are doing the Negro a real service. But those who know the facts know that when employers are forced to pay the same wage to the Negro that is paid to the white man the Negro will not be employed. This in turn will mean that he will be thrown onto the relief roll to be fed in idleness. This is just another instance of the well-intentioned but misguided interference of our uninformed neighbors in a delicate racial problem that is gradually being solved by the people of the South. This bill, like the antilynching bill, is another political gold brick for the Negro, but this time the white laborer is also included in the scheme.

I would also call your attention to the difficulty of administering this proposed law. These five men sitting in Washington must deal with the social and economic conditions prevailing in every village and hamlet as well as every large city in the country. They must deal with conditions prevailing in a small sawmill community in Florida and at the same time consider the conditions in New York and Boston and Kansas City and San Francisco. The garment maker in Philadelphia and the turpentine Negro in Georgia; the cigar maker in Tampa and the automobile worker in Detroit must all come under the jurisdiction of five men in Washington. To administer such a law would require an army of snoopers, investigators, informers, and sleuths exceeding even that of prohibition days. It would be physically and humanly impossible for five men to gather the information necessary without such an army, and with their help it will be equally impossible to work out wage scales that will do justice between men in different sections of this vast country. Many things enter into the determination of wage scales just as they enter into every other activity. Living costs, proximity to markets, freight rates, availability of raw materials, climate, all must be considered, and because these must be considered a rate of pay which is just and fair in one section may be grossly unfair in another. And yet under this bill five men are to be given the power to determine these questions upon which the happiness and welfare of millions of Americans depend.

Whatever purposes may have motivated the framers of this bill, whatever their aims or intentions may have been, the result undoubtedly will be to drive industry out of the South and force it into those sections which are closer to the larger markets. When Florida with its warm climate, where fuel costs are low, rents are cheap, and where fruits and vegetables are close at hand, but where its products must be shipped hundreds of miles to market, is forced to meet the living costs of New England it will simply mean that industry will go to New England. And I rather suspect that it is the knowledge of this fact and not their interest in southern workmen that accounts for the New England support behind this bill. Of course, I cannot blame New England Senators and Representatives for trying to get everything they can for their section, but in this instance they are doing an injustice not only to southern business and industry but to southern labor as well. What good would it do a southern workman to have the law or the Federal board fix a high rate of pay for him if the plant where he works shuts down and moves away?

I offer no defense for any employer in the South who pays less than a proper living wage. If employers in my section pay less than the traffic will bear, if they exploit the labor of the South, I condemn them just as I condemn employers in the North, East, or West who are guilty of such practices, and I do not in any sense condone their actions. But while we are on the subject and since it has been made to appear here that we in the South are the chief offenders in the matter of low wages, it might be well to refer briefly to the "sweatshops" of the North and East. I think no one will deny that the worst labor conditions in this country prevail in those industries where employees are paid on a piece-work basis.

Now, either by accident or design, this bill does not attempt to correct any of the evils of the piece-work system. The sweatshops of the North and East will go merrily on their way, free to exploit their employees without restraint and without regulation.

Here again, I should like to ask: If this is a good law why have these people been left out?

If our friends really want to help the underpaid and overworked labor of this country, why do they not extend the alleged benefits of the law to the people in the sweatshops who are paid on a piece-work basis?

Now, to my Democratic colleagues, I want to say this: Many people have been circulating the rumor that the Democratic platform of 1936 binds our party to the passage of this bill. Exactly the opposite is true. The one thing that the Democratic Party has always stood for is the right of the States to settle internal affairs, and the one thing that the Democrat Party has always vigorously opposed is the centralization of power in the hands of the Federal Government.

But let us look at our 1936 platform and see just what it says. This is the section dealing with wages and hours:

> We know that drought, dust storms, floods, minimum wages, maximum hours, child labor and working conditions in industry, monopolistic and unfair business practices cannot be adequately handled exclusively by 48 separate State legislatures, 48 separate State administrations, and 48 separate State courts. Transactions and activities which inevitably overflow State boundaries call for both State and Federal treatment. We have sought and will continue to seek to meet these problems through legislation within the Constitution.

The language used is significant. It does not say that there shall be a Federal board or bureau with autocratic power. It would have violated every principle of the Democratic Party if it had said so. What it says is that the problem calls for "both State and Federal treatment." Our platform requires joint action, so that each State shall have a part in the program. This is not only democratic but it is necessary. No five men in Washington can possibly solve the problems incident to the enforcement of such a law. But if the people in Florida, who know Florida conditions, are given a voice in the matter they can work it out to fit the needs and requirements of Florida people, and the people of the other States can do the same thing as regards their own localities.

All of these questions are important and are deserving of our careful consideration, but they are of little consequence when compared to the more important question of whether we shall set up a Federal board or bureau to have dominion over labor. Once we establish such a board with the powers proposed by this bill we will have surrendered the last vestige of States' rights and the right to work out our own problems in the manner best suited to our own particular needs. But what is of vastly more serious importance we will have sold labor "down the river."

A great friend of labor once said, "Keep labor from under the thumb of government." How wise, how farseeing he was is evidenced by the plight of labor in every country where

government has assumed the right to regulate and thereby the right to control it. American labor enjoys the highest standard of living; it receives the best wages and works under the best conditions which exist in any country on earth. This is true because the American workingman retains his freedom to negotiate collectively with his fellows. He has not surrendered to government his right to work out his problems in the manner that insures to him the maximum income which the traffic will bear. But now, with a great fanfare of trumpets, with the mouthing of honeyed words and high sounding phrases, with great protestations of good faith and high purpose, the Congress proposes a measure which may easily result in the loss of the victories which American labor has achieved as the result of a half century of laborious effort.

Already our Federal Government has traveled a long way along the road toward concentration of all power in the hands of a few bureaucrats. Already we have drifted far from the course charted in our plan of representative government. Let us not take this final step of regimenting those who earn their bread by the sweat of their brows. [Applause.]

[Here the gavel fell.]

Mr. McREYNOLDS. Mr. Chairman, it is understood that I may reserve the other 10 minutes of my time until tomorrow.

Mr. WELCH. Mr. Chairman, I yield 8 minutes to the gentleman from Minnesota [Mr. KNUTSON].

Mr. KNUTSON. Mr. Chairman, in order that there may be no misunderstanding as to my position or, rather, my feeling toward organized labor, may I say that I have carried a card in the Typographical Union for nearly 30 years and have in my files many letters commending me for positions I have taken on various measures of interest to labor that have come before the House in the 20 years that I have been a Member.

I was amazed to receive a letter in this morning's mail which reads as follows:

Hon. HAROLD KNUTSON,
The House Building, Washington, D. C.

HONORABLE SIR: The executive board, International Union United Automobile Workers of America, at its special meeting in Detroit, unanimously resolved to send to you and all other Members of Congress whose constituents include any of our 400,000 members the following communication:

1. That our union considers it vital to the security and welfare of its members that you cast your vote and use your influence in favor of the Black-Connery fair labor standards bill;
2. That we consider it equally vital to the security and welfare of all wage earners and therefore of the country as a whole;
3. That Representatives in Congress who vote against or fail to vote or pair in favor of the bill are thereby placing themselves on record as opposed to the best interests of their constituents;
4. That an unfavorable vote on this bill or failure to vote or pair in favor will not be forgotten next year, when Representatives ask their constituents to reelect them, as this will be the acid test of a Representative's real position.

Evidently this young man was alive before the war broke out—"the acid test of a Representative's real position."

Then he goes on to say:

5. That this is not a political threat—

[Laughter.]

but a frank expression of conviction and fair notice that Representatives who do not represent cannot expect support.

Respectfully yours,

HOMER MARTIN,
International President of the United Automobile Workers of America.

It may not be a threat, Mr. Chairman, but it is certainly a promise.

Mr. MICHENER. Mr. Chairman, will the gentleman yield?

Mr. KNUTSON. I yield.

Mr. MICHENER. I call the gentleman's attention to the fact that the author of this letter assumed a similar attitude recently in the Detroit election, but in that election the city of Detroit overwhelmingly cast that kind of philosophy and leadership into the discard. In Monroe, Mich., the same leadership attempted to defeat for reelection the mayor, who had organized a volunteer police force to protect those who wanted to work during the sit-down strikes in that city. In this instance the mayor was reelected by a 3-to-1 vote.

Mr. KNUTSON. I am not surprised. Thinking people will not stand for such tactics.

This same gentleman, my friends, a short time ago called upon the automobile workers of the United States to stop buying meat; in other words, to boycott the American farmer so as to depress prices, yet today he is out in my country trying to organize our farmers and trying to bring them into the C. I. O. In this connection I want to read a telegram sent him by Edward A. O'Neal, president of the American Farm Bureau Federation:

American farmers are shocked at newspaper reports of your urge upon all members of the C. I. O. automobile unions to withhold consumption of meat in an effort to reduce prices. Is this an invitation for American farmers to take similar action against products produced by C. I. O. labor? Factory wages are more than 20 percent in excess of 1929 level, and retail food prices, including meat, are nearly 20 percent less than during same period. National welfare demands a balance as between agriculture, labor, and industry, and American farmers will resist by whatever means necessary any efforts to aggravate the present disparities.

A Mr. Frazier, down in Lovettsville, Va., wrote Mr. Martin something worth thinking about. I read the article which appeared in the Washington Star recently:

Meat strikes and "meatless weeks" advocated by the United Automobile Workers to force down meat prices were met today with a counterstrike.

The Lovettsville Farmers' Club has begun a boycott against products of industries employing U. A. W. labor, and said its members would call upon other "farmers throughout the country" to follow suit.

W. H. Frazier, club president, in announcing the boycott, declared that 90 percent of the differentiation in the price of meat received by the farmer and that paid by the consumer may be traced to efforts to "unionize labor."

BLAMES DECLINE ON C. I. O.

He charged the "declining state of business" to the "bargaining tactics of the Committee for Industrial Organization and its constituent unions, including the United Automobile Workers."

Mr. Frazier, in a letter to Homer Martin, U. A. W. president, who encouraged the meat strikes in a letter to U. A. W. members on November 12, asked:

"Do you know what a farmer's hours of labor are, Mr. Martin? If the farmer worked only as many hours a day as does the U. A. W. member, you would pay twice as much for steaks."

CALLS FOR A BOYCOTT

"Farmers, nearly to a man, use automobiles and trucks, Mr. Martin. But they don't buy them when they can't. And when farmers don't buy, you don't sell much, Mr. Martin."

In his letter he explained the Lovettsville Farmers' Club is composed of farmers of Loudoun County, Va., who are actively engaged in the production of meat animals.

"In order to combat the effect on all farmers of the U. A. W. propaganda and reduce the market price of meat animals below the cost of production," Mr. Frazier wrote, "we do hereby call upon the farmers of the county to strike against and boycott the products of industries employing labor who participate in and endorse such tactics. In particular, we call this strike against the purchase of automobiles made in plants dominated by the U. A. W. and you, Mr. Martin."

LABOR CALLED MONOPOLY

"You cannot, in truth, plead that your campaign is directed against monopoly in processing and distributing channels; if there is a monopoly there, it is that of organized labor. Do you want the Federal Government to prosecute that monopoly, or other labor monopolies such as the U. A. W.?

"You know, as we know, that up to 90 percent of the spread between the price the farmer receives and the price the consumer pays is labor cost, and you know, as we know, that your parent—the C. I. O.—has endeavored to organize all processing and distributing channels. Are we to believe that you, Mr. Martin, desire that wages of that labor be reduced? Does not the C. I. O. and the U. A. W. stand for, and get, higher wages and shorter working hours? Does that raise the cost of anything, automobiles, for instance, Mr. Martin? What you would dictate then, Mr. Martin, is and can be nothing else but lower prices to the farmer—poverty to the farmer—even though the C. I. O. is trying to organize the farmers in the Middle West."

Reverting to the letter from this man Martin, I can remember the time when, if a man sent a letter like that to 400 Members of this House of Representatives, he would have been hailed before the bar of the House and censured by the Speaker; but, in this day of rubber stamps, we take it and we smile, and we invite more of it.

EXHIBIT E

Congressional Record

APPENDIX

SEVENTY-FIFTH CONGRESS, SECOND SESSION

Federal Spending and Its Relation to the Balancing of the Federal Budget

EXTENSION OF REMARKS

OF

HON. ROBERT L. DOUGHTON

OF NORTH CAROLINA

IN THE HOUSE OF REPRESENTATIVES

Monday, November 15, 1937

ADDRESS BY HON. HENRY MORGENTHAU, SECRETARY OF THE TREASURY, BEFORE THE ACADEMY OF POLITICAL SCIENCE, AT NEW YORK CITY, ON NOVEMBER 10, 1937

Mr. DOUGHTON. Mr. Speaker, under the leave to extend my remarks in the RECORD I include the following address of the Secretary of the Treasury delivered before the Academy of Political Science, at the Hotel Astor, New York City, Wednesday evening, November 10, 1937:

I welcome the opportunity to discuss before the members and guests of the Academy of Political Science the subject of Federal spending and its relation to the balancing of the Federal Budget.

Nineteen years ago tomorrow we signed the armistice ending the World War. That war was enormously costly in human values, and it was enormously costly in material values. In the 2 years between the middle of 1917 and the middle of 1919 the Federal Government sustained a net deficit of $22,000,000,000.

During the past 4 years this country has been engaged in another war. This time our enemy was a great economic disaster. In this war we fought with jobs and with dollars to save farmers from losing their farms; to save home owners from losing their homes; to give not only bread but work to the unemployed; to increase the security of jobs, property values, and business profits; and to bring order out of chaos in our economic system.

This war, like that other war, required a many-sided campaign under intelligent and courageous leadership—a leadership that was magnificently supplied by President Roosevelt.

Finally, this war, like that other war, required a large spending program. This program, plus the special needs arising out of the great drought and the prepayment of the soldiers' bonus, necessitated net outlays during the 4 years ended June 30, 1937, of some $14,000,000,000 in excess of our receipts.

Of course, it is easily possible to criticize some of the detailed uses of the relief funds. Let us concede that there was some waste. In any expenditure program of such magnitude this is inevitable. But, contrasted with the human and material values at stake, such wastes as may have occurred shrink into insignificance.

We deliberately used an unbalanced Federal Budget during the past 4 years to meet a great emergency. That policy has succeeded. The emergency that we faced in 1933 no longer exists.

I am fully aware that many of our problems remain unsolved. I am aware that there still remains a considerable volume of unemployment; that the speculative markets have recently been under severe pressure; and that our business indexes have recently shown a declining tendency. I am further aware that some persons contend that another great spending program is desirable to ward off the risk of another business depression.

I claim no prophetic insight into the future. But, after giving serious and careful consideration to all of these and other factors, I have reached the firm conviction that the domestic problems which face us today are essentially different from those which faced us 4 years ago. Many measures are required for their solution. One of these measures, but only one, in the present juncture is a determined movement toward a balanced Budget.

Early in 1933, after 3 years of progressive deterioration, our whole economic mechanism was demoralized. Under these conditions there was no agency outside of the Federal Government with the resources and the courage to bring about a business revival.

Today the situation is greatly changed. We are now nearing the end of one of the most active years in the business history of this country. On the whole, this high level of activity has been of a healthy character—not of the character that usually marks an unhealthy boom and precedes a serious depression. The present situation is not characterized by the existence of huge inventories, high interest rates, overextended credit positions, or great surpluses of housing and capital equipment. We have not reached the stage of full employment of our productive resources. On the contrary, from all these standpoints, conditions are favorable for a continued increase in the level of business activity.

This stands in contrast to the unhealthy excesses of 1929. It stands in even sharper contrast to the banking collapse, the bread lines, the bankruptcies, and the general demoralization of 1933.

Despite the substantial increase in the public debt during the past 4 years, the credit of the Federal Government has remained absolutely unimpaired. Not once during even the darkest days of the depression did the Treasury experience the slightest difficulty in borrowing all the funds that were required. Moreover, the rates of interest on our borrowings have been lower, for comparable securities, than at any other time in the history of the country.

But the underlying conditions that made deliberate deficit spending the wisest kind of policy during the depression have been altered during the progress of recovery. Thus, when we borrowed during the depression to finance our deficit spending, a large part of the funds was obtained through an expansion of bank credit. To this extent our spending did not absorb capital funds that might otherwise have gone into private industry, nor did it absorb by taxation funds that might otherwise have gone into private consumption. Even to the extent that our bonds and notes were purchased by nonbanking investors, the effect was largely to put to work capital funds that would otherwise have remained idle.

Our industrial recovery of the last year, however, has created large new demands for private capital. Our commercial banks have been again utilizing their credit resources for the financing of private industry. During the present calendar year the insured commercial banks of the country have substantially reduced their holdings of Government securities in order to meet actual and prospective demands for commercial credit. The obligations that they sold, plus an amount equal to the securities newly marketed by the Treasury, were purchased by investors. Any deficit spending under conditions of active demand for private capital would have to be financed in large part by capital funds that would otherwise be available for business purposes.

The basic need today is to foster the full application of the driving force of private capital. We want to see capital go into the productive channels of private industry. We want to see private business expand. We believe that much of the remaining unemployment will disappear as private capital funds are increasingly employed in productive enterprises. We believe that one of the most important ways of achieving these ends at this time is to continue progress toward a balance of the Federal Budget.

I turn now to the immediate practical aspects of Budget balancing for the coming fiscal year. What are the controlling figures?

Our total receipts for this year were estimated in the President's Budget summation of October 19 at about $6,650,000,000, and our total net expenditures at about $7,345,000,000, leaving an estimated net deficit of $600,095,000.

To attain an ordinary balancing of the Budget next year—that is, a balance after full provision for accruing liabilities for old-age benefit payments, but exclusive of debt retirement—it would be necessary to accomplish a net improvement of about $700,000,000 in our budgetary position as last estimated. To be prudent, we should not count on an increase in revenues next year from the existing tax structure. Nor should we impose additional taxation. Instead we should plan to bring next year's expenditures within this year's income.

But where can cuts totaling $700,000,000 be made? After a careful study of the whole problem, I have come to the following conclusion: On the one hand, while everything possible is being and

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wages, long hours, and child labor in some of our industries. When we raise these standards to a higher level, as we seek to do by this legislation, we thereby increase the consuming power and augment the market for all manufactured goods and products of the farm, first, in those immediate localities in which these industries are located, and secondly, throughout the Nation.

AS DEMOCRATS WE ARE UNQUALIFIEDLY COMMITTED TO THIS TYPE OF SOCIAL LEGISLATION

Mr. Speaker, it was my privilege and honor to serve as a delegate to the Democratic national convention held at Philadelphia in 1936, and I say to my fellow Democrats that we are unqualifiedly committed to this type of social legislation. I still remember the enthusiasm and fervor with which we in the convention adopted our platform, containing this plank:

We know that * * * minimum wages, maximum hours, child labor, and working conditions in industry cannot be adequately handled by 48 separate State legislatures, 48 separate State administrations, and 48 separate State courts. * * * We have sought and will continue to seek to meet these problems through legislation within the Constitution.

Upon that platform we went before the electorate of the country, and in his closing campaign speech at Madison Square Garden, President Roosevelt said:

Of course, we will continue to seek to improve working conditions for the workers of America—to reduce hours overlong, to increase wages that spell starvation, to end the labor of children, to wipe out sweatshops. * * * For all these things we have only just begun to fight.

WE ARE KEEPING FAITH WITH THE AMERICAN PEOPLE

President Roosevelt and the leaders of our party, and each of us, have since reiterated time and time again these promises and pledges to the American people. Now we are going to keep faith with the American people, carry out their mandate predicated upon their acceptance of the covenant set forth in our party platform, and redeem our campaign promises and subsequent pledges, and enact into law this legislation to increase wages, shorten hours, improve working conditions, abolish child labor, and raise the living standards of the workers of America.

Mr. Madden's Defense

EXTENSION OF REMARKS

OF

HON. EDWARD R. BURKE

OF NEBRASKA

IN THE SENATE OF THE UNITED STATES

Tuesday, December 14 (legislative day of Tuesday, November 16), 1937

EDITORIAL IN PITTSBURGH PRESS, DECEMBER 13, 1937

Mr. BURKE. Mr. President, I ask unanimous consent to have printed in the Appendix of the RECORD an editorial appearing in the Pittsburgh Press of Monday, December 13, 1937, entitled "Mr. Madden's Defense."

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

[From Pittsburgh (Pa.) Press of Monday, December 13, 1937]

Chairman J. Warren Madden, of the National Labor Relations Board, sees no infringement upon the constitutional guaranty of free speech and free press in the recent actions of his Bureau. His defense, outlined in a lengthy statement dealing with the summoning of a magazine editor to produce all papers, proofs, letters, memoranda, telegrams, etc., in connection with an article criticizing the Weirton Steel Co. hearing, is based on the premise that the editor knew something about a "violation of the law" and didn't want to tell where or how he learned it.

Said Mr. Madden: "Some editors are interpreting this concise expression (the first amendment of the Constitution) substantially as follows: 'No publisher or editor shall be required by any public authority to appear and give testimony in any trial or hearing as to violations of law of which he has knowledge or in which he has participated, if his knowledge was gained or his participation occurred in the course of gathering, writing, printing, or distributing matter which was to pass or had passed through a printing press.' "

In short, that editors claim they shall not be compelled to testify if they know about a "violation of the law."

All right, let's examine that premise. If it is true, Mr. Madden's defense of his Board's action is valid. If untrue, then his defense is unsound.

What could the editor in question know about in the nature of a "violation of the law?" There is only one answer, as admitted by the Labor Board. He knew about the origin and circumstances surrounding the publication of an article in his magazine. Therefore either the publication or the distribution of that article was a violation of the law. It was the only thing about which he was presumed to know.

But the first amendment to the Constitution of the United States declares: "Congress shall make no law * * * abridging the freedom of speech or of the press."

That amendment did not declare that it is a violation of law to attack the Wagner Act.

It did not declare that it is a violation of law to criticise the Labor Board.

It even did not declare that it is a violation of law to approve the labor theories of E. T. Weir, the head of Weirton.

It made no exceptions—for capitalist or labor leader, for union organizer or trade-paper publisher.

No publication—according to the first amendment of the Constitution—was in itself a violation of law. The only violations were for libel and for exciting to riot and rebellion, as defined by other laws.

Under Mr. Madden's definition of a "violation of law" the police at Dearborn, Mich., and the mayor at Jersey City were equally within the law when they arrested C. I. O. organizers for distributing union literature.

They, too, claimed to be upholding the law by calling union men to account for what they had printed or distributed.

If it is a "violation of the law" to print and distribute matter hostile to the Wagner Act about which the Constitution says nothing—then it can be claimed with equal validity that it is a "violation of the law" to print and distribute union arguments when the police at Jersey City and Dearborn want to say so.

If it is a "violation of the law" to print matter critical of an action under the Wagner Act, then why can't Congress make it illegal to print criticisms about the income-tax law or the interstate-commerce law or the pure-food law—or any other law it sees fit?

Mr. Madden's argument is good—up to the time where he forgets that the first clause of the Bill of Rights forgot to make an exception in the case of the National Labor Relations Board.

Wage and Hour Bill

EXTENSION OF REMARKS

OF

HON. E. E. COX

OF GEORGIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, December 14, 1937

ADDRESS DELIVERED BY HON. E. E. COX, OF GEORGIA, ON DECEMBER 10, 1937

Mr. COX. Mr. Speaker, under leave granted to extend my remarks in the RECORD, I include the following address I delivered in Atlanta last Friday, December 10, 1937:

Mr. Chairman, were it not for the profound and fundamental changes—I might say revolution—now going on in our economic and social life, and, indeed, in the very structure and functioning of the Government itself, I would not subject myself to the criticism of too often resisting measures that are offered with the reported blessings of an administration of the party of which I am a humble member.

But so far reaching and so dangerous are these changes I am compelled by a sense of love for my country, love for my party, and concern for the posterity to which we of today must soon turn over this Government and this Nation, to speak out when I see steps being taken, encroachments being attempted, and legislation being enacted which point unerringly toward a government by men rather than by laws, the kind of government which burdens many of the Old World nations of today and which is utterly repugnant to every concept of free American democracy—the democracy of Jefferson, of Cleveland, and of the founding fathers, who fought for the establishment of personal liberty on our shores and who wrote into the Constitution the guaranties of those liberties.

I am not unaware of the criticism which has been voiced of my attitudes toward certain phases of the so-called New Deal. Nor have I been free of the mental travail, the unpleasantness, and the need for long and grave mental struggle attendant upon a position of disagreement with an administration that is struggling

so desperately to solve the innumerable vexing problems that press for attention.

My task of warning against some of these proposals and of opposing some of them has not been a happy one. But I have no regret, for nothing has been said or done in malice; it has been out of the deepest sense of duty to sustain our constitutional system and to defend the liberties of our people that I have sought to beat back every encroachment of despotism wherever and whenever it has raised its head, regardless of under what banner, whatever guise, or whatever circumstance. I must fight for a free America, for your personal liberties and mine, for an American concept of government, and against the creeping paralysis of fascism, nazi-ism, communism—dictatorship.

I do not accuse those who believe that circumstances of necessity or the exigencies of an emergency justify a temporary departure from the fundamental principles of free government of being the willing and knowing partisans of a totalitarian form of government. But I do say that once this camel gets its nose under the tent, it will mean in America what it has meant in those dictator-ridden nations of the Old World that shortly the camel will be entirely in the tent and the liberties and the personal freedom of American citizens will be trampled under foot and ground into the dust.

I have warned time after time—and I warn again now—that there is a snowball sort of effect to this constant encroachment of Government on the rights and liberties and activities of the citizens. Once let any government begin to control business, industry, labor, agriculture, church, or school, and unless that government is at some point willing to turn about in its course and release its control over these activities it must go on and on until complete control is exercised over all activities. And when government once assumes full control it must maintain itself by the device of terrorism. It can brook no criticism. It can risk no press and no voice and no collective action of the citizens against it. When that point is reached we will have in this country exactly the same sort of government—no matter by what name it is called—the same kind of government that today curses Germany, Italy, Russia, and Japan. No matter that the handcuffs and the leg irons are velvet-lined—they are handcuffs and leg irons nevertheless, and once they are clamped upon the citizenry of this Nation the chafing and finally the rebellion will come—and come sooner than we think. You cannot put the people of this country in a governmental strait jacket and keep them there. Our whole training is against it. It was easy enough to do this in Europe where the populace for generations was trained and conditioned to submission to authority. Those peoples were accustomed to bow to authority and to not question its right or power to control them. But that is not true of you—the sons and daughters of those pioneers who with faith in God, confidence in themselves, an irresistible determination to carve out their own destiny of freedom in the primeval forest by grace of strong bodies and keen axes, who threw off the yoke of absolutism and who made America what it is today. You cannot shackle such people by new instruments of power dangerous to the liberties of the people, even though such "new instruments" be placed in the hands of political puppets and self-serving bureaucrats intent upon perpetuating their own power at whatever cost to the people.

If absolutism ever comes to America it will not be through the desire of her people but through their lack of knowledge of what is being done. It will not come so much from design as from blindness. It will not come so much from determined direction as from thoughtless drift. And it is that blindness that I seek to prevent. It is that drift I seek to retard and to stop by warning against those measures and those trends which I see inevitably leading to that concentration of power that I know will not be accepted as a finality by our people. So, then, in short, you have the reason for my opposition to many of the administration measures, such as the wage-hour bill, and you have the reason for my criticisms of those measures which were so obviously in violation to the Constitution and to the whole American concept of government. I am not fighting men. I am fighting encroachment of dangerous ideologies. I am not criticizing men. I am criticizing the blindness, the indifference and the cowardice, that would make compromise with some form of absolutism, which, no matter how expedient it may seem for the moment, has within it the seeds of destruction for the liberties of America and the Constitution carved out of the blood and sacrifice of our forefathers who loved liberty and spiritual and intellectual freedom more than they loved this enigmatic struggle we call human life.

There has grown up in our national life all too much of the clamor that if a Member of the Congress does not submit supinely and on every occasion and on every proposal for legislation to the dictation of those in the executive branch of the Government, he has betrayed his party and has rebelled against his party's administration. That premise is false and that conclusion is obnoxious to every proper understanding of the constitutional duty of an elected legislator. A Congressman has his own constituency to serve. He has his own conscience to meet. He has, if he is worthy of his place in the councils of the Nation, a standard of courageous honesty and of honest courage which he cannot compromise without being faithless to the trust of his constituency, without being false to the liberties of his people, without being careless of our duty to our posterity to turn over to them a free Nation which we inherited from our forefathers.

Honest men differ in their views and their opinions—and such differences of opinions and the peaceful and reasonable adjustment of such divergence of views are the very essence and life and being of that structure—that great spiritual truth which we call constitutional democracy. That constitutional democracy is not a physical thing at all. It is truth, justice, good will, fairness, and cooperation aimed to attain the more abundant spiritual life and the more abundant physical well-being of our people. And when any man through cowardice or political expediency violates his concepts and his convictions of truth, justice, good will, fairness, and cooperation he has violated the very basis of constitutional democracy and of liberty among men. Many do it, as I have said, through blindness. They do not think these things through. Many do it through hope that by compromising for the moment they may turn back before it is too late and retrieve these elements of freedom. But there are some who give evidence of deliberately desiring to strangle the elements of constitutional democracy because they hope in the chaos which would follow to loot power and profit for themselves.

I perceive in the constant trend toward centralization in government, in the constant trend toward regimentation and regulation of all the activities of the people, this thoughtless drift and this blind and unthinking acquiescence to compromise with an alien political philosophy which spells the end of freedom in America.

Take, for instance, the pending wage and hour bill being considered by the Congress.

This measure is proposed in the name and under the guise of an economic and social necessity. The basic argument is that it is economically unsound for anybody in the United States to work for less than 40 cents an hour and that it is socially unsound for anybody to work more than 40 hours a week.

If that assertion be true, if that philosophy be sound, then it must be true and it must be sound in every case. It must be true and sound in the case of the agricultural worker as well as in the case of the industrial worker. It must be just as true and just as sound for the domestic worker, the white-collar worker, the clerk, the stenographer as it is for the lathe worker or the pick-and-shovel man or the man who follows the plow. So, therefore, if it is true for all of these, then there could be no exemptions granted by any all-powerful board or any all-powerful dictator at the head of wage-hour enforcement without violating in the case of every exemption those fundamental principles. But it is proposed to either set up a board, or a single administrator, or the Department of Justice, or the Department of Labor to violate in thousands of cases this alleged economically and socially necessary regulation. Discretionary power to an extent heretofore undreamed of is to be vested in the administrative agency chosen to enforce this proposed act, to exempt and to exclude from its provisions and operations some industries or some workers or some sections in which it is found that the fundamental theory won't work. So, then, we are to have the spectacle of an alleged fundamental economic and social necessity being set aside by edict of some enforcing administrative agency, so that in the cases of exemption the fundamental necessity will not apply while in others it will. Picture for yourselves the utter chaos and confusion that would result.

Now all this adds up to the establishment of a dictatorship over labor and over industry that will have to enforce its edicts upon all interests and activities coming within the zone of its jurisdiction or it will have to create a condition of emasculation and exemption that will render the act merely a meaningless series of exceptions and discriminations.

Let me say to you now that one of the underlying intentions of this wage-hour bill is to provide a board or some other administrative agency with the power to denude and deprive the South of certain climatic and raw-material advantages, certain labor and living advantages which are now bringing us to the forefront of industrial advancement, in order to provide competing northern industries with a weapon by which to retard our advancement and to deprive us of our markets which we can and do possess by reason of these natural and other economic advantages.

In other words, the purpose of the wage-hour bill is to put the industrial advancement of the South in a strait jacket so some administrator can sit in Washington and say when, how, and to what extent the South may utilize her industrial advantages to aid her own progress.

In utter violation of States' rights, local self-government, local self-determination of our own sociological and economic problems, this act is to be foisted upon us so that an administrator sitting in Washington can send a horde of regulators and field administrators down here to tell us the hours we shall work, the wages we shall pay, the industrial and labor and living standards to which our people and our industries shall conform, whether we like it or whether we don't, and whether we want it or whether we don't.

The very essence of the reason for State sovereignty is because the interests, the conditions, and the requirements of the various sections of the United States are so diverse and so widely divided as to render it economically and sociologically impossible to put America in a strait jacket of industrial and agricultural and social regulation made to apply to every section and to all industry and all labor alike.

It is contended that only a very small fraction of labor will be touched by the operations of this bill. If that is true, why outrage the Constitution and set up a dangerous and all-powerful board or single administrator in Washington to wield any such power if it is to touch such a small fraction of the laboring people as it is claimed?

Let me strip this whole question of the falsity of political argument and the mist of vague economic and sociological vaporings which becloud it, and stand it naked before you that you may see of what it is composed, what purposes actually enshroud it, so that you may for yourselves see the dangers to the South inherent in this dangerous and iniquitous proposal.

It has been said that this proposal grew out of the desire of the industrial East to stop the industrial development of the South, and to paralyze the industry we already have. But this is not true.

It has been said that organized labor, out of a desire to spread employment, to increase wages, and to shorten hours gave birth to the proposal. But this is not true.

It has also been said that the idea came out of a certain racial group interested in the elimination of all racial distinctions, who demand it as the price for continued political support. But this is not true.

This whole proposal grows out of the hearts and minds of those intellectual "reds" in America who actually are interested in achieving by stealth and by subterfuge and by usurpation a despotic form of government in place of our constitutional democracy, in order that they may be the ones to wield the power which, under free government and individual effort, they have neither the wits, the determination, the energy, nor the integrity to accomplish for themselves.

There are industrialists who are supporting this wage-hour proposal because if it is enforced it would tremendously handicap if not stop the present industry of the South and would paralyze our future efforts at industrial expansion. There are labor leaders who are supporting the measure because it will mean not only political organization of the industrial workers, but eventually and without doubt the political organization of farm workers and domestic workers as well, into a compact political force which could and would be manipulated and played upon as an organ by which these self-seeking labor leaders could acquire that despotic dominion over industry and over government for which they avidly thirst.

The organized Negro groups of the country are supporting it because it will, in destroying State sovereignty and local self-determination, render easier the elimination and disappearance of racial and social distinctions, and by the concentration of this vast and despotic power in a political board or administrator in Washington throw into the political field the determination of the standards and the customs which shall determine the relationship of our various groups of people in the South.

I say to you that these local problems cannot be so administered. It is not only impossible, but it is dangerous beyond conception to try to so adjust all of these intimate questions of daily life and associations by a political power sitting in Washington and determining these questions not from the standpoint of the best and wisest solution but from the standpoint of advantageous political determination of these questions. Along that way lies terrible trouble and dreadful social unrest and friction which, over the years, we have tried so hard to allay and to adjust.

These groups with their varying self-interests have all been consolidated into the common drive for this wage-hour bill. I think the President has been misled in this matter. I believe that if many of those who are now supporting this bill under the delusion that it will accomplish what it is purported to accomplish knew the real situation in the South they would withdraw their support and would denounce the measure.

It has been claimed by the friends of this measure that those who are struggling to make a living out of agricultural pursuits would escape its blighting effect, but this is not true.

It is impossible to put into effect the provisions of this proposed Wage-Hour Act without increasing the cost of all the things that the farmer has to buy. This is one effect. This act will increase the price that the farmer will have to pay for farm labor—or else your farm laborers will flock to the industrial centers for the 40 cents and 40 hours and fields will have to lie fallow and become buried under a growth of weeds because of lack of aid to keep them producing.

This act will operate, by increasing the cost of manufactured goods, to drain from the farmers' present markets a great portion of the purchasing power now spent for agricultural products, because it would be spent for manufactured products at increased prices.

There is pending before the Congress another bill, called the Agricultural Act of 1937. The administration is under commitment to farmers to secure for them parity of price, parity of income, and something more than the cost of production; and pending farm legislation is intended as a move in this direction. But can such parity be accomplished if the moment the farm bill is adopted you are to face, under this wage-hour bill, competition for your labor, higher prices for everything you buy, and a lowered purchasing power in your markets?

The ultimate effects of these two bills would be like infusing into agriculture a pint of blood through the Agricultural Act and at the same moment draining from agriculture a gallon of blood through the operation of the Wage-Hour Act.

I want such farm legislation as will achieve parity of prices, parity of income, and financial security for the farmers of America. The Nation cannot survive with the agricultural workers, comprising one-third of the population, drawing only a tenth of the national income. I am for intelligent farm legislation designed permanently to achieve for the farming population equality and parity of prices and of income. It is because of that necessity, and it is because of that desire which I have to actually secure such a condition of affairs for the farmers that I supported the agricultural bill while I oppose this wage-hour bill. I want such security and such parity for the farmers with the very least possible amount of regulation, regimentation, and interference with their individual liberty of action and self-determination. The American farmer is able. He is honest. He is of the best type of citizen we have in this Nation. What he wants and what he needs is a fair and equal chance with industry for the production and marketing of his products at prices on a parity with the prices of the things he must buy. But I say to you that the farmer cannot secure such parity if new and unpredictable competition, and new and unpredictable price burdens are to be created against him at the same time by such legislation as this wage-hour bill.

The great need of America today is intelligent cooperation between the Government and business and agriculture, not blind and arbitrary compulsion and regimentation.

We need between industry and agriculture intelligent cooperation, not blind competition and warfare.

We need between industry and labor intelligent cooperation, not blind force and hostility.

We need in America intelligent cooperation from a basis of enlightened self-interest, not class and racial hatreds and strife.

We need in America not to rob those who have to give to those who have not, but intelligent cooperation to enable the have-nots to acquire their own so they will not need that which others have.

The best form of relief known to mankind is that form which helps the needy to relieve his own condition of need.

Class hostilities and hatreds and wishful thinking never helped any nation to survive. We need a practical application of sound economics and sound sense and sound integrity to our problems in a concerted effort to eliminate the obstacles in the way of a renewed and continued prosperity.

Our Nation is again in a grave situation. It is essential that we all work together as good citizens and sensible citizens to preserve our democracy from destruction, to preserve our liberties from being wrested from us, and to preserve our defense from any assaults by other nations, while we hold in our hearts peace and good will toward all men.

I want my party to be dominant because it is worthy to be dominant through an enlightened and practical concept of government. The traditional policies and the traditional ideals of Jeffersonian democracy are the traditions of sound, enlightened, and fair American government in a constitutional way. We have, I think, wandered away, in some cases a long way, from those traditions and those ideals, but we are struggling to come back and will come back to those traditions and those ideals such as we know them here in the South, and hold them dear to our hearts because up to now they have resulted in establishing the greatest Nation under the greatest charter of liberty ever yet devised by the mind of man. [Applause.]

A Prophetic Utterance by Elihu Root

EXTENSION OF REMARKS

OF

HON. ROBERT F. WAGNER

OF NEW YORK

IN THE SENATE OF THE UNITED STATES

Tuesday, December 14 (legislative day of Tuesday, November 16), 1937

EDITORIAL BY DAVID LAWRENCE, DECEMBER 13, 1937

Mr. WAGNER. Mr. President, I ask unanimous consent to have printed in the RECORD an editorial appearing in the United States News of December 13, 1937, by David Lawrence, entitled "A Prophetic Utterance by Elihu Root."

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

A PROPHETIC UTTERANCE BY ELIHU ROOT

The other day I happened upon a quotation from a speech by Elihu Root delivered in 1916. By that time, Mr. Root had served as Secretary of War and then as Secretary of State by appointment of President Theodore Roosevelt. He had been elected to the United States Senate from the largest State in the Union and held a position of esteem in the councils of the Republican Party and business groups of America. Said Mr. Root:

"The real difficulty appears to be that the new conditions incident to the extraordinary industrial development of the last half century are continuously and progressively demanding the readjustment of the relations between great bodies of men and the establishment of new legal rights and obligations not contemplated when existing laws were passed or existing limitations upon the powers of government were prescribed in our Constitution.

EXHIBIT F

CHAPTER 294.

[Sub. S. B. 424.]

WASHINGTON MINIMUM WAGE AND HOUR ACT.

AN ACT relating to wages and other conditions of employment for employees to be known as the Washington minimum wage and hour act; and providing penalties.

Be it enacted by the Legislature of the State of Washington:

Definitions.

SECTION 1. As used in this act:

"Director."

(1) "Director" means the director of labor and industries;

"Wage."

(2) "Wage" means compensation due to an employee by reason of his employment, payable in legal tender of the United States or checks on banks convertable into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by regulations of the director under section 5;

"Employ."

(3) "Employ" includes to suffer or to permit to work;

"Employer."

(4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;

"Employee."

(5) "Employee" includes any individual employed by an employer but shall not include:

(a) any individual employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wild life, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance

of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; and the exclusions from the term "employee" provided in this item shall not be deemed applicable with respect to commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

(b) any individual employed in domestic service in or about a private home;

(c) any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the director);

(d) any individual employed by the United States;

(e) any individual engaged in the activities of an educational, charitable, religious, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously;

(f) any newspaper vendor or carrier;

(g) any carrier subject to regulation by Part I of the Interstate Commerce Act;

(h) any individual engaged in forest protection and fire prevention activities;

(i) any person employed by a funeral director or operator of an emergency ambulance service;

"Occupation."

(6) "Occupation" means any occupation, service, trade, business, industry, or branch or group of in-

dustries or employment or class of employment in which employees are gainfully employed.

Minimum wage set.

SEC. 2. Every employer shall pay to each of his employees wages at a rate of not less than one dollar per hour except as may be otherwise provided under this act.

Eight hour day, forty hour week—Overtime rates, computation, exceptions.

SEC. 3. (1) Except as otherwise provided in this section, no employer shall employ any of his employees for a workday longer than eight hours or for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. Every employee is entitled to have his overtime computed on both a daily and weekly basis each week and shall be paid either his daily or weekly overtime whichever is greater.

(2) No employer shall be deemed to have violated subsection (1) by employing any employee for a workday or workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(a) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in packing or preparing for market, canning, freezing, dehydrating or preserving, perishable or seasonal fish, fruits or vegetables and in any other industry found by the director to be of a seasonal nature, and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed;

(b) in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup; and in the case of

EXHIBIT G

cease using, selling, handling, transporting, or otherwise dealing in the products or any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. (June 23, 1947, 3:17 p. m., E. D. T., ch. 120, title III, § 303, 61 Stat. 158.)

§ 188. Repealed. Aug. 9, 1955, ch. 690, § 4 (3), 69 Stat. 625.

Section, act June 23, 1947, ch. 120, title III, § 305, 61 Stat. 160, forbade striking by Government employees, required discharge of striking employee and forfeiture of his civil-service status, and made him ineligible for employment for three years, and is now covered by sections 118p—118r of Title 5, Executive Departments and Government Officers and Employees.

SUBCHAPTER V.—CONGRESSIONAL JOINT COMMITTEE ON LABOR-MANAGEMENT RELATIONS

§§ 191—197. Omitted.

CODIFICATION

Sections, acts June 23, 1947, 3:17 p. m., E. D. T., ch. 120, title IV, §§ 401—407, 61 Stat. 160, 161; Aug. 10, 1948, ch. 833, 62 Stat. 1286, relating to establishment and composition of a joint committee to survey the entire field of labor-management relations, were omitted from the Code as executed, since a final report was required to be filed not later than March 1, 1949.

[1] So in original. Probably should read "of".

Chapter 8.—FAIR LABOR STANDARDS

Sec.
201. Short title.
202. Congressional finding and declaration of policy.
203. Definitions.
204. Administrator.
205. Special industry committees for Puerto Rico and the Virgin Islands.
206. Minimum wages; effective date.
207. Maximum hours.
208. Wage orders in Puerto Rico and the Virgin Islands.
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211. Investigations, inspections, records, and homework regulations.
212. Child labor provisions.
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214. Learners, apprentices, and handicapped workers.
215. Prohibited acts; prima facie evidence.
216. Penalties; civil and criminal liability; waiver of claims; actions by Secretary of Labor; limitation of actions.
216a. Repealed.
216b. Liability for overtime work performed prior to July 20, 1949.
217. Injunction proceedings.
218. Relation to other laws.
219. Separability of provisions.

CROSS REFERENCES

Rules and regulations implementing Fair Labor Standards Act, see Appendix to this title.

§ 201. Short title.

This chapter may be cited as the "Fair Labor Standards Act of 1938". (June 25, 1938, ch. 676, § 1, 52 Stat. 1060.)

SHORT TITLE OF 1949 AMENDMENTS

Congress in enacting amendment of sections 202—208 and 211—217 of this title, provided by section 1 of act Oct. 26, 1949, ch. 736, 63 Stat. 910, that the amendments should be popularly known as the "Fair Labor Standards Amendments of 1949".

§ 202. Congressional finding and declaration of policy.

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. (June 25, 1938, ch. 676, § 2, 52 Stat. 1060; Oct. 26, 1949, ch. 736, § 2, 63 Stat. 910.)

AMENDMENTS

1949—Subsec. (b) amended by act Oct. 26, 1949, to include the regulation of commerce with foreign nations.

EFFECTIVE DATE OF 1949 AMENDMENT

Section 16 (a) of act Oct. 26, 1949, provided that: "(a) The amendments made by this Act [amending sec-

tions 202—208, 211—217 of this title] shall take effect upon the expiration of ninety days from the date of its enactment [October 26, 1947]; except that the amendment made by section 4 [amending section 204 of this title] shall take effect on the date of its enactment [October 26, 1949]."

§ 203. Definitions.

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j (g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(*l*) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.

(o) Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. (June 25, 1938, ch. 676, § 3, 52 Stat. 1060; 1946 Reorg. Plan No. 2, § 1, eff. July 16, 1946, 11 F. R. 7873, 60 Stat. 1095; Oct. 26, 1949, ch. 736, § 3, 63 Stat. 911.)

AMENDMENTS

1949—Subsec. (b) amended by act Oct. 26, 1949, § 3 (a), by substituting "between" for "from" following "States or", and "and" for "to" preceding "any place".

Subsec. (j) amended by act Oct. 26, 1949, § 3 (b), which inserted "closely related" preceding "process" and substituted "directly essential" for "necessary" following "occupation".

Subsec. (*l*) (1) amended by act Oct. 26, 1949, § 3 (c), to include parental employment of a child under 16 years of age in an occupation found by the Secretary of Labor

to be hazardous for children between the ages of 16 and 18 years, in the definition of oppressive child labor.

Subsecs. (n) and (o) added by act Oct. 26, 1949, § 3 (d).

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment of section by act Oct. 26, 1949, as effective ninety days after Oct. 26, 1949, see note set out under section 202 of this title.

TRANSFER OF FUNCTIONS

References to the Chief of the Children's Bureau in subsec. (l) were changed to Secretary of Labor by 1946 Reorg. Plan No. 2, and set out in note to section 133y-16 of Title 5, Executive Departments and Government Officers and Employees, which transferred the functions of the Children's Bureau and its Chief under sections 201—216 and 217—219 of this title to the Secretary of Labor to be performed under his direction and control by such officers and employees of the Department of Labor as he designates.

CROSS REFERENCES

Agricultural employment as including activities within subsection (f) of this section, see section 1467 (1) of Title 7, Agriculture.

Portal-to-Portal Act of 1947, sections 251—262 of this title, as affected by subsec. (o), see section 216 note of this title.

§ 204. Administrator.

(a) There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this chapter referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this chapter and shall fix their compensation in accordance with the Classification Act of 1949. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the minimum wages established by this chapter, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in productivity and the level of wages in manufacturing, the ability of employers to absorb wage increases, and such other factors as he may deem pertinent. (June 25, 1938, ch. 676, § 4, 52 Stat. 1061; Oct. 26, 1949, ch. 736, § 4, 63 Stat. 911; Oct. 28, 1949, ch. 782, title XI, § 1106 (a), 63 Stat. 972; Aug. 12, 1955, ch. 867, § 2, 69 Stat. 711; July 31, 1956, ch. 804, title I, § 106 (a), 70 Stat. 737.)

REFERENCES IN TEXT

The civil-service laws, referred to in the text, are classified generally to Title 5, Executive Departments and Government Officers and Employees.

The Classification Act of 1949, referred to in the text, is classified to chapter 21 of Title 5.

CODIFICATION

Provisions in subsec. (a) which prescribed the compensation of the Administrator were omitted to conform to the provisions of act July 31, 1956, and are now covered by section 2205 (a) of Title 5, Executive Departments and Government Officers and Employees.

AMENDMENTS

1955—Subsec. (d) amended by act Aug. 12, 1955, to require an evaluation and appraisal by the Secretary of the minimum wages, together with his recommendations to Congress, to be included in the annual report.

1949—Act Oct. 28, 1949, substituted the "Classification Act of 1949" for the "Classification Act of 1923".

Act Oct. 26, 1949, amended section by increasing salary of Administrator from $10,000 to $15,000.

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment of section by act Oct. 26, 1949, as effective Oct. 26, 1949, see note set out under section 202 of this title.

TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of Labor and functions of all agencies and employees of that Department were, with the exception of the functions vested by the Administrative Procedure Act (section 1001 et seq. of Title 5, Executive Departments and Government Officers and Employees) in hearing examiners employed by the Department, transferred to the Secretary of Labor, with power vested in him to authorize their performance or the performance of any of his functions by any of those officers, agencies, and employees, by 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F. R. 3174, 64 Stat. 1263, set out in note under section 611 of Title 5, Executive Departments and Government Officers and Employees.

SECRETARY OF LABOR

Section 6 of act Aug. 12, 1955, provided that: "The term 'Secretary' as used in this Act and in amendments made by this Act [to subsec. (d) of this section and to sections 205 (a), 206 (a) (1), 208 (a), (b), (c), (d), (e), and 210 (a) of this title] means the Secretary of Labor."

§ 205. Special industry committees for Puerto Rico and the Virgin Islands.

(a) The Administrator shall as soon as practicable appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 206 of this title to employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under said section to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin

Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees shall be subject to the provisions of section 208 of this title.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations. (June 25, 1938, ch. 676, § 5, 52 Stat. 1062; June 26, 1940, ch. 432, § 3(c), 54 Stat. 615; Oct. 26, 1949, ch. 736, § 5, 63 Stat. 911; Aug. 12, 1955, ch. 867, § 5 (a), 69 Stat. 711.)

AMENDMENTS

1955—Subsec. (a) amended by act Aug. 12, 1955, to eliminate provisions which subjected the Administrator to the provisions of section 208 of this title in the determination of minimum rates of wages and classifications.

1949—Act Oct. 26, 1949, amended section generally by making it applicable only to Puerto Rico and the Virgin Islands, and omitted former subsec. (e) of the section as its provisions are now covered by subsec. (a) of this section.

1940—Subsec. (e) added by Joint Res. June 26, 1940.

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment of section by act Oct. 26, 1949, as effective ninety days after Oct. 26, 1949, see note set out under section 202 of this title.

TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of Labor and functions of all agencies and employees of that Department were, with the exception of the functions vested by the Administrative Procedure Act (section 1001 et seq. of Title 5, Executive Departments and Government Officers and Employees) in hearing examiners employed by the Department, transferred to the Secretary of Labor, with power vested in him to authorize their performance or the performance of any of his functions by any of those officers, agencies, and employees, by 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F. R. 3174, 64 Stat. 1263, set out in note under section 611 of Title 5, Executive Departments and Government Officers and Employees.

SECRETARY OF LABOR

The term "Secretary" as meaning the Secretary of Labor, see section 6 of act Aug. 12, 1955, set out as a note under section 204 of this title.

§ 206. Minimum wages; effective date.

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than $1 an hour;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed in American Samoa, not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are now applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this chapter. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this chapter to employees employed in American Samoa as pertain to special industry committees established under section 205 of this title with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection.

(b) This section shall take effect upon the expiration of one hundred and twenty days from June 25, 1938.

(c) The provisions of paragraph (1) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands

engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title: *Provided,* That the wage order in effect prior to the effective date of this Act for any industry in Puerto Rico or the Virgin Islands shall apply to every employee in such industry covered by subsection (a) of this section until superseded by a wage order hereafter issued pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title. (June 25, 1938, ch. 676, § 6, 52 Stat. 1062; June 26, 1940, ch. 432, § 3 (e), (f), 54 Stat. 616; Oct. 26, 1949, ch. 736, § 6, 63 Stat. 912; Aug. 12, 1955, ch. 867, § 3, 69 Stat. 711; Aug. 8, 1956, ch. 1035, § 2, 70 Stat. 1118.)

REFERENCES IN TEXT

The effective date of this Act, referred to in text of subsec. (c), probably means ninety days from October 26, 1949.

AMENDMENTS

1956—Subsec. (a) (3) added by act Aug. 8, 1956.

1956—Subsec. (a) (1) amended by act Aug. 12, 1955, which increased the minimum wage from not less than 75 cents an hour to not less than $1 an hour.

1949—Subsec. (a) amended by act Oct. 26, 1949, § 6 (a), (b), which struck out subpars. (1), (2), (3), and (4) and inserted in lieu thereof subpar. (1) fixing the minimum wage rate at not less than 75 cents an hour, and changed the designation of former subpar. (5) to subpar. (2).

Subsec. (c) amended by act Oct. 26, 1949, § 6 (c), which continued existing minimum wage rates in Puerto Rico and the Virgin Islands until superseded by special industry committee wage orders.

EFFECTIVE DATE OF 1955 AMENDMENT

Section 3 of act Aug. 12, 1955, which amended subsec. (a) (1) of this section provided in part that the amendment of subsec. (a) (1) should be effective Mar. 1, 1956.

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment of section by act Oct. 26, 1949, as effective ninety days after Oct. 26, 1949, see note set out under section 202 of this title.

SHORT TITLE OF 1956 AMENDMENTS

Section 1 of act Aug. 8, 1956, provided that act Aug. 8, 1956, which is classified to this section and sections 213, 216 of this title, should be popularly known as the "American Samoa Labor Standards Amendments of 1956".

TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of Labor and functions of all agencies and employees of that Department were, with the exception of the functions vested by the Administrative Procedure Act (section 1001 et seq. of Title 5, Executive Departments and Government Officers and Employees) in hearing examiners employed by the Department, transferred to the Secretary of Labor, with power vested in him to authorize their performance or the performance of any of his functions by any of those officers, agencies, and employees, by 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F. R. 3174, 64 Stat. 1263, set out in note under section 611 of Title 5, Executive Departments and Government Officers and Employees.

SECRETARY OF LABOR

The term "Secretary" as meaning the Secretary of Labor, see section 6 of act Aug. 12, 1955, set out as a note under section 204 of this title.

CROSS REFERENCES

Action by employee to recover unpaid minimum wages and liquidated damages, see section 216 (b) of this title.

Employees performing services within foreign country or certain territory under jurisdiction of United States as not subject to provisions of this section, see section 213 (f) of this title.

Hours worked defined, see section 203 (o) of this title.

Minimum wages for employees covered by Walsh-Healy Act, see section 35 (b) of Title 41, Public Contracts.

Minimum wages of employees of Government contractors prescribed by Bacon-Davis Act, see section 276a of Title 40, Public Buildings, Property and Works.

Overtime pay, see section 207 of this title.

Rules and regulations implementing Fair Labor Standards Act, see Appendix to this title.

§ 207. Maximum hours.

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of forty hours in the workweek or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed

milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) of this section shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a) of this section, during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or forty in a workweek or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours,[1] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

(e) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 206 (a) of this title and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(f) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of forty hours if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of forty hours—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

[1] So in original. Probably should have closed parenthesis.

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided,* That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1)—(7) of subsection (d) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(g) Extra compensation paid as described in paragraphs (5)—(7) of subsection (d) of this section shall be creditable toward overtime compensation payable pursuant to this section. (June 25, 1938, ch. 676, § 7, 52 Stat. 1063; Oct. 29, 1941, ch. 461, 55 Stat. 756; July 20, 1949, ch. 352, § 1, 63 Stat. 446; Oct. 26, 1949, ch. 736, § 7, 63 Stat. 912.)

AMENDMENTS

1949—Subsec. (a) amended by act Oct. 26, 1949, which continued requirement that employment in excess of 40 hours in a workweek be compensated at rate not less than 1½ times regular rate except as to employees specifically exempted.

Subsec. (b) (1) amended by act Oct. 26, 1949, which increased employment period limitation from one thousand hours to one thousand and forty hours in semi-annual agreements.

Subsec. (b) (2) amended by act Oct. 26, 1949, which increased employment period limitation from two thousand and eighty hours to two thousand two hundred and forty hours in annual agreements, fixed minimum and maximum guaranteed employment periods, and provided for overtime rate for hours worked in excess of the guaranty.

Subsec. (c) amended by act Oct. 26, 1949, which added buttermilk to commodities listed for first processing.

Subsec. (d) omitted and a new subsec. (d) defining regular rate with certain specified types of payments excepted, added by act Oct. 26, 1949.

Subsec. (e) added by act July 20, 1949, and amended by act Oct. 26, 1949, which determined compensation to be paid for irregular hours of work.

Subsecs. (f) and (g) added by act Oct. 26, 1949.

1941—Subsec. (b) (2) amended by act Oct. 29, 1941.

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment of section by act Oct. 26, 1949, as effective ninety days after Oct. 26, 1949, see note set out under section 202 of this title.

TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of Labor and functions of all agencies and employees of that Department were, with the exception of the functions vested by the Administrative Procedure Act (section 1001 et seq. of Title 5, Executive Departments and Government Officers and Employees) in hearing examiners employed by the Department, transferred to the Secretary of Labor, with power vested in him to authorize their performance or the performance of any of his functions by any of those officers, agencies, and employees, by 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F. R. 3174, 64 Stat. 1263, set out in note under section 611 of Title 5, Executive Departments and Government Officers and Employees.

FORTY-EIGHT HOUR WARTIME WORKWEEK

Ex. Ord. No. 9607, Aug. 30, 1945, 10 F. R. 11191.

By virtue of the authority vested in me by the Constitution and statutes as President of the United States it is ordered that Executive Order 9301 of February 9, 1943 [8 F. R. 1825] (formerly set out as note under this section), establishing a minimum wartime workweek of forty-eight hours, be, and it is hereby, revoked.

CROSS REFERENCES

Action by employee to recover unpaid overtime compensation and liquidated damages, see section 216 (b) of this title.

American Samoa employees not subject to provisions of this section, see section 213 (e) of this title.

Employees performing services within foreign country or certain territory under jurisdiction of United States as not subject to provisions of this section, see section 213 (f) of this title.

Forty-hour workweek for employees covered by Walsh-Healy Act, see section 35 (c) of Title 41, Public Contracts.

Hours of labor on public works, see section 321 et seq. of Title 40, Public Buildings, Property and Works.

Hours worked defined, see section 203 (o) of this title.

Liability for overtime work performed prior to July 20, 1949, see section 216b of this title.

Overtime pay for employees of Government contractors, see section 326 of Title 40, Public Buildings, Property and Works.

Overtime pay on work covered by contracts with United States, see section 326 of Title 40.

Preliminary and post-liminary activities not compensable, see section 254 of this title.

Rate of overtime for employees covered by Walsh-Healey Act, see section 40 of Title 41, Public Contracts.

Rules and regulations of the Administrator under the Fair Labor Standards Act, see Appendix to this title.

Suspension of eight-hour law in case of emergency upon work covered by contracts with United States, see section 326 of Title 40, Public Buildings, Property and Works.

Walsh-Healey Act inapplicable to employees entering into agreements with employees under paragraphs 1 or 2 of subsection (b) of this section, see section 35 (c) of Title 41, Public Contracts.

§ 208. Wage orders in Puerto Rico and the Virgin Islands.

(a) The policy of this chapter with respect to industries in Puerto Rico and the Virgin Islands engaged in commerce or in the production of goods for commerce is to reach as rapidly as is economically feasible without substantially curtailing employment the objective of the minimum wage prescribed in paragraph (1) of section 206 (a) of this title in each such industry. The Administrator shall from time to time convene an industry committee or committees, appointed pursuant to section 205 of this title, and any such industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 206 of this title by employers in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce in any such industry or classifications therein. Minimum rates of wages established in accordance with this section which are not equal to the minimum wage rate prescribed in paragraph (1) of section 206 (a) of this title shall be reviewed by such a Committee once during each biennial period, beginning with the biennial period commencing July 1, 1958, except that the Secretary, in his discretion, may order an additional review during any such biennial period.

(b) Upon the convening of any such industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof,

shall after due notice hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this chapter. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry, and will not give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

(c) The industry committee shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of that prescribed in paragraph (1) of section 206 (a) of this title) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classifications shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Secretary a report containing its findings of fact and recommendations with respect to the matters referred to it. Upon the filing of such report, the Secretary shall publish such recommendations in the Federal Register and shall provide by order that the recommendations contained in such report shall take effect upon the expiration of 15 days after the date of such publication.

(e) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

(f) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons. (June 25, 1938, ch. 676, § 8, 52 Stat. 1064; Oct. 26, 1949, ch. 736, § 8, 63 Stat. 915; Aug. 12, 1955, ch. 867, §§ 4, 5 (b)—(e), 69 Stat. 711, 712; Aug. 25, 1958, Pub. L. 85–750, 72 Stat. 844.)

AMENDMENTS

1958—Subsec. (a) amended by Pub. L. 85–750 to provide for biennial instead of annual review of rates and for additional review, in Secretary's discretion, during any biennial period.

1955—Subsec. (a) amended by act Aug. 12, 1955, § 4, to require review of minimum wage rates at least once each fiscal year.

Subsec. (b) amended by act Aug. 12, 1955, § 5 (b), to permit the industry committee or any authorized subcommittee to hear witnesses and receive evidence only after due notice.

Subsec. (c) amended by act Aug. 12, 1955, § 5 (c), to eliminate provisions which applied to the Administrator in determining classifications and minimum wage rates.

Subsec. (d) amended by act Aug. 12, 1955, § 5 (d), to eliminate provisions which required hearings to be held on the recommendations of the industry committee, and to insert provisions requiring publication of recommendations and providing that such recommendations should take effect 15 days after the date of publication.

Subsec. (e) amended by act Aug. 12, 1955, § 5 (e), to eliminate provisions which required due notice of orders by publication in the Federal Register and by other means as the Administrator deemed reasonably calculated to give general notice to interested persons.

1949—Subsec. (a) amended by act Oct. 26, 1949, which stated policy of chapter with regard to minimum wage rate of industries in Puerto Rico and the Virgin Islands and limited application of section to such industries.

Subsec. (b) amended by act Oct. 26, 1949, which required an industry committee in fixing minimum wage rates not to give a competitive advantage to industries in Puerto Rico and the Virgin Islands over United States industries.

Subsec. (c) amended by act Oct. 26, 1949, which omitted "for any industry" preceding "shall recommend" and substituted "that prescribed * * * of this title" for "40 cents an hour" within parentheses in first sentence.

Subsec. (d) reenacted without change by act Oct. 26, 1949.

Subsec. (e) omitted and subsecs. (f) and (g) redesignated as (e) and (f) by act Oct. 26, 1949.

EFFECTIVE DATE OF 1955 AMENDMENT

Section 4 of act Aug. 12, 1955, which amended subsec. (a) of this section, provided in part that the amendment of such subsec. (a) should be effective July 1, 1956.

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment of section by act Oct. 26, 1949, as effective ninety days after Oct. 26, 1949, see note set out under section 202 of this title.

TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of Labor and functions of all agencies and employees of that Department were, with the exception of the functions vested by the Administrative Procedure Act (section 1001 et seq. of Title 5, Executive Departments and Government Officers and Employees) in hearing examiners employed by the Department, transferred to the Secretary of Labor, with power vested in him to authorize their performance or the performance of any of his functions by any of those officers, agencies, and employees, by 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F. R. 3174, 64 Stat. 1263, set out in note under section 611 of Title 5, Executive Departments and Government Officers and Employees.

SECRETARY OF LABOR

The term "Secretary" as meaning the Secretary of Labor, see section 6 of act Aug. 12, 1955, set out as a note under section 204 of this title.

ORDERS, REGULATIONS, INTERPRETATIONS OR AGREEMENTS PRIOR TO 1949 AMENDMENTS

Section 16 (c) of act Oct. 26, 1949, provided that: "Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of

Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended [this chapter], on the effective date of this Act [ninety days from October 26, 1949], shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act."

WAGE ORDERS ISSUED PRIOR TO JUNE 26, 1940, IN PUERTO RICO OR THE VIRGIN ISLANDS

Joint Res. June 26, 1940, ch. 432, § 3 (d), 54 Stat. 616, provided as follows: "(d) No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 (this section) of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands."

CROSS REFERENCES

Rules and regulations implementing Fair Labor Standards Act, see Appendix to this title.

§ 209. Attendance of witnesses.

For the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees. (June 25, 1938, ch. 676, § 9, 52 Stat. 1065; 1946 Reorg. Plan No. 2, § 1, eff. July 16, 1946, 11 F. R. 7873, 60 Stat. 1095.)

TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of Labor and functions of all agencies and employees of that Department were, with the exception of the functions vested by the Administrative Procedure Act (section 1001 et seq. of Title 5, Executive Departments and Government Officers and Employees) in hearing examiners employed by the Department, transferred to the Secretary of Labor, with power vested in him to authorize their performance or the performance of any of his functions by any of those officers, agencies, and employees, by 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F. R. 3174, 64 Stat. 1263, set out in note under section 611 of Title 5, Executive Departments and Government Officers and Employees.

"Secretary of Labor" was substituted for "Chief of the Children's Bureau" by 1946 Reorg. Plan No. 2. See note under section 203 of this title.

§ 210. Court review.

(a) Any person aggrieved by an order of the Secretary issued under section 108 of this title may obtain a review of such order in the United States Court of Appeals for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within 60 days after the entry of such order a written petition praying that the order of the Secretary be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record of the industry committee upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by such industry committee when supported by substantial evidence shall be conclusive. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceedings before such industry committee, the court may order such additional evidence to be taken before an industry committee and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. Such industry committee may modify the initial findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(b) The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect. (June 25, 1938, ch. 676, § 10, 52 Stat. 1065; Aug. 12, 1955, ch. 867, § 5 (f), 69 Stat. 712; Aug. 28, 1958, Pub. L. 85-791, § 22, 72 Stat. 948.)

AMENDMENTS

1958—Subsec. (a) amended by Pub. L. 85-791, which, in second sentence, substituted "transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record of the industry committee" for "served upon the Secretary, and thereupon the Secretary shall certify and file in the court a transcript of the record", and inserted "as provided in section 2112 of Title 28", and which, in third sentence, substituted "petition" for "transcript".

1955—Subsec. (a) amended generally by act Aug. 12, 1955, to make subsection conform to the new procedure applicable to Puerto Rico and the Virgin Islands.

TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of Labor and functions of all agencies and employees of that Department were, with the exception of the functions vested by the Administrative Procedure Act (section 1001 et seq. of Title 5, Executive Departments and Government Officers and Employees) in hearing examiners employed by the Department, transferred to the Secretary of Labor, with power vested in him to authorize their performance or the performance of any of his functions

by any of those officers, agencies, and employees, by 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F. R. 3174, 64 Stat. 1263, set out in note under section 611 of Title 5, Executive Departments and Government Officers and Employees.

SECRETARY OF LABOR

The term "Secretary" as meaning the Secretary of Labor, see section 6 of act Aug. 12, 1955, set out as a note under section 204 of this title.

CROSS REFERENCES

Employees performing services within foreign country or certain territory under jurisdiction of United States as not subject to provisions of this section, see section 213 (f) of this title.

§ 211. Investigations, inspections, records, and homework regulations.

(a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect. (June 25, 1938, ch. 676, § 11, 52 Stat. 1066; 1946 Reorg. Plan No. 2, § 1, eff. July 16, 1946, 11 F. R. 7873, 60 Stat. 1095; Oct. 26, 1949, ch. 736, § 9, 63 Stat. 916.)

AMENDMENTS

1949—Subsec. (d) added by act Oct. 26, 1949.

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment of section by act Oct. 26, 1949, as effective ninety days after October 26, 1949, see note set out under section 202 of this title.

TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of Labor and functions of all agencies and employees of that Department were, with the exception of the functions vested by the Administrative Procedure Act (section 1001 et seq. of Title 5, Executive Departments and Government Officers and Employees) in hearing examiners employed by the Department, transferred to the Secretary of Labor, with power vested in him to authorize their performance or the performance of any of his functions by any of those officers, agencies, and employees, by 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F. R. 3174, 64 Stat. 1263, set out in note under section 611 of Title 5, Executive Departments and Government Officers and Employees.

In subsection (b), "Secretary of Labor" was substituted for "Chief of the Children's Bureau" by 1946 Reorg. Plan No. 2. See note under section 203 of this title.

CROSS REFERENCES

Attendance of witnesses and production of books, papers, and documents, see section 209 of this title.

Rules and regulations implementing Fair Labor Standards Act, see Appendix to this title.

§ 212. Child labor provisions.

(a) No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided,* That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection: *And provided further,* That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Secretary of Labor or any of his authorized representatives, shall make all investigations and inspections under section 211 (a) of this title with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 217 of this title to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this chapter relating to oppressive child labor.

(c) No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce. (June 25, 1938, ch. 676, § 12, 52 Stat. 1067; 1946 Reorg. Plan No. 2, § 1, eff. July 16, 1946, 11 F. R. 7873, 60 Stat. 1095; Oct. 26, 1949, ch. 736, § 10, 63 Stat. 917.)

AMENDMENTS

1949—Subsec. (a) amended by act Oct. 26, 1949, § 10 (a), which omitted obsolete effective date at beginning of

subsection and inserted proviso excepting good faith purchaser of goods produced by oppressive child labor.

Subsec. (c) added by act Oct. 26, 1949, § 10 (b).

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment of section by act Oct. 26, 1949, as effective ninety days after Oct. 26, 1949, see note set out under section 202 of this title.

TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of Labor and functions of all agencies and employees of such Department were, with the exception of the functions vested by the Administrative Procedure Act (section 1001 et seq. of Title 5, Executive Departments and Government Officers and Employees) in hearing examiners employed by such Department, transferred to the Secretary of Labor, with power vested in him to authorize their performance or the performance of any of his functions by any of such officers, agencies, and employees, by 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F. R. 3174, 64 Stat. 1263, set out in note under section 611 of Title 5, Executive Departments and Government Officers and Employees.

In subsection (b), "Secretary of Labor" was substituted for "Chief of the Children's Bureau in the Department of Labor" by 1946 Reorg. Plan No. 2. See note under section 203 of this title.

CROSS REFERENCES

Employees performing services within foreign country or certain territory under jurisdiction of United States as not subject to provisions of this section, see section 213 (f) of this title.

§ 213. Exemptions.

(a) The provisions of sections 206 and 207 of title shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or (3) any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: *Provided*, That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business; or (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing (other than canning), marketing, freezing, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 214 of this title; or (8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where printed and published or counties contiguous thereto; or (9) any employee of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, not included in other exemptions contained in this section; or (10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has not more than seven hundred and fifty stations; or (12) any employee of an employer engaged in the business of operating taxicabs; or (13) any employee or proprietor in a retail or service establishment as defined in clause (2) of this subsection with respect to whom the provisions of sections 206 and 207 of this title would not otherwise apply, engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month; or (14) any employee employed as a seaman; or (15) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed twelve.

(b) The provisions of section 207 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or (2) any employee of an employer subject to the provisions of sections 1—27 of Title 49; or (3) any employee of a carrier by air subject to the provisions of sections 181—188 of Title 45; or (4) any employee employed in the canning of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof; or (5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state.

(c) The provisions of section 212 of this title relating to child labor shall not apply with respect to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, or to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(d) The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer.

(e) The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206 (a) (3) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 206 (a) (3) of this title, that economic conditions warrant such action.

(f) The provisions of sections 206, 207, 211 and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Alaska; Hawaii; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act; American Samoa; Guam; Wake Island; and the Canal Zone. (June 25, 1938, ch. 676, § 13, 52 Stat. 1067; Aug. 9, 1939, ch. 605, 63 Stat. 1266; Oct. 26, 1949, ch. 736, § 11, 63 Stat. 917; Aug. 8, 1956, ch. 1035, § 3, 70 Stat. 1118; Aug. 30, 1957, Pub. L. 85–231, § 1 (1), 71 Stat. 514.)

REFERENCES IN TEXT

Outer Continental Shelf Lands Act, referred to in subsec. (f), is classified to section 1331 et seq. of Title 43, Public Lands.

AMENDMENTS

1957—Subsec. (f) added by Pub. L. 85–231.

1956—Subsec. (e) added by act Aug. 8, 1956.

1949—Subsec. (a) (2) amended by act Oct. 26, 1949, which clarified exemption by defining term "retail or service establishment" and stating conditions under which exemption shall apply.

Subsec. (a) (3) amended by act Oct. 26, 1949, which redesignated cl. (3) as cl. (14) and added new cl. (3) providing a limited exemption to employees of laundries and establishments engaged in laundering, cleaning, or repairing clothing or fabrics.

Subsec. (a) (4) amended by act Oct. 26, 1949, which redesignated cl. (4) as subsec. (b) (3) and added new cl. (4) providing limited exemption to employees of retail establishments making or processing goods.

Subsec. (a) (5) amended by act Oct. 26, 1949, which omitted canning of fish, shellfish, etc., and which is now covered by subsec. (b) (4).

Subsec. (a) (6) amended by act Oct. 26, 1949, which added irrigation workers to the exemption.

Subsec. (a) (8) amended by act Oct. 26, 1949, which extended exemption to employees of newspapers published daily, increased circulation limitation from 3,000 to 4,000, and increased circulation area to include counties contiguous to county of publication.

Subsec. (a) (10) amended by act Oct. 26, 1949, which omitted "to" preceding "any individual".

Subsec. (a) (11) amended by act Oct. 26, 1949, which increased number of stations from, less than 500, to, not more than 750.

Subsec. (a) (12), and (13) added by act Oct. 26, 1949.

Subsec. (a) (14) added by act Oct. 26, 1949, formerly was designated as cl. (3).

Subsec. (a) (15) added by act Oct. 26, 1949.

Subsec. (b) amended by act Oct. 26, 1949, which added cls. (3), (4), and (5).

Subsec. (c) amended by act Oct. 26, 1949, which substituted "outside of school * * * so employed" for "while not legally * * * attend school" following "in agricultural", and added radio or television productions to the exemption.

Subsec. (d) added by act Oct. 26, 1949.

1939—Subsec. (a) amended by act Aug. 9, 1939, which added cl. (11).

EFFECTIVE DATE OF 1957 AMENDMENT

Pub. L. 85–231, § 2, provided that: "The amendments made by this Act [amending subsec. (f) of this section, and sections 216 (d) and 217 of this title] shall take effect upon the expiration of ninety days from the date of its enactment [Aug. 30, 1957]."

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment of section by act Oct. 26, 1949, as effective ninety days after Oct. 26, 1949, see note set out under section 202 of this title.

TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of Labor and functions of all agencies and employees of that Department were, with the exception of the functions vested by the Administrative Procedure Act (section 1001 et seq. of Title 5, Executive Departments and Government Officers and Employees) in hearing examiners employed by the Department, transferred to the Secretary of Labor, with power vested in him to authorize their performance or the performance of any of his functions by any of those officers, agencies, and employees, by 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F. R. 3174, 64 Stat. 1263, set out in note under section 611 of Title 5, Executive Departments and Government Officers and Employees.

TRANSPORTATION OF MIGRANT FARM WORKERS

Subsec. (b) (1) as not applicable to employee with respect to whom Interstate Commerce Commission has power to establish qualifications and maximum hours of service by section 304 (a) (3a) of Title 49, see note set out under section 304 of Title 49, Transportation.

CROSS REFERENCES

Rules and regulations implementing Fair Labor Standards Act, see Appendix to this title.

§ 214. Learners, apprentices, and handicapped workers.

The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 206 of this title and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 206 of this title and for such period as shall be fixed in such certificates. (June 25, 1938, ch. 676, § 14, 52 Stat. 1068; Oct. 26, 1949, ch. 736, § 12, 63 Stat. 918.)

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