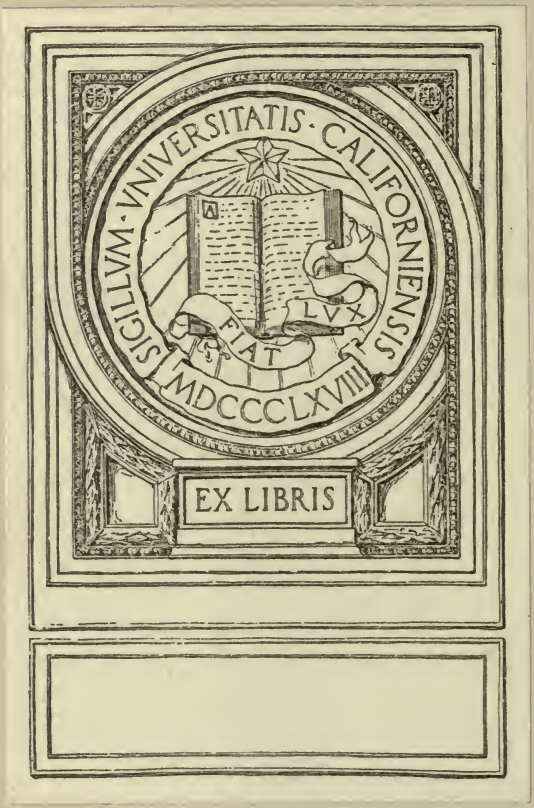
Constitutional Law in the United States

McClain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AMERICAN CITIZEN SERIES.

EDITED BY

ALBERT BUSHNELL HART, LL.D.

CONSTITUTIONAL LAW IN THE UNITED STATES.

EMLIN McCLAIN.

American Citizen Series.

Constitutional Law in the United States

BY

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SECOND EDITION

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TO

ELLEN GRIFFITHS McCLAIN,

THE INDULGENT SOVEREIGN WHO FINDS SOMETHING TO COMMEND
IN A BOOK WHICH HAS TEMPORARILY DIVIDED WITH HER
THE ALLEGIANCE OF HER WILLING SUBJECT.

Preface to Second Edition.

In the preparation of a book intended to give to students an intelligent conception of the Constitutional Law of the United States, both state and federal, it is essential that the historical development of those institutions and ideas of government which have become characteristic features of our system be noticed, that the practical organization of the government as provided for be explained, and that the interpretation which has been put upon the provisions of constitutional instruments in the solution of difficult and important questions which have arisen shall be stated; and it is especially important that the proper relationship between these various divisions of the subject shall be maintained.

I have endeavored, therefore, to make such references to English institutions and the institutions prevailing in the Colonies prior to independence, and to call attention to such of the important reforms in government, for which the English people and the Colonists had struggled, as may be necessary to explain the nature of the state and federal governments provided for in our written constitutions; for it ought to be borne in mind that constitutional law with us involves the correct interpretation of formal instruments of government, framed to meet supposed difficulties and to avert dangers suggested

by experience. The language and purport of these instruments are never to be lost sight of in attempting either to rightly comprehend the system of government provided for or to determine what is within the scope of constitutional law, and therefore fundamental, as distinguished from that which is the result of mere practice or statutory provision, and in its nature transitory and mutable. It is true that constitutions may be amended, and yet, whether we look at the constitution of any particular state or at that of the federal government, we discover that thus far in our national history there has been little tendency toward any radical change in the form of government first established. Our constitutional system may therefore be regarded as substantially permanent, the result of national development before it was molded into final form, and of constitutional interpretation after such final form was given to it by the adoption of the constitutions of the thirteen original states and the federal constitution.

This book is not, on the one hand, a theoretical exposition of the general principles of government, nor, on the other, a mere description of the workings of the state and federal governments and their various departments. But, as its title imports, so far as the accomplishment corresponds to the purpose, it is an exposition of the principles of an established system; and it is intended to afford to the reader an explanation of the important events of the history of our government, and the means of intelligently comprehending the problems constantly arising, the solution of which will make our constitutional history of the future. In short, if the book serves its purpose, it will enable the person who intelli-

gently uses it to reach a rational and correct conception of the nature and meaning of the constitutions of the United States and of his state, and to understand the essential features of the governments provided for by such constitutions.

In attempting to depict accurately our entire constitutional system in due proportions it has been necessary to give a larger share of attention than is usually given in works on constitutional law to the nature and functions of the state governments, and to the division of powers between them and the federal government. The state governments are still the repositories of broad and very important powers, and notwithstanding the increased exercise of power by the federal government, there is manifested in our recent constitutional history a persistent attachment to the theory of local self-government which must not be lost sight of in estimating the present trend in the development of our institutions.

I have taken advantage of the opportunity afforded by a new edition to make some changes in the text that may perhaps render it clearer and more accurate and to make additions on points suggested by recent decisions of the Supreme Court of the United States.

EMLIN McCLAIN.

Iowa City, June, 1910.

Contents.

Part I.

SYSTEM OF GOVERNMENT.

Part II.

ORGANIZATION OF GOVERNMENT.

Part III.

LEGISLATION.

Part IV.

EXECUTIVE POWER.

Part V.

THE JUDICIARY.

Part VI.

THE STATES AND TERRITORIES.

Part VII.

RELATIONS OF THE INDIVIDUAL TO THE GOVERNMENT.

Part VIII.

CIVIL RIGHTS.

SUGGESTIONS FOR STUDENTS, TEACHERS, AND READERS.

It seems desirable to impress upon the teacher who makes use of this book as a foundation for a course of instruction, and upon the reader who resorts to it to secure a general outline of constitutional law or information as to any particular question within the proper scope of the subject, that there has been no attempt to make it either easy or popular. It is assumed as desirable that such a book shall give as careful, thorough, and accurate a statement as can be made of the established principles of constitutional law. Some discrimination has been necessary in selecting as topics for treatment those which are of general importance and as illustrations those which involve fundamental principles, and the most difficult part of the task has been to state and illustrate such principles not only with clearness, but with such accuracy that they shall not be misleading when applied to the solution of other questions than those which have been specially considered.

In arrangement of topics a merely mechanical order such as that which might be indicated by the sequence of the provisions in the federal constitution, or of some state constitution which could be taken as a type, would evidently be unsatisfactory, and the author has therefore adopted a plan of arrangement according to his own judgment; and the plan adopted must be comprehended and intelligently followed if the relation of the different parts of the subject-matter to each other and the proper connection for the discussion of each part are to be understood. It is inevitable that subjects may suggest themselves to the teacher or reader in one connection which have

been discussed elsewhere, but the numerous brief cross-references will furnish the necessary assistance in finding the desired collateral matter. It is important that these cross-references be noticed, especially by the teacher, in order that the relations of the subject-matter of the chapters be fully appreciated as presented. And the teacher should have in mind the necessity of covering the whole ground and not amplifying any one part to the exclusion of another. It would be a great mistake as affecting the practical success of the course of instruction to give so much time to the earlier portions of the book, relating to the nature, organization, and exercise of power by the different departments of the state and federal governments, that the final chapters, explaining the relations of the individual to these governments and the protection afforded under our constitutions to individual rights, should be slighted.

Some chapters, especially those relating to the jurisdiction of the federal courts and the constitutional guaranties in criminal procedure, may seem to be so far technical as to be uninteresting. But the exercise of judicial power is a matter of constant public interest, and an intelligent appreciation of the functions of the judiciary, and especially of the relations between the federal and the state courts, is essential to a sound understanding of our governmental system; and the teacher will find that his students have sufficient general interest in the proceedings of courts to enable them to follow the explanation of the practical application of constitutional principles in such proceedings.

The list of references given in the first section of each chapter is not intended to furnish authorities to support the statements of the text nor to indicate the sources from which such statements have been drawn, but to suggest suitable parallel reading and afford opportunity for further study of the particular subject of the chapter, or some portion of it. But it would be unwise for either teacher or reader to allow himself to be so diverted from the subjects presented in the text as to lose sight of the essential principles. It is possible to extend collateral reading

beyond its proper scope and thereby fill the mind with a confused mass of undigested information of little benefit in understanding constitutional law proper, and misleading as to the deductions to be drawn from constitutional history. No effort has been made to present a complete bibliography of the subject, for it reaches into several independent fields. A few standard books on constitutional law are constantly referred to, and in these general books can readily be found matter germane to chapters in which no specific reference to them is made. Other references are intended to facilitate the investigation of particular questions which may be thought to be of interest to the reader or student.

In this connection the purpose with which references are given to judicial decisions in important cases should be noticed. In works intended primarily for lawyers such cases are referred to as furnishing the authoritative decision of specific questions involved, and they are to be understood and rightly applied only by understanding the exact legal question which the court was called upon to decide in the case presented to it. In this view cases can be satisfactorily studied only by those having a legal education. But on the other hand the judges writing the opinions in these cases, in explaining the reasoning on which they rely in reaching their conclusions, often expound established principles of constitutional law, and refer to the history of our institutions and the theory of our government as indicating the interpretation to be given to the various clauses of the constitution itself; and their views are entitled to as great weight as those of an author discussing the same subject-matter. For the purposes of this book, therefore, cases are referred to as furnishing such an exposition, rather than as deciding particular points. The lawyer looking at a case as furnishing a precedent, attaches more importance to the point decided than to the explanation of the reasons taken into account by the judges in reaching their conclusions, although he does, of course, notice the reasoning for the purpose of determining whether the con-

clusion reached would be applicable in a similar case which he has under consideration. But for the purposes of the general reader the reasoning of the judges is more important than the technical decision in the case, for frequently the ultimate result depends on the solution of questions strictly legal in their nature. However, cases involving constitutional questions usually turn on the interpretation of the language of some provision of the constitution itself, and are therefore often more intelligible to the general reader than are decisions on other legal questions. Although the cases referred to are usually those decided by the Supreme Court of the United States, it is not to be understood that the expositions of constitutional law found in the decisions of state courts are not equally interesting and valuable. But it is obvious that a decision of the highest judicial tribunal of the country is of more general interest than that of a state tribunal relating to the same subject, even when the subject is one as to which the decision of the federal supreme court is not controlling; and the fact that nearly all the fundamental guaranties found in the state constitutions are also found in some form in the federal constitution has made it possible on nearly every question discussed to refer to some important case decided by the Supreme Court of the United States.

This book will but poorly serve the purpose for which it was written if it does not impress upon teacher and reader the fact that as to fundamental matters we have a well-established and fully matured constitutional system; that the solution of difficult questions about which there may be much controversy will finally be reached by applying principles which are well settled; and that the development of our constitutional system and the solution of difficult questions which have heretofore arisen have not been the result of the triumph of any one party or faction, but, unconsciously, of all the influences tending to mold our system of government into its present form, and that their combined effect has been determined, not by the wisdom

and judgment of the few, but by that indeterminate and immeasurable power which imparts vitality to national life.

Finally, the teacher should bear in mind that the ultimate purpose of any course of instruction in constitutional law must be to furnish to the student guidance in the interpretation of the constitutions themselves. The student should be constantly required to recall the very language of the constitutional instruments. While it is not practicable to give the same detailed attention to the language of any state constitution, it would be advisable to require students to provide themselves with copies of the constitution of the state in which instruction is given and to familiarize themselves with it, comparing its provisions, so far as possible, with those of the federal constitution.

In the Appendix will be found not only the Federal Constitution, but the English Bill of Rights, the Virginia Bill of Rights, and other important documents of English and American constitutional history, and students should be encouraged to become familiar with such constitutional documents.

SMALL REFERENCE LIBRARY.

THE following list indicates convenient books which the teacher and student ought to have access to for purposes of collateral reading on subjects directly involved in Constitutional Law. The latest edition is indicated in each case, although in most cases any edition will serve the purpose. Suggestions for a broader scope of reading are found in the Select Bibliography and in the lists of references at the beginning of each chapter.

TASWELL-LANGMEAD, THOMAS PITT. *English Constitutional History, from the Teutonic Conquest to the Present Time.* (5th ed., 1896.)

STORY, JOSEPH. *Commentaries on the Constitution of the United States.* (2 vols. 5th ed. by Bigelow, 1891, includes the additional matter found in the 4th ed. by Cooley.)

HAMILTON, ALEXANDER, and Others. *The Federalist: A Collection of Essays written in favor of the New Constitution.* (Ed. by Lodge, 1888.)

COOLEY, THOMAS MCINTYRE. *A Treatise on the Constitutional Limitations which rest on the Legislative Power of the States of the American Union.* (7th ed. by Lane, 1903.)

COOLEY, THOMAS MCINTYRE. *The General Principles of Constitutional Law in the United States of America.* (3d ed. by McLaughlin, 1898.)

HART, ALBERT BUSHNELL. *Actual Government as applied under American Conditions.* (American Citizen Series, 1903, 3d ed. 1908.)

MCCLAIN, EMLIN. *A Selection of Cases on Constitutional Law.* (1900, 2d ed., 1909.)

OR

THAYER, JAMES BRADLEY. *Cases on Constitutional Law, with Notes.* (2 vols., 1895.)

HILL, MABEL. *Liberty Documents, with Contemporary Exposition and Critical Comments drawn from various writers.* (Ed. by Hart, 1901.)

SELECT BIBLIOGRAPHY OF CONSTITUTIONAL LAW.

In the following classified list the standard books are collected which may properly be consulted as bearing on the general subject-matter of constitutional law or history. The date of the first publication is usually given, but the number and date of the last edition, if there has been more than one, is not specially indicated, unless it is deemed important. Some works of a general character are here mentioned which are not cited in the chapter references. Monographs and articles in periodicals cited in the chapter references as furnishing interesting discussions on special topics are not included in this list, but are sufficiently described in the references under the chapter headings.

I. Constitutional History.

The standard constitutional histories of England will furnish information as to the principles of government which were familiar to the framers of our state and federal constitutions and the controversies which emphasized or led to the recognition of these principles and afforded the occasion for the insertion of particular guaranties in our fundamental instruments of government. The various histories of the United States explain in greater or less detail the development of our constitutional system and contain frequent references to matters germane to constitutional law.

Taswell-Langmead, Thomas Pitt. *English Constitutional History, from the Teutonic Conquest to the present time.* (1875; 5th ed. 1896.) — A concise but comprehensive history of the origin and development of the English constitution intended primarily as a text-book for students.

Taylor, Hannis. *The Origin and Growth of the English Constitution.* (2 vols., 1889, 1898.) — This work by an American author is interesting because it treats of the growth of the

English constitution, with particular reference to those matters which are important to the students of American constitutional law.

STUBBS, WILLIAM. *The Constitutional History of England in its Origin and Development.* (3 vols., 1873–1878.) — A standard work, relating to the early history.

HALLAM, HENRY. *Constitutional History of England from the Accession of Henry VII to the Death of George II.* (2 vols., 1827, and later eds.) — This is also a standard work, covering important topics of English constitutional history, but not the earliest period nor the period of the controversy between the American Colonies and the Crown.

MAY, SIR THOMAS ERSKINE. *The Constitutional History of England Since the Accession of George III, 1760–1860.* (2 vols. 1861, 1863. Later editions. 3 vols. 1895.) — This is substantially a continuation of Hallam, and covers the Colonial Period.

HOLST, HERMANN EDUARD VON. *Constitutional and Political History of the United States* (transl. by Lalor and Mason, 7 vols. and Index vol., 1877–1892.)— This treatise was originally written while its author was a professor in a German university. He subsequently became professor of law and history in an American university and published a short treatise on *The Constitutional Law of the United States* (transl. by Mason, 1887), which covers very accurately the principles of our federal system but is too brief to be especially valuable for collateral reading. His main historical treatise is largely devoted to the discussion of political questions, especially the conflict as to the extension of slavery.

ADAMS, HENRY. *History of the United States During the Administrations of Jefferson and Madison.* (9 vols., 1889–1891.) — Special attention is given to constitutional questions arising during the early period of our national existence.

CURTIS, GEORGE TICKNOR. *Constitutional History of the United States.* (2 vols., 1889, 1896.) — Volume I is a new edition of the same author's *History of the Constitution* (2 vols., 1854), and Volume II covers the subsequent development of our constitutional system.

HART, ALBERT BUSHNELL, editor. *The American Nation, A History from Original Materials by Associated Scholars.* (26 vols. and Index and Atlas vols., in progress, 1904.) — A co-operative work, including in its various volumes the beginnings and development of our constitutional system.

II. Formation and Adoption of Federal and State Constitutions.

The Federalist, A Collection of Essays Written in Favor of the New Constitution. (1788, latest ed. by Lodge, 1888.) — The essays were published separately as political pamphlets or contributions to periodicals during the period of the discussion in New York as to the ratification of the proposed federal constitution by that state. Their authorship was not announced at the time, but they were in fact prepared by Alexander Hamilton, John Jay, and James Madison. They contain a valuable contemporaneous exposition of the important features of the proposed constitution and are constantly referred to in works on constitutional law and history of the United States.

BANCROFT, GEORGE. *History of the Formation of the Constitution of the United States.* (2 vols., 1882, reprinted as Vol. VI of his *History of the United States of America* (author's last rev., 6 vols., 1884–1885.) — This final part of Bancroft's History is substantially an independent work on the formation of the Constitution of the United States and its adoption in the states. It is popular in character, but quite fully discusses the questions in controversy at that time with reference to the nature of the federal government.

FISKE, JOHN. *The Critical Period of American History.* (1888.) — A popular account of the political history of the United States from the end of the Revolutionary War to the adoption of the federal constitution, explaining the conditions under which the federal government was instituted.

JAMESON, JOHN ALEXANDER. *Constitutional Conventions; Their History, Powers, and Modes of Procedure.* (1867 4th ed., 1887.) — This work was written during the Reconstruction Period, when the powers of and procedure in constitutional conventions was the subject of much controversy; but it is fundamental in

treatment, dealing with sovereignty and other subjects involved in the making of constitutions, and contains valuable data as to the original state constitutions and the admission of states by Congress, as well as the constitutional conventions held in the southern states during the period of secession and reconstruction.

JAMESON, JOHN FRANKLIN. *Essays on the Constitutional History of the United States in the Formative Period, 1775–1789.* (1889.) — An interesting discussion of controversies which arose during the early period of our history.

BORGEAUD, CHARLES. *Adoption and Amendment of Constitutions in Europe and America.* (1893. Transl. by Hazen, 1895.) — This is a brief work of comparative constitutional law, discussing the general exercise of the function of constitution making.

POORE, BEN. PERLEY. *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States.* (2 vols., 1877.) — A compilation of matter valuable for comparison, much of which is not otherwise readily accessible.

III. Theory of Our Government.

WILSON, JAMES. *Lectures on Law* (in his *Works*, ed. by Bird Wilson, 1804, last ed. by Andrews, 1896). — This is a publication of the first course of law lectures delivered in any American university, but it is so largely devoted to an exposition of the theory of government that it is properly referred to under this head. The author was one of the delegates from Pennsylvania to the Constitutional Convention and one of the signers of the Constitution. Subsequently he was the able advocate of the ratification of the proposed constitution in his state, and later a justice of the supreme court of the United States. What he says is of interest as a contemporaneous exposition of the theories entertained by one who was active and influential in the Convention itself and in securing the ratification of its work.

LIEBER, FRANCIS. *Civil Liberty and Self-Government.* (1853; 3d ed. by Wolsey, 1880.) Also, *Contributions to Political Science.* (Vol. II of his *Miscellaneous Writings*, 1881.) — Dr.

Lieber exercised a large influence in arousing interest in the theory of our government. His books are popular in their method of treatment.

BURGESS, JOHN W. *Political Science and Comparative Constitutional Law.* (2 vols., 1890) — This is a philosophical treatment of the theory of government from a comparative standpoint.

BATEMAN, WILLIAM O. *Political and Constitutional Law of the United States of America.* (1876.) — One of the first efforts to present in a methodical manner the theory of our state and federal systems as interdependent.

WILSON, WOODROW. *The State; Elements of Historical and Practical Politics.* (Rev. ed., 1900.) — An extremely thoughtful and discriminating presentation of the nature of the state from a philosophical point of view.

WILLOUGHBY, WESTEL WOODBURY. *The Nature of the State.* (1896.) — A philosophical discussion of the grounds on which the exercise of authority by government may be justified.

HURD, JOHN CODMAN. *The Theory of Our National Existence.* (1881.) — An extremely theoretical discussion of the nature of our government, especially with reference to the doctrine of sovereignty.

FISHER, SIDNEY GEORGE. *Evolution of the Constitution of the United States.* (1897.) — An interesting account of the development of our written constitutions from the Colonial Charters.

IV. Description of Actual Government in the United States.

TOCQUEVILLE, ALEXIS DE. *Democracy in America.* (1835–1840. Transl. by Reeve; new ed. 1889.) — This extremely interesting account of our government as it appeared to a foreigner when our institutions were still but little understood, even in America, has been constantly referred to as an illuminating description of their actual operations.

BRYCE, JAMES. *The American Commonwealth.* (1889. 3d ed. 1895; abridged by Macy, 1896.) — This account of the actual public life of the United States, written after a careful and intelligent study of its constitutional and political systems, is discriminating and very suggestive. It is popular in character.

HART, ALBERT BUSHNELL. *Actual Government as Applied under American Conditions.* (American Citizen Series, 1903.) — The practical working out of our constitutional system through state and federal governments is fully explained, and a large amount of detailed information is given.

MACY, JESSE. *Our Government.* (Rev. ed., 1890.) — A school text-book on civil government.

V. Technical Works on Constitutional Law.

STORY, JOSEPH. *Commentaries on the Constitution of the United States.* (2 vols., 1833 ; 4th ed. by Cooley, 5th ed. by Bigelow, 1891.) — This is a fundamental exposition of the federal constitution and its early amendments. The author was a professor in the Harvard Law School and an associate justice of the Supreme Court of the United States. The soundness of his views of our constitutional system, so far as it had been developed in his time, cannot be questioned. To some extent it is also a constitutional history, Book I being devoted to the Colonies, Book II to the Revolution and the Confederation, and the first part of Book III to the origin and adoption of the federal constitution. The fourth edition, by Thomas M. Cooley, contains additional chapters with reference to the later amendments, which are retained in the last edition.

COOLEY, THOMAS M. *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union.* (1868; 7th ed. by Lane, 1903.) — This book was the first systematic attempt to discuss the effect of constitutional limitations on the exercise of power by the states ; and it remains one of the ablest and most instructive expositions of the constitutional system from a legal standpoint. It is a classic, and the views of the author are constantly cited in the decisions of the courts as authoritative with reference to the meaning and interpretation of the general provisions of the state and federal constitutions, especially as limitations upon legislative power.

TUCKER, JOHN RANDOLPH. *The Constitution of the United States: A Critical Discussion of its Agencies, Development, and Interpretation.* (2 vols., 1899.) — This is the latest complete

and systematic exposition of the federal constitution from a legal standpoint. The author also deals fully with the sources and limitations of governmental power, and makes constant and instructive references to the development of our constitutional principles from English sources.

HARE, J. I. CLARK. *American Constitutional Law.* (2 vols., 1889.) — A course of lectures, giving a full account of the history of our institutions and the theory of our government, as well as of the important questions which have been decided by the courts in the interpretation of the federal and state constitutions.

POMEROY, JOHN NORTON. *An Introduction to the Constitutional Law of the United States.* (1868; 9th ed., 1886.) — A concise but fundamentally sound and careful exposition of constitutional law for students.

MILLER, SAMUEL F. *Lectures on the Constitution of the United States.* (1891.) — This short course of lectures on constitutional law was published after the author's death. As containing in concise form the views of one of the ablest of the associate justices of the supreme court of the United States on fundamental questions, many of which had been considered in opinions written by him, this book is of great interest; but the discussions are in general too brief to be cited with satisfaction.

FOSTER, ROGER. *Constitution of the United States.* (Vol. I, 1895.) — The first volume contains interesting and valuable matter, but the work remains incomplete.

KENT, JAMES. *Commentaries on American Law.* (4 vols., 1826–1830; 14th ed., 1896.) — This standard treatise on law contains matter which is valuable from a constitutional standpoint, especially the exposition in Part II of the jurisdiction of the federal court.

COOLEY, THOMAS M. *The General Principles of Constitutional Law in the United States of America.* (1880; 3d ed. by McLaughlin, 1898.) — This is a students' book, written by the eminent author of *Constitutional Limitations*, but the scope is broadened to cover the entire subject of constitutional law while

the exposition is condensed into rather brief and dry statements. References are made throughout to adjudicated cases.

BLACK, HENRY CAMPBELL. *Hand Book of American Constitutional Law.* (1895; 2d ed., 1897.) — A students' book. Covers quite fully the usual ground, with citation of authorities on each point.

DICEY, A. V. *Lectures Introductory to the Study of the Law of the* [British] *Constitution.* (5th ed., 1897.) — An analytical description of the British constitution according to present conceptions, distinguishing between the parts which have the character of law and those parts which are only usage. The book is interesting on some questions as to which a parallel may be drawn between the English and the American constitutional systems.

BLACKSTONE, SIR WILLIAM. *Commentaries on the Laws of England.* (1765–1769. Last American ed. by Hammond, 1890, with notes.) — This eminent and frequently quoted work on the English law is especially valuable as showing the condition of English jurisprudence at the time the Colonies became independent. In Book I the constitution of England is quite fully described. An American edition was printed (1771, 1772) almost immediately after the completion of the English edition and was widely sold.

VI. Judicial Decisions.

The decisions of the highest courts, especially of the Supreme Court of the United States, furnish very valuable material for the study of the history of the Constitution and the theory of government, and they furnish the only authoritative interpretation of the provisions of our written constitutions, so far as the application of those provisions is to be made in judicial tribunals.

For the information of those who are not familiar with the use of the volumes of reported decisions of the various courts it should be stated that references are to particular cases by name, followed by the volume and page of the report (the number of the volume precedes and the number of the page follows the name of the series of reports) wherein the case is found. Where cases from state courts are referred to the state is indicated. The reports of the Supreme Court of the United States were for years issued and referred to under the names of the successive reporters, as follows : Dallas

(4 vols.); Cranch (9 vols.); Wheaton (12 vols.); Peters (16 vols.); Howard (24 vols.); Black (2 vols.); Wallace (23 vols.). References to the volumes subsequent to those of Wallace are now almost universally made as though there were a continuously numbered series of volumes from the beginning, the next volume after 23 Wallace being cited as 91 U. S. The cases in the volumes of Dallas, Cranch, Wheaton and Peters, and the first eighteen volumes of Howard, are also published, somewhat abridged, in a series cited as "Curtis' Decisions." The decisions of the court are now published as soon as they are announced, in *The Supreme Court Reporter*, a periodical. Cases specially referred to in the text are indicated by name only, but the full citation for each is given in the references for the chapter. Cases thus referred to in the text are also included in the Index.

Several collections of cases have been made which are convenient for the use of those who have not access to the volumes of the reports, as follows:

McClain, Emlin. *A Selection of Cases on Constitutional Law.* (1900, 2d ed., 1909. References are applicable to either edition, unless the second is specially mentioned.)—A few of the leading cases on each branch of constitutional law are given, the cases selected for the most part being those which are suitable for the use of students.

Thayer, James Bradley. *Cases on Constitutional Law, with notes.* (2 vols., 1895.) — Professor Thayer has developed some branches of constitutional law very fully through cases from the state and federal courts, but has not attempted to cover all the topics which may be considered as within its proper scope.

Boyd, Carl Evans. *Cases on American Constitutional Law.* (1898, 2d ed., 1907.) — This collection is a very convenient one as a basis for a short course of instruction, but many of the cases are so abridged as to render it unsuitable as a book for collateral reading.

Dillon, John M. *Marshall: Complete Constitutional Decisions, Annotated.* (1903.) — In many of the most important cases on constitutional law decided during the early period of our consti-

tutional history, the opinions were written by Chief-Justice Marshall, and this collection is therefore a convenient one for collateral reading on important questions.

VII. Bibliographies.

The select bibliography of American government given in Hart's *Actual Government* (American Citizen Series, 1903, 3d ed., 1908), includes the principal authorities which can be usefully consulted with reference to constitutional law and many monographs and articles on special topics of the subject. In the same author's *Handbook of American History, Diplomacy and Government* (1908), there are also extensive lists of references to treatises, articles and cases relating to different constitutional topics. At the end of Fiske's *Critical Period of American History* there is an extended bibliographical note. Many references are collected at the end of Vol. II of the final edition of Curtis' *Constitutional History of the United States*, where is to be found a bibliography of the Constitution prepared in 1896 by Paul Leicester Ford.

Constitutional Law in the United States.

Constitutional Law in the United States.

Part I.

System of Government.

CHAPTER I.

CONSTITUTIONAL GOVERNMENT.

1. References.

CONSTITUTIONAL HISTORY: T. P. Taswell-Langmead, *English Constitutional History;* Hannis Taylor, *Origin and Growth of the English Constitution,* Introd. and ch. i; John Fiske, *Beginnings of New England,* ch. i; J. R. Tucker, *Constitution,* chs. i, iv; J. I. C. Hare, *Constitutional Law,* chs. i, iii, viii; J. F. Jameson, *Essays in Constitutional History;* James Wilson, *Lectures on Jurisprudence* (Andrew's ed.).

WRITTEN AND UNWRITTEN CONSTITUTIONS: W. C. Morey, *Genesis of a Written Constitution* (Am. Acad. of Pol. Sci. *Annals,* I, 529); Brooks Adams, *Embyro of a Commonwealth* (*Atlantic Monthly,* LIV, 610); J. H. Robinson, *Original and Derived Features of the Constitution* (Am. Acad. of Pol. Sci. *Annals,* I, 203); A. V. Dicey, *The Law of the* (*British*) *Constitution,* Introd. and chs. i, xv; T. M. Cooley, *Comparative Merits of Written and Prescriptive Constitutions* (*Am. Law Rev.,* XXIII, 311); J. H. Burgess, *Political Science and Constitutional Law,* I, 137–154; Emlin McClain, *Unwritten Constitutions in the United States* (*Harv. Law Rev.* XV, 531); S. G. Fisher, *Evolution of the Constitution of the United States;* Charles Borgeaud, *Adoption and Amendment of Constitutions.*

SOVEREIGNTY: T. M. Cooley, *Constitutional Limitations,* chs. iii, vii; J. A. Jameson, *Constitutional Conventions,* ch. ii; P. Bliss, *Sovereignty;* J. A. Jameson, *National Sovereignty* (*Pol. Sci. Quart.* V, 193); J. C. Hurd,

Theory of Our National Existence; J. Dewey, *Austin's Theory of Sovereignty* (*Pol. Sci. Quart.*, IX, 31); D. G. Ritchie, *Conception of Sovereignty* (Am. Acad. of Pol. Sci. *Annals*, I, 385); W. W. Willoughby, *Nature of the State*, ch. ix; Henry Sidgwick, *Elements of Politics*, ch. xxxi; Theodore Woolsey, *Political Science*, §§ 72, 73; W. O. Bateman, *Political and Constitutional Law of the United States*; I. B. Richman, *From John Austin to John C. Hurd* (*Harv. Law Rev.* XIV, 353); I. B. Richman, *Law and Political Fact in the United States* (*Atlantic Monthly*, LXIV, 205).

Unconstitutionality of Statutes: Joseph Story, *Commentaries on the Constitution*, §§ 373–456; T. M. Cooley, *Constitutional Limitations*, ch. vii; *The Federalist*, No. 78; J. B. Thayer, *Origin and Scope of the American Doctrine of Constitutional Law* (*Harv. Law Rev.*, VII, 129); T. M. Cooley, *Federal Supreme Court — Its place in the American Constitutional System* (*Pol. Sci. Lectures*, *Univ. of Mich.*, 1889); A. B. Hart, *Actual Government* (Am. Citizen Series), §§ 135–146; J. B. Thayer, *Cases on Constitutional Law*, I, notes pp. 146–154, 157, 175, 183; *Marbury* v. *Madison* (1803, 1 Cranch, 137; 1 Curtis' Decisions, 368; Thayer's Cases, 107; McClain's Cases, 815; Boyd's Cases, 17; Marshall's Decisions, Dillon's ed., 1); *Eakin* v. *Raub* (Pa. 1825, 12 Serg. & Rawle, 330; Thayer's Cases, 133); *Opinion of the Justices* (1878, 126 Mass. 557; Thayer's Cases, 178); *In the Matter of the Application of the Senate* (1865, 10 Minn. 78; Thayer's Cases, 181).

Initiative and Referendum: E. P. Oberholzer, *Referendum in America*; James Bryce, *American Commonwealth*, I, ch. xxxix; T. A. Sherwood, *Initiative and Referendum under the United States Constitution* (*Centr. Law Jour.* LVI (1903), 247); *Kadderly* v. *Portland* (Oregon, 1903, 44 Oreg. 118).

2. Constitutional Law as Related to Constitutional History.

The proposition that governments exist for the benefit of the governed, and not merely for the advantage of those who exercise the powers of government, is not original with the American people. It had been recognized as fundamental by many writers before the Revolution, and is a necessary outcome of the fact demonstrated by human experience, that as between a single ruler, or a small ruling class, and the mass of the people who are ruled, the great preponderance of power and resource is with the latter. This consideration has made it essential that all rulers or governing classes shall at least pretend to administer government for the benefit of the governed. The tendency of civilization towards the betterment of the people as a whole, and the recognition by Christianity of the

individual as entitled to consideration on his own account as a human being, have co-operated with the primary necessity of recognizing the welfare of the governed, in bringing about a constant pressure for the improvement of government and of the institutions which are supported or recognized by government. The result in human history has been to produce changes, more or less gradual, in government and institutions; so that in any state or nation a system of government, and the institutions existing under it, must be regarded as the result of a development due to the action of this constant pressure.

Human institutions must be studied in the light of their historical origins and progress. They do not spring into existence spontaneously without relation to that which has gone before; they are not the result of conscious creation. New conceptions or ideals on the part of those who have controlling influence in shaping institutions may result in modifications, and new circumstances or conditions almost certainly lead to changes. But changes will necessarily be gradual, and usually by adapting to the new conditions that which is in existence. This will be peculiarly true under a system of government recognizing a distribution or division of powers among several departments.

Revolutions in society or government are usually found on examination to be more apparent than real. Changes, no matter how radical or sudden, commonly spring out of causes having a connected and definite history. In a government in which a considerable portion of the people exercise a controlling influence, changes in form as well as in substance will be gradual; or if sudden, the institutions which most nearly affect the general welfare will alter least and most slowly.

The people of the colonies of Great Britain in America who, by declaring their independence and organizing state governments and subsequently the federal government as it now exists, laid the foundations and determined the form of our present system, were for the most part of English descent, and before independence was declared were British subjects claiming rights which they believed themselves entitled to as such

subjects. The governments of the colonies derived their authority from the British crown; the institutions prevailing in the colonies were almost wholly British institutions, the history of which is to be traced in the history of the people of Great Britain; and the theories of government prevailing were such as were familiar to English people, modified, however, to meet the new conditions under which the colonists lived. To understand our institutions and the principles of our government, constant recourse must be had to the government and institutions of Great Britain as they existed just prior to and during the colonial period. The constitutional history of Great Britain will therefore furnish a basis for the comprehension of the constitutional history of the United States.

Constitutional history is, however, to be distinguished from constitutional law. By the latter term is meant the body of rules and principles in accordance with which the powers of government are exercised. To understand the development of those rules and principles, and their origin, and true nature, it is necessary to look to constitutional history; but the determination, with such definiteness as is practicable, of what those rules and principles actually are at the present time, is within the province of constitutional law. These rules and principles are not to be understood, however, without constant reference to the course of their development, and constitutional law is therefore dependent upon constitutional history.

3. Features of Our System of Government of British Origin.

Although our system of government has many elements not found in the British system, in the following respects the government and institutions of the people of Great Britain furnish the explanation for corresponding characteristics of the government and institutions of the people of the United States. (1) The recognition of a considerable measure of local self-government; that is, the right of the people of distinct communities or divisions to determine in some way for themselves the rules and regulations for their own conduct, so far as the

welfare of the whole people is not thereby prejudiced. (2) Participation in the exercise of the powers of government by representatives of different communities or divisions, collected together in some legislative body, as, for instance, in England the Parliament, in the states the legislatures, and in the United States the Congress. Direct election of all these representatives by popular vote is not essential to the representative character of such a legislative body, although the present tendency in both countries is to entrust the selection of such representatives to popular suffrage. (3) Constitutional limitations on the powers of those who exercise public authority, imposed not merely by the will of those who exercise the power of government, but resting on some higher sanction, and assumed to be of such binding force that they ought to be acknowledged and respected. It is not essential, however, to the existence of constitutional government that these limitations rest on any definite authority, or that they be enforcible in any specific manner. (4) Distribution of the powers of government among distinct departments, and their exercise by different persons or classes of persons. It was theoretically assumed by those who attempted to state in a philosophical way the nature of the British constitution at the time the state and federal governments were organized in the United States, that the powers of the government of Great Britain resided in and were exercised by the king, the Parliament, and the courts, and that these three departments were to a considerable extent co-ordinate and independent of each other. The subsequent historical development of the British government has, however, resulted in the subordination of the authority of the king to that of Parliament; and in Parliament the House of Lords has acknowledged the ultimate authority of the House of Commons, so that at this time there is no longer, if there ever was, a real balancing of power among the three so-called departments of the British government. In the United States, however, the division of powers among the three departments was actual in the colonial period, and continues, in fact, definite in the state and federal governments, where the legisla-

tive, executive, and judicial functions are practically, as well as theoretically, distinct and independent.

4. Popular Sovereignty; Initiative and Referendum.

As the result of what were deemed unwarranted assertions of power, and unjust exactions on the part of the crown and Parliament of Great Britain with reference to the government of the American colonies, there was violent excitement among the people of the colonies prior to the Declaration of Independence, leading to animated discussion of theories of natural rights and the powers of government. Many of the ideas on these subjects which were entertained and advocated by leading men of the time were expressed in language current in France among critics of the monarchical system of government, which had existed there, since the feudal age, with little direct limitation upon its power or representation of the popular will. In France, the natural rights of man, the doctrines of liberty, equality, and fraternity, and the notion that government rested upon an implied social compact to which the governed were parties were widely exploited; and the resulting agitation culminated in the French Revolution of 1789, by which monarchical institutions were overthrown, and a pure republic temporarily substituted. These philosophical theories were, however, not peculiar to France. Some of them were of English origin, and were common among the philosophers of the time in England and in Europe; but in England they did not, as in France, result in immediate modification of the government or institutions.

To the exploiting of so-called natural rights, or the rights of man, and the recognition of the social compact as the foundation of governmental authority (see below, § 204) may be attributed the formal announcement in the Declaration of Independence, and in the constitutions of many of the states, of the doctrine of popular sovereignty, with the corollary that those who exercise the powers of government are vested only with authority conferred upon them in some form by the people. The practical result was that state and federal constitutions were

framed on the assumption that sovereign power is found in a general way in the body of the people who are to be governed under such constitutions; that the departments of government provided for thereunder can exercise only such general authority as is given them by the constitution; that any authority asserted in excess of such granted powers, or in violation of restrictions imposed, is unconstitutional; and that acts performed in the attempt to exercise such authority are *ipso facto* void.

It is only so far, however, as the theoretical principles of popular sovereignty, announced in the Declaration of Independence and in the early state constitutions, are practically recognized and protected by the state and federal constitutions, that they have any legal significance. No provision is made in any of these constitutions for the active exercise by the people of the powers of sovereignty, save as those who may be given the elective franchise are authorized to express their will by the ballot. The voters have no power except that given them under the constitution, and therefore the general and ultimate powers of sovereignty which reside in the body of the people can be practically exercised only by revolution. But by giving to the people a general voice through their electors in the selection of representatives, the government is made responsive to the actual will of the people to such an extent that occasions for revolution will be indeed rare; and it is not likely that at any time the will of the people will be so far repressed by, or unrepresented in the government, that revolution will be justifiable on moral grounds. Whatever may be the moral grounds for revolution, any change in the form of government or interference with the action of the duly constituted authorities, save by a modification of the fundamental law in the method authorized by the constitution, will be unconstitutional.

There has recently been developed in this country a tendency to introduce the initiative and referendum in matters of legislation, and the subject may properly be referred to here because it illustrates a radical departure from English notions

as to the functions of the people in affairs of government. The initiative, so called, is an application by voters on their own motion to have a proposed statute enacted into law by the legislature, or submitted to vote of the electors for the purpose of determining whether it shall become a law; and the referendum is the submission to the vote of the electors of the question whether a measure thus proposed or statutes passed by the legislature shall become a law. These methods of securing or determining upon specific legislation have for a long time been known and applied in Switzerland. By the Constitution of South Dakota (1898), Oregon (1902), and Oklahoma (1907), provision is made for legislation by the people, through the initiative and referendum. The agitation in favor of this form of legislation is based on the assumption that the ultimate power resides in the people, and that they should have the opportunity of acting directly through the qualified body of electors if they see fit to do so, instead of through the legislative department of the government. It is apparent, however, that such an exercise of legislative power on the part of the people is inconsistent with the general theory of our government, which involves action of the people through representatives and the division of the functions of government among distinct departments. Indeed, it is still open to discussion, notwithstanding the attempts to introduce the initiative and referendum, whether the exercise of the powers of government by the people through the body of the electors is not in violation of the provision of the federal constitution (Art. IV, § 4), that each state shall have a republican form of government, for it may well be contended that a republican form of government necessarily involves the exercise of the powers of government by representative officers and bodies and the distribution of the powers of government among distinct and independent departments.

The practical objections to this form of legislation are that a small body of chosen representatives can perfect the details of legislation much more effectively than the large body of electors, and that legislative power should be exercised under

the restriction of constitutional limitations, which cannot be effectively applied if legislation rests directly upon the popular will. The fundamental constitutional rights of liberty and property should be as fully protected against the will of the majority of the people as they are against the action of the departments of government. The generally recognized policy of submitting local police regulations to popular vote to determine whether they shall go into effect in particular localities (see below, § 29) is not strictly analogous to the referendum, for in such cases, the general statutes under which such police regulations are submitted for adoption or rejection in the particular localities are adopted in the regular manner by the legislative department, and are valid as general laws, while the theory of the initiative and referendum is that the statute itself shall be proposed or enacted by the voters. It may be suggested that such a radical change in our theory of government is of doubtful expediency and should be considered in all its bearings and with a view to all its possible consequences before it shall be accepted.

5. Written and Unwritten Constitutions.

The constitution of a government is the body or collection of rules and principles in accordance with which the powers of that government are exercised; and a constitutional government is one the powers of which are exercised in accordance with rules and principles which are generally accepted as binding upon it and usually followed. In this proper and usual sense all the governments of civilized peoples are constitutional, whether they be monarchical or republican. If the body of rules and principles is not reduced to definite and authoritatively written form, the constitution is said to be unwritten, as in the familiar case of Great Britain. The body of rules and principles defining the nature of the British government and prescribing the persons who exercise authority under it and the scope of such authority is to some extent declared in statutes which are a part of the written law; to a further extent is composed of rules of law recognized by the

courts, without any written basis, and therefore a part of the unwritten law; and to a still further extent consists of conventions or customs which though generally recognized and followed, do not have the force of law. An example of a statute which is regarded as a part of the constitution is the Habeas Corpus Act (1679) which declared more fully the duty of those holding persons under commitment for criminal offences to make prompt response to orders of the judges to show the nature of the authority under which the prisoner was detained, in order that the lawfulness of the detention might be judicially inquired into. (See below, § 241.) One of the rules of the unwritten law which is regarded as a part of the constitution is the principle that the king can do no wrong, and that his ministers, or others pretending to act under his authority, are themselves personally accountable for any violation of law, even though committed, as a matter of fact, under the king's command. A constitutional custom which has not the force of law may be illustrated by the practice that the cabinet, composed of various ministers acting as the king's advisers, and administering particular offices or departments of the government, must act as a body and must resign when they no longer have the support of Parliament. Such a practice is not prescribed by any statute, nor would any court attempt to enforce it as a part of the unwritten law. But it is fully recognized as one of the principles in accordance with which the government of Great Britain is conducted.

The constitution of Great Britain as a whole is, therefore, unwritten in the sense that it is not reduced to any definite and authoritative statement, although as a whole or in parts it has been expounded and explained by authors who have written on the subject, and who have stated, with more or less fulness and accuracy, its rules and principles. Some important English statutes, besides the Habeas Corpus Act already referred to by way of illustration, are constantly treated as parts of the constitution. The most notable of these is Magna Charta, which received the royal approval of King John in 1215, and, with slight modifications, was reapproved

by many of his successors. Another is the Petition of Right, which was addressed by Parliament to Charles I. in 1628, and received his approval. And still another is the Bill of Rights, which regulated the descent of the crown, and also declared certain fundamental rights of the people as against the royal power, which was enacted by Parliament in 1689, and received the royal assent. These statutes are in form not different from other statutes which are a part of the written law of England, but the nature of their provisions is such as to properly characterize them as important parts of the English constitution, and no attempt is ever made to repeal them. As parts of the written law, such statutes as these are of course binding on the courts.

In the United States the constitutions of the various states and of the federal government are formally written and rest upon the will of the people expressed directly, through their chosen representatives, and are regarded, therefore, as having a higher authority than that of statutes enacted by the legislatures, created and existing in accordance with the provisions of the constitutions, or of executive acts authorized by the constitutions. These constitutions are not only laws of the states and the federal government respectively, and therefore a part of the written law, but they are superior to the ordinary statutory law. Constitutional law in the United States, therefore, is concerned with the history and interpretation of certain formal written instruments, and not merely with the exposition of general and unformulated principles of government. Strictly speaking, constitutional law, as the term is used in this country, takes no account of mere practices and usages, no matter how generally observed, but is based on the language of written constitutions, and takes into account statutes, treaties, executive acts and regulations, and the decisions of the courts applying their provisions to specific cases.

Although the authority of a state or federal government is to be determined by the provisions of the written state and federal constitutions, and not from any mere general principles or constitutional rules recognized in this country or in Eng-

land, nevertheless a written constitution is, like a statute, subject to interpretation, and must be applied to new circumstances and conditions by determining the true intent and purpose of its provisions. Nowhere is there any authority, however, to add to those provisions or to eliminate any portion of them, or to give them a meaning not reasonably within the intent with which they were framed, save by a formal amendment, as authorized in the constitutions themselves. Some text writers and a few judges have assumed that there is back of the written constitution a general unwritten constitution, somewhat analogous to that of Great Britain, serving as a limitation on the exercise of the powers of government as defined by the written instruments. This position is untenable and dangerous. If the written constitutions do not express the will of the sovereign people with reference to the distribution and limitations of the powers of government, but such will is to be ascertained from other sources, then we are practically in the same condition as the people of Great Britain and have no authoritative constitution. Furthermore, it is a fundamental principle of our constitutions that they have a higher authority than the corresponding general principles of the British constitution. Any act of the British Parliament supersedes previously existing rules and usages, however long established; while our constitutional provisions are effective as a definition of and limitation upon the powers of each branch of government, so that acts of any branch in excess of the power given to or in violation of limitations imposed upon it are invalid and of no force. To give to general principles and rules not found in a written constitution the force and effect of nullifying any action of a branch of the government which is not contrary to the written terms of the constitution, would be to assume that elsewhere than in the constitution-making power there is a power to limit and define the authority of branches of government created under the constitution. But no such authority can be found anywhere in our constitutional system. On examination it will be seen that what have been referred to as rules

and principles of an underlying unwritten constitution are either on the one hand clearly implied in the provisions of the written constitutions themselves and therefore a part of them, as binding and effectual as though written in words; or on the other hand are mere general and well-recognized usages such as are said to be constitutional under a government like that of Great Britain, having no written and authoritative constitution, but which should not, where there is an authoritative constitution, as with us, be deemed any part of constitutional law.

Examples of such usages which have been so fully recognized that they might, if we had no written constitution, be said to be a part of the unwritten constitution, are the following: That no president shall be elected for more than two successive terms; and that the presidential electors shall vote for the candidate of the party on whose ticket they are selected. But it is evident that these so-called rules are not a part of our constitutional law. The limitation of the presidency to two terms for any one person furnishes a strong argument against the nomination or election of a president for a third term, an argument which has heretofore, as in the case of President Grant, been sufficiently potent to prevent renomination for a third term. But no one would pretend that, if such limitation were ignored and a president nominated and elected for a third term, he would not be lawfully president of the United States and have all the authority of president. No congress or court would venture to say that his election was for that reason not valid. Likewise there have been emergencies, such as the death before nomination of a candidate for president, which made it absolutely necessary for the electors chosen on a national party ticket to cast their votes for some one not nominated on such ticket, as in 1872, when Horace Greeley, the regular nominee of the Democratic party, died before the electoral vote was cast, and the electors in states in which the democratic ticket had a majority of the votes were compelled to exercise a discretion as to the candidate for whom their choice should be ex-

pressed. It could not have been contended for a moment that votes thus cast should not be counted for the person designated, although he was not the nominee of the party. Any such general rules and principles, therefore, though they may be said in some sense to be a part of the unwritten constitution under our form of government, are not of equal authority with the provisions of our written constitutions and are not in a legal sense limitations on the powers of government. They are analogous to those portions of the unwritten constitution of Great Britain which are of no binding and legal effect, although representing the general customs and usages in accordance with which that government is administered.

In Great Britain no acts of Parliament regularly adopted can be said to be unconstitutional in the sense of being invalid and without legal effect. It may be urged as against a proposed act of Parliament that it will be unconstitutional because in violation of the general principles and usages recognized by the unwritten constitution. But when adopted the statute in practical effect modifies the constitution, and is fully operative and potent. In this country, however, a statute which is in violation of the constitution is wholly invalid and impotent, and the constitution remains unaffected.

6. Government under a Written Constitution; Ultimate Sovereignty.

The difference between the governmental system of the United States and that of Great Britain, from a constitutional point of view, is not, however, merely that the principles of constitutional law are in the one case formally reduced to writing, while in the other they are recognized without being authoritatively reduced to definite statement. In Great Britain the ultimate sovereign power rests in the government and is exercised by Parliament, and no superior constitutional authority is recognized; while in the United States there is no unlimited sovereign power in either the federal or state governments or in any of the branches thereof, and ultimate

sovereignty, if it is to be conceived as existing anywhere, rests with the people as a whole. The powers of government in the United States are derived by delegation in the terms of the federal and state constitutions from the people by whom such constitutions have been adopted; and no department of government can lawfully exceed the authority given to it by general or specific grant in the constitution under which it exists, nor can it transcend the limitations imposed upon it by such constitution. The real distinction, then, consists in the fact that the government of Great Britain is regarded as possessing sovereign power, while the federal and state governments of the United States possess only such powers as are generally or specifically delegated to them.

Since sovereignty in the United States does not rest in the government or any division of it, it may be interesting to inquire where it does reside. (1) The state and federal constitutions are supposed to emanate from the body of the people; but in fact the state constitutions have been adopted in most instances by popular vote, the assent of the body of the people being expressed by the qualified electors; that is, the approval of a majority of those voting, out of the one-fifth of the population which is entitled to vote, is the highest formal approval obtainable for them from the body of the people, in which ultimate sovereignty may be supposed to rest; while the federal constitution was adopted by conventions in the different states at that time composing the Union, such conventions being made up of delegates selected by the electors and acting under authority derived from them. It can hardly be said, therefore, that in any practical sense ultimate sovereignty as indicating an efficient power resides in the body of the people, for such body does not in any sense or under any circumstances act in its sovereign capacity. (2) It cannot be said that sovereignty resides in the voters, for, as they are determined and their action is regulated by the constitutions and the statutes, they can do nothing except as authorized by such constitutions. The body of the voters like the officers whom they select exercise only a delegated

authority. (3) It therefore appears that although sovereignty, in the highest sense of the term, does not reside elsewhere than in the body of the people, no constitutional method is provided by which this body as distinct from the voters and the officers selected by them, can express its will. (4) Ultimate sovereignty, the term which is used as indicating ultimate power, may well be said, however, to reside in the body of the people, for by the exercise of the power of revolution any government which does not correspond to its ultimate will can be overthrown. An important object to be attained by constitutional government is to enable the people as a whole eventually to secure such action as is deemed desirable in accordance with the orderly and well-recognized methods of procedure prescribed in definite form, so that the assertion of the power of revolution, which must necessarily in itself be irregular and unregulated, shall not be necessary.

In this country ultimate sovereignty is a purely abstract term. It cannot be actually exercised in accordance with any method recognized by the constitutions or the laws of the state or federal government, but in a sense it is proper to say that federal and state governments exercise delegated sovereign power while acting in accordance with and under the limitations of the constitutions in accordance with which they are organized and exist. They cannot, however, be said to be sovereign in the full sense of the term, for the reason that sovereign power cannot in its nature be limited; while all the powers of both federal and state governments are in fact restricted by their respective constitutions.

7. Unconstitutionality of Legislative or Executive Acts.

Perhaps the most marked distinction between the governmental system of Great Britain and that of the United States, is that in Great Britain the courts cannot question the validity of an act of Parliament regularly passed on the ground that it is in violation of the constitution, while in the United States such power is regularly and frequently exercised by the courts

with reference to state or federal statutes. The reasoning on which this exercise of power by the courts in the United States is based is the following: The law-making power of the federal or of a state government exercises only delegated authority, and it cannot transcend constitutional limitations imposed upon it; and therefore its acts, when without authority or in violation of constitutional limitation, are invalid. If such a statute were to be regarded by the courts as a part of the law, binding upon them, then constitutional limitations, transgressed by such a statute, would be of no validity whatever. Consequently when in any case before a court it becomes necessary to determine what the law is, and a statute is relied upon as being an authoritative statement of the law, the court must decide whether or not the statute is valid. This reasoning applies with equal force to any action of the executive department which is without authority or in violation of constitutional restrictions. This peculiar characteristic of our form of government, which results in giving to the courts a much more important function than any exercised by the courts in other countries, results, then (1) from the conception of ultimate sovereignty as residing in the people and not in the government; (2) from the conception of the government as exercising only delegated and limited powers; and (3) from the division of the powers of government among three separate departments, each of which has authority only so far as the powers of government provided for in the constitution are conferred upon it. The courts are required under our form of government to exercise such power in order to arrive at a proper basis for deciding cases before them.

It is to be observed that this function of the courts is not the primary or the principal purpose of their creation and recognition as a department of government. Courts are created primarily to decide legal controversies; but in deciding such controversies it is necessary for them to determine what is the law as applicable to the particular case, and as incidental to the exercise of this function they may have to decide whether a statute or an executive act relied upon by one party or the

other is valid, or whether, on the other hand, it is invalid because in excess of the power conferred upon the department which has attempted to act, or is in violation of some constitutional provision or limitation. It is a function of the law-making power to determine prospectively what shall be the law, and to express that determination by adding to or modifying or repealing the existing law by statutes taking effect from the time of their enactment. (As to *ex post facto* and other retrospective laws, see below, §§ 59, 272.) The courts, on the other hand, decide cases submitted to them with reference to what the law was at the time the controversies to be determined arose, by which the rights of parties to such controversies are to be adjudged. Their principal concern is as to what is, or rather what has been, the law up to the time of the decision, not what shall be the law for future cases.

It is true that, having decided what the law is, a court will be likely in future cases to adhere to the views expressed in previous decisions, and the desirability of having the rules of law on which persons may act and rely stable and settled will incline the courts to adhere to their former decisions, which will be regarded as precedents in subsequent cases. But the act of the court in determining what the law is in a given case is not primarily for the purpose of ascertaining it for future cases, but in order that the case before it may be rightly decided. It is erroneous, therefore, to speak generally of the judicial department as having power to interpret or declare the law as though it were especially created for the purpose of interpreting the constitution and the acts of the other departments of the government in order that the people shall be advised as to what they mean. It is assumed rather that the constitution and the law, both written and unwritten, are known, and that persons whose controversies come before the courts have acted with reference to the law as it existed and are bound to knowledge thereof; and the courts, therefore, on that basis determine only retrospectively what law applies in the settlement of controversies which have already arisen. Nevertheless, as a result of such determination, persons may in the future

be guided and greatly assisted in following the law, by having reference to what has already been decided in previous cases.

The preceding considerations lead to some other important conclusions as to the proper province of the courts, in passing upon the constitutionality of statutes. First, it will always be borne in mind by a court that the legislative department, on whose authority the statute rests, is a co-ordinate branch with the judicial; that there is no superiority as between them; that each is vested with power and discretion within the scope prescribed for it by the constitution; and therefore that an act of the legislative department is entitled to every presumption in its favor, and that to question its validity is the exercise of a very delicate and extraordinary power, to be resorted to only in the last extremity and when the rights of the parties to the litigation are found necessarily to depend upon its construction. The courts then, instead of being zealous to interpret and determine the validity of statutes with respect to their constitutionality, in order that the people may know and act accordingly, will discharge such duty with great reluctance and reserve, the importance of making the law clear for future cases being subordinate to that of leaving the legislative department free in the exercise of its constitutional prerogative of law making. Moreover, the courts will entertain every presumption in favor of the validity of a statute called in question, and declare it to be invalid on constitutional grounds only where it is plainly and clearly in conflict with the constitution. They will not pass upon such a question save in a case in which it is necessary to do so in order to adjudicate the real and substantial rights of the parties in that case; and they will avoid, if practicable, considering such a question except after full argument and a consultation in which all the judges of the court are present.

Second, a court will avoid, if possible, setting up its own judgment as against the judgment of a co-ordinate branch of the government as to matters which are by the constitution entrusted to the discretion of such co-ordinate branch. The diplomatic relations between this and foreign countries being

exclusively within the control of the executive department, the determination by that department as to whether territory has been acquired from a foreign state so as to become a part of the United States will be conclusive on the courts, and they will not undertake to review the correctness or propriety of the determination. The legislative department having been vested with authority to levy taxes, the propriety of any particular tax as to its subject, amount, or the method of its collection, will not be questioned by the judiciary; but on the other hand, as private property rights are involved in the exaction of a tax, the courts will determine whether such exaction is within the scope of the taxing power, and whether the property is properly subject to taxation; and if a particular method of apportionment is directed by the constitution, the courts will say whether that method has been followed. Furthermore, as the two houses of Congress are made judges of the election and qualification of their respective members, and are authorized to prescribe their rules and procedure, and punish their members for disorderly behavior by expulsion, no court will attempt to review or revise the action of either house in this respect, even though the question to be determined may in its nature be judicial. For instance, if a member should be expelled, no court could pass on the question whether the expelled member was guilty of the acts charged as a ground of expulsion.

In other words, while the constitution is binding upon all branches of the government, the question whether it has been violated by the executive or legislative branch cannot be inquired into by the courts, except in a case of judicial cognizance, that is, a case coming within the jurisdiction which has been given to the courts by the constitution and the laws. It is to be assumed that the executive and legislative departments are as zealous in abiding by the constitution as are the courts, and that the requirements and limitations of the constitution will be carefully observed; and only when in the exercise of judicial power it becomes necessary to determine whether an executive or legislative act is valid will the courts

enter into a consideration of the question whether the power granted in the constitution or the limitations imposed by it have been exceeded or infringed. Many questions of constitutional law, in the broad and proper sense of the term, can never come before the courts for final determination; because the action of the executive and legislative departments with reference thereto must, so far as any legal remedy is concerned, be conclusively presumed to be in accordance with the constitution. It is true that in Massachusetts and a few other states the constitution authorizes the judicial department to give advisory opinions to the legislative and executive departments on application, but advisory opinions thus given have not the force of decisions and are not regarded as within the scope of judicial power (*Opinion of the Justices.*)

The fact that the judicial department is limited to the determination of controversies properly arising in cases brought into the courts for adjudication, is to be carefully borne in mind in correctly understanding the result of a decision rendered by a court. Such a decision is conclusive as to the rights of the parties before the court, and also serves as a precedent which will have more or less weight in the determination of subsequent cases involving the same question. But the courts cannot repeal or annul a statute, nor dictate to the executive in any compulsory way what his action shall be. The effect of declaring, in a particular case, that a statute is unconstitutional is not to repeal the statute, but to determine in the case before the court that it will not be recognized as valid, and to furnish a precedent or authority for contending in similar cases where such a statute is brought in question, that it should not be recognized. The statute remains, nevertheless, on the statute books as an act of the legislative department, even though for the purpose for which it has been relied upon the court may have decided that it is not a part of the law of the land. The decision of the court is not that the statute shall thereafter be of no force and effect, but that it has never been a valid statute. While it may be proper that other departments of the government shall yield great deference to the

conclusions of the court on such a question, there is no method of compelling them to do so, and they must still be allowed to exercise their own discretion in such matter, subject only to the presumption that if another case is presented to the judiciary department, involving the same question, the courts will adhere to the former decision.

Although the power of the courts to declare legislative acts unconstitutional has been firmly established for more than a century and has been acted upon in numberless cases in every state of the Union, as well as in the Supreme Court of the United States, there is still a popular tendency to call in question the propriety of its exercise, especially when the decision seems to run counter to public opinion in favor of the legislation which is thus annulled; hence, a further discussion of the development of the doctrine may be interesting. In some early cases in the English courts it was suggested rather than decided that an act of Parliament might be so unreasonable and unjust that the courts would refuse to enforce it. But these suggestions were not followed by the English courts to the extent of establishing any rule by which they would be authorized to question the validity of an act of Parliament on such ground. On the other hand, it has become firmly established as a principle of the constitutional law of Great Britain that the courts cannot exercise that power. The courts of Great Britain did, however, exercise the power of declaring invalid acts of colonial legislative bodies, on the ground that they were in excess of the power conferred by their colonial charters, and out of this exercise of power no doubt arose the notion that the acts of legislative bodies having a delegated and limited authority could be held to be invalid in the courts. Before the adoption of the federal constitution such authority had been exercised in a few cases by the courts in some of the states. But in the case of *Marbury* v. *Madison*, in the Supreme Court of the United States (1803), Chief Justice Marshall delivered an opinion on the question which has since been almost uniformly followed in judicial decisions in the federal and state courts, and which

practically has set it at rest. The point decided in that case was that an act of Congress by which it was attempted to give jurisdiction to the Supreme Court of the United States over a class of cases not placed within its jurisdiction by the language of the constitution, was invalid. The reasoning sustains fully the authority of a court to inquire into the question whether a legislative act is within the scope of the power conferred upon the legislature or in violation of restrictions imposed upon it, and to declare such act invalid and inoperative if it be found to be in excess of the power granted or in violation of the limitations imposed. The soundness of this decision was not, however, at once universally recognized as applied to the state courts; and in at least one state an attempt was made to impeach judges for declaring legislative acts to be unconstitutional. But the reasoning of Chief Justice Marshall, based on the nature of our federal and state governments as exercising a delegated authority under their respective constitutions, and the practical necessity of some determination by a duly constituted authority of the scope of governmental power, have led to the universal acceptance by the courts of this country of his conclusions, and a popular acquiescence in them as embodying a sound exposition of a fundamental principle of our constitutional law.

CHAPTER II.

ADOPTION AND AMENDMENT OF CONSTITUTIONS.

8. References.

J. Story, *Constitution*, §§ 198–271, 1826–1831; T. M. Cooley, *Constitutional Limitations*, ch. iii; G. T. Curtis, *Constitutional History*, chs. i–xv; H. Von Holst, *Constitutional History of the United States*, ch. i; J. A. Jameson, *Constitutional Conventions;* J. I. C. Hare, *Constitutional Law*, chs. iv–vii; J. N. Pomeroy, *Constitutional Law*, ch. ii; J. Fiske, *Critical Period;* A. B. Hart, *Actual Government* (Am. Citizen Series), ch. iii; James Bryce, *American Commonwealth*, chs. i–iv; *The Federalist*, Nos. 21, 22; J. J. Lalor, *Cyclopedia*, Arts. "Amendment" and "Convention"; T. M. Cooley, *Principles of Constitutional Law*, ch. i; H. C. Black, *Constitutional Law*, §§ 22, 28, 29; *McCulloch* v. *Maryland* (1819, 4 Wheaton, 316; 4 Curtis' Decisions, 415; Thayer's Cases, 271; McClain's Cases, 1; Marshall's Decisions, Dillon's ed., 257); *Martin* v. *Hunter's Lessee* (1816, 1 Wheaton, 304; 3 Curtis' Decisions, 652; Thayer's Cases, 123; McClain's Cases, 746); *Luther* v. *Borden* (1848, 7 Howard, 1; McClain's Cases, 595); *Koehler* v. *Hill* (1883, 60 Iowa, 543; Thayer's Cases, 252); *Maxwell* v. *Dow* (1900, 176 U. S. 581); *Dorr* v. *United States* (1904, 195 U. S. 138; McClain's Cases, 2d ed. 1252).

9. Colonial Charters; Transition to State Governments.

The governments of the colonies, as provided for in their charters, or instructions to governors, or frames of government proceeding from a proprietor or from the royal government, combined some elements of royal authority with other elements of popular government. The governor was generally an appointive officer, selected either directly by the king, or indirectly, under his authority, by the proprietor or corporation to whom the colonial grant was made. There was usually a provision for a legislative body of two branches, the lower branch, at least, chosen by some form of suffrage. In the exercise of the powers of government, serious conflicts

arose in several of the colonies between the representative of the royal power on the one hand, and the representatives of the people on the other, and it was quite as much the result of these local conflicts as it was of the agitation in the colonies for a greater measure of local self-government, which led to the widespread discussion of the proper sphere and functions of government.

The change from the charter or proprietary or royal government to a state government, which took place in each colony in some form in accordance with the action of the representatives of the colonies assembled in the general Congress at Philadelphia, in 1775, was a revolutionary change; that is, it was not in accordance with any prescribed constitutional form, as there could not be, of course, any power in the colonial governments to disavow the authority on which such governments rested. This change was effected in definite form in most of the colonies by the adoption of a constitution, and these first constitutions, in several instances, consisted of three parts: (1) a preamble, declaring the purpose for which the constitution was adopted; (2) a bill of rights, or declaration of rights, containing an exposition of the nature and powers of government and limitations on the powers of the government created under the constitution; (3) a description of the framework of the new government not very different from the former colonial organization. The preamble was omitted in later state constitutions, but the bill of rights has been preserved as an important feature in most, if not all, of the state constitutions which have been adopted down to the present time.

10. Authority on which State Constitutions Rest.

The first state constitutions adopted in the respective colonies being revolutionary in their character had no basis of legal authority, and rested on the general consent of the people evidenced by their acquiescence in the authority of the governments established under such constitutions. Those adopted prior to 1780 were not submitted to popular vote, but went into effect on the authority of the legislative bodies existing in

the colonies, and assuming the revolutionary prerogative of declaring independence and establishing a state government. Many of those subsequently adopted went into effect in accordance with provisions found therein for their submission to and adoption by vote of the electors in the respective states.

Provision is usually made in state constitutions for their amendment and for the substitution of another constitution in due and legal form, and any changes thus made are not in their nature revolutionary so far as the prescribed methods of alteration or substitution are pursued. Whether such amendment or substitution is effected by legislative action in the submission of amendments or new constitutions, to be adopted by popular vote, or by the action of constitutional conventions proposing amendments or new constitutions to go into effect on adoption by popular vote, the ultimate authority of constitutional provisions is now assumed to rest on the action of the people exercising sovereign power. (See above § 6.) Nevertheless it is evident that even in this exercise of power the people do not act as a whole, but through their representatives in the legislature or the constitutional convention, and the voters who exercise the power delegated to them of thus acting, so that even the power of constitution making is discharged in the exercise of a delegated rather than an original sovereign authority; and unless the provisions for amendment or substitution are complied with, the new constitution will be revolutionary in its nature, that is, will rest on general assent and not on legal authority. But even though revolutionary, such an amended or substituted constitution will be valid and binding so far as the acts of any department of government authorized by it are exercised under its authority. If, however, the question arises whether an amendment or a new constitution has been lawfully adopted, and that question is to be determined under the authority of the pre-existing constitution, then, unless the proper steps have been taken, the amendment or the new constitution cannot be recognized by the government existing under the previous constitution. (*Koehler* v. *Hill.*)

11. Independence of the States.

The state constitutions adopted in the colonies did not in general make any provision for union under a federal government. In legal effect each colony, when its relations with the parent government were severed, became an independent state, and for the time being a sovereign state; and the earliest attempts at any concerted action among the states were based on the mutual consent to the exercise by a body of delegates appointed from the different states of authority to act for the states in matters of common interest. The Continental Congress, which adopted the Declaration of Independence, and under whose authority the War of Independence was inaugurated and carried on, was made up of delegates chosen by the state legislatures, and was therefore a body without power to control the action of the states, except so far as they saw fit to abide by and conform to its recommendations. It was practically an advisory body.

As a matter of fact, however, the states, although theoretically independent, and each in itself a complete sovereign, did not attempt to exercise all the powers of independent sovereignties. No one of them made war on its own account, sent ambassadors to any foreign government, or received representatives of such government. Nor did they have with one another the relations which usually exist among states independent of and foreign to each other. While it is true that the states are still regarded in law as foreign to each other, so far as their jurisdictions, laws, and affairs are concerned (see below, § 188), they do not occupy towards one another, nor towards foreign nations, the relations of sovereign and independent states. Their relations towards each other are now determined by the fact that their people are bound together under a common federal government; but during the transition period from independence to the establishment of the federal government they were in the anomalous position of theoretically possessing, but not practically exercising, all the powers of independent sovereignty.

12. Union of the States under the Articles of Confederation.

The first suggestion in the Continental Congress for the formation of the federal government was made by Franklin in 1775; the first official draft of a plan for the confederation was submitted by that Congress to the thirteen states for ratification in 1777, under the title, "Articles of Confederation and Perpetual Union." The plan was to go into effect when the articles were adopted by the legislatures of each of the thirteen states, but this was not accomplished until March, 1781. The federal government provided for by these articles consisted only of a legislative department; there was no provision for a permanent executive nor permanent federal courts. It was expressly provided that "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled." The government thus provided for was a league or confederation for common defence, and the Congress was to consist of delegates without limit as to number, chosen and paid by the legislatures of the different states, those from each state acting as a unit. It was provided, however, that the states should not individually enter into relations with foreign nations, nor with each other, by way of common treaty or compact, nor engage in any war, without the consent of the Congress of the confederation, which should have the exclusive right and power of determining on peace and war and carrying on foreign relations. Congress was authorized to borrow money and support an army and navy, and for the purpose of raising the necessary funds was to receive contributions from the several states in proportion to the value of land. But no means was provided for collecting taxes directly from the people, nor for enforcing payment of the contributions asked from the different states.

The government thus provided for had not sufficient authority to secure respect abroad nor to discharge at home the

duties essential to the maintenance of peace and the public credit; and it was found impossible to enforce even those limited regulations which Congress was authorized to make. The most serious difficulty, however, and the one appealing most strongly to the people, was the lack of any uniform regulations with reference to commerce among the states or with foreign nations. Each state imposed its own restrictions on the bringing of goods from other states or from abroad, and upon the shipment of goods out of the state. Of scarcely less importance was the want of any common and stable currency with which business among the people of the different states might be carried on; for while, under the provisions of the Articles, Congress had "the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority or by that of the respective states," no uniform system of currency was actually adopted and put into operation.

The weakness of this government, and its defects, which became more and more evident as it attempted to exercise the limited powers entrusted to it, led to agitation for amendments of the Articles; and in 1787 a call was issued by Congress, recommending the different states to send delegates to a convention for the purpose of revising the Articles of Confederation and reporting such alterations as they should deem necessary "to the exigencies of government and the preservation of the nation." But the convention of delegates which sat in Philadelphia in pursuance of this call from May to September, 1787, found it to be impracticable to propose amendments to the Articles which should remedy the defects and give to the federal government sufficient power; and the convention therefore proceeded to formulate an entirely new federal constitution, providing for a central government radically different from that contemplated in the Articles. This new constitution was to go into effect when ratified by nine states (Const. Art. VII). It was submitted to the people of the states in 1787, and was ratified by eleven of them before any definite action was taken under it. The constitution

which was thus proposed and ratified, and which is the present constitution of the United States, went into actual effect as an instrument of government in 1789. In April of that year the Congress, chosen in accordance with the new constitution, met and counted the electoral votes for president, and on April 30th George Washington was inaugurated as the first President of the United States; and a few months later the remaining two states ratified the constitution.

13. Adoption of the Federal Constitution.

In the new constitution, framed by the delegates from the different states, referred to in the preceding paragraph, it was provided that the ratification thereof by conventions of nine of the thirteen states should be sufficient to authorize it to go into effect as among the states in which it was so adopted. As the Articles of Confederation provided only for their amendment by unanimous consent of the thirteen states, it is apparent that the new constitution was to this extent a revolutionary measure, not authorized by the Articles of Confederation. As a matter of fact one state — Rhode Island — sent no delegates to this convention, and was therefore in no way bound by its proceedings; and neither Rhode Island nor North Carolina ratified until after the federal government authorized by the constitution was actually in operation. Moreover, the Articles of Confederation provided for their change or amendment by the action of the states, — meaning the state legislatures, — whereas the constitution was by action of Congress submitted for ratification in the different states by conventions chosen by the voters, as the legislatures of the different states might provide (Const. Art. VII). The federal government under the constitution was not, therefore, the legal successor to the government under the Articles of Confederation, but supplanted it. So far, however, as the new government was recognized by the states, eleven of whom had ratified before such government was organized, it was as to them legitimate and regular, and it was acquiesced in by the

remaining two states when they finally ratified it in the prescribed form.

It is apparent from what has been said as to the method of adopting the federal constitution that it was not a league or a compact among several independent sovereign states, but, on the contrary, a government resting for its authority on the assent of the people of the different states expressed by ratification in conventions of delegates selected by the people. It differed from the government under the Articles of Confederation, therefore, primarily in the source of its authority, and secondarily in the nature of the government authorized, as indicated by the powers delegated to it. This difference is well expressed in the preamble, which is in the following words: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America."

Although the people acted in the different states separately, there is no reason now to question the general proposition that the federal government rests on the authority of the people as a whole, and not on the authority of the states individually. As to the form of government provided, it is significant that its powers are to be exercised with reference to its citizens as individuals, rather than with reference to the states as communities. The revenues of the government are to be raised by taxes on persons and property, not by contributions from the states; the salaries of senators and representatives are to be paid by the United States, and not by the states from which they are chosen; and in general the powers of the government are to be exercised by the making of laws, the enforcement of which is entrusted to a president and a judicial department.

14. Methods of Constitutional Amendment.

Written constitutions usually contain provisions for their own amendment. In the federal constitution it is provided (Art. V) that amendments shall be proposed by Congress, two-thirds of each house concurring, which shall become effective as parts of the constitution when ratified by the legislatures of, or by constitutional conventions in, three-fourths of the several states as may be proposed by Congress; or, on the application of the legislatures of two-thirds of the several states, Congress is directed to call a convention for proposing amendments to the constitution, which amendments shall go into effect when approved by the legislatures of, or conventions in three-fourths of the states as may be proposed by Congress; but no state without its consent can be deprived of its equal representation in the Senate. All the amendments to the federal constitution thus far made have been proposed by Congress and ratified by the legislatures of the requisite number of states, the result of the action of the states being declared by the executive department.

The methods provided for amendment of state constitutions are by no means uniform. In some states amendment by the legislature has been recognized, but the usual method is for the legislature to submit the proposed amendment to the qualified electors for approval. Whatever the method provided, it must be strictly followed, and no amendment not proposed and adopted in the method prescribed becomes a part of the constitution; and it is for the courts to determine, when such a question is properly brought before them, whether the amendment has been legally adopted. No matter how general may have been the popular approval of a proposed amendment, if the required steps have not been taken, it does not become a part of the constitution. While a constitution may become effective by general acquiescence, a government provided for by such a constitution, not adopted in accordance with previously prescribed methods, is in its origin revolutionary and not regular, and a constitution which has gone into effect as the fundamental law can be regularly changed only in

accordance with its provisions. A state cannot by constitutional amendment violate the provisions of the federal constitution, so far as they impose restrictions on the exercise of state power, any more than it can do so by statute. Nor can it by amendment provide for any other than a republican form of government, for the United States is bound to guarantee that form of government to every state in the union (Const. Art. IV, § 4).

CHAPTER III.

NATURE OF THE FEDERAL AND STATE GOVERNMENTS; THEIR RELATIONS.

15. References.

NATURE OF STATE AND FEDERAL GOVERNMENTS: A. B. Hart, *Actual Government* (Am. Citizen Series), ch. vi; T. M. Cooley, *Constitutional Limitations*, ch. viii; J. Kent, *Commentaries on American Law*, Lec. xviii; J. I. C. Hare, *Constitutional Law*, Lecs. vi, vii; H. C. Black, *Constitutional Law*, ch. ii; J. N. Pomeroy, *Constitutional Law*, §§ 85–120; J. Bryce, *American Commonwealth*, I, chs. iv, xxvii, xxviii, xxxvi, xxxvii; J. F. Jameson, *Essays in Constitutional History:* J. Wilson, *Lectures on Jurisprudence* (Andrew's ed.), I, ch. xi; II, ch. i; *Lane* v. *Oregon* (1868, 7 Wall. 71; McClain's Cases, 40).

RULE OF CONSTRUCTION; LIBERAL INTERPRETATION; IMPLIED POWERS: J. Story, *Constitution*, §§ 397–456; J. Kent, *Commentaries*, I, ** 243–254; *McCulloch* v. *Maryland* (1819, 4 Wheaton, 316; 4 Curtis' Decisions, 415; Thayer's Cases, 271; McClain's Cases, 1).

SUPREMACY OF THE FEDERAL GOVERNMENT: J. Story, *Constitution*, §§ 373–396; *Martin* v. *Hunter's Lessee* (1816, 1 Wheaton, 304; 3 Curtis, Decisions, 562; Thayer's Cases, 123; McClain's Cases, 746); *Tarble's Case* (1871, 13 Wallace, 397; Thayer's Cases, 2298; McClain's Cases, 43); *Tennessee* v. *Davis* (1879, 100 U. S. 257; Thayer's Cases, 316; McClain's Cases, 51); *Ex parte Siebold* (1879, 100 U. S. 371; McClain's Cases, 56; Thayer's Cases, 326); *In re Nagle* (1889, 135 U. S. 1; McClain's Cases, 65; Thayer's Cases, 335); *In re Debs* (1895, 158 U. S. 564); *Hauenstein* v. *Lynham* (1879, 100 U. S. 483; McClain's Cases, 72); *Davis* v. *Elmira Sav. Bank* (1895, 161 U. S. 275; McClain's Cases, 76).

LIMITATIONS IN THE FEDERAL CONSTITUTION: J. I. C. Hare, *Constitutional Law*, Lect. xxiv; J. R. Tucker, *Constitution*, ch. xiv; H. C. Black, *Constitutional Law*, ch. iii; *The Federalist*, Nos. 83, 84; H. V. Ames, *Amendments to the Constitution;* E. McClain, *Federal Protection against State Power* (*Harv. Law Rev.* VI, 405); *Barron* v. *Baltimore* (1833, 7 Peters, 243; 10 Curtis' Decisions, 464; McClain's Cases, 14; Thayer's Cases, 449); *Maxwell* v. *Dow* (1900, 176 U. S. 581); *Twining* v. *New Jersey* (1908, 211 U. S. 78; McClain's Cases, 2d ed. 17); *Hawaii* v. *Mankichi* (1903, 190 U. S. 197; McClain's Cases, 2d ed. 1214); *Dorr* v. *United States* (1904, 195 U. S. 138; McClain's Cases, 2d ed. 1252); *Slaughter-House*

Cases (1872, 16 Wallace, 36; McClain's Cases, 18; Thayer's Cases, 516); *United States* v. *Cruikshank* (1875, 92 U. S. 542; McClain's Cases, 31); *Civil Rights Cases* (1883, 109 U. S. 3; Thayer's Cases, 554; McClain's Cases, 37); *Hurtado* v. *California* (1884, 110 U. S. 516; McClain's Cases, 905; Thayer's Cases, 616).

16. Division of Powers.

The first state constitutions were adopted at a time when there was no established federal government, so that all the powers of government, so far as their exercise was in any way provided for, were distributed among the three departments of the state governments, and this form of constitution has been substantially followed to the present time in the amendment of former constitutions or the making of new ones. But when the people, through their proper representatives, adopted the federal constitution, they thereby restricted the authority of the state governments, so far as powers which had theretofore existed in the state governments were conferred upon the federal government. The power of any branch of a state government consists, therefore, of the general power conferred upon that department by the state constitution, subject to the limitations found in the state constitution itself; and subject also to the implied limitation arising out of the creation and existence of a federal government with the powers delegated to it. But on the other hand a state government does not derive its authority in any way from the federal government, nor are the departments of the state government in any way divisions or subordinate agencies of the corresponding departments of the federal government. The two governments rest upon the same general authority. There is a division of powers of government, therefore, between the state and federal governments, which division was effectuated by the adoption of the federal constitution, creating a national government which should exercise the authority conferred upon it by that instrument. We have then in the United States a curious and original example of divided sovereignty, which results in many theoretical and some practical difficulties in the determination of the respective powers of the state and federal governments. Any apparent

conflict in authority, however, is to be settled by consideration of the fact that the adoption of the federal constitution amounted in itself to a restriction of state authority; hence there can be no inconsistency between the exercise of power by the state governments and a like exercise of power by the federal government under the provisions of the federal constitution. Practically, it is to be noticed that the powers given to the federal government are in general only those essential to the existence of such a government and the discharge of functions involving a union of the states and the common interests of the people of the different states; while to the state governments is left such authority as is necessary to the protection of the people of the different states in their personal liberty, their property, and their general welfare.

The relation of persons to each other under the law with reference to their personal and property rights, except so far as the federal constitution contains specific provisions on the subject, is within the jurisdiction of the states. That great body of the law which affects ownership, possession, conveyance, and distribution of property, which determines the status and privileges of those who are subject to the law, and which protects personal and property rights of one person from infringement by another, is the law of the state, and in this sense it has been said that there is no common law of the United States, but that the common law, that is, the unwritten general law which the courts recognize and apply in the absence of any statutory provisions, is deemed to be the law of each state, resting on its general authority, and not on the authority of the United States. General powers of government, involving the protection of personal and property rights, remain in the state, except in so far as by the provisions of the federal constitution they are conferred upon the federal government. Thus the so-called police power, that is, the power to regulate the conduct of persons and the control and management of property, with the general object of securing to each protection against unlawful interference by another, and to protect the public as a whole against injury from unlawful action of its members, is in the state. (See

below, § 49.) It is for the state government to regulate the conduct of persons and the control of property so as to prevent injury to the public or to others. As a branch of this general police power, the punishment of crimes is left to the states, except in so far as under express or implied authority, found in the federal constitution, the power to punish particular classes of crimes may have been conferred upon the federal government. (See below, § 52.)

On the other hand, the federal government is given authority to legislate with reference to taxation for national purposes, the relations of the United States to foreign governments, the making of war and peace, the maintenance of an army and navy, the regulation of foreign and interstate commerce, and the government of territory not included within any state. These powers, and others which are conferred upon the federal government, are such as were deemed necessary by the framers of the constitution in order to enable the federal government to carry out the purposes for which it was formed. However, while these general purposes may be taken into account in construing the powers given to the federal government by the constitution, it is not left an open question what the powers of that government shall be in order to carry out the general object of its creation; but the powers granted are limited to those which were deemed to be necessary and proper when the federal constitution was adopted, or which have been given to it by subsequent amendments.

17. Rule of Construction as to Powers Granted by Federal and State Constitutions.

It is apparent from what has been said that the general powers of government are vested in the departments of the state government, while the departments of the federal government have only such powers as are given to them under the federal constitution. It may therefore properly be said that the state government has all the governmental power not denied to it by the state constitution, so far as not inconsistent with the powers given to the general government by the

federal constitution; while the federal government, on the other hand, is one of enumerated powers. In other words, the state government is a government of general powers, while the powers of the federal government are limited in their scope. It would perhaps be more logical, however, to say that neither state nor federal government has any powers save those granted; and that the grant of power to the state government is in terms general, while the grant to the federal government is in terms specific. For instance, state constitutions do not usually in specific terms give to any department of the state government the power to impose taxes; but the creation of a legislative department under the terms of a state constitution implies the power to impose taxes, subject only to limitations which may be expressed, while, on the other hand, the power to impose taxes for federal purposes is specified in the federal constitution, and does not exist as a general power, conferred apart from such specification. Another illustration may be found in the power to provide for the punishment of crimes. This power is incident to the general power given to the legislative department of a state government, and need not be conferred through the state constitution in terms. The legislative department of the federal government, however, has such power only as the result of specific grant, or by way of incident to or implication from other powers which are granted. Thus, the power to punish counterfeiting and to define and punish piracy and felony on the high seas are specifically given to Congress; but as incidental to the power to legislate with reference to territory ceded by the states to the United States, as provided in the federal constitution, for the seat of government, or for forts and arsenals, Congress may provide a complete criminal code; and it may likewise provide for the punishment of certain crimes as incident to the exercise of other powers conferred, such as the power to collect duties on imports, or establish post offices and post roads. (See below, § 52.)

Many state constitutions include clauses either expressly reserving to the people the ultimate sovereignty, and all

powers not granted by the constitution to the government, or expressly limiting the departments of government to the exercise of the powers conferred. But as the people cannot exercise under a constitution any powers of government not provided for in the constitution (see above, §§ 4, 6) it is difficult to give any specific effect to such reservations or limitations, save as they may be construed to indicate that unlimited power is not conferred upon any department of government. The provision of the federal constitution (Amend. IX.) that "The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" is a mere general reservation of the same character as those often found in state constitutions; but the further provision (Amend. X.) that "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people" was evidently intended to emphasize and make plain the general principle that the federal government is one of enumerated powers.

18. Implied Powers under the Federal Constitution; Liberal Interpretation.

Although the federal government is given limited rather than general powers, it cannot be said that it has no powers save those expressed in the federal constitution. In determining the meaning of any written document, whether it be a contract, a statute, or a constitution, it will frequently be necessary to determine the meaning by considering what is implied, as well as what is expressed, in the language used. It is manifestly impossible that every incident and detail shall be set out in specific terms, or that each circumstance calling for an application of the language used shall have been anticipated and provided for; and it is particularly true of statutes and constitutions that the intent of the law-making or constitution-making body will have to be inferred with reference to matters not specifically covered. The federal govern-

ment, therefore, has not only the powers expressly granted to it by the constitution, but also those which by reasonable implication are included in or flow from those expressly granted. Indeed, this is specially declared in the constitution itself, which provides that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution" the powers conferred upon it (Const. Art. I, § 8, ¶ 18).

It has never been questioned, therefore, that the departments of the federal government have implied as well as express powers, but controversy may arise as to whether a given power claimed for the federal government as an implied power is properly implied in the grant of specified powers. In a controversy of this character there may be great difference of opinion; but the solution will be facilitated by bearing in mind that the meaning of the framers of the constitution is to be sought in the language used; and that an implied power which is claimed should be justified as a reasonable grant by implication in some of the enumerations of express power. At various times there have been conflicting views with reference to particular powers claimed as incidental, between those who consider themselves strict constructionists, and those who insist upon a liberal interpretation of the constitution. But in determining what acts are necessary and proper in the exercise of the enumerated powers, a liberal interpretation has been favored by the supreme court of the United States. It is perhaps not possible to improve on the language of Chief Justice Marshall, in announcing the rule to be followed in the interpretation of the federal constitution: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional" (*McCulloch* v. *Maryland*, 4 Wheaton, 316, 421). Examples of the exercise of implied powers by Congress are collected in another place. (See below, § 117.)

19. Supremacy of Federal Government in Exercise of Powers Granted.

Although, as compared with a state government, the federal government is one of limited and enumerated powers rather than of general powers, it does not follow that it is in any way inferior or subordinate to a state government. On the other hand, its very nature and the purpose for which it was created indicate that in the exercise of the powers granted either expressly or by implication, it must be supreme. In Article VI (¶ 2) of the federal constitution, it is declared: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." In expounding this provision it has been said: "If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is a government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control it. The nation, on those subjects on which it can act, must necessarily bind its component parts" (Marshall, Ch. J., in *McCulloch* v. *Maryland*, 4 Wheaton, 316, 405). Moreover, in order that the supremacy of the federal government as to those matters entrusted to its authority shall be maintained without encroachment, it is essential that the final interpretation of the extent of its powers shall rest with it alone; and one of the functions of the federal judiciary is to determine ultimately the construction of the federal constitution with reference to the powers of the federal government. Other courts may be called upon in cases properly before them to construe the federal constitution as a part of the written law;

but when such constitution has been interpreted in any respect by the supreme court of the United States, that interpretation becomes a part of the supreme law, binding on all the state courts, and on the citizens of the states. (See below, §§ 142,146.)

A clear understanding of the declared supremacy of the power of the federal government, and of the conclusiveness of the interpretation by the supreme court of the United States of the scope of these powers, will indicate that there is no possibility of any conflict between the federal government and the government of a state. If conflicting assertions of authority are to be reconciled by peaceful and lawful means, rather than by the resort to violence, it must be by the recognition of ultimate authority somewhere to determine the controversy; and there can be no reasonable question as to the intention of the framers of the constitution that this ultimate solution should be furnished by the federal government, and that it should be binding upon all.

20. Limitations in the Federal Constitution on State and Federal Power.

Not only is the federal constitution in itself a limitation on state power, in so far as the exercise by the federal government of the powers conferred upon it are inconsistent with any exercise by the state of authority in conflict with that of the federal government as to matters coming within its legitimate scope, but it was deemed necessary in some respects definitely to limit the powers of the state governments, or to prohibit their exercise of authority in ways inconsistent with the general purpose of forming a national government. Therefore it is expressly provided (Art. I, § 10) that "no state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; . . . or grant any title of nobility"; and further, that "no state shall without the consent of the Congress, levy any imposts or duties on imports or exports, except what may be

absolutely necessary for executing its inspection laws," etc., nor, "without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." Further consideration will be given to these limitations in connection with the discussion of particular branches of the federal power, but they must properly be borne in mind here as indicating the intention to subordinate the authority of the state to that of the federal government in national matters.

The relation of the states to each other is also in some respects regulated by the federal constitution. The prohibition noticed in the preceding paragraph as to agreements or compacts would prevent any attempt being made by two or more states, through concerted action, to interfere with national authority; and would indicate the intention that, while each state in itself is recognized as having powers of government, the relations of the states to each other, and of each to the citizens of each other, are to be determined by the federal constitution, and not by mutual arrangement. But there are further specific provisions as to the relations between the states. Thus, in Article IV it is specified that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state"; that "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; and that fugitives from justice, fleeing from one state to another, shall be surrendered back by the latter on demand of the chief executive authority of the former. These clauses must also be more fully considered in another connection (see below, ch. xxxiii), but are important here as indicating the nature and scope of the federal plan.

21. Limitations in the Federal Constitution for Protection of Personal Rights.

When the federal constitution was framed by the constitutional convention, it was assumed, not only that the protection

of the personal and property rights of the citizens of each state would remain primarily with the states themselves, but also that, as the federal government was to be a government possessing only enumerated powers, no general guaranties to individuals against the improper exercise of authority on the part of the federal government were necessary. Nevertheless, a few restrictions on the federal government were specifically imposed. Thus (Art. I, § 9), the privilege of the writ of *habeas corpus* was guaranteed; the passage of bills of attainder or *ex post facto* laws was prohibited, and the power to grant titles of nobility was denied; and in the same connection the powers of the federal government were restricted so that there should be no discriminations made between the states or the citizens thereof. But there were no express provisions for the protection of personal and property rights. As against the federal government, there was no guaranty of due process of law, or the protection of contract rights, or of jury trial in civil cases and the usual forms of procedure in criminal cases. The omission from the federal constitution of any such general guaranties was made a ground of objection to its adoption in several of the state conventions. The fact that the state constitutions all contained some general guaranties in the form of a bill of rights gave countenance to the assumption that such guaranties were an essential and fundamental part of a constitution, and in some of the state conventions the ratification of the proposed federal constitution was accompanied with the recommendation that a bill of rights be added to it by way of amendment. Accordingly, ten amendments to the federal constitution were proposed to the several states by the first Congress, and were ratified and became a part of the constitution prior to the year 1791. Of these Amendment IX is in the nature of a general saving clause, and Amendment X emphasizes the fact that the federal government has under the constitution only the powers enumerated, all others being reserved to the states or to the people. The first ten amendments indicate a prevailing distrust of the power which the federal government might attempt to exercise. They indicate

anxiety for the preservation of local freedom of government, and the wish to rely for protection of personal and property rights on the state governments, which, it was evidently assumed, would be safer repositories of power with respect to the rights of their citizens.

But even in the constitution as originally adopted, some restraint was imposed upon the states in behalf of the personal security of the people. For example, it is provided (Art. I, § 10) that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." And after the Civil War, as a means of making permanent the personal liberty which had accrued to individuals of the negro race, three amendments were adopted, limiting in very important respects the powers of the states with reference to the civil and political rights of their citizens. By Amendment XIII (1865) slavery was prohibited. By Amendment XIV (1868) citizenship in the states as well as in the Union as a whole was defined, and abridgment of the privileges or immunities incident to citizenship forbidden; and the states were also prohibited from depriving any person of life, liberty, or property without due process of law, or denying to any person the equal protection of the laws. By Amendment XV (1870) the states were restrained from denying or abridging the right of suffrage on account of race, color, or previous condition of servitude.

The adoption of these three amendments indicated a shifting of responsibility for the protection of the citizen against the undue exercises of governmental authority by a state government from the state itself to the federal government. The controlling consideration no doubt was the purpose to guarantee to the negroes the same civil and political rights accorded under the laws of any state to the white citizens of that state. But the ultimate result, especially of Amendment XIV, has been to place personal and property rights largely within the protection of the federal government. The guaranty of due process of law and the equal protection of the laws, found in that amendment, has been broadly invoked as a pro-

tection against state legislation which would result in an undue restriction in any respect of the exercise of personal liberty, or the ownership and profitable employment of property, and also as against unwarrantable discriminations between classes of persons in the enjoyment of personal and property rights. It is not to be assumed, however, that prior to the adoption of Amendment XIV, personal and property rights were not protected against arbitrary exercise of state power. Guaranties of due process of law and the equal protection of the laws were already found in the constitutions of the different states. But this amendment to the federal constitution gives to those persons who are entitled to the protection of the laws, and the enjoyment of the privileges of citizenship, the uniform security afforded by the specific provisions of the federal constitution itself, and a resort to the legislative, executive, and judicial power of that government for the protection of the rights thus guaranteed as against infringement by state action. (See below, ch. xliv.)

22. Bills of Rights in State and Federal Constitutions.

In the first constitutions of the states, adopted just before or immediately after independence, and in nearly all the state constitutions adopted later, either during the Revolutionary period or subsequently, a special enumeration is made of rights of the people which are not to be infringed by the government set up by the constitution. These enumerations are sometimes called "declarations of rights" and sometimes "bills of rights." But whether introduced by any such formal title, or embodied without separate designation, they are intended as, and constitute, distinct limitations on the powers of the state government. The terms "declaration of rights" and "bill of rights" are borrowed from English history, the instrument known as the Declaration of Rights having been promulgated by Parliament in 1688, and presented to William and Mary, who were jointly succeeding to the throne of England, in consequence of the dethronement of James II by Parliament and the exclusion of his heirs from the succession. The Bill of Rights was

adopted by Parliament and approved by William and Mary in the year 1689, as a statement of some of the fundamental principles which should be recognized by them in the administration of the government. It recites the grievances which had already been set forth in the Declaration of Rights, and declares, among other things, that the power to suspend or dispense with the laws, or the execution thereof, is illegal; that money can be levied only by act of Parliament; that the right to petition shall be preserved; that standing armies shall not be raised or kept within the kingdom in time of peace without the consent of Parliament; that the right to bear arms and freedom of speech and of the press shall be protected; that excessive bail shall not be required, nor cruel or unusual punishments inflicted, etc. The corresponding declarations or bills of rights found in the various state constitutions include similar declarations, and others more fundamental and pertinent. They are, of course, not uniform as to the subjects to which they relate; but in most of them are important guaranties of jury trial, procedure according to due process of law, guaranties of personal and property rights, freedom of speech and of the press, and the like. So far as these provisions have been the subject of subsequent judicial controversy, they will be hereafter referred to.

It may also be noticed as a matter of constitutional history that, even before the adoption of state constitutions, the rights of the people of the colonies to the guaranties of personal liberty found in the English Declaration of Rights had been frequently asserted, as, for instance, in the Declaration adopted by the first Continental Congress, and in the Declaration of Independence.

The federal constitution, as originally adopted, contained some express limitations on the states, such as that "no state shall make anything but gold and silver coin a legal tender in the payment of debts; emit bills of credit; . . . pass any bill of attainder or *ex post facto* law, or law impairing the obligation of contracts" (Art. I, § 10), and also some limitations which are general in their terms, such as that the

privilege of the writ of *habeas corpus* shall not be suspended; no bill of attainder or *ex post facto* law shall be passed; and no tax or duty shall be laid on exports (Art. I, § 9). It is evident that these general limitations are on the federal government, and not on the states, so far as the states are not mentioned; for it would have been useless to provide in section 10 that no state shall pass any bill of attainder or *ex post facto* law, if the general provision in section 9 that no bill of attainder or *ex post facto* law shall be passed was intended to be applicable to the states as well as the federal government. Therefore the rule of construction has been that general limitations in the federal constitution are applicable to the federal government only, and not to the states, unless the states are expressly referred to (*Barron* v. *Baltimore*). But these limitations in the federal constitution, as originally adopted, were not broad enough in their scope to constitute a bill of rights in any proper sense.

Of the ten amendments adopted soon after the constitution went into effect the first eight contain provisions analogous to those usually found in the bills of rights of the state constitutions. Without now enumerating or discussing the provisions of these amendments in detail, it is sufficient to say that they relate to freedom of religion; right to bear arms; the quartering of soldiers in time of peace; protection against searches and seizures except upon warrant duly issued; procedure in criminal cases; and the right to trial by jury in civil cases. It is clear, from the history of the discussion which led to their adoption and the arguments presented in support thereof, that they relate to the federal government, and not to the governments of the states; that is to say, when it is provided that the right of people to bear and keep arms shall not be infringed, it is intended to say that the government of the United States shall not interfere with that right; and likewise, when it is provided that no person shall be held to answer for a capital or otherwise infamous crime, unless on the presentment or indictment of a grand jury, it is intended that indictment shall be necessary in the federal courts, in cases for

infraction of federal law, no reference being made, either expressly or by implication, to procedure in the state courts in criminal cases; and further, when it is said that in suits at common law, the right of trial by jury shall be preserved, the states are not thereby restrained from providing for trials without a jury in state courts. The first eight amendments to the federal constitution are therefore to be interpreted as limitations on the federal power, and in no sense as having reference to the power of the states. Indeed, for all practical purposes it would have been unnecessary to embody such provisions in the federal constitution, for similar provisions were at that time found in the constitutions of most of the states. But when it was sought to change some of the state constitutions, so as to provide for trial of accused persons on criminal charges, made in some other method than by indictment, it became very material to determine whether the states were in this respect restricted by the provisions of the federal constitution, and it was definitely settled by the decision of the Supreme Court of the United States in the case of *Hurtado* v. *California* (1884) that, so long as no express limitations on state power were violated, the states might, for their own tribunals, adopt any provisions as to procedure in criminal cases that they should think wise or expedient. (See below, ch. xlii.)

It has been argued that the adoption of Amendment XIV, in which it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, rendered the first eight articles of amendment to the federal constitution binding on the states, the theory being that these articles enumerated privileges and immunities which, by Amendment XIV, the states were prohibited from abridging. But this argument has not been sustained; and in *Maxwell* v. *Dow*, and *Twining* v. *New Jersey* the construction originally adopted, that the first eight articles of amendment are in the nature of a bill of rights with reference to the federal government and the federal government alone, has been adhered to.

One question, however, remains unsettled, and that is

whether the first eight amendments to the federal constitution apply to legislation by or proceedings in the courts of territories or territorial possessions of the United States. To understand the difficulties surrounding the solution of this question, it must be borne in mind that the federal constitution was adopted by the people of the original thirteen states, and that it evidently contemplates and is drawn with reference to a federal government, the subjects of which are citizens of states. As has already been pointed out (see above, § 16), the powers of the federal government as to citizens of states are limited. But Congress is given authority to make "all needful rules and regulations respecting the territory or other property belonging to the United States" (Const. Art. IV, § 3, ¶ 2). And under this grant of power it has been held that Congress can create territorial governments, and provide at its discretion for the government of territory of the United States in which no territorial government has been provided for. (See below, ch. xxxii.) Those who live within the limits of such organized or unorganized territory, and not within the limits of states, are governed entirely by the federal government, or territorial governments created by it. Further, it is to be noticed that, so far as the first eight amendments relate to procedure in courts, they apply to the federal courts, properly speaking, that is, to the courts created in pursuance of Article III of the constitution, and not to the courts of the states. Now whether these eight amendments apply to territorial or other courts created directly or indirectly under the authority of Congress to legislate for the territories, has been a subject of much controversy. On the one hand it has been said that the constitution was evidently not drawn with any special reference to permanent possession by the United States of territory not incorporated into states; and on the other hand that the constitution as a whole is a limitation on the power of Congress exercised for any purpose. It has recently been decided by the Supreme Court of the United States, however, that the provisions as to the right of jury trial in civil cases, and by inference other provisions found in the

first eight amendments, are not applicable to procedure in courts created under Act of Congress for the government of the Philippine Islands (*Dorr* v. *United States*). The conclusion reached in that case warrants the general statement that the limitations as to methods of procedure are not applicable in proceedings before territorial courts, save so far as they may have been made applicable by act of Congress.

The last three amendments to the federal constitution are very different in their scope and purposes from those of the first eight. Amendment XIII, prohibiting slavery or involuntary servitude, is applicable, not only to the federal government, but also to state governments and to individuals as well; by its language it reaches into every place within the United States or subject to its jurisdiction. Amendment XV, prohibiting the denial or abridgment of the right to vote on account of race, color, or previous condition of servitude, expressly applies to both the federal and state governments. Amendment XIV contains various provisions, some of them expressly applicable to the states, others to both the federal and state governments. These three articles are not in any proper sense a portion of the bill of rights of the federal constitution.

CHAPTER IV.

RELATIONS OF DEPARTMENTS OF GOVERNMENT TO EACH OTHER.

23. References.

DISTRIBUTION OF POWERS: T. M. Cooley, *Constitutional Limitations*, **87–92; *The Federalist*, Nos. 47, 48, 51; T. M. Cooley, *Constitutional Law*, ch. iii; H. C. Black, *Constitutional Law*, ch. v; *Kilbourn* v. *Thompson* (1880, 103 U. S. 168); W. Blackstone, *Commentaries*, I, ch. ii; Montesquieu, *Spirit of Laws* (Nugent's Trans.) Book XI, ch. vi; A. B. Hart, *Actual Government* (Amer. Citizen Series), § 53; E. C. Mason, *Veto Power;* J. B. Thayer, *Cases on Constitutional Law*, I.

INDEPENDENCE OF EXECUTIVE: *Marbury* v. *Madison* (1803, 1 Cranch, 137; 1 Curtis' Decisions, 368; Marshall's Decisions (Dillon's ed.), 1); *Mississippi* v. *Johnson* (1866, 4 Wallace, 475; McClain's Cases, 102; Thayer's Cases, 196); *Georgia* v. *Stanton* (1867, 6 Wallace, 50; Thayer's Cases, 201); *State ex rel.* v. *Stone* (1894, 120 Mo. 428; McClain's Cases, 105); *State ex rel.* v. *Nash* (1902, 66 Ohio, 612; 64 N. E. Rep. 558); *United States ex rel.* v. *Black* (1888, 128 U. S. 540; McClain's Cases, 109).

LEGISLATURE CANNOT EXERCISE JUDICIAL POWER: T. M. Cooley, *Constitutional Limitations*, **87–92, 392; *Taylor* v. *Place* (1846, 4 R. I. 324; Thayer's Cases, 159; McClain's Cases, 79).

JUDGES CAN DISCHARGE ONLY JUDICIAL FUNCTIONS: *Case of Supervisors of Elections* (1873, 114 Mass. 247; McClain's Cases, 113); *State ex rel.* v. *Barker* (1902, 116 Iowa, 96; 89 N. W. Rep. 204).

LEGISLATIVE POWER CANNOT BE DELEGATED: *Rice* v. *Foster* (Del., 4 Harrington, 492); *Santo* v. *State* (1856, 2 Iowa, 203); *Geebrick* v. *State* (1857, 5 Iowa, 491; McClain's Cases, 88); *Dalby* v. *Wolf* (1862, 14 Iowa, 228; McClain's Cases, 91); *Stone* v. *Charleston* (1873, 114 Mass. 214; McClain's Cases, 93); *Field* v. *Clark* (1892, 143 U. S. 649; McClain's Cases, 95).

IMPEACHMENT OF OFFICERS: J. Story, *Constitution*, §§ 688, 689, 742–813; J. R. Tucker, *Constitution*, §§ 198–201; J. N. Pomeroy, *Constitutional Law*, 480–494; S. F. Miller, *Constitution of the United States*, 171, 213; *The Federalist*, No. 65; T. M. Cooley, *Principles of Constitutional Law* (3d ed.), 177, 178; H. C. Black, *Constitutional Law*, §§ 82–84; R. Foster, *Constitution of United States*, ch. xiii; A. B. Hart, *Actual Govern-*

ment (Amer. Citizen Series), § 139; H. Hallam, *Constitutional History of England* (Am. ed. 1893), I, 350, 351, 364; W. Blackstone, *Commentaries*, IV, ch. xix; James Wilson, *Lectures on Jurisprudence* (Andrews' ed.), II, 44.

Checks and Balances: T. M. Cooley, *Constitutional Limitations*, ** 34, 35; T. M. Cooley, *Principles of Constitutional Law*, ch. vii.

24. Departments Independent.

The division of the powers of government among the three departments, executive, legislative, and judicial, rests on the assumption that while no one of them is in itself sovereign and unlimited in authority, yet each is independent of the others. The theory involves, first, a limitation of each department to its own sphere of action; and, secondly, absolute independence and supremacy within that sphere. This principle of exclusion is, however, rather a general principle than a rule of exact application. The functions of the three departments of government do necessarily, to some extent, overlap. The legislature not only makes the laws which the executive enforces, and which the judiciary applies in the determination of controversies, but it has the exclusive power of taxation and appropriation of money, and, for the funds necessary to carry on the other branches of the government, those branches are therefore dependent upon the legislature. On the other hand, the executive department controls the military force, and for the protection which the legislature and the judiciary may require, they are dependent on the executive. Furthermore, each department in the performance of the functions assigned to it may have occasion to exercise powers and duties analogous to those of the other departments; for instance, the executive department, in determining whether money shall be collected for taxes or claims paid out of appropriations, must often decide judicial questions; and the judicial department, on the other hand, in repressing interruption or preventing interference with its proceedings, or in providing the material means for carrying on its operations, may exercise functions analogous to those of the executive or the legislature. It will not, therefore, be possible to draw any very definite line between the functions

of the three departments, although some important questions affecting their relations have been definitely settled and should be well understood.

25. Independence of the Executive.

All executive officers are under obligation to recognize and enforce the laws made by the legislative department within its proper sphere of action; and subordinate executive officers, such as the secretaries or heads of departments, may be compelled by proceedings in court to perform duties which are purely ministerial, and may be held liable in damages for injuries suffered by private persons by reason of the failure to discharge legal duties affecting the rights of such persons. If, however, the duty imposed upon the inferior executive officer is one involving the exercise of discretion — and many duties thus imposed are of this character — then, while he may be required to act, he cannot be controlled in the exercise of the discretion imposed upon him by law, nor can he be held liable in damages, if his discretion is exercised in good faith and on a proper occasion.

As to the chief executive, it has generally been considered that the independence of the executive department, while it does not exempt him from the obligation to respect the law, does require that he be free from interference on the part of the judicial department. Thus, courts cannot compel the execution of a grant of land by the executive, although it is required by law; nor can they enforce his attendance in court or before a grand jury as a witness (*State* v. *Stone*). But on these questions there is difference of opinion among the courts, some being inclined to insist that, as no officer is too high to be amenable to law, the courts can compel the observance of law by the chief executive as well as by any other person; whilst others insist that it would be an interference on the part of the judiciary with executive independence if the chief executive were coerced as to his official action by the orders of a court, or prevented from performing his high executive functions by imprisonment. However, any clashing of author-

ity between the executive and the judiciary has usually been avoided by the exercise of wise forbearance and mutual discretion. For instance, the president or a governor will not refuse to give testimony in a proper case pending in court in which his evidence is sought, though he might insist that he cannot be compelled to do so; and the courts, on the other hand, will not issue compulsory process against such an officer, though they may request his presence for the giving of testimony on a proper occasion. It is always to be borne in mind that the executive is vested, under the constitution, with independent power and discretion, and that he cannot by any legal process be compelled to submit to inquisition on the part of the courts as to matters solely within the proper scope of the discharge of his executive duties, nor dictated to with reference to such matters by the courts, or even the legislature.

Fortunately the occasion has seldom arisen for considering how far the courts may proceed against an individual who is vested with supreme executive authority, for acts or conduct not official in character. He may be sued as any other individual, and his private property may be taken to satisfy a judgment. Whether he could be arrested, tried, and punished by imprisonment, while holding his official position, for crimes committed by him as an individual, and not in connection with his official duty, may well be left unsettled until some occasion arises for the determination of the question. No such difficulty exists with reference to subordinate executive officers. They are in every respect fully amenable to the judiciary. No commands of superior officials will excuse them for violations of law, nor will any plea of interference with the performance of official duty be sufficient to exempt them from obeying the process of the courts. It may well be assumed that necessary executive functions can be otherwise discharged, although they as individuals are incapacitated from performing them (*Marbury* v. *Madison*).

The chief executive and other officers are subject to removal from office on impeachment by the legislative department for crimes and misconduct while in office, and this power of

supervision on the part of the legislative department over the executive has sometimes been suggested as evidence of the subordination of the executive to the power of the legislature. But in discharging the power of impeachment and trying the officer for the crime or misconduct alleged against him, the branches of the legislative department act rather in a judicial than a legislative capacity. The court of impeachment, consisting of the senate in the case of a federal officer, and usually of the higher branch of the state legislature in the case of a state officer, does not act as a legislative body, but proceeds in accordance with the provisions of the federal or state constitution, as the case may be, to determine whether the officer charged has been guilty of the crime or misconduct alleged, and whether, in consequence thereof, he shall be removed from office. (See below, § 28.) In this there is no infringement by the legislative department of executive independence.

It has already been pointed out (see above, § 7) that there are many political questions and questions affecting international relations, as to which the action of the executive department is conclusive, and cannot be reviewed or passed upon by the courts.

26. The Legislature Cannot Exercise Judicial Power.

The independence of the different departments of government is especially emphasized with reference to the functions of the judiciary. It is a fundamental principle of constitutional government that the courts, which are organized for the purpose of deciding controversies, shall be free from bias or extraneous influence, and that judicial questions shall be determined by the courts, and not by the executive or the legislature. Therefore it is fully recognized that under our system of government questions which are in their nature essentially and necessarily judicial cannot be passed upon save by judicial tribunals; and the decisions of such tribunals are final and cannot be reviewed by any other department of the government. Neither the legislature nor the executive can, as between adverse claimants to property, vest the title in the one or the other, and thus in

effect adjudicate the ownership of the property; nor can the legislature determine that an individual has been guilty of crime, and subject him to punishment therefor without a judicial trial. These principles are involved in the usual constitutional guaranties of due process of law and prohibition of bills of attainder; but a fuller exposition of them will be given in another place. (See below, §§ 228, 258.) However, an important application of these principles should be noticed here, involving the power of the legislature to interfere with the judgments of the courts. It is well settled that when a judgment has been rendered, the legislature cannot by a statutory enactment undo what the courts have done, or reverse their decisions. For instance, although the legislature may authorize new trials, it cannot provide for a new trial in a case already tried; and although it may provide for appeals, it cannot of its own authority in a particular case review or reverse a decision of a court.

Some judicial authority is exercised in England by the House of Lords, but in so acting it is a court, and not a legislative body. Likewise at one time in New York the senate was a court for the correction of errors, to which appeals might be taken from the courts of the state, but this also was the exercise of judicial, and not legislative, functions. Legislative divorces have been recognized as valid in some of the states, it being considered that the power to grant a divorce was not a judicial power; but in many of the states, there are now constitutional prohibitions of legislation with reference to granting divorces in specific cases, although, of course, the legislature may provide the laws in accordance with which divorces may be granted by the courts.

27. Judges of Courts Cannot Exercise Executive Functions.

The independence of the judiciary, which, as suggested in the last section, has been preserved with peculiar care, involves also the exemption of the judges of the courts from any obligation to perform functions which are not judicial. There are in many states inferior tribunals of a mixed character, such as

the so-called county courts, the judges of which have administrative as well as judicial powers; but the courts provided for by the constitutions of the different states for the exercise of judicial power, and the judges thereof, are regarded as exempt from any duty to perform functions which properly belong to other departments of the government. Thus the judges cannot be required to act as commissioners of elections (*Case of Supervisors of Elections*) nor as trustees for the administration of municipal works such as waterworks (*State* v. *Barker*), or the like; and it may be stated as a general proposition that such authority cannot be exercised by them.

28. Impeachment of Officers through Legislatures.

By the constitution of England, Parliament exercises some restraint on the power of the king by means of the impeachment of the king's ministers, the officers appointed by him to discharge important functions of government. This power is said to have been exercised by Parliament as early as the year 1376, and has been recognized throughout the subsequent constitutional history of Great Britain down to the present time, the charge being presented by the House of Commons to the House of Lords, in which the trial for the offence is conducted. In the Act of Settlement (1700), the king was expressly prohibited from exercising the power of pardon with reference to a charge made or punishment imposed by way of impeachment.

This power of Parliament no doubt furnished to the framers of state and federal constitutions the suggestion of a means by which the legislative department might exercise a legitimate restraint on executive power, and provision is made in many, if not all the state constitutions, as well as in the constitution of the United States, for the removal of officers by the higher branch of the legislative body on complaint of the lower branch. It is to be noticed, however, that the power is circumscribed by our written constitutions as to (1) the persons who may be impeached, (2) the misconduct which may be made the ground of impeachment, (3) the method of procedure, and (4) the punishment to be imposed.

By the federal constitution (Art. II, § 4), it is provided that "The president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors," and it is now generally conceded that only one who is in office can be thus proceeded against, and that the punishment can only extend to his removal from office and disqualification for holding office in the future. But he may be tried and punished by the courts in accordance with law for any crime he may have committed, notwithstanding the impeachment (Art. I, § 3, ¶ 7). The president's power of pardon cannot be exercised in cases of impeachment (Art. II, § 2, ¶ 1).

There has been much uncertainty as to the grounds for removal by impeachment. Those specified in the federal constitution are, no doubt, exclusive so far as federal officers are concerned; but it may now be regarded as settled by practice that "high crimes and misdemeanors" may include misconduct in office which does not in itself constitute a crime.

The impeachment, that is, the accusation against the officer, is formulated by the lower branch of the state legislature or of Congress and presented to the higher branch, which acts as a court for the trial of the officer on the charges presented, and in the case of the United States Senate there is a special provision that when the president of the United States is to be thus tried, the chief justice of the supreme court of the United States shall preside, and that a conviction can be had only upon the concurrence of two-thirds of the members present (Art. I, § 3, ¶ 6).

Any attempt on the part of the legislative department to interfere with the executive department by removal of the president or other executive officer on accusations not involving breach of duty, as distinct from the exercise of a legitimate discretion, would be wholly unwarranted by the spirit of our constitutional system, and fortunately no such effort, if it can properly be said to have been made, has ever been successful.

But final authority in determining the sufficiency of the grounds presented is with the legislative body before which the officer is put on trial, and the courts have no power to interfere with the proceedings or pass upon the validity of the action taken.

29. Legislative Power may not be Delegated.

The legal principle that an officer or agent cannot delegate to another the powers confided to him, unless authorized to do so, is specially applicable to legislative bodies. Since the power to make laws is vested in the legislative department, and involves a large exercise of discretion and judgment to be discharged by those directly selected for that purpose by the people, it is properly insisted that the authority thus conferred cannot be transferred to any other person or body of persons, unless authorized by the constitution. Therefore, it is well settled that, unless in the state constitution there is some provision made for a referendum (see above, § 4), the legislature cannot make the validity of a statute depend upon the result of a popular election, in which the voters are asked to decide whether or not the proposed law shall go into effect (*Rice* v. *Foster; Geebrick* v. *State*). The constitutional power of the electors with reference to the making of laws, in the absence of a provision for referendum, is limited to the selection of members of the legislature, in whom the legislative authority is vested. For the same reasons, it is well settled that Congress cannot delegate to the president the power to determine whether or not a statutory provision shall become a law. While the president may in proper form approve or veto a bill which has passed both houses of Congress, he cannot be given authority, in his own judgment and discretion, to determine whether a proposed measure shall go into effect. A statute must rest for its authority on its lawful adoption by the houses of Congress and approval by the president, and not merely on the executive authority.

A distinction must be drawn, however, between the making of laws, and the provision, by means of laws duly made, for the exercise of authority and discretion by some officer or

body, exercised in accordance with the provisions of such laws. Thus, the legislature of a State may by statute, duly enacted, leave it to be determined by vote in cities whether or not licenses for selling liquor shall be granted, and in counties whether domestic animals shall be allowed to run at large (*Dalby* v. *Wolf*), and Congress may, by statute regularly passed, leave it to the president to decide whether retaliatory tariff duties shall be collected on goods brought from a particular country (*Field* v. *Clark*). Moreover, limited legislative authority may be directly conferred by a state legislature upon municipal corporations, such delegation of authority being within the implied powers of the legislative department, even though not expressly recognized in the constitution. (See below, § 97.)

30. Checks and Balances in our Government.

It is often said that our governmental system is one of checks and balances for the purpose of restraining the undue exercise of power by the government or its officers, the theory being that unlimited power is not vested in any department; and, to the degree previously set forth in this chapter, this statement is measurably true. Each department of government does, in a sense, serve the purpose of a check upon the others. While the legislative department cannot directly control the action of the executive or judiciary, it can, by virtue of its sole power to provide for the raising and expenditure of money, exercise a very potent influence with reference to executive and judicial action; and the judiciary department, by virtue of its authority in a proper case to pass upon the validity of the acts of the legislature or the executive, can restrain those departments within the scope of their proper functions. Again, the division of sovereignty between the federal and the state governments, so that the federal government has supreme power as to limited subjects of a federal nature, while the state governments have general power as to all matters not placed in the control of the federal government, makes each, to some extent, a check upon the other. But the theory of checks and

balances must not be interpreted as meaning that either the state or federal government may interfere with the other in the proper discharge of the powers conferred upon it; nor with the well-established rule that in case of an apparent conflict of authority between a state and the federal government, the latter has the ultimate power to decide upon the extent of its own authority. This power is to be exercised, it is true, in accordance with the provisions and limitations of the constitution, but the necessity of providing some tribunal where such conflicts of authority may be authoritatively decided in accordance with the constitution and the law, and not by force or revolution, has dictated the wise provision that the federal judiciary is vested with this ultimate authority. (See above, § 19.) In other words, the checks which federal and state governments may exercise with reference to each other, and likewise those which are vested in the departments of government, are, after all, merely the checks which, by the constitution, are imposed on each; and the whole matter comes to this, that no government, or department of government, can constitutionally exceed the authority given to it, nor act otherwise than as authorized by the constitution.

Part II.

Organization of Government.

CHAPTER V.

LEGISLATIVE DEPARTMENTS.

31. References.

Joseph Story, *Constitution*, §§ 545–904, 1410–1488, 1963; T. M. Cooley, *Constitutional Limitations*, ch. vi; J. R. Tucker, *Constitution*, §§ 186–212; *The Federalist*, Nos. 52–63; H. C. Black, *Constitutional Law*, §§ 141, 144–148; A. B. Hart, *Actual Government* (Amer. Citizen Series), chs. vii, xiii, xiv; James Wilson, *Lectures on Jurisprudence* (Andrews' ed.), II, ch. i; James Bryce, *American Commonwealth*, I, chs. xix, xl; *Williamson* v. *United States* (1908, 207 U. S. 425.)

32. Legislative Branches.

Under the constitution of England as it has existed for several centuries, Parliament, the legislative department of the government of Great Britain, is composed of two houses, and their concurrence in legislation is necessary. The membership of the upper house consists of lords, both secular and ecclesiastical, whose titles are derived from the crown, and the lower branch, or House of Commons, is composed of members chosen by a limited suffrage. In the colonial governments there was usually provision for some sort of legislative assembly of two branches, the members of the upper branch being appointed by the king or his representative, the governor, and the members of the lower branch elected by the people. It was natural, therefore, that in the earliest

state constitutions, as well as in the federal constitution, it should be provided that the legislative power should be vested in an assembly consisting of two branches, the higher branch less numerous than the lower, and that the concurrence of the two branches should be essential to the enactment of laws. This so-called bicameral system is found also in other countries, and possesses some theoretical and practical advantages which have been sufficient to cause it to be retained in the formation of the later state constitutions. Indeed, this system is so fully recognized and firmly established that it may be regarded as a part of our plan of republican government.

In England the assent of the king to legislation proposed by Parliament has always been regarded as essential, and it was natural that the approval of the chief executive should likewise be required in the state and federal constitutions. But in England the king is not a part or component element of Parliament, and it cannot be properly said that the delegation of the veto power to the executive renders the executive a branch of the legislative department in the matter of legislation. The functions of the executive in approving or vetoing proposed legislation will therefore properly be discussed in one of the chapters relating to the executive power. (See below, ch. xxi.) Although in Great Britain and also in the colonial governments the higher branch of the legislative body was composed of appointed members, the higher branch, under our system of government, usually called the Senate, as well as the lower and more numerous branch, usually called the House of Representatives, is composed of members selected by some form of election; but the qualifications and method of election of the members of the higher branch may be somewhat different from those provided in case of members of the lower branch. This is especially noticeable with reference to the organization of Congress, the senators being regarded as representatives of the states, while the members of the House of Representatives are selected by vote of the people in separate districts of each state.

33. Legislative Representation; Election and Qualification of Members; Privileges.

For the purpose of selecting senators and representatives in the state legislature, the states are generally divided, under the provisions of their constitutions, into senatorial and representative districts, and from each one or more members are selected for the respective branches of the legislative body.

By the constitution of the United States it is provided that two senators shall be chosen in each state by the legislature thereof (Art. I, § 3, ¶ 1), the term of office being six years. There is now some popular agitation in favor of the choice of senators by popular vote instead of by legislative selection, but any such change would require a constitutional amendment. In case a vacancy occurs by resignation or otherwise, while the legislature of the state is in session, it is filled by the legislature, but if a vacancy occurs during the recess of the state legislature, the executive thereof may make a temporary appointment until the next meeting of the legislature (Art. I, § 3, ¶ 2).

The members of the House of Representatives of the United States are chosen every second year by the people of the several states by the electors of the state having the qualifications requisite for members of the most numerous branch of the state legislature (Art. I, § 2, ¶ 1). The number of members from each state is determined by the enumeration in the census taken each ten years of the whole number of persons in each state, excluding Indians not taxed (Art. I, § 2, ¶ 3, and Amend. XIV, § 2). Congress determines after each census the number of members of which the House of Representatives shall be composed, and apportions them among the various states in proportion to population, each state being entitled, however, to at least one representative. The provision of the Fourteenth Amendment that representation of any state in Congress may be reduced proportionally if the right to vote is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of

the United States, has not as yet been the subject of any final action on the part of Congress.

By federal statute (1901, following that of 1872) the Representatives apportioned to each state are to be elected by districts composed of contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants, not more than one Representative to be elected from any district. But even under this plan it may at times be necessary (and the Act so provides) to elect members at large for the whole state as for instance where the representation of the state has been changed as the result of a reapportionment, and the legislature has not redistricted the state accordingly.

A representative in Congress must have attained the age of twenty-five years and have been for seven years a citizen of the United States, and at the time of election an inhabitant of the state in which he is chosen (Art. I, § 2, ¶ 2). Vacancies are filled by a special election called by the state executive (Art. I, § 2, ¶ 4).

A Senator must have attained the age of thirty years, and have been for nine years a citizen of the United States, and at the time of his election an inhabitant of the state for which he is chosen (Art. I, § 3, ¶ 3). Vacancies are filled by the legislature of the state; but in case of a vacancy during a recess of the legislature the state executive may make a temporary appointment (Art. I, § 3, ¶ 2).

The times, places, and manner of holding elections for senators and representatives in Congress are prescribed in each state by the legislatures thereof, unless Congress makes provision on the subject, which it may do, except as to the places of choosing senators (Art. I, § 4, ¶ 1). By federal statutes the times and manner of electing senators and representatives are now specifically regulated (Acts of 1866, 1871, 1872, 1901). Senators are to be chosen by the legislature chosen next preceding the expiration of the term of a senator, and on the second Tuesday after its organization by a majority vote of each house voting separately; but if the houses do not agree then by a majority vote of the members

of both houses in joint session. Vacancies are to be filled by the legislature in the same manner. The result of the election is certified by the executive, countersigned by the secretary of state. Representatives are to be chosen by districts on the Tuesday after the first Monday of November of each second year for the Congress which commences the next year. Vacancies are to be filled as prescribed by the laws of the respective states. The control of elections is left with the states. (See below, § 200.)

By statute (1817) provision has been made for the election by each territory of a delegate to Congress, who has all the privileges of a member except the right to vote.

It would not be profitable to go into further detail as to the provisions of state and federal constitutions and statutes relating to representation in legislative bodies. It is sufficient to say in general that these questions seldom come before the courts, for the reason that by provision of most of the state constitutions, as well as under the federal constitution (Art. I, § 5, ¶ 1) each house of a state legislature or of Congress is the judge of the elections, returns, and qualifications of its own members. Contests as to the validity of elections are therefore determined by the house in which membership is claimed, and the action of that house is final and conclusive. Each house has also the power to expel a member for such cause as it may deem sufficient.

By provision of the federal constitution (Art. I, § 6, ¶ 1) senators and representatives are privileged from arrest in all cases except for treason, felony, or breach of the peace during attendance at the sessions of their respective houses and in going to and returning from the same; and they are also exempt from being questioned for any speech or debate in either house, save under the authority of the house itself; and similar privileges are granted in state constitutions. The object of the privilege from arrest is to exempt members from being interfered with by judicial procedure while in the discharge of their duties. At other times and in other respects they are subject to the jurisdiction of the courts as fully as private per-

sons. Indeed, the exemption is of little practical value, as arrest or seizure of the person is no longer generally authorized except for crime, and all crimes of a serious nature are included within the description of treason, felony, and breach of the peace. (*Williamson* v. *United States.*)

34. Organization and Methods of Legislative Business.

By the federal constitution it is provided that Congress shall assemble at least once in every year, and, in the absence of statutory provision fixing a different time, the regular session shall commence on the first Monday in December (Art. I, § 4, ¶ 2). Each house determines the rules of its proceedings, and has authority to punish its members for disorderly behavior, and, by a two thirds vote, expel a member (Art. I, § 5, ¶ 2). It is also provided that each house shall keep a journal of its proceedings on which the yeas and nays on any question shall be entered at the desire of one-fifth of the members present (Art. I, § 5, ¶ 3).

Similar provisions are found in state constitutions; but it is not desirable to consider at length the methods of legislative procedure, nor the various questions of parliamentary law which may arise with reference thereto. These are matters to be determined by each legislative body for itself.

Each house of the legislature chooses its own officers, save that the vice-president of the United States is president of the senate (Art. I, § 3, ¶ 4), and the lieutenant-governor or other corresponding elective officer is president of the state senate.

35. Methods of Enacting Statutes.

It is usually provided in state constitutions, as it is in the federal constitution (Art. I, § 7, ¶ 2), that a bill proposed in either house, in order to become a law, must be passed by both houses and approved by the executive, or passed over his veto (see below, § 126), and the passage of a bill by either house requires the approval of a majority of the members thereof present when the action is taken, or under some

state constitutions the approval of a majority of the whole membership. Each house acts for itself, but it may act either on bills introduced in that house, which after passage are transmitted to the other house for its action, or on bills which have passed the other house and been transmitted to it for action. In the absence of some such provision as that found in the federal constitution (Art. I, § 7, ¶ 1), that all bills for raising revenue shall originate in the lower house, either house may take the initiative with reference to any kind of legislation, and a bill which has passed one house may be amended in any respect by the other. But it is only when the same identical bill has passed both houses without change that it can become a law. The enactment of a bill by the respective houses of a legislative body is finally evidenced by the signature of the presiding officer of each, and such signature is conclusive. It is not open for the courts in determining whether a statue has been lawfully enacted to go behind the signatures of the presiding officers and to investigate the question whether as a matter of fact it received in each house the necessary number of votes.

In the English Parliament, bills were originally proposed or submitted by or in behalf of the sovereign, but the present practice in Parliament, and in all legislative bodies in this country, is that bills are proposed or introduced by members as they see fit, and are acted on in accordance with the rules adopted by the respective houses to govern their procedure.

There is no specific provision in the federal constitution as to the time when a statute shall take effect; and an act of Congress is therefore deemed to be effectual and in force from the time of its approval by the president unless otherwise provided. This is also the rule under state constitutions containing no specific provision on the subject. But in some of the state constitutions it is provided that statutes shall go into effect either at the end of a specified period after approval, or at a fixed date subsequent to such approval, or on publication in a specified manner. The object of postponing the taking effect of the statute to a time later than that of its

enactment and approval is to enable those to be affected thereby to advise themselves as to the statute before being bound by its provisions.

36. Limitations as to Methods of Legislation.

With reference to the forms and methods of enacting statutes, there are special provisions in many of the state constitutions, such as, for instance, that no special laws shall be passed, except under circumstances rendering a general law inapplicable; no statute shall embrace more than one subject, which must be expressed in the title; each bill before it becomes a law must receive the approval of the two houses of the legislature and of the governor; and the like. But as provisions on these subjects are not uniform, and are not embodied in all state constitutions, it is impracticable to give them any extensive consideration.

The prohibition against special legislation when general laws can be made applicable is intended to prevent the granting of special privileges or the forwarding of individual interests. Where there is such a prohibition, the legislature cannot pass special statutes for the incorporation of cities, but must provide for such incorporation by general statutes which may be acted upon wherever applicable; and such a provision prevents the passage of statutes applicable to only a particular city and not available to other cities of substantially the same class, or under substantially the same conditions. The prohibition of special legislation also prevents the granting of special charters to private corporations, and makes it necessary for the legislature to provide for the formation and regulation of corporations in accordance with general laws on the subject. By such a provision the granting of divorces by the legislature in special cases is also prohibited. Indeed, the granting of a divorce is not properly a legislative, but rather a judicial function; but owing to the fact that before the separation of the colonies from Great Britain Parliament exercised the power of granting divorces, such power has been recognized in some of the states as belonging to the legislature. (See above, § 26.)

The provision against including more than one subject in a legislative enactment is intended to prevent the tacking to a statute of provisions relating to irrelevant matters, and thus carrying through the legislature measures which would not be adopted on their own merits. It is a common device, in the absence of such a prohibition, for some members of a legislative body to secure the incorporation into a statute of a provision relating to a different subject, the supporters of the particular measure refusing to vote for the principal measure unless such provision is incorporated, and thus securing the adoption of a provision which has not really the support of a majority of the members. It is not intended, however, by the prohibition against including more than one subject-matter to prevent the incorporation in the same statute of separate provisions germane to the same general purpose; and if there is substantial connection between the different parts of the statute, it will not be held invalid as in violation of such a prohibition, although very broad and general in its scope. Thus the legislature may in one statute embody all the provisions necessary to constitute a complete code of criminal law and procedure or a complete code governing the practice in the courts; or it may by a general statute provide for the organization and government of municipal or private corporations, or otherwise cover a whole branch of the law. The requirement that a statute shall not embrace any subject not embodied in or covered by the title of the act has a substantially similar purpose. The title of a statute is intended to be a brief statement of the subject-matter to which the statute relates; and if, by general terms, the scope of the statute is indicated in the title, that is sufficient.

CHAPTER VI.

EXECUTIVE DEPARTMENTS.

37. References.

Joseph Story, *Constitution*, §§ 1430–1449, 1477–1480; James Kent, *Commentaries on Am. Law*, ch. xiii; J. R. Tucker, *Constitution*, ch. xii; J. N. Pomeroy, *Constitutional Law*, 126–139; J. I. C. Hare, *Constitutional Law*, ch. xiv; James Bryce, *American Commonwealth*, I, ch. v; *The Federalist*, No. 68.

38. Organization of Executive Departments.

In apparent analogy to the theory of the British constitution as it existed at the time of the organization of the state and federal governments, by which the executive functions of government were supposed to be discharged by the king and his ministers and other officers appointed by him or under his authority, provision is made in our constitutional system for the choice of a chief executive and subordinate executive officers. As a matter of fact the practical exercise of executive power no longer rests in Great Britain with the king, but it is now in the cabinet or ministry composed of officers technically appointed by the king but in fact chosen from the two houses of Parliament, not in accordance with the king's own judgment or wishes, but in accordance with the will of the majority in Parliament, that is, for the purpose of securing the support of a majority for the measures which may be proposed or the action which may be taken by them as ministers.

In the United States the theory of an independent executive department is still practically as well as theoretically retained. In the states the chief executive and also the principal executive officers are selected by popular vote; under the provisions of the federal constitution the president and vice-president are

chosen indirectly by popular vote, while the chief executive officers, composing the president's cabinet, are appointed by the president, with the approval of the Senate (Art. II, § 2, ¶ 2). There is, however, no direct provision that the chief executive officers, who are provided for by law and designated as secretaries of different departments, shall act together as an advisory cabinet; but this seems to be contemplated in the provision that the president "may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices" (Art. II, § 2, ¶ 1). At any rate, it has become the practice for the president to present matters which concern the government as a whole, and not merely the administration of any particular department, to the cabinet sitting as a body; although action, when finally taken, is on the authority of the president, the opinion of the cabinet being merely advisory.

39. The State Executive.

The chief executive officer of a state, usually called the governor, is in all the states chosen by popular election. A lieutenant-governor is usually selected in the same manner. In some of the states the result of the election is determined by the legislature, to which the boards of canvassers in each county send the returns of the votes as to those offices in their respective counties. In other states special canvassing boards count and announce the vote. In most states a plurality of votes elects.

40. Election of President.

The plan provided in the federal constitution for the choice of the chief executive is complicated and in some ways unsatisfactory. The plan prescribed by the constitution is for each state to appoint, "in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress" (Art. II, § 1, ¶ 2). But in Amendment XII the details have been changed, and it is provided that the electors chosen in each state shall meet in

their respective states and ballot on the question of the election of a president and a vice-president; that a certified return of the ballots cast shall be transmitted to the seat of government, directed to the president of the Senate; that the president of the Senate, in the presence of the Senate and the House of Representatives, shall open the certificates "and the votes shall then be counted," and that the person having the greatest number of votes for president shall be the president, if he has received the votes of a majority of the whole number of electors chosen. If no person has received such majority, then, from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the House of Representatives shall immediately choose the president by ballot, voting, however, by states, the representation from each state having one vote, and to constitute a quorum for this purpose, two-thirds of the states must be represented, and a majority of the states shall be necessary to a choice. It is further provided that if the choice of president devolves upon the House of Representatives, and no choice is made before the fourth day of March following, then the vice-president elect shall act as president. The vice-president is chosen in substantially the same way, save that if no one person has received the votes of a majority of the presidential electors, then the choice shall be made by the Senate, from the two highest numbers on the list.

Congress is authorized to determine the time of choosing the presidential electors in the respective states and the day on which they shall give their votes, which day shall be the same throughout the United States (Art. II, § 1, ¶ 3), and by statute (1792) the Tuesday next after the first Monday in November was fixed by Congress as the day of popular voting. Another statute (1887) provides that the electors of each state shall meet and give their votes on the second Monday in January next following their appointment, at such place in each state as the legislature thereof shall direct.

The practical working of the plan is this: that the states provide for the choice of presidential electors by popular vote, rarely by districts, almost invariably by general ballot for the

whole electoral college throughout the state. As the choice of a president is a party matter, this method results, save in very exceptional cases, in the choice of all electors for the state nominated on the ticket of the party which secures the greatest number of votes; hence all the electors from a state will cast their votes for the person designated by the national convention of the party which secures the largest popular vote in that state. The electoral vote of a state is occasionally divided, however, when for some local reason one or more of the candidates for the office of presidential elector nominated by the dominant party have been defeated, although their associates on the same ticket have been elected.

The evident intention in the framing of the constitutional provisions was to secure a body of presidential electors who should exercise a discretion in the choice of a suitable person for president; but as a matter of fact no such discretion has been exercised since 1792. There might be contingencies, however, under which the electors would vote for a different person than the candidate on the ticket of their party, either by failing to carry out the implied obligation to express the preference of the voters, or, as happened in 1872, if the party candidate should die before the time when the boards of electors are required to cast their ballots. But even if no such contingency occurs, the result will not necessarily be the same as though the voters in each state cast their ballots directly for president; and it has several times happened that the candidate for president receiving a majority of the electoral votes was not the candidate who would have been chosen had the election been by national popular vote.

In the election of 1877, when Mr. Hayes as the candidate of the Republican party and Mr. Tilden as the candidate of the Democratic party had received the votes of the electors chosen by the respective parties, a question was raised as to the legality of the returns from certain of the states, and the result depended upon whether certain returns should be recognized as lawful. On this occasion a compromise measure was passed by the two houses in accordance with which an extra-

constitutional electoral commission was created to determine what returns should be counted; and as a result Mr. Hayes was declared the president. Provision has since been made by statute (1887) for another method of counting the electoral vote. Whatever difficulties may arise on the subject must be settled by the two houses of Congress, in whose presence the president of the Senate is directed to count the returns. No question relating to the result of the election can be raised in the courts.

41. Term and Qualifications of President; Vacancy in Office.

The president and vice-president hold office during the term of four years, and it is required that the president be a natural-born citizen who shall have attained the age of thirty-five years and been fourteen years a resident within the United States (Art. II, § 1, ¶ 4).

In case of vacancy in the office of president on account of removal from office or of death, resignation, or inability to discharge its powers and duties, such powers and duties devolve on the vice-president, and Congress is authorized to provide by law for the case of removal, death, resignation, or inability of both the president and vice-president (Art. II, § 1, ¶ 5). Congress has made such provision by a statute (1886) declaring that in such case the secretary of state, the secretary of the treasury, the secretary of war, the attorney-general, the postmaster-general, the secretary of the navy, and the secretary of the interior, shall, in the order named, act as president (each only in the event of the removal, death, resignation, or inability or ineligibility of those preceding him in the list) until the disability of the president or vice-president is removed or a president shall be elected, and that when the powers and duties of the president shall devolve upon any of the persons named, he shall convene Congress in extraordinary session, if it be not then in session.

CHAPTER VII.

JUDICIAL DEPARTMENTS.

42. References.

Joseph Story, *Constitution*, §§ 1599–1636; J. R. Tucker, *Constitution*, ch. xiii; James Kent, *Commentaries on Am. Law*, Lect. xiv; *The Federalist*, No. 78; James Bryce, *American Commonwealth*, I, chs. xxii, xlii; J. W. Burgess, *Political Science and Constitutional Law*, II, 322–325; A. B. Hart, *Actual Government* (Amer. Citizen Series), ch. xvii.

43. Selection of Judges.

The powers of the judicial departments of the state and federal governments are exercised by courts provided for in their respective constitutions or created by the legislative departments for the purpose of exercising such judicial powers. The general functions of courts and the apportionment of powers among them will be considered later. In describing the organization of such departments for present purposes, it is sufficient to say that courts are presided over by judges; and that these judges are selected by election or appointment, as may be provided in the state or federal constitution, respectively. In England the judges are appointed by or under the authority of the king, and the term of office is unlimited. In some of the older states the judges are appointed by the executive, in others they are elected by the state legislatures. In much the larger number of states, however, judges, like legislative or executive officers, are chosen by a popular election for fixed terms. But the desirability of securing the complete independence of the judiciary and removing the judges from all party influence was a sufficient argument with the framers of the federal constitution to induce them to provide that the judges of the federal courts shall hold office dur-

ing good behavior and receive a compensation which shall not be diminished during their continuance in office (Art. III, § 1). This means that they are appointed for life and can be removed only by impeachment. Their appointment is by the president, by and with the advice and consent of the Senate (Art. II, § 2, ¶ 2).

Even in the states in which the judges are elected there has been a tendency to secure independence of party influences by providing for long terms, or for choice at an election distinct from that at which other state and federal officers are elected, or by continuing the incumbents in office by repeated re-elections.

Part III.

Legislation.

CHAPTER VIII.

STATE LEGISLATION.

44. References.

Joseph Story, *Commentaries on the Constitution*, §§ 531–544; J. W. Burgess, *Political Science and Constitutional Law*, II, 41–185; James Bryce, *American Commonwealth*, I, ch. xl; A. B. Hart, *Actual Government* (Amer. Citizen Series), ch. vii.

45. Nature of Legislative Power.

Bearing in mind the difference between the powers of a state government which are general in their scope, and those of the federal government, which has only the enumerated powers conferred upon it by the federal constitution and those which are implied therefrom (see above, § 17) it is apparent that the general powers of legislation are vested in the legislatures of the states, while Congress has legislative authority only as to limited classes of subjects. It will be useful, therefore, to consider first the scope of state legislation. But it is not easy to be exhaustive in this respect, for the original state constitutions and some of a later period contain very few specifications as to the matters about which laws may be enacted.

The difficulties which bring before courts questions in regard to state legislation concern limitations on, rather than the extent of, the powers of the state governments. The general

object of legislation is to provide for the public good and the health, good order, education, and morals of the people; and any statutes in furtherance of these purposes, and not in violation of limitations upon powers of the state government or its legislative department, will in general be valid. In determining the extent of legislative power we may properly have in mind the history of constitutional government in Great Britain and the United States, and especially the fact that in Great Britain Parliament is the legislative power, and we may safely say that those subjects with reference to which in the course of English history Parliament has been in the habit of dealing by way of legislation are within the scope of legislative power under our form of government, unless some constitutional restriction has been imposed. Out of this mass of potential powers, seldom enumerated in state constitutions, three classes of subjects for legislative power may be distinguished.

(1) All legislation relating to the carrying on of the operations of government, not only legislative, but also executive and judicial; for the general laws in accordance with which the functions of the judicial and executive departments are to be discharged must be provided by the legislative power. Thus legislation will provide for the election and appointment of judicial officers and apportion their duties to them, so far as their selection and duties are not directly controlled by the constitution. As to this kind of legislation, very little need be said by way of explanation or illustration, for the whole matter is left largely to the discretion of the legislatures.

(2) Legislation relating to the providing and expenditure of the revenues essential to the carrying on of the operations of the government; and this may be described in a general way as an exercise of the taxing power.

(3) Legislation relating to the control of the personal and property rights of those who are subject to the government, with a view to securing and promoting their general welfare; for this is the main object of government. Such legislation is an exercise of the so-called police power, which will be more fully explained in the next chapter.

46. General Considerations as to Limitations on Legislation.

Before proceeding with a further discussion of state legislation, it will be convenient to explain the nature of the limitations on that power; for it may be stated as a general proposition that the power of state legislation in the making of laws is controlled only by its own discretion, unless it oversteps the limitations on its power imposed by the state or federal constitutions.

(1) The first limitation is one already suggested, that the power which the legislature attempts to exercise must be legislative in its nature, for it is only legislative power that the state constitution confers upon the legislative department, and it cannot interfere with the other departments in the discharge of their functions. Such limitations, so far as they restrain the legislative department with reference to the executive and judicial departments, have already been sufficiently considered. (See ch. iv.)

(2) It must also be noticed that the legislative department in the enactment of laws must comply with the forms of procedure pointed out by the constitution, for only as authorized by the constitution can a legislature exercise its functions. Something has already been said in preceding chapters as to the constitution and organization of the legislative departments and the methods of exercising their powers so far as they are specified in the state and federal constitutions.

(3) The state legislature is also limited in its powers by the fact that it is subordinate to the federal government as to all matters which by the federal constitution are placed within the control of that government (see ch. iii), and therefore state legislation as to subjects over which the federal government has exclusive supervision will be invalid; and even as to subjects which are within the scope of federal regulation, although the powers of the federal government are not exclusive, state legislation must yield to such federal regulations as have properly been adopted with reference to such subjects.

(4) The state legislature is restricted by the direct limitations upon its power found in either the state or federal constitution. The more general and important of these are that no person shall be deprived of his life, liberty, or property without due process of law; that no person shall be denied the equal protection of the laws; that the obligation of contracts shall not be impaired; that private property shall not be taken for public use without compensation; and that no bills of attainder or *ex post facto* laws shall be enacted. These express limitations will be considered in subsequent chapters. The discussion of these limitations constitutes the principal part of constitutional law as administered by the courts.

(5) A legislature cannot bind or restrict the powers of subsequent legislatures, except in so far as it may and does create contractual obligations as against the State. (See below, § 268.)

CHAPTER IX.

THE POLICE POWER.

47. References.

T. M. Cooley, *Constitutional Limitations*, ch. xvi; T. M. Cooley, *Constitutional Law*, ch. xiii, § 4; H. C. Black, *Constitutional Law*, ch. xiv; J. R. Tucker, *Constitution*, ch. xiv; E. Freund, *The Police Power;* C. G. Tiedeman, *Limitations of Police Power;* W. P. Prentice, *Police Powers; Munn* v. *Illinois* (1876, 94 U. S. 113; Thayer's Cases, 743; McClain's Cases, 946); *Mugler* v. *Kansas* (1887, 123 U. S. 623; Thayer's Cases, 782; McClain's Cases, 938); *Wynehamer* v. *People* (1856, 13 N. Y. 378; Thayer's Cases, 715); *Barbier* v. *Connelly* (1885, 113 U. S. 27; McClain's Cases, 925; Thayer's Cases, 623); *Holden* v. *Hardie* (1898, 169 U. S. 366; McClain's Cases, 929); *Dent* v. *West Virginia* (1889, 129 U. S. 114; McClain's Cases, 934); *Slaughter-House Cases* (1872, 16 Wallace, 36; McClain's Cases, 18; Thayer's Cases, 516); *Civil Rights Cases* (1883, 109 U. S. 3; McClain's Cases, 37; Thayer's Cases, 554); *Lottery Case* (1903, 188 U. S. 321; McClain's Cases, 2d ed. 1071).

48. General Scope of Police Power.

The term "police power" is used to designate that most important function of securing the largest practicable measure of wellbeing to those who live together in the social organization. This is indeed the ultimate object of government. No very specific or complete definition or description of this power can be framed, nor has it been often attempted. Perhaps an enumeration of some of the most important subjects which indisputably fall within it will give a better idea of its scope and nature than any technical definition.

(1) The legislature may provide for the acquisition, use, and control of property for the public benefit, such as for public buildings, charitable and educational purposes, highways, parks, and public grounds. Such property is acquired by the exercise of the power of eminent domain; but legislation in reference to the exercise of that power, and in refer-

ence to control and enjoyment by the public, is within the scope of the police power. There are also public rights in navigable streams and inland lakes and the seas, bays, and other waters, so far as they are within the jurisdiction of the state, which the state may properly regulate. It may also make regulations for the preservation of fish and game on the theory that they are a species of public property in which the people of the state have a common interest.

(2) Legislation as to the public school system and institutions of higher education, at least so far as they are provided at the public expense, is within the scope of the police power.

(3) Some kinds of property and some callings are so far of a public nature that the state may regulate them to a greater extent than it may regulate property and callings not public in their nature; and such regulations are made in the exercise of the police power. For instance, the legislature may regulate the rates to be charged by railroads and express companies and by those operating public elevators or warehouses, and may control the business of hotel keepers and others furnishing places of public entertainment. The exercise of the police power in the regulation of rates of charge for public services is in recent years very largely extended. Corporations such as gas and electric light, water, street car and other companies to which are given the privilege of using the streets of a city for the advantage of the public may be controlled as to their rates and charges, even though no such reservation has been expressly made by constitutional or statutory provision. The charters of such companies, although they are regarded as contracts, do not exempt them from such regulation. (See below, § 269.)

(4) In the furtherance of the public welfare the legislature may control the use of property which is strictly private in its nature, and the business and conduct of individuals, on the general principle that each individual may be restricted in his own actions and in his own property so as not to interfere with the enjoyment of like privileges of others. Thus the

owner of property may be prevented from using it for purposes obnoxious to his neighbors, that is, he may be prevented from maintaining a nuisance; the heights of buildings in cities may be restricted; fire limits in cities may be fixed, within which buildings of wood or other inflammable material may not be constructed; the storage and sale of explosives or extremely inflammable materials may be regulated; to some extent limitations may be placed on hours of labor, especially for the preservation of the health of those engaged, or for the protection of the weak, as women and children (and see below, § 261); the sale of intoxicating liquors and drugs may be regulated and controlled; a large measure of power may be exercised with reference to the protection of public health; immorality may be suppressed; business, such as the carrying on of lotteries, which is deemed contrary to public policy, may be forbidden; the rates of interest on loans of money may be limited.

(5) Finally, without continuing further the enumeration, which might be extended to cover a long list of subjects, the destruction of property by reason of some controlling public necessity may be authorized.

49. Police Power Primarily in States.

The police power lies within that great body of powers reserved to the states, and not conferred upon the federal government. In the very nature of things this ought to be so. If state governments were to be continued for any purpose as independent repositories of the powers which the people confer upon governments, then it was natural that in the formation of our constitutional system the protection of property and personal rights, the preservation of the public health and the promotion of the general welfare would be left to the state governments. Thus it was held in *The Civil Rights Cases* that even under the Fourteenth Amendment of the federal constitution prohibiting the states from making or enforcing any law "which shall abridge the privileges or immunities of citizens of the United States," and authorizing Congress to enforce this amendment by appropriate legislation, Congress could

not enact a civil rights act, the object of which was to protect colored persons in the equal enjoyment with white persons of the privileges of hotels, passenger trains, theatres, barber shops, and other places of public enjoyment, entertainment, or amusement, on the ground that federal legislation "cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all privileges between man and man in society. It would be to make Congress take the place of state legislatures and to supersede them."

States in exercising this police power must keep within the limitations of federal and state constitutions, but their authority to exercise it is not conferred by the federal constitution, nor taken away by it. Such statutory provisions as were embodied in the civil rights acts may well be enacted by the states in the exercise of the police power; but they are not within the exercise of any of the enumerated powers given to Congress by the federal constitution. It may be true that the impelling motive for the adoption of the Fourteenth Amendment was the protection of the rights of the colored people recently emancipated from slavery; but the protection guaranteed was against discrimination by the states themselves and not infringement of their rights as citizens by their fellow-citizens; and it is well settled now that whatever may have been the motive for the adoption of that amendment, its provisions are general in their character and extend to all persons alike. (See, §§ 21, 259.)

Some classes of legislation enacted by Congress may be prompted by a desire to promote the general welfare of the people, as, for instance, the general protective tariff system and the legislation in reference to internal improvements; but such legislation rests for its constitutionality on powers implied from those conferred upon Congress by the federal constitution. The protective tariff laws are measures properly enacted under the express power to raise revenue and to regulate foreign commerce; and appropriations for internal im-

provements are justified as a legitimate exercise of powers given to Congress with reference to commerce, post offices and post roads, and like subjects. Thus obscene publications, lottery advertisements, and like objectionable matter are excluded from the mails (see below, § 104); and under the power to regulate interstate and foreign commerce the transportation of lottery tickets as articles of such commerce is prohibited. (*Lottery Case.*) But the federal constitution nowhere gives to Congress a general power to provide for the public welfare. The phrase "for the common defence and general welfare of the United States" appears in the clause relating to the power of Congress to lay and collect taxes, duties, and imposts (Art. I, § 8, ¶ 1), and is merely a specification of purposes — possibly a limitation on the purposes — for which money may thus be raised, not a grant of legislative power in reference to the protection of private rights. The citizens of a state, although they are also citizens of the United States, are to look to the laws and authority of their own state to determine and protect their rights with reference to each other and each other's property, and the federal authority interferes only so far as the federal constitution itself may authorize.

CHAPTER X.

PUNISHMENT OF CRIME.

50. References.

IN GENERAL: E. McClain, *Criminal Law*, ch. iii; J. P. Bishop, *Criminal Law*, chs. ix, xii; J. I. C. Hare, *Constitutional Law*, Lects. lii, liii; J. N. Pomeroy, *Constitutional Law*, §§ 415–440.

TREASON: J. Story, *Constitution*, §§ 1295–1301, 1796–1803; E. McClain, *Criminal Law*, ch. lxxv; J. P. Bishop, *Criminal Law*, I, §§ 611–613, II, §§ 1202–1255; J. R. Tucker, *Constitution*, §§ 303–305; F. Lieber, *Civil Liberty and Self-Government*, ch. viii; A. B. Hart, *Actual Government* (Amer. Citizen Series), § 251; T. M. Cooley, *Constitutional Law*, ch. iv, § 14, ch. xv, § 2; H. C. Black, *Constitutional Law*, §§ 265–267; *United States* v. *Greathouse* (U. S. Circuit Court, 1863, 4 Sawyer, 457; McClain's Cases, 541).

COUNTERFEITING: E. McClain, *Criminal Law*, §§ 774–776; J. P. Bishop, *Criminal Law*, I, § 988, II, §§ 274–300; T. M. Cooley, *Constitutional Law*, ch. iv, § 8; H. C. Black, *Constitutional Law*, 212; *United States* v. *Marigold* (1849, 9 Howard, 560; 18 Curtis' Decisions, 261; McClain's Cases, 474).

CRIMES ON HIGH SEAS: J. Story, *Constitution*, §§ 1157–1167; E. McClain, *Criminal Law*, ch. lxxvi; J. P. Bishop, *Criminal Law*, II, §§ 1057–1063; T. M. Cooley, *Constitutional Law*, ch. iv, § 11; H. C. Black, *Constitutional Law*, 218; *United States* v. *Smith* (1820, 5 Wheaton, 153; 4 Curtis' Decisions, 597; McClain's Cases, 501); *United States* v. *Rodgers* (1893, 150 U. S. 249; McClain's Cases, 504).

CRIMES WITHIN THE TERRITORIES: *Reynolds* v. *United States* (1878, 98 U. S. 145).

IMPLIED POWER OF FEDERAL GOVERNMENT: E. McClain, *Criminal Law*, ch. lxvii; *Logan* v. *United States* (1892, 144 U. S. 263; McClain's Cases, 557; Thayer's Cases, 343); *Chinese Exclusion Case* (1889, 130 U. S. 581; McClain's Cases, 562).

EX POST FACTO LAWS: J. Story, *Constitution*, §§ 1345, 1373; T. M. Cooley, *Constitutional Limitations*, ** 264–273; E. McClain, *Criminal Law*, §§ 78, 79; J. N. Pomeroy, *Constitutional Law*, §§ 512, 535; J. R. Tucker, *Constitution*, §§ 320, 321; T. M. Cooley, *Constitutional Law*, ch. xv, § 1; H. C. Black, *Constitutional Law*, §§ 262, 263; *Calder* v. *Bull* (1798, 3 Dallas, 386; Thayer's Cases, 1435; McClain's Cases, 980); *Cummings* v. *Missouri* (1866, 4 Wallace, 277; Thayer's Cases, 1436); *Kring* v. *Missouri* (1882, 107 U. S. 221; Thayer's Cases, 1458; McClain's Cases, 983).

51. State Power as to Crimes in General.

The authority to declare what acts shall constitute crimes, and to provide for the trial and punishment thereof, is a branch of the general police power primarily belonging to the states. (See above, § 49.) No matter how serious the offence may be, if it is only an offence against the general security of person or property which the law seeks to afford, or against the general public peace and welfare, it is within the jurisdiction of the state; and the proceedings and punishment with reference thereto will be controlled by the laws of the state, subject only to the specific limitations on state power found in the federal constitution, such as that no state shall pass any bill of attainder or *ex post facto* law (Art. I, § 10; see below, § 59), nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws (Amend. XIV). Any state legislation as to crime is, of course, subject to the limitations of the state constitution, among which are usually found provisions as to *ex post facto* laws, due process of law, trial for the graver crimes only on indictment, the right of trial by jury, and other like guaranties. (See ch. xlii.) It is sufficient for the present to say that the general criminal jurisdiction is with the state government, and only those acts affecting the safety of the federal government or interfering with its exercise of the powers granted to it, can be made crimes under federal law.

52. Federal Jurisdiction as to Crimes.

Congress has authority to provide for the punishment of four classes of crimes: (1) those specified in the federal constitution or which Congress is therein given express power to punish; (2) those committed within territory which is permanently subject to the exclusive jurisdiction of the United States, such as the District of Columbia, and forts, arsenals, navy yards, and public buildings, the sites of which have been ceded for public purposes by the state to the federal govern-

ment; (3) those committed within territory subject to the jurisdiction of the United States, but not included within the limits of states admitted to the Union; (4) offences the punishment of which is provided for by Congress under implied power to carry out the express provisions of the constitution. Bearing in mind that the federal government is a government of delegated and not of general powers (see above, § 17), it is evident that any criminal legislation of Congress must be sustained under some one of these four heads; and that outside of these classes of cases, Congress has no authority to provide for the punishment of acts as crimes against the laws of the United States; and, of course, it has no authority to provide for the punishment of crimes against the laws of the states, for that is exclusively within the scope of state power.

53. The Crime of Treason.

Congress is expressly given power to declare the punishment of treason against the United States (Art. III, § 3), and in the same section of the constitution the crime of treason against the United States is expressly defined by the declaration that it "shall consist only in levying war against them [the United States], or in adhering to their enemies giving them aid and comfort." It is not usual expressly to define specific crimes by constitutional provisions, but historically there is a good reason for giving in state and in federal constitutions an explicit definition of this crime, so that the legislative power cannot, by statute, define treason so as to include any other acts than those enumerated. By the old English law, the crime of treason was divided into (1) petit treason, a crime against a superior, and (2) high treason directed against the sovereign or the government, and it is the latter offence which is referred to when the term "treason" is used in the constitution or statutes of the United States or the states.

By the early law of England, many acts were deemed high treason which were only constructively or inferentially offences against the sovereign or government, and the courts, by arbitrary construction, punished persons for treason who had not

attempted any act directed against the sovereign or calculated to overthrow the government. Criticism of the sovereign or the government tending to lessen the public respect for either might be thus punished; and prosecutions for treason were resorted to for the purpose of intimidating or overthrowing those who were hostile to the ruler, although such hostility was not manifested by any act of violence. As early as the year 1350, English statutes were passed to remedy this abuse by specifically defining what should constitute high treason, and such statutory provisions have been in force in England to the present time. It is natural, therefore, that these provisions intended as a guaranty of the security of the subjects of England against the exercise of tyrannical power on the part of the government through the courts, should be embodied in substance in the state and federal constitutions; and the definition incorporated into the federal constitution is a portion of the definition found in the early English statutes. Under such constitutional provisions neither Congress nor a state legislature can make a definition for the crime of treason so as to include any acts not included in the terms of the federal or state constitution.

The levying of war, under the definition of treason against the United States, implies an assembling of persons with force and arms to overthrow the government or resist the laws. All who aid in the furtherance of the common object of levying war in however minute a degree or however remote they may be from the scene of action are guilty of treason. The enemies of the United States, within the language of the definition relating to lending aid and comfort to such enemies, must be those who are engaged in carrying on hostilities against the government. A mere conspiracy or intent to overthrow the government or to interfere with its operations, or an interference with the officers or agents of the government in the discharge of their duties, but not in pursuance of any general plan to resist the enforcement of the laws, will not constitute treason, although such an act may be punishable as constituting a crime of some other description.

During the war of the rebellion, it was held that the confederate government was for the time being a government waging war against the United States in such sense that participation in such war in hostility to the United States, or the act of adhering to such hostile government, rendering aid and comfort to it or its forces in the war, constituted treason against the United States (*United States* v. *Greathouse*). It is to be noticed, however, that acts of hostility on the part of the subject of a foreign government owing no allegiance to the United States by reason of citizenship or permanent or temporary residence within its limits cannot constitute treason. Such persons would not be subject to the laws of the United States. The citizens of the confederate states who engaged in rebellion against the federal government were guilty of treason, because while citizens and subjects of the United States they levied war against the United States.

Although the various states of the Union are not in every sense sovereign powers, nevertheless it seems to be conceded that treason may be committed as against a state and punished by the state as a crime. As a matter of fact, during the entire existence of the United States as a nation there have been very few prosecutions for treason either against the federal government or against a state.

54. The Crime of Counterfeiting.

Congress may provide "for the punishment of counterfeiting the securities and current coin of the United States" (Const. Art. I, § 8, ¶ 6). Such an act is not only injurious to the public in impairing the general security of the currency and to the individuals who are actually defrauded, but it also affects directly the government issuing and authorizing the circulation of the currency, counterfeits of which are made or put into circulation; and it was therefore regarded as important that the power to punish such a crime should be given to the federal government (*United States* v. *Marigold*). So far as the act of counterfeiting affects the general public welfare or may result in defrauding individuals, its punishment is also

within the scope of state power, so that the same act of counterfeiting or of circulating counterfeit money, knowing it to be counterfeit, may constitute an offence under the state law as well as under the federal law; and punishment under the one will not preclude a second punishment under the other. Congress has also provided (1877) for the punishment of those who counterfeit foreign coin or put such counterfeit coin into circulation; this, however, is not under the express constitutional power to punish counterfeiting, but rather under the power to coin money and the corresponding and necessary implied power to protect and to preserve the soundness and the security of the currency of the country. Likewise the counterfeiting of national bank notes may be punished by the United States as incident to the implied power to authorize the issuance of such notes.

55. Piracies; Crimes on the High Seas; Offences against the Law of Nations.

The specific power given to Congress "To define and punish piracies and felonies committed on the high seas, and offences against the law of nations" (Const. Art. I, § 8, ¶ 10) brings within the scope of federal legislation acts directly affecting the relations of this and foreign governments. The high seas furnish the channels of intercourse with foreign nations, and although they are outside of the jurisdiction of any of the states they are still within the jurisdiction of the United States to this extent, that vessels registered under the laws of the United States, while on the seas, are regarded as parts of the territory of the United States; and criminal acts committed on such vessels are deemed to have been committed within the jurisdiction of the United States. A robbery or forcible depredation on the high seas without lawful authority constitutes piracy (*United States* v. *Smith*), and the offender is subject to punishment, if brought into the United States, as for a crime against the United States, although he may not have been at the time of the commission of the crime a subject of the United States. Pirates are treated as the enemies of all nations,

and they are subject to punishment in any jurisdiction into which they may be brought.

Felonies, that is, crimes of a grave nature, committed by persons who are on vessels authorized to sail under the United States flag, are punishable by the laws of the United States, on the theory that the crime is committed within its jurisdiction. Under their admiralty and maritime jurisdiction, the courts of the United States may punish other crimes as defined by Congress, committed on United States vessels; so that it may be said in general that it is within the power of Congress to provide for the punishment of crimes committed on the high seas or on the navigable waters of the United States without regard to whether they are felonies or crimes of lesser degree (*United States* v. *Rodgers*).

56. Crimes in Places within Exclusive Federal Jurisdiction.

As Congress is given exclusive power of legislation over the District of Columbia and "places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings (Const. Art. I, § 8, ¶ 17), it may provide for the punishment of all crimes committed within such district or within such places, as fully as a state may provide for the punishment of crimes within its own limits. Congress has therefore adopted a general criminal code for the definition and punishment of offences within such district and places. Even though the states may retain the right to issue criminal process into such places they have no authority to punish crimes committed there, for the jurisdiction of the United States is exclusive. (See below, § 107.)

57. Crimes within the Territories.

So far as territory which is not incorporated into or admitted as a state is concerned, Congress has power to provide for the punishment of crime under the constitutional authority to make "needful rules and regulations respecting the territory and other property belonging to the United States" (Art. IV,

§ 3, ¶ 2). So far as portions of such territory are organized under a territorial government, the power to define and punish crimes is usually conferred by Congress on such territorial government; but Congress may still by general legislation make acts within the territories punishable as crimes against the United States. Thus Congress has enacted statutory provisions for the punishment of polygamy within the territories (1862, 1882), although it has no power to provide for the punishment of such a crime if committed within the limits of the states, for such matters are subject to state regulation and control under the general police power (*Reynolds* v. *United States*).

58. Implied Power to Define and Punish Crimes.

As an incident to the exercise of any of the powers expressly given to the federal government, Congress may provide for the punishment as crimes of acts calculated to interfere with such exercise of its powers. Thus under the power to establish post offices and post roads, Congress has provided for the punishment of a variety of acts calculated to interfere with the safety or efficiency of the postal service; and under the power to lay and collect taxes, it has provided for the punishment of various acts of fraud or evasion with reference to the payment of import or excise duties. The scope of the federal power to punish crimes against the operations of the government is therefore very extensive, and a general enumeration of the classes of offences defined by Congress in the exercise of its implied powers would be impracticable.

59. Ex Post Facto Laws; Bills of Attainder.

By the federal constitution Congress is expressly prohibited from passing any bill of attainder or *ex post facto* law (Art. I, § 9, ¶ 3) and the same prohibition is imposed on the states (Art. I, § 10, ¶ 1). A bill of attainder is a statute imposing criminal punishment without judicial trial for an act already committed without regard to whether it was by law criminal when done. The Parliament of Great Britain assumed the authority to pass such acts and to inflict the

punishment thus imposed. In England the term bill of attainder was limited to statutes inflicting the death penalty and confiscation of property for acts already done, while similar statutes imposing a less degree of punishment were called bills of pains and penalties. But the general term bills of attainder is understood in this country as meaning a statutory imposition of criminal punishment for an act already committed and without any previous trial according to due process of law. It is plain that any such statute would be contrary to the fundamental conception of due process of law, which in criminal cases necessarily involves a judicial trial before imposition of punishment.

In a general sense the term *ex post facto* law might be applied to any law retrospective in its operations, but as used in the federal and state constitutions it is interpreted as applicable only to retrospective statutes providing for the punishment of crimes (*Calder* v. *Bull*). Other retrospective statutes may be valid unless they impair the obligation of contracts or deprive persons of property rights, as will be explained in a later chapter. (See below, § 272.)

An *ex post facto* law, then, within the meaning of the constitutional prohibitions, is a law which makes acts criminal which were not criminal when committed, or provides a more severe punishment for criminal acts already committed, or changes the rules of procedure so as to make it more difficult for the person accused of a crime already committed to defend in a prosecution for such crime (*Kring* v. *Missouri*, and *Cummings* v. *Missouri*). No matter how reprehensible or immoral an act may be when committed, if at that time it is not criminally punishable under the law then existing it cannot subsequently be made punishable by statute; and no matter how inadequate the punishment provided for an act already committed, the punishment cannot as to that particular act be made made more severe by statute; and no matter how technical or unreasonable the rules of evidence or the rules of procedure may be, by which one who has committed a crime may be enabled to escape punishment, such defects

in the law cannot as to that particular criminal act be remedied by subsequent legislation. The whole theory of the criminal law is that no one shall be punished thereunder unless in a clear case and in strict compliance with the existing law; and on the whole such a policy is deemed to be promotive of the general public welfare, although in particular cases it may facilitate the escape from punishment of persons who plainly ought to be punished.

CHAPTER XI.

PUBLIC PROPERTY; THE EMINENT DOMAIN.

60. References.

T. M. Cooley, *Constitutional Limitations*, ch. xv; T. M. Cooley, *Constitutional Law*, ch. xvi, § 3; H. C. Black, *Constitutional Law*, ch. xvi; J. I. C. Hare, *Constitutional Law*, chs. xviii, xix, xx; J. Lewis, *Eminent Domain* (1900); H. E. Mills, *Eminent Domain* (2d ed., 1888); A. B. Hart, *Actual Government* (Amer. Citizen Series), ch. xviii; J. B. Thayer, *Cases on Constitutional Law*, 945–955; *Kohl* v. *United States* (1875, 91 U. S. 367; McClain's Cases, 1061; Thayer's Cases, 956); *United States* v. *Gettysburg Electric Railway Co.* (1896, 160 U. S. 668; McClain's Cases, 1065); *Bauman* v. *Ross* (1897, 167 U. S. 548; McClain's Cases, 1059); *Pumpelly* v. *Green Bay Co.* (1871, 13 Wallace, 166; McClain's Cases, 1050; Thayer's Cases, 1060); *Pierce* v. *Drew* (1883, 136 Mass. 75; McClain's Cases, 1055; Thayer's Cases, 1133); *Central Bridge Corporation* v. *City of Lowell* (Mass. 1855, 4 Gray, 474; McClain's Cases, 1052); *Story* v. *New York Elevated Railroad Co.* (1882, 90 N. Y. 122; Thayer's Cases, 1095).

61. Rights of the Government to Acquire and Own Property.

A state government or the federal government may, for a variety of purposes, be the owner of property. Although neither has all the attributes of complete sovereignty, yet each is a public corporation, and, as such, recognized in law as capable of acquiring, possessing, and disposing of property as an individual. (1) It may hold such property as a public asset, the proceeds of which, like public moneys realized from any other source, are to be used for the public welfare, but as to which the government is not charged with any specific duty. Thus the federal government owns the public lands, to be disposed of by direct appropriation, or to be sold and the proceeds turned into the public treasury as the government may see fit; but appropriation of public lands has been made to various states to be held and disposed of by the states in aid of education, or of the construction of public works, or for like

purposes. (2) A sovereign government may also, and necessarily must, in carrying out its functions, own property for public use. Thus a state government will own a capitol building, and various other buildings for asylums, penitentiaries, and the like purposes; while a municipal corporation, which is in reality a branch or division of the state government, may own a city hall, or school buildings, or municipal works operated for the public benefit, such as waterworks, lighting plants, street railways, and the like. And the federal government owns public buildings in the city of Washington, federal buildings in various cities, forts, arsenals, and navy-yards, military supplies of various kinds, and a variety of other property which enables the government to carry on its functions. (3) Property may be charged with a public use, the title being in the federal or state government, while the benefit inures directly to the people. For example, the public may have or acquire the right to use land for streets or highways, parks, landing places for vessels and similar purposes, and the title to the property thus acquired, or the easement in it in behalf of the public, may be said to be in the government, although the use is not necessary in the discharge of any of its essential functions.

A manifest distinction must not be overlooked, between the property which is subject to the exercise of the sovereign power of the government, that is, as it may be said, within the jurisdiction of the government, and the property which belongs to the government. All private property within the territorial limits, over which the government exercises sovereignty, is within the jurisdiction of the government; but property belonging to the government is, to that extent, excluded from private ownership. Thus when the United States, by treaty with Spain, acquired Porto Rico and the Philippines, the primary result was to give the government of the United States jurisdiction over that territory, as it had already jurisdiction within the former limits of the United States, but the private ownership of property within the acquired territory was not thereby affected. Lands which were already subject to private owner-

ship remained subject to such ownership and did not become the public property of the United States. But the public property of Spain within the limits covered by the treaty became the public property of the United States; and land within those limits, not belonging to any person, became a part of the public domain of the United States. Public buildings, forts, public records, and other property already devoted to use in discharging the functions of government became public property of the United States for like purposes, and the property devoted to the general uses of the people, such as public grounds, highways, and streets, passed to the United States to be held in trust for the people.

The nature of state ownership of property and the power which states may exercise with reference to such property is not within the scope of constitutional law. The right to own and control public property is incident to the existence of government and is implied in the creation of the federal and state governments. No special provisions authorizing such ownership and control are found in the state constitutions nor in the federal constitution. It is only with reference to the acquisition of private property for public use that any specific provision is made; and even without such provision the power of the government to acquire property by purchase for public purposes is assumed and often exercised.

Under a fictitious theory of the English law that all title to real property was originally derived from the crown — but in reality as the result of a wise public policy in accordance with which there must be some ownership of all real property — land is said to escheat to the state when the owner dies intestate and no one is found entitled to take it by descent. In like manner some kinds of personal property, such as abandoned vessels and stray cattle, are taken possession of by the public authorities; or the proceeds of such property is required to be paid into the public treasury, subject to be reclaimed within a limited time by the owner, and in the absence of such claim on the part of the owner becomes the property of the state or some division thereof.

62. The Power of Eminent Domain.

A necessary incident to the power of government is the right, in the interest of the public, to control private property, even without the consent of the owner; and this is exercised within the scope of the police power, so that the public health, morals, and welfare will be protected. And as will appear in the discussion of taxation, the owner of private property may be compelled to contribute a portion of it for public purposes. (See below, § 70.) Furthermore, the public welfare or public necessity may even require the destruction of private property. Thus it appears that the owner of property exercises the privileges of ownership and possession subject to the paramount sovereign power of the state.

The owner of private property holds it also subject to a paramount right in the government to appropriate it to public uses without his consent. In this respect the individual interest should not be allowed to stand as against the sovereign will, exercised for a proper purpose. This paramount right of the government, whether federal or state, to appropriate private property to public use is called the power of eminent domain, which is not to be explained as resulting from any paramount title or reserved estate; nor as involving the theory that all property rights are derived from the government, subject to some restriction or condition that the government may retake the property for public purposes; but rather on the theory that the public interest is greater than any private interest, and that personal rights must be subjected, so far as necessary, to the public welfare. This is a condition essential to the existence of organized society, and comes about without constitutional grant. Various state constitutions and the federal constitution so far recognize the existence of this right on the part of these governments as to provide that it shall be exercised only on making compensation to the owner whose property is taken; and these are the only specific provisions with reference to the power of eminent domain. Before discussing the constitutional provisions and the various rules

which result from their application, it is desirable to indicate more clearly the nature of the power as distinct from other governmental powers with reference to private property.

As already suggested, the power of eminent domain is distinguished from the police power in that the latter relates to restrictions on the use of private property in the interest of the public; while the power of eminent domain is exercised by the taking of private property and devoting it to public use. Thus in the exercise of the police power, the owner of intoxicating liquors, or one who has devoted his property to the business of manufacturing such liquors, may be so far restricted in the sale or manufacture as to greatly impair the value of the property thus owned; but so long as his property is not taken from him by the government to be used for some public purpose, he cannot say that it has been taken under the power of eminent domain. Again, as will be pointed out in the chapter relating to taxation (see below, ch. xii), while a property owner may be compelled to make contribution for the support of the government or for public purposes to which the government is justified in making appropriations, and his property may be seized and sold in order to compel the making of such contributions, yet the exercise of the power of taxation does not necessarily involve the taking of specific property for public use; and the power of taxation, therefore, while in some respects analogous to the power of eminent domain, especially as to the purposes for which it may be exercised, is nevertheless distinct from it. Nor does the destruction of private property by the government, or under its authority, involve the exercise of the power of eminent domain. For the purpose of stopping the progress of a fire in a city, the public authorities may destroy buildings, but it cannot properly be said that such destruction is an exercise of the power of eminent domain; it is simply the result of the discharge of a duty arising from necessity. In military operations, private property may be destroyed without the power of eminent domain being at all involved.

63. Constitutional Limitations on Eminent Domain.

Coming now to a consideration of the specific constitutional provisions relating to the exercise of the power of eminent domain, two lines of analysis must be considered, the one relating to the purposes for which the power may be exercised, the other to the compensation which must be made; for while the specific provisions are only that private property shall not be taken for a public use without just compensation, such a provision is interpreted as meaning that the state or federal government shall not take private property for a private use whether with or without compensation.

At the outset it is important to notice that while the clause of the federal constitution, "nor shall private property be taken for public use without just compensation" (Amend. V) applies only to the federal government, and makes applicable to that government a restriction which is imposed on state governments by their various constitutions, nevertheless, the power of the states in this as in other respects is expressly circumscribed by the provision of the federal constitution, that no state shall deprive any person of his property without due process of law (Amend. XIV); for it is clear that the taking of property under a pretended exercise of the power of eminent domain, but for a purpose not public, would be a violation of fundamental property rights. The guaranty of the Fourteenth Amendment as to equal protection of the laws has no very direct application to the exercise of the power of eminent domain by the states, for in the nature of things the taking of specific property for public use cannot be in accordance with any rule of uniformity. Equality of burden in this respect is secured by the provision requiring just compensation to be made.

64. What is a Public Purpose.

As has already been suggested, although there is no direct prohibition of the taking by state or federal authorities of private property for other than public use, such a taking would

be contrary to the principles of constitutional government, and prohibited by the provision as to due process of law, so that the question, What is a public purpose, is fundamental; and if it appears that the purpose of the taking is not a public purpose, the attempt of the government to take will be futile. The purposes which have been held to be sufficiently public are those for which the state or the federal government may own property to be used in a discharge of its public functions, or to be held as charged with a public use. Thus private property may be taken to furnish sites for public buildings, to provide for streets and highways, parks and other public grounds; to provide the sources and channels for water supplies for cities; to provide cemeteries in which the dead may be buried; to provide outlets for the drainage of swamps which should be drained or otherwise cared for in the protection of the public health; to provide wharves and landing places necessary for the public use in connection with navigable waters; to facilitate the improvement of streams by locks and dams so as to promote public navigation. All these and many others analogous to them are purposes for which private property may be appropriated under the power of eminent domain. So the federal government may take land for post-offices and other buildings, for forts, arsenals, and navy yards and for other uses of that government (*Kohl* v. *United States*).

Cities, counties, school districts, and other municipal and quasi-municipal corporations which exercise by delegation some of the powers of government requiring the use of property, may be authorized to take under the power of eminent domain; and such public corporations may be authorized to carry on operations such as supplying water or light or transportation for which private property may be necessary and may be justly appropriated in proper proceedings. Indeed, it may be safely said, that anything which the government or any of its branches is authorized to do requiring the use of property affords proper occasion for the exercise of the power of eminent domain.

But the government may exercise some of its functions and

secure to the public some of the benefits to which the people are reasonably entitled, by delegating authority to private or corporate agencies. Thus the government may properly furnish facilities for transportation of person or property, and in doing so, it may establish and improve streets and highways; but it may authorize means of transportation, as by railways, ferries, canals, and the like, to be provided by private persons or by corporations, immediately for their own profit but ultimately for the public good. So cities, instead of directly supplying water and light to their inhabitants, may be authorized to grant franchises for waterworks and lighting plants, to corporations which derive revenue from furnishing to the public facilities which the municipal government might directly furnish if the legislature should so provide. It is with reference to these public utility corporations, as they have been called, that the greatest difficulty has been experienced in determining the extent to which the government may go in authorizing the taking of private property for public uses; but it may be regarded as reasonably well settled that if the government authorizes a private person or corporation to render services to the public which the government might render for itself if it saw fit so to do, it may confer upon such person or corporation the power to take private property without the owner's consent on making compensation, so far as reasonably necessary to the performance of the public functions thus delegated. Accordingly it is now well settled that railroad companies may be authorized to take land for right of way, depot grounds, and other necessary purposes (*Cherokee Nation* v. *Kansas R. Co.*); that telegraph companies may by proper proceedings acquire the right to construct lines through private property; that one who desires to establish a public ferry across a river may be authorized to condemn such land as is necessary for landing places on the opposite sides of the stream; that a corporation desiring to erect a toll-bridge may be authorized to condemn land required for abutments and piers; that a corporation authorized to furnish water to the residents of a city may be empowered to condemn the land essential for establishing its plant and laying its pipes.

The taking of private property for the utilization and improvement of water power is also regarded as a purpose for which private property may be condemned. Thus a person having acquired the right to construct a dam across a stream to secure power for the operation of a mill or other manufacturing purpose may by condemnation acquire the right to flood the lands of private owners by thus damming the stream (*Pumpelly* v. *Green Bay Co.*) The right to thus practically confiscate private property in order to utilize water power for private purposes rests on peculiar grounds. It can hardly be said that the purpose is public in any sense, and yet, if water power is a public resource of which individuals may be allowed to avail themselves, it is perhaps not unreasonable to say that they may be permitted to damage the property of other individuals, on making just compensation, as far as is necessary to render such water power available.

As distinct from these uses which are clearly public in their nature, other uses incidentally advantageous to the public but primarily for individual benefit have been held to be private uses for which property cannot be taken without the consent of the owner. The establishment of a manufactory may be incidentally of public benefit to those living in a particular locality, but the property devoted to such use nevertheless remains private property and the purpose is not one justifying a compulsory taking.

It is to be noted that in all the cases where individuals or private corporations are authorized to condemn private property for their uses, the nature of the business which they are to carry on involves appropriation of specific property so peculiarly situated with reference to the undertaking that other like property could not be substituted for it; and therefore, if the individual or corporation could not compel the owners of such specific property to allow its appropriation, the enterprise might be defeated by the unreasonable demands of such private owners. There are many other uses to some extent public for which private property cannot be taken because the enterprise does not necessarily involve the use of

one piece of property rather than another. But after all, these considerations affect more directly the expediency of authorizing private individuals or corporations to take the property of others, and it may, perhaps, safely be said that conceding the purpose to be public, the question whether an individual or corporation shall be allowed to condemn private property for such purposes is a matter of legislative discretion.

Another illustration of what may properly be deemed a public purpose is furnished by cases involving the right to establish private roads. As a general proposition, lands may be taken on which to locate public highways; while on the contrary a mere right of way by which the individual is benefited is not such a purpose. But in order to operate coal mines, stone quarries, oil and gas wells, and other like works for making available the natural resources of particular portions of the earth's surface, it is necessary that an outlet be secured to highways, railways, navigable streams, or other public avenues of transportation. Therefore a roadway or railway or canal or pipe line specifically intended to furnish necessary facilities to the individual or corporation operating the mine, quarry, or well, while it is primarily for his benefit, nevertheless may be for a public purpose to such an extent that the right to pass over or through private property may be taken therefor.

65. Kind of Property Taken; Extent of the Right Acquired.

The illustrations used in the preceding paragraph have all related to the taking of land; but there is nothing in the constitutional provisions on the subject which would limit the power of eminent domain to the taking of real property. No doubt personal property might be taken under the same restrictions, but the necessity for taking or authorizing the taking of personal property will seldom arise, since in most cases the personal property of one owner will be no more essential than that of another owner; and such property, as far as needed, can be secured by purchase from some owner

willing to sell for a reasonable price, and the necessity for condemnation of the property of an unwilling owner will not arise. But in reference to real property which is of such peculiar nature that different parcels or portions thereof cannot be regarded as necessarily interchangeable or capable of substitution, there may still be a question as to the nature of the interest therein or the extent of the use thereof which may be appropriated.

For some purposes the entire, permanent, and exclusive ownership may be necessary and the fee title may be taken, compensation on the basis of the entire value of the property being required to be made. Thus if a state or a city were condemning land to be used as the site of a public building, the state or city would necessarily acquire the complete ownership of the land taken and must pay damages accordingly; but for public highways, and for the right of way for railways, the use and occupancy of the surface is all that is essential, and it may properly be provided that such use only shall be condemned, and compensation for such use paid, leaving in the original owner of the land the right to any beneficial enjoyment of it and especially of coal or mineral rights under it which he may be able to make without interfering with the easement, as it is called, which is taken over the land for public purposes. The city may be authorized in condemning land for streets to take either the fee or an easement as the legislature in its discretion may provide.

The distinction between the taking of the fee and of an easement becomes important in considering the use which may be subsequently made of the right condemned. Thus where an easement over lands is condemned for use as a highway, leaving the title in the owner for every purpose not inconsistent with the public use for highway purposes, a railway company cannot be authorized, without payment of additional compensation, to locate its track and operate its road in such highway, because this is a further infringement on the rights of the property owner for which he has not received compensation; inasmuch as his compensation when the highway was

located was determined with reference to the use of his property as a highway, and not for some other public purpose. Likewise, it might well be urged that telegraph or telephone lines could not be established along such highways without additional compensation to the property owner (*Pierce* v. *Drew*). The use involved in the establishment of city streets over private property is a more extensive use than that involved in the establishment of an ordinary highway, and may well be considered as including the construction and operation of telegraph and telephone lines, street railways, grading, curbing, paving, sewering, and other forms of improvements usually incident to the public enjoyment of city streets. The nature and extent of the right acquired by condemnation will depend largely upon the statutory provisions under which condemnation has been made.

As a general rule, the appropriation of land to one public use precludes its subsequent appropriation to another and inconsistent public use. When the state has condemned land for its use in connection with public buildings, either as furnishing the site therefor or the necessary surrounding grounds, the same land cannot be taken a second time by a city for a park, or by a school district for school purposes. Such matters are, after all, in the discretion of the legislative power (*U. S.* v. *Gettysburg Electric R. Co.*). A limitation of more practical importance is that a railway company, having the general authority to condemn land for right of way, cannot without direct legislative sanction exercise the power of eminent domain for the purpose of acquiring a right of way over land already appropriated for public use under the authority of the state. For this reason one railway company cannot, under its general power to condemn, take the right of way of another railway company, and yet the legislature has the authority to provide for one railway crossing the right of way of another, or that when any one railway has abandoned the use of its right of way, it may be condemned for the use of another.

As between the federal government and a state government,

neither one can authorize the condemnation for public use of land which has already been acquired either by condemnation or purchase by the other for its public uses. Possibly the United States government could not, by any action of the state, be excluded from appropriating state property for federal purposes; but such questions are not likely to arise, for it is hardly conceivable that the federal government should find it expedient and necessary to interfere with any state in the enjoyment and discharge of its public rights and duties.

An individual or corporation which has under proper authority condemned land for public uses, though for private benefit, has a property right in the land thus acquired; but this private right is still subject to be taken for other public uses if the legislature shall so provide. Thus a company which has constructed a toll bridge across a stream and has acquired necessary land for that purpose, has a property right in maintaining such toll bridge, and deriving the profits incident thereto; but under legislative authority, such property might be taken for the construction of a public bridge, due compensation being made to the company (*Central Bridge Corp.* v. *Lowell*). Public corporations, however, do not have a vested right which the legislature may not take away without making compensation to them, for all their rights and privileges are derived from and subject to the control of the legislative power. Questions of this kind arise more frequently under the constitutional provision as to impairing the obligation of a contract, and the extent to which corporate franchises either public or private may be impaired by legislation will be discussed elsewhere. (See below, § 269.)

66. Compensation for Property Taken by Eminent Domain.

No doubt it is in accordance with ordinary conceptions of right and justice that if the property of an individual be appropriated by the state for the benefit of the general public, compensation should be made to the one whose property is appropriated. Thus while the burden of providing for the public welfare would be thrown on a particular person, yet as

the money to be paid is raised by taxation, bearing alike on all taxpayers, the burden is equalized. It is doubtful, however, whether in the absence of express constitutional provision, any legislature would be bound, in making provision for the exercise of the power of eminent domain, to provide that compensation must be paid. Such provision would be likely to be made as in accordance with public policy and expediency, but it does not necessarily follow that the exercise of the power of eminent domain, as one of the powers incident to government, would be a violation of the protection of property involved in the constitutional requirement of "due process of law," even though no compensation was provided for. This, however, is a matter of purely speculative interest, for the state constitutions practically without exception contain the requirement that just compensation shall be made as a condition of the exercise of the power of eminent domain, and the federal constitution (Amend. V) contains the same provision, which as already stated applies only to the federal government. It might, perhaps, be open to argument, whether the attempt on the part of a state to take private property for public use without just compensation would be a violation of the guaranty found in Amendment XIV to the constitution, which is expressly applicable to the states, but no such question is likely to arise. The cases decided by the federal Supreme Court with reference to the power of the state legislatures in the exercise of the right of eminent domain, have almost uniformly been determined under provisions of state constitutions, except where the question has been as to the exercise of such power by the federal government.

The requirement that just compensation be made is easily applied where the entire right and title to a distinct parcel of property, such as a certain tract of land owned and used independently of and without relation to other property of the same owner, is taken under the power of eminent domain. In such case, the compensation is the value of the property taken, estimated on the same basis as if disposed of for any other purpose, and in estimating such value it would be immaterial to consider

whether some incidental benefit accrued to the owner from the public use to which the land taken was appropriated. If it is beneficial to the people of a community to have a public building erected in their midst, or a park established, or a railway constructed and operated, such benefit is common to many persons, and the fact that the owner of the land taken for such use is benefited thereby cannot well be considered for the purpose of decreasing the amount of compensation which he should receive for his land. Nor on the other hand, should the compensation be affected by an increase in the value of the land which would have resulted in benefit to the owner had the public improvement been made without the appropriation of his land. Just compensation will be the value of his land as it was before and without regard to the proposed public improvement. In some states there is an express provision that in estimating the compensation, presumptive benefits to the owner of the land shall not be considered. Thus by way of illustration, if the same individual owned two tracts of land possessed and used by him independently of each other, and if one tract should be taken for a public use, the fact that the other tract was thereby increased in value should not be taken into account as an offset to the compensation which he ought to receive for the tract taken, nor would it be competent to fix the value of the tract taken with reference to any advantage which would have beneficially affected its price had the public improvement been made without such tract being taken.

The measure of compensation becomes more difficult of determination where the thing taken is only an easement, that is, a right to a limited use of the land, as a right of way for a public highway or railroad; or where only a portion of a tract or one of several tracts used together for one purpose is taken. With reference to public highways and railroad rights of way, it is usually provided that the public or the railroad company, as the case may be, shall acquire only an easement, that is, a right to such use of the land taken as may be necessary for the purpose, leaving the owner still vested with the title, subject to the public use, and authorized to enjoy the land in any way consistent

with the public use. Thus the owner of a strip of land taken for a public highway might, no doubt, take out coal or mineral from under such strip, provided that in doing so he did not interfere with the necessary support of the surface, and compensation should be made to him, not for the value of the strip, but the detriment he would suffer by its use for the designated purpose. When only an easement is being taken for a public use, it has been argued that possibly the benefit resulting to the owner with reference to his residuary right in the land thus subjected to an easement might be considered as lessening the damage to which he is entitled. But such a question could scarcely arise, for the residuary right would seldom be of such nature as to be susceptible of any benefit by reason of the establishment of an easement in it.

More serious difficulty is encountered when the right taken for a public use is only that of an easement in a portion of a tract of land, or a portion of one of several tracts, owned and used for a single purpose. Thus if a highway or railway is located through a tract of land used as a farm, is the owner of the farm entitled, by way of compensation, to damages sustained as to the entire farm, or only to the damage which he suffers as to the particular strip of land which is thus appropriated? And on the other hand, if his damages are to be computed with reference to the injury to his entire farm, may the benefits accruing to his farm, by reason of the location of the highway or railway, be taken into account? In attempting to answer the first of these questions, it must be borne in mind that the ordinary constitutional provision, requiring just compensation to be made, applies only to the person whose land is taken. The location or operation of a railway in close proximity to a man's land, occupied by him for a farm or residence or a like purpose, may be seriously detrimental, but it does not follow that under any constitutional provision he is entitled to compensation for such injury. The owner of land owns it subject to the contingency that he may be injuriously as well as beneficially affected by the lawful use of neighboring property. He may justly complain of a

nuisance, that is, an unlawful use of other property which is peculiarly injurious to him; but a highway or railway or schoolhouse is not a nuisance in itself, and he must endure any discomfort or inconvenience which results. Thus one who has a dwelling upon a public street may be inconvenienced in the use of his premises or injured by depreciation thereof by reason of the location of a street railway along such street, but if the use of the street is lawful, he cannot say that he is entitled to damages. Much less can he contend that any property of his has been taken for public use without just compensation.

It could, therefore, be reasonably argued, that where a strip of land is taken for a railroad right of way through a man's farm, he is entitled only to the depreciation in value of such strip due to its being appropriated for a right of way, and not to any compensation for depreciation in value of the remainder of his land. But it is usual to provide, at least with reference to the taking of a right of way for a railway, that all the damages suffered by the land owner, a portion of whose land is thus taken, shall be allowed to him; and as a railroad company can exercise the power of eminent domain only under such conditions as may be imposed by the legislature, such provision, even if it allows to the land owner greater damages than he is entitled to under the letter of the constitution, will be entirely valid. Statutory provisions as to the compensation to be paid are usually given a somewhat liberal construction, and the land owner can generally get a compensation based upon an estimation of the injury to his entire premises, resulting from the taking of a portion thereof for a public purpose. As the injury to the portion of the premises not taken does not fall within the constitutional requirement of just compensation, it may be that as against such injury the benefit to the remainder of the premises resulting from the public improvement can be taken into account by way of offset; but this must depend rather on the construction of the statute than on any constitutional provision (*Bauman* v. *Ross*).

Some state constitutions contain broader provisions than those above referred to, and require that just compensation be made, not only to those whose property is taken, but also to those whose property is damaged by reason of the appropriation of private property to public use. Especially interesting questions have arisen out of the construction of elevated railways in city streets, as to the right of the owners of property abutting upon the streets to have compensation for damages to their property, resulting from such construction; but the questions which have arisen in such cases depend for solution to so great an extent upon statutory provisions that no general rule can safely be announced. (See *Story* v. *New York Elevated R. Co.*) It must be constantly borne in mind that private property owners will frequently suffer injuries from the exercise of proper public authority for which they cannot, under any constitutional provision, secure redress.

67. Method of Procedure in Eminent Domain.

It is for the legislature to determine, in its discretion, the propriety of exercising the power of eminent domain in cases in which it may constitutionally be exercised; that is to say, the legislature determines by statute, either general or special, in what cases private property may be taken for a public use, subject, however, to the supervision of the courts, which have the final power to decide whether or not the use is in such sense public that private property may be condemned for that purpose. Thus, conceding that land may be constitutionally taken for a public park, it is for the legislature to provide by statute how and under what circumstances this shall be done. If it makes no provision for public parks, then private property cannot be taken for such purpose; if it does provide for such taking, then the method prescribed by the statute must be followed. Indeed, the determination by the legislature that any specified purpose is a public purpose for which private property may be taken, is *prima facie* valid, and the courts will not override the judgment of the legislature in that matter except in a clear case.

The legislature must also provide some method of ascertaining the just compensation required by the usual constitutional provision and enforcing its payment; else the attempt to confer authority to take will be ineffectual on account of the constitutional limitation; but in general, the method to be pursued is discretionary with the legislature.

Judicial proceedings for the condemnation of property are required in some states; but the constitutional requirement as to due process of law does not necessitate an action in court to determine the amount of the damage to be paid in order that just compensation shall be made. It is usual to provide for the selection, by the sheriff or some other ministerial officer, of appraisers or commissioners to view the premises and report the amount which the owner shall receive for his property taken, and the damage suffered by him in case he is entitled to any damages beyond the value of the property taken. It is, however, further provided in many if not all of the states in which it is not required that the original proceeding be in a court, that there may be an appeal from the finding of the appraisers or commissioners to a court, in which the question as to the amount to be paid shall be judicially determined. In many states it is specifically required that the compensation thus determined be paid before the property is taken. Where this is not required by the constitution, it is usually required by statute, unless it may be in cases where the property is taken directly for the use of the state or a public corporation.

CHAPTER XII.

TAXATION.

68. References.

In General: T. M. Cooley, *Constitutional Limitations*, ch. xiv; J. Story, *Constitution*, ch. xiv; T. M. Cooley, *Constitutional Law*, ch. iv, § 1; T. M. Cooley, *Taxation;* H. C. Black, *Constitutional Law*, ch. xv; J. I. C. Hare, *Constitutional Law*, chs. xv, xvi, xvii; *The Federalist*, Nos. 12, 21, 30–36; J. N. Pomeroy, *Constitutional Law*, §§ 271–312 A. B. Hart, *Actual Government* (Amer. Citizen Series) ch. xxi; D. R. Dewey, *Financial History of the United States* (Amer. Citizen Series), *passim*.

Public Purposes: *Loan Association* v. *Topeka* (1874, 20 Wallace, 655; McClain's Cases, 189; Thayer's Cases, 1235); *Kingman* v. *City of Brockton* (1891, 153 Mass. 255; McClain's Cases, 195; Thayer's Cases, 1029); *Lowell* v. *City of Boston* (1873, 111 Mass. 454; Thayer's Cases, 1224); *North Dakota* v. *Nelson County* (1890, 1 N. Dak. 88; Thayer's Cases, 1242); *Deering* v. *Peterson* (1898, 75 Minn. 118; McClain's Cases, 201); *State* v. *Osawkee Township* (1875, 14 Kansas, 418); *Wurts* v. *Hoagland* (1885, 114 U. S. 606; McClain's Cases, 203; Thayer's Cases, 768); *Perry* v. *Keen* (1876, 56 N. H. 514; Thayer's Cases, 1247); *Railroad Company* v. *Otoe* (1873, 16 Wallace, 667; Thayer's Cases, 1256).

Subjects of Taxation: *State Tax on Foreign-Held Bonds* (1872, 15 Wallace, 300; McClain's Cases, 136; Thayer's Cases, 1258); *Murray* v. *Charleston* (1877, 96 U. S. 432; McClain's Cases, 1002); *Kirtland* v. *Hotchkiss* (1879, 100 U. S. 491; McClain's Cases, 142; Thayer's Cases, 1268); *New Orleans* v. *Stempel* (1899, 175 U. S. 309); *Savings & Loan Society* v. *Multnomah County* (1898, 169 U. S. 421; McClain's Cases, 146).

Taxation of Government Agencies: *The Collector* v. *Day* (1870, 11 Wallace, 113; McClain's Cases, 153; Thayer's Cases, 1378); *Dobbins* v. *Commissioners* (1842, 16 Peters, 435; Thayer's Cases, 1352); *McCulloch* v. *Maryland* (1819, 4 Wheaton, 316; 4 Curtis' Decisions, 415; McClain's Cases, 1; Thayer's Cases, 1340; Marshall's Decisions, Dillon's ed., 252); *United States* v. *Railroad Company* (1873, 17 Wallace, 322; McClain's Cases, 158); *Railroad Company* v. *Peniston* (1873, 18 Wallace, 5; Thayer's Cases, 1833; McClain's Cases, 166); *Thomson* v. *Pacific Railroad* (1869, 9 Wallace, 579; McClain's Cases, 162; Thayer's Cases, 1369); *California* v. *Central Pacific R. R. Co.* (1887, 127 U. S. 1; McClain's Cases, 167; Thayer's Cases, 1394); *Bank of Commerce* v. *New York City* (1862, 2 Black, 620; McClain's Cases, 170; Thayer's Cases, 1357);

Bank v. *Supervisors* (1868, 7 Wallace, 26; McClain's Cases, 175; Thayer's Cases, 1351); *Wisconsin Central R. R. Co.* v. *Price County* (1890, 133 U. S. 496; McClain's Cases, 178; Thayer's Cases, 1397).

METHODS; UNIFORMITY: *Kentucky Railroad Tax Cases* (1885, 115 U. S. 321; McClain's Cases, 205); *Kelly* v. *Pittsburg* (1881, 104 U. S. 78; McClain's Cases, 211; Thayer's Cases, 1197); *French* v. *Asphalt Co.* (1901, 181 U. S. 324); *Veazie Bank* v. *Fenno* (1869, 8 Wallace, 533; McClain's Cases, 222; Thayer's Cases, 1334).

COMMERCE WITH TERRITORIAL POSSESSIONS: *Insular Cases*, *De Lima* v. *Bidwell* (1901, 182 U. S. 1); *Downes* v. *Bidwell* (1901, 182 U. S. 244; McClain's Cases, 2d ed. 1119); *Dooley* v. *United States* (1901, 183 U. S. 151; McClain's Cases, 2d ed. 1226).

DIRECT TAXATION BY FEDERAL GOVERNMENT: *Income Tax Case*, *Pollock* v. *Farmers' Loan & Trust Co.* (1895, 157 U. S. 429, 158 U. S. 601; McClain's Cases, 223).

69. General Powers of Taxation.

One of the powers inherent in government is that of raising revenue for the purpose of carrying on its legitimate functions. As the functions of the federal government are limited, so the purposes for which the powers of taxation may be exercised by it are limited; but as all the general powers of government are vested in the different departments of a state government, unless denied to it expressly or by implication by the state or federal constitution, so the purposes for which the powers of taxation may be exercised by a state are, in the nature of things, unlimited, save as specific limitations have been imposed. Nor is it necessary that the state constitution contain any grant of specific power of taxation to any department of the state government, for that power is inherent in any government having general powers, and is necessarily implied in the creation of such a government. Therefore we do not find in state constitutions the power to tax included in any express enumeration; but some limitations on or directions as to the exercise of such power are sometimes embodied therein.

As between the different departments of a state government, the taxing power belongs to the legislative department. Probably the very first conception of the existence of legislative power as distinguished from executive power, and of a

limitation upon executive power, was that involved in the assertion of the right of some form of representative assembly to vote taxes for the purposes of government, and to exclude the monarch or other ruler exercising executive functions from levying money for the expenses of the government otherwise than as provided for and authorized by the representative body. The long contest in England for supremacy, between the king and Parliament, involved more frequently controversies as to the right of the king to raise money otherwise than by parliamentary sanction than the right to exercise any other function of government, and it was finally established, as a principle of the English constitution, that no taxes could be collected save as they were authorized by law — that is, by the action of the legislative branch of the government — and that the moneys thus collected should be expended only as authorized by law, that is, in accordance with appropriations made by Parliament.

The policy of Parliament in this respect was, and has continued to be, to make appropriations only for a short period, so that the king would be unable to carry on the government for any great length of time without the approval of Parliament. This principle is expressed in some of the state constitutions and is embodied in the federal constitution (Art. I, § 9, ¶ 7) in the provision that, "No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." With reference to the support of armies, especially, has this jealous restriction of the executive power been recognized by the provisions of the state and federal constitutions. It is provided in the federal constitution (Art. I, § 8, ¶ 12) that no appropriation of money for the raising and support of armies, shall be for a longer term than two years. And in order that the power to raise and appropriate money shall be retained within the immediate control of the popular branch of the legislature, it is usually provided in the state constitutions, as it is expressly provided in the federal

constitution (Art. I, § 7, ¶ 1), that bills for raising revenue shall originate in the more numerous branch of the legislative body. But the practice of Congress, and of many of the state legislatures, illustrates more forcibly, even than the constitutional provisions, the prevailing conception that the power of taxation belongs peculiarly to that branch of the legislative body which immediately represents the popular will. By custom general appropriation bills, that is, bills for the expenditure of money for carrying on the government in its various operations, originate in the lower houses respectively of the state and federal legislative bodies, and such appropriations are usually made for the shortest practicable period, that is, for the term of one Congress or one session of the legislature.

70. State Power to Levy Taxes.

The purposes for which the power of state taxation may be exercised are as limitless in their variety as the special objects for which laws may be passed. Nor is the exercise of such power restricted to the general legislative department of the state government. It may be delegated to subordinate tribunals or legislative bodies such as the boards of supervisors of counties, the councils of cities, the trustees of towns or townships or school districts and the like; and the purposes extend from providing for the general expenses of the state government down to the support of the smallest branches of the local government.

An indispensable characteristic, however, of every exercise of the power, whether original or delegated, is that the purpose for which money is raised by taxation be a public purpose, that is, a purpose properly incident to the exercise of the powers of government. The legislature cannot authorize the collection of money to be expended for the private benefit of individuals. Difficult as it may be to determine whether any specific purpose is public, as distinguished from a private purpose, that distinction when properly applied will determine whether the money to be expended may properly be raised by means of taxation. It is sometimes said that the levying

of taxes for a purpose not public is the taking of private property for private use, or for public use without just compensation, and contrary, therefore, to the provisions of the state and federal constitutions regulating the exercise of the power of eminent domain. But the power of eminent domain and the power of taxation are wholly distinct and independent powers. They have this in common: that each of them, in the nature of things, can be exercised for a public purpose only; and it is sometimes pertinent in determining whether the purpose is one for which the power of taxation can be exercised, to consider whether it is one for which private property may be taken without the consent of the owner.

The purposes of taxation may, however, be either general or special. General taxes may be collected to provide a general fund from which the expenses of state, county, or city government may be met, and such purposes are unquestionably public, so that no controversy can very well arise on that point. Taxes may also be levied for specific purposes, and the validity of such a tax may depend, therefore, on whether the specific purpose is a public purpose. Questions of this character do frequently arise, and their solution is often difficult, but it may safely be stated, as a general proposition, that if the purpose for which a specific tax is levied is not a public purpose, or if an attempt is made to incur a specific indebtedness for a purpose not public, which indebtedness can only be met by taxation, then the specific tax or indebtedness will be held invalid. The general ground on which such legislation is declared invalid is that it amounts to depriving persons of their property without due process of law; for the guaranty of due process of law relates not only to the method, but also to the purpose for which private property may be taken under the exercise of the power of government. This phase of the taxing power will be made the subject of consideration in a subsequent section.

It is pertinent here to observe, however, that though taxes can only be levied for a public purpose where the purpose is express or specific, appropriations of public money are not

thus limited by any constitutional provision. They should be for a public purpose, but the decision as to what is a public purpose lies largely in the discretion of the legislative department; and no citizen has such direct interest in the matter that he can call in question the propriety of appropriations made from the general funds. But where the tax is specific, or the statute authorizes the incurring of indebtedness for a specific purpose which can be met only by the raising of money by a special tax, the persons whose property is subject to be taken for raising such tax may usually question the legality of the tax or indebtedness by appealing to the courts.

71. What is a Public Purpose.

The general scope of the purposes which are public, and for which, therefore, the power of taxation may be exercised, can best be illustrated by stating some of the purposes which have been held not to be public and for which, therefore, taxes cannot be properly levied. It is well settled that the legislature cannot authorize cities and towns to levy special taxes or contract indebtedness in aid of the establishment of manufacturing enterprises; for although the establishment of manufactories may be in one sense beneficial to the public, and especially to the people of the locality where they are established, nevertheless, as they are private enterprises, the immediate benefit of any bonus or appropriation would enure to the owners, while the benefit to the public would be merely incidental (*Loan Association* v. *Topeka*). Of course money might legitimately be raised by taxation or by the incurring of indebtedness for the purpose of establishing municipal works, such as waterworks, lighting plants, and the like, to be owned by the city, for the money would then be used directly for a public purpose.

It is also settled that a statute would not be valid which should authorize a city to raise money by borrowing or by taxation, to be loaned to private property owners to enable them to improve their property. In one sense it is to the public benefit that property be improved and business be car-

ried on, but this public benefit is incidental only to the private advantage which the property owners would derive from the use of the public money. This was the conclusion reached in the case of *Lowell* v. *City of Boston* with reference to a statute in Massachusetts, authorizing the City of Boston, after a large destruction of private property by a great fire, to borrow money for the purpose of loaning it to property owners to enable them to restore the buildings which had been destroyed. For similar reasons it was held by the Supreme Court of Minnesota in *Deering* v. *Peterson*, that statutes providing for the loaning of money by the state to farmers who had suffered from a general drought to enable them to purchase seed with which to carry on their business of farming, were invalid; for while it is incidentally to the public advantage that the people be enabled to carry on their private enterprises, the immediate benefit of such an arrangement is to the private persons to whom the money is loaned. It is true that taxes may be collected and expended for the relief of the poor, but this is regarded as a public rather than a private benefit. The maintenance of indigent persons, who are unable to earn a living, has always been considered as among the purposes for which, in the exercise of reasonable discretion, public money may be used, and however unwise public charity may be in particular cases, the power to give poor relief cannot well be denied, as not within the scope of the general legislative discretion.

On the other hand, there are many purposes for which money may properly be raised and used which are deemed public although incidental private advantage results therefrom. Thus bounties may be given for acts which are deemed advantageous to the public, such as enlistment in the military service, the killing of wild animals, or the like, from which a public advantage arises, although the money is paid to private individuals. Public money may be expended for internal improvements such as the creation or preservation of water power, the construction of canals, and the improvement of the highways; although the benefits of such improvements are not equally enjoyed by all persons. So public money may be raised and expended for

the construction of levees, drains, and ditches, which promote the safety and health and welfare of great numbers of persons, although it may be that many of those required to pay such taxes are not personally interested in the improvement. (See *Wurts* v. *Hoagland.*) The power of the federal government to impose a protective tariff, that is, a tax by which money is raised although the rate of tax and the subjects of taxation are determined to some extent with reference to incidental benefits to manufacturers, is upheld on the ground that as the government has a right to raise money by taxes on imports, it may, in its discretion, so adjust those taxes as to foster or benefit particular industries.

An interesting example of the exercise of the power to levy taxes or create indebtedness for a public purpose but with incidental private benefits is that of granting public aid in the construction of railroads. Such enterprises are usually organized and carried on by private capital and for private profit; and yet a railroad when constructed is in some sense a public highway, a work of public improvement. The legislature may regulate the rates to be charged by the railway company, and it may authorize the company to take private property for its right of way, depot grounds, and other necessary purposes without the consent of the owner on making him just compensation, in the exercise of the power of eminent domain. Therefore, taxes voted or bonds issued by counties, cities, or towns in aid of a railroad are for a legitimate public purpose, although incidentally for the private advantage of those engaged in the enterprise. (See *Perry* v. *Keene* and *Railroad Co.* v. *Otoe.*)

Exemption from taxation in behalf of persons or organizations devoting their property to religious, charitable, or educational purposes rests on substantially the same ground. Exemption of private property owned and used for private benefit is objectionable, because a heavier burden is thereby thrown upon other property, but if the use to which the property is put is in some sense for the public advantage rather than for private gain, it may be proper to relieve it from the general burden of taxation which rests on other property.

Indeed, exemptions have been upheld as to property used for purposes for which taxes could not be properly levied or public indebtedness incurred. Thus property used for religious purposes is generally exempted from taxation, although the levying of taxes for such purposes would not be authorized. But attempts to grant exemptions to persons using their property for purely private purposes, even though such use may be incidentally beneficial to the public, have generally been held to be unauthorized.

72. What Property may be Taxed.

The subjects of taxation are as various as the purposes for which taxes may be levied, and the largest discretion is allowed to the legislative power in determining the basis on which taxes shall be imposed. Universally those owning property, whether tangible or intangible, are required to pay taxes in some proportion in accordance with the value of the property thus owned. Taxes may be levied on real property or personal property, on occupations, on incomes, on inheritances, and on various other rights, benefits, and privileges which are enjoyed under the protection and sanction of organized society. *Per capita* taxes, usually called poll taxes, are also levied, but it is not usual to attempt to raise any considerable general revenue in that manner.

Where it is attempted to levy a tax upon property, the property must be in some sense within the jurisdiction of the taxing power. Thus real property may be taxed in the state within which it is situated, but not in another state. Personal property may be taxed where the owner resides, for property of that character is presumed to be under the possession and control of the owner at the place of his domicile. Thus an individual may be taxed in the state of his residence upon his moneys and credits, including notes, bonds, and other forms of indebtedness which he owns, even though such notes and bonds are secured by mortgage on property situated elsewhere. On the other hand, personal property may be taxed in the state in which it is actually situated and held, though

the owner may reside in another state (*New Orleans* v. *Stempel*). This may result in double taxation, that is, in the case of personal property the owner may be taxed on such property where he resides, though the property itself is in another state, and the state in which the property actually is may levy taxes thereon regardless of the fact that the owner lives and is taxed on such property in another state. It is, of course, inequitable that the owner of property should be compelled to pay taxes thereon in two distinct jurisdictions, but it is impracticable entirely to avoid such results under present methods of taxation.

Double taxation also results from the levying of taxes on real property for its full value in the state where the property is situated, while one to whom the owner owes indebtedness secured by mortgage on the property is also taxed on the notes evidencing such indebtedness and the mortgages given to secure them; but it seems to be impracticable to avoid such a result without, in some cases, allowing persons to escape taxation on property with which they are justly chargeable. Perfect equality and equity as to the burdens of taxation cannot be attained, and the best that can be done is to adopt such a basis for the levying of taxes and such methods for their collection as shall on the one hand afford necessary public revenue, while on the other they are apportioned as fairly and justly as may be among the persons and property subject to the taxing power.

But taxes cannot be imposed upon property which is in no sense within the jurisdiction of the taxing power. If neither the property nor the owner is within the state, then no tax can be imposed by the state. For instance, it has been held in *Murray* v. *Charleston* that if municipal bonds are owned by a non-resident of the state, the legislature cannot authorize the municipality issuing and under obligation to pay interest on such bonds to deduct a portion of the interest by way of taxes as against the non-resident owner of the bonds. For similar reasons the state in which is situated real property that is mortgaged to a non-resident cannot require that a part of the interest on the mortgage indebtedness be paid by the debtor

to the state by way of tax against the non-resident owner (*State Tax on Foreign-Held Bonds*). But there seems to be no legal objection to requiring a non-resident mortgagee to pay taxes on his interest in the mortgaged real property where the property is situated. (See *Savings Society* v. *Multnomah County*.)

73. Taxation of Government Officers or Agencies.

It results from the peculiarities of our dual government, involving the co-existence within the same territorial limits of federal and state authority, that neither government can tax the property, the agencies, or the instrumentalities of the other. Thus a state cannot tax lands or buildings belonging to the federal government (*Wisconsin Central R. Co.* v. *Price County*), nor can a state, without the permission of the federal government, tax as property the bonds or currency issued by the federal government, though owned by private individuals. It has frequently been said, and the statement is considered to be an axiom, that the power to tax involves the power to destroy, and if a state could tax the persons who owned bonds or currency of the federal government, it could thereby make it more difficult for the federal government to borrow money by the issuance of bonds, interfere with its proper regulation and control of the currency, and thus impair its efficiency. Therefore, a bank having a portion of its capital stock invested in United States bonds cannot be directly taxed by the state on the portion of its capital stock thus invested (*Bank of Commerce* v. *New York City*) ; but there seems to be no valid reason why the owners of shares of stock in a bank should not be taxed on the basis of the value of such shares, though the property of the bank may be to some extent invested in United States bonds. For similar reasons, currency issued by the United States government was held not to be subject to state taxation in the hands of persons holding it; but the statutes of the United States now authorize the taxation of United States currency, the same as other money held by individuals (see Act of 1894), and such consent by the United States removes any objection to such taxation by the states.

National bank notes are subject to state taxation under the federal statute which authorizes the creation and operation of the national banks as well as under the statute relating to taxation of treasury notes just referred to. The same reasons which require the exemption of United States property and the bonds and currency issued by the United States from state taxation except by the consent of the federal government, also require that the officers of the federal government shall not be taxed on their salaries by the states in which they reside (*The Collector* v. *Day* and *Dobbins* v. *Commissioners*).

On the other hand, the federal government cannot impair or interfere with the legitimate operations of the state governments. Therefore, the federal government has no authority to exact an income tax from state officers on the basis of their salaries; nor to require federal stamps to be placed on the processes of state courts, or on state bonds or warrants, or on the bonds of state officers. Neither government has any power to interfere with the other in the exercise of its legitimate functions.

Some of the functions of the federal government may be carried on by corporations organized under its authority. Thus in *McCulloch* v. *Maryland* it was held that the property of a branch of the United States Bank, chartered by Congress, was exempt from state taxation. Under its authority to regulate post-offices and post-roads and provide for the carrying on of its necessary operations in the transportation of property and troops, the federal government has also granted charters or franchises; and it has been held (*Pacific Railroad Cases*) that the franchises of such corporations, and the property used by them in carrying on the operations authorized by the federal government, are not subject to state taxation. But the fact that a railroad company enjoys a franchise granted to it by the federal government does not necessarily exempt it entirely from taxation by a state in which it carries on its business. The rule seems to be that such a corporation is exempt from state taxation only so far as it is using its property in the performance of the functions authorized by the federal government.

74. Due Process of Law as to Taxation; Rule of Uniformity.

While the states may exercise a large discretion as to the purposes for which taxes shall be imposed, the property from which they shall be derived, and the methods in which they shall be levied and enforced as against such property, there are limitations in the federal constitution on the exercise of these powers which must always be borne in mind. The provisions of the Fourteenth Amendment to the federal constitution prohibiting states from depriving any person of property without due process of law, and from denying to any person the equal protection of the laws, are applicable to taxation as well as to other forms of the exercise of state power. "Due process of law" in this connection means that taxes must be for a public purpose, and imposed and collected in the usual methods applicable to the raising of revenue. These usual methods will be briefly described in a subsequent section of this chapter. But an attempt by the state in any method to exact taxes from persons or property not within its jurisdiction, or for a purpose not essentially public in its nature, would be an attempt to take property without due process of law, and therefore unlawful. The state cannot under the pretence of taxation impair fundamental individual rights to property. It cannot exact money from one person to pay it over to another for purposes which are not public, for this would not be a legitimate exercise of the power of taxation.

The very nature of the power to raise money by means of taxation involves the idea of an apportionment of the burden in accordance with some principle of uniformity. Absolute uniformity is impracticable and it would be equally inexpedient. The legislative power may, in its discretion, adjust the burdens of government so as to make them fall in some measure in accordance with the benefits resulting and the protection afforded. Different classes of property may be taxed in different methods, and different classes of persons may be required to contribute to the maintenance of government in different ways;

and as long as the classifications made are reasonable and general, they will not be objectionable, though they may result in some measure of inequality. But if the lands of non-residents are taxed on a higher valuation, or at a higher rate than the lands of residents; or if some persons are required to pay a higher charge for the privilege of pursuing a particular occupation than other persons, the uniform operation of the law required by the Fourteenth Amendment is denied, and the distinctions thus attempted would be invalid.

The principle of uniformity requires some correspondence between burdens and benefits. The general advantages of government as to the protection of persons and property constitute all the benefits necessary to sustain a general tax applicable to persons and property within the jurisdiction of the state; but as to municipal taxes and special taxes for improvements, the question may sometimes be raised whether the person or property taxed is within the benefit of the tax in such sense as to authorize its imposition. Thus general municipal taxes may properly be laid on all property within the municipal limits; but if it is attempted to bring within the municipal limits agricultural land, which is not in any way benefited by the municipal government, it may well be said that the owner of such property does not belong to the class of persons, and his property does not belong to the class of property, which can properly be subjected to such taxes; and that the tax is not therefore levied according to the principle of uniformity. (See *Kelly* v. *Pittsburg*.)

Similar considerations apply to special assessments for public improvements, such as the paving of streets, the construction of sewers, and the like. These objects are sufficiently public in their nature to justify a general municipal tax therefor upon all property within the municipality. But property deriving a peculiar advantage from such improvements may properly be required to pay a special tax therefor by reason of such special benefit (see *French* v. *Asphalt Co.*), and the question often arises whether specific property is justly included within the class of property deemed to be especially benefited, and

whether the tax is apportioned according to the benefit enjoyed. These are questions to be primarily determined by the taxing power, but it is for the courts to say ultimately, in any particular case, whether the determination reached is reasonably consonant with the requirement of uniformity.

License taxes on occupations are a proper means of raising revenue, but they are often imposed as a means of police regulation of occupations or forms of business which are properly subject to such regulation, and as thus imposed, the same restrictions as to uniformity are not applicable as where the object is to raise revenue only. Licenses to sell intoxicating liquors may be restricted to a limited number of persons in the city and refused to others; or licenses to practice medicine or dentistry or pharmacy may be denied to those not having certain qualifications; or licenses may be exacted from those engaged in certain kinds of business, although not required of those engaged in other kinds of business. An example of an exaction in the form of a tax which is properly imposed for other reasons than to raise revenue is the federal tax on the currency of state banks. As an exercise of the taxing power, such an exaction could not, perhaps, be justified; but the power of the federal government to regulate the currency is a sufficient justification for an exaction, the result of which is practically to prevent the issuance of paper money by corporations chartered by a state, and to limit the use of such money to the notes issued by the federal government directly, and national bank notes issued by corporations chartered under its authority (*Veazie Bank* v. *Fenno*).

75. Specific Limitations on State Power to Tax.

Aside from the general limitations resulting from the requirements of due process of law and equal protection of the laws, the federal constitution contains some specific limitations on the state taxing power. The laying and collection of duties, imposts, and excises is a legitimate method of exercising the power of taxation; but by the federal constitution authority to raise taxes by this method is specifically conferred on

the federal government (Art. I, § 8, ¶ 1), and while this does not in itself exclude the exercise of like power by the states, nevertheless it is specifically provided that "No state shall without the consent of the Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws" (Art. I, § 10, ¶ 2), and that "No state shall without the consent of Congress lay any duty of tonnage" (Art. I, § 10, ¶ 3). These restrictions, while they relate specifically to the state power to tax, seem to be intended to prevent interference by the states with freedom of commercial intercourse. The provision that Congress shall have power "To regulate commerce with foreign nations and among the several states and with the Indian tribes" (Art. I, § 8, ¶ 3), has been interpreted also as restricting the levying of state taxes on foreign or interstate commerce. The extent to which this clause restricts state taxation will be considered in the chapter relating to the regulation of commerce. (See below, § 92.) The validity of state inspection laws, and of state taxes on boats and vessels, has been the subject of some discussion, but the matter is not of sufficient general importance to justify further elaboration. It is sufficient to say that few attempts have been made by the states to impose taxes for the enforcement of state inspection; and that taxes on boats and vessels have been sustained where they are reasonably calculated to reach the value of the property itself, so far as it is within the jurisdiction of the states, the tonnage tax prohibited being considered to be a tax on boats and vessels based upon their capacity rather than their value.

76. Methods of State Taxation.

The requirement of due process of law does not necessitate judicial proceedings to determine the amount of tax to be paid by each person and to enforce the tax as against his property. (See *Kentucky Railroad Tax Cases*. Also see below, § 257.) The usual method of assessment and levy for the purpose of determining the amount of tax to be paid, and of seizure and

sale to enforce such payment, if the tax becomes delinquent, are themselves due process of law. But there must be a procedure of some kind to fix the valuation of the property for the purposes of taxation, and some apportionment of taxes on the basis of such valuation, and the taxpayer must have some kind of notice to enable him to pay before his property is seized. The ordinary public taxes which are based on property owned are usually apportioned by means of an assessment of the value of the property, made by proper officers, for determining the amount belonging to each taxpayer; and following the assessment there is usually a levy made by some proper board or tribunal which determines the amount which each property owner must pay in order that the desired aggregate sum of public money shall be raised. As to the general public taxes which are levied in accordance with law on assessments regularly provided for, the law itself constitutes sufficient notice, and the taxpayer is bound to ascertain the sum required of him and pay it within the time required by the general statutes; but as to special taxes for public improvements and the like, the taxpayer is entitled to some specific notice of the proceeding in which it is to be determined whether he or his property is within the class subject to the tax, and of the amount which he is required to pay, so that he shall have opportunity to make payment. On failure to pay either a general or a special tax, the property of the taxpayer may be seized and sold; but he may by judicial proceedings question the validity of the tax sought to be exacted.

77. Federal Taxation.

As the federal government is one of enumerated powers rather than of general powers, we find the power to levy taxes expressly conferred upon Congress in the federal constitution. Perhaps the power to levy taxes for the purpose of carrying out the objects for which the federal government was created would have been necessarily implied without specific provision; but one of the difficulties attending the form of government provided for by the Articles of Confederation was that it

could not exercise the power of taxing persons or property, but was dependent on contributions from the state governments; and while the Congress of the Confederation could apportion among the states the charges of war and of other expenses incurred for the common defence and welfare, no method was provided by which the states could be compelled to raise and turn over to the federal government the sums thus apportioned to them. It was to be expected, therefore, that the framers of the federal constitution should incorporate therein some specific provision by which the federal government should have this power so essential to its existence. This specific authority is given in the following clause: "The Congress shall have power: — To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States" (Art. I, § 8, ¶ 1). The power to tax for the purpose of raising public money is thus specifically given, and the purposes for which taxes may be levied and collected are as broad as the needs of the government can possibly be, for any public purpose within the scope of the powers given to the federal government would fall within the authority to raise revenue, "To pay the debts and provide for the common defense and general welfare." Within this general authority, it is for Congress to determine what is a proper purpose and the method and extent of exercising the taxing power. The power to tax thus given to Congress undoubtedly extends in a general way to all persons and property within the jurisdiction of the United States. But the further specification of the power to lay and collect duties, imposts, and excises, with the concluding limitation that they shall be uniform throughout the United States, suggests a distinction between such duties, imposts, and excises which are required to be uniform, and direct taxes which, by other provisions, are required to be apportioned among the several states according to population (Art. I, § 2, ¶ 3, and § 9, ¶ 4). These two forms of federal taxation will therefore be separately considered.

78. Duties, Imposts, and Excises.

As a matter of practical expediency, the power of federal taxation for the raising of public revenue is exercised almost entirely by the levy and collection of duties, imposts, and excises. These are merely different forms of taxes. "Duties and imposts" cover levies on imports and exports of commodities; and the power to levy these, in its discretion, is restricted only by two clauses, the one included in the general provision already quoted that they shall be uniform; and the other in the clause providing that, "No tax or duty shall be laid on articles exported from any state" (Art. I, § 9, ¶ 5). In the exercise of the power to levy and collect duties and imposts, import duties are levied which are either (1) specific, that is, in accordance with quantity, or (2) *ad valorem*, that is, in accordance with value, upon very many classes of goods brought from foreign countries; and from this source a large portion of the revenue of the United States government is derived. The extent to which this taxing power shall be carried, and the methods in which it shall be exercised, are peculiarly within the discretion of Congress, and as the states cannot levy taxes on imports or exports, as already indicated, this is a source of revenue available only to the United States.

The term "excises" applies to taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon the privilege of pursuing occupations, upon corporate privileges, and the like. The power of levying and collecting such taxes is exercised in a variety of ways. Thus manufacturers of alcohol and various forms of liquors containing alcohol, and manufacturers of tobacco in various forms, are required to pay taxes on their manufactured products; sellers of such products, whether at wholesale or retail, are required to pay a license fee for the privilege of carrying on their business; license fees are also required for the privilege of conducting other forms of business or engaging in specified occupations; and when specific emergencies have necessitated special rev-

enues, stamp duties have been imposed on various forms of commercial transactions. Some corporations chartered by the federal government, such as national banks, are required to pay taxes for the privilege of exercising their franchise rights; licenses are exacted from those who employ vessels in foreign commerce under the jurisdiction of the United States, or who engage in the coast trade, or in navigating the navigable waters; those who make use of the postal facilities afforded by the federal government are required to make compensation therefor as Congress in its discretion shall deem expedient; and in a variety of other ways persons who enjoy specific benefits from the operation of the federal government are compelled to contribute to its support. There seems to be no specific limitation on the power of the United States to levy excise taxes except that already indicated, viz., excises like duties and imposts must be uniform throughout the United States.

Since the acquisition by the United States of Porto Rico and the Philippines, serious difficulties have arisen in determining whether the requirement that "all duties, imposts and excises shall be uniform throughout the United States" (Art. I, § 8, ¶ 1), prevents the levying of duties on goods brought from such territorial possessions into the ports of the United States. It has been settled in the case of *De Lima* v. *Bidwell* and the other insular cases, that since the final acquisition of such territorial possessions by treaty with Spain, they are not foreign territory, and that the ordinary tariff duties on goods brought into the United States from foreign countries are not applicable. This being so, the question is whether special provisions as to tariff duties on goods brought from those islands into the United States are valid under the clause just quoted as to uniformity. The view which seems to be generally accepted is that the uniformity provided for is uniformity as among the states, that is, throughout the territory of the states which originally constituted the United States, and those states which have since been admitted to the Union; and therefore that the requirement of uniformity does not apply to duties on goods exported from the insular possessions into the United States;

and accordingly a tariff duty on exports from such insular possessions has been sustained. It would seem clear that the clause prohibiting the levying of duties by the United States on goods exported from any state (Art. I, § 9, ¶ 5) is not applicable to duties on exports from these insular possessions. In fact, the power of Congress to levy duties on imports and exports to and from such possessions in order to maintain territorial governments, and not to raise revenue for the support of the general government, is not derived from the taxing clause of the federal constitution but by implication from the power to "make all needful rules and regulations respecting the territory or other property belonging to the United States" (Art. IV, § 3, ¶ 2), and is not subject to the rule that duties, imposts, and excises shall be uniform.

79. Direct Taxation by the Federal Government; Income Tax.

While the revenues of the United States have usually been derived almost entirely from duties, imposts, and excises, as to which the rule of uniformity is applicable, the federal government is not limited to such sources for the raising of revenue. It is within the scope of its taxing power to levy *per capita* taxes, or direct taxes on property, but such taxes are required to be apportioned among the states in accordance with the population, for it was provided in the federal constitution as originally adopted that, "Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to servitude for a term of years, and excluding Indians not taxed, three-fifths of all other persons" (Art. I, § 2, ¶ 3), and that, "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken" (Art. I, § 9, ¶ 4). The "census or enumeration" referred to in the latter provision has reference to the enumeration provided for in connection with the first provision which furnished a basis

for determining the ratio of representation among the states The apportionment of representation has been changed (Amend. XIV, § 2), so that representatives are now "apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed"; but it still remains true that direct taxes, and also capitation taxes, must be apportioned among the states on the same basis as representatives, that is, on the basis of enumeration of the population. Therefore, if the federal government should desire to raise revenue by a capitation tax, it would not be possible for it to do so by exacting, for instance, a fixed sum from each male person over twenty-one years of age within the limits of its jurisdiction; but it must determine how much each person shall pay by apportioning the aggregate amount to be raised among the several states in accordance with their respective populations, as ascertained by the census, and then determine how much each person of the class of persons required to pay the capitation tax and residing in any particular state must pay in order to make up the total amount of tax apportioned to that state. Likewise, if the United States should desire to raise revenue by a direct tax on real property, it could not tax all the lands within the jurisdiction of the United States on the basis of value, nor on the basis of extent, that is, for instance, at so much per acre; but it must apportion among the several states in accordance with their population the total amount of the revenue to be raised by taxes upon real property and must then provide the rate at which real property in each of the several states shall be taxed in order to raise in each state the sum apportioned to that state.

The inconvenience and difficulty which would attend the levy of capitation and direct taxes in accordance with this method are so great that no successful effort has ever been made or probably ever will be made to raise revenue in this manner, although several times attempted. The object of these provisions, however, was evidently not to render such taxes impossible, but to preserve some proportionate relation between representation

and taxation of this character. The discussion attending the incorporation of these provisions into the federal constitution seems to indicate a purpose to attach to the advantage which the states in which slavery existed were given by way of additional representation on account of including in their enumeration three-fifths of the slave population, a corresponding burden by way of imposition of a higher proportion of capitation and direct taxes. At the time of the adoption of the federal constitution, the elective franchise in states where slavery existed was limited to free white persons, and the result of giving such states representation on the basis of an enumeration of population which included three-fifths of the slave population was that the voters in those states had a larger proportional representation in Congress than had the voters in states not including any slave population. As capitation and direct taxes have not generally been resorted to as a source of revenue, the states which had the slave population did not actually suffer any detriment to correspond with the increased representation thus given to them; and since the amendment of the constitution abolishing slavery and apportioning representation in accordance with actual population, there seems to be no sufficient reason for perpetuating the requirement that capitation and direct taxes shall be apportioned among the states in accordance with population, rather than imposed on all persons and property within the limits of the United States in accordance with the rule of uniformity; but until the constitution shall be amended in this respect, the difficulties attending the levy of capitation and other direct taxes must remain.

Within comparatively recent years there has been a notable illustration of the practical effect of the provision requiring apportionment of direct taxes. In 1894 Congress provided for a tax on incomes, that is, a tax on individuals graduated on the basis of the income of each. This provision seems to have been adopted in order to supply anticipated deficiencies in import duties to result from a radical change of tariff schedules. But it was held by the Supreme Court of the United States in the *Income Tax Case* that a tax on incomes

was in effect a tax on the ownership of the property from which the income was derived; and that whether this property was realty or personalty, such a tax was a direct tax and could only be levied on the basis of apportionment, and as the statute did not provide for apportionment it was invalid. The decision was, not that it was beyond the power of Congress to impose a tax upon incomes, but that such a tax must be distributed by apportionment among the states, and not determined simply on the plan of uniformity throughout the United States.

CHAPTER XIII.

FINANCIAL POWERS OTHER THAN TAXATION.

80. References.

J. Story, *Constitution*, §§ 1054, 1055, 1116–1121, 1357–1372; T. M. Cooley, *Constitutional Law* (3d ed.), 64, 90–93; H. C. Black, *Constitutional Law* (2d ed.), 183–185, 306, 307; J. R. Tucker, *Constitution*, 508–516, 823–827; J. I. C. Hare, *Constitutional Law*, 198–205; *The Federalist*, No. 44; J. B. Thayer, *Cases on Constitutional Law*, 2197–2199; A. B. Hart, *Actual Government* (Amer. Citizen Series), § 214; *Craig* v. *State of Missouri* (1830, 4 Peters, 410; Thayer's Cases, 2199; Marshall's Decisions, Dillon's ed., 617); *Briscoe* v. *Bank of Kentucky* (1837, 11 Peters, 257; Thayer's Cases, 2207; McClain's Cases, 459); *Veazie Bank* v. *Fenno* (1869, 8 Wallace, 533; McClain's Cases, 222; Thayer's Cases, 1334); *Legal Tender Case* (1884, 110 U. S. 421; McClain's Cases, 442; Thayer's Cases, 2255); *Hepburn* v. *Griswold* (1870, 8 Wallace, 603; Thayer's Cases, 2222); *Legal Tender Cases* (1872, 12 Wallace, 457; Thayer's Cases, 2237, and notes, 2267–2273); *Trebilcock* v. *Wilson* (1871, 12 Wallace, 687; McClain's Cases, 454); *Bronson* v. *Rhodes* (1868, 7 Wallace, 229; Thayer's Cases, 2215); *Lane* v. *Oregon* (1868, 7 Wallace, 71; McClain's Cases, 40).

81. Financial Powers of States.

It is within the general scope of legislative power to provide for the borrowing of money for the public use, which is usually done either by the issuance of bonds bearing interest, which may be sold for money, or by issuing warrants, treasury notes, or other evidences of indebtedness which may be used as money or by way of substitutes for money. Warrants are mere evidences of debt and are not intended for circulation, so that they need not be further considered. Treasury notes, or like instruments in the form of due-bills, by which the government promises to pay the amount specified on the face of the bill or note, are usually intended, however, to pass from hand to hand as currency and to constitute a part of the cir-

culating medium of the country. The states may exercise the power of borrowing money in any of these ways except as forbidden by the provisions of the federal constitution. There is nothing in the constitution to prevent their borrowing money by means of the sale of bonds, nor to prohibit them from issuing warrants as mere evidences of indebtedness; but they are specifically prohibited from emitting bills of credit (Art. I, § 10, ¶ 1), and this prohibition puts it beyond the power of the state to issue due-bills, or paper of any kind intended to pass from hand to hand as or as a substitute for money; that is, a state cannot, even for the purpose of borrowing money, exercise the sovereign power of emitting paper currency (*Craig* v. *Missouri*). But this prohibition does not interfere with the power of a state to authorize banks to issue bank notes in the form of due-bills or of similar character, intended to pass as currency on the faith and credit of the bank itself, and not of the state which authorizes their issuance.

The business of banking is a form of business which the state may regulate and it may authorize the creation of corporations to engage in such business. In the case of *Briscoe* v. *Bank of Kentucky* it was held that even though the state itself is a stockholder in the bank, the notes issued by the bank and in its own name are not bills of credit of the state. It is entirely possible, therefore, and it was at one time the practice for states to charter banks with authority to issue currency under regulations and restrictions imposed by law. Such currency might properly be called state currency as distinguished from national currency, being issued under authority of the state. However, as will appear in the next section, Congress has also authority to provide currency for the country, and, in the exercise of this sovereign power it may impose restrictions on the exercise of a like power on the part of the states. In the exercise of this sovereign power, Congress has imposed a tax of ten per cent on the currency issued under the authority of a state, and this tax is, as it was intended to be, so severe a burden on the emitting of bills by banks chartered under state authority that state bank currency has

wholly gone out of use and been supplanted by currency provided for by the federal government. Such a tax has been held valid in *Veazie Bank* v. *Fenno*.

By the section of the federal constitution last above referred to, states are also prohibited from coining money or making anything but gold and silver coin a tender in payment of debts; and it results, that neither coin nor paper money can be emitted by a state, and that practically the entire power of providing for and regulating the making and issuance of money rests with the federal government.

82. Power of Federal Government as to Money.

Congress is expressly given by the constitution power to borrow money on the credit of the United States (Art. I, § 8, ¶ 2), and this it may do and frequently has done by the sale of bonds bearing interest, and also by emitting due-bills or promises to pay in the form of treasury notes, or so-called "greenbacks," intended for use as a circulating medium. There is no express provision in the constitution as there was in the Articles of Confederation for emitting bills of credit, but in the practical construction of the constitution it has been thought that the power to emit bills of credit is incident to the power to borrow money and involves the general power to regulate the currency of the country.

Congress has the implied power, which it exercised during two considerable periods of its early history, to charter a United States Bank with branches in order to facilitate the financial operations of the government, but under its general powers to regulate the currency and to borrow money, it has more recently provided for the incorporation of a group of national banks with authority to issue currency. This currency consists of the so-called national bank notes, which are promises of the banks to pay, guaranteed by the government itself; so that, in effect, this currency rests for its security on the credit of the government as well as upon the financial responsibility of the banks issuing it. The government secures itself, as against its guaranty of this paper, by requiring the banks to

deposit with the federal government bonds which the banks are required to buy for that purpose, so that the national banking scheme was originally a means by which the United States borrowed money, although that is not now the ultimate object of conducting the national banking system.

One means, and a very important one, of securing the circulation of the paper money, or promises to pay, of the United States, was to make such promises to pay a legal tender for the payment of all public and private debts. In the absence of some such statutory provision, only coin would be a legal tender. When "greenbacks" were first provided for in 1862, it was a serious question whether Congress had any authority to make such paper money a legal tender, but it was finally decided in the *Legal Tender Cases* (1871) that the power to make it a legal tender was incident to the power to emit it, that is, incident to the express power to borrow money and the implied power to issue bills of credit. As stated in the preceding section, the states are prohibited from making anything but gold and silver coin a legal tender, but there is no such prohibition with reference to the power of Congress, and its exercise of the power to make its own obligations a legal tender in the payment of debts is now generally conceded. It has been held, however, in *Lane County* v. *Oregon*, that Congress cannot make its own obligations a legal tender for the payment of state taxes, for the power to tax is a necessary power of the states, and they may require their own taxes to be paid in whatever manner they see fit. Nor can Congress make legal tender notes receivable in payment of debts which by specific contract are payable in coin (*Trebilcock* v. *Wilson* and *Bronson* v. *Rhodes*).

Congress has also the constitutional power "to coin money, regulate the value thereof, and of foreign coin" (Art. I, § 8, ¶ 5). In the exercise of this power, Congress has provided for the coining of various metals into money of different denominations, specifying the quantity of metal for each coin. In so doing the federal government does not merely indicate the quantity of each particular metal which is included in the

coin piece, leaving the value to be determined by the current market value of such metal, but in the exercise of its sovereign power, it determines arbitrarily the money value of the coins issued, and by the fact of their issuance, makes them legal tender for their coin value as may be provided by statute, with a limitation as to the aggregate amount for which the minor coins may be used as a legal tender. The power to coin money does not, however, include the power of stamping a merely fictitious value on any material which may be selected for the purpose. It is doubtful whether Congress could, in the exercise of this power, stamp a piece of paper with the words "five dollars" and make such a piece of paper a legal tender for that amount of money. At any rate it has never attempted to do so, and has limited the issuance of legal tender paper money to obligations of the United States to pay money.

As pointed out in the chapter relating to taxation (see above, § 73), the states cannot tax the bonds or currency issued by or under the authority of the federal government except as Congress may authorize, and, conversely, the federal government cannot tax the bonds or warrants issued by or under authority of a state government, because for either to do so would be impossible without interfering with the proper exercise of power on the part of the other.

CHAPTER XIV.

REGULATION OF COMMERCE.

83. References.

In General: J. Story, *Constitution*, §§ 259–263, 1054–1101; T. M. Cooley, *Constitutional Limitations*, ** 584–594; T. M. Cooley, *Constitutional Law*, ch. iv, § 2; H. C. Black, *Constitutional Law* (2d ed.), pp. 186–207, 368–371; J. I. C. Hare, *Constitutional Law*, chs. xxxi–xxxiii; J. R. Tucker, *Constitution*, §§ 250–268; J. N. Pomeroy, *Constitutional Law*, §§ 321–384; *The Federalist*, Nos. 7, 11, 12, 22, 42; Prentice and Egan, *Commerce Clause of the Federal Constitution;* A. B. Hart, *Actual Government* (Amer. Citizen Series), chs. xxiv, xxvii; J. B. Thayer, *Cases on Constitutional Law*, pp. 2090, 2091; John Fiske, *Critical Period in American History*, ch. iv.

Extent of Federal Power: *Gibbons* v. *Ogden* (1824, 9 Wheaton, 1; 6 Curtis' Decisions, 1; McClain's Cases, 235; Thayer's Cases, 1799, and notes, 1818–1823; Marshall's Decisions, Dillon's ed., 421); *Henderson* v. *Mayor of New York* (1875, 92 U. S. 259; McClain's Cases, 244; Thayer's Cases, 1961); *The Passenger Cases* (1848, 7 Howard, 283; 17 Curtis' Decisions, 122; Thayer's Cases, 1865); *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (1877, 96 U. S. 1; McClain's Cases, 252; Thayer's Cases, 1985); *Lord* v. *Steamship Co.* (1880, 102 U. S. 541; McClain's Cases, 256); *The Daniel Ball* (1870, 10 Wallace, 557; McClain's Cases, 260; Thayer's Cases, 1930); *Kidd* v. *Pearson* (1883, 128 U. S. 1); *United States* v. *E. C. Knight Co.* (1895, 156 U. S. 1; McClain's Cases, 263; Thayer's Cases, 2185); *Northern Securities Co.* v. *United States* (1904, 193 U. S. 197; McClain's Cases, 2d ed., 1081); *In re Debs* (1895, 158 U. S. 164); *The Lottery Case* (1903, 188 U. S. 321; McClain's Cases, 2d ed. 1071; *United States* v. *Standard Oil Co.* (1909, 173 Fed. Rep. 177).

Validity of State Regulations: *Willson* v. *Blackbird Creek Marsh Co.* (1829, 2 Peters, 245; 8 Curtis' Decisions, 105; McClain's Cases, 273; Thayer's Cases, 1837); *Cooley* v. *Board of Wardens* (1851, 12 Howard, 299; 19 Curtis' Decisions, 143; McClain's Cases, 275; Thayer's Cases, 2191); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.* (1855, 18 Howard, 421; McClain's Cases, 282; Thayer's Cases, 1889); *Escanaba Co.* v. *Chicago* (1882, 107 U. S. 678; McClain's Cases, 285; Thayer's Cases, 2002); *Harman* v. *Chicago* (1893, 147 U. S. 396; McClain's Cases, 290; Thayer's Cases, 2011); *United States* v. *Rio Grande Dam & Irrigation Co.* (1899, 174 U. S. 690; McClain's Cases, 297); *Kansas* v. *Colorado* (1907, 206 U. S. 46).

STATE TAXATION OF COMMERCE: *Brown* v. *Maryland* (1827, 12 Wheaton, 419; 7 Curtis' Decisions, 262; McClain's Cases, 303; Thayer's Cases, 1826); *Welton* v. *Missouri* (1875, 91 U. S. 275; McClain's Cases, 313; Thayer's Cases, 1957); *Robbins* v. *Shelby County Taxing District* (1887, 120 U. S. 489; McClain's Cases, 317; Thayer's Cases, 2056); *Ficklen* v. *Shelby County Taxing District* (1892, 145 U. S. 1; McClain's Cases, 323; Thayer's Cases, 2143); *Emert* v. *Missouri* (1895, 156 U. S. 296; McClain's Cases, 324); *Crutcher* v. *Kentucky* (1891, 141 U. S. 47; McClain's Cases, 328; Thayer's Cases, 2135); *Brown* v. *Huston* (1885, 114 U. S. 622; McClain's Cases, 333; Thayer's Cases, 2022); *Telegraph Co.* v. *Texas* (1881, 105 U. S. 460; McClain's Cases, 338); *Philadelphia & Southern Steamship Co.* v. *Pennsylvania* (1887, 122 U. S. 326; McClain's Cases, 342; Thayer's Cases, 2063); *Adams Express Co.* v. *Ohio State Auditor* (1897, 165 U. S. 194; McClain's Cases, 349); *Allen* v. *Pullman Palace Car Co.* (1903, 191 U. S. 171; McClain's Cases, 2d ed., 1114); *Western Union Tel. Co.* v. *Kansas* (1909, 30 Sup. Ct. Rep. 190).

STATE POLICE POWER AS TO COMMERCE: *Railroad Co.* v. *Fuller* (1873, 17 Wallace, 560; McClain's Cases, 355); *Wabash, etc., R. R. Co.* v. *Illinois* (1886, 118 U. S. 557; Thayer's Cases, 2045); *Lake Shore & Michigan Southern Railway Co.* v. *Ohio* (1899, 173 U. S. 285; McClain's Cases, 357); *Railroad Co.* v. *Husen* (1877, 95 U. S. 465; McClain's Cases, 367; Thayer's Cases, 753); *Kimmish* v. *Ball* (1889, 129 U. S. 217; McClain's Cases, 371); *Brimmer* v. *Rebman* (1891, 138 U. S. 78; McClain's Cases, 373); *Minnesota* v. *Barber* (1890, 136 U. S. 313; Thayer's Cases, 2112); *Morgan's Steamship Co.* v. *Louisiana Board of Health* (1886, 118 U. S. 455; McClain's Cases, 376; Thayer's Cases, 2040); *Bowman* v. *Railway Co.* (1888, 125 U. S. 465; Thayer's Cases, 2080); *Leisy* v. *Hardin* (1890, 135 U. S. 100; McClain's Cases, 378; Thayer's Cases, 2104); *Austin* v. *Tennessee* (1900, 179 U. S. 343; *In re Rahrer* (1891, 140 U. S. 545; Thayer's Cases, 2123); *Rhodes* v. *Iowa* (1898, 170 U. S. 414; McClain's Cases, 390); *Schollenberger* v. *Pennsylvania* (1898, 171 U. S. 1; McClain's Cases, 395); *Powell* v. *Pennsylvania* (1887, 127 U. S. 678; Thayer's Cases, 537); *Capital City Dairy Co.* v. *Ohio* (1902, 183 U. S. 238).

FEDERAL OR STATE TAXES ON EXPORTS, IMPORTS, AND TONNAGE: *Pace* v. *Burgess* (1875, 92 U. S. 372; McClain's Cases, 402); *Almy* v. *California* (1860, 24 Howard, 169; McClain's Cases, 404); *Woodruff* v. *Farham* (1868, 8 Wallace, 123; Thayer's Cases, 1922); *Turner* v. *Maryland* (1882, 107 U. S. 38; McClain's Cases, 406; Thayer's Cases, 2120); *Inman Steamship Co.* v. *Tinker* (1876, 94 U. S. 238; McClain's Cases, 409); *Packet Company* v. *Keokuk* (1877, 95 U. S. 80; McClain's Cases, 411); *Transportation Co.* v. *Wheeling* (1878, 99 U. S. 273; McClain's Cases, 416).

COMMERCE WITH INDIAN TRIBES: *United States* v. *Holliday* (1865, 3 Wallace, 407; McClain's Cases, 270; Thayer's Cases, 1909); *Cherokee Nation* v. *Kansas Railway Co.* (1890, 135 U. S. 641; McClain's Cases, 1063).

84. State Power over Commerce in General.

The general power to regulate commerce is in strict analysis a part of the police power, and, as has already been indicated in the discussion of that subject (see above, § 48), the states may regulate rates charged by common carriers for the transportation of persons or goods. In some states boards of commissioners have been especially created to exercise a particular supervision over railroad, express, telegraph, and other kinds of corporations engaged in business affecting commerce. Indeed, regulations as to the use of highways, the construction of bridges, the navigation of public waters, and the like, are instances of police regulation principally affecting commerce. Were it not for the limitations upon state power, involved in the provisions in the clause of the federal constitution to be hereafter discussed, which gives Congress certain powers as to the regulation of commerce, there would be no necessity for any separate or particular treatment of this subject, but as the powers of the state are greatly restricted in this respect by that provision it is necessary that the division of powers between the federal government and the governments of the states be considered in some detail.

85. Necessity for Federal Regulation of Commerce.

Under the Articles of Confederation, Congress had no power to levy taxes or to regulate commerce; and, as a consequence, it could not adopt navigation laws, impose duties on imports, or prevent conflicting or retaliatory enactments by the legislatures of the different states with respect to trade between the states and foreign countries, or other states of the Union. Each state could, for itself, levy duties on exports or imports, and make such commercial regulations as it saw fit. This situation was inconsistent with any uniform or beneficial regulation of commercial intercourse with foreign countries, and because of division and animosity as between the people of the several states, tended to a disruption of the Confederation. So serious was the condition that the legislature of

Virginia, in 1786, passed a resolution for the appointment of commissioners from that state to confer with like commissioners from other states with reference to the adoption of some more efficient and satisfactory system of commercial regulations. These commissioners were asked to meet at Annapolis, but at the time fixed there were commissioners present from only five states, and the so-called Annapolis convention was, therefore, unable to take any efficient action; but resolutions were adopted recommending action by Congress with a view of securing amendments or additions to the Articles of Confederation, and this convention was the first formal step towards securing for the Union a better organization and a more practical constitutional system. When the constitutional convention, subsequently called, met to consider the revision of the Articles of Confederation, or the adoption of some better plan of federal government, one of the first objects which the members had in mind was a uniform system for the regulation of commerce; and the system adopted involved the grant to Congress of the power to impose duties on imports as a means of raising revenue, and the further power to regulate foreign and interstate commerce. The provision as to duties on imports has already been discussed under the chapter relating to taxation. The subject of regulation of commerce, as involving the exercise of that power by Congress and the corresponding limitations upon the power of the states, is for this chapter.

86. Provisions of the Federal Constitution on Commerce.

The principal commerce clause of the federal constitution, (Art. I, § 8, ¶ 3), is as follows: The Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." (1) The necessity of such control with reference to foreign commerce is manifold and self-evident. It is essential in determining the relations of the general government to foreign countries, and in exercising supervision over navigation by vessels carrying the flag of the United States on the high seas and other

public waters. (2) The necessity for federal regulation of interstate commerce arises from the fact that without such regulation freedom of commercial intercourse between residents of the different states on an equal basis would be impossible. (3) Commerce with the Indian tribes was put under the control of Congress, because those tribes were recognized as to some extent independent and self-governing bodies, existing within the limits of the United States, over which the national government asserted a form of protection, although the members of such tribes were not, as individuals, subjects of the United States. As to any forms of commerce not coming within one of these three classifications, the states are allowed to retain the power of control and regulation as effectually as though independent of each other and not subject to federal authority.

87. Concurrent State Power over Commerce.

Even as to commerce belonging to any of the three classes specified by the federal constitution, the power of state regulation is not necessarily denied. It is to be noticed that Congress is not expressly given the exclusive power to regulate, and while the power of Congress is necessarily superior to that of the states, so that any regulations which Congress may adopt will supersede state laws on the same subject, it does not follow that state legislation affecting the three forms of commerce enumerated and not in conflict with any laws of Congress on the same subject is necessarily invalid. Thus harbor regulations, or rules as to the employment of pilots, may affect foreign or interstate commerce, but they are not on that account ineffectual if there are no statutes of Congress with which they are in conflict. Again, the erection of bridges over navigable streams within state limits, or the construction of dams in such streams, can be authorized by the state, although foreign or interstate commerce is thereby, to some extent, interrupted. There are many local regulations essential for the control of commerce under peculiar circumstances, which cannot very well be provided by general law, and so far as the state regu-

lations do not interfere with the general law on the subject they are regarded as proper.

The fact that state regulations adopted in the exercise of the general police power may incidentally affect foreign and interstate commerce does not render such state regulations necessarily invalid. If they are not unreasonable, nor calculated to effect a discrimination, and do not in substance amount to general regulations of such commerce as is placed within the control of Congress, they will be upheld. For instance, a state may require locomotive engineers to procure a license, although they are to act for railroads engaged in interstate as well as internal commerce. In the absence of any legislation by Congress, this principle would also apply to engineers on vessels navigating the public waters within the state, and also to the inspection of such vessels, but if there is congressional legislation on this subject, any state legislation is thereby superseded. The states can also, without doubt, prohibit the sale of goods dangerous to the public health or morals, even though brought from another state or from a foreign country. As the general police power is left to the states and is not vested in Congress, it is evidently necessary that the states shall exercise it, not only with reference to goods produced in the state, but also as to goods brought into the state from without.

88. What is a Regulation of Commerce.

Evidently a careful distinction must be made between state provisions which incidentally affect commerce and those which amount to a regulation of commerce, and this distinction depends on the legal definition of commerce. As applied in determining whether a particular act or transaction involves foreign or interstate commerce which is within the control of Congress, or internal commerce which remains within the control of the states, the term has been held to cover the transportation of goods, including the bringing of goods into the state for sale, the transportation of persons into or from the state, the conveyance of messages by telegraph between persons in the state and those in another state or in a foreign

country, and, in general, all forms of personal and business intercourse over or across state lines. But the making of contracts is not commerce in this sense.

Foreign and interstate commerce is not limited to the mere transportation of goods, persons, or intelligence across the state lines. The whole transaction from the beginning to the end is one continuous act of commerce. If goods are shipped from a point in one state to a point in another state or in a foreign country; or conversely, if goods are shipped from a point in another state or in a foreign country to a point within the state, the entire transaction is interstate or foreign commerce, and state regulations are no more applicable to the portion of the transaction which takes place within the state than to that which is outside of the state, or which involves the mere passing of the state line. Thus although a navigable river or lake is entirely within the state limits, nevertheless navigation on such river or lake, so far as it involves the transportation of goods along such channel of communication, is interstate or foreign commerce so far as the goods are brought from without the state to a point of destination in the state, or taken from a point within the state to a point without the state. The same principle is applied to transportation over railroad lines, even though they are operated exclusively within the state, if they constitute a portion of a line of transportation for goods brought into or taken out of the state. The same principles apply to transportation of goods through the state between points in other states. Illustrations of the application of these principles will be found in subsequent sections of this chapter.

89. Freedom of Commercial Intercourse Protected.

As has already been said, the power of Congress to regulate foreign and interstate commerce is not in terms exclusive, nor is it construed as excluding state regulation which incidentally affects such commerce, or even directly affects it for local purposes, so far as no congressional legislation exists. But the very purpose of the commercial clause in the federal constitution was to exclude discriminating restrictions and unneces-

sary interference on the part of the states, and it is to be presumed, therefore, that so far as these kinds of commerce are to be subjected to general regulations affecting them, not locally but throughout their entire extent, such regulations must come from Congress and not from the states. It must be assumed that, so far as general regulations are concerned, it is the intention of Congress that commerce shall be unrestricted save as congressional relations may have been adopted. Thus it has been held in *Welton* v. *Missouri* that a state cannot require a license for the selling within the state of goods brought into the state from another state or from a foreign country. A so-called license tax on drummers or commercial agents is therefore invalid as applied to such agents soliciting orders of goods from without the state (see *Robbins* v. *Shelby County Taxing District*); for freedom of intercourse involves the right of persons living in other states or in foreign countries to come into the state for the purpose of selling their goods save so far as restrictions may have been interposed by Congress, as, for instance, by the requirement for payment of import duties.

On the other hand, the control of persons carrying on business within the state, not necessarily involving the bringing of goods into the state for sale, is a matter for state regulation, and any business carried on within the state which is a proper subject for state taxation or police regulation is under state control. The state may impose a license tax upon transient merchants, or authorize cities to do so, without interfering with freedom of commerce, even though such a transient merchant may be selling goods brought from another state; and it has been held in *Emert* v. *Missouri* that the business of peddling, being one which is subject to regulation in the exercise of the police power, may be restricted by state statute, although the peddler is actually engaged in the sale of goods brought from without the state. In this connection, it is necessary, however, to bear in mind the provision of the federal constitution that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several

states" (Art. IV, § 2, ¶ 1), and therefore any state law or municipal regulation based on a discrimination between citizens of the state and citizens of other states, which excludes citizens of other states from all the privileges in this respect accorded to citizens of the state, and which bears harder on citizens of another state than the state's own citizens, are invalid. (See below, § 190.) Consequently any state legislation which only incidentally affects foreign or interstate commerce is invalid if it imposes a burden on such commerce as compared with commerce which is wholly within the state.

90. State Restrictions Invalid; Further Illustrations.

The principles stated in the preceding sections of this chapter can be rendered more intelligible by a brief statement of some of the important questions which have been decided under them. Soon after the application of steam power to the purpose of propelling vessels, the state of New York granted an exclusive franchise to certain persons to operate steam vessels upon waters within the limits of the state; but the Supreme Court of the United States in *Gibbons* v. *Ogden* held this exclusive privilege to be invalid so far as it operated to exclude from the Hudson River steam vessels coming from another state; for although the portion of the Hudson River on which the vessel was navigated is exclusively within the limits of New York, the state statute amounted to a regulation of navigation on that river, and as navigation is included within the meaning of the term commerce, and as, therefore, vessels coming into the waters of New York from another state were engaged in interstate commerce, the restriction which the state of New York had attempted to make was a restriction of freedom of commercial intercourse among the states. Likewise a statute of New York, in effect requiring the payment by steamship companies of a per capita tax upon all passengers brought into the state, was held invalid in *Henderson* v. *Mayor of New York*, because transportation of persons as well as of goods is within the meaning of the term commerce, and the state passenger tax amounted to a restriction on foreign commerce. No doubt the state could take proper meas-

ures for excluding persons affected with contagious diseases, or who would be likely to become objects of charity, but as Congress has enacted immigration laws covering the whole subject, any state regulation of that character would no doubt now be invalid, as interfering with specific regulations by Congress.

In the proper exercise of its police power, the state may exclude animals having diseases likely to be communicated to other animals, or meat which is unwholesome, but such police regulations must be directly calculated to subserve purposes with reference to which the state can legislate, and not be used as a cloak for regulation of foreign and interstate commerce. Therefore it was held in *Railroad Company* v. *Husen* that a statute excluding from a state all cattle brought from another state which may have been subjected to the so-called Texas fever was unconstitutional, because it operated to exclude all the cattle from a certain region without regard to whether they had actually been contaminated with that disease. So in *Brimmer* v. *Rebman* it was held that meat inspection statutes, which required that all animals slaughtered for food be inspected while alive within one hundred miles of the place of sale and within a limited time before the meat was offered for sale, were unconstitutional as, in practical effect, preventing the sale within the state of fresh meat from animals slaughtered in another state, regardless of whether such meat was actually unwholesome by reason of diseased condition of the animals slaughtered or the keeping of the meat for an improper length of time after slaughtering.

In the exercise of its police power, the state may unquestionably regulate or prohibit the sale of intoxicating liquors or cigarettes, but as liquors and tobacco are recognized subjects of commerce, it has been held in *Bowman* v. *Railroad Company* that state statutes prohibiting the bringing into the state of such articles of commerce are invalid. The regulation of the sale of such goods after they have been brought into the state is another matter, and will be referred to in the next section of this chapter. The state may regulate rates of transportation by common carriers, but state statutes regulating such

rates have been held in *Wabash, etc. R. Co.* v. *Illinois* not to be applicable to the transportation of goods or passengers so far as such transportation is a part of interstate or foreign commerce. The state may, however, make regulations affecting railroads engaged in interstate or foreign commerce, if such regulations do not amount to an unreasonable restriction on such commerce. Thus statutes requiring that signals be given at highway crossings, or that rates of freight and fare be posted for information of the public, have been upheld. (See *Railroad Co.* v. *Fuller.*)

91. Sale of Goods brought into the State.

It is evident that commerce would not be substantially free from state interference if the state could impose a license tax on the privilege of selling such goods after they had been brought in, for such a tax imposed specifically with reference to goods which are the subject of foreign or interstate commerce would be in effect a restriction upon such commerce. Accordingly it was held in an early case in the Supreme Court of the United States (*Brown* v. *Maryland*), that a license tax on the privilege of selling goods which had been imported, and on which duties had been paid in accordance with the provisions of the federal law as to importation, was invalid, and it was suggested that the privilege of importing secured under the law of the United States involved more than merely the right to bring into the state for use, and included also the right to sell without interference of state law so long as the goods had not become mingled with the general property within the jurisdiction of the state. More specifically it was suggested that the importer had the right to sell imported goods in the original packages in which they had been brought into the state, but that this immunity from the application of the state law did not extend to sales other than in the original packages or to sales by persons who had procured the goods in the state from the importer.

Subsequently in *Leisy* v. *Hardin* the same general rule was applied to goods such as intoxicating liquors brought into

the state from another state, although there was no particular congressional regulation as to such matter and no duties had been paid to the United States for the privilege of bringing the goods into the state from another state; for, of course, Congress cannot impose duties on goods taken from one state into another. The so-called "Original Package" rule, therefore, means simply that in the absence of any regulation by Congress the state cannot tax or prohibit sales in the original package by the person who has brought the goods into the state from another state or from a foreign country, and that so long as such person continues to hold such goods for sale in the original package, the state cannot impose restrictions or burdens upon such sale.

This rule was the subject of particular discussion in connection with its application to the transportation and sale of intoxicating liquors in states where prohibitory liquor laws had been adopted; and the conclusion reached that state liquor laws did not apply to intoxicating liquors sold in the original packages by the person bringing them into the state was regarded by many as peculiarly unfortunate, because it opened the way for the constant violation of the policy of the state laws relating to the regulation of the liquor traffic. This objection has been obviated, so far as intoxicating liquors are concerned, by an act of Congress, known as the "Wilson Act," passed in 1890, providing that after intoxicating liquors are brought into any state they shall be subject to the regulations of the state law as to their sale; and since the passage of that act, sales in original packages are subject to the same restrictions as other sales of intoxicating liquors, for in the exercise of its power to regulate interstate and foreign commerce Congress may undoubtedly subject such commerce to state regulation so far as it may see fit (*In re Rahrer*). But the Wilson Act does not subject to state control the transportation of intoxicating liquors into a state; it relates only to their sale after they have reached their destination in the state (*Rhodes* v. *Iowa*). The "Original Package" rule still applies to sales of cigarettes, oleomargarine,

and other articles which are subjects of general commerce, but which come within the scope of the police regulations in the various states; it does not apply, however, to articles such as unwholesome food, infected clothing, devices for counterfeiting, and like articles which have no lawful use and are not properly subjects of commerce. As to such articles, the power of the state to prohibit transportation and sale may be fully exercised (*Kimmish* v. *Ball*).

92. State Taxation of Commerce.

The general power of the state to tax all property within its jurisdiction extends to property which, although it has been brought into the state as a subject of foreign or interstate commerce, is owned in the state or is otherwise subject to its jurisdiction for taxation purposes; but the state cannot levy taxes on property, which is a subject of interstate or foreign commerce, that is, while it is actually being transported through the state or from a point in the state to some point in another state or a foreign country. The exemption of such property from taxation commences when the transportation commences and continues so long as the transportation continues. The mere fact, however, that goods are manufactured or otherwise prepared to be sold outside of the state does not exempt them from state taxation or from state regulations until they have actually become subjects of commerce by the commencement of transportation to another state or country. (See *Kidd* v. *Pearson*.) On similar reasoning it has been held that the anti-trust and combination statutes passed by Congress in the exercise of its power to regulate interstate and foreign commerce (Act of 1890, known as the Sherman Act) have no application to trusts and combinations affecting the manufacture of goods in a state, for the reason that such trusts and combinations are subject only to state regulation (*United States* v. *E. C. Knight Company*).

But the state taxing power cannot be so exercised as to impose specific burdens upon persons or corporations engaged

in interstate or foreign commerce. Thus it has been held (*Philadelphia, etc. Steamship Co.* v. *Pennsylvania*) that a state tax on the gross receipts of a railway company or a steamship line is unconstitutional if a substantial part of such receipts are from interstate or foreign commerce. Likewise a specific tax on a telegraph company based upon its gross receipts for the transmission and delivery of telegrams is unconstitutional if the company is engaged in transmitting messages to or from other states and countries. (See *Telegraph Co.* v. *Texas*.) It is entirely proper, however, to require corporations engaged in interstate commerce to pay taxes in the state based on the value of their business within its limits, and it may properly be required that a corporation transacting such business in the state shall pay state taxes in accordance with the entire amount or profits of its business in all the states in which it operates, proportioned to the share of that business which is done in the state which levies the tax. (See *Adams Express Company* v. *Ohio State Auditor*, and *Allen* v. *Pullman Palace Car Co.*). But the state cannot impose a tax upon the entire capital stock of a foreign corporation engaged in interstate commerce as a condition to allowing it to also do local business. (*Western Union Tel. Co.* v. *Kansas*.)

93. Federal Regulations of Commerce.

In the exercise of its power to regulate interstate and foreign commerce, Congress has enacted statutes which need not be here discussed in detail. It has in a variety of ways regulated the commerce on navigable rivers and lakes. It has regulated railroad transportation for the purpose of preventing unjust discrimination in rates as between persons and localities, and has provided (1887) for an interstate commerce commission, having specific duties to perform with reference to the enforcement of these laws. It has also exercised incidentally a police power over interstate commerce (see above, § 49) as by prohibiting the transportation from one state to another of lottery tickets, thus extending the power to regulate so as to amount to entire exclusion (*Lottery Case*). It has passed statutes as

to immigration and in a variety of ways regulated and exercised supervision over commerce on the high seas either with foreign countries or between ports of the different states.

In the further exercise of its powers as to interstate and foreign commerce, Congress has by the so-called Sherman Act of 1890 prohibited the making of contracts and the formation of trusts and combinations and every other attempt to monopolize such commerce, and by a statute of 1898 made provision for settlement of controversies between carriers engaged in such commerce and their employés. As to the Sherman Act it has been decided that while the manufacturer of goods to be shipped into another state or abroad is not within the control of Congress (*United States* v. *E. C. Knight Co.*) the consolidation of competing railroad lines by means of the organization of a corporation to hold and control the stock of the railroad companies forming such lines so as to completely pool their interests and take over all inducement for competition is an arrangement in restraint of trade and an attempt to form a monopoly, and is invalid (*Northern Securities Co.* v. *United States*). Congress has power under the commerce clause of the Constitution to restrict and regulate the use of every instrumentality employed in interstate or international commerce, so far as it may be necessary to do so in order to prevent the restraint thereof denounced by the Anti Trust Act (*United States* v. *Standard Oil Co.*). Several other important decisions have been rendered as to the validity and effect of that statute, but they are all referred to and commented on in the case last above cited. For the purpose of preventing discrimination in rates of transportation in interstate commerce Congress has passed an act (1903) making it a crime for a carrier to transport merchandise at less than its published rate. (*Armour Packing Co.* v. *United States*).

The power of Congress to regulate commerce has been held to extend to the preservation of the navigability of rivers and lakes within state limits, and in the exercise of this power Congress may prohibit the construction of dams or the diversion of water, even at points above the head of navigation of

a navigable stream, so as to preserve the flow of water in that portion of the stream which is capable of use for the purpose of navigation (*United States* v. *Rio Grande Dam and Irrigation Co.* and *Kansas* v. *Colorado*).

In the exercise of its power to regulate commerce with the Indian tribes Congress has prohibited the sale of intoxicating liquors to the members of such tribes, and in other ways sought to protect them from impositions or injury at the hands of white persons seeking to take advantage of their helpless condition. And it has been held (*United States* v. *Holiday*) that such statutes may be made applicable to commercial transactions between the members of Indian tribes and white persons, whether such transactions take place on Indian reservations or elsewhere.

But the control which the federal government may exercise over such commerce as is placed under the regulation of Congress is not limited to the enactment of statutes. The federal executive may act, even to the extent of employing the military power to prevent unlawful interference with such commerce, as he may in preventing interruption in the carrying of the mails, and injunction suits may be prosecuted under his authority to stop any such interference. This power was exercised by President Cleveland in 1894 on the occasion of the so-called "Pullman Strike," and was sustained by the Supreme Court in the *Debs Case*.

CHAPTER XV.

CORPORATIONS: CREATION AND REGULATION.

94. References.

James Kent, *Commentaries*, Lect. xxxiii; J. Story, *Constitution*, §§ 1259–1271, 1392–1395; T. M. Cooley, *Constitutional Limitations*, ch. vii and ** 276–284, 575–582; T. M. Cooley, *Constitutional Law* (3d ed.), 333, 334, 338–342, and ch. xvii; J. R. Tucker, *Constitution*, 829–836, 863–865; S. D. Thompson, *Commentaries on Corporations*, I, chs. i–v, IV, ch. 118; H. O. Taylor, *Corporations*, chs. i–iv, viii; J. F. Dillon, *Municipal Corporations*, chs. i–vi; C. B. Elliott, *Private Corporations*, chs. i, iv; C. B. Elliott, *Public Corporations*, chs. i–iv; W. L. Clark, *Corporations*, chs. i, ii, viii; E. Freund, *Legal Nature of Corporations* (University of Chicago Press, 1896); J. P. Davis, *Nature of Corporations* (*Pol. Sci. Quart.*, XII, 273); G. W. Pepper, *Introduction to Study of Law of Associations*, (*Am. Law Register*, Vol. XLIX, O. S., 255); S. D. Thompson, *Abuses of Corporate Privileges* (*Am. Law Rev.*, XXVI, 169); A. J. Eddy, *Combinations;* R. T. Ely, *Monopolies and Trusts;* F. H. Cooke, *Law of Trade and Labor Combinations;* W. W. Cook, *Corporations as Affected by Statutes and Constitutions;* E. L. Von Halle, *Trusts or Industrial Combinations and Coalitions in the United States;* T. C. Spelling, *Trusts and Monopolies;* A. Stickney, *State Control of Trade and Commerce;* Civic Federation, *Report of Chicago Trust Conference of 1899*; *Industrial Commission Report*, Vol. I (Government Printing Office, 1900); J. W. Burgess, *Private Corporations from the Point of View of Political Science* (*Pol. Sci. Quart.*, XIII, 201); R. C. Davis, *Judicial Decisions and Statutes Prohibiting Combination and Trusts*, (*Quart. Jour. of Econ.*, XIV, 416); F. J. Goodnow, *Trade Combinations at Common Law* (*Pol. Sci. Quart.*, XII, 212); A. T. Hadley, *Difficulties of Public Business Management* (*Pol. Sci. Quart.*, III, 572); E. Q. Keasbey, *New Jersey and the Great Corporations* (*Harv. Law Rev.*, XIII, 198, 264); E. Q. Keasbey, *Jurisdiction over Foreign Corporations* (*Harv. Law Rev.*, XII, 1); F. E. Horack, *Organization and Control of Industrial Corporations* (1903); A. B. Hart, *Actual Government* (Amer. Citizen Series) § 209; *McCulloch* v. *Maryland* (1819, 4 Wheaton, 316; 4 Curtis' Decisions, 415; McClain's Cases, 1; Thayer's Cases, 271; Marshall's Decisions, Dillon's ed., 252); *Munn* v. *Illinois* (1876, 94 U. S. 113; Thayer's Cases, 743; McClain's Cases, 946); *Trustees of Dartmouth College* v. *Woodward* (1819, 4 Wheaton, 518; 4 Curtis' Decisions, 463; Thayer's Cases, 1564; McClain's Cases, 1006; Marshall's Decisions,

Dillon's ed., 299); *East Hartford* v. *Hartford Bridge Co.* (1850, 10 Howard, 511; 18 Curtis' Decisions, 483; McClain's Cases, 1021); *United States* v. *E. C. Knight Co.* (1895, 156 U. S. 1; McClain's Cases, 263; Thayer's Cases, 2185); *Northern Securities Co.* v. *United States* (1904, 193 U. S. 147; 24 Sup. Court Reporter, 436; McClain's Cases, 2d ed., 1081).

95. Classes of Corporations.

A corporation is a collection of individuals authorized by the government to enjoy the privilege of acting as one body, and of being considered as an artificial person, in the owning of property and the enjoying of rights, as distinct from the persons composing it. As an artificial person, it has a continuous existence, notwithstanding changes in its membership. Individuals may contract with each other as to their collective rights and become joint owners of property, may form partnerships, and in various ways may have, for the time being, a unity of interest; but the privilege of organizing associations which shall be considered as owning property as units and having rights which are not treated in law as the rights and property of the individuals composing such associations is a privilege which only the sovereign power can confer. In England corporate franchises may be conferred by the crown, but they may be also authorized by act of Parliament, and in this country the creation of corporations is one of the important functions of the legislative department of government.

Formerly the legislative authority to create a corporation was exercised by the passage of a statute defining the powers of the corporation created, and providing for the method of its organization and management and the exercise of the powers conferred, and this was called its charter. But it is now usual to make general statutory provisions for the organization and the management of the affairs of corporations, and to define the powers which they may exercise, so that individuals desiring to associate themselves together into a corporation may do so without special legislation by pursuing the course pointed out by statute. In some states, special statutes for the creation

of corporations are prohibited in the constitution, and no corporations can be created except in accordance with general statutory provisions. When a corporation is thus organized under general statutory authority it has no charter, properly speaking, but the articles of incorporation or ordinances or by-laws which it adopts under the general power to incorporate, taken in connection with the general statute authorizing such corporation, constitute its charter, and it has the powers which it undertakes to exercise in the proper method, subject always to the limitations of the general statutory provisions under which its organization is attempted or effected.

The purposes for which corporations may be chartered or organized are various, but may be divided into general classes: (1) those for private advantage; (2) those public in their nature, analogous to the purposes for which governments are instituted. Corporations are correspondingly divided into private and public corporations.

The ordinary corporation organized for transacting business and owning property is a private corporation; the object of its creation is primarily to promote the personal interests of its members. Manufacturing corporations, corporations organized to carry on wholesale or retail business of various kinds, insurance companies, and railroad, telegraph, telephone, and steamboat companies, all will be readily recognized as corporations private in their objects, for they are all created and carried on with the primary purpose of promoting the individual financial interests of those interested in them. Such corporations as these are sometimes designated as corporations organized for pecuniary profit, because they contemplate the ownership of property or the expenditure of money for the personal advantage of their members. Other private corporations, however, are organized for the purpose of promoting the common individual interests of their members without having any immediate financial purpose. Thus persons may associate themselves together in a corporation with the object of promoting scientific research, or preserving or inculcating a particular form of religious belief, or promoting some work

of charity or the like. Although such corporations have not for their primary objects the financial benefits of the members, they may nevertheless own property and raise and expend money in furtherance of the general purposes of their organization.

Public corporations, on the other hand, are organized for the general benefit and welfare of the people of a particular locality, in the promotion of objects of a public nature. Familiar examples of public corporations are cities, towns, and school districts; but, as will hereafter be explained, the state itself and the subdivisions of a state for political and governmental purposes, such as counties and townships, are also spoken of as public corporations.

96. Powers of States as to Private Corporations.

In general, the power to create and regulate private corporations is in the state governments and not in the federal government. It is a branch of the general police power, that is, the power to legislate as to the relation of individuals to each other. As already indicated in the preceding section, this authority is incident to the general legislative power without further specification, and is exercised by the legislative department by virtue of provisions in a state constitution for the creation of a legislative department. There are limitations on the power of the state in this respect, found in the provisions of the federal constitution that no state shall impair the obligation of contracts (Art. I, § 10, ¶ 1); and that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws (Amend. XIV, § 1).

The importance of the provisions as to the impairing of the obligation of contracts grows out of the fact that the privilege which is granted by the state to a private corporation, whether it be for pecuniary purposes or for purposes not pecuniary, is considered to be granted as the result of a contract between the state and the corporation, and therefore any impairment

or restriction of the powers of such a corporation (*Trustees of Dartmouth College* v. *Woodward*) otherwise than as the right to do so may have been reserved by the state at the time of its creation (either by special provision in the charter or by general provision in the constitution or statutes in the state) would be an impairment of the contract with the state (see below, § 269). The provisions as to due process of law and equal protection of the laws are applicable to private corporations, which are deemed persons within the language of those clauses of the constitution, although they are artificial and not natural persons; a private corporation is in this sense a person, although it is not a citizen. (See below, § 259.)

One further distinction must here be made relating to the government control of private corporations. With reference to their property and business they are subject to the same supervision under the police power as private individuals. But so far as their business is public in its nature, such as the carriage of goods and passengers for hire, the supply of water, gas, electric light, and other public utilities, or the operation of pipe lines for the transmission of oil or gas, or of warehouses, telegraphs, and telephones, they are peculiarly subject to the police regulation as to rates. (*Munn* v. *Illinois*. See also above, § 48.)

97. Public Corporations Classified.

Powers and privileges are given by the state to public corporations, not for the individual benefit of the persons who are members of them, but for their collective benefit as a part of the people of the state, and membership in such corporations depends, not upon individual choice, but upon residence in a particular locality or within particular limits. It is evident, therefore, that the charter of a public corporation or the privilege granted to it to have corporate existence does not constitute a contract, the impairment of which is prohibited by the federal constitution relating to impairment of contracts by the states. (See below, § 269.) Consequently it is entirely optional with the legislature of a state to create such

public corporations as it sees fit, to change the laws relating to their powers and privileges whenever and however it is deemed to be advisable, and to discontinue them according to its best judgment, having in view the public interests, regardless of any claim of vested right. But so far as such corporations may be authorized to make contracts and own property, they may perhaps be said to have vested rights which the legislature cannot directly interfere with. It has also been contended that there is a constitutional right of local self-government, that is, a right possessed by the people composing a city or town to manage their own local affairs which cannot be taken away or substantially impaired by the state legislature. If the state constitution, either in express language or by implication, recognizes the right of local self-government, then no doubt a limitation on the power of the legislature with reference to such public corporations as cities and towns may well be inferred. But as yet no such implied limitations have been agreed to and it will be impossible to discuss the matter more fully or accurately without an elaboration which would be out of place in an elementary treatise. While, as a general principle or theory, the right of local self-government is recognized, it by no means follows that a state legislature is limited otherwise than as its discretion may dictate in legislating with reference to the power of public corporations which can exist only as a result of the legislative will. At any rate, it is universally conceded that the state legislature may provide for changing the boundaries of public corporations and fixing the limits within which the powers conferred upon them are to be exercised.

In this connection it is proper to suggest a convenient division of public corporations into two classes. The term public corporation can properly be applied only to collections of persons to which are given some powers of local self-government and which are authorized to act in an independent and collective capacity. Such corporations are usually termed municipal corporations. But the state may be divided into counties, townships, or similar portions for general govern-

mental purposes, including the ownership of property, although the people of such portions are not given any corporate powers. Such divisions are created merely to facilitate the election of officers, the levying of taxes, and like purposes which the state can provide for as it sees fit. Counties and townships are therefore not public corporations in a proper sense and are not municipal corporations, but for convenience they are sometimes designated as quasi-corporations. The distinction between these two classes of corporations is not very definitely fixed, but some distinction is usually recognized. The state itself is sometimes spoken of as a public corporation, but only for purposes of convenience. It does not derive its authority from the federal government, nor from any other definite source except the will of the people as expressed in its constitution; and the rules respecting the powers which it may exercise are only remotely analogous to those recognized as applicable to corporations.

98. Power of the Federal Government to Create Corporations.

As the federal government has only the powers which are expressly or by implication conferred upon it in the constitution, and as the constitution does not expressly provide for the creation of corporations by Congress, the power of Congress to create a corporation must exist, if at all, by implication. It is well settled, however, that Congress may, in the exercise of its implied powers, create corporations when their creation is a necessary and proper means of carrying out the powers conferred upon it (*McCulloch* v. *Maryland*). Thus, as Congress has the power to borrow money and regulate the currency, it may charter a United States bank with branches through which the financial operations of the government may be conducted; or it may, by general law, provide for the organization of national banks with authority to carry on a general banking business and issue currency. It has also, in the exercise of its power with relation to post offices and post roads and interstate commerce, chartered railroad companies with authority to

operate lines of road through different states and territories. No doubt the power to create private corporations and to regulate the corporations thus created might legitimately be further extended if Congress should deem it wise to do so. Municipal corporations within the various states must necessarily, however, derive their authority from the states and not from Congress. But in the portions of the territory of the United States which are not within the limits of any state and which are therefore subject exclusively to congressional legislation, Congress may create or provide for the creation of both municipal and private corporations as it sees fit.

It is apparent, therefore, that while Congress may regulate corporations created under its authority, and may also to some extent control the business of corporations engaged in interstate or foreign commerce (see above, § 93), it has no power to regulate other corporations (*United States* v. *E. C. Knight Co.*). The fact that state regulations are not applicable beyond the limits of the state, and that these regulations are by no means uniform as to their policy or their methods, has suggested the desirability of a further control by Congress which should be uniform throughout the states. But without an amendment to the federal constitution giving Congress further power, it does not seem possible to suggest any theory on which Congress can legislate with reference to corporations in general.

CHAPTER XVI.

OTHER ENUMERATED POWERS OF CONGRESS.

99. References.

NATURALIZATION: J. Story, *Constitution*, §§ 1102–1104; J. R. Tucker, *Constitution*, § 269; J. Kent, *Commentaries*, *423; T. M. Cooley, *Constitutional Law*, ch. iv, § 3; Henry Wheaton, *International Law* (Lawrence's ed.) Appendix, p. 891; A. B. Hart, *Actual Government* (Amer. Citizen Series) § 9; *Boyd* v. *Thayer* (1892, 143 U. S. 135; McClain's Cases, 423); *In re Rodriguez* (U. S. Dist. Ct. 1897, 81 Federal Rep. 337; McClain's Cases, 434); *In re Halladjian* (U. S. C. C., 1909, 174 Fed Rep. 834).

BANKRUPTCY: J. Story, *Constitution*, §§ 1105–1115; J. R. Tucker, *Constitution*, §§ 270, 271; T. M. Cooley, *Constitutional Law*, ch. iv, § 4; *Baldwin* v. *Hale* (1863, 1 Wallace, 223; McClain's Cases, 436); *Ogden* v. *Saunders* (1827, 12 Wheaton, 213; 7 Curtis' Decisions, 132; Thayer's Cases, 1590; Marshall's Decisions, Dillon's ed., 549); *Sturges* v. *Crowninshield* (1819, 4 Wheaton, 117; 4 Curtis' Decisions, 362; Thayer's Cases, 1582).

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WEIGHTS AND MEASURES: J. Story, *Constitution*, § 1122; A. B. Hart, *Actual Government*, § 213; *The Miantinomi* (1855, 3 Wallace, Junior, 46; Thayer's Cases, 2192); *Weaver* v. *Fegely* (1857, 29 Penn. State, 27; McClain's Cases, 471; Thayer's Cases, 2195).

POST-OFFICES AND POST-ROADS: J. Story, *Constitution*, §§ 1124–1150; J. R. Tucker, *Constitution*, §§ 274–276; T. M. Cooley, *Constitutional Law*, ch. iv, § 9; *Ex Parte Jackson* (1877, 96 U. S. 727); *In re Rapier* (1892, 143 U. S. 110; McClain's Cases, 478; Thayer's Cases, 732).

Slavery: J. Story, *Constitution* (Suppl. Cooley's ed.), §§ 1915–1927; J. R. Tucker, *Constitution*, §§ 254, 309; T. M. Cooley, *Constitutional Law*, ch. xiii, § 1; *Prigg* v. *Commonwealth* (1842, 16 Peters, 539; Thayer's Cases, 476); *Dred Scott Case*, *Scott* v. *Sandford* (1857, 19 Howard, 393; Thayer's Cases, 480, and note); *State* v. *Mann* (N. C., 1829, 2 Dev. 263; Thayer's Cases, 473); *Lemmon* v. *People* (1860, 20 N. Y. 562, Thayer's Cases, 496); *Civil Rights Cases* (1883, 109 U. S. 3; Thayer's Cases, 554, McClain's Cases, 37); *Robertson* v. *Baldwin* (1897, 165 U. S. 275); *Clyatt* v. *United States* (1905, 197 U. S. 207).

Government of District of Columbia: J. Story, *Constitution*, §§ 1216–1223; J. R. Tucker, *Constitution*, § 293; T. M. Cooley, *Constitutional Law*, ch. iv, § 13; A. B. Hart, *Actual Government*, § 162; *Metropolitan Railroad Co.* v. *District of Columbia* (1889, 132 U. S. 1; McClain's Cases, 522); *Roach* v. *Van Riswick* (D. C., 1879, 4 McArthur & M. 171); *Hepburn* v. *Ellzey* (1804, 2 Cranch, 445; 1 Curtis' Decisions, 520; Thayer's Cases, 348).

Control of Sites for Forts, Arsenals, and Public Buildings: J. Story, *Constitution*, §§ 1224–1235; J. Kent, *Commentaries*, *429; T. M. Cooley, *Constitutional Law*, ch. iv, § 13; A. B. Hart, *Actual Government*, § 163; *Ft. Leavenworth Ry. Co.* v. *Lowe* (1885, 114 U. S. 525; McClain's Cases, 528); *Commonwealth* v. *Clary* (1811, 8 Mass. 72); *Sinks* v. *Reese* (1869, 19 Ohio State, 306); *State* v. *Kelly* (1884, 76 Maine, 331); *Kohl* v. *United States* (1875, 91 U. S. 367; McClain's Cases, 1061; Thayer's Cases, 956).

100. Naturalization.

In a subsequent chapter the subject of citizenship will be considered (see below, ch. xxxiv), and it will there appear that persons may be citizens of the United States either by birth or by naturalization; and that those who are citizens of the United States by virtue of either birth or naturalization are also citizens of the states in which they reside. It will also there appear that naturalization may be effected, not only by means of a general law, but also by statutes or treaties applicable to limited classes of persons. In the present consideration of the enumerated powers of Congress, we are concerned only with the provision that Congress shall have power "To establish an uniform rule of naturalization" (Const. Art. I, § 8, ¶ 4). In the exercise of this power Congress has prescribed the method by which aliens, that is, persons not born in the United States and subject to the jurisdiction thereof, may become citizens.

It is only within modern times that the privilege of expatri-

ation has come to be fully accorded by civilized nations to their own subjects, but from much earlier times governments have asserted the right to admit to citizenship those who have previously been subjects of another government, and this has frequently given rise to conflicting obligations; for the doctrine that a subject cannot throw off his allegiance, even by departing from the country of his nativity and going to reside elsewhere, is inconsistent with the doctrine that he may be admitted to rights of citizenship in a foreign country. For instance, the assertion on the part of Great Britain of the right to impress into her naval service persons who had formerly been British subjects, but had by naturalization become citizens of the United States, was one of the causes leading to the War of 1812. In 1868 Congress passed a statute definitely asserting the right of subjects of foreign countries to absolve themselves from such allegiance, and providing for expatriation on the part of citizens of the United States desiring to become subjects of foreign states, and since that time treaties have been made with other countries by which the right of expatriation is mutually recognized.

But without any definite recognition of the right of expatriation, it has been the policy of the various states and of the United States from the beginning to admit to citizenship on such conditions as may be imposed the subjects of foreign governments who come to this country with the intention of permanent residence, provided such persons desire to assume the duties and obligations of citizenship. Prior to the adoption of the federal constitution each state had the power to determine for itself how such persons should acquire citizenship, and under the provisions of the Articles of Confederation (Article IV), the free inhabitants of each of the states were entitled to all the privileges and immunities of free citizens in the several states. Under this article it was not practicable for any one state to restrict citizenship therein, for persons coming to that state from other states, regardless of the conditions which the state imposed with reference to its own

citizenship, would be entitled to the same privileges. Therefore it was deemed expedient and proper to provide in the federal constitution that the subject of naturalization should be regulated by Congress. And while it is not expressly specified in the constitution that the power of Congress in this respect excludes the power of the states to legislate on the same subject, nevertheless it is evident that this power of Congress must be exclusive, otherwise there would be no uniform rule.

Each state may determine for itself what political privileges shall be enjoyed by persons who are residents therein, and such privileges may be extended to those persons who are not citizens or withheld from those who are. (See below, § 193.) But since the adoption of the Fourteenth Amendment, by which it is expressly declared that citizens of the United States residing in any state are citizens of that state, it is generally conceded that a state cannot confer citizenship, and that the whole subject is regulated by the provisions of the federal constitution and the treaties and statutes made in pursuance thereof.

Congress has accordingly provided specifically how aliens may become citizens of the United States and of the state in which they reside. These statutory provisions require that the alien shall make a preliminary declaration under oath, at least two years prior to his application for naturalization, of his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign power; that on applying for citizenship he shall show that he has been resident within the United States for five years, and within the state or territory where he applies for naturalization for at least one year; that during the time specified he has behaved as a man of good moral character, attached to the principles of the constitution of the United States; and that he entirely renounces and abjures all allegiance and fidelity to every state and sovereignty, and particularly by name to the state and sovereignty of which he was before a citizen or subject. The application may be made to a court of the

United States or of the state or territory in which he applies for admission, or to the clerk of any such court, and the clerk or court must determine whether his term of residence and other qualifications are such as entitle him to naturalization.

The power of Congress to provide for naturalization in accordance with uniform rules includes, of course, the power to impose conditions or to limit the privilege to such classes of persons as in its judgment it shall deem proper. At first the privilege was restricted to free white persons. After the abolition of slavery the words "free white" were stricken out of the statute and for a time there was no limitation as to race or color; but subsequently the statute was again amended so that it should apply only to aliens who are free white persons and to aliens of African nativity and persons of African descent; consequently persons not belonging to the white races nor to the African race cannot be naturalized. It has accordingly been held that persons of Indian blood coming into the limits of the United States, for instance from the British possessions, are not entitled to naturalization, and the same reasoning excludes the Chinese, the Japanese (but not all Asiatics, for instance not Armenians, see *In re Halladjian*) and indeed all persons of colored races save only those of the African race (*In re Rodriguez*). But it must be borne in mind that these restrictions apply only to naturalization, not to citizenship by birth. Persons of African descent born within the limits of the United States are citizens by birth without regard to naturalization either of themselves or their parents. Indians cannot become citizens by naturalization under the general law, but may be naturalized in accordance with special acts of Congress applicable to them. Chinese cannot be naturalized under general law, and by a special statutory provision they are expressly excluded, but their children born in this country are citizens. (See below, § 194.)

In connection with the subject of naturalization it may be remarked, however, that persons may permanently reside in one country without losing citizenship in another, and that, without assuming the duties and obligations of citizenship in the country of their residence, they may be fully subject to the

laws of the country where they live. Citizenship involves permanent allegiance, that is, an allegiance which is permanent until dissolved by some formal expatriation; but temporary allegiance, so long as residence continues, is owed to the sovereignty and laws of the country of such residence.

101. Bankruptcy.

Congress is given the express power to establish "uniform laws on the subject of bankruptcy throughout the United States" (Const. Art. I, § 8, ¶ 4). A bankruptcy law is one by which provision is made for the distribution of the property of an insolvent debtor among his creditors in proportion to their proved claims, and it may include also the discharge of the debtor from further liability to his creditors. The statutes which have been passed by Congress on the subject of bankruptcy have included both these features, and they are distinguishable in this respect from the statutes of the various states which usually provide only for the distribution of property and not for discharge from further liability. It has been determined, however, that the power of Congress to pass bankruptcy laws does not exclude the power of the states to legislate on the same subject, and in the absence of any legislation by Congress, the states may legislate, not only for the distribution of an insolvent debtor's property, but also for his discharge from further liability. But the states are restricted in this respect by limitations which are not applicable to Congress; for a state cannot provide for the discharge of a debtor from liability under a contract made prior to the passage of the state law, as this would be to impair the obligation of the contract (see below, § 265), nor can it discharge the bankrupt from liability to creditors living outside of the state who do not present their claims in the state bankruptcy proceeding, for this would be to adjudge and determine in a state court the rights of persons not subject to the jurisdiction of such court (*Ogden* v. *Saunders*, *Sturges* v. *Crowninshield*, and *Baldwin* v. *Hale*).

When Congress has legislated upon the subject of bankruptcy, any state statute in conflict with the provisions of the

federal statute on the subject, or any proceedings of a state court interfering with the proceedings or judgments of a federal court acting in pursuance of the federal statute, will necessarily be invalid; but so far as the administration of the state insolvency laws does not interfere with the operations of the federal bankruptcy law, the state laws will still be valid. Proceedings under the state insolvency statutes are therefore entirely proper until some action under the federal bankruptcy laws has been commenced.

102. Copyrights and Patents.

"To promote the progress of science and useful arts," Congress is authorized to secure "for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (Const. Art. I, § 8, ¶ 8). In the exercise of this authority, Congress (in 1790) passed patent laws and copyright laws, the term "patent" being used to describe an invention or discovery, and the term "copyright" to signify the exclusive right of an author to publish his writings.

The word "patent," as originally used in English law, signified the grant of some privilege, property, or authority made by the government or sovereign to an individual or individuals. The term derived this meaning from the fact that the sovereign in making such grant issued "letters patent," that is, an open or public instrument, bearing the great seal, in which the right or privilege granted was set out. Titles of nobility were thus conferred as well as estates, corporate privileges, the exclusive right to carry on a particular trade or deal in a particular commodity, and the like. In this country the instrument by which the government conveys title to land to a purchaser is still called a patent. It would be proper to speak of the grant of the exclusive privilege to manufacture an invented article, or to make use of a valuable discovery as a patent, but in common usage the term, as employed with relation to inventions and discoveries, signifies the privilege itself rather than the grant of the privilege, and is, in ordinary parlance, frequently used to designate the invention or discovery, or even the manufactured

article or other thing manufactured or used under or in pursuance of such privilege.

In enacting the patent laws under the authority of the constitution to promote the progress of science and useful arts, Congress has but followed the custom of other governments. In all civilized countries there are now some such provisions for the promotion of invention and discovery in the useful arts. According to the method provided for by Congress, the discoverer of a useful invention or process makes application to the patent office, which is a branch of the Interior Department of the government, for a patent, that is, for the exclusive privilege of using and transferring to others the right to use his invention or discovery. The proper officers of the department investigate his claim, and upon becoming satisfied that his invention is new and useful, letters patent are issued to him granting such exclusive privilege. These letters are, however, only *prima facie* evidence that he is entitled to a patent, and the question whether the invention or discovery is such as entitles him to an exclusive privilege with reference thereto under the laws of Congress, is ultimately to be determined by the courts in an action brought by or against him for infringement on the part of some one making a conflicting claim, or by the United States against him to determine the validity of his claim. In short, the right granted is treated as a property right to be determined and protected in the courts.

The power to authorize the granting of exclusive privileges of using, manufacturing, and selling an invention or discovery can be granted only by the federal government. The states cannot exercise such power, for in doing so they would necessarily interfere with the authority of Congress. But a patent right like any other property is owned and held subject to law, and the states may make such regulations with reference thereto as they see fit, so long as such regulations do not directly or unreasonably interfere with the privileges acquired under the patent laws. (See *Patterson* v. *Kentucky*.) Thus the state, in the exercise of its police power, might prohibit the sale of toy pistols to children, even though the pistols were manufactured

under a patent; and it has been said that a state may by statute regulate the negotiability of notes given for patent rights. (See *Herdic* v. *Roessler.*)

A copyright is the exclusive privilege of publishing or copying an original writing or composition (*Wheaton* v. *Peters*). The statutes passed by Congress on the subject provide that the author or composer shall file with the librarian of Congress a printed copy of the title of the book, map, chart, etc., or a description of the painting, etc., and at the time of publication, deliver to the librarian two copies of the book or other publication, or in the case of a painting a photograph of the same, and announce by printing on the title-page or page following of every copy the fact and date of the copyright claimed. A copyright differs in at least one important feature from a patent right in that in the case of a patent the letters issued constitute *prima facie* evidence of the privilege, while in case of a copyright there is no formal document, but the author or other person claiming the right may assert it in the courts, proving the facts necessary to entitle him to such privilege as provided by the statute. Like the patent laws, the copyright laws are modelled after those which had previously been in existence in England and other countries. Exclusive privileges to authors have been recognized in all civilized countries, and recently provisions have been made by Congress for an international copyright, so that a book copyrighted in one country cannot be published in another except under the authority of the owner of the original copyright. Without a copyright, the writer or composer of an original literary or musical or artistic production may retain the exclusive use and enjoyment of it; but he cannot publish it without giving to every one the general right to make such use of it as he sees fit, including republication, unless he secures at the time of such publication an exclusive privilege under the copyright laws.

No express authority is given to Congress with reference to securing to manufacturers and dealers the exclusive use of trademarks. It was attempted to provide for such exclusive use

under the copyright law, but it was held by the Supreme Court of the United States in the *Trade-Mark Cases* that Congress could not provide for the copyrighting of trade-marks. Under the authority to regulate interstate and foreign commerce, Congress has, however, authorized the registration of trade-marks on goods destined for interstate or export trade, and interference with or infringement upon the lawful use of a trade-mark is illegal.

103. Weights and Measures.

In connection with the power to coin money and regulate the value thereof, Congress is expressly authorized to fix the standard of weights and measures (Const. Art. I, § 8, ¶ 5). But this power has never been exercised by Congress. Congress has indeed (1866) authorized the use of the metric system, but there is no requirement of its use. Until there is some further federal legislation on the subject, the power to establish standards of weight and measure is in the states acting each for itself. In the absence of any state statute, the common law or customary standards are recognized. In many states there is legislation fixing standards, providing penalties for the use of false weights and measures, and determining how many pounds of different commodities and substances shall constitute a bushel, the size of various fruit boxes and packages, and like matters. There is noticeable and very inconvenient lack of uniformity among the states on the entire subject, but thus far no steps have been taken by Congress to establish uniformity under the authority which has been given to it in the constitution.

104. Post-Offices and Post-Roads.

The power "To establish post-offices and post-roads" (Const. Art. I, § 8, ¶ 7) has been fully exercised by Congress in creating a post-office department of the federal government, under which the transportation of mail matter is generally and economically effected. Very few questions have arisen with reference to the exercise of this power, and there has never

been any conflict in that respect between federal and state authority, the power and practice of the United States to control the whole subject being fully recognized. Congress may undoubtedly make railroads, steamship lines, and other methods of transporting the mails, post-roads; and thereby bring such means of conveyance under federal control. Indeed, Congress might no doubt go further than it has already gone in establishing and controlling lines for mail and telegraphic communication. As railroad, steamship, and telegraph lines are almost universally engaged in carrying on interstate and foreign commerce as well as in transporting the mails, Congress has a double power of regulation.

One important question has, however, arisen as to the extent to which Congress may authorize the exclusion from the mails of matter which is deemed injurious to the public. Under the power to establish post-offices and post-roads, it has been provided that obscene matter, advertisements of lotteries, and communications calculated to defraud or in their nature libellous, may be excluded, and this has been held to be within its power (*Ex parte Jackson*), the discretion to determine what matter is improper being left to the post-office department. A question may well arise as to the extent to which this discretion can be exercised. So long as the matter excluded is matter which a reasonable public policy declares to be improper, there can be no question; but if Congress should attempt to exclude from the mails matter which is essentially proper and not injurious, it might well be questioned whether the restriction would not be unlawful, perhaps under the general requirement that laws should be uniform in their operation, and that all persons are entitled to the equal protection of the laws. It is settled (see *In re Rapier*) as to lottery companies that even though chartered by the state in which they are operated, they may be excluded from United States postal facilities. (See § 216.)

105. Slavery and Peonage.

The federal constitution as originally adopted recognized the existence of human slavery in providing that "The migra-

tion or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808" (Const. Art. I, § 9, ¶ 1); and further, that "No person held to service or labor in one state under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due" (Const. Art. IV, § 2, ¶ 3). In pursuance of the latter of these provisions, the Fugitive Slave Laws of 1793 and 1850 were passed, authorizing the owners of slaves to pursue and retake them in another state. But by the Thirteenth Amendment, ratified in 1865 by the legislatures of a sufficient number of the states to make it a part of the constitution, slavery and involuntary servitude, except as a punishment for crime, were abolished; and since the adoption of that amendment slavery in any of the United States or in any place subject to the jurisdiction of the United States has ceased to exist as an institution recognized by law, and the questions which had been previously discussed relating to slavery have ceased to be of any practical importance.

Soon after the adoption of the Thirteenth Amendment, evidently under the supposed authority given by the second section of that amendment, Congress passed a statute (1867) abolishing and prohibiting the holding of any person to service or labor under the system known as "peonage" within any territory or state. As express reference is made in the act to the territory of New Mexico, although the provisions of the statute are not limited to that territory, it is evident that the purpose was to forbid the perpetuation of the system of involuntary service which had existed in that territory since its acquisition from Mexico. But the statute is applicable within the states as well as the territories, and is intended to reach the case of any one who holds another in peonage, notwithstanding he may be claiming the right to do so under state law or municipal ordinance. (*Clyatt* v. *United States.*)

106. Government of the District of Columbia.

Congress is given power "To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of Congress become the seat of government of the United States" (Art. I, § 8, ¶ 17). In pursuance of this provision and under the authority of Congress, Maryland and Virginia in 1790 ceded to the United States portions of their territory which were set apart as the seat of the federal government. Subsequently the portion of the district which had been ceded by Virginia was re-ceded to that state, and the district now comprises only the territory acquired from Maryland. Within this district the exclusive power of legislation for all purposes is in Congress, and although Congress in 1871 undertook to establish a government for the district with legislative powers, and the government thus established continued in operation until 1874, it was seriously questioned whether the legislation enacted by it was valid. Indeed, in the case of *Roach* v. *Van Riswick*, decided by the Supreme Court of the District of Columbia in 1879, the conclusion was reached that all the legislation of the government thus established was without legal authority.

However, it is well settled that Congress may create municipal corporations within territory which is subject to its exclusive jurisdiction, and by the legislation of Congress now in force on the subject, the District is a public corporation, having such authority as is usually conferred upon such corporations (*Metropolitan Railroad Co.* v. *District of Columbia*). The District is not a state of the Union, and those who permanently reside within it are not citizens of any state, although they are citizens of the United States (*Hepburn* v. *Ellzey*).

107. Legislation as to Places Ceded to the Federal Government.

By the constitutional provision referred to in the preceding section, Congress is authorized also to exercise exclusive legis-

lation "over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." Territory ceded to the United States under this provision ceases to be territory of the state, and is no longer subject to the jurisdiction of the state by which it is thus ceded. The grant to the United States of the exclusive power of legislation with reference to such territory excludes it and the persons permanently residing therein from the jurisdiction of the state, and as a consequence no state can tax property which is thus situated, nor punish crimes committed within such territory; for the persons therein permanently residing are not citizens of any state. It has been held, however (*Ft. Leavenworth Railroad Co.* v. *Lowe*), that in ceding such territory the state may reserve the power to tax property located there, and also the right to serve process of its courts on persons found therein. Such a reservation of power has been recognized by the United States as proper, and it is expedient, for otherwise the forts, navy-yards, and public buildings of the United States might be resorted to by those seeking to evade the state laws.

It is to be borne in mind that it is only with reference to territory thus voluntarily ceded that the state loses its jurisdiction. The United States may, like any other sovereign power, acquire the ownership of property by purchase, or by the exercise of the power of eminent domain (*Kohl* v. *United States*). But it acquires exclusive jurisdiction over property thus purchased or condemned only by voluntary cession from the state. For instance, if at the time of the admission of a state to the Union, the United States has forts or public buildings located within the limits of such state as admitted, the state acquires jurisdiction with reference thereto unless in the act of admission or by subsequent voluntary action of the state exclusive jurisdiction is reserved or ceded to the United States. As has already been indicated in the chapter in which the power of the United States to punish crimes is considered (see above, § 56), Congress has legislated for the punishment

of crimes committed in the District of Columbia and in other ceded districts, and like legislative power with reference to such districts may be and is exercised by Congress in other matters.

CHAPTER XVII.

WAR POWERS.

108. References.

J. Story, *Constitution*, chs. xxi, xxii; T. M. Cooley, *Constitutional Law*, ch. iv, § 12; H. C. Black, *Constitutional Law* (2d ed.), pp. 220–224; J. I. C. Hare, *Constitutional Law*, Lects. xli–xliv; J. R. Tucker, *Constitution*, pp. 576–597; J. N. Pomeroy, *Constitutional Law*, pp. 281–288; G. T. Curtis, *Constitutional History*, I, 527–531; *The Federalist*, Nos. 23–26, 29, 41; A. B. Hart, *Actual Government* (Amer. Citizen Series), ch. xxv; A. V. Dicey, *Law of the Constitution* (4th ed.), 271, 289; J. B. Thayer, *Cases on Constitutional Law*, 2274–2279; *Martin* v. *Mott* (1827, 12 Wheaton, 19; 7 Curtis' Decisions, 10; McClain's Cases, 518; Thayer's Cases, 2290); *The Prize Cases* (1862, 2 Black, 635; McClain's Cases, 515; Thayer's Cases, 2339, and note); *Ex parte Milligan* (1867, 4 Wallace, 2; Thayer's Cases, 2376); *Ex parte Merryman* (1861, Taney's Reports, 246; Thayer's Cases, 2361); *Dynes* v. *Hoover* (1857, 20 Howard, 65; Thayer's Cases, 2333); *United States* v. *Clark* (1887, 31 Federal Rep. 710; Thayer's Cases, 2413).

109. State Power as to War.

Among the express limitations on the powers of the state which were incorporated into the federal constitution in 1787, were prohibitions against entering into any treaty, alliance, or confederation, granting letters of marque and reprisal, keeping troops or ships of war in time of peace, entering into any agreement or compact with another state or with a foreign power, or engaging in war unless actually invaded, or in such imminent danger as will not admit of delay (Art. I, § 10). The object of the prohibition as to treaties, alliances, or confederations among themselves, or with a foreign power, was no doubt to prevent the states from having any relations with each other as independent powers other than expressly

authorized by the constitution; and also to prevent any attempt on the part of one state to obtain an advantage over another by arrangements, commercial or otherwise, with foreign countries. The broad principle was established that as to the relations of the states among themselves and as to the relations of the people of the United States to those of foreign countries, the federal government should be supreme and its power exclusive. But evidently an important consideration was to avoid hostility between the states, and alliances with foreign governments which might involve offensive or defensive military operations, and this idea is carried out in the prohibition as to maintaining troops or ships of war and engaging in war.

The war power, in a broad sense, is reserved to the federal government. But a state may, in case of sudden emergency, repel invasion, and in doing so it may perhaps carry on military operations outside its own boundaries, such operations being limited, however, to the purpose of preventing an imminent invasion.

110. State Militia.

The right of the state to maintain an organized militia is, however, expressly recognized by the federal constitution (Amend. II). The militia of the state consists of those persons who under the law are liable to perform military duty; and such persons may be enrolled under officers so as to be ready for service when called upon. The militia may be employed by the state in maintaining internal tranquillity and in enforcing obedience to state law, but cannot under state authority be sent outside the limits of the state unless, as suggested in the preceding paragraph, to prevent an imminent invasion. In the various states there are statutory provisions as to the organization and discipline of the militia; and so long as the state does not attempt to make use of this power for purposes forbidden by the constitution, the matter is left to state control.

111. Federal Power as to State Militia.

Congress is authorized "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and "To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress" (Const. Art. I, § 8, ¶¶ 15, 16). It is evident that the militia here referred to is the militia of each state, and that when thus called out for federal purposes, the militia of a state becomes a military force of the federal government. The method of calling out the militia is prescribed by federal statute, and the command over them, as over other military forces of the United States, is vested in the president (Art. II, § 2). His exercise of this power will be considered in the chapter relating to his war powers. (See below, § 131.)

112. The Army and Navy.

Congress is given express authority "To raise and support armies" with the provision that "no appropriation of money to that use shall be for a longer term than two years" and "To provide and maintain a navy" (Const. Art. I, § 8, ¶¶ 12, 13). The reason for the provision that appropriations for the support of the army must be for a limited period only has been already suggested. (See above, § 69.) The armies may consist of the state militia called into the federal service; but Congress is not limited to this method of raising armies, and may provide for the enlistment of regular federal troops, or if deemed necessary, for compelling service by conscription, and the calling out of the state militia as such has been found to be inexpedient save for temporary purposes. The United States maintains a regular army, and in time of war provides for additional forces by the enlistment of volunteer regiments which may be enlisted and recruited in the various states as Congress shall provide.

Regiments of state militia may be enlisted as volunteer regiments. There is no practical distinction between the militia of the various states called into the service of the United States, and the other military forces of the United States, save as to their original organization and the appointment of subordinate officers. As the states are prohibited from having ships of war, the federal navy is composed entirely of vessels belonging to, or for the time being employed in the service of the United States under its authority. The powers of the president as to the army and navy will be discussed in a subsequent chapter. (See below, § 130.)

The power to grant letters of marque and reprisal (Const. Art. I, § 8, ¶ 11) involves the granting to private vessels, sailing under the flag of the United States, the authority to capture enemies' vessels and other property upon the high seas. Indeed, reprisals may be authorized without the existence of a state of war, and for the purpose of securing from a foreign country or its citizens, redress for grievances; but the making of reprisals is an initial step towards the commencement of hostilities, and may therefore be properly regarded as incident to the war-making power. Private vessels to which letters of marque and reprisal have been granted, usually denominated privateers, act under the authority of the government granting such letters, but are not, properly speaking, a part of its navy.

113. Power to Declare War.

Congress is expressly given the power to declare war (Const. Art. I, § 8, ¶ 11), and this grant of power is exclusive. The executive department, although it is charged with the foreign relations of the government, cannot declare war, but a state of war may exist without being declared, and the president may employ the military and naval forces of the United States in repelling invasion before any declaration of war has been made by Congress, or in suppressing insurrection. One of the incidents of a state of war is the seizure of the enemy's property and vessels, and it has been held that the seizure of vessels of

a hostile power, as prizes of war, may lawfully take place although war has not been declared. (See *Prize Cases.*) However, as the money for the support of the army and navy must be appropriated by Congress, there is no practical danger that this country will be engaged in war for any considerable length of time without a recognition by Congress of the existence of war.

114. Military Law.

The express power given to Congress "To make rules for the government and regulation of the land and naval forces" (Const. Art. I, § 8, ¶ 14) has been exercised by the adoption of a code of military law for the government of the officers and men composing the land and naval forces. This code is in force in time of peace as well as during war, but it applies exclusively to the persons who constitute the land and naval forces, that is, the soldiers and sailors, including in those terms both officers and men. By this military law their conduct is regulated and punishments for its violation are provided. Offenders against the military law are triable before a court-martial composed of officers of the army or navy, as the case may be, under the direction of a judge advocate; and the punishment of the offender found guilty is administered under military or naval authority. The different forms of punishment provided for include death, imprisonment, fine, degradation in rank, dismissal from the service, reprimand, and other penalties.

It is to be noticed that a court-martial has jurisdiction only over persons who are enrolled in the military or naval forces, and administers only the military law. When a state of war exists and the operation of the ordinary courts within any portion of territory which is subjected to military occupation is thereby suspended, the military power may provide temporarily for military courts or commissions administering law for the time being among persons within such territory who are not part of the military forces, but these military courts or commissions are not courts-martial and they can exercise

jurisdiction within the limits of the United States only where the ordinary operations of the courts have been suspended by declaration of martial law. While declaration of martial law is not expressly provided for in the constitution, it is regarded as authorized by the provision for the suspension of the privilege of *habeas corpus* (Const. Art. I, § 9, ¶ 2).

115. Subordination of the Military to the Civil Authority.

While the military power must necessarily be absolute for the time being, and beyond the control of the civil authorities so far as it is lawfully exercised, yet it is regarded as exceptional and, so far as it affects persons not in the military or naval service, temporary. The civil law, by which term is here meant the general law both civil and criminal administered by the ordinary courts, is the law which governs individuals in all cases except as they may be outside of the civil law by reason of being in the army or navy, or of being in a region where martial law has been declared and the ordinary operations of the courts suspended. The civil courts cannot interfere with the proceedings of courts-martial so far as they have jurisdiction (*Dynes* v. *Hoover*) ; but, on the other hand, courts-martial cannot exclude the general jurisdiction of the civil courts. Even persons who are in the military or naval service and are therefore subject to the military law are not thereby exempted from obedience to the civil law, and may be required to answer in the ordinary courts for their acts in violation of the general law. Thus a soldier may be tried in the regular courts for murder or other crime committed by him, even though he may have been already tried therefor as a violation of the military law by a court-martial. Whether a soldier is to be held individually responsible for acts done under orders or authority of his superior officers or the general military power, is a wholly different question. He may be justified for thus acting if the occasion is one for the exercise of military authority, but his justification is to be determined when he is called upon to account for his acts in the regular courts. The general supremacy of the civil over the military

authority is fully recognized in England and the United States, and is one of the essential features of our constitutional system. The maintenance by the king of standing armies in the colonies in time of peace and his subordination of the civil to the military power are among the grievances enumerated in the Declaration of Independence.

CHAPTER XVIII.

IMPLIED POWERS OF THE FEDERAL GOVERNMENT.

116. References.

J. Story, *Constitution*, §§ 433–435, 1236–1294, 1329, 1330; T. M. Cooley, *Constitutional Law*, ch. iv, § 15; H. C. Black, *Constitutional Law*, §§ 105, 106; *McCulloch* v. *Maryland* (1819, 4 Wheaton, 316; 4 Curtis' Decisions, 415; McClain's Cases, 1; Thayer's Cases, 1340; Marshall's Decisions, Dillon's ed. 252); *Gibbons* v. *Ogden* (1824, 9 Wheaton, 1; 6 Curtis' Decisions, 1; McClain's Cases, 235; Thayer's Cases, 1799; Marshall's Decisions, Dillon's ed., 421); *Legal Tender Case* (1884, 110 U. S. 421; McClain's Cases, 442); *Anderson* v. *Dunn* (1821, 6 Wheaton, 204; 5 Curtis' Decisions, 61; McClain's Cases, 548); *Kilburn* v. *Thompson* (1880, 103 U. S. 168; McClain's Cases, 553); *Ex parte Curtis* (1882, 106 U. S. 371; McClain's Cases, 554); *Logan* v. *United States* (1892, 144 U. S. 263; McClain's Cases, 557; Thayer's Cases, 343); *The Chinese Exclusion Case*, *Chae Chan Ping* v. *United States* (1889, 130 U. S. 581; McClain's Cases, 562); *Fong Yue Ting* v. *United States* (1893, 149 U. S. 698; McClain's Cases, 567; Thayer's Cases, 374).

117. Implied Powers Expressly Given.

As has already been indicated (see above, § 18), the federal government, although a government of limited and delegated rather than general powers, has such implied powers as may be necessary to the reasonable exercise of the powers granted. This would be true without any express provision, but it is expressly declared that Congress shall have power "To make all laws which shall be necessary and proper for carrying into execution" the powers previously enumerated, and "all other powers vested by this constitution in the government of the United States or in any department or officer thereof" (Const. Art. I, § 8, ¶ 18). This clause of the constitution has two aspects: it recognizes the existence of implied powers, and it

authorizes Congress to regulate the exercise of such powers by the departments or officers of the United States.

It would be impossible to enumerate in an exhaustive way the classes of statutory provisions which have been enacted by Congress in the exercise of its implied powers, and it would be equally impossible to forecast the legislation which might be proper under implied powers not, as yet, recognized or acted upon. A few examples of the exercise of implied powers will be sufficient for present purposes.

Under the general power to raise revenue and carry on the fiscal operations of the government, Congress passed two acts incorporating a United States bank (see *McCulloch* v. *Maryland*), and more recently has established a system of national banks. Under the power to regulate foreign and interstate commerce, Congress has passed a variety of statutes relating to navigation, immigration, and similar subjects. (See *Gibbons* v. *Ogden*.) Under the power to borrow money and the general power implied from various provisions of the constitution to regulate the currency, Congress has made treasury notes a legal tender in the payment of debts (*Legal Tender Case*). Under the power given to each House of Congress to determine the rules of its proceedings and to act as a co-ordinate branch of the legislative department, punishment of contempts of the authority of either House may be provided for, and such punishment may be inflicted on persons who are not members (*Anderson* v. *Dunn* and *Kilbourn* v. *Thompson*). Congress may regulate the methods of appointment of officers and employés of the United States, and prescribe their qualifications so far as such qualifications are not prescribed in the constitution itself, and it may prohibit and punish misconduct on the part of such officers (*Ex parte Curtis*). Under the power to regulate commerce and in the exercise of the powers incident to the sovereignty which belongs to the government of the United States, Congress has provided for the exclusion of the Chinese (*Chinese Exclusion Case* and *Fong Yue Ting* v. *United States*).

118. Restrictions on the Exercise of Power by Congress.

What has been said in a previous section (above, § 20) as to express and implied restrictions on the powers of the several departments of the federal and state governments, is especially applicable to the powers of Congress. It cannot exercise any power not given to it by express grant or reasonably implied from the powers which are granted. Furthermore, there are express limitations on its power such as those enumerated in Article I, § 9, of the constitution which, although not directly stated to be limitations on congressional power, are evidently intended to apply especially to Congress, as they are included in the article of the constitution relating to the legislative department. But these limitations are all discussed in connection with the various subjects to which they relate and need not now be further considered.

Part IV.

Executive Power.

CHAPTER XIX.

GENERAL NATURE OF EXECUTIVE FUNCTIONS.

119. References.

J. I. C. Hare, *Constitutional Law*, lect. x; J. R. Tucker, *Constitution of the United States*, §§ 98, 99; *The Federalist*, Nos. 69–73; James Bryce, *American Commonwealth*, chs. v, vi, xx, xxi, xli; J. W. Burgess, *Political Science and Constitutional Law*, II, 185, 320; J. N. Pomeroy, *Constitutional Law*, ch. v; A. B. Hart, *Actual Government* (Amer. Citizen Series), ch. viii.

120. Historical View as to the Executive.

Among a primitive people, not yet united under any strong central government, and recognizing the right of local self-government as existing in small divisions or bodies, limited and temporary authority only is conceded to any one official; there is but little concentrated executive power. Such a people were the Anglo-Saxons during the early period of their existence in England. But the necessary development of a stronger central government will be effected by the assertion of greater power on the part of some leader or ruler, and before the Norman Conquest the office of king had been fully established in England, though the king was not looked upon by any means as the source of all power or as entitled to exercise absolute

power. After the Norman Conquest, and especially after the superiority of the king over the nobility had been established, the monarch, although never recognized as the repository of absolute authority, was regarded as ruling by divine right, and as the source of all the authority exercised by the general government. He made the laws, after consultation with his duly appointed counsellors, and even after Parliament became fully established, he framed statutes for the consideration of Parliament. In course of time the importance and influence of Parliament had so far increased, especially by the persistent assertion on its part of the right to regulate the levying of taxes and the expenditure of money, that the power to legislate was fully established as a Parliamentary power, and Parliament (king, lords, and commons) became the legislative branch of the government, whilst the monarch was recognized as the executive branch.

Until 1715 the king still participated with Parliament in the making of laws inasmuch as he could veto any bill sent up to him by the two Houses; and still no act of Parliament becomes a statute until it has received the royal approval. In the relations between the government of England and foreign governments, he was the sole representative of the nation. The supreme military authority was in him, and he exercised the function of enforcing the laws. In course of time the judicial authority was separated, to a great extent, from the person of the sovereign, but it was exercised by judges appointed by the sovereign, and the judicial branch of the government was recognized as deriving its authority from the executive.

This was the substantial framework of the English constitution at the time the colonies asserted their independence, and the state constitutions, as has already been explained (*supra*, ch. iv), recognize three co-ordinate departments of government, the legislative, the executive, and the judicial. By these constitutions, and in general by all state constitutions subsequently framed, the governor as the head of the executive department is the head of the state. He is the chief adminis-

trative officer charged in a general way with the enforcement of the laws; he is at the head of the military establishment of the state; and he has the pardoning power. He has also some functions to perform in connection with the legislative department. By the constitution of the United States, which was framed in general analogy to the state constitutions then existing, the president is the head of the military and naval forces; he represents the national government in its relation with foreign governments; he participates in legislation by exercising the power of approving or vetoing bills passed by Congress; and he is vested with the power of pardon (Art. II).

It appears, therefore, that the chief executive, whether of a state or of the federal government, exercises a variety of functions, which must be separately considered.

CHAPTER XX.

ADMINISTRATIVE FUNCTIONS; APPOINTING AND PARDONING POWER.

121. References.

ADMINISTRATION AND ENFORCEMENT: A. V. Dicey, *Law of the Constitution*, chs. v, vi; Alexis De Tocqueville, *Democracy in America*, I, ch. v; J. I. C. Hare, *Constitutional Law*, 138–145; J. R. Tucker, *Constitution*, § 362; J. N. Pomeroy, *Constitutional Law*, §§ 662–668; A. B. Hart, *Actual Government* (Amer. Citizen Series), § 252; *Marbury* v. *Madison* (1803, 1 Cranch, 137; 1 Curtis' Decisions, 368; McClain's Cases, 815; Thayer's Cases, 107; Marshall's Decisions, Dillon's ed., 1); *In re Neagle* (1889, 135 U. S. 1; McClain's Cases, 65; Thayer's Cases, 335); *In re Debs* (1895, 158 U. S. 564).

APPOINTMENT OF OFFICERS: J. Story, *Constitution*, §§ 1524–1529; J. N. Pomeroy, *Constitutional Law*, §§ 642–661; J. R. Tucker, *Constitution*, §§ 357–359; *The Federalist*, Nos. 76, 77; A. B. Hart, *Actual Government* (Amer. Citizen Series), §§ 125, 130, 131; *United States* v. *Germaine* (1878, 99 U. S. 508; McClain's Cases, 607); *Blake* v. *United States* (1880, 103 U. S. 227; McClain's Cases, 610).

PARDONS: J. Story, *Constitution*, §§ 1494–1504; J. R. Tucker, *Constitution*, § 352; J. N. Pomeroy, *Constitutional Law*, §§ 682–696; *The Federalist*, No. 74; *Ex parte Wells* (1855, 18 Howard, 307; McClain's Cases, 569); *Cummings* v. *Missouri* (1866, 4 Wallace, 277; Thayer's Cases, 1446); *Ex parte Garland* (1866, 4 Wallace, 333; McClain's Cases, 576; Thayer's Cases, 1453, and note).

122. Administration and Enforcement of Law.

The administrative power of the federal or a state government is necessarily vested in the executive department. Our system of government does not, however, recognize administrative law as superior to the civil law administered by the courts. Executive officers, even the highest, are subject to the law. Although the chief executive cannot be directly interfered with by the courts in the discharge of his duties (see above, § 25), he is liable, in both civil and criminal proceedings, for

breach of the law in the same way as a private citizen; and subordinate executive officers may be directly controlled by the courts as to the discharge of their duties. It must be understood, however, that where a discretion is given to an executive officer he cannot be controlled by the courts in the exercise of his discretion, although he may be compelled to act where it is his duty to act, and prevented from acting where he has no right to do so (*Marbury* v. *Madison*).

In speaking of the division of power among the three departments of government, it is often said that the peculiar duty of the executive department is to enforce the laws made by the legislative department. By state constitutions it is usually provided that the executive shall take care that the laws are faithfully executed; and there is such a provision in the federal constitution (Art. II, § 3). It is also provided that the president shall take an oath to faithfully execute his office, and to the best of his ability preserve, protect, and defend the constitution of the United States (Const. Art. II, § 1, ¶ 7). The practical execution of the laws rests, however, more directly with the judiciary than with the executive department. It is for the courts to determine whether a law has been violated in a particular case, and what the redress or punishment shall be. If the authority of the court is resisted, then it is the function of the executive department to employ the power of the government, even the military power, if necessary, to uphold the authority of the courts and carry out their judgments; so that it is proper to say, in a general sense, that the ultimate power to enforce the laws is with the executive (*In re Neagle*).

The question has been mooted whether the president in the enforcement of the laws may take into account their constitutionality and disregard those which he believes to be unconstitutional. As to those acts which are purely executive and which are not subject to review by the courts, it is plain that the president must act on his own judgment and responsibility; but on the other hand, as to the interpretation of the constitution which has been announced by the judiciary in cases properly coming before that department, he should acquiesce

in the decisions of the highest judicial tribunal. President Lincoln practically disregarded the Dred Scott decision in the policy of his administration with reference to slavery, and he was no doubt justified in doing so, for that decision had not and could not have any direct bearing on the duties of the executive department.

In the enforcement of the law it may become necessary for the president to use the military power, not only in securing obedience to the decisions of the courts, but also in preventing interference with the performance of governmental functions or the carrying on of governmental operations. For instance, if the transportation of the mails or the carrying on of interstate or foreign commerce is interfered with, he may undoubtedly employ such military force as is necessary to remove such interference. (See above, § 93.) The executive department is not bound to suspend the discharge of the duties with which it is vested until by judicial proceedings a remedy may be afforded. The president may use the military forces of the United States under such circumstances without being called upon by the legislature or governor of the State (*In re Debs*).

123. Appointment of Officers.

In many of the states the principal executive officers subordinate in rank to the chief executive are chosen by popular election. But many other subordinate officers are provided for, usually appointed by the governor, although the method of selection is of course determined by the constitutional or statutory provisions under which the offices are created, and selection by the legislature or appointment by other authority is to some extent provided for.

In the federal government only the president and vice-president are elected, and the vice-president is an executive officer only in case he is called upon to perform the functions of the president on the removal of the latter from office, or his death, resignation, or inability. (See above, § 41.) The function of the vice-president as presiding officer of the Senate is not in any sense executive.

Under the federal constitution (Art. II, § 2, ¶ 2) it is provided that the president "shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court and other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law." The ambassadors, public ministers, and consuls may be regarded as officers of the executive department discharging its functions in the diplomatic relations of this country to foreign countries, while the judges of the Supreme Court belong exclusively to the judicial department. In fact, all the important officers of the judicial department are by law appointed by the president. In the same section it is provided that Congress may by law vest the appointment of such inferior officers as it thinks proper in the president alone, in the courts of law, or in the heads of departments.

There has been some controversy as to the power of the president to remove the officers whom he is authorized to appoint. Judges of the federal courts are appointed for good behavior, and can only be removed by impeachment. Other officers appointed by and with the advice and consent of the Senate are in effect removed by the appointment of a successor and the approval of such appointment by the Senate. During the recess of the Senate the president is expressly authorized to fill vacancies by granting commissions, which shall expire at the end of the next session, and it seems that the president may for this purpose declare whether a vacancy exists which he has authority thus to fill, and thereby in effect remove an officer. If during the ensuing session no appointment to such position is approved by the Senate, then at the end of the session there is again a vacancy in such office, which the president may fill by appointment, to expire at the end of the following session. The president does, therefore, in fact, exercise the power of removing from office even the officers who are appointed by and with the advice and consent of the Senate. Indeed, it seems to be generally conceded that all appointive officers who are not entitled by the constitution to hold their

offices for life are removable by the appointing power, and that, in case of officers who are appointed with the approval of the Senate, the power to remove is in the president alone.

Congress may provide, however, as to the qualifications of subordinate executive officers, the conditions on which they shall hold their offices, and the grounds on which they shall be removed; for as the offices themselves are not provided for by the constitution, but are created by law, the same power which creates them may prescribe the conditions on which they shall be filled.

124. Pardons.

The legislative department, in the exercise of its discretion, defines crimes and provides for their punishment. (See above, ch. x.) The courts determine whether a person charged with violation of the criminal law is guilty and prescribe his punishment. The executive department not only sustains the officers of the court in enforcing the punishment imposed, but exercises the independent function of suspending or annulling the punishment by reprieve or pardon. This independent power is in England recognized as one of the attributes of sovereignty, which, so far as the punishment for crime is concerned, has not been delegated to the judiciary, and under the federal and state constitutions it is preserved as one of the functions of the executive department. State constitutions vest this power in the governor or an executive board, and the federal constitution expressly gives it to the president (Art. II, § 2, ¶ 1). It is to be noticed, however, that the power of the president to reprieve or pardon relates only to crimes committed against the federal government. He has no power to interfere with the execution of the laws of the states. And it is to be further noticed that the power of the president in this respect does not extend to punishment imposed on a public officer by impeachment.

The power of the president to pardon extends to every offence known to the federal law, and may be exercised by him at any time after its commission, either before legal proceedings

are taken or during their pendency, or after conviction. It may be exercised by granting the pardon in a particular case, or by a general pardon or amnesty proclamation as to classes of persons who have been guilty of crime against the United States. Congress can neither limit the effect of a pardon nor exclude from the exercise of the pardoning power any class of offenders, and unconditional pardon not only relieves the offender from punishment, but extinguishes the consequences of his guilt, whether civil or criminal, so that after pardon the offender is free from the legal effects of his crime as fully as though no offence had been committed.

Congress, on the other hand, may attach as a condition or qualification to the holding of an office that the person to be appointed has not been guilty of certain specified crimes, and the president's pardon will in such case not remove the disqualification. But in the cases of *Cummings* v. *Missouri* and *In re Garland*, it was held that neither by state constitution nor statute, nor by act of Congress, could a course of conduct which was not criminal at the time it was pursued, nor an offence for which a full pardon has been granted subsequently be made a ground of disqualification for holding office, as the effect would be to impose a penalty or an additional penalty by a subsequent statutory provision. Such legislation would be *ex post facto* in its nature and contrary to the express prohibitions of the federal constitution. (See above, § 59.)

A pardon may be granted upon conditions, and the immunity from punishment accorded thereby will continue only so long as the conditions imposed are complied with. A reprieve is not a conditional pardon, but a temporary suspension of punishment, and after the term of the reprieve has expired, punishment may be inflicted as though no reprieve had been granted.

CHAPTER XXI.

LEGISLATIVE FUNCTIONS OF THE EXECUTIVE; VETO POWER.

125. References.

J. Story, *Constitution*, §§ 881–893, 1560–1564; J. I. C. Hare, *Constitutional Law*, 211–213; J. R. Tucker, *Constitution*, §§ 213, 214, 360; J. N. Pomeroy, *Constitutional Law*, §§ 174–179, 697–702; James Bryce, *American Commonwealth*, ch vi; *The Federalist*, No. 73; A. B. Hart, *Actual Government* (Amer. Citizen Series), § 118; E. C. Mason, *The Veto Power*; E. C. Mason, *Calls for Information from the Executive* (Amer. Hist. Assoc., *Papers*, 1891, 367).

126. Executive Approval or Veto.

It is provided in all the state constitutions except two, as it is in the federal constitution (Art. I, § 7, ¶ 2), that bills which have passed both branches of Congress or of a state legislature, as the case may be, shall be presented to the president or the governor, who shall sign them, if in his judgment they should be approved; otherwise he returns them with his objections to that house of Congress or of the state legislature in which they shall have originated. Such a return of a bill with objections is usually called a veto, and in some state constitutions that term is expressly used. A bill thus returned may become a law by being again passed by both branches of the legislature over the objections of the executive, which passage, however, according to the federal constitution, must be by a two-thirds vote of each house; and similar provisions are found in the state constitutions. When a bill has thus been passed, it becomes effectual without further action on the part of the executive.

It is generally provided in the state constitutions, as it is in the federal constitution, that the retention of a bill for a speci-

fied time without approval or return by the executive shall be construed as an approval, and such a bill becomes a law as effectually as though it had been approved. On one point, however, there is great diversity, that is, as to the effect of the retention by the executive without approval until after the adjournment of the legislative body, the time fixed by the constitution for the return of the bill not having expired when the legislative body adjourns; and this matter is of great practical importance, for it is a common occurrence that the most important bills are not finally acted upon by the legislative body until within a few days of adjournment, so that the time fixed after which the bill shall become a law without approval if not returned with objections does not expire before adjournment.

The practical construction put upon the provisions of the federal constitution in this respect is that bills which have not received the president's approval, or have not been returned by him with objections and passed over his veto, before the adjournment of Congress, cannot become effective, no approval of the president after the adjournment of Congress being considered sufficient. But by the provisions of some state constitutions, the governor may, within the time specified by the constitution, approve a bill so as to make it effectual as a statute after the legislative body has adjourned.

127. Exercise of Executive Discretion toward Legislation.

In the approval or veto of a bill presented, the executive is not limited to the mere determination of whether the bill, if it becomes a statute, will be valid or constitutional. The executive may take into account all those considerations which may properly influence the members of the legislative body in determining whether they should favor or oppose the proposed legislation. In the exercise of his functions in this respect, the president or the governor acts in reality as a branch of the legislative department. He exercises substantially the authority which, under the constitution of England, is exercised by the king with reference to legislation, subject, however, to the limitation which was a feature novel in forms of government, that the

proposed bill may become a law upon passage over the executive veto by the requisite majority of each branch of the legislative body.

In practice the president or a governor actually exercises greater authority than is now exercised in this respect by the king of England, for in England the sovereign since 1715 has uniformly approved all bills which have been presented to him by Parliament. The English practice results from the custom prevailing there that the king acts only through the ministry, composed of officers appointed by him from the dominant party in Parliament, so that the measures favored by the ministry, as it is called, are the measures which receive the approval of Parliament, and, therefore, will likewise receive the approval of the king. In other words, the king, in his relations with Parliament, does not exercise his individual will or judgment, but adopts the judgment of the officers who represent him, and who are selected for the reason that they can secure the approval of Parliament for the measures which they propose. Under the constitutional system of the United States, the chief executive, whether president or governor, has an individual responsibility, and exercises an independent judgment; and while it is likely that, being an elective officer, his political views will correspond with those of the majority in the legislative body, it by no means follows that he will necessarily approve all measures which have received the support of the majority in each branch of the legislative body.

128. Executive Recommendations as to Legislation.

The participation of the chief executive, whether president or governor, in matters of legislation, is not limited, however, to the exercise of the veto power. The president is directed to give to Congress, from time to time, "information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient" (Const. Art. II, § 3), and similar provisions are found in state constitutions with reference to the governor. Accordingly, it is the practice for the executive to indicate in a message to the legislative body

at the beginning of each session such measures of legislation as he deems important to be considered, and he may at other times, in special messages, propose other measures for their consideration. These measures are not, however, officially proposed in the form of statutes, but by way of recommendations, in order that appropriate bills may be framed and passed by the legislative body, if the majority of the members thereof approve of the proposed legislation.

By the same section of the federal constitution it is provided that the president may, on extraordinary occasions, convene both houses of Congress in extra session, or, in case of disagreement between them as to the time of adjournment, may adjourn them to such time as he shall think proper, and similar provisions are found in state constitutions. There has been little occasion to exercise the power to adjourn, but the power to call extra sessions when some emergency arises rendering legislative action important is frequently resorted to.

CHAPTER XXII.

MILITARY POWERS.

129. References.

J. Story, *Constitution*, §§ 1490–1492; J. R. Tucker, *Constitution*, § 363; J. N. Pomeroy, *Constitutional Law*, §§ 703–714; *The Federalist*, No. 74; A. B. Hart, *Actual Government* (Amer. Citizen Series), §§ 201, 202; *Martin* v. *Mott* (1827, 12 Wheaton, 19; 7 Curtis' Decisions, 10; McClain's Cases, 518; Thayer's Cases, 2290), *Luther* v. *Borden* (1848, 7 Howard, 1; 17 Curtis' Decisions, 1; McClain's Cases, 595; Thayer's Cases, 191).

130. President or State Executive as Commander-in-Chief.

Perhaps no function of the president or chief state executive is more significant as indicating his independent and exalted position than that of being the commander-in-chief of the army and navy of the United States and of the militia of the several states when called into the actual service of the United States, in the case of the president (Const. Art. II, § 2, ¶ 1), or commander-in-chief of the state militia in the case of a state executive. As already indicated in the chapter relating to the war power (see above, § 114), Congress is authorized to make rules for the government and regulation of the land and naval forces, but the command of these forces and the enforcement of the rules for their government are vested in the president. The governor of a state is given similar authority with reference to the state militia. It is not intended that the president or a governor shall take active command of the military forces of the United States or of a state in time of hostilities. He is essentially a civil officer. But the military or war department is a branch of the executive department, and the chief executive is therefore necessarily its head.

As the head of the executive department, the power of declaring martial law, that is, of putting the military power for the

time being in superiority to the civil power, is in the president, in the case of the United States, and in the governor in the case of a state. In the federal constitution this power is limited by the provision that "The privilege of the writ of *habeas corpus* shall not be suspended unless when in case of rebellion or invasion the public safety may require it" (Art. I, § 9, ¶ 2). The existence of martial law is regarded, however, as but a temporary condition arising from necessity. (See above, § 115.) The civil power of the government and the jurisdiction of its courts are not to be permanently abrogated, but so soon as the condition of necessity ceases to exist, the civil power, which has been temporarily suspended, is restored to supremacy.

131. Protection of the States against Invasion or Domestic Violence.

With reference to the protection of the state governments and interference in state affairs, the government of the United States has no other authority than to "guarantee to every state in this Union a republican form of government," and "protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence" (Const. Art. IV, § 4). The duty to guarantee a republican form of government does not, perhaps, rest especially on the president; but, as the head of the military and naval forces of the United States, it is within the scope of his duty to give protection against invasion and domestic violence, and Congress by act of 1795 provided for the exercise by him of this function. He may call out the militia of other states for this purpose, and, as the final and conclusive authority, must determine whether an emergency exists requiring the exercise of his authority. (See *Martin* v. *Mott*.) It may be necessary for him to determine whether there is a state government, and, as between conflicting claims of different persons or bodies, who is the lawful executive of the state and which is the lawful legislative body thereof. These are among the political powers of the federal government, and such powers are necessarily in the executive rather than in the

legislative or judicial department. Each department, however, can determine questions of this character, necessarily arising before it in the discharge of its duties. Thus, the Senate of the United States may have to determine which of two senators elected by rival state legislatures is entitled to a seat as senator from the state; and the judicial department may find it necessary, in a suit brought by a state, to determine whether the government purporting to act for the state in bringing such suit is the lawfully authorized government of the state. But so far as the president is called upon, in the discharge of his duties, to determine the legality or illegality of a state government, his action cannot be overridden or reviewed by either of the other departments of the federal government. It is to be noticed that there is a distinction between the power of the president to protect a state against invasion and domestic violence and his power to enforce the laws of the United States. (See above, § 122.) In the one case he acts only upon the call of the state government, in the other he acts under his authority as chief executive of the United States to see that its operations are not interfered with or hindered, and with reference to the discharge of his duties in this respect the request of the state government is wholly immaterial and its protests would be unavailing. The authority of the president in enforcing the laws of the United States cannot be made to depend upon state action.

CHAPTER XXIII.

DIPLOMATIC RELATIONS; TREATY-MAKING POWER

132. References.

J. Story, *Constitution*, §§ 1505–1523, 1565–1568; J. R. Tucker, *Constitution*, §§ 353–356, 361; J. N. Pomeroy, *Constitutional Law*, §§ 669–681; *The Federalist*, No. 75; C. H. Butler, *Treaty-Making Power;* A. B. Hart, *Actual Government* (Amer. Citizen Series), ch. xxiii; H. W. Rogers, *Treaty-Making Power* (Amer. Bar Assn., *Proceedings*, 1893, p. 243; *North-western Law Rev.*, II, 1); J. W. Burgess, *Federal Government and International Responsibility* (Pol. Sci. Quart.), vi. 338; E. W. Huffcut, *International Liability for Mob Injuries* (Amer. Academy of Pol. Sci., *Annals*, II, 69); *Jones* v. *United States* (1890, 137 U. S. 202; McClain's Cases, 590; Thayer's Cases, 364); *Haver* v. *Yaker* (1869, 9 Wallace, 32; McClain's Cases, 581); *People* v. *Gerke* (1855, 5 California, 381; McClain's Cases, 583); *Head Money Cases* (1884, 112 U. S. 580; McClain's Cases, 587; Thayer's Cases, 758); *The Cherokee Tobacco* (1870, 11 Wallace, 616); *Foster* v. *Neilson* (1829, 2 Peters, 253); *Chinese Exclusion Case, Chae Chan Ping* v. *United States* (1889, 130 U. S. 581; McClain's Cases, 562); *United States, ex. rel.* v. *Williams* (1904, 194 U. S. 279).

133. Executive Authority in Diplomacy.

The states can have no relations whatever with foreign governments (Const. Art. I, § 10, ¶ 1). Toward foreign powers, the United States collectively constitute one single power, represented by the federal government, and the relations between that government and foreign governments are through the executive department and in the name of the president as chief executive. Congress cannot deal with foreign powers, and the courts can only take cognizance of their existence and rights by recognizing, interpreting, and applying the action of the executive department, evidenced by treaties or otherwise. The action of the executive department in determining in a controversy with a foreign government whether certain territory is territory of the United States cannot be interfered with by the courts. (See *Jones* v. *United States*.) So also it is for the executive department to determine whether this government

will recognize as an independent sovereign power a foreign state claiming such recognition. In short, the entire diplomatic relations between this and other countries are under the control of the executive; and the action of the executive in such matters is binding upon Congress, the courts, and all federal and state officers.

134. Executive Authority as to Aliens.

The power to determine the relations between this government and other governments extends also to the determination of the rights and privileges which shall be accorded to the subjects of foreign governments, either in relation to property within the jurisdiction of this government, or the personal privileges which shall be accorded to them within the limits of the United States. As will appear in the next section, these rights and privileges may be determined by treaty. But in the absence of treaty provisions, the presence of aliens within the limits of the United States is within the control of the executive department. Congress, in the exercise of the legislative power, may provide for the exclusion of aliens, or the deportation of aliens who have been permitted to come within the limits of the United States but have not acquired or are not permitted to acquire the rights of citizenship. The enforcement of the regulations made by Congress rests with the executive, primarily, and not with the courts.

While the policy of the federal government has in general been to permit aliens freely to come into this country, and reside here, enjoying the same personal and property rights as citizens, this policy has been within recent years modified in two important respects: (1) by excluding immigrants who belong to the criminal classes or are likely to become charges on the public, or are afflicted with contagious diseases so that their admission would imperil the general health, or who are brought in under contract binding them to service; (2) by excluding the Chinese, whose presence in large numbers was thought to be inimical to the general public welfare.

The restrictions on immigration might be supported under

the power of Congress to regulate commerce with foreign nations (see above, § 93), but the total exclusion of the Chinese, and provisions for the deportation of persons of that nationality who refuse to comply with certain regulations as to their residence in this country, rest on a higher power than that involved in the regulation of commerce, and can be supported only on the theory that the federal government may control not only the relations of this government with foreign governments, but also the relations of this government with the subjects of foreign governments (*Chinese Exclusion Case;* and see *United States* v. *Williams* as to deportation of anarchists).

135. Treaty Power.

A treaty is a compact between two independent governments, determining rights or privileges between them as sovereigns; or between each and the subjects of the other; or between the subjects of one and the subjects of the other. In the United States the treaty-making power is vested by the constitution in the president, who negotiates the treaty through the regular diplomatic representatives of the government, or special representatives appointed for the purpose; but it does not become a complete treaty except by the advice and consent of the Senate, concurrence of two-thirds of the senators present when the treaty is acted upon being necessary to its approval (Art. II, § 2, ¶ 2). Even then it must be promulgated by the executive department after it has also been ratified by the other contracting power.

A treaty may be self-executing, or it may involve legislative action in order that its provisions may be carried into effect. In the latter case the necessary legislation must be provided by Congress, and the House of Representatives, by refusing to concur in legislation proposed for that purpose, may defeat the execution of the treaty. While it may perhaps be said that it is in a general sense the duty of Congress to carry out the provisions of a treaty by necessary legislation, and the national honor may require that it do so, nevertheless that is a matter for the exercise of legislative discretion, and if the House of Representatives refuses to act, or imposes conditions not in-

cluded in the treaty itself, there is no means provided for controlling its action. Thus, if a treaty involves the payment of money, it can only be carried out by the concurrence of the House of Representatives in an act appropriating money from the public treasury for the purpose.

The treaty-making power is practically without limit, so far as it is exercised with reference to matters which may be regulated by treaty, and it extends to all proper subjects of negotiation between our government and the governments of other nations. Its limitations are to be found only in its nature and the nature of the federal government, as defined by the federal constitution. It could not be used for the purpose of changing the character of the federal government, or determining its relations with a state government. But whatever limitations there may be on the treaty-making power, they are implied, and are nowhere expressed in the federal constitution.

136. Treaties are a Part of the Law of the Land.

Being compacts between governments, treaties are not usually regarded as a part of the internal or municipal law of either of the governments which are the parties thereto. But it is expressly provided in the federal constitution that "all treaties made or which shall be made under the authority of the United States" shall be, like the federal constitution and the laws of the United States made in pursuance thereof, "the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding" (Const. Art. VI, ¶ 2). Therefore, rights and duties of persons, as well as the rights and obligations of the government, may be directly affected by treaties; and such rights and duties, so far as they are granted to or imposed upon individuals, may be protected and enforced in the courts. The provisions of a treaty which it is within the power of the federal government to make will be superior in authority to any state statute relating to the same subject-matter.

Thus, as the rights of the subjects of foreign governments to acquire by purchase or inheritance property within the limits

of the United States is a proper subject to be regulated by treaty between this government and such foreign governments, the states cannot by legislation deprive the subjects of foreign governments of property rights guaranteed to them by treaty. It is within the general power of the states to determine to what extent, if at all, aliens may acquire and enjoy property rights under state laws. In many states non-resident aliens are forbidden from acquiring real property by purchase or inheritance. Nevertheless, so far as such state statutes may interfere with the rights of an alien under a treaty between this government and the government of which such alien is a subject, the state law must give way, and if under the treaty the alien is entitled to acquire or own property, by inheritance or otherwise, he may enjoy that right, and it will be protected by the courts, although it is in contravention of the law of the state where the property is situated (*People* v. *Gerke*).

Another result of declaring a treaty to be the law of the land is that it stands on the same footing in this respect with an act of Congress. It is the general rule, as between two statutes which are in conflict, if they are enacted by the same authority, that the one later in time will control, being deemed in this respect and to the extent to which the two are in conflict to be a repeal of the former. Likewise, as between two treaties, made between the same contracting powers, the later in time will control or supersede, so far as they are inconsistent, the former. It is to be borne in mind that a statute enacted by Congress is not a part of the law of the land unless it is consistent with and enacted under the authority of the constitution, so that there are no doubt some subjects, such as the right of an alien to acquire or inherit property, which cannot be regulated by Congress, although they may be controlled by treaty. In such a case there could be no conflict between the treaty and the statute, for the statute would be unconstitutional.

As between a treaty and a statute which is enacted by Congress in the exercise of some express or implied power conferred upon it, the later in point of time is controlling, and this will be true even though in the enactment of the statute Con-

gress has violated the treaty obligations of the government to the foreign power with whom the treaty is made. Thus, if there were a treaty between this government and the Chinese government by which the subjects of the latter were entitled to come freely into the United States, Congress would have the power, notwithstanding the treaty, to exclude Chinese subjects. (See *Chinese Exclusion Case.*) As between this country and China such a statute would be a violation of treaty obligations; but redress for such breach of faith would be secured by diplomatic negotiations between the two countries. The courts would recognize the statute, being later in point of time, as controlling so far as any judicial questions could arise. On the other hand, the treaty-making power may abrogate a statute and the courts would be bound to recognize the treaty, being later in point of time, as superseding the statute, so far as it was applicable to the subject-matter controlled by the treaty.

It is apparent, therefore, that while the executive department is supreme in determining the relations between this and foreign countries, it may not be able to carry out its agreements so far as they involve either legislation by Congress or the action of the states. This inability of the executive department in its relations with foreign governments to carry out its obligations is due to the fact that no one department of the federal government is sovereign with reference to the other departments, and the further fact that the federal government is in itself a government of limited powers. With reference to the latter point it has already been noticed (see above, § 49) that the general protection of persons and property within state limits depends upon the laws of the state. If, therefore, an alien is denied in any state the proper protection of the law, his government may justly make complaint to the federal government, but the federal government can give no redress unless it be by way of payment of damages to the subject of the foreign government who is thus denied the protection of the law. Perhaps Congress might and should by statute give protection to aliens in their personal and property rights; but thus far it has failed to do so in any effectual manner.

Part V.

The Judiciary.

CHAPTER XXIV.

GENERAL NATURE OF JUDICIAL POWER.

137. References.

J. Story, *Constitution*, §§ 1573–1579; T. M. Cooley, *Constitutional Limitations*, ** 397–414; J. I. C. Hare, *Constitutional Law*, lect. viii; J. R. Tucker, *Constitution*, ch. xiii; J. N. Pomeroy, *Constitutional Law*, §§ 729–739; James Kent, *Commentaries*, lects. xiv, xviii; *The Federalist*, No. 78; James Bryce, *American Commonwealth*, chs. xxii, xlii; J. W. Burgess, *Political Science and Constitutional Law*, II, 320–366.

138. The Judiciary in General.

In those countries in which Anglo-Saxon institutions prevail, the independence of the judiciary and the importance of its functions are very fully recognized, and under our constitutional system they are peculiarly emphasized. Although the courts have no military force directly at their command, and no treasury from which to appropriate money, nevertheless their decisions in the cases coming before them, although they may involve questions of the greatest importance, not only to individuals but to the public, are almost always acquiesced in and carried out. The judicial department is ultimately dependent on the executive department to enforce its judgments if resisted, and upon the legislative department for the appropriation of the funds necessary to enable it to continue in existence and discharge its

functions; but the general respect for law, and the conviction that the rights of the people are better protected by an orderly administration of justice than in any other way, gives to the judiciary a popular support, notwithstanding criticism or dissatisfaction as to the result reached in particular cases, and enables it with confidence to rely upon all the executive and legislative assistance which may be necessary. On the other hand, the total inability of the courts to do more than render judgments, which must be dependent for enforcement, if resisted, on the action of the executive department, and their obligation to apply the law as it exists, subject to any change which the legislative department may see fit to make within constitutional limits if the law as administered is found to be unsatisfactory, constitute an ample safeguard against any revolutionary or tyrannical use by the courts of the independent power vested in them.

The functions of the judicial department are discharged by courts created by law, and courts can only decide cases which are properly brought before them. A case brought before a court is said to be within the jurisdiction of the court if it is one which by law the court is authorized to try, and which, in the particular instance, is so submitted to it that it may be tried. It is often said that, to authorize the determination of a case in a court, the court must have jurisdiction of the subject-matter and of the parties. But by such a statement is simply meant that the case must be one of a class of cases which by law the court has authority to determine; and that the particular case is brought by one having the right to sue in the court, and that the party against whom a decision is asked is served with notice or otherwise brought into court in such way that he is bound to present his defence.

It would be going beyond the proper scope of a treatise on constitutional law to discuss at length and in detail the subject of jurisdiction; it is sufficient to say that, when a case is properly within the jurisdiction of a court to decide, its decision is conclusive on the rights of the parties as to the matter presented, save as it may be subject to review by some higher

court, and cannot be questioned by either of the other departments of government. On the other hand, the courts have no power to determine any other questions than those presented to them in controversies between parties; and they cannot, therefore, interfere, except in particular cases in which the rights of individuals are involved, with the discharge of their functions by the other departments. It is true that a decision of a court interpreting the constitution or the law is properly regarded as a precedent, which ought to be followed by the other departments, as well as by other courts of the same or an inferior grade in similar cases. But the decision of a court is a precedent of controlling effect only because of the power which the courts may have to decide similar cases in the same way; as to a matter which cannot come before the courts for adjudication, the decision of a court is not binding on the legislative or the executive department, although it may properly be given weight and respect as expressing views which are entitled to the highest possible consideration. (See also above, § 7.)

139. The Judiciary of the States.

The general function of deciding legal controversies in cases properly presented is one which pertains to and is exercised by the courts established in each state. It is to be borne in mind that the general powers of government, which include the exercise of judicial power, are exercised by the state governments, and that only so far as these powers are conferred on the federal government is the power of the state judiciary limited by the federal constitution.

It would not be practicable here to describe in detail the judicial departments of the state governments, for their organization and methods of procedure are various, depending on the constitution and laws of the respective states. It may, however, be pointed out that in each state there is a system of courts, which may be roughly classified as courts of inferior jurisdiction, courts of general original jurisdiction, and courts of appellate jurisdiction.

(1) The courts of justices of the peace, and police or other

city courts, are examples of courts of inferior jurisdiction; their powers are limited to the trial of particular classes of cases of an inferior grade; that is, in civil cases, controversies involving a comparatively small amount, and in criminal cases the trial of prosecutions for offences of a minor character.

(2) Courts of general original jurisdiction are those in which any case cognizable by the judiciary may be tried, so far as their jurisdiction is not restricted by provision of law. They are the ordinary courts for the trial of lawsuits. They are presided over by judges who exercise the judicial power, assisted by officers, such as a clerk or recorder, and a sheriff or marshal, who perform the ministerial functions of the court.

(3) Courts of appellate jurisdiction are those having authority to review the decisions of courts inferior to them in grade, and to determine whether an error has been committed or an erroneous conclusion reached in the trial of a case in which an appeal has been taken; for our judicial system is constructed on the theory that in important cases there should be not only a trial, but an opportunity to the unsuccessful party to have the decision reviewed by other judges in a court of higher rank, in order that ultimate justice, as determined by the law, shall be carefully and deliberately administered and the rules of law applicable to such cases fully announced to serve as precedents in other cases. While it is important on the one hand that a party seeking the protection of his rights or redress for his wrongs shall have speedy justice, yet it is equally important, on the other hand, that there be such care and deliberation and opportunity for the avoidance of possible error, as that the justice administered be not hasty, but the result of due consideration after full opportunity for investigation. A court of inferior jurisdiction or of general original jurisdiction is presided over by one justice or judge, while a court of appellate jurisdiction is composed generally of not less than three judges, sitting together and consulting as to the decision to be rendered in each case.

140. The Law Administered in the State Courts.

It must not be understood that because the courts of a state constitute the judicial department of the state government they cannot take cognizance of any other law than that found in the constitution and statutes of the state. It is the function of a court to decide cases, and to apply the law governing the case, whatever it may be. Much of the law of any state or nation is so-called unwritten law; that is, it consists of rules and principles not embodied in constitutions or statutes; and if the questions in a case depend for their determination upon rules of unwritten law, it is for the court to decide what those rules are, resorting for that purpose to the principles announced in other cases in the same state, or by courts in other states recognizing the same general system of jurisprudence. Moreover, the federal constitution, treaties, and statutes are the supreme law of the land as to all matters to which they are applicable, and binding upon the judges of the state courts as well as upon the federal judges (Constitution, Art. VI, ¶ 2). And if the determination of a case before a state court involves the application of the federal constitution, treaties, or statutes, it is the duty of that court to make the application and decide the case with reference thereto. The jurisdiction of a state court does not depend upon the kind of law to be administered, but upon the nature of the case itself, and it will hereafter appear that many cases are of such nature that they may be tried either in a state or federal court at the election of one or the other of the parties. (See below, §§ 143, 156–158, 170.)

CHAPTER XXV.

JURISDICTION OF THE FEDERAL JUDICIARY.

141. References.

J. Story, *Constitution*, §§ 1573–1579; J. I. C. Hare, *Constitutional Law*, lects. xlv–xlix; J. R. Tucker, *Constitution*, ch. xiii; James Bryce, *American Commonwealth*, ch. xxii; J. N. Pomeroy, *Constitutional Law*, §§ 740–746; T. M. Cooley, *Constitutional Law*, ch. vi; *The Federalist*, Nos. 81, 83; *Cohens* v. *Virginia* (1821, 6 Wheaton, 264; 5 Curtis' Decisions, 82; Thayer's Cases, 285; Marshall's Decisions, Dillon's ed., 357); *Martin* v. *Hunter's Lessee* (1816, 1 Wheaton, 304; 3 Curtis' Decisions, 562; McClain's Cases, 746).

142. Necessity for Federal Courts.

It is apparent from what has been said in the preceding chapter relating to the general jurisdiction of the state courts, that it would have been possible to provide for a federal government without a judicial department; for all cases, whether involving the federal or state law, might have been tried in the courts of the states. Under the Articles of Confederation there was no provision whatever for a federal judiciary, although Congress could appoint courts for the trial of piracies and felonies on the high seas and also prize courts (Art. IX). But, on the other hand, a sovereign government would be lame and impotent indeed which should depend for the interpretation of its constitution and statutes, and the determination of the powers of its departments, so far as they might be judicially called in question, upon the decisions of the courts of the respective states of which it should be composed. An immediate and practical difficulty would be that the courts of the different states might well entertain diverse views as to the construction of the constitution and statutes of the United States, and the federal law, which is the supreme law of the land, might in fact

be one thing in Massachusetts and another thing in Virginia. It was therefore necessary to the stability and perpetuity of the Union that there should be federal courts, in which the rights of parties depending upon the constitution and statutes of the United States could be ultimately decided.

For some other purposes, also, it was essential that there should be federal courts. For instance, it would greatly embarrass the relations of the federal government with foreign governments if the ambassadors, public ministers, and consuls of foreign countries, while in this country, should be subject to the jurisdiction of courts not constituting a part or department of the federal government. Moreover, as to navigation on the high seas, it is important that there be federal courts to determine controversies relating thereto, for the ships of the United States, while on the high seas, are deemed a part of United States territory, although they are beyond the jurisdiction of any state.

Furthermore, it is important that there be courts in which the federal government may prosecute crimes against the laws of the United States, and bring civil suits, in the public interest, against individuals; and it would be embarrassing and inconvenient for that government to be compelled to prosecute these suits in state courts. In these classes of cases, at least, it is essential to the dignity and sovereignty of the federal government that there be federal courts in which such controversies may be determined.

But there are other classes of cases in which it may be desirable that there be a tribunal other than the state courts for the determination of controversies in which the federal government has not essentially any direct interest. For instance, in controversies between two states respecting their boundaries it would not be expedient to allow the courts of either state to render a final decision. It could not be expected that either state would be satisfied with a decision in such a matter rendered in the courts of the other state. Likewise, in controversies between a state and citizens of another state, or between citizens of different states, or between citizens of a

state and foreign states, citizens or subjects, it is highly desirable that the final jurisdiction should be in some court of higher authority than the courts of a state. In cases pertaining to any one of these classes last enumerated, the federal government has no direct interest, except to furnish a tribunal, impartial as between the parties, and removed from suspicion of local influence, and whose decisions would be likely to command the respect of the parties concerned. This branch of the jurisdiction of the federal courts may therefore be said to be required as a matter of expediency, although not essential to the sovereignty and independence of the federal government.

143. General Jurisdiction of the Federal Courts.

The propriety of providing a system of federal courts in which cases of the various classes described in the preceding section might be tried, is recognized in the federal constitution, and a judicial department is provided, to consist of one supreme court and such inferior courts as Congress may from time to time ordain and establish (Const. Art. III, § 1). But while the courts thus provided are necessarily superior in authority as to the cases within their jurisdiction over any courts provided for by the states, on the other hand they are necessarily courts of limited and not of general jurisdiction. The judicial department of the federal government, like either of the other departments of that government, has only the powers expressly or by implication given to it in the federal constitution, although in the discharge of the powers thus given it is supreme.

Thus it may well be said that the courts of a state, having general jurisdiction, are presumed to have authority to decide any controversy of a judicial nature, not excluded from their jurisdiction by the state or federal constitution, while the courts of the United States have only authority to decide such cases as are expressly or by implication placed within their jurisdiction by the provisions of the federal constitution, or by statutes passed in accordance with authority given to Congress under that constitution. This practical difference, then, exists between

a state court of general jurisdiction and any federal court, that any judicial controversy is presumed to be within the jurisdiction of such a state court until the contrary appears, while no case is presumed to be within the jurisdiction of a federal court unless it is made to appear that the nature of the controversy is such as to bring it within the jurisdiction of such court, as prescribed by the constitution and laws of the United States.

In describing the federal courts and the jurisdiction of each, it will be necessary, therefore, to bear in mind that the cases of which a federal court may take cognizance must in the first place be of one of the classes of cases to which the judicial power of the federal government is extended by the federal constitution; and secondly, in the case of any federal court, save the Supreme Court, the jurisdiction of which is to some extent prescribed by the constitution itself, it must appear that the case is one which, by federal statute, is placed within the jurisdiction of the particular court in question. Congress cannot create courts exercising jurisdiction within the states beyond the jurisdiction prescribed by the federal constitution. On the other hand, as to the particular courts which it is authorized to create, it may limit or apportion their jurisdiction in such way as it sees fit. It therefore follows that some of the cases falling within the general scope of jurisdiction of the federal judicial power are not actually within the jurisdiction of any particular federal court, and in such cases the judicial authority to decide must remain exclusively with the state courts, simply because no federal courts have been created to determine such cases.

As to the relations between the federal and the state courts, the fact that the case may be within the jurisdiction of the former does not necessarily exclude it from the jurisdiction of the latter. The state and the federal courts are independent of each other. But in any case in which a federal court is properly exercising its jurisdiction, its authority is necessarily superior to that of any state court, while on the other hand a state court may exercise general jurisdiction so far as in any

particular case it does not interfere with the exercise of power by a federal court. No doubt the federal government might, should it see fit, exclude the state courts from jurisdiction in any of the cases which, under the Constitution, are embraced in the general grant of judicial power to the federal government. But Congress has seen fit to exclude the jurisdiction of the state courts in only a few classes of cases falling within the scope of the federal judicial power; and to leave the others subject to the jurisdiction of the state courts so far as the latter do not interfere with the actual exercise of power in the particular case by a federal court.

It is not intended to indicate by this statement that a state court and a federal court may actually try the same case. It is a principle of general jurisprudence that when one court has acquired jurisdiction of a case, no other court will interfere while the case is pending, nor will any other court, except a court having appellate or supervisory jurisdiction, review, revise, or disregard the result of the trial of the case in the court having authority to try it. Therefore, in saying that as to many classes of cases the federal and state courts have concurrent jurisdiction, no more is intended than to indicate that a particular case of one of these classes may be in either a state or a federal court, depending upon the question where the case is actually brought on for trial; and that, if such a case is actually brought in the court of a state, it may be finally and conclusively determined in the courts of that state, although had it been properly brought in the first instance in a federal court it could properly have been tried and finally determined in the federal courts.

CHAPTER XXVI.

CASES OF FEDERAL JURISDICTION.

144. References.

In General: J. Story, *Constitution*, §§ 1637–1700; T. M. Cooley, *Constitutional Limitations*, ** 11–15; J. I. C. Hare, *Constitutional Law*, lects. lv, lvi; J. N. Pomeroy, *Constitutional Law*, §§ 747–760; T. M. Cooley, *Constitutional Law*, ch. vi; H. C. Black, *Constitutional Law*, §§ 88–90.

Cases arising under Constitution, Laws, or Treaties of the United States: *Osborne* v. *Bank of United States* (1824, 9 Wheaton, 738; 6 Curtis' Decisions, 251; McClain's Cases, 617; Thayer's Cases, 1346); *Pacific Railroad Removal Cases* (1885, 115 U. S. 1; McClain's Cases, 622); *Southern Pacific Railroad Company* v. *California* (1886, 118 U. S. 109; McClain's Cases, 624); *Bock* v. *Perkins* (1891, 139 U. S. 628; McClain's Cases, 626).

Cases affecting Ambassadors, etc.: *Börs* v. *Preston* (1884, 111 U. S. 252; McClain's Cases, 628).

Cases of Admiralty: *The Propeller Genesee Chief* v. *Fitzhugh*, (1851, 12 Howard, 443; McClain's Cases, 648); *The Steamboat Magnolia* (1857, 20 Howard, 296; McClain's Cases, 650); *Manchester* v. *Massachusetts* (1891, 139 U. S. 240; McClain's Cases, 655).

Suits by or against the United States: *Stanley* v. *Schwalby* (1896, 162 U. S. 255; McClain's Cases, 673); *United States* v. *Texas* (1892, 143 U. S. 621; McClain's Cases, 676; Thayer's Cases, 310).

Suits against States: *Hans* v. *Louisiana* (1890, 134 U. S. 1; McClain's Cases, 702; Thayer's Cases, 293); *New Hampshire* v. *Louisiana* (1883, 108 U. S. 76; McClain's Cases, 713); *South Dakota* v. *North Carolina* (1904, 192 U. S. 286; McClain's Cases, 2d ed., 713).

Suits against Officers or Agents of United States or State: *United States* v. *Lee* (1882, 106 U. S. 196; McClain's Cases, 720); *Louisiana* v. *Jumel* (1882, 107 U. S. 711).

Cases of Diverse Citizenship: *Hepburn* v. *Ellzey* (1805, 2 Cranch, 445; Thayer's Cases, 348; Marshall's Decisions, Dillon's ed., 48); *Hooe* v. *Jamieson* (1897, 166 U. S. 395; McClain's Cases, 734); *The Ohio & Mississippi Railroad Company* v. *Wheeler* (1861, 1 Black, 286; McClain's Cases, 737); *St. Louis & San Francisco Railway Co.* v. *James* (1896, 161 U. S. 545; McClain's Cases, 739).

145. Constitutional Enumeration.

Bearing in mind the statement already made that no federal court can have jurisdiction of any case unless it is one of the classes of cases enumerated in the federal constitution as those to which the judicial power of the federal government may extend, we have to consider briefly the enumeration of these classes of cases found in the federal constitution. In this enumeration (Const. Art. III, § 2) we find nine classes of cases, which are considered briefly in the following paragraphs of this chapter.

146. Cases Arising under the Federal Constitution, Laws, and Treaties.

The first and most extensive class of cases described as of federal cognizance, are those "in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." The distinction here recognized between cases in law and cases in equity is of no particular significance for present purposes. In the jurisprudence of England, there were at the time our Constitution was framed, and until recently, distinct courts of law and of equity. Law and equity in this sense are simply different divisions of jurisprudence; the distinction between them depends on the nature of the case, or the nature of the relief which the court may grant. Such distinction is still recognized in some of the states, although in many states the same courts administer both law and equity. By the use of these two terms in the federal constitution, it was only intended to indicate that both law and equity may be administered in the federal courts, if the case is one otherwise coming within the jurisdiction of those courts. (See below, § 168.)

The essential description of the cases within the class now under consideration is that they are cases arising under the constitution, laws, or treaties of the United States. Such a case

may involve the construction of the federal constitution or a law or treaty of the United States, or it may involve the determination of some right, privilege, or immunity under such constitution, law, or treaty. In either event, it is a case as to which the federal judicial power may be exercised. For instance, if a person were being punished by state authority for violating some state statute, which statute was unconstitutional because in conflict with the provisions of the federal constitution, such person seeking relief as against the unlawful exercise of authority on the part of the state would have a case arising under the federal constitution. If one who has a patent from the United States entitling him to the exclusive use, manufacture, and sale of an invention should desire to bring suit against another who was infringing his right under such patent, the case would be one arising under the laws of the United States, for it is only under the United States laws that a patent may be granted and enjoyed, and the case would therefore be one within the possible jurisdiction of the federal courts. If the subject of a foreign state had the right by treaty between his government and the government of the United States to inherit property in the United States, and his right to thus inherit was denied to him or questioned under the laws of a state, his case would be one arising under a treaty, and therefore one as to which the federal courts might have jurisdiction.

It is to be noticed that it is not essential that cases of this class directly involve the interpretation of the federal constitution, statute, or treaty; it is enough if the right asserted be a right dependent upon such constitution, statute, or treaty. Thus, suits by or against federal corporations have been held to be cases arising under the laws of the United States, for a federal corporation can only exist by virtue of federal law (*Osborn* v. *Bank of United States* and *Pacific Railroad Cases*). However, national banks, although they are federal corporations, are by Congress prohibited from resorting to the federal courts on the ground that they are federal corporations, and must submit to the jurisdiction of the state courts in the same way as corporations organized under the authority of the states. But

a detailed discussion of the cases which belong to this class is not practicable. It is enough to indicate their general characteristics.

147. Cases Affecting Ambassadors, etc.

The second class of cases of federal cognizance embraces those "affecting ambassadors, other public ministers, and consuls." These officers of foreign governments, while within the limits of the United States, are entitled, according to international law, to some exemption from the ordinary jurisdiction of the courts. Ambassadors and other public ministers are the personal representatives of the foreign governments under whose authority they have come into the limits of the United States, so far as their public character has been recognized and acquiesced in by this government. By international law they are regarded, while thus authorized and recognized, as entirely exempt from the jurisdiction of the courts; neither civil nor criminal suits may be prosecuted against them. The practical remedy for any wrongs which they may commit is to make complaint to the state department of the federal government, and, if sufficient reparation is not voluntarily made, the representative may be dismissed by this government, or on complaint to the home government of such representative, he may be recalled, and after having had reasonable opportunity to leave this country, may be treated as no longer entitled to any immunity from procedure in the courts.

So long as he is within the limits of the United States, as the recognized representative of a foreign government, the foreign minister according to international law is entirely outside of the jurisdiction of the courts. Therefore, the practical effect of this provision is to enable the federal courts to interfere, should any state court improperly attempt to exercise jurisdiction over a foreign ambassador or minister. As to consuls, however, the case is different. They are mere agents, not representatives of foreign governments, and are not exempt from the jurisdiction of our courts. And as to them, the result of this provision is to enable Congress to give jurisdiction with reference to them

to the federal courts, should it see fit to do so (*Börs* v. *Preston*). Suits by foreign ambassadors or public ministers or consuls may be brought in the Supreme Court; or as individuals they may sue in any other court having general jurisdiction of the case.

148. Admiralty Cases.

The extension of the federal judicial power "to all cases of admiralty and maritime jurisdiction" can better be understood if it is stated that in England admiralty courts have jurisdiction of matters on the high seas which are beyond the jurisdiction of the ordinary courts. The purpose of giving such a jurisdiction to the federal courts was to enable them to exercise the powers of admiralty courts in England. But as a matter of fact the jurisdiction has been extended by construction, so that it is broader in scope than that of the English admiralty courts. Admiralty cases are those brought for breaches of contract relating to maritime affairs, or for torts committed on the high seas or other waters within the admiralty jurisdiction, or for the enforcement of the peculiar liens recognized by courts of admiralty. The admiralty law is distinct in its rules and methods of procedure from both the law and equity systems, and as a separate branch of the law, it is exclusively administered in the federal courts; that is to say, an admiralty case cannot be tried in the state courts. It is true, the state courts may give the ordinary legal or equitable relief between the parties as to subject-matter which might have been the basis for a proceeding in admiralty; but an admiralty case as such cannot be tried save in the federal courts upon which admiralty jurisdiction is conferred by acts of Congress.

In England the admiralty jurisdiction is limited to the high seas and navigable waters within the ebb and flow of the tide; but this limitation has been deemed inapplicable in this country, because of the existence of lakes and rivers capable of navigation, and over which extensive foreign commerce is conducted, in which the tide does not ebb and flow. As now construed, the admiralty jurisdiction extends not only over the high seas, but over all of the navigable waters of the United States which

constitute avenues for foreign or interstate commerce (*The Steamboat Magnolia*). Thus, the Great Lakes, the navigable rivers, such as the Mississippi and the Hudson, and even the canals, are within the admiralty jurisdiction, and the powers of the admiralty courts extend to the determination of cases relating to maritime rights or transactions on all such waters.

149. Cases to which the United States is a Party.

The provision giving to the federal courts power as to "controversies to which the United States shall be a party" simply authorizes Congress to provide for trial in the federal courts of suits brought by or against the United States. Prosecutions for offences committed against the laws of the United States are of this character, as are also suits by the United States government to enforce penalties and forfeitures for violation of the revenue or postal laws, or similar statutes. A suit against a federal officer and his sureties to recover a penalty under his bond for breach of duty would come within the same description. As plaintiff the United States may also under this provision sue in the federal courts to recover damages for breach of contract, or to enforce any other legal obligation.

It is important to notice in this connection that a sovereign government cannot be sued in its own courts, and it was evidently not the intention of this clause of the constitution to change the rule in this respect as to the United States. Therefore, a suit against the United States cannot be maintained, even in the federal courts, unless under some express authority. The rule is this: that the ordinary statutory provisions conferring jurisdiction on the courts in certain classes of cases do not authorize suits against the United States, for it is to be presumed that a sovereign government will do justice without the compulsion of a court; and that, moreover, it was not intended to give to any tribunal a coercive power with reference to the government itself.

Yet, as it is within the legislative authority to provide for the payment of just claims against the government, Congress may, if it sees fit, authorize such claims to be prosecuted in courts

specially designated for that purpose, and, accordingly, it has created a Court of Claims in which persons claiming that the United States is justly indebted to them may prosecute their demands, and have the justice of such demands legally investigated. It has been further especially provided by statute that the general courts of the United States may exercise much the same jurisdiction as to claims against the government as was conferred upon the court of claims. But these special provisions authorize only the determination by the court of claims, or other court having the same authority, of the legality of a claim; they do not authorize the enforcement of any judgment which may be rendered against the United States, and it still remains for Congress in its discretion to appropriate the money necessary to pay such judgments.

The immunity of the United States from suit in its courts does not extend to its officers or agents claiming to act under its authority (*United States* v. *Lee*). If, as matter of fact, they act without authority, they may be sued in the federal or state courts, and held liable as individuals. And the validity of the authority which they claim to be exercising as officers or agents of the federal government may be investigated. The executive or legislative department cannot, by action in excess of its authority, confer upon any officer or agent the power to violate the law.

150. Controversies between States.

The states are independent of each other, but, since they are not capable of negotiating with each other, or having foreign relations with reference to each other, it is provided that controversies between them may be determined in the federal courts. Such controversies have usually been as to boundaries.

As will be noticed in the next section, a state may not be sued, even in a federal court, by its own citizens or the citizens of another state or of a foreign government for the purpose of compelling it to pay its debts; but if one state has a claim for money against another, the controversy relating to such claim is a controversy between states, bringing it within the

scope of the federal jurisdiction. Thus, where one state was the owner in its own right of bonds of another state, it was held that suit on such bonds could be maintained by the one state against the other in the federal courts (*South Dakota* v. *North Carolina*).

151. Controversies between a State and Citizens of another State.

Where a state has a claim of any kind against a citizen of another state, it cannot usually prosecute that claim in its own courts, because its courts cannot get jurisdiction of a non-resident except by his voluntary appearance; and the state ought not to be compelled to submit its case to the courts of the state in which its debtor resides, because it is not consistent with the dignity of a state that it be compelled to submit itself to the jurisdiction of the courts of another independent state. Provision is therefore properly made for the trial of such cases in a federal court.

But the general rule already announced with reference to the United States, that a sovereign government should not be subject to suit, is applicable also to the sovereign states. It could not have been intended that a state government should be subject to suit by private individuals. And this principle is expressly enunciated in Amendment XI in which it is provided that "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another, or by citizens or subjects of any foreign state."

Even if the controversy is one arising under the constitution, laws, or treaties of the United States, and for that reason would otherwise be within the jurisdiction of the federal courts, such jurisdiction is excluded by Amendment XI if the suit is by private individuals or corporations against a state, and the same reasoning applies to a suit against a state by its own citizens, for, although this class of cases is not expressly covered by the Eleventh Amendment, it is excluded from the jurisdiction of the federal courts by the general rule that a sovereign state cannot

be sued except by its own consent (*Hans* v. *Louisiana*). Whether the citizens of a state may sue the state in its own courts will depend entirely on the laws of the state, and such authority has in some cases, although not generally, been granted. The conclusion to be drawn is that the jurisdiction of the federal courts does not extend to suits against a state, no matter what be the nature of the subject-matter, unless the suit be by another state of the Union or by a foreign state, or by the United States.

152. Controversies between Citizens of Different States.

The jurisdiction of suits in which the party or parties on one side are citizens of a different state from that of the party or parties on the other, furnishes the larger part of the civil business in the ordinary federal courts. The object of the provision with reference to such suits is to secure to the parties in such cases a trial before a court free from any possible prejudice or bias on account of the citizenship of the parties on the one side or the other.

To determine the citizenship of a party, in order to ascertain whether the case is one involving diverse citizenship as described in the constitutional language, the test now applied is that of the Fourteenth Amendment. Prior to the adoption of that amendment there may have been some uncertainty as to the test of citizenship in a state; but now the simple rule is to ascertain whether the party in question is a citizen of the United States either by birth or naturalization, and, if so, whether he has a legal residence in the state of which he claims to be a citizen. It is to be noticed that by the language of the constitution the controversy must be between citizens of different states, that is, the party on one side must be a citizen of a different state from that of which the other is a citizen. It follows that controversies between a citizen of one state and a citizen of the United States having his legal residence in the District of Columbia or in a territory, is not within that class of cases, for it is not a controversy between citizens of different states, the District of Columbia not being considered a state in

this sense, and territories of course being excluded by the terms used. A controversy between a citizen of a state and an alien would not fall within the terms of this provision, but it is covered by the last clause of the section relating to controversies between a citizen of a state and a citizen or subject of a foreign state.

Under the clause as to diverse citizenship a corporation is deemed a citizen of the state in which it is organized and authorized to do business. For some purposes a corporation is said not to be a citizen, as that term is used in other sections of the constitution, and perhaps it is only by a fiction that a controversy between a corporation of one state and a citizen or corporation of another can be said to be a controversy between citizens of different states (*Ohio, etc. R. Co.* v. *Wheeler*). But it is well settled that, for the purpose of determining the jurisdiction of the federal courts, a corporation is for practical purposes a citizen of the state of its organization and under the laws of which it is authorized to transact business. While a corporation organized in one state, and authorized there to do business, may also transact business in another state by acquiescence or express permission of the latter, it is not, however, a corporation of that state with reference to the jurisdiction of the federal courts under this clause (*St. Louis, etc. R. Co.* v. *James*).

153. Controversies under Land Grants of Different States.

The provision that the judicial power of the federal government extends to controversies between citizens of the same state claiming lands under grants of different states has not given rise to any difficulties of interpretation, although it was no doubt intended to cover specific classes of cases which it was thought would be likely to arise, and which, by reason of the fact that the claims would be made under the laws of different states, ought to be determined in the federal courts.

154. Controversies between a State and Foreign States, or between Citizens and Aliens.

The last of these enumerations of grounds for jurisdiction of the federal courts includes several possible classes of cases. It is difficult to conceive of a controversy between a state and a foreign government. But if such controversy could arise, determinable by the courts, it would be within the possible jurisdiction of the federal courts. If a foreign government sought to sue the citizens of a state, such suit would be within the scope of federal jurisdiction. Controversies between a citizen of a state and a citizen or subject of a foreign government, that is, suits between citizens and aliens, are of frequent occurrence, and the propriety of placing them within the general scope of federal jurisdiction is self-evident.

CHAPTER XXVII.

THE EXERCISE OF FEDERAL JUDICIAL POWER.

155. References.

J. Story, *Constitution*, §§ 1731–1747, 1760–1773; J. I. C. Hare, *Constitutional Law*, lect. 1; T. M. Cooley, *Constitutional Law* (3d ed.), 139–152; H. C. Black, *Constitutional Law*, § 97; *Martin* v. *Hunter's Lessee* (1816, 1 Wheaton, 304; 3 Curtis' Decisions, 562; McClain's Cases, 746; Thayer's Cases, 123); *Cohens* v. *Virginia* (1821, 6 Wheaton, 264; 5 Curtis' Decisions, 82; Thayer's Cases, 285; Marshall's Decisions, Dillon's ed., 357); *Gaines* v. *Fuentes* (1875, 92 U. S. 10; McClain's Cases, 769).

156. Jurisdiction by Original Suit.

The simplest and most natural method of providing for the exercise of federal jurisdiction as to classes of cases which are by the constitution declared to be within the scope of the federal judicial power is by providing courts in which such suits may be originally brought; and there are courts provided, as described in the next chapter, in which controversies arising under the constitution, laws, or treaties of the United States, and cases of admiralty and maritime jurisdiction, and suits by the United States, and suits by a state against another state, or against the citizens of another state, and suits by a citizen of one state against a citizen of another state, and by a citizen against an alien, or an alien against a citizen, may be originally instituted. The facts which make the case a proper one for the jurisdiction of the court in which it is brought must be stated, and the particular court in which the suit is instituted will not have jurisdiction, unless, as already explained, the case is one within the enumeration of federal judicial power, and also one which may be tried in the court as constituted.

157. Jurisdiction by Removal.

Inasmuch as the jurisdiction of the federal courts in the classes of cases which may be within their jurisdiction is not exclusive, as already explained, unless expressly so declared, suits may be properly instituted in a state court (see above, § 143) which belong to some of the classes of cases of which a federal court may have jurisdiction. Under the rule that the court which first takes jurisdiction of the case should be allowed to proceed without interference from any other court, save a court of appeal, it would result that a case first brought in a state court, for instance, by a citizen of that state against a citizen of another state, or an alien, would be finally tried and determined in the state court, notwithstanding it was a case of which the federal courts might have jurisdiction, unless some provision were made for the removal of such a case from the state court to a federal court for trial. And the same considerations apply to a controversy arising under the constitution, laws, or treaties of the United States; for, as has already been said, the state courts are not excluded from the determination of such controversies.

Therefore, it is provided by the statutes of the United States, that the party against whom a suit is brought in a state court, which is of such character by reason of the subject-matter or the nature of the parties that it might have been brought in a federal court, may have it removed to the federal court for trial (*Gaines* v. *Fuentes*). This removal is secured by showing to the state court the facts which make the case a proper one for removal, and asking that it be transferred to the proper federal court. But even if the state court refuses to grant the transfer in a proper case, such transfer may be secured by application to the federal court to which the party applying has a right to have it removed. Such removal must, in general, be applied for before further proceedings are taken in the state court, and if the case is allowed to proceed before a removal is asked, it is too late to secure trial thereof in the federal court. But where the party asking to have the case removed can show

that there is some prejudice or local influence making it improper that it be tried in the state court, he may secure a removal at a later stage in the proceedings, and thus have a trial in a tribunal free from such prejudice or local influence. It is, of course, impossible to state in detail the conditions and methods for removal of cases from the state to the federal courts, but the general principles in accordance with which such removals are allowed have been sufficiently indicated.

158. Jurisdiction by Appeal from State to Federal Courts.

The jurisdiction of the federal courts in the classes of cases placed within their jurisdiction by the federal constitution may be exercised, however, not only by trial in a federal court but also by means of an appeal from a state court to a federal court, and such an appeal is authorized by statute where the construction of the constitution, laws, or treaties of the United States is involved, or some right, privilege, or immunity, is claimed under such constitution, laws, or treaties (*Cohens* v. *Virginia* and *Martin* v. *Hunter's Lessee*). It is evident that there would be no proper occasion for such an appeal unless the decision of the state court should be against the party who makes some claim by reason of the constitution, laws, or treaties of the United States or is asserting some right, privilege, or immunity by virtue thereof. The theory is that it is only when a state court has put a construction on some provision of the constitution, laws, or treaties which is contrary to that which the unsuccessful party claims should have been put upon it, and such construction is injurious to him; or when the state court has denied some right, privilege, or immunity claimed under federal authority, that an appeal to the federal courts is necessary. Such an appeal can only be taken after the unsuccessful party has carried the case through the state courts to the court of last resort, and is still unsuccessful.

Such an appeal from a state court can only be taken to the Supreme Court of the United States. None of the lower federal courts have authority to review on appeal the decisions of the

state courts, and, as will appear from what has been said, the Supreme Court exercises such appellate jurisdiction only with reference to federal questions. In cases which are declared to be within the jurisdiction of the federal courts in order to provide a fair court for their trial, and which might have been originally brought in or removed to a federal court, no right of appeal from the state to a federal court is provided for. If the parties have seen fit to submit their controversy to a state court, neither of them can afterwards complain that such court did not afford him a fair trial.

CHAPTER XXVIII.

APPORTIONMENT OF FEDERAL JURISDICTION.

159. References.

J. Story, *Constitution*, §§ 1636, 1701–1731; J. I. C. Hare, *Constitutional Law*, lects. liii, liv; James Kent, *Commentaries*, lects. xv, xvii; T. M. Cooley, *Constitutional Law*, ch. vi; H. C. Black, *Constitutional Law*, §§ 85–87, 91, 92; *Ross* v. *McIntyre* (1891, 140 U. S. 453).

160. The Federal Judicial System.

In pursuance of the power given to Congress under Article III, § 1, of the constitution, to ordain and establish courts inferior to the Supreme Court, in which, together with the Supreme Court, which is expressly provided for in the same article, the judicial power of the United States shall be vested, Congress has established a system of courts of three grades, known as the district courts, the circuit courts, and the circuit courts of appeal, the first two classes being courts of original jurisdiction, and the last class courts of appellate jurisdiction; and these courts, together with the Supreme Court, exercise all the jurisdiction authorized by the constitution to be exercised by the federal judicial power, so far as that jurisdiction is conferred on any federal tribunal. The scope of the jurisdiction of the Supreme Court is determined by the constitution, as will be explained in a subsequent section; the scope of jurisdiction of each of the other classes of courts is determined by statutes, the first of which was enacted in 1789. It will not be possible to go into the details as to the particular classes of cases which may be determined in each of these classes of courts; but the general nature of the jurisdiction conferred upon each may be so described that the scope of their jurisdiction shall be intelligible.

161. Federal District Courts.

The class of federal courts of lowest grade is composed of the district courts. The United States is divided into districts, no one of them embracing more than one state, although many of the states are divided into two or more districts; and in each district is appointed a district judge, who must be a resident of the district, and who holds a district court at one or more places in the district. The circuit judge may hold the district court in place of the district judge, and it is provided that the judge of another district may by delegation serve temporarily in a district other than that for which he is appointed. But with few exceptions the district court is held at the place or places designated by law within the district by the judge appointed for that district.

The most important jurisdiction conferred upon the district courts is that of trying prosecutions for crimes under the laws of the United States which are not punishable by capital punishment. The circuit court only can try prosecutions for capital crimes, but it has concurrent jurisdiction with the district court as to crimes not capital. Nevertheless, criminal prosecutions in cases not capital are usually conducted in the district courts. Suits by the United States are authorized to be brought in the district courts, and such courts have jurisdiction for the trial of civil cases in admiralty and prize cases. Jurisdiction is given to the district courts as to some other matters, but the classes of cases here enumerated are those of principal importance.

162. Federal Circuit Courts.

In one or more places in each district is held a circuit court of the United States, presided over by any one of the following federal judges, to wit, the justice of the Supreme Court assigned to the circuit, one of the two or more circuit judges of the circuit, and the district judge of the district in which the circuit court is held. Any two of these judges may together hold the circuit court, but any one of them is competent and is qualified to do so. The number of circuits

into which the districts are grouped corresponds to the number of justices of the Supreme Court, and each of such justices is permanently assigned to a particular circuit. Formerly it was the practice for these justices to preside over the circuit courts in their respective circuits, but this practice has fallen into disuse, although the authority remains. The circuit judges, two or more of whom are appointed for each circuit, are also judges of the circuit court of appeals, described in the succeeding section, and their time is principally devoted to the discharge of their duties in connection with those courts, so that, as a rule, the ordinary terms of the circuit court in any particular district are presided over by the district judge for the district in which the circuit court is held.

As stated in the preceding section in describing the criminal jurisdiction of the district courts, the circuit courts have jurisdiction to try prosecutions for any crimes against the laws of the United States, and they have exclusive jurisdiction in prosecutions for crimes punishable capitally. But, except as to capital crimes, they do not usually try criminal cases. Their civil jurisdiction includes cases arising under the constitution, laws, or treaties of the United States, provided the matter in dispute exceeds the sum or value of $2,000, and controversies between citizens of different states, or between citizens of a state and foreign states, citizens, or subjects, with a like limitation as to the amount in controversy. Cases of either of these classes which might originally have been brought in a circuit court, if brought in a state court may be removed by the defendant into a circuit court for trial (see above, § 157). Suits by the United States may be brought in the circuit court instead of in the district court, if the amount in controversy exceeds $2,000. There are cases arising under the laws of the United States which may be brought in the circuit court without regard to the amount in controversy: such as suits under the patent or copyright laws, the revenue laws, and the postal laws, and proceedings under the interstate commerce law, the act to protect trade and commerce against unlawful combinations, trusts, and conspiracies, and under the immigration acts.

It is apparent, therefore, that the jurisdiction of the circuit court is usually exercised in civil cases, arising under the constitution, laws, or treaties of the United States, and in cases involving controversies between citizens of different states, or between citizens and aliens; and that this jurisdiction may be exercised, either by trying cases originally brought in this court, or those removed from state courts; but that, save in cases arising under the patent and copyright laws, the revenue laws, the postal laws, and a few other classes of cases, the amount in controversy must exceed $2,000, to give the circuit court jurisdiction.

163. Federal Circuit Courts of Appeals.

The district courts and circuit courts, as above described, exercise only original and not appellate jurisdiction. The courts of these two classes, together with the Supreme Court, constituted the judicial department of the federal government until 1891, when a new court was created, called the circuit court of appeals, to be held at one or more places in each circuit, presided over by the three judges authorized to hold the circuit courts throughout the circuit, that is, the justice of the Supreme Court assigned to the circuit, and the two circuit judges appointed for the circuit. But by acts of Congress passed from time to time the number of circuit judges in many of the circuits has been increased to three, and in practice the justices of the Supreme Court do not, except in rare instances, serve in this capacity. Where there are only two circuit judges, or in case one or more of the circuit judges is incapacitated to sit, the requisite number of judges is provided by assigning district judges from districts within the circuit to serve temporarily. In no instance does the judge who has tried a case sit in the circuit court of appeals on the hearing of an appeal in such case.

Before the creation of the circuit courts of appeals, the appellate jurisdiction over the district and circuit courts was exercised exclusively by the Supreme Court, save that as to a few classes of cases appeals might be taken from the district to the circuit courts. When the circuit courts of appeals were

established, the appellate jurisdiction of the circuit courts was transferred to them, and they were given also a considerable portion of the appellate jurisdiction formerly exercised by the Supreme Court, the object of establishing the circuit courts of appeals being to relieve the Supreme Court of some of the business with which it was found to be overburdened.

The circuit courts of appeals have in general jurisdiction to hear appeals from the district and circuit courts in suits which are between citizens of different states, or citizens of a state and aliens; also in admiralty cases and cases under the patent, copyright, revenue, or postal laws, and in criminal cases where the crime is not capital or otherwise infamous, in which case the appeal is to the Supreme Court. With few exceptions the decision of a circuit court of appeals, in a case properly appealed to it, is conclusive, and no further appeal to the Supreme Court of the United States can be taken. The circuit courts of appeals do not entertain appeals from state or territorial courts, but only from the district and circuit courts. But an exception is made in case of the United States court in the Indian Territory, which is put on the same basis as the district and circuit courts.

164. The Federal Supreme Court.

Under the statutory provisions now in force, the Supreme Court consists of a chief justice and eight associate justices, and sits only at the national capital. By the constitution (Art. III, § 2, ¶ 2) the Supreme Court has both original and appellate jurisdiction; original "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party," and appellate in other cases as provided by law.

The original jurisdiction of this court cannot be extended by statute: but by statute it is made exclusive in some of those cases mentioned in the constitution, to wit, cases against ambassadors or public ministers or their domestics, and also cases to which a state is a party, except between a state and its citizens, or between a state and citizens of other states or aliens. It has already been explained (above, § 147) that,

according to the rules of international law, ambassadors and public ministers are exempt from suit in the courts of the country to which they are accredited and by which they are received, so that the only practical effect of giving to the Supreme Court exclusive jurisdiction in such cases is to prevent any other court from entertaining jurisdiction. It is to be noticed, however, that this does not apply to consuls. But, on the other hand, the original jurisdiction of the Supreme Court in cases affecting consuls is not made exclusive, so that it is not necessary that suits against them be brought in the Supreme Court.

As to cases in which a state is a party, the effect of the statutory provision is to give the Supreme Court exclusive original jurisdiction where a suit is brought against a state, that is, where a suit is between states, or by the United States against a state, while, on the other hand, if the suit is by a state against citizens of another state or aliens, the suit need not be in the Supreme Court, but may be in some other federal court, if any such court has jurisdiction.

The appellate jurisdiction of the Supreme Court is extensive and complicated, but may briefly be described as follows: (1) It has jurisdiction of appeals from the district or circuit courts in prize cases, in cases of conviction of a capital or otherwise infamous crime, in cases involving the construction or application of the constitution of the United States, and in cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; also in cases in which the constitution or a law of a state is claimed to be in contravention of the constitution of the United States. (2) It has jurisdiction of appeals from a circuit court of appeals in any case certified by that court to the Supreme Court, or removed from that court to the Supreme Court by direction of the latter, and in some other cases in which appeals to the circuit courts of appeals are not final. (3) It has jurisdiction of appeals from state courts of last resort in cases involving a federal question, where the decision of the state court is against the validity of a statute or

treaty of or authority exercised under the United States, or in favor of the validity of a statute of or authority exercised under any state, where the validity of such statute or authority is called in question as being repugnant to the constitution, laws, or treaties of the United States, or where the decision is against any title, right, privilege, or immunity claimed under the constitution, statutes, treaties, or authority of the United States. (See above, § 158.) (4) It has jurisdiction of appeals from the Supreme Court of the District of Columbia, and from the supreme courts of the territories, with limitations as to amount in controversy which need not be here particularly specified. (5) It has jurisdiction of appeals from the court of claims, and from district or circuit courts in cases against the United States, with some limitation as to the amount in controversy. There are some other classes of cases in which the Supreme Court exercises an appellate jurisdiction which need not be here particularly enumerated.

165. Other Courts Created by Congress.

The courts which have been described in this chapter, the Supreme Court being one of them, constitute all the courts which exercise the judicial power of the federal government, as specifically prescribed in the constitution. But in the exercise of the authority vested in Congress, either expressly or by implication, in other portions of the constitution, Congress has created other judicial tribunals. Under the power to legislate for the District of Columbia, it has provided a system of courts for that district. Under the authority to make rules and regulations for the government of territory of the United States, outside of the limits of any state, it has provided for territorial courts. Under authority derived by certain treaties with Turkey, China, and some other non-Christian nations, it has given jurisdiction to consuls of the United States in those countries to try citizens of the United States for offences committed there, and also to determine civil suits to which citizens of the United States are parties. (See *Ross* v. *McIntyre*.) And under the authority to provide for the payment of claims

against the United States, it has created a court of claims, in which claimants may have an adjudication as to the justice and legality of their demands. (See above, § 149.)

166. United States Commissioners and Magistrates.

The circuit courts may appoint commissioners, often termed United States Commissioners, who are authorized to exercise various powers conferred upon them, such as the taking of affidavits, the issuance of warrants of arrest for crime under the laws of the United States, and the taking of bail in such cases. These commissioners are also given certain powers in admiralty cases, and in regard to other matters, which need not be particularly described.

The justices and judges of the federal courts, and the judges, justices of the peace, and other magistrates of a state, as well as the United States Commissioners just described, are authorized to cause the arrest of offenders against the laws of the United States and to admit them to bail.

Various courts and judges of the United States and of the states are authorized to issue certificates of naturalization to aliens applying therefor and complying with the naturalization laws. (See above, § 100.)

CHAPTER XXIX.

THE LAW ADMINISTERED IN THE FEDERAL COURTS.

167. References.

J. Story, *Constitution*, §§ 1748–1759; J. I. C. Hare, *Constitutional Law*, lect. li; James Kent, *Commentaries*, lect. xvi; James Bryce, *American Commonwealth*, ch. xxiii; T. M. Cooley, *Constitutional Law* (3d ed.), 152, 159; H. C. Black, *Constitutional Law*, §§ 93–96; *The Federalist*, No. 82; *Swift* v. *Tyson* (1842, 16 Peters, 1; 14 Curtis' Decisions, 166; McClain's Cases, 796); *Railroad Company* v. *National Bank* (1880, 102 U. S. 14; McClain's Cases, 800); *Burgess* v. *Seligman* (1883, 107 U. S. 20, McClain's Cases, 805; Thayer's Cases, 1545); *Smith* v. *Alabama* (1888, 124 U. S. 465; McClain's Cases, 812; Thayer's Cases, 2068); *Western Union Telegraph Co.* v. *Call Publishing Co.* (1901, 181 U. S. 92; 21 Sup. Court Reporter, 561); *Riggs* v. *Johnson County* (1867, 6 Wallace, 166; McClain's Cases, 784).

168. Distinction between Law and Equity.

In actions at law the federal courts follow in general the procedure provided for their own tribunals by the states in which they sit; but in equity cases the federal courts follow their own rules of procedure, which are founded on the practice in the chancery courts of Great Britain as they existed at the time of the adoption of the federal constitution. The result is that the equity practice of the federal courts is uniform throughout the Union, and is governed by the rules and decisions of the Supreme Court of the United States; while in law cases the practice is not uniform, but depends on the laws of the various states in which the courts are held. This distinction depends on statutory provisions, and is made for convenience in the practical administration of justice. (See above, § 146.)

169. The Common Law and the Law of the States.

In cases arising under the constitution, laws, or treaties of the United States, and depending for their decision on the

construction thereof, the federal courts follow their own judgment, guided, of course, by the decisions of the Supreme Court of the United States. But many cases, particularly cases which are in the federal courts by reason of diversity of citizenship of the parties, do not involve the constitution, laws, or treaties of the United States, or any rights arising under them, but only the application of general principles of law, or the construction of the constitutions or statutes of the different states; and in these cases the federal courts apply the general principles of law, or the constitutional or statutory provisions which would have been applied had such cases been tried in the state courts. The federal courts follow the decisions of the state courts in the construction of their own constitutions and statutes, and also in cases involving some established rule of property. But in other cases, which are to be decided according to the general principles of law, the federal courts determine for themselves what such general principles are, without feeling themselves bound to follow the decisions of the particular state (*Railroad Company* v. *National Bank* and *Burgess* v. *Seligman*).

In all the states except Louisiana the common-law system, that is, the English system of law, is recognized as in force, so far as consistent with the institutions and conditions under which we live; while in that state the prevailing system of law is that known as the civil law, as embodied in the Code Napoleon, which was in force in France at the time the Louisiana Territory was acquired by the United States. Therefore, in cases tried in the federal courts sitting in any of the states except Louisiana, it is presumed that the rights of parties are determined by the common law, save as it may have been modified or superseded by state statutes; that is, the common law is the general law for each of these states (*Smith* v. *Alabama*). It can hardly be said, however, that there is a common law of the United States, for so far as cases are to be determined by general law, in the absence of statutory provisions, the federal courts are presumed to follow the general law as it exists in the state where the federal court sits, or in the state according to the law of which the case is to be de-

cided, although, as already indicated, the federal courts are not bound by the decisions of the state courts interpreting the general law, except so far as the decisions of the state courts have become rules of property. A subject-matter which is placed within the control of Congress, such as interstate commerce, is assumed to be subject to the general rules of the common law so far as Congress has not legislated with reference to it. (See *Western Union Telegraph Co.* v. *Call Publishing Co.*)

There are no common-law crimes against the United States, that is to say, no acts are punishable in the federal courts as crimes save as they have been made criminal by federal statutes. However, when a punishment is provided by federal statute for an act generally described by the terms used in the common-law definitions of crimes, the courts will consider the common-law definition as indicating the scope of the language used in the statute.

170. Conflicting Jurisdiction of Federal and State Courts.

It seldom occurs that there can be any conflict of jurisdiction between a federal and a state court. Any apparent conflict is usually determined by the application of the principle of comity (see above, § 143), in accordance with which one court will not interfere with or take jurisdiction over a matter as to which another court has already acquired jurisdiction. But should any conflict as to jurisdiction arise, the final authority to decide must necessarily be in the federal court, and no state court can interfere with the proceedings in a federal court, nor with officers of a federal court acting in pursuance of its orders or judgments (*Riggs* v. *Johnson County*). Redress for wrongs committed by an officer acting under the federal authority should be sought in the federal courts. But on the other hand, a federal officer, acting without authority, may be called to account in a state court for any wrong done or injury committed, subject to the power of the federal courts to review or inquire into the case for the purpose of determining whether the officer was justified by federal authority in what he has done or has attempted to do.

171. Authority of the Judiciary to Pass upon the Constitutionality of Statutes.

In discussing the relations of the departments of government to each other, it has already been indicated that, in a case properly coming before a court, the court has the power to determine the constitutionality of a statute. (See above, § 7.) This power is exercised by the federal courts with reference to statutes passed by Congress, as well as by state courts in determining the constitutionality of state statutes, and no further discussion of the subject is necessary. It is sufficient to say that neither the legislative nor the executive department of the federal government is independent of the constitution, and that, in the decision of a case properly before it, a court may properly determine whether the action of Congress or of an officer of the executive department is in violation of the constitution, and therefore invalid.

Part VI.

The States and Territories.

CHAPTER XXX.

RELATIONS OF FEDERAL AND STATE GOVERNMENTS.

172. References.

J. Story, *Constitution*, §§ 1813–1825; J. R. Tucker, *Constitution*, §§ 310–319; T. M. Cooley, *Constitutional Law*, ch. xi; H. C. Black, *Constitutional Law*, ch. x; *The Federalist*, Nos. 43, 44; *Luther* v. *Borden* (1848, 7 Howard, 1; 17 Curtis' Decisions, 1; McClain's Cases, 595; Thayer's Cases, 191); *Texas* v. *White* (1868, 7 Wallace, 700; Thayer's Cases, 302; McClain's Cases, 838).

173. Relations of States and Federal Government under the Constitution.

In discussing the historical development of our constitutional system, it has already been pointed out that the state governments came into existence in practically their present form before the federal constitution was adopted (see above, § 9) and that by reason of the establishment of the federal government, they were deprived of such powers and only such powers as are expressly denied to them in the federal constitution or are inconsistent with the powers given to the federal government. (See above, § 16.) The states remain sovereign and independent with reference to each other; but the authority which they can exercise over their citizens is inferior to the power which the federal government acting within the scope of the federal

constitution can exercise over the same persons as citizens of the United States. The states do not derive their powers from the federal government under the constitution but are merely limited in their powers by that constitution, and the authority of the federal government operates primarily and directly upon its citizens and not upon the states.

Still there are necessarily some relations between state governments and the different departments of the federal government, and there are some relations of the states to each other which are provided for or recognized by the federal constitution. For instance, the legislatures of the states provide how presidential electors are chosen (Const. Art. II, § 1, ¶ 2); and the times, places, and manner of holding elections for senators and representatives in Congress are prescribed in each state by the legislature thereof subject to revision by Congress (Art. I, § 4, ¶ 1). Further, it is provided that the states may organize their militia and appoint the officers thereof, subject to the superior authority of the United States when the militia is called into the service of the United States (Art. I, § 8, ¶ 16). Again, appeals from the courts of last resort in a state to the Supreme Court of the United States are provided for in cases where federal questions are involved and the decision is against the right, privilege, or immunity claimed under the constitution, laws, or treaties of the United States or the authority thereof. (See above, § 158.) And there is, further, an express guarantee of the preservation and protection of the state governments by the United States, which will be considered in the next section. It is evident from these various provisions, as well as from the historical relations between the state governments and the federal government, that while the federal government was organized as a sovereign and permanent government, the perpetual existence of the states was at the same time fully recognized and provided for. "The constitution in all its provisions looks to an indestructible Union, composed of indestructible states" (*Texas* v. *White*).

174. Guarantee of Republican Government in the States.

The continuing obligation of the United States with reference to the existence of the states is twofold: The constitution provides (Art. IV, § 4), for (1) a republican form of government in each state, and (2) the protection of such government against being overthrown by invasion of a foreign power or by domestic violence. It is evidently assumed in the guarantee that the forms of government existing in the different states at the time of the adoption of the federal constitution were republican. The characteristic feature of such a form of government is that those exercising authority do so in a representative capacity; it cannot be a monarchy on the one hand nor a pure democracy on the other. No doubt a republican form of government, as described in the federal constitution, involves the exercise of the powers of government by different departments, and a selection of the members of, at least, the lower branch of the legislature by popular vote, but by popular vote it is not necessarily meant that all the adults or even all the adult males shall be entitled to exercise the electoral franchise, but only that officers be in some form selected by a body of electors substantially representing the people. As will be pointed out in the chapter relating to citizenship and political privileges (see below, § 200) the right to vote is to be regarded only as a privilege conferred in accordance with the public interest.

While the constitution provides that the United States "shall" guarantee a republican form of government to the states, it is to be understood that the exercise of this power is discretionary. There has been, as yet, but little discussion as to the nature and extent of this power, for there has been little occasion for its exercise. It may be suggested, however, that republican government might cease to exist in a state (1) through invasion by a foreign power and an attempt to set up some other form of government by its authority; (2) or by a revolutionary attempt of the people themselves to overthrow the existing republican form of government and to substitute some other form in its place; (3) or by an attempt to destroy repub-

lican government by amendment of state constitutions. In any of these instances the new government would be illegal and unauthorized, and a republican form of government having ceased to exist there would be no state government and Congress would have occasion to provide for the establishment of such a government (see below, § 181).

175. Guarantee against Invasion or Domestic Violence.

The provision of the federal constitution last above referred to, so far as it relates to the protection of the state governments, involves protection, not only against invasion, but also against domestic violence. As to invasion, no action of the state invoking federal protection is necessary; an invasion of a state is also an invasion of the United States, and would be a proper ground for the exercise of the federal executive power, involving the use of the military and naval forces (see above, § 130). In case of domestic violence against a state government the federal government is authorized to act only on application of the state legislature, if in session, or the executive when the legislature cannot be convened. It is provided by statute that this application be made to the president and that he may call out the militia of other states if a military force is necessary, and it is evidently implied that he may make use of any of the military and naval forces of the United States in the exercise of his discretion (see above, § 131).

The express denial to the states of the power to grant titles of nobility (Const. Art. I, § 10, ¶ 1) should properly be regarded as a provision for the preservation of a republican form of government, and the similar restriction on the power of the United States (Const. Art. I, § 9, ¶ 8) was undoubtedly intended to have the same effect in the preservation of a republican form for the federal government. These provisions are self-executing, and any attempted grant of such titles by the federal or a state government would be void because unconstitutional.

176. Reconstruction of States.

There has been no occasion for the active exercise by Congress of the power to guarantee a republican form of government in any state save in those cases where the existing state governments were overthrown as the result of the rebellion of the Southern states in 1861 and the attempt by the people of those states to form a new federal government under the name of the Confederate States of America. This attempt was so far successful that in eleven Southern states the regularly constituted state governments ceased to exist and revolutionary governments were substituted. These new state governments were *de facto* governments and were republican in form; but they were not the state governments recognized by the federal constitution, for they were not organized to exercise powers which states might have under that constitution, but were, on the other hand, organized to exercise power in hostility to the government therein provided for.

The people of the Southern states in rebellion continued to be citizens of the United States and subject to the constitution and laws of the United States and the authority provided under such constitution and laws; but ceasing for the time being to exercise the political functions provided for by the federal constitution they were without "state" governments in the sense of the federal constitution. Therefore, as far as the federal government was concerned, those states at the end of the war were still without state governments. It thereupon became the duty of the federal government, as soon as peace and tranquillity had been so far restored in those states as to make civil government possible, to provide for the establishment therein of regular state governments; and this was done under the provisions of the so-called reconstruction acts (1867).

It is unnecessary now to discuss at length the provisions of these acts or to consider the different questions which arose under them; it is enough to say that state governments of a republican form were re-established. During the interval between the overthrow of the existing but irregular state govern-

ments and the recognition of new state governments under the reconstruction acts, the states whose people were in rebellion did not cease to be states in the Union, but they were for the time being states without any regular and lawful governments, that is, without any governments which the federal government could recognize.

CHAPTER XXXI.

ADMISSION OF STATES.

177. References.

J. Story, *Constitution*, §§ 1314–1321; J. A. Jameson, *Constitutional Conventions*, ch. vii; J. R. Tucker, *Constitution*, §§ 295–301; T. M. Cooley, *Constitutional Law*, ch. ix; H. C. Black, *Constitutional Law* (2d ed.), 233–235; *Boyd* v. *Thayer* (1892, 143 U. S. 135; McClain's Cases, 423); *Texas* v. *White* (1868, 7 Wallace, 700; McClain's Cases, 838; Thayer's Cases, 302); *Sands* v. *Manistee River Improvement Co.* (1887, 123 U. S. 288; McClain's Cases, 842).

178. Ratification by Original States.

As the federal constitution was to go into operation when ratified by conventions in nine of the original thirteen states (Const. Art. VII), it evidently was contemplated that as the federal government was created by such ratification, any of the original states which had not thus ratified at that time should later become members of the union by similar ratification. It was not intended that such states should be excluded from the union nor that the union should be forced upon them, but only that they should not be members of it until such ratification had taken place. Congress was not called upon to take any steps with reference to admission of such states and although ratification was postponed in two states, they soon became members by their voluntary action.

179. Admission of New States by Congress.

But at the time of the formation of the federal government, there were large areas of territory within its jurisdiction derived by cessions from the various states and from Great Britain under the treaty of peace ending the war of the Revolution, which were not included within the limits of any state, and provision was made in the constitution for the admission of

new states out of such territory. This provision (Const. Art IV, § 3, ¶ 1) does not specify the conditions under which new states shall be admitted; consequently Congress may impose such conditions as it sees fit. It may require that certain fundamental provisions be incorporated into the constitution of the new state, that the state accept such boundaries as Congress may prescribe, and in general that any plan or policy which has the support of Congress be acceded to. But when a state has once been admitted, it is on a par, so far as power to regulate its internal affairs is concerned, with the other states, and it seems that it may by amendment change its constitution, regardless of any condition imposed by Congress. After admission a state is limited as to its powers only by the provisions of the constitution itself (*Sands* v. *Manistee River Improvement Co.*).

180. Change of State Boundaries.

After the admission of a state with specified boundaries, such boundaries cannot be changed by action of the state alone, for by the federal constitution (Art. IV, § 3, ¶ 1) it is provided that "no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states or parts of states without the consent of the legislatures of the states concerned, as well as of the Congress." Therefore, territory cannot be taken away from a state nor added to a state without the consent of both states involved and of Congress as well. In the construction of this language it may well be assumed that to attempt to change the boundaries of a state would in practical effect be to attempt the creation of a new state.

181. Reorganization of Seceded States.

From what has been said in the last preceding chapter with reference to the condition of the states which seceded during the war of the Rebellion, it is evident that Congress, in providing for the reorganization of governments in those states after the restoration of peace, did not act under the authority

to admit new states to the union, but rather under the authority to guarantee a republican form of government. The states were not readmitted, but provision was made for the re-establishment of governments therein.

182. Steps for Admission of States.

Different methods for the admission of new states have been pursued by Congress in different cases. Sometimes the proposed state has organized itself by the adoption of a constitution and has asked admission under such constitution; at other times conditions have been imposed, on compliance with which by the proposed state admission has been granted; and again, Congress has sometimes first provided for the formation of a constitution under the authority of an enabling act, and then for the admission of the proposed state when the constitution should be adopted by the people as prescribed by the act. It has not always been required that the constitution under which the state is admitted shall have been submitted for approval by the people of the proposed state, but that has been required in most cases and in all the recent cases of admission.

183. Effect of Admission of States.

Congress has authority to organize territories and provide for local governments therein, analogous in some respects to the governments of the states. Frequently, but not uniformly, territories thus created have been subsequently admitted as states with the same boundaries, but even when so admitted the state government has gone into operation under the constitution adopted at the time of its admission as a new government. It is proper, however, to provide and is often provided by the statute for admission that the laws of the territory shall remain in force until they are superceded by the adoption of state laws under the authority of the constitution of the new state.

CHAPTER XXXII.

TERRITORIAL GOVERNMENTS.

184. References.

J. Story, *Constitution*, §§ 1322–1330; J. N. Pomeroy, *Constitutional Law*, §§ 483–499; T. M. Cooley, *Constitutional Law*, ch. viii; H. C. Black, *Constitutional Law* (2d ed.), pp. 228–232; *American Insurance Co.* v. *Canter* (1828, 1 Peters, 511; 7 Curtis' Decisions, 685; McClain's Cases, 827; Thayer's Cases, 350 and note, Marshall's Decisions, Dillon's ed., 586); *Clinton* v. *Englebrecht* (1871, 13 Wallace, 434); *Thompson* v. *Utah* (1898, 170 U. S. 343; McClain's Cases, 831); *The Insular Cases:* viz. *De Lima* v. *Bidwell* (1901, 182 U. S. 1); *Downes* v. *Bidwell* (1901, 182 U. S. 244; McClain's Cases, 2d ed., 1119); *Dooley* v. *United States* (1901, 182 U. S. 222; McClain's Cases, 2d ed., 1226); *Hawaii* v. *Mankichi* (1903, 190 U. S. 197; McClain's Cases, 2d ed., 1244); *Gonzales* v. *Williams* (1904, 192 U. S. 1); *Dorr* v. *United States* (1904, 195 U. S. 138; McClain's Cases, 2d ed., 1252.)

185. Territorial Power of Congress.

The territories of the United States not included within the limits of any state may be governed directly by Congress under authority "to make all needful rules and regulations respecting the territory or other property belonging to the United States" (Art. IV, § 3, ¶ 3). In the exercise of that power Congress may provide as it sees fit for a greater or less degree of local self-government in any portion of such territory. It may provide for the organization of a territorial government in a specified portion of territory set apart under a distinct name given to it, with executive, legislative, and judicial departments, may grant the elective franchise to persons within such territory having certain qualifications, and may authorize the election by them of members of the legislative body. The governor and the judges are appointed by the president. But such judges are not technically "judges of the courts of the United States," within the description of the federal constitution, and

its provisions with reference to tenure of office of the judges of the judicial department of the federal government are not applicable to the territorial judges thus provided for, and the courts thus created are not courts of the United States, but courts of the territories, having such authority as Congress may prescribe (*American Insurance Co.* v. *Canter* and *Clinton* v. *Englebrecht*).

186. The Constitution in the Territories.

Serious questions have recently arisen as to whether all the provisions of the federal constitution are applicable in territory which is under the jurisdiction of the United States but outside the limits of the states. Some provisions of the federal constitution are by their terms applicable only to the states, and it may be assumed that the provisions of the constitution, as a whole, were primarily designed for a federal government exercising its powers with reference to territory and persons included within state limits. On the other hand, it is evident that when the federal constitution was framed and adopted it was contemplated that there should be territory within the jurisdiction of the United States which should temporarily, at least, not be within the limits of any state; and that there should be persons, subjects of the United States, who are not citizens of any states. Prior to the adoption of the federal constitution, the so-called Northwestern Territory had been organized by the Congress existing under the Articles of Confederation, including the territory now embraced in the states of Ohio, Indiana, Illinois, Michigan, and Wisconsin; and this territorial government was recognized as continuing to exist after the adoption of the federal constitution. It is not to be doubted that persons residing within the limits of this territory and subject to the jurisdiction of the United States were considered citizens of the United States.

As a matter of fact, the constitution of the United States has been expressly extended by acts of Congress to all the territory of the United States within the limits of the North American continent, and citizenship has been conferred either by treaties

of annexation or by action of Congress upon all persons becoming subject to the United States within those limits; so that there is no question as to the constitution having full force and effect, either by its own operation or by express action of the federal government, within such territory. But express provision has not thus been made for the extension of the constitution over Porto Rico and the Philippine Islands, recently acquired by treaty with Spain; nor has citizenship been expressly conferred upon the inhabitants of such territory, and it is still, perhaps, not fully decided whether the general limitations found in the federal constitution on the powers of the federal government and the rights of citizenship under the federal constitution have been extended to these islands and their inhabitants in consequence of acquisition by the United States. It has, indeed, been settled that the islands are not foreign territory (see *Insular Cases*), and that the inhabitants, who have become permanently subject to the authority of the United States, are not aliens (*Gonzales* v. *Williams*). Something more will be said in the chapter relating to citizenship (below, ch. xxxiv) as to the condition of the inhabitants.

Whatever may be the conclusion as to citizenship in the insular possessions, it is conceded that Congress has the power under the constitution to make such provisions as it sees fit, with reference to the government of the people within such insular possessions and to organize such local governments as it deems expedient; and it may confer upon the inhabitants such political rights as public policy may justify or require. The extent to which the inhabitants of this newly acquired territory shall enjoy the privileges of self-government cannot be determined otherwise than by action of Congress (*Dorr* v. *United States*).

CHAPTER XXXIII.

RELATION OF THE STATES TO EACH OTHER.

187. References.

J. Story, *Constitution*, §§ 1302–1313; J. R. Tucker, *Constitution*, §§ 307–309; T. M. Cooley, *Constitutional Limitations*, *397; T. M. Cooley, *Constitutional Law*, ch. x; H. C. Black, *Constitutional Law*, ch. ix; *Kentucky* v. *Dennison* (1860, 24 Howard, 66); *Ex parte Reggel* (1885, 115 U. S. 642; McClain's Cases, 867); *Lascelles* v. *Georgia* (1893, 148 U. S. 537; McClain's Cases, 872); *McCready* v. *Virginia* (1876, 94 U. S. 391); *Ward* v. *Maryland* (1870, 12 Wallace, 418; Thayer's Cases, 1410); *Paul* v. *Virginia* (1868, 8 Wallace, 168; McClain's Cases, 855; Thayer's Cases, 1928); *Blake* v. *McClung* (1898, 172 U. S. 238; McClain's Cases, 859).

188. States Independent; Inter-State Comity.

As a general proposition it may be said that the states are independent of each other, and so far as they can have any relations to each other or to the citizens of another state those relations are determined by the provisions of the federal constitution. The laws of each state have force only within its limits. The extent to which rights and obligations arising within one state are to be recognized in another is determined in general by the same rules of comity which apply between foreign governments; that is, the states are said to be foreign to each other in deciding the effect to be given in one state to the laws of another.

Nevertheless, just as between governments entirely foreign to each other, so as between states, some principles obtain to which the term "private international law" or "conflict of laws" is usually applied. Thus contracts made in one state and valid where made are usually recognized as valid when it is sought to enforce or call them in question in another state. But the general subject of conflict of laws as affecting the validity of

contracts, the liability for injury done to persons or property, the recognition of marriages and divorces in another state and like matters, are beyond the scope of this treatise.

The fact that the laws of one state cannot be enforced in another and that the authority of one state cannot be in any way exercised within the limits of another is to be especially borne in mind with reference to crimes against its laws. A crime is to be punished if committed against the laws of a state only within the limits of that state, and the courts of another state cannot take cognizance of such a crime for purposes of punishment; nor has any state the authority to send its officers into another state for the purpose of arresting and bringing back a fugitive from justice, save as provided by the federal constitution.

189. Extradition of Criminals.

The federal constitution does provide, however, that "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime" (Art. IV, § 2, ¶ 2). The purpose of such provision is that the fugitive may be duly tried and punished. Between foreign governments the return of fugitives from justice fleeing from one country to another may be provided for by treaty. But as the states cannot make treaties with each other, it was proper that, as between states, the matter be regulated by the constitution. It is to be noticed that while it is made the duty of the executive of any state to deliver up a fugitive from justice upon demand of another state, there is no method provided in the constitution by which such duty may be enforced; and though Congress has by statute regulated the matter (1793) it has never taken up the question of a refusal by a state executive to follow out that procedure.

In each state there are statutory provisions with reference to demanding the return of fugitives from justice who have escaped

into another state, and for extraditing fugitives found in the state whose return is demanded by the executive authority of another state. It is regarded as proper, however, for the executive upon whom the demand is made for the extradition of a fugitive from justice to inquire into the question whether such person is in fact a fugitive, that is, whether he has come into the state from another state where he is charged with having committed a crime, and until it appears that he is such fugitive, and that he has been in a proper proceeding charged with a crime in the state demanding his return, he will not be delivered up.

The crime for which a fugitive should be returned on proper demand may be any crime under the laws of the state demanding his return, whether it be a crime under the laws of the state from which his return is demanded or not (*Kentucky* v. *Dennison*), and the state to which he is returned may put him on trial for any offence which he has committed in that state, though it be a different crime from that for which he has been brought back (*Lascelles* v. *Georgia*). Although the constitutional provision does not refer to the territories, Congress has by statute covered such cases of fugitives (*Ex parte Reggel*).

The succeeding paragraph of the federal constitution relating to persons held to service or labor in one state under the laws thereof who have escaped into another, and requiring that such persons shall not be discharged from such service or labor by any laws or regulations of another state, but shall be delivered up on claim of the party to whom such service or labor may be due, was evidently intended primarily to apply to slaves escaping from one state to another; and fugitive slave laws were passed by Congress in order to make effectual this provision. But since the abolition of slavery throughout the United States by the adoption of the Thirteenth Amendment, this provision has ceased to have any practical value, though it doubtless applies to apprentices, and perhaps might apply to persons convicted of crime in one state and sentenced to labor as a punishment, but who have subsequently escaped to another state.

190. Privileges and Immunities of State Citizenship.

Even in the absence of express treaty comity between countries foreign to each other usually involves during time of peace the privilege of the subjects of one country to come into the territory of the other, to conduct business and acquire property, and to have the protection of the judicial tribunals to substantially the same extent as enjoyed by subjects of the latter; especially is this true where the subjects of one country become permanent residents of the other, although they may not acquire citizenship. The only substantial exception to this rule of comity is as to the ownership of real estate. By the law of England, as it existed when the colonies became independent, an alien could not, in general, acquire title to real estate by inheritance. In many of the states the disability of aliens to acquire and hold real estate has been removed, while in others it has been preserved.

In order that such questions as this might not be left uncertain as between the states, and dependent on comity merely, it was provided in the federal constitution that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" (Const. Art. IV, § 2, ¶ 1). The manifest result is that all the privileges and immunities enjoyed by the citizens of a state by virtue of the fact of citizenship may also be enjoyed by citizens of any other state; and this involves a prohibition of any discrimination in the laws of a state against citizens of other states as compared with the state's own citizens. Thus a state statute is unconstitutional which restricts the pursuit of some particular business to citizens of the state and prohibits citizens of other states from engaging in such business.

But political privileges, such as the right to vote and hold office and the privilege of serving on juries and the like, can be limited to citizens of the state, and a person going from one state to another does not carry into the latter state the privileges which he enjoyed in the former, for these are matters to be regulated by each state for itself. The privilege of practising law in a

state may be limited, undoubtedly, to persons who are citizens of the state. There are some privileges also, such as the right to fish in the public waters and to hunt game within the state limits (*McCready* v. *Virginia*), which are regarded as incident to the enjoyment by the citizens or inhabitants of the state of the public property belonging to the state as representing its people, and the state may exclude from the enjoyment of these privileges persons who are not inhabitants of the state. The following are privileges and immunities of citizenship which cannot be denied by a state to citizens of other states: protection by the government; enjoyment of life and liberty; the right to acquire and possess property, subject, of course, to the general police power, which, however, must be exercised without discrimination as between citizens of the state and citizens of other states; the right of a citizen of one state to pass through or reside in any other state; the right to institute and maintain actions in the courts of the state (*Ward* v. *Marylana*).

The equality of privileges thus guaranteed is equality with citizens, that is, with natural persons who are entitled to citizenship in the state in which they have their permanent residence. Corporations are artificial persons, and while they are regarded as having in many respects the same rights as natural persons and protected by the guaranties of rights which are accorded to natural persons, they are not and cannot be citizens in the full sense and meaning of the term. Therefore, a state is not bound by the provisions of the federal constitution to accord to corporations created in other states all the privileges granted to state corporations, much less all the privileges and immunities possessed by natural citizens. While it is usual for a state to allow corporations created in other states to carry on business in that state, it is not a violation of the provision of the federal constitution to impose restrictions on such foreign corporations which are not imposed on corporations created in the state, or to discriminate as against foreign corporations in favor of domestic corporations; and it is regarded as permissible to a state to exclude foreign corporations altogether or to prescribe special conditions on which all foreign corporations or foreign

corporations doing a particular class of business shall be allowed to engage in business within the state (*Paul* v. *Virginia* and *Blake* v. *McClung*). It does not follow that a foreign corporation can be deprived of property lawfully acquired within the state without due process of law, or that it can be denied within the state the equal protection of the laws as to property which it has lawfully acquired.

191. Faith and Credit to Acts, Records, and Judgments of the States.

By comity between foreign governments judgments of courts in one country are usually treated as valid in another country; that is to say, if in an action brought in the courts of one country having jurisdiction of the case, a judgment is rendered determining the rights of the parties to the action, this judgment is regarded as conclusive between the same parties in an action involving the same issues brought in another country, and can only be impeached or disregarded on proof that the judgment was not valid where rendered. This rule of comity existing between countries wholly foreign to each other is made a constitutional rule as between the states by provision of the federal constitution that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof" (Const. Art. IV, § 1, ¶ 1). This provision extends not only to judgments rendered and the records thereof, but also to the public statutes of a state, so that if it becomes necessary to determine in the courts of one state what the public statutes of another state are, the fact may be shown by the legislative records of the state whose laws are in question.

Congress has made provision (first in 1790) for the method of proving in any state the public acts, records, and judicial proceedings of any other state. The public laws of any state are presumed to be known to persons within that state and the courts of the state will take judicial notice of them without

proof; but the laws of another state are not thus presumed to be matter of general knowledge and the courts will not take judicial notice of them, but they must be proven like other facts when they are in any way called in question. However, the courts of a state must take judicial notice of the constitution, laws, and treaties of the United States; and likewise the courts of the United States held in any state must take judicial notice of the constitution and laws of that state. The laws of another state or country are to be proved as matters of fact; a court cannot in general take judicial notice of them.

Part VII.

Relations of the Individual to the Government.

CHAPTER XXXIV.

CITIZENSHIP.

192. References.

J. Story, *Constitution* (Cooley's ed.), Suppl., §§ 1930–1937; J. R. Tucker, *Constitution*, §§ 174, 389; J. I. C. Hare, *Constitutional Law*, 515–522; J. N. Pomeroy, *Constitutional Law*, § 102; J. A. Jameson, *Constitutional Conventions*, §§ 358–361; J. W. Burgess, *Political Science*, I, 218–232; T. M. Cooley, *Constitutional Law*, ch. xiv, § 1; H. C. Black, *Constitutional Law*, §§ 224–231; F. Van Dyne, *Citizenship of United States;* James Wilson, *Lectures on Jurisprudence* (Andrews' ed.), II, ch. xi; I. B. Richman, *Citizenship of United States* (*Pol. Sci. Quart.*, V, 104); A. P. Morse, *Civil and Political Status of Inhabitants of Ceded Territories* (*Harv. Law Rev.*, xiv, 262); J. B. Thayer, *Cases on Constitutional Law*, notes, pp. 459 and 464; *United States* v. *Wong Kim Ark* (1898, 169 U. S. 649; McClain's Cases, 964); *Elk* v. *Wilkins* (1884, 112 U. S. 94); *Downes* v. *Bidwell* (1901, 182 U. S. 244; McClain's Cases, 2d ed., 1119); *Gonzales* v. *Williams* (1904, 192 U. S. 1); *Boyd* v. *Thayer* (1892, 143 U. S. 135; McClain's Cases, 423); *Ward* v. *Maryland* (1870, 12 Wallace, 418; Thayer's Cases, 1410); *Slaughter-House Cases* (1872, 16 Wallace, 36; Thayer's Cases, 516; McClain's Cases, 18); *Civil Rights Cases* (1883, 109 U. S. 3; McClain's Cases, 37; Thayer's Cases, 554).

193. Citizenship in the States.

Prior to the adoption of the Fourteenth Amendment to the federal constitution there was no uniform rule as to state citizenship. (See above, § 100.) The sole power of providing by

uniform law for the naturalization of aliens was in Congress, and perhaps it was to be assumed that the rule recognized in England that birth within the jurisdiction of a state was sufficient to constitute citizenship was the only rule on the subject. But since the adoption of the Fourteenth Amendment, which specifically provides that "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside," it is assumed that citizenship in a state is acquired by permanent residence therein of any person who by birth or naturalization has become a citizen of the United States; and state citizenship is therefore determined by this test.

It is to be noticed that citizenship in a state is not determined by any prescribed term of residence. A state may require residence for a specified period as a condition for enjoyment of the elective franchise; but the moment that residence in a state by one who is a citizen of the United States commences, or the moment one who resides in a state acquires citizenship in the United States, that moment such person becomes a citizen of the state. By residence is meant, not merely a temporary abiding within the state, but residence in a legal sense, that is, a permanent residence. The term in this connection is synonymous with domicil and involves residence in fact, with intent that it shall continue until subsequent removal with the intent of abandoning such residence and acquiring another.

While it is usual to confer political privileges only upon citizens, the states may, if they see fit, confer at least some of these privileges upon persons who are not citizens. In several of the Western states persons who have declared their intention to become citizens of the United States, although the required period of residence entitling them to naturalization has not been completed, have been allowed to vote and hold office; but such persons do not thereby become citizens of the state, not being citizens of the United States. It would thus appear that not only may persons who are citizens of a state be denied political privileges, because their term of residence in the state has not been of sufficient duration, but on the other hand persons may

be given political privileges who have not yet acquired citizenship. It is apparent that there is no necessary connection between the two, and that citizenship is to be determined by the federal constitution and laws, while the enjoyment of political privileges is dependent upon the constitution and laws of the state. (See below, § 198.) Of course, in the territory within the jurisdiction of the United States and not within the jurisdiction of any state, political privileges, if any, are enjoyed by virtue of the laws of the United States.

The distinction between the right of citizenship and the enjoyment of political privileges is made clear by noticing that political privileges are conferred only on adults and in most of the states only on adult males; while all persons, men, women, and children, are citizens if they come within the description of citizenship found in the constitution and laws.

194. Citizenship in the United States by Birth.

One becomes a citizen of the United States either by birth or naturalization. By the simple language of the Fourteenth Amendment "All persons born in the United States and subject to the jurisdiction thereof are citizens"; but interpretation has been necessary in applying this language to particular classes of cases. For instance, an Indian whose parents at the time of his birth were members and subject to the jurisdiction of his tribe, although he may have been born within the territorial limits of the United States, is not a citizen by birth and can become a citizen only by naturalization (*Elk* v. *Wilkins*); and this can be effected only under special laws relating to Indians, not under the general naturalization laws. If, however, at the time of his birth his parents, although not citizens of the United States, are not members and subject to the jurisdiction of a tribe, then he is no doubt a citizen by birth, for citizenship of parents is not essential if such parents are subject to the jurisdiction of the United States at the time when the person in question is born within the territory of the United States. Thus it has been held in *United States* v. *Wong Kim Ark*, that although the subjects of China cannot become citizens, never-

theless the children of Chinese parents having a permanent residence within the United States are citizens by birth.

A proof that the birth which confers citizenship must be not only within the actual territorial limits of the United States, but also within the jurisdiction of the United States, is the recognized rule applied to children born within the territorial limits to alien parents who are only temporarily within such limits. In such cases a right of choice is recognized; if the child remains within the limits of the United States until he reaches years of discretion he is entitled to claim citizenship by birth; while on the other hand if before years of discretion are attained he is taken by his parents to the country of their allegiance and elects to remain there he is an alien to the United States notwithstanding his birth.

As to all these matters there is some uncertainty, but by principles of international law which are recognized by the United States, as well as in all other civilized countries, children born to ambassadors and foreign ministers temporarily residing in one country as the representative of a foreign government are regarded as having been born within the jurisdiction of the government which the ambassador or minister represents and to which he owes allegiance, and not within the jurisdiction of the country in which he is thus temporarily residing. This principle is applied to children born abroad to persons who are citizens of the United States in the foreign service, and such children though not born within the actual territorial limits of the United States are by fiction said to have been born within the jurisdiction of the United States and to be citizens by birth, unless perhaps they have elected to remain permanently abroad and thus disavow the assumption of United States citizenship. In 1855 Congress enacted statutory provisions still in force by which it is declared that children born outside the limits of the United States whose fathers are citizens thereof are citizens by birth. An analogous rule is applicable, no doubt, to children born on the high seas on vessels sailing under the flag of the United States, and such persons may claim to be citizens of the United States by birth although the actual

place of birth was not within the territorial limits of the United States.

The rule, in short, seems to be this, that persons born within the territorial limits of the United States are citizens by birth without regard to the citizenship of their parents at the time of birth, with the recognized exception, that if the parents are not subject to the jurisdiction of the United States by reason of being members of an Indian tribe, or foreign ambassadors or ministers, or foreign subjects on board vessels of another nationality, or perhaps foreign subjects temporarily sojourning in the United States, then the place of birth is not controlling; while on the other hand persons born outside of the territorial limits of the United States whose parents are citizens of the United States in its foreign service, or are upon United States vessels, or are subjects of the United States temporarily sojourning abroad, may claim United States citizenship on reaching the age of discretion if they so desire.

The status of persons permanently residing within the Philippine Islands and the Island of Porto Rico at the time of acquisition of such islands from Spain seems to be still in doubt; for no provision was made in the treaty with Spain, nor has any provision been made by act of Congress, respecting the acquisition of citizenship by such persons; but it will probably be decided that children born within such insular possessions of the United States subsequent to the date of their acquisition, their parents at time of birth being permanent residents of such territory, are citizens by birth irrespective of any question as to the citizenship of such parents; for, as already indicated, citizenship of the parents is not the test in determining citizenship of the children.

195. Citizenship in the United States by Naturalization.

It lies within the power of the United States government, either by treaty with a foreign power or by act of Congress, to confer citizenship on classes of persons without regard to birth or naturalization. Thus, when foreign territory is acquired by treaty, it is competent to provide in the treaty that the inhabi-

tants of the territory by the fact of continuing to permanently reside within such territory become citizens. So it is competent for Congress to provide that on the division of land in an Indian reservation among the members of the Indian tribe to which the reservation is recognized as belonging, the Indians who accept their shares under such apportionment become citizens. (It has been so provided in acts of 1887 and other statutes.) When the independent state of Texas was admitted into the Union by act of Congress, the citizens of the state became citizens of the United States. It has even been suggested (in *Boyd* v. *Thayer*) that by the admission of a state into the Union which has previously had a territorial form of government, persons who were recognized by the territorial laws as possessing political privileges became citizens of the United States by virtue of the admission of the state, although they had been enjoying such political privileges without being citizens of the United States. Without attempting to specify all the methods of naturalization it is sufficient to say that citizenship by naturalization may be conferred by treaty or by statute, applicable to particular classes of persons, or by compliance on the part of any particular persons with the naturalization laws.

It still remains to be definitely determined whether by the acquisition of territory under a treaty which makes no provision as to citizenship, and without any act of Congress on the subject, the permanent inhabitants of such territory become citizens. It has, however, been settled that when foreign territory by treaty becomes territory of the United States, the persons permanently residing and continuing to reside therein whether they have become citizens or not are no longer aliens, and the statutes of the United States regulating immigrants from foreign countries are not applicable to such persons (*Gonzales* v. *Williams*).

196. Privileges pertaining to United States Citizenship.

Political privileges are not necessarily incident to citizenship (above, § 193), but citizenship is important with reference to

the protection to which the citizen is entitled while outside of the limits of the United States, and also as to privileges to which he is entitled within the United States under the federal constitution and laws and under the constitutions and laws of the states.

A citizen abroad is not exempt from local jurisdiction in the country where he is sojourning or temporarily residing, but it is the duty of the United States to secure to its citizen abroad the equal protection of the laws of the country where he is sojourning, and in countries which are regarded as not fully civilized, such as Turkey and China, he is accorded the specific privilege of being tried for crimes or of having his civil rights determined by proceedings before officers who represent the United States government. (See above, § 165.)

It is impossible to state fully the privileges and immunities which a citizen of the United States enjoys and is entitled to have protected as distinct on the one hand from mere political privileges, and on the other from those civil rights which are guaranteed to all persons by the federal constitution. It is evident that some such privileges and immunities must be recognized as incident to federal citizenship, for the Fourteenth Amendment, after specifically describing federal and state citizenship, provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." These privileges and immunities are, however, different from those pertaining to citizens of a state and which are not to be denied in any other state (see above, § 190). It has been suggested that among the privileges and immunities incident to federal citizenship are the right to participate in foreign and inter-state commerce, to make use of the navigable waters of the United States, to enjoy the postal privileges, to petition the federal government and visit the seat of government, to participate on equal terms in the purchase of public lands, and to sue in the federal courts, if by the provisions of the constitution and laws regulating the jurisdiction of such courts there is a right to bring such suit. (See *Ward* v. *Maryland* and *Slaughter-House Cases*.) Indeed it might safely be

said that the right of a citizen of the United States to remain within its limits, or to go into a foreign country, or to return to the United States from such country, or to reside in such part of the United States as he may see fit, and to enjoy, without discrimination against him, all the benefits and the protection of the constitution, laws, and treaties of the United States are privileges and immunities which cannot be denied to the citizen either by the federal or state government.

It is doubtful whether the provision in the Fourteenth Amendment was essential as a guaranty of any of these rights. They would, undoubtedly, have been fully recognized and protected had the amendment never been adopted. The immediate occasion for the adoption of that amendment was the fear that the negroes would not be accorded equal protection with white persons in some of the states, and accordingly citizenship was so defined as to include negroes born within the limits of the United States and subject to the jurisdiction thereof. But on the other hand it must not be assumed that the Fourteenth Amendment is of no significance otherwise than as applied to colored persons. The provisions of the amendment are general in terms and are of universal application, and they enunciate rules which although they may have been previously recognized were thought to be of so fundamental a character that their definite statement was important.

The first eight amendments to the federal constitution contain general guaranties which were primarily intended as restrictions on the powers of the federal government, but since the adoption of Amendment XIV the question has been raised whether these guaranties, which were not originally intended as limitations on state powers, have not become privileges and immunities of the citizens of the United States which the states cannot abridge. For instance, in Amendment V it is provided that no person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury, and in Amendments VI and VII the right to trial by jury in civil and criminal cases is provided for. Now there is no reasonable question but that

these provisions as originally adopted related to proceedings in federal courts and not to those in the state courts, and that a state might by proper amendment of its constitution and change of its laws substitute some other form of accusation and indictment in criminal cases and some other form of trial than the trial by jury as generally known in all the states of the Union in which the common law is recognized. Since the adoption of Amendment XIV, which contains the further provision that no state shall "deprive any person of life, liberty, or property without due process of law," it is clear that some form of accusation as the basis of a trial for crime and some form of trial in a judicial tribunal in either criminal or civil cases must be provided; but it seems to be well settled that it was not intended by the adoption of the Fourteenth Amendment to restrict the state as to the matters referred to in the first eight amendments and that those amendments continue to be guaranties as against the exercise of federal power, and not limitations upon the power of the states. (See above, § 22.)

CHAPTER XXXV.

POLITICAL PRIVILEGES.

197. References.

J. Story, *Constitution*, §§ 577–586, and (Cooley's ed.) §§ 1969–1974; T. M. Cooley, *Constitutional Limitations*, ch. xvii; J. I. C. Hare, *Constitutional Law*, 522–530; J. N. Pomeroy, *Constitutional Law*, §§ 206–215; T. M. Cooley, *Constitutional Law*, ch. xiv, § 2; H. C. Black, *Constitutional Law*, §§ 232–234; *Minor* v. *Happersett* (1874, 21 Wallace, 162; McClain's Cases, 974; Thayer's Cases, 459); *Ex Parte Siebold* (1879, 100 U. S. 371; Thayer's Cases, 326); *Ex parte Yarborough* (1883, 110 U. S. 651; Thayer's Cases, 551); *Wiley* v. *Sinkler* (1900, 179 U. S. 58).

198. Federal and State Privileges.

The right to participate in the affairs of government and the conditions under which such right may be exercised are primarily within the control of the respective states; but in the territory of the United States outside of state limits they are subject to the control of Congress (see above, § 193). While the general theory of our constitutional system involves a large and full participation by the people in the affairs of government, such participation has never been recognized as the natural right of an individual nor as a right necessarily incident to citizenship (*Minor* v. *Happersett*). The right of suffrage, the right to hold office, the right to serve on juries, and other like so-called rights are in reality duties and privileges imposed and granted for the public good and not for individual benefit. The states have from the beginning had the power to impose these duties and accord these privileges as they should see fit, and the constitution and laws of the state have been and continue to be the source of political privileges in the states, save as certain forms of discrimination are prohibited by the Fifteenth Amendment. Therefore, a person who has enjoyed the privi-

lege of voting or holding office in one state does not necessarily have the like privilege in another state. As a matter of fact the proportion of citizens who have political privileges in many of the states does not now include more than about one-fifth of the whole number, for in all states children, and in most states women, although they become citizens by birth or naturalization as fully and completely as adult males, are excluded from participating in elections, the holding of office, and service on juries.

199. The Fifteenth Amendment.

After the full rights of citizenship had been by Amendment XIV conferred upon negroes who came within the description of citizenship enunciated in that amendment, it was thought desirable that such persons should not be excluded on account of their race or color from participation in affairs of government under the same conditions imposed as to white persons; and accordingly Amendment XV was incorporated into the federal constitution in these words: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

200. Suffrage and Elections.

From what has already been said in this chapter, it is apparent that the elective franchise is not a right but a privilege, dependent in the states on the constitution and laws of each state, subject only to the limitations imposed by Amendment XV. It is not a necessary incident of citizenship, although it is now generally conferred in the states on all adult male persons over the age of twenty-one years and in some states on women as well as men. But in all the states there are some conditions, for instance, that the person desiring to vote must have been a resident of the state for a specified period, or that he shall have been registered. Persons convicted of a crime are usually excluded, and in some states those who have been guilty of bribery or of engaging in a duel, or those who have failed to pay a poll tax.

Thus it is apparent that not even all adult male citizens are entitled to exercise the elective franchise, for a citizen of the United States coming into a state with the intention of permanently remaining becomes at once a citizen thereof and his rights as a citizen cannot be made dependent upon length of residence.

The only federal officers chosen by election are the president, the vice-president, the senators, and the members of the House of Representatives. The president and vice-president, as already explained (see above, § 40), are chosen by presidential electors, and these are selected in each state as may be provided by the laws of the state; so that the qualifications of the electors who vote for presidential electors are left to be prescribed by the state law. Senators are chosen by the legislatures of the states (Const. Art. I, § 3, ¶ 1). Members of the House are chosen "by the people of the several states"; and it is provided that the electors in each state voting for members of Congress "shall have the qualifications requisite for electors of the most numer ous branch of the state legislature" (Const. Art. I, § 2, ¶ 1). In this sense the right to exercise the elective franchise with reference to the selection of members of Congress is a right enjoyed by reason of the provision of the federal constitution (*Ex parte Yarborough* and *Wiley* v. *Sinkler*), and yet there is no uniform set of qualifications applicable throughout the United States; but the specific description is to be found in the laws of each state.

The method of conducting elections and determining the result is regulated by the constitution and laws of each state, but provisions for a secret ballot are now almost, if not quite, universal in the states, and in many of them the Australian Ballot System has been adopted, by which the state authorities provide a uniform ballot containing the names of all persons to be voted for, which each voter marks and deposits as provided by law. The general objects of the state statutes regulating elections are to exclude disqualified persons from participating; to enable each voter to express his individual choice without fear of criticism and without being influenced by bribery or in-

timidation and without fear of oppression; and to secure a fair and honest counting of the ballots and determination of the result of the election.

By the federal constitution (Art. I, § 4, ¶ 1) the times, places, and manner of holding elections for senators and representatives are as prescribed in each state by the legislatures thereof, unless Congress has made regulations on the subject. (See above, § 33.) It is, however, now specifically provided (Act of 1899) that votes for representatives in Congress must be by written or printed ballot or voting machine, the use of which has been duly authorized by the state law. The only congressional provisions now in force as to the method of conducting elections are those prohibiting military or naval officers from interfering with the freedom of elections (Act of 1865), and prohibiting distinction of race, color, or previous condition of servitude (Act of 1870, embodying substantially the provisions of Amend. XV). Provisions of the act of 1865, for the federal supervision of elections, were repealed in 1894. But the right of Congress to provide for regulation of elections of members of the House of Representatives is fully established (*Ex parte Siebold*).

201. The Holding of Office.

The constitution of the United States prescribes the qualifications for president, senators, and representatives (Art. I, § 2, ¶ 2, § 3, ¶ 3; Art. II, § 1, ¶ 4) and the qualifications for appointive officers are prescribed by the statutes regulating their appointment. The state constitutions contain similar provisions as to qualifications for the principal elective officers, and qualifications for other officers may be fixed by statute. In the absence of any specific statutory provision on the subject it is presumed that those persons who are qualified voters under the constitution and laws of the state are qualified to hold office. It is apparent, therefore, that a public office or the privilege of holding a public office is not an individual right, but is a privilege conferred by law. However, one who has been duly elected to a public office is usually regarded as having as to the discharge

of the duties of that office and the enjoyment of the compensation and emoluments attached thereto by law a property right which the courts will recognize and protect. On the other hand, such right is generally regarded as dependent on the continuance of the office, and unless there is some constitutional restriction in the way, the right may be terminated by abolishing the office and the office-holder has no ground for complaint. Removal from an office which continues can, however, only be effected by impeachment or some other proceeding authorized by law. These matters are so far controlled by the peculiar provisions of the constitution and laws of each state that further general discussion is impracticable.

202. Jury Service.

The privilege of serving on juries, when selected for the purpose according to the provisions of law, is sometimes spoken of as a political privilege analogous to that of holding office, and the method of selection and the qualifications are regulated by statute. The states are not subject to any limitations in this respect by the federal constitution save that the provision of the Fourteenth Amendment, by which all persons are guaranteed the full protection of the laws, has been held to imply that no class of persons shall be excluded from serving on juries on account of race or color. Aside from this implied limitation, the states may impose such restrictions in this respect as they see fit.

Part VIII.

Civil Rights.

CHAPTER XXXVI.

GUARANTIES TO THE INDIVIDUAL.

203. References.

J. R. Tucker, *Constitution*, ch. i; J. W. Burgess, *Political Science*, I, 174–232; F. Lieber, *Civil Liberty and Self-Government*, chs. i–iii; W. W. Willoughby, *Nature of the State*, chs. iv, v; J. Kent, *Commentaries*, lect. xxiv; H. C. Black, *Constitutional Law*, ch. xviii; T. M. Cooley, *Constitutional Law* (3d ed.), 246–248; W. Blackstone, *Commentaries*, Hammond's ed., I, pp. 47, 54, and notes 20 and 23, pp. 144, 158; J. Wilson, *Lectures on Jurisprudence* (Andrews' ed.), II, ch. xii.

204. Natural Rights Protected.

Organized government has for its object the protection of the individual against undue interference on the part of others with his enjoyment of life and the beneficial employment of his faculties. The statement in the Declaration of Independence in substance that governments are instituted among men to secure to them the inalienable privileges of life, liberty, and the pursuit of happiness is a practically sound statement of political philosophy. The statement made in the same connection, that all men are created equal, is, of course, to be construed in the connection in which it is made as meaning that all persons have equal rights to protection and enjoyment of life and liberty and in the employment of their faculties as they see fit, so far as the public welfare does not require that they be restricted in order that others may have the same enjoyment of life, liberty, and employment of their faculties. The succeeding statement of

that instrument, that governments derive their just powers from the consent of the governed, is also to be understood in a general sense as a sound statement of political philosophy. Without a condition of equality as to rights to be enjoyed, there could not be a government which would substantially represent the views and wishes of a majority of the people. It is evident that the consent of the governed here referred to is simply the general assent which the majority of the people give to the government under which they live and which they choose to obey. It is plainly not meant that the government has no authority over those who do not see fit to assent to its exercise of authority.

It must be borne in mind that the Declaration of Independence was a declaration of the right to throw off the authority of an established government and institute a new government in its place. It was not intended, nor does it purport to be a statement of the obligations owed by the individual to the established government, nor the obligation of the government to the individual; but the purposes of government will not be carried out in accordance with the principles of the Declaration of Independence, unless all men are guaranteed equality before the law, that is, the equal right to protection under the law in the enjoyment of individual liberty, so far as it can be secured without depriving other persons of substantially the same degree of freedom and opportunity.

The rights of person and property which are protected by constitutional provisions are sometimes spoken of as among the natural rights of human beings. In some sense this is proper, for they are among the rights of individuals generally recognized by all civilized governments; but in a strict sense there are no rights recognized by the law except legal rights. However, it is not improper to say that rights which are recognized and protected under our system of law and which are such as are generally protected by law everywhere are on that account protected as natural or inherent rights of human beings.

Closely connected with the theory of natural rights which is suggested in the Declaration of Independence and announced

in many of the state constitutions, and which must be regarded as a part of the philosophical explanation of government rather than as a part of constitutional law, is the theory of the so-called social compact, also referred to in many state constitutions as well as in the Declaration of Independence, to the effect that the obligation of the citizen to the government is one arising only by the implied consent to be governed. This theory, which seems to have originated with the English philosophers Hooker, Hobbes, and Locke during the seventeenth century, was fully exploited in Rousseau's *Contrat Social* (1762), and obtained wide recognition in England, France, and America. It is recognized by Blackstone in his *Commentaries on the Laws of England*, republished in America in 1765, and generally accepted throughout the colonies as a correct exposition of the English constitution and system of laws. The social compact theory has now, however, been generally discredited as a philosophical doctrine and is no longer of any significance in the explanation of the powers of a constitutional government.

It is to be noticed that nothing is said in the Declaration of Independence as to equality in the ownership of property, or in social condition, or in capacity for the enjoyment of happiness. While the tendency of civilization, especially civilization which has been influenced by Christianity, is to give better opportunities to those who by reason of lack of health, strength, or capacity are under a disadvantage in the competition of life, it has not been found possible nor probably will it be found possible in any social condition which can be conceived of, to eliminate differences of condition. The existence of a competitive struggle for betterment of condition seems to be inherent in the human constitution; but just and wise governments give protection to the individual in order that he may not be deprived of the opportunity of life, liberty, and the beneficial enjoyment of his faculties so far as his strength and capacity are employed in ways not interfering with the enjoyment of like opportunities by others.

It is also to be noticed that nothing is said in the Declaration of Independence as to political privileges or participation in the affairs of government. It is evident that governments

established for the securing of the highest possible welfare of their subjects will necessarily afford some participation in public affairs on the part of those who are to be governed and who have in general the qualifications fitting them for such participation. It is conceivable that a monarchical form of government might secure the freedom and prosperity of its subjects to a fuller degree than a popular government, but this would be so only if the ruler or the members of the ruling class considered the interests of all its subjects as equally important with his or their own interests; and as this is not consistent with human nature, it is essential that a government which shall have for its sole object the best interests of all the people who are qualified to participate in such a government shall afford them the opportunity of doing so. The extent of such participation must be determined on broad principles of public policy and in any particular government largely in accordance with the established and customary forms, for it is the efficient administration of the system of government to which a people are accustomed rather than any theoretical perfection of the system which produces the most satisfactory results.

It is evident, therefore, that there is a fundamental distinction between political rights and individual rights. The enjoyment of political rights is simply a means for accomplishing the ultimate result of affording the best protection to individual rights, that is, the largest opportunities which may be given to one individual consistently with the enjoyment of similar rights by others. Under the general head of civil rights, it is now proposed to discuss briefly the various guaranties found in the federal and state constitutions which are intended as restrictions on the powers of the government, in order that the enjoyment of the largest practicable measure of liberty and opportunity shall be secured to the individual.

205. Classification of Individual Rights specially guaranteed and protected.

The guaranties found in the state and federal constitutions which are intended for the protection of the individual in his

person, his liberty, and his property have not been the result of any theorizing as to what ought to be secured to the individual by way of enjoyment; they have been the result of experience, and they relate to the supposed respects in which it has been found necessary to limit the powers of government in order that the largest practicable measure of individual freedom and opportunity may be secured. Nearly all of them may be traced more or less directly to struggles on the part of the people against the unjust exercise of powers of government in England and in this country.

The guaranty of the right to "life" seems to be intended as a safeguard against inflicting death on persons who are regarded as obnoxious to the government, otherwise than as the result of a regular and orderly procedure for the punishment of crime; hence, the provisions with reference to the method of accusation, trial, and punishment may be regarded as guaranties intended for the protection of the right to life.

But liberty is equally imperilled by criminal proceedings which are not in accordance with regular and orderly methods, and by imprisonment inflicted as a punishment for crime for which there has not been a proper conviction. Therefore, the provisions with reference to the methods of criminal procedure are guaranties both as to life and liberty, and these will be considered in a subsequent chapter as among the provisions intended for the protection of civil rights, although in a popular sense immunity from unjust or illegal criminal punishment is not classified among the civil rights of the individual.

The enjoyment of the largest measure of liberty which can consistently be guaranteed by organized government to the individual involves, however, much more than protection against unlawful physical restraint. Liberty is a most comprehensive term. It suggests, not only freedom of action, but the unrestricted enjoyment of the result of beneficial activity so far as such freedom is not inconsistent with like freedom on the part of others. Civil liberty is therefore impaired when individuals are deprived of protection in the acquisition and enjoyment of property, for the accumulation of property is one of the most

substantial results of the freedom of action, the desire for acquisition being one of the strongest desires of human beings. Hence, proper guaranties of civil liberty involve guaranties of property rights and of rights to pursue profitable occupations, and to make and enforce contracts.

The social instincts involve a desire to communicate with others, either for the mere pleasure of social intercourse or for the purpose of persuading or inducing others to act in accordance with one's wishes or for his benefit. Therefore, civil liberty is unduly restricted if the privilege of writing and speaking one's views and sentiments, so far as the privilege may be exercised without involving injury to others, is impaired or taken away. Hence, the so-called freedom of speech and the press is among the rights protected by constitutional guaranties.

Among the privileges most highly prized are those involving the enjoyment of religious forms and observances according to the dictates of individual conscience. Therefore, among the provisions for securing civil liberty are those prohibiting the undue interference with religious beliefs and the expression thereof in suitable forms. The constitutional provisions relating to the protection of these various forms of civil liberty will be discussed in succeeding chapters.

Although the first eight amendments to the federal constitution are limitations only upon the powers of the federal government, and serve as protections of the rights therein guaranteed as against the exercise of federal authority, and have no application as limitations on the exercise of authority by the state (see above, §§ 22, 196), nevertheless they correspond to provisions found in many of the state constitutions which are limitations upon state power, and the clauses of the federal constitution may therefore be made the text for discussion in separate chapters of the various rights which are usually guaranteed by state constitutions as well. And it will be convenient to follow the order of the clauses as they appear in these amendments in discussing the various topics suggested.

CHAPTER XXXVII.

RELIGIOUS LIBERTY.

206. References.

J. Story, *Constitution*, §§ 1843–1849, 1870–1879; T. M. Cooley, *Constitutional Limitations*, ch. xiii; J. R. Tucker, *Constitution*, § 326; J. Bryce, *American Commonwealth*, ch. ciii; T. M. Cooley, *Constitutional Law*, ch. xiii, § 1; H. C. Black, *Constitutional Law*, §§ 196–198; *Pfeiffer* v. *Board of Education of the City of Detroit* (1898, 118 Mich. 560; McClain's Cases, 879); *State ex rel. Weiss* v. *District Board* (1890, 76 Wis. 177; McClain's Cases, 882); *Reynolds* v. *United States* (1878, 98 U. S. 145; McClain's Cases, 883).

207. Religious Equality.

With reference to religious liberty, it is provided in Amendment I, that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof," and in the constitution as originally adopted it is declared that "no religious test shall ever be required as a qualification to any office or public trust under the United States" (Art. VI, ¶ 3). The prohibition of religious tests as a qualification for holding office is now of universal recognition throughout the United States, and originated, no doubt, with the protest in England against the exercise of authority on the part of the government, the reigning family of which belonged to one religious sect, in excluding from participation in public affairs those of other sects. This form of religious liberty has now been practically recognized in England, although complete religious equality has not been established in that country.

Some state constitutions have an additional provision analogous in its nature, that no person shall be incompetent to give evidence in court in consequence of his opinion on the subject of religion; but notwithstanding such a provision, it is usually regarded as permissible to inquire into the question whether a

witness has religious convictions and a belief in punishment after death, as bearing upon the question whether he is likely to appreciate the solemn obligation of an oath; for the legal oath as administered according to forms generally in use involves an appeal to a Supreme Being. However, the object of the courts in requiring the administration of an oath to witnesses is to secure so far as practicable the speaking of the truth, and the oath may be varied so as to impose upon the witness in the manner most effectual as to him the obligation to speak the truth.

Religious toleration is also the rule in all states, and involves as it is sometimes expressed the right to worship God according to the dictates of one's own conscience. But as a civil right, religious freedom is broader than this and involves freedom from compulsion with reference to any religious observances. The establishment of any religion by the state is inconsistent with religious liberty, for it must necessarily result in some discrimination against or compulsion upon persons who conscientiously adhere to some other form of religion or are not believers in any religion. The union of church and state in any form or for any purpose is inconsistent with our constitutional theory of government. It is widely recognized in the United States as beyond the proper functions of civil government to concern itself with the religious beliefs of its subjects, so far as such beliefs do not lead to actions inconsistent with the public health, public morals, or general welfare of the people. In other words, government concerns itself with acts rather than with beliefs or motives.

Complete religious liberty does not, however, necessitate an ignoring in public affairs of the fact that men in general entertain religious beliefs and that the Christian religion is the predominating form of religious belief among the people of the United States. Forms of religious observances in accordance with the accepted doctrines of Christianity are generally recognized or acquiesced in by public authorities. Thus, it is customary in the houses of Congress, and in many if not all of the legislative bodies in the states, to have the proceedings opened

with public prayer offered in accordance with the general beliefs entertained by Christian denominations, although it is not usual to give any preference or exclusive privilege to the forms practised by one denomination over those of others. It is customary also for the president of the United States and the governors of the various states by public proclamation to set apart a special day in each year for thanksgiving; and special occasions for thanksgiving are sometimes indicated in the same way. Chaplains are appointed and paid by the federal government to perform religious offices in the army and navy and by state governments in the various state institutions. By law ministers of the gospel and other religious teachers are sometimes exempt from jury service and prohibited from testifying as to communications made to them in their religious capacity. These various provisions are not in the nature of the establishment of religion, or any form of religion, but rather in recognition of the fact that by general custom religion is considered not inimical to but rather promotive of the public welfare.

208. Taxation for the Support of Religion.

Complete religious liberty is not, however, secured by exemption from religious tests as a qualification for voting and holding office, nor by guaranteeing toleration and freedom from restraint as to religious beliefs. Any exaction of support for religious organizations or observances by way of taxation would also be an interference with religious liberty. The same causes which forbid restraint or compulsion of the person with regard to religion would also forbid compulsory contribution of property for its support, and the various state constitutions generally contain some prohibition of this character. Such a prohibition not only prevents the establishment of a state church to be supported by taxation, but also precludes the support by public taxation of educational institutions devoted to the promulgation of any particular form of religion.

The controversies which have actually arisen in the courts as to religious liberty have related for the most part to the use of public money in aiding the schools under the control of some

particular religious sect or the introduction into schools supported by public taxation of some form of religious worship or instruction. (See *Pfeiffer* v. *Board of Education* and *State* v. *District Board.*) No satisfactory rule can be derived from the decisions of the courts with reference to these questions, for the reason that they have been made in applying the particular provisions of the different state constitutions, which are by no means uniform in their requirements; but this, perhaps, may safely be said, that the reading without comment of portions of the bible in the public schools is not an interference with religious liberty, provided attendance at such exercise is not made compulsory on the part of the scholars who desire to be excused, or whose parents desire to have them excused, on account of conscientious scruples. With regard to the use of public money in aiding sectarian schools a similar principle must be applied, and if attendance in the school is permitted only to those entertaining some particular form of religious belief, or if the school gives some form of religious instruction, or if it imposes any conditions which exclude pupils on account of religious belief or want of belief, it cannot properly be given appropriations or support from the funds raised by public taxation.

Similar questions have been raised as to the constitutionality of exemptions from taxation of property devoted to religious purposes. It might reasonably be argued that to exempt property devoted to sectarian purposes from taxation is in effect to promote such purposes at the public expense, but it may be said, on the other hand, that such property is devoted to a benevolent purpose and a purpose which the state may legitimately encourage in the same way that property devoted to the use and support of private educational institutions, libraries, charitable societies, and other like objects is devoted to a use beneficial to the public, and may be exempted from taxation on the same general grounds. The amount of taxation of which the state is deprived by the exemption of property devoted to religious purposes is so small as compared with the total amount realized from general taxation, that the increase

of burden thus thrown on other property owners may reasonably be disregarded. Moreover, the exemption of such property is not directly but only indirectly and remotely the imposition of any pecuniary burden, and such exemptions are generally sustained as proper when authorized by law.

209. Sunday Laws; Blasphemy, etc.

In the promotion of the general public welfare, the law-making power may properly take into account the fact that the great majority of the people recognize as desirable the setting apart of the first day of the week as a day on which ordinary business shall be suspended in order that they may have opportunity for undisturbed religious assemblies and exercises if they see fit; and it is regarded as proper and constitutional to prohibit the transaction of business or the performance of labor on such day, save as may be necessary to the public welfare or promotive of charity or religion. Such statutory provisions are supported, not as intended directly to compel or promote religious observances, but rather as securing the general tranquillity and welfare of the people. Perhaps a Sunday law could be sustained on the theory that it is conducive to the general health and prosperity of the people that they have an opportunity to devote one day in seven to rest from their regular callings. Without inquiring very particularly into the grounds on which Sunday laws have been sustained it is sufficient to say that they have been generally held to be constitutional, even as to persons whose conscientious belief requires them to set apart some other day of the week for religious purposes; but it is not unusual to exempt from the provisions of the law those who conscientiously observe some other day.

Laws for the punishment of profane swearing and blasphemy are also sustained, as calculated to prevent conduct shocking and obnoxious to the general sentiments of the people and productive of disturbance and disorder. Punishment for such offences is not imposed on account of the moral wrong done, but on account of the injury to others which results.

Disturbance of religious worship is generally punishable, but

this is rather for the preservation of the public peace and protection of the people in the exercise of religious liberty than as a recognition of religion in any form. In this instance, as in others, the government in making and enforcing the laws has regard to the general peace and welfare rather than to the protection of religion.

210. Religious Belief no Defence for Violating Law.

When in the exercise of its legitimate authority and for purposes recognized as proper to be considered and promoted, the legislative power has prohibited any act or line of conduct, the conscientious belief that such prohibition is wrong and that the act or conduct prohibited is required as a religious duty will not be an excuse or defence for a violation of the law. Religious liberty does not include or involve the right or duty to violate the law. It is not necessary here to enter into any philosophical discussion as to possible conflicts between the law of the land and any assumed natural, moral, or higher law. For the purposes of government, its authority exercised within its recognized sphere must be paramount to any other authority. Therefore, conscientious belief that war is wrong or immoral or contrary to divine law will not justify a refusal to pay taxes for the raising of funds to be used in military operations; and the persons thus refusing to contribute to the support of the government in the exercise of one of its recognized functions can properly be subjected to whatever penalty or punishment is provided in such cases. Likewise, compulsory military service may be required of such persons. But in the full recognition of religious liberty it may be provided that persons who have a conscientious objection to war may be excused from military service on payment of some pecuniary equivalent. As a further illustration of the principle that religious belief is no excuse for violation of law it has been held that persons entertaining the belief recognized by one branch of the Mormon church that polygamy is morally right and commendable, may without interference with their religious belief be required to abstain from polygamous marriages on penalty of criminal punishment (*Reynolds* v. *United States*).

CHAPTER XXXVIII.

FREEDOM OF SPEECH AND THE PRESS.

211. References.

J. Story, *Constitution*, §§ 1880–1892; T. M. Cooley, *Constitutional Limitations*, ch. xii; J. R. Tucker, *Constitution*, 669, 670; T. M. Cooley, *Constitutional Law*, ch. xiv, § 5; H. C. Black, *Constitutional Law*, §§ 235–242; T. M. Cooley, *Torts*, ch. vii; E. A. Jaggard, *Torts*, ch. viii; M. L. Newell, *Slander & Libel;* W. Blackstone, *Commentaries*, III, 123–126, IV, 150–153; *Ex parte Jackson* (1877, 96 U. S. 727); *In re Rapier* (1892, 143 U. S. 110; McClain's Cases, 478; Thayer's Cases, 732); *Public Clearing House* v. *Coyne* (1904, 194 U. S. 497).

212. Constitutional Provisions as to Expression of Opinion.

The state constitutions usually contain guaranties of freedom of speech and the press similar to those found in the federal constitution, that "Congress shall make no law . . . abridging the freedom of speech and of the press" (Amend. I). But it is not intended by such prohibitions to guarantee the right, without restraint or liability, to utter or publish matter which may be injurious to individuals or detrimental to public peace and tranquillity. By the common law of England, which has been fully recognized in this respect in the various states, libel, that is, the publication of defamatory matter by printing or writing, is punishable criminally; and injurious utterances, whether in writing or print or by spoken word, have also been recognized as a ground of action for the recovery of damages by the person thereby injured.

The object of the constitutional guaranties as to freedom of speech and the press seems to be to prevent the exercise of the power of the government in the regulation beforehand of what shall be published and the suppression of publications on account of their supposed injurious consequences. In European countries supervision over publication is exercised to some extent

by public officials charged with determining what is likely to be injurious to the government or the people, and the power is also exercised of suppressing newspapers and books which are deemed to be harmful to tranquillity or good morals. Similar powers had been exercised by the government of England prior to the independence of the colonies, and had been the subject of much discussion and discontent; and the effect of the constitutional guaranties is rather to deny to the government any such power of supervision than to relieve persons from civil or criminal liability for wrongful and injurious publication.

In other words, under our constitutional system freedom of speech and of the press is, like any other civil right, subject to regulation by law in the exercise of the general police power, and may be enjoyed only so far as it is not thus prohibited, and each person exercises this freedom subject to the same general restrictions which are by law imposed upon the exercise of freedom in any other respect. It will therefore be necessary to notice some of the general restrictions which are imposed by law in order to understand the extent and nature of freedom of speech and the press. These restrictions are found in the statutory or common-law rules relating to slander and libel.

213. Slander and Libel.

One may do injury to another in his property rights, in his feelings, and in his reputation, by making to others false and defamatory statements about him. Such statements made by word of mouth, and not in writing, in print, by caricature, or in some other tangible form, are denominated slander; and the person injured is entitled to maintain an action against the wrong-doer to recover damages for the injuries suffered. There is in general no criminal punishment for slander; but spoken words may be criminally punishable on other grounds, as amounting to blasphemy, or being obscene, or calculated to disturb the public peace, and the like; that is, in general, spoken words are not the subject of criminal punishment on account of injuries to individuals, but only on account of some harm to the public. In a civil action for slander the truth of the words

spoken is a defence, for the injured party is not to be heard to say that he has been damaged by the speaking of the truth concerning him. Even where the words are untrue they may have been spoken without malice and upon a proper occasion, so as not to constitute an actionable wrong.

In a general sense libel may be said to be publication by written or printed language or caricature, or some tangible method of conveying thought or information of matter which is defamatory and injurious in its character. Such matter may be considered with reference to its injurious effect upon the government, its tendency to disturb the public peace or impair the public morals, its tendency to injure the individuals directly concerned, thus impairing the security of property and reputation, and its actual injurious consequences as affecting the particular individuals injured such as to entitle them to recover damages. In some of these respects libel constitutes a crime; in others it forms a basis for the recovery of damages in a civil action.

214. Libels on Government and Injurious Publications.

In England publications tending to bring the government into contempt, or to impair its authority, were at one time punishable criminally; but the theory of our system of government is that it exists only for the benefit of the people, and therefore that it is unwise to restrain full discussion and criticism of its acts and policies. Therefore, prosecutions for libels on the government, whether state or federal, are practically unknown. Defamatory statements as to the acts or conduct of a public official might be such as to be punishable criminally, or to form a basis for an action for civil damages sustained by him as an individual; but neither criminally nor civilly could the persons responsible for the defamatory publication be called to account for the wrong as a specific injury to the government itself. Censorship of the press by the government in its own interests and for its own protection is not regarded as a proper exercise of authority, either with reference to publications threatened or anticipated, or as to those actually made. This liberty of persons in respect to the government may be sometimes

exercised for improper purposes and with injurious consequences; but the general public good is on the whole promoted by this absolute freedom of discussion, and the resulting advantages are deemed to outweigh any possible injurious consequences.

The publication of defamatory matter may, however, be productive of disturbance and disorder, and in that sense may be a public wrong punishable as a crime. In this form of libel the injury sought to be avoided is that to the public peace and tranquillity. For the protection of the public morals it may be made criminal to publish obscene or scandalous matters; and for similar reason the federal government prohibits the sending of obscene publications through the mails. The public morals as well as the public health are regarded as proper subjects for legislation in the promotion of the general welfare of the people.

215. Defamation of Individuals.

The security of individuals against defamation calculated to injure them in their property rights, or in their feelings or their reputation, is a proper matter for consideration by the law; and it is therefore generally regarded as criminal to publish any matter calculated to bring individuals into contempt, or subject them to ridicule, or to destroy their good reputation. Such a wrong is regarded as a public injury in the same sense as wrongful appropriation or destruction of the property of individuals; and while the individual concerned may be alone directly damaged, it is for the protection of the public in general against similar injuries that such acts are treated as crimes. Moreover, the publication with reference to individuals of defamatory matter is calculated to cause disorder and is in that sense a public wrong.

It is evident that the publication of defamatory matter may be objectionable from the point of view of the public tranquillity and security, although it is in fact true; and therefore in prosecutions for libel as a crime, the truth of the defamatory matter published is not necessarily any defence. But there may well

be just occasion for publishing defamatory matter which is true, as, where it relates to the conduct of a public officer or the character of one who is a candidate for office; and it is usually provided in state constitutions in some form of language that in criminal prosecutions for libel the truth of the defamatory matter may be shown and will constitute a defence if it appears that the publication was with good motives and for justifiable ends.

In many state constitutions it is also provided that in criminal prosecutions for libel, the jury shall be judges of the law as well as of the facts. This modification of the ordinary rule as to jury trials, that the court determines questions of law and leaves only the facts to be determined by the jury, is due to a peculiarity of the English law, in accordance with which judges were in the habit of instructing juries that the fact of publication of the alleged defamatory matter was alone to be determined, it being for the court to say whether the publication was in fact defamatory, or whether it was privileged. There seems to be no substantial difference, however, under such a constitutional provision, between a prosecution for libel and a prosecution for any other crime; the judge directs the jury as to the law, and the jury determines whether the facts are such as to constitute a crime as defined by the court.

A person may be directly damaged in his property rights or in his feelings or reputation by defamatory publications made concerning him; and for such damage he is entitled to recover compensation in a civil action brought against the person wrongfully causing injury to him. In such action the truth of the defamatory matter may be shown by way of defence, for here, as in the case of slander referred to in a preceding section, the policy of the law is not to recognize as a civil injury the detriment suffered from the publication of the truth.

216. Privileged Publications.

It has been said in the preceding section that in a criminal prosecution for libel the defendant may show the truth as a defence if the publication was with good motives and for justifi-

able ends. Such a publication is said to be privileged; and the ends which will justify publishing defamatory matter which is true are various. Not only is it justifiable in the public interest to publish the truth as to the conduct of public officers, and as to the character of those who are candidates for office so far as their character is a subject for proper consideration in determining their fitness for the office; but in general the truth may be published although injurious to individuals if it in any way concerns matters of proper public interest.

For a better understanding of the reasons which underlie the doctrines of privilege, not only as relating to criminal prosecutions, but also as affecting liability in civil suits for damages, it will be convenient to divide cases of privilege into those which are absolute and those which are qualified. There are some subjects as to which it is necessary to make statements in writing or print, which are of such nature that the public interest requires that no one shall be held accountable for them unless they are maliciously made for the purpose of causing injury. Thus, the attorneys for the parties in judicial proceedings are required to set forth the facts which they rely upon as constituting the cause of action or the defence; and the proper administration of justice renders it essential that they be allowed to do so without danger of being called to account for the untruth of the statements made. The truth of the statements is to be determined by the court as affecting the rights of the parties in the proceeding. Therefore, the written pleadings as well as the records made by judicial officers in a case in court are publications which are absolutely privileged, and no prosecution or civil suit can be predicated on statements thus made, unless, perhaps, where it can be shown that they were not made in good faith for the purposes of the case, but were maliciously and wantonly made with the object of doing injury to others. For like reasons the publication in newspapers of the actual proceedings in a court is privileged, for such proceedings are public in their nature. Members of a legislative body should be at liberty to discuss fully any question properly coming before such body for discussion; no member can be called to

account otherwise than by the body itself for what is said or published by him in the discharge of his office; and a newspaper publication of the proceedings of such bodies is likewise absolutely privileged.

Freedom of the press involves also a full discussion of matters of public concern. One who expresses his views as to such matters on a proper occasion and in a proper way, with good motives, should not be held accountable in a criminal or a civil proceeding, although other persons may be injuriously affected. Thus it is lawful to discuss the conduct of public officers and the character of candidates for office, to comment on judicial proceedings, to criticise books and pictures, to publish the news in the ordinary course of business, and otherwise to attempt to enlighten the public as to the affairs in which they have an interest. With reference to these matters, which are subject to qualified privilege, the requirements are that the publication be in good faith and not for the purpose of maliciously injuring others, and also so far as the publication purports to state facts, that it be true; for while good motives and justifiable ends will relieve from liability for the publication of matter which is truthful, they will not relieve from liability for injury actually inflicted by the publication of matter which is untrue, even though there be reasonable grounds to believe it to be true. The reasonable belief as to the truth of the matter may relieve from liability for what are called punitive or vindictive damages in a suit, but not for actual damage done.

There are occasions, however, when it may be justifiable or even obligatory to give information not in the public interest, but in private interests; and here there is no liability if the statements are made in good faith and with reasonable ground to believe that they are true. Thus an agent who is under obligation to communicate to his principal what he believes to be facts as affecting such person's interests, cannot be held accountable to third persons for statements made, even though they are false, if reasonably believed to be true, and such as it was proper to make. Likewise in the family relations, communications between husband and wife or parent and child

cannot be complained of by others if, when made, they were believed to be true, and such as it was proper under the circumstances to make. It is not purposed here to discuss in full the law of libel, but only the extent to which the constitutional guaranties of freedom of speech and of the press have been applied as affecting criminal and civil liability.

It may be added that the federal statutes prohibiting the sending of obscene matter, lottery advertisements, etc., through the mails are not an infringement of freedom of the press (*Ex parte Jackson* and *In re Rapier*) but are properly within the power given as to post-offices and post-roads. (See above, § 104.) The postal service is not a necessary function of the government, but is assumed and established by Congress for the general welfare, and Congress may designate what shall be carried in the mails and what excluded. The action of the Post Master General under statutes thus regulating the postal service is not subject to judicial review. Thus it is held that the propriety of the action of a post master under the acts of 1890 and 1895 in excluding from the privilege of receiving mail a concern engaged in fraudulent business cannot be questioned in the court (*Public Clearing House* v. *Coyne*).

CHAPTER XXXIX.

RIGHTS OF ASSEMBLY AND PETITION.

217. References.

J. Story, *Constitution*, §§ 1893–1895; T. M. Cooley, *Constitutional Limitations*, * 349; J. R. Tucker, *Constitution*, 671; F. Lieber, *Civil Liberty and Self-Government*, ch. xii; T. M. Cooley, *Constitutional Law*, ch. xiv, § 3; H. C. Black, *Constitutional Law*, § 243; *United States* v. *Cruikshank* (1875, 92 U. S. 542; McClain's Cases, 31).

218. Peaceable Assembly.

It may be true that the prohibition in the federal constitution as to abridgment of "the right of the people peaceably to assemble and to petition the government for a redress of grievances" (Amend. I), and similar prohibitions in the state constitutions, primarily had reference to assemblies for political purposes. Nevertheless, the right guaranteed is not to be regarded as a mere political privilege, but one just as fundamental as that of freedom of speech and the press, or freedom of contracting, or any other phase of liberty recognized by our constitutional system. Assemblies may be held, not only for political purposes, but also for religious, social, and business purposes; and regardless of the object, if it be lawful, and the method, if it be timely and orderly, the exercise of the right is to be recognized and protected. The government may properly, in the preservation of peace and order, suppress or disperse assemblies made for an unlawful purpose or cause, or which by reason of the time, place, or manner, are illegal, dangerous, or turbulent. No doubt the right to assemble for political purposes in connection with the selection of presidential electors or congressmen, or for the purpose of petitioning the federal government, is a privilege of United States citizenship, but the general right to assemble for lawful pur-

poses, and in proper and orderly places and manner, is a civil right, to be protected like other civil rights by the states. It is not granted by constitutions, but by them is recognized and protected.

219. Right to Petition.

So far as the clause of the federal constitution, last above quoted, relates to the right of petition, it evidently contemplates a petition by many persons addressed to some public officer or body.

Petitioning may be a political privilege or a privilege of citizenship, but it is broader than that in its scope and was undoubtedly intended as one of the guaranteed civil rights. Those subject to law ought to have the opportunity, if they desire, to avail themselves of this right, in order to urge upon legislative bodies reformations or changes in the law, and upon the executive department the administration of the law in such a way as to protect personal and property rights. However, as no method of presenting or securing the consideration of such petitions is provided for, the duty to receive and consider is to be discharged in the exercise of discretion on the part of the legislative body or executive officer, and the right to petition will not justify violence or disorder or interference with the proceedings of any duly constituted body or authority.

CHAPTER XL.

RIGHT TO BEAR ARMS; QUARTERING OF SOLDIERS.

220. References.

J. Story, *Constitution*, §§ 1896–1900; T. M. Cooley, *Constitutional Limitations*, * 350; J. R. Tucker, *Constitution*, 671, 672; J. N. Pomeroy, *Constitutional Law*, §§ 239, 240; F. Lieber, *Civil Liberty and Self-Government*, ch. xi; T. M. Cooley, *Constitutional Law*, ch. xiii, § 2, and ch. xiv, § 4; H. C. Black, *Constitutional Law*, §§ 203, 218; *Ex parte Cruikshank* (1875, 92 U. S. 542; McClain's Cases, 31).

221. Keeping and Bearing Arms.

The provision of the federal constitution that "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed" (Amend. II), and like provisions in state constitutions are evidently intended to guarantee the right of the people to form military organizations under lawful authority for a proper purpose. The federal guaranty would prevent any attempt on the part of Congress to render illegal the organization and discipline of a state militia, but such interference would be unconstitutional without this guaranty, for (see above, § 110) the right of the state to maintain an organized militia is elsewhere recognized. As an exercise of a civil right, the formation of military companies or bodies must depend for its lawfulness upon the state constitution and laws, and must be exercised in accordance with the law. Therefore, the state may prohibit the gathering of armed men for an unlawful purpose or in a manner likely to result in violation of law or in disorder and riot.

The state may also prohibit the carrying of arms by private individuals as an act imperilling the public peace and safety.

In many states there are statutes making it a crime to carry concealed weapons, and such statutes are not regarded as unconstitutional.

222. The Quartering of Troops.

One of the grievances of the colonies as indicated in the Declaration of Independence was that the English government kept among the people in times of peace standing armies without the consent of their legislative bodies, and quartered upon them and required them to maintain bodies of armed troops; and the policy indicated by the federal and state constitutions is that standing armies for the purpose of maintaining internal peace and the enforcement of law should be avoided. Accordingly, the organization of the militia in the states is provided for, and the federal government is authorized to call out the state militia for the protection of the United States government and the enforcement of its laws (see above, § 111). Nevertheless, the United States government is authorized to maintain standing armies and to use the regular troops whenever the employment of military force is justified. The prohibition against the quartering of troops referred to in the federal constitution (Amend. II) and in the state constitutions, is intended to prevent, in time of peace, the imposition of the support of soldiers on private persons or of their maintenance by such persons in time of war, and also to prevent the intrusion of soldiers upon the private premises of individuals. The common-law notion that every man's house is his castle and that he shall not be compelled to allow any person to come upon his premises except with his consent, save the officers of the law in the execution of their regular duties, is undoubtedly recognized by such constitutional provision.

CHAPTER XLI.

SEARCHES AND SEIZURES.

223. References.

Joseph Story, *Constitution*, §§ 1901, 1902; T. M. Cooley, *Constitutional Limitations*, * 299–308; J. R. Tucker, *Constitution*, 672; F. Lieber, *Civil Liberty and Self-Government*, ch. vi; J. N. Pomeroy, *Constitutional Law*, § 241; T. M. Cooley, *Constitutional Law*, ch. xiii, § 2; H. C. Black, *Constitutional Law*, §§ 216, 217; *Boyd* v. *United States* (1886, 116 U. S. 616; McClain's Cases, 885).

224. Search and Seizure without Warrant.

The fundamental principles of civil liberty and the enjoyment of property forbid that one's person or premises be searched or that his person or property be seized without lawful authority; and without any express constitutional guaranty, immunity from such unlawful acts would be fully recognized. But the people of England and of the colonies had experienced unjustifiable invasion of this right by means of searches and seizures not authorized by law and in the exercise of a tyrannical authority, and it was natural that express guaranties against such tyrannical acts should be inserted in the state constitutions and in the federal constitution. The provision of the latter is as follows: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized" (Amend. IV). The notion that every man's house is his castle, to be invaded without his consent only under lawful authority, which has been already referred to in the preceding chapter, is further recognized here. There may be proper occasion for the invasion of private premises in the

execution of the law, but the guaranty is as against such acts by public authority without the sanction of law. Such invasion on the part of public officers may be lawful without warrant or other process for the purpose of arresting a criminal or in the protection of the public health or safety, but the officer thus acting on his own responsibility and judgment is subject to the risk of being held accountable for trespass if in the judgment of the court the circumstances did not justify his action. He cannot safely proceed upon mere suspicion or upon his own whim or caprice. Subject to the same liability a private person may sometimes be justified in breaking into private premises to prevent a crime or arrest a criminal.

The sanctity of the person and the dwelling, which the common law fully recognizes, extends also to private books, correspondence, and other things in which the public has no legitimate concern.

225. Search Warrants.

Regular proceedings are recognized in all the states in pursuance of which the officers of the law may be authorized by a warrant duly issued, to enter private premises and search for property or the evidence of crime, but a search warrant will be issued only after some form of proof to a magistrate or other judicial officer that there is just occasion for such search and seizure; and the proofs and warrant issued in pursuance of it, must indicate the object of the search, which must be an object recognized by law, and the premises to be searched must be described with some particularity. A warrant not thus describing the premises to be searched, and the object, is called a general warrant, and under our system of government is unauthorized. The officers of the law may also be authorized by warrant for the arrest of a person designated therein to enter private premises for the purpose of making such arrest, and in making an arrest for the commission of a crime they may seize property procured by means of the crime charged, or weapons which have been used in the commission of the crime, or which tend to furnish evidence of its commission.

CHAPTER XLII.

GUARANTIES AS TO PROSECUTIONS FOR CRIME.

226. References.

J. Story, *Constitution*, §§ 1778–1794; T. M. Cooley, *Constitutional Limitations*, ** 309–348; J. N. Pomeroy, *Constitutional Law*, §§ 242–244; F. Lieber, *Civil Liberty and Self-Government*, chs. xix, xx, and app. iii; T. M. Cooley, *Constitutional Law*, ch. xv, §§ 3–6; H. C. Black, *Constitutional Law*, ch. xx; J. C. Hurd, *Habeas Corpus;* W. Blackstone, *Commentaries*, III, 134–138; *Hurtado* v. *People of California* (1884, 110 U. S. 516; Thayer's Cases, 616; McClain's Cases, 905); *Mackin* v. *United States*, (1885, 117 U. S. 417, McClain's Cases, 985); *Kring* v. *Missouri* (1882, 107 U. S. 221; McClain's Cases, 983; Thayer's Cases, 1458); *Brown* v. *Walker* (1896, 161 U. S. 591; McClain's Cases, 990); *Mattox* v. *United States* (1895, 156 U. S. 237; McClain's Cases, 995); *In re Kemmler* (1890, 136 U. S. 436); *Tarble's Case* (1871, 13 Wallace, 397; McClain's Cases, 43; Thayer's Cases, 2299); *In re Neagle* (1889, 135 U. S. 1; McClain's Cases, 65; Thayer's Cases, 335); *Whitten* v. *Tomlinson* (1895, 160 U. S. 231; McClain's Cases, 777); *Ex parte Milligan* (1867, 4 Wallace, 2; Thayer's Cases, 2376); *Ex parte Merryman* (1861, Taney's Reports, 246; Thayer's Cases, 2361, and note, 2374); *Hallinger* v. *Davis* (1892, 146 U. S. 314; McClain's Cases, 987); *Harris* v. *People* (1889, 128 Ill. 585; McClain's Cases, 989).

227. General Guaranties as to Prosecutions.

Restrictions on the state and federal government in the exercise of the power to define and provide for the punishment of crime have already been briefly discussed (see above, ch. x) and it has been suggested that on this subject there are certain specific limitations in the federal constitution on the power of states as well as on the power of the federal government. Indeed those provisions in the federal constitution are generally included in the state constitutions, so that the whole subject may be discussed with reference to the provisions of the federal constitution, bearing in mind, however, the rule of construction that general limitations in the federal constitu-

tion apply only to the federal government, and that limitations intended as restrictions on state power make specific reference to the states.

228. Due Process of Law.

The most important general limitation in both state and federal constitutions, applicable in criminal prosecutions as well as in civil suits, is the guaranty found in Amendment V, and in similar provisions in state constitutions, against depriving "any person of life, liberty, or property without due process of law." This restriction is specifically imposed on the states in Amendment XIV (see below, ch. xliv). It is difficult to describe in a very definite way the essentials of due process of law in criminal cases. It was no doubt intended by the use of this language to preserve the common-law methods of procedure for the punishment of crimes, which involve usually some form of accusation on oath before a magistrate; the issuance by such magistrate of a warrant for the arrest of the accused; a preliminary investigation by the magistrate to determine whether the accused shall be held under bail or otherwise to appear before the grand jury; the hearing of evidence by the grand jury to determine whether there is such reasonable ground to believe the accused to be guilty as to justify the finding of an indictment against him; trial by jury on the charge made in the indictment; sentence by the court to a specified punishment on a verdict of guilty; and execution of the sentence imposed by the court.

These are the usual steps as to crimes of a graver nature designated as felonies; but the preliminary proceedings with relation to the issuance of a warrant of arrest are not regarded as essential steps and may be omitted, for the charge can be made directly to the grand jury, or the grand jury can investigate on its own motion, and a warrant of arrest can be issued in the first instance by the court to which the indictment is returned. The essential steps, therefore, as to felonies are, so far as the protection of the rights of the accused may be concerned, indictment by grand jury, trial by jury, and sen-

tence on verdict of guilty. But in case of crimes involving a lesser degree of criminality, accusation by information may be substituted for indictment by grand jury, and indeed some petty crimes can be punished on trial before a magistrate without a jury. Therefore, it cannot be said that in all criminal cases indictment and jury trial are essential to due process of law.

It may, however, safely be stated that the accused in any criminal proceeding is entitled to know what acts are charged as constituting the crime for which he is put on trial and to an investigation of these facts on evidence received in a judicial tribunal governed by the rules of evidence generally recognized by courts, and to be convicted only when the evidence establishes his guilt beyond a reasonable doubt. These, therefore, are the essential features of due process of law in criminal prosecutions. Certain specific restrictions with reference to each of these steps in the procedure must now be separately considered.

229. Presentment or Indictment.

The first guaranty in Amendment V to the federal constitution is, "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger." A distinction is here recognized between "presentment" and "indictment" which is of no practical value. Either must be the result of action by a grand jury. A presentment is made by a grand jury on its own motion, based on an investigation had at the instance of the members themselves and not upon charges submitted by a prosecuting officer, while an indictment is drawn by a prosecuting officer and approved by the grand jury after hearing the evidence tending to show that the person charged is guilty of the crime named and described in the indictment; but the effect in each case is the same and the distinction need not be further referred to.

The grand jury at common law is a body of persons qualified to act in that capacity and selected in accordance with some established procedure and sworn to discharge fairly and impartially the duty of investigating crimes of which they have knowledge or which are brought to their attention in proper form, and to return indictments against those whom they have reasonable ground to believe to be guilty of such crimes. At common law a grand jury may consist of not more than twenty-three qualified persons, twelve of whom must concur in finding an indictment. In every case, therefore, in which indictment is required it is meant, unless otherwise provided, that such an indictment must have been concurred in by twelve grand jurors. In states having constitutional provisions in this respect similar to that found in Amendment V, the same rule is applicable; but by express constitutional provision a grand jury of less than twelve may be authorized, for there is no restriction in the federal constitution on the action of states in this respect. Indeed it is now provided in some state constitutions that the accused may be put on trial without indictment, some other form of accusation being substituted, and this is no violation of the provisions of the federal constitution. In other words, indictment by grand jury is not essential to due process of law, and is not required in the state courts unless either expressly or by implication the state constitution so provides (*Hurtado* v. *California*).

230. Capital or otherwise Infamous Crimes.

In states where by constitutional provision indictment is still essential, it is usually required in cases of treason and felony; but Amendment V uses somewhat different language and specifies the crimes triable only on indictment in the federal courts as those which are capital or otherwise infamous. Capital crimes are those for which punishment by death may be imposed; and infamous crimes are those subjecting the guilty person to an infamous punishment. The infamy which is referred to in this description is infamy in the punishment which may be imposed, and not infamy in the nature of the crime it-

self. An infamous punishment not capital is punishment by imprisonment in a penitentiary, as distinct from imprisonment in a county jail (*Mackin* v. *United States*).

Crimes which are not capital or otherwise infamous may be prosecuted in the federal court on indictment, but in such cases indictment is not essential under the constitutional provision. There must, however, be some recognized form of accusation, and the usual form in such cases is called an information, which is a complaint made under oath and presented by the prosecuting officer to the court, charging the crime in substantially the same manner which is usual in an indictment.

231. Courts-Martial.

The exception found in Amendment V, with reference to cases arising in the land and naval forces or in the militia, applies to proceedings in courts-martial for violation of the military law. (See above, § 114.) Such courts proceed in accordance with the provisions made by Congress under the authority to establish rules for the government and regulation of the land and naval forces and for governing such part of the militia as may be employed in the services of the United States (Const. Art. I, § 8, ¶¶ 14, 16). The ordinary constitutional limitations are not applicable to such courts.

232. Twice in Jeopardy.

The clause found in Amendment V of the federal constitution and in the constitutions of the various states, that no person shall be subject for the same offence to be twice put in jeopardy of life or limb, is merely a partial statement of a common-law principle that no one shall be twice tried for the same offence. As found in the federal constitution the clause is of extremely limited application, and strictly interpreted relates only to crimes which may be punished by death, for maiming as a form of punishment has never been recognized in this country. But similar provisions in the state constitutions go to the full extent of prohibiting a second trial for an offence for which the same person has previously been put on trial.

The usual application of this rule is in cases where the accused has been acquitted by a jury ; and such acquittal is conclusive, not only as to the crime charged, but as to any other crime involving the same acts which were depended upon or sought to be established in the first trial for the purpose of securing a conviction. No matter how unwarrantable under the evidence may be the action of the jury, and no matter how erroneous may have been the procedure in the court, the verdict of the jury acquitting the accused is final. But if the accused is convicted and the conviction is set aside for some error of the court or misconduct of the jury, the accused who has procured the hostile verdict to be thus set aside may be again put on trial, although, as held by some courts, he cannot be again tried for any higher crime or higher degree of crime charged than that for which he was convicted, the conviction of the lesser crime or lower degree being deemed an acquittal of any higher crime or higher degree of crime (*Kring* v. *Missouri*). The constitutional provision also prevents a second trial for a crime which involves any criminal act for which the accused has been convicted on a previous trial.

It is not practicable to discuss in full the doctrine of second jeopardy as applied to cases where a prosecution has been duly commenced, and for some reason has never proceeded to the verdict of a jury. It is sufficient to say that if the defendant by escaping from custody or otherwise has prevented the trial of the case, or if by reason of sickness of the judge or inability of the jury to agree no verdict has been reached, the accused may be again put on trial.

233. Self-Crimination.

The provision in Amendment V that no person shall be compelled in any criminal case to be a witness against himself, which is found also in many, though not all, of the state constitutions, is an announcement of a general rule of evidence long recognized in common-law courts as applicable in civil as well as criminal cases. The object of this rule of evidence is to protect the witness against being compelled in any judicial pro-

ceeding to disclose facts which would tend to subject him to a criminal prosecution. Under the civil-law system as administered in France and some other European countries, one who is put on trial for a crime is subjected to an inquiry into his whole life and conduct, without regard to its relevancy to the particular crime with which he is charged; and in such countries physical torture was formerly permitted for the purpose of securing confessions of guilt. But such proceedings were not recognized as justifiable by the common law as it prevailed in England at the time that the American colonies became independent, and are not permitted in any of the states of the Union. Some of the rules resulting from the recognition of the principle that a witness cannot be required to give self-criminating testimony are the following: Admissions of guilt made outside of court cannot be proven against one accused of crime unless they are voluntarily made. The accused cannot be required to testify in a criminal case. In no case either civil or criminal can a witness be compelled to give testimony tending to show that he has been guilty of a crime, nor to produce books and papers having such tendency.

As to some crimes it is found so difficult to secure the evidence of persons not implicated that statutes have been passed in various states providing that as to certain classes of crimes persons implicated therein may be required to testify against others, with the provision that their testimony shall not afterwards be used against themselves in prosecutions for the same crime; but to these statutes it has been objected that they subject the witness to the ignominy of disclosing his criminal conduct, and to the danger that after his connection with the crime has been discovered his guilt thereof may be proven by other evidence to which his enforced disclosure has furnished a clue; and it is thought that such statutes do not adequately protect the person required to testify unless it is provided further that he shall not subsequently be held accountable in a criminal prosecution for any crime committed by him in any way connected with the transaction with reference to which he is compelled to testify (*Brown* v. *Walker*).

234. Speedy and Public Trial.

State constitutions usually contain a provision similar to that found in the federal constitution, that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial" (Amend. VI). But these provisions are rather directory than mandatory in character. The accused cannot insist on a trial otherwise than in accordance with the usual and recognized method of procedure in a court of justice, and it may result that even against his will the trial is postponed until his guilt can be properly investigated and the evidence against him secured. Statutory provision is usually made, however, for giving preference to criminal over civil cases, so that the trial of criminal prosecutions may be had as soon as practicable, and it is not uncommon to provide that one accused of crime shall be released after the second term of court at which he might have been tried has passed without his case being reached, unless his own fault or request or some unusual emergency has brought about a further postponement.

By public trial is meant a trial in open court and this is the usual method of procedure in all American judicial tribunals. The requirement of a public trial does not, however, prevent the exclusion from the court room of witnesses, for the purpose of preventing them from hearing the testimony given by other witnesses so as to be able to conform their own testimony to that of others whom they may be called upon to corroborate or controvert; nor does it prevent the like exclusion of children, or even the general public who have no direct interest in the case, in prosecutions which are of such character that their presence might tend to the corruption of their morals or the morals of the community.

235. Trial by Jury; Venue.

It is further provided (Amend. VI) that the trial in criminal prosecutions is to be "by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." This

is analogous to a rule of the common law formerly recognized in England requiring that in criminal prosecutions the jury shall consist of persons summoned from the vicinity where the crime was committed;[1] but such a rule no longer prevails in the states, and it is usually left to be determined by statute in what county of the state a criminal trial shall be held. It is generally required that, save where a crime is continuous in its nature and has been partly committed in two or more counties, or has been commenced in one county and the final result accomplished in another, the trial must be in the county of the commission of the crime. It is no longer regarded as desirable or even expedient that persons familiar with the circumstances of the crime shall serve as jurors for the trial of the accused.

But there is a paragraph in the federal constitution as first adopted requiring criminal trials in the federal courts to be by jury, in this language: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed" (Art. III, § 2, ¶ 3). As no federal district includes two states or parts of two states, this provision is complied with if the crime is tried by the proper federal court for the district in which the crime is committed; and Congress has made direction as to crimes against the United States not committed in any state (as, for instance, on the high seas) by providing that if the crime is committed outside the limits of any of the districts, the trial shall be had in the district in which the accused is arrested, or if arrested outside of any of the districts, then in

[1] Reference is no doubt made to this rule of the common law in the complaint embodied in the Declaration of Independence that the king had deprived the colonists of the benefit of jury trial and transported them beyond the seas for trial for offences; but it is more distinctly referred to in the "Declaration of Rights" adopted by the First Continental Congress in 1774 in which this language is used: "The respective colonies are entitled to the common law of England and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."

the district into which he is first brought after being arrested. The manifest purpose is to avoid the possibility that the prosecuting officers shall select for the trial of one accused of crime some particular court or district in which they shall have a better chance of securing conviction than in some other, or that they shall unnecessarily inconvenience or oppress the accused by subjecting him to trial at a great distance from the place where the crime was committed, thus making it more difficult for him to secure the attendance of witnesses.

236. Right to be Informed of the Accusation.

It is of the very essence of due process of law in criminal cases that the accused "be informed of the nature and cause of the accusation," as required by Amendment VI, and by similar provisions in state constitutions. If the crime is one triable only on indictment by a grand jury, the indictment must state in accurate legal terms the facts showing the accused to be guilty of the crime charged, and he can only be convicted on proof of the facts thus alleged. The purpose of the constitutional requirement is that the accused may have full opportunity to defend against the charge made, by introducing evidence tending to meet that introduced by the prosecution to establish his guilt on such charge. This opportunity would not be afforded him if he could be convicted on evidence tending to show the commission of a different crime, or the same crime in a different manner than that stated in the indictment. In prosecution by information instead of indictment there must be the same definiteness in the information as is required in case of indictment.

237. Right to be Confronted with Witnesses.

The requirement of Amendment VI that the accused in a criminal prosecution must be confronted with the witnesses against him is simply a statement of a rule of common-law procedure in prosecutions for crime which is generally recognized in the constitutions of the states. The purpose of such require-

ment is to enable the accused to subject the witnesses against him to the tests of credibility afforded by cross-examination and impeaching evidence, and to have the jury pass upon the weight of their testimony in view of such tests and their general conduct and appearance while testifying. Experience has shown that these are valuable means for arriving at the truth. In civil cases testimony may be authorized to be taken by deposition to be read in evidence without the presence of the witness, the deposition having been given and sworn to before some officer authorized to administer oaths, but the constitutional provision that the accused in a criminal prosecution must be confronted by the witnesses against him prevents the testimony of witnesses for the prosecution being introduced by depositions. The accused may, if he sees fit, waive the constitutional requirement and permit testimony to be given by deposition, and he may introduce such testimony on his own behalf, if authorized by statutory provisions. It may result from this constitutional requirement that the prosecution will be unable to convict, if some essential fact in connection with the commission of the crime can only be proven by witnesses who are outside of the state, as the state cannot compel the attendance of witnesses from beyond its limits.

There are at least two apparent exceptions to the rule requiring the defendant to be confronted by the witnesses against him, which are made by the courts in the practical administration of justice. (1) In a prosecution for criminal homicide the dying declarations of the person killed with reference to the circumstances of the homicide and the connection of the accused therewith may be shown. The reason usually given for this exception is that one who believes himself to be about to die is as likely to tell the truth as though he were under oath and subjected to cross-examination, and the exception as to dying declarations is accordingly limited to statements made by the injured person under the sense of impending death which in fact follows soon after the statements are made. (2) Another apparent exception is found in the admission on a second trial of the testimony given against the accused on a former trial by

a witness subsequently deceased; that is, if the accused on one trial is confronted by a witness duly sworn and properly cross-examined, and by reason of the failure of the jury to agree or in case a verdict of guilty has been set aside and a new trial granted, the accused has again been put on trial under the same indictment and the witness testifying on the former trial is dead (or perhaps if he has gone beyond the reach of a subpœna) those who heard his evidence on the former trial may testify what it was and thus make it available against the accused. In such case the accused has in fact once been confronted with the witness who has been required to testify under oath and been subjected to a cross-examination, and there is no good reason why the prosecution should be deprived of the benefit of such testimony by the accident of death or by other casualty not due to any fault or negligence on its part (*Mattox* v. *United States*).

238. Compulsory Process for Witnesses.

By Amendment VI and similar provisions in the state constitutions the accused has the privilege of compulsory process for obtaining witnesses in his favor, that is, to have the machinery of the law employed in his behalf, as it may be employed in behalf of the prosecution, for the purpose of bringing witnesses into court and compelling them to testify. There is nothing exceptional, however, in this requirement, for in all cases tried in a judicial tribunal the parties are generally entitled to have compulsory process for securing the attendance and testimony of witnesses. In civil cases the party desiring the attendance of a witness may be compelled to pay or tender his legal fees, and perhaps in the absence of statutory provision this is true also as to the accused in a criminal prosecution, but it is generally provided by statute in the interest of justice that witnesses may be subpœnaed for the accused at the expense of the county, upon approval by the court, so that the accused in a proper case may secure the attendance of witnesses in his behalf without advancing or tendering their fees.

239. Right to Assistance of Counsel.

The guaranty of the right of the accused to the assistance of counsel in making his defence, found in Amendment VI, and in the state constitutions, is intended as an assurance against the recognition in the courts of a practice which at one time prevailed in the criminal courts of England by which a person put on trial for treason or felony was not allowed to be represented by counsel in his behalf. The general rules of procedure in common-law courts allow in civil cases and in prosecutions for lesser crimes that a defendant may have the assistance of counsel if he sees fit, and the exception in prosecutions for treason or felony was unreasonable.

The constitutional right of the accused to be represented by counsel does not necessarily involve the employment of counsel for him at the expense of the state; but it is usually provided by statute that if the accused is unable by reason of poverty to secure the assistance of counsel such assistance shall be furnished at the state's expense.

240. Excessive Bail; Cruel and Unusual Punishments.

One of the beneficent rules of criminal procedure in courts of common law is that a person accused of and arrested for a crime but not yet proven guilty in a judicial trial shall not, save in cases of the gravest character, be deprived of his liberty while awaiting trial, provided he can give reasonable assurance that he will appear when his case is brought on for trial and submit to the punishment imposed, should he be found guilty; and he is allowed to give this assurance by the execution of a bond with a money penalty signed by persons who are financially responsible and who undertake that he shall be present when required, and submit to the punishment imposed. The term "bail" is in common parlance used indiscriminately to indicate either the bond which is furnished or the persons who bind themselves under penalty to see that the accused appears when required. In prosecutions for the graver crimes the accused must be arrested and brought before the court or

voluntarily appear and subject himself to arrest; the court cannot proceed if the prisoner by escaping either before or after arrest prevents the prosecution from having him actually in the presence of the court. Therefore, release on bail after arrest may properly be refused in cases of treason or murder or other crime which may be punished capitally, for it is not to be supposed that any pecuniary consideration or any consideration for bondsmen would be adequate to restrain the escape of one who feared a conviction that would result in the loss of his life. In some state constitutions there are specific provisions as to the cases in which bail may be allowed, but in the absence of such specific provisions it is to be allowed in the general discretion of the court, subject to such statutory regulations as may have been adopted. Release on bail is the rule and the refusal of bail is the exception; but the amount of bail, that is, the penalty to be fixed in the bail bond and exacted from the sureties in case the accused does not appear for trial or render himself for punishment in case he is found guilty, is to be fixed by the judge or court. The accused who has been released on bail is supposed to be in the custody of or under the supervision of his sureties, who are authorized to surrender him to the proper officers in case they wish to relieve themselves from further responsibility. The provision of Amendment VIII, that excessive bail shall not be required, is by implication a direction that bail shall not be refused in a proper case; but it is directory rather than mandatory, for there must be authority somewhere to determine whether the charge is one of such nature that bail should not be allowed, or if bail is allowed the amount of bail which should be required.

It is usually provided that even after conviction, save in cases where bail may properly be denied on account of the nature of the crime, the accused may be released on bail pending an appeal from his conviction to the proper appellate court.

Amendment VIII also prohibits the infliction of cruel and unusual punishments. The common law as administered in England in earlier times authorized barbarous punishments such as being drawn and quartered or maimed or branded or

disfigured; and while the death penalty for very grave crimes, such as treason and murder, has been retained, the infliction of such penalty in any barbarous or unusual manner would be in violation of the guaranties of the federal and state constitutions. Hanging as a means of inflicting the death penalty has been continuously practised as a proper method, and perhaps decapitation would not be an improper method, although it is unusual. Execution by electricity has been held not to be such a cruel method of inflicting capital punishment as to be open to constitutional objection (*In re Kemmler*). Whipping as a punishment for certain offences is authorized by the laws of some of the states. It may be announced as a safe rule that whatever forms of punishment were usual at the time of the adoption of the state constitutions would still be authorized.

241. Writ of Habeas Corpus.

A legal remedy against unlawful deprivation of personal liberty which is peculiarly applicable as to criminal prosecutions, although it is not expressly limited to such cases, is the writ of *habeas corpus*, which is granted by a court or judge on an application under oath alleging that some person named is illegally imprisoned or restrained of his liberty, and asking that the person exercising such imprisonment or restraint be required to come before the court or judge to show under what authority his power is being exercised. If the person against whom the proceeding is brought can show lawful authority, as where a parent is restraining his child, or a guardian his ward, or where an officer is imprisoning one accused or convicted of crime under legal process of arrest or by way of punishment lawfully imposed, then the proceeding will be dismissed; but if no lawful authority can be shown for the imprisonment or restraint, the court or judge hearing the case may order the person found to be illegally restrained set at liberty.

As applicable to criminal prosecutions, the proceeding by *habeas corpus* enables the court or judge before whom it is brought to inquire into the legality of the arrest of a person

complaining of unlawful detention. If the accused has been refused bail, a proper method of securing the release on bail, if the offence is a bailable one, is by use of this writ. But the proceeding is not a method for revising or reviewing the action of the court which has jurisdiction to hold the accused for trial, or for freeing him from restraint under arrest or commitment for an offence charged so long as the court is proceeding lawfully and without violation of constitutional guaranties.

As a general rule one court will not by writ of *habeas corpus* interfere with restraint or imprisonment by virtue of the authority of another court; and the fact that the federal courts while acting within the scope of their authority are superior to the state courts, and are given ultimate power to determine the extent of their authority, renders it impossible for a state court to exercise jurisdiction by writ of *habeas corpus* to determine the legality of imprisonment or restraint under the authority of a federal court (*Tarble's Case*). One who is unlawfully imprisoned or restrained under the pretended authority of a federal court is not without redress, but he should seek it by application to a federal court or judge. On the other hand the federal judiciary in affording the protection guaranteed in the federal constitution as against state authority in particular classes of cases has the power to inquire into the legality of the proceedings of a state court if it is contended that under such authority a person is being deprived of some right guaranteed to him by the federal constitution. Therefore, a federal court or judge may in a *habeas corpus* proceeding determine the validity of proceedings under the authority of a state court (*In re Neagle*). But as the person who is unlawfully proceeded against in a state court has usually other remedies for the protection of his rights under the federal constitution, such as an appeal to the highest court of the state, and on denial there, an appeal to the Supreme Court of the United States, the federal courts will interfere by *habeas corpus* with proceedings under the authority of a state court only in a case of peculiar urgency, and will usually leave the complaining party to his remedy by appeal (*Whitten* v. *Tomlinson*).

242. Suspension of Habeas Corpus.

To protect the privilege of resorting in a proper case to proceedings by *habeas corpus* the federal constitution as well as the constitutions of the various states contain provisions regulating the suspension of the writ. The provision of the federal constitution is that "The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it" (Art. I, § 9, ¶ 2). Such suspension is involved in the declaration of martial law (see above, § 114), and is only proper when it becomes necessary temporarily to subject the exercise of civil authority to the military power. It has been the subject of much discussion whether without legislative authority the president may suspend the writ on his own judgment in cases of rebellion or invasion (*Ex parte Merryman* and *Ex parte Milligan*). But he may be authorized to do so by statute, as was done in 1863, 1866, and 1867.

In the absence of any suspension of the writ on account of such emergency as is contemplated by the constitution, the right to the writ for the purpose of having determined by judicial authority the lawfulness of imprisonment or other deprivation of personal liberty is a constitutional right, and the prohibition against its suspension is regarded as one of the personal guaranties of civil liberty. In the constitutional history of England the final establishment of the right to a judicial inquiry as to the lawfulness of any arrest or detention, even under the authority of the king himself, was the final step in the complete recognition of individual liberty and the subordination of the executive authority to the limitations imposed by constitutional government. The right was finally established in England by the Habeas Corpus Act, passed in 1679, which is regarded as one of the fundamental charters of civil liberty.

243. Waiver of Constitutional Guaranties.

While the protection afforded by the guaranties found in the federal or a state constitution is often spoken of as the inalien-

able right of one accused of crime, it does not follow that such guaranties may not be waived by the accused. While he cannot by any act of his give jurisdiction to a court which under the law does not have jurisdiction, nor consent to a punishment which a court cannot lawfully inflict, there is no inherent reason why he may not waive any provisions of the constitution or the law which are intended for his protection, provided he freely and in the possession of a sound mind exercises the discretion of doing so for his own presumed advantage. He cannot waive the necessity for his presence in the court on a trial for treason or felony, because the court has no jurisdiction to proceed without his presence; nor can he consent to be tried in a court which is not authorized by law to try prosecutions for the offence with which he is charged; nor can he consent to death or imprisonment as a punishment for an offence for which such punishment is not provided; but he may waive a jury trial by plea of guilty (*Hallinger* v. *Davis*) and may waive objections to evidence which he might interpose according to constitutional provisions; and he may consent to be tried without a jury provided the court is legally authorized to proceed to try a criminal case without a jury (*Harris* v. *People of Illinois*); and without question he may waive a speedy trial or the assistance of counsel or any of the other provisions specially intended to secure to him a fair trial.

CHAPTER XLIII.

TRIAL BY JURY.

244. References.

J. Story, *Constitution*, §§ 1768–1772; J. R. Tucker, *Constitution*, § 334; T. M. Cooley, *Constitutional Law*, ch. xiii, § 5; H. C. Black, *Constitutional Law*, §§ 220–223; M. Hale, *History of the Common Law*, ch. xii; W. Blackstone, *Commentaries*, III, ch. xxiii, and note in Hammond's ed., 507; J. F. Dillon, *Laws and Jurisprudence of England and America*, 121–132; *The Federalist*, No. 83; *Capital Traction Co.* v. *Hof* (1899, 174 U. S. 1; McClain's Cases, 956); *Vicksburg & Meridian Railroad Co.* v. *Putnam* (1886, 118 U. S. 545; McClain's Cases, 963); *Eilenbecker* v. *Plymouth County* (1890, 134 U. S. 31; Thayer's Cases, 673); *In re Debs* (1895, 158 U. S. 564); *Maxwell* v. *Dow* (1900, 176 U. S. 581).

245. Constitutional Provisions.

Jury trial is not only guaranteed in criminal prosecutions (see above, § 235), but also in civil suits, by Amendment VII of the federal constitution, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

These provisions are analogous to those found in the various state constitutions on the same subject, the general purpose being to preserve as a distinctive and important feature of judicial procedure the common-law trial by jury as a safeguard against the encroachments of arbitrary power. The evident intent has been to preserve it in form and substance as it was known in the courts of Great Britain and the colonies, for it was regarded by the people as a right to which as British subjects

they were entitled; which they were anxious to preserve as against any encroachments by the royal government; and which they thought it necessary to perpetuate as against any possible encroachment by the governments established under the constitutions.

246. Selection of a Jury.

Jury trial as guaranteed in general terms means a determination of questions of fact in cases tried at law, either civil or criminal (as distinct from civil cases tried in equity), by a jury of twelve qualified persons selected, in accordance with legal methods, for the particular case and constituting for the time being a part of the machinery of the court to find the ultimate facts, and under the instructions of the judge as to the law render a general verdict which has received the unanimous approval of the twelve jurors, which verdict determines the case as between the parties and furnishes the basis for a judgment in favor of one party against the other to be rendered by the court. The essential features of this form of trial are numerous and they cannot all be elaborated here; but briefly they are as follows.

By some suitable means of procedure twelve persons are secured for the trial of the particular case; they are usually required to be citizens of the state or United States, as the case may be, possessing full mental capacity and in the enjoyment of the faculties of seeing and hearing so that they may rightly and fully comprehend the evidence presented to them. It is usually required that they be selected from the class of persons who are entitled to exercise the elective franchise, but there is no necessary connection between the right to vote and the capacity to serve as juror.

Some classes of persons are as a matter of public policy exempted from the obligation to serve on juries, such exemptions usually extending to physicians, lawyers, teachers, and public officers whose business or public duties are such as to be seriously interfered with to the public detriment if jury service is required of them. It is left discretionary with the court

to excuse in particular instances other persons who by reason of some special emergency would be unreasonably inconvenienced or damaged by such compulsory service; but mere interference with ordinary business or occupation is not regarded as just ground of excuse, for the citizen can be properly required to perform his public duties without regard to the effect upon his private interests.

A juror to be qualified to sit in a case must be, however, not only generally qualified to discharge such duty, but he must also be qualified with reference to the particular case in which he is to sit; that is, he must be substantially without bias or prejudice which would be likely to interfere with his rendering a fair and impartial verdict. Therefore one who has formed or expressed an opinion as to the merits of the case, or is so related to one of the parties that he is likely to be predisposed to favor him, or who occupies a position of hostility towards one of the parties which would predispose him to a decision hostile to such party's interests may properly be excluded. The general and special qualifications of each particular juror are inquired into, and if for any reason he appears to be disqualified the party desiring that he shall not serve as a juror in the trial of the case interposes a challenge for cause, and if the judge considers the objection to be well taken such person is not selected as one of the jurors.

There may be special reasons why a person called as a juror would not be likely to render a fair verdict in a case between the parties, other than the general reasons just suggested, and it is usually provided that each party shall have a number of so-called peremptory challenges which he may exercise for the purpose of excluding such persons from the jury as he desires to object to, although no legal reason for such exclusion is given. When twelve persons are secured against whom no valid objection is found to exist and to whom no peremptory challenge is interposed, these twelve persons are sworn to render a fair and impartial verdict in the case and become the jury for the trial.

247. Evidence to the Jury; Instructions.

The jurors thus sworn hear the evidence which the trial judge permits to be offered. In determining what evidence is to be offered and considered the judge applies rules of law and the jury is authorized only to consider the evidence which is submitted to them. They have no right to take into account matters of fact not shown by the evidence, such as particular facts relating to the case which they know or believe as of their own knowledge. They are to try the case under the direction of the court as to what testimony or facts are properly admissible as affecting the verdict which they shall render.

Having heard the evidence submitted to them, the jurors are instructed by the judge as to the rules of law which they are to follow in reaching a conclusion from the evidence that is submitted, and they have no right to exercise their own judgment as to the rules and principles of law applicable to the case. The determination of the law is for the judge in the discharge of his legal duty. But the credibility of the witnesses and the weight of the evidence is for the determination of the jury in the exercise of their discretion, and the judge should not interfere with or control them in its exercise. In some states the statutes very specifically prohibit any comments by the judge as to the credibility of the witnesses or weight of the evidence; in other states and in the federal courts the judge may discuss the evidence for the enlightenment of the jury, though he cannot control the conclusions which they see fit to draw from the evidence properly presented to them (*Vicksburg, etc. R. Co.* v. *Putnam*).

248. Verdict of the Jury.

After being instructed by the judge as to the law applicable to the case the jurors consider by themselves, without the presence of the judge or any other person, the evidence submitted to them and the instructions given, and if they are able to do so they agree unanimously upon a verdict in favor of one party or the other. If they are unable to agree on a verdict then the

case must be resubmitted in full before another jury, for according to the common law no verdict can be rendered one way or the other unless all the jurors concur therein. In some states there are constitutional provisions for a majority verdict or for a verdict of a specified number of jurors more than a majority and less than all, but any such provision constitutes a modification of the common-law jury trial.

The conclusion of the jury as to the facts reached under the direction of the court as to the law is a final and conclusive determination of the case which the judge must recognize and embody in the final judgment to be rendered by the court as the result of the trial. If it is manifest that the jury has not followed the direction of the judge in applying the law, the verdict may be set aside by the judge and a new trial granted. If the judge is satisfied that in some essential respect there is no competent evidence to support the verdict of the jury, he may set it aside as not supported by the evidence. If the judge is satisfied that the jurors have rendered their verdict as the result of passion or prejudice and not through a full and fair consideration of the evidence submitted, he may set it aside on that ground. If the jurors have been guilty of some misconduct such as conversing with persons outside of court with reference to the merits of the case while it is being tried, or have allowed other persons to be present during their deliberations, or have heard statements by fellow-jurors as to facts not shown by the evidence and calculated to influence them in reaching a conclusion, or have determined the result otherwise than by a consideration of the evidence, as by casting lots to determine what their verdict shall be, then the judge will set aside their verdict for such misconduct. The result of setting aside the verdict is in all cases that a new trial is ordered. No irregularity on the part of the jury in reaching a verdict will justify the judge in rendering a decision for one party or the other. The judge may also set aside a verdict and grant a new trial if he is convinced that he himself has committed an error in material rulings on the admission of evidence or in instructing the jury as to the law. In criminal prosecutions the rule

that the accused shall not be twice put in jeopardy for the same crime makes a verdict of "not guilty" conclusive regardless of any error of law or misconduct of the jury (see above, § 232), but if the verdict is against the accused then the same judicial discretion may be exercised by the judge as in a civil case in setting aside the verdict and granting a new trial.

249. The Jury in Inferior Courts.

Constitutional provisions as to jury trial are in general applicable only to courts of general jurisdiction. Inferior courts may be provided for in which questions of fact may be tried before a jury of less than twelve, or even without a jury, the right of jury trial being sufficiently preserved in such cases if an appeal from the judgment of such a court to a court of general jurisdiction is provided for in which a jury trial may be had (*Capital Traction Co.* v. *Hof*). In limiting the requirements as to jury trial to cases where the value in controversy shall exceed twenty dollars, the intention evidently was to allow Congress to provide if it saw fit for the trial of petty cases in the federal courts without a jury; but as a matter of fact no provision is made for such trials.

250. The Jury in Equity Cases.

It has already been stated that the article of the federal constitution on the judiciary recognizes a distinction between cases at law and cases in equity (see above, § 146) and Amendment VII guarantees jury trial only in cases at law. In equity cases, that is, cases which according to the practice in England at the time the colonies became independent were triable in courts of chancery, the judge determined both the law and the facts; and jury trial was not recognized except that in a case involving an issue of fact which might have been tried in a law court the judge could in his discretion refer the determination of such issue to a law court having a jury. In many of the states the same courts now try both law and equity cases, proceeding in the latter substantially in accordance with the chancery practice and determining both the law and the fact without

the assistance of a jury, and this is the method adopted in the organization of the federal courts so that the question whether there shall be a jury trial in a case depends not upon the court in which the case is tried but upon the nature of the case.

If the case is one properly triable in equity and the procedure is in that form, it cannot be objected that the defendant is thereby deprived of trial by jury (*Eilenbecker* v. *Plymouth County* and *In re Debs*).

251. Re-examination of Cases Tried by Jury.

By the provision of the federal constitution, that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law" (Am. VII) it was simply intended to prohibit a review by a court sitting without a jury, of the conclusion of fact reached by a jury in the trial of such a case; that is, a trial judge cannot set aside the verdict of the jury and render a judgment on his own conclusions of fact, nor can an appellate court review the conclusions of fact reached by a jury and render a judgment on the evidence disregarding the verdict which the jury has reached on the facts. Although this specific provision is not usually found in state constitutions, the same rule is necessarily involved in the guaranty of jury trial. The appellate court in a case tried at law before a jury can review the rulings of the trial judge and can reverse the decision rendered on the verdict of the jury for errors of law committed, and on such review it may determine whether the judge has committed an error of law in refusing to set aside the verdict on the ground that such verdict is without support in the evidence, or is the result of passion or prejudice, or on similar grounds, but it cannot review the evidence for the purpose of determining whether the jury reached a correct conclusion. In equity cases, however, the appellate court may review the judgment of the trial court, both as to law and as to the facts, and it is usually provided that on appeal in an equity case the appellate court shall try the case anew on the evidence submitted to the trial court, and render such decision as should have been rendered under the evidence.

252. Waiver of Jury Trial.

The right to trial by jury in a court of law is one which may be waived by the person entitled thereto, and such courts are generally authorized to try cases without a jury where both parties consent thereto. In a case so tried, the conclusion of the judge as to the facts takes the place of the verdict of a jury. In criminal cases courts are not usually authorized to proceed without a jury, and it is often stated that jury trial cannot be waived in a criminal case; but there seems to be no reason why if the court is by law authorized to proceed in a criminal case by the consent of the defendant without a jury, such a trial would not be valid. (See above, § 243.)

253. Modification of Trial by Jury.

As the first eight amendments to the federal constitution apply to the federal government only, and are not limitations upon the powers of the states, there is no reason why the method of trial by jury recognized at common law may not be modified or superseded in any state by the amendment of the state constitution, even though such state constitution as originally adopted contained a guaranty of the right of jury trial. "Due process of law" which the states are by Amendment XIV prohibited from impairing does not necessarily involve jury trial, at least in civil cases (*Maxwell* v. *Dow*). But due process of law does necessarily involve trial in a duly constituted judicial tribunal, and whether such tribunal shall proceed in accordance with common-law methods of trial or shall be authorized to determine cases by some other recognized method, as the trial by a judge without a jury, is for the states to determine. Of course no modification of trial by jury could be made in the federal courts without an amendment to the federal constitution.

254. Expediency of Provisions as to Jury Trial.

The historical fact that the colonists regarded jury trial as an essential of the common-law system of administering justice

and that it has been guaranteed in all the state constitutions as well as in the bill of rights incorporated in the federal constitution soon after its adoption by way of amendment, proves that it was regarded as one of the important safeguards against oppression by a tyrannical government and the danger that the governments in which authority is vested under our constitutional system might attempt to exercise like tyrannical powers. Especially has the importance of this guaranty been insisted upon with reference to criminal prosecutions, for it was by means of such prosecutions that the liberties of British subjects were, during some periods of English history, peculiarly imperilled.

But constitutional provisions remain, after conditions leading to their adoption have disappeared, and it can hardly be thought that there is longer any necessity for jury trial as a bulwark against tyranny on the part of the government with reference to the individual. It may perhaps still be reasonably deemed important that one accused of crime in a prosecution necessarily instituted and carried on by a public prosecutor representing the interests of the government shall have the right to this form of trial, which secures the determination of the question of guilt or innocence by "twelve good and true men" taken from the body of people; and there has been no serious discussion of the expediency of abolishing jury trial in criminal cases. But the same considerations do not apply in civil cases, involving as they do only a contest between individuals as to their respective rights; and it has been seriously questioned whether in such cases some better form of trial might not be introduced for the determining of questions of fact. The necessity for maintaining a careful distinction between questions of law and questions of fact renders the trial of a jury case complicated and difficult. There is much greater danger of the commission by the court of errors of law which will necessitate a new trial on the theory that the jury may have been misled as to the law, than there would be if the trial judge determined both the law and the facts and rendered his judgment on the issues and evidence presented. There is more opportunity for the exercise

of corrupt influences for the purpose of securing an unjust verdict or preventing the rendition of a just verdict when the result may be affected by influences brought to bear upon any one of twelve jurors who are selected largely at random. They are not trained to the responsibility of the discharge of legal duties which rests upon a judge whose training and experience have prepared him for the exercise of a sound, independent, and unbiassed judgment, and the publicity of whose life and duties removes him to a considerable extent from the danger of being approached for improper purposes. Great delay in the administration of justice may be occasioned by the necessity of granting another trial when for any reason the first trial has not ended in a verdict which can be sustained. And finally the requirement that the verdict be unanimous enables one juror, although actuated by prejudice or corrupt motives, to defeat the rendition of such a verdict as the evidence requires.

As against these objections and any arguments for modifying trial by jury or superseding it by some other form of trial it may well be urged that a jury made up of men of average intelligence is quite as well qualified as one person trained in the law to determine questions of fact; that a certain amount of assurance that justice will be done as between man and man is encouraged by leaving the ultimate decision to a jury; that while the necessity for a unanimous verdict may delay justice, it affords a protection against injustice; and finally, that the well-known methods of procedure in accordance with which rights are protected and injuries redressed should not be changed save for very cogent reasons, nor until it has been very fully agreed what method of procedure would be better.

It is a significant fact that although there has been for many years much discussion in this country of the supposed defects of jury trial as a means of determining civil suits, those who are most experienced in the administration of law continue, with rare exceptions, to believe that no better system could be devised for the disposition of cases in which jury trial is now required. In some states by constitutional amendment verdicts may be rendered on the concurrence of less than all of the

jurors, and such modification of the method of jury trial seems to have been generally satisfactory where introduced, but there is a manifest reluctance to introduce any extensive change in the jury system, and practically no concerted effort has been made anywhere to entirely abolish it. It seems likely that for a long time to come the present jury system will be preserved in most of the states of the Union and in the federal courts.

CHAPTER XLIV.

DUE PROCESS OF LAW; EQUAL PROTECTION.

255. References.

T. M. Cooley, *Constitutional Limitations*, ch. xi; J. I. C. Hare, *Constitutional Law*, § 39; J. R. Tucker, *Constitution*, § 390; J. N. Pomeroy, *Constitutional Law*, §§ 245–250; T. M. Cooley, *Constitutional Law*, ch. xiii, § 4, and ch. xvi, § 2; H. C. Black, *Constitutional Law*, §§ 212–214; L. P. McGehee, *Due Process of Law*; W. D. Guthrie, *Fourteenth Amendment*; *Murray's Lessee* v. *The Hoboken Land and Improvement Co.* (1855, 18 Howard, 272; McClain's Cases, 895; Thayer's Cases, 600); *Eilenbecker* v. *Plymouth County* (1890, 134 U. S. 31; Thayer's Cases, 673); *In re Debs* (1895, 158 U. S. 564); *Ex parte Wall* (1883, 107 U. S. 265; McClain's Cases, 903); *Hurtado* v. *People of California* (1884, 110 U. S. 516; McClain's Cases, 905; Thayer's Cases, 616); *Yick Wo* v. *Hopkins* (1886, 118 U. S. 356; McClain's Cases, 917; Thayer's Cases, 774); *Hayes* v. *Missouri* (1887, 120 U. S. 68; McClain's Cases, 923); *Pembina Mining Company* v. *Pennsylvania* (1888, 125 U. S. 181; McClain's Cases, 923; Thayer's Cases, 1406); *Missouri Pacific Railway* v. *Nebraska* (1896, 164 U. S. 403; McClain's Cases, 1030); *Cunnius* v. *Reading District* (1905, 198 U. S. 458; McClain's Cases, 2d ed., 1038); *Pennoyer* v. *Neff* (1877, 95 U. S. 714; McClain's Cases, 1032); *Arndt* v. *Griggs* (1890, 134 U. S. 316; McClain's Cases, 1037); *Holden* v. *Hardy* (1898, 169 U. S. 366; McClain's Cases, 929); *Lockner* v. *New York* (1905, 198 U. S. 45; McClain's Cases, 2d ed., 1260); *McLean* v. *Arkansas* (1908, 211 U. S. 539); *Barbier* v. *Connolly* (1885, 113 U. S. 27; McClain's Cases, 925; Thayer's Cases, 623).

256. Constitutional Provisions as to Due Process of Law.

The early state constitutions, as well as various documents in which the colonists set forth their claims to the enjoyment of privileges vouchsafed to British subjects by the common law of England, make reference to due process of law as a valuable safeguard of personal liberty and property rights. This phrase is said to be and no doubt is used as an equivalent of the guaranty given by King John in Magna Charta (A. D. 1215;

reaffirmed by many succeeding sovereigns) that "No freeman can be taken or imprisoned or disseized or outlawed or in any other manner injured, neither will we proceed against him, unless by the lawful judgment of his peers or by the law of the land." In short "due process of law" is construed as equivalent to "the law of the land." In the federal constitution it is declared that no person "shall be deprived of life, liberty, or property without due process of law" (Amend. V) and that no state shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" (Amend. XIV). These limitations on the power of the federal and state governments respectively are of very wide and important application. They have already been frequently referred to in previous chapters and it only remains now to indicate their general nature and scope.

It is now well settled that the Fourteenth Amendment guarantees the civil rights of all persons as against infringement by state action; while, on the other hand, it is equally well settled that the civil rights of the inhabitants of the states are within the protection of the state constitutions and laws, and that the federal guarantee applies only to infringements by the constitution or laws of a state or under the authority of the state acting through its government or officers. The provisions of the Fifth Amendment are of course applicable as limitations only on the exercise of power by the federal government.

257. What is Due Process of Law.

It is very difficult to give any concise definition of what is meant by due process of law, but it has been well said that by the use of these words in constitutional guaranties the intent is "to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice" (per Johnson, *Bank of Columbia* v. *Okely*). To determine what are the established principles of private right and distributive justice recognized in the United States we must have reference to the common law

as it was in force at the time the colonies became independent of Great Britain.

By due process of law is not meant in all cases judicial proceedings, for private property is frequently taken from its owner according to well-recognized methods and for legitimate purposes without the judgment of a court. Thus for non-payment of public taxes property may be sold under state authority, and the owner thereby deprived of it. In such cases due process of law consists of the regular proceedings provided for the assessment and collection of taxes. (See above, § 74.) Likewise, property may be taken for public use without the consent of the owner on compensation being made, and no procedure in a court is essential to determine the propriety of the taking or the amount of the compensation. (See above, § 63.) Again in the exercise of its police power the state may under some emergencies and for the public welfare destroy private property without the consent of the owner, although the necessity for such destruction has not been determined in any judicial proceeding. (See above, § 48.) In each of these cases the courts may be called upon ultimately to decide whether the taking or destruction of the property was in accordance with due process of law, but it is evident that the essential procedure constituting due process does not necessarily involve any action on the part of a judicial tribunal.

Although in the clause from Magna Charta above quoted and in the provisions relating to due process of law found in state constitutions, jury trial is referred to in the same connection, it is not to be inferred that even when due process of law involves a judicial trial it is essential that such trial be by jury. Other forms of trial are recognized by the common law and, except when jury trial is guaranteed, the form of trial may be determined by the law. Thus notwithstanding the general guaranty of jury trial where personal liberty is in question, courts may in some cases deprive a person of his liberty otherwise than by a jury trial, without violating the guaranty of due process. Courts, and for that matter legislative bodies also, may punish persons for contempt without a jury trial (*Eilenbecker* v. *Ply-*

mouth County and *In re Debs*). Likewise by special proceedings and for proper cause an attorney may be disbarred and the right to earn his living by the practice of his profession cut off without a jury trial (*Ex parte Wall*). Again in military tribunals trial by jury is not provided for according to the forms of the common law, although such tribunals may punish violations of the military law by death or imprisonment.

Due process of law does not necessarily require indictment by grand jury (see above, § 229), nor trial by jury in civil suits at law. (See above, § 253.) Other methods of judicial trial may be substituted, except, of course, in so far as jury trial is required by constitutional provision.

In fact, the phrase "judgment of his peers" which is used in Magna Charta in connection with the words "law of the land," and which is usually interpreted as meaning jury trial, did not have that meaning when it was first used (*Hurtado* v. *California*), for a jury trial as we now know it was not then in existence. But a discussion of the guaranty in Magna Charta would not be profitable. The essential of due process of law in judicial proceedings is that there be some regular, orderly method provided for the determination of the case presented to the court for decision. "Due process of law," says Judge Cooley in his *Constitutional Limitations*, "in each particular case means such an exertion of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs."

258. Effect of Legislation on Due Process of Law.

It must not be understood, however, that whatever is enacted by the legislative department is a part of the law of the land in such sense that compliance therewith necessarily constitutes the due process of law which is guaranteed in the constitution. The law-making power may modify the common law, may repeal its rules as applicable to a particular subject and substitute other rules, or it may add to the common law such rules

as to personal and property rights not recognized in the common law as it sees fit, but it cannot in so doing override the general restrictions found in the common law for the protection of personal and property rights, nor deprive the individual of beneficial remedies for the maintenance of such rights and for securing redress for their breach. The language of Webster in his argument in the *Dartmouth College Case* has frequently been quoted as a sound exposition of the true principle to be borne in mind in determining whether statutory provisions are open to the objection that they deprive a person of his property without due process of law: "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. 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 for men to live under. The administration of justice would be an empty form and idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or to administer the justice of the country." Methods of procedure in courts may be changed, new rights may be given, privileges not essential to the enjoyment of life, liberty, and property or which are not inconsistent with the general public welfare may be taken away, but the substantial protection afforded by common-law rules of procedure for the administration of justice cannot be abrogated.

259. What Persons are Entitled to Due Process of Law.

It is to be noticed as of great significance that the Fourteenth Amendment declares that no state shall deprive "any person" of life, liberty, or property, etc., and the same form of expression is used with reference to the equal protection of the laws. No doubt privileges and immunities are and may be recognized or conferred as incident to citizenship which are not recognized or conferred as to aliens, but it is now well settled that the fundamental guaranties of civil rights relate to persons who are subject to the law of the state, regardless of their condition. As has already been said the Fourteenth Amendment was adopted on account of a fear that the negroes recently emancipated from slavery, and who prior to the adoption of that amendment had not been uniformly regarded as citizens, would be deprived in some of the states of their civil rights. But the language of the amendment goes further than to make the negroes citizens and guarantee to them the privileges and immunities of citizenship. It is unlimited in its scope and has been so interpreted. (See above, § 21.) Thus Chinese subjects within the limits of a state, although they are not citizens of the state nor of the United States, and under the provisions of the present naturalization laws cannot become citizens, are, nevertheless, entitled to full protection of their civil rights (*Yick Wo* v. *Hopkins*).

The question has arisen whether a corporation is a person within the language of the Fourteenth Amendment. A corporation is undoubtedly entitled to the protection of property rights which it has acquired under authority of law. To deny it such protection would be to deprive the members of the corporation of their property rights, and it is therefore properly said that a corporation, though only an artificial person, is a person within the language of the amendment (*Pembina Mining Co.* v. *Pennsylvania*). In this respect the distinction between "person" and "citizen" is recognized, for corporations are not and cannot be citizens either of a state or of the United States. In construing the clause of the judiciary article conferring jurisdiction on the federal courts in controversies between

citizens of different states (see above, § 152) corporations are by fiction said to be citizens of their respective states; but this conclusion was reached by regarding the corporation as composed of individuals presumed to be citizens of the state in which the corporation is organized. A state may discriminate against corporations organized in another state, although it could not thus discriminate against persons who are citizens of another state. (See above, § 190.)

260. What are Property Rights Protected by Due Process of Law.

Whatever has been generally regarded as property, tangible or intangible, corporeal or incorporeal, in possession or in expectancy, is regarded as property within the meaning of the constitutional provisions; and whatever rights to such property have been generally recognized by the system of law prevailing in the states of the Union are such rights as are thereby protected. (See below, ch. xlvi.)

Illustrations of the protection afforded to private property by the limitation as to due process of law might be multiplied, such as that the legislature cannot by statute transfer the property of one person to another (*Missouri Pacific R. Co.* v. *Nebraska*), nor determine the rightfulness of one person's claim to property as against another, nor compel one person to pay damages to another for injuries to person or property claimed to have been suffered through a wrongful act. In all cases involving private rights and remedies the determination must be by judicial proceedings. For the determination of rights of individuals a judicial proceeding involves the necessity of jurisdiction of the parties and of the subject-matter (*Cunnius* v. *Reading District;* see above, ch. xxiv). Jurisdiction of the parties is acquired by the plaintiff or complainant asking judicial relief, presenting his case to a court, and by summons or notice of some kind as authorized by law giving the opposite party opportunity to appear in the court and make his defence. As the courts of the state can have no jurisdiction over persons outside of the limits of the state unless such persons come into the

court voluntarily and submit themselves to its jurisdiction, this summons or notice must be served in the state. It is thus that a court having by law the right to determine cases of the character brought before it, that is, having jurisdiction of the subject-matter, may acquire jurisdiction of the person (*Pennoyer* v. *Neff*). But there are classes of cases in which a court may proceed to render an adjudication binding upon property, although the owner of the property is not served with notice within the state. Such proceedings are called proceedings *in rem*. Thus, one who has a mortgage or mechanics' lien on property may subject it to the payment of his claim, although personal jurisdiction over the debtor has not been secured; or property within the state belonging to a non-resident may be subjected by his creditors to the payment of his claims by means of proceedings by attachment; or the title to property may be determined and quieted although the adverse claimant is not served with personal notice by reason of his absence from the state (*Arndt* v. *Griggs*). But in all such cases the court must limit itself to giving redress with reference to the property which is within the jurisdiction of the court; it cannot render a personal judgment against one who is not a party to the proceeding, either by proper servance or by voluntary appearance.

261. Freedom of Contract and of Labor.

The right of personal liberty and the right to acquire and hold property which are protected by the general guaranty of due process of law involve the right to make contracts and to enforce remedies for breach of contract. On the other hand, the legislature in the exercise of its police power for the protection of infants, persons not of sound mind, and in general persons who are not capable of protecting their own interests may regulate the making and enforcement of contracts by and against such persons. The question may arise, therefore, whether a statutory regulation which restricts the making or enforcement of certain classes of contracts is a reasonable exercise of the duty to afford protection to persons incapable of

guarding their own interests. Thus the employment of children in factories beyond a specified number of hours per day of labor may be prohibited. Moreover, certain kinds of labor may be injurious except under special restrictions; and the legislature may therefore provide that not more than a specified number of hours of labor per day shall be permitted to be performed by any person in such occupations as mining (*Holden* v. *Hardy*). As tending to prevent fraud the legislature may prohibit contracts requiring payment of miners' wages to be made on the basis of the amount of screened coal produced (*McLean* v. *Arkansas*). These matters are properly subject to control in the exercise of the police power (see above, § 48); but on the other hand, freedom to labor or to contract with reference to labor not peculiarly injurious, to be performed by persons competent to consult their own interests, cannot be properly restricted by legislation (*Lockner* v. *New York*). The general principle is that each person should be allowed to exercise his own discretion as to his private affairs, subject only to such restrictions as are reasonably within the scope of the police power.

262. Equal Protection of the Laws.

The principle of equality of all men before the law (see above, § 204), which is fundamental in our constitutional system, necessarily involves all that is especially guaranteed by the provisions of the Fourteenth Amendment with reference to the equal protection of the laws, and the significance of that provision is that it gives to this guaranty the sanction of the federal constitution and makes it binding on the states so that the persons who are entitled to the equal protection of the law are not left dependent upon the guaranties found in the state constitutions and the enforcement of these guaranties by the state courts, but may rely upon the federal constitution and the protection of the federal courts. It is to be noticed, however, as has already been suggested with reference to due process of law, that the limitation of Amendment XIV is upon

state action and not upon individual action. As between individuals the sovereign authority for the protection of rights is in the state governments; it is only as against the action of some department of a state government or its officers in the exercise of public authority that equality before the law is guaranteed by the federal constitution.

The equal protection of the laws does not require that all laws be equally applicable to all persons and all conditions. In the chapter on the police power (see above, § 48) it has been already pointed out that the necessity of regulation may exist as to one class of persons rather than another and as to some conditions rather than others. A law may properly be passed regulating innkeepers which does not apply to those who keep boarding-houses or restaurants; or applying to public carriers of passengers or goods, and not to private carriers. Restrictions on sales of intoxicating liquors may be imposed which are not applicable to sales of other goods. Particular occupations, although they may not be charged with a public interest, such as those of peddlers, pawnbrokers, or dealers in explosives, may be especially regulated in the public interest. Persons pursuing certain professions such as the practice of law, medicine, and pharmacy may be required to have certain qualifications. The requirement of the equal protection of the law is that in imposing regulations on one class of persons which are not imposed on others the distinction must be founded on some reasonable ground of public policy or general welfare and that it be not arbitrary or oppressive. The ground of distinction must have some foundation in reason according to general common sense and good judgment, and the laws applicable to a particular class must not bear more severely upon that class than the reason which justifies that distinction fairly warrants.

It rests primarily with the legislative power to determine what classification and distinctions shall be made and what restrictions shall be imposed; but it is for the courts to determine ultimately whether there is a fair and reasonable ground for such classification and distinctions and whether the restrictions fairly represent the requirements of sound public policy. The

courts will, however, only interfere when the legislative department has clearly and plainly exceeded its authority. For instance, it has been held that a regulation requiring that the laundry business within the thickly settled portions of a city shall not be conducted in wooden buildings is valid, because such a regulation is for the protection of the people from the danger of the spread of fire from such establishments (*Barbier* v. *Connolly*), but that the restriction of the laundry business to certain classes of persons is unconstitutional because it is not founded upon any reasonable ground as to the qualification of different classes of persons to pursue that particular business (*Yick Wo* v. *Hopkins*). Illustrations might be multiplied but without further amplification these suggestions will indicate the principles to be observed in regard to class legislation. It is always to be borne in mind that primarily and fundamentally each person is to be allowed to pursue that calling or line of business which he desires to follow and shall be prevented from doing so only for some sound reason of public policy.

CHAPTER XLV.

IMPAIRMENT OF CONTRACT RIGHTS.

263. References.

J. Story, *Constitution*, §§ 1374–1400; T. M. Cooley, *Constitutional Limitations*, ** 273–294; J. I. C. Hare, *Constitutional Law*, chs. xxvi–xxviii; J. R. Tucker, *Constitution*, 828–840; J. N. Pomeroy, *Constitutional Law*, §§ 538–627; *The Federalist*, No. 44; T. M. Cooley, *Constitutional Law*, ch. xvi, § 1; H. C. Black, *Constitutional Law*, ch. xxi; *Hans* v. *Louisiana* (1890, 134 U. S. 1; McClain's Cases, 702; Thayer's Cases, 293); *McGahey* v. *Virginia* (1890, 135 U. S. 662; McClain's Cases, 1001; Thayer's Cases, 1664); *Woodruff* v. *Trapnall* (1850, 10 Howard, 190; 18 Curtis' Decisions, 358; McClain's Cases, 998); *Sturges* v. *Crowninshield* (1819, 4 Wheaton, 117; 4 Curtis' Decisions, 362; Thayer's Cases, 1582; Marshall's Decisions, Dillon's ed., 226); *Ogden* v. *Saunders* (1827, 12 Wheaton, 213; 7 Curtis' Decisions, 132; Thayer's Cases, 1590; Marshall's Decisions, Dillon's ed., 549); *Legal Tender Case, Juillard* v. *Greenman* (1884, 110 U. S. 421; McClain's Cases, 442; Thayer's Cases, 2255); *Fletcher* v. *Peck* (1810, 6 Cranch, 87; 2 Curtis' Decisions, 328; Thayer's Cases, 114; Marshall's Decisions, Dillon's ed., 194); *Louisiana* v. *Mayor of New Orleans* (1883, 109 U. S. 285; McClain's Cases, 1047); *Morley* v. *Lake Shore & Michigan Southern Railway Co.* (1892, 146 U. S. 162; McClain's Cases, 1023; Thayer's Cases, 1555); *Mobile Transportation Co.* v. *Mobile* (1903, 187 U. S. 479; 23 Sup. Court Reporter, 170); *Salt Company* v. *East Saginaw* (1871, 13 Wallace, 373; McClain's Cases, 1003); *Fisk* v. *Jefferson Police Jury* (1885, 116 U. S. 131; McClain's Cases, 1005); *Trustees of Dartmouth College* v. *Woodward* (1819, 4 Wheaton, 518; 4 Curtis' Decisions, 463; McClain's Cases, 1006; Thayer's Cases, 1564; Marshall's Decisions, Dillon's ed., 299); *The Binghamton Bridge* (1865, 3 Wallace, 51; McClain's Cases, 1011; Thayer's Cases, 1753); *Douglas* v. *Kentucky* (1897, 168 U. S. 488; McClain's Cases, 1016); *Stone* v. *Mississippi* (1879, 101 U. S. 814; Thayer's Cases, 1771); *Beer Company* v. *Massachusetts* (1877, 97 U. S. 25; McClain's Cases, 1014; Thayer's Cases, 757); *Central Bridge Corporation* v. *Lowell* (Mass. 1855; 4 Gray, 474; McClain's Cases, 1052); *Pennsylvania College Cases* (1871, 13 Wallace, 190; McClain's Cases, 1013; Thayer's Cases, 1716); *East Hartford* v. *Hartford Bridge Company* (1850, 10 Howard, 511; 18 Curtis' Decisions, 483; McClain's Cases, 1021).

264. Constitutional Provisions as to Contracts.

In state constitutions there is usually a provision that no law shall be passed impairing the obligation of contracts; and in the federal constitution (Art. I, § 10, ¶ 1) this prohibition is expressly imposed on the states. There is nothing in the federal constitution, however, prohibiting the enactment of laws by the federal government impairing the obligation of contracts save that in Article VI is found the provision that "All debts contracted and engagements entered into before the adoption of this constitution shall be as valid against the United States under this constitution as under the Confederation." The object of this provision was undoubtedly to guard against any repudiation by the federal government, organized under the constitution, of treaties made or debts contracted by the government under the Articles of Confederation; but as the United States cannot be sued (see above, § 149) there could be no legal redress for the violation of this provision. As likewise the states cannot be sued by individuals (see above, § 151) there is no direct legal remedy against a state for the impairment of its own obligations. Thus, if a state should provide for the issuance of bonds and direct their payment when due out of the state treasury, a subsequent repeal of the statute authorizing their payment would be an impairment of the obligation of the contract, but the creditor would be without redress as against the state (*Hans* v. *Louisiana*). However, if the statute providing for the issuance of the bonds should also provide that such bonds and the interest coupons thereon were receivable in payment of state taxes, no subsequent statute could take away from the bonds or coupons their value or availability for that purpose; and the holder would be entitled to tender them in payment of his taxes, and the officers of the state would be bound to receive them, notwithstanding the repeal. And if a tax payer had tendered such bonds in payment of his taxes he might by proceedings restrain the officers of the state from any attempt to enforce such taxes against his property (*McGahey* v. *Virginia*). Likewise if a state charters a bank

with the provision that the notes of such bank shall be receivable in payment of debts to the state, it cannot afterwards by legislation deprive such notes of their value for such purpose (*Woodruff* v. *Trapnall*).

It is, however, with reference to private contracts that the constitutional guaranty is usually applied, and the prohibition is construed as preventing the state from passing any law impairing the force or obligation as between individuals of contracts already made. What is prohibited with reference to the impairment of private contracts is a retroactive law having the effect to render any valid contract previously made invalid, or to interfere with the assertion of substantial rights acquired under such contract, or to take away the substantial remedies for their enforcement.

265. Bankruptcy and Legal Tender Statutes.

The fact that states are prohibited from impairing contracts while no such provision is imposed on the federal government is significant when there is occasion to consider the validity of state statutes as to discharge in bankruptcy or payment in legal tender currency. It is a common provision in laws relating to bankruptcy that after the application of all his property to the payment of his debts the bankrupt is discharged from further liability (see above, § 101), but a state bankruptcy statute with these provisions could not be made applicable to debts already created by contract, for to do so would be to deprive the creditor of legal redress for the violation of such contract by one who should subsequently be declared a bankrupt and discharged (*Sturges* v. *Crowninshield* and *Ogden* v. *Saunders*). There is no such limitation on the federal government, and as Congress is expressly given authority to pass general laws on the subject of bankruptcy (Art. I, § 8, ¶ 4) a discharge under a federal bankruptcy law will relieve the bankrupt from further liability on debts created prior to the passage of such a statute as well as on those contracted subsequently. For similar reasons, although a state may perhaps

declare what currency shall be receivable as a legal tender in the absence of any federal statute on the subject, it cannot provide for the extinguishment of indebtedness by payment in some form of money not recognized by the law of the state as a legal tender when the contract was made; but Congress may pass legal tender statutes applicable to debts already contracted as well as those subsequently contracted (*Legal Tender Case*).

266. What Kind of Contracts are Protected from Impairment.

There is a legal distinction between the obligation of an executory contract, that is, one not yet performed or carried out on one side at least, and an executed contract, that is, one which has been fully carried out on both sides; and it has been held that the constitutional guaranty extends to contracts fully executed as well as to those which are in whole or in any part still executory. This conclusion was reached in a case in which a state attempted to impair the effect of a conveyance of land made by it to an individual, and it was held that as a conveyance was in this sense a contract, the title acquired thereby could not be impaired or affected by the state action (*Fletcher* v. *Peck*). This decision was made, however, before the adoption of Amendment XIV which prohibits any state from depriving any person of his property without due process of law. Under that amendment any attempt on the part of the state by statute to impair a property right would be invalid, and since the adoption of that amendment the decision that a state cannot impair the rights acquired under an executed contract is probably of little significance, for such rights would now be protected as property rights.

There is also a legal distinction between express and implied contracts, an express contract being one which is definitely entered into between parties intending to contract and bind themselves with reference to each other, while an implied contract is nothing more than an obligation arising by law from the acts of the parties without any expressed intention to as-

sume such obligation. An implied contract in the proper sense of the term is one the obligation of which a party is presumed to have assented to by reason of his conduct and his relations to the other party, although such assent is not indicated by any specific words or acts, and the constitutional guaranty applies to such implied contracts as fully and effectively as to expressed contracts. The term "implied contract" is sometimes, though inaccurately, used to cover any legal obligation, such as, for instance, the obligation to pay damages for a wrong done, although such wrong is not a violation of any duty specifically assumed but only of a duty generally imposed by law. The obligations arising from implied contracts when the term is used in the sense last above indicated are not obligations which are within the guaranty of the constitutional provision as to impairing the obligation of contracts (*Louisiana* v. *Mayor of New Orleans*).

267. Are Judicial Decisions Contracts?

The judgment of a court is sometimes spoken of as an implied contract and if the judgmeut is for the performance of a duty arising by contract no doubt its obligations are protected as against subsequent legislation by the constitutional provision. A judgment, however, may also be for the enforcement of an obligation not arising out of contract but by general law, and in such cases the judgment itself cannot be said to be a contract (*Morley* v. *Lake Shore, etc. R. Co.*). In applying the constitutional provision as to impairment of the obligation of contracts it will be safe, therefore, to say that so far as contract obligations have been embodied in a judgment they are still protected as against subsequent legislation, but that the effect and enforcement of a judgment rendered with reference to obligations not arising out of contract may be regulated by subsequent legislation.

A rule or principle of law established by judicial decision is for some purposes as much a part of the law as a rule established by statute; but the decision of a court is primarily the law only as between the parties to the case decided, and with

reference to the rights involved (see above, ch. xxiv) and while such a decision is a precedent, and will usually be followed in other cases in the same jurisdiction, it is not binding on the court in other cases in the same sense that a statute is binding upon the court. Therefore, the change of a rule of law established by a judicial decision is not the impairment of the obligation of a contract (*Mobile Trans. Co.* v. *Mobile*), although it may be that the parties making the contract have assumed that the first decision would be followed in other cases and therefore are prejudiced by the subsequent refusal of the court to follow the former decision.

268. Statutory Privileges or Exemptions.

A state may make contracts with individuals, and such contracts when made cannot be impaired, although as already indicated (see above, § 264) there may be no remedy afforded for the violation of the contract by the state. But a general statute does not constitute a contract, and one who relies upon such statute must do so with the understanding that the legislature which made it may repeal it at discretion. A state cannot contract away or impose limitations upon its general power to legislate for the public benefit. Thus if, while a state statute is in force providing that members of voluntary fire companies or militia organizations shall not be required to pay poll taxes, a person becomes a member of such organization, he cannot afterwards complain if the general statute in this respect is changed and the privilege is withdrawn. Statutory exemptions from taxation are therefore repealable (*Salt Company* v. *East Saginaw*).

Where an office is created by statute it may be abolished, and the incumbent thereby deprived of the privileges and emoluments of such office without the violation of any contract right. But the state cannot take away the right to recover compensation already earned by performing the duties of the office, for here the right is already accrued and has become complete as a property right of which the officer cannot be deprived without due process of law (*Fisk* v. *Jefferson Police Jury*).

269. Corporate Charters.

In the famous *Dartmouth College Case, Trustees of Dartmouth College* v. *Woodward*, it was held after elaborate discussion pro and con that a charter granted to a corporation by the state was a contract between the state and the corporation which could not be impaired or taken away by subsequent legislation. The significance of this decision, which has been constantly recognized and followed, is that under the doctrine thus announced the state has no power to revoke the privileges granted in a corporate charter nor substantially impair their value. Thus if a charter granted to a corporation provides that the corporate property shall be exempt from taxation, or fixes the rate or method of its taxation, the legislature cannot by subsequent statute make different provisions as to the taxation of such corporate property. But it will not be presumed that the legislature intended in granting a corporate charter to limit its general legislative power, and only in cases in which specific provision has been made in the charter will the corporation be exempted from general legislative control.

Moreover, the privileges granted by a corporate charter are no more sacred than other property or contract rights, and in the exercise of its police power the legislature may make regulations in the interest of the public health and welfare applicable to the business which the corporation is authorized to conduct as fully as to the business of an individual, the general police power being one which the legislature itself cannot impair nor grant away. Therefore, it has been held that statutes prohibiting lotteries (*Douglas* v. *Kentucky*, and *Stone* v. *Mississippi*) or regulating the manufacture and sale of intoxicating liquors (*Beer Company* v. *Massachusetts*) are applicable to corporations already created by the state for the purpose of conducting a lottery business or the business of manufacturing and selling liquor.

Moreover, the property of the corporation, including its franchise, which is regarded as a part of its property, may be taken like other property for public use upon compensation

being made, and therefore it is held that a corporation authorized to conduct a toll bridge or maintain a ferry and given the exclusive privilege of doing so within certain limits may have such right taken away from it for the public benefit in order to construct a free bridge or public ferry, just compensation being made to it for the privilege taken (*Central Bridge Corporation* v. *City of Lowell*).

But the exemption of corporate charters from legislative control has been thought to be against public interest, and in many states it is declared by constitutional or statutory provisions that all corporate charters are subject to repeal or modification by the legislature; and in such states charters granted after the enactment of such constitutional or statutory provisions are fully subject to legislative regulation (*Pennsylvania College Cases*). As to such charters, even conceding that they are contracts, the law authorizing their regulation or repeal, in existence at the time of the granting of the charter, constitutes a part of the contract, and the exercise of the power to revise or repeal is not an impairment of the obligation of the contract, but on the other hand is an exercise of a power expressly or impliedly reserved in the contract.

The doctrine that a corporate charter is a contract applies only to charters granted to private corporations. Public corporations, such as cities, school districts, and institutions created and controlled by the state in the exercise of its power to collect and expend money for public purposes, even though they may be created by charter, are not regarded as having any contract rights, and the charters or privileges granted to them may be taken away or modified or regulated as the legislature may see fit (*East Hartford* v. *Hartford Bridge Co.*).

CHAPTER XLVI.

VESTED RIGHTS AND RETROACTIVE LEGISLATION.

270. References.

J. Story, *Constitution*, §§ 1398, 1399; T. M. Cooley, *Constitutional Limitations*, ** 358–389; J. I. C. Hare, *Constitutional Law*, ch. xxxv; H. C. Black, *Constitutional Law*, §§ 215, 285–289; T. M. Cooley, *Constitutional Law* (3d ed.), 350–361; *Campbell* v. *Holt* (1885, 115 U. S. 620; McClain's Cases, 1044); *Louisiana* v. *Mayor of New Orleans* (1883, 109 U. S. 285; McClain's Cases, 1047); *Mitchell* v. *Clark* (1884, 110 U. S. 633; McClain's Cases, 1029; Thayer's Cases, 2402); *Bronson* v. *Kinzie* (1843, 1 Howard, 311; Thayer's Cases, 1645); *McCracken* v. *Hayward* (1844, 2 Howard, 608; 15 Curtis' Decisions, 228; McClain's Cases, 1026; Thayer's Cases, 1651); *Mattingly* v. *District of Columbia* (1878, 97 U. S. 687; McClain's Cases, 1043).

271. What Rights are Vested.

The term "vested rights" is not used in the federal constitution (*Campbell* v. *Holt*) nor generally in state constitutions; but it is frequently employed to describe those rights incident to property or arising out of contract which are deemed to be beyond impairment by subsequent legislation, under the usual clauses as to due process of law and the impairment of the obligations of contract. For instance, the right of a prospective heir to inherit property is subject to legislative control, so that the share which he shall take or the conditions under which the property shall pass to him may be changed by statute passed before the death of the person from whom he is to inherit; but after the right to inherit has thus become fixed by law, no statute can be passed, general or special, which takes away or restricts the interest which he has thus already acquired by inheritance. Likewise the share which a wife is entitled to have out of her husband's property in the event that she survives him may be diminished or increased at any time

before the husband's death; but after his death her right to dower, as it is called, is fixed, and any attempt by statute to limit it would be unconstitutional as impairing her property rights.

As stated in the preceding chapter, a judgment is not, strictly speaking, a contract, neither is it property. If it represents an interest in property or a right accruing under contract, it may be exempt from impairment by subsequent legislation; but it is not a property right so far as it represents merely a remedy which might or might not be afforded as the legislature in its discretion should determine. Thus if it is provided by statute that cities shall be liable for the value of property destroyed by city officers to prevent the spread of a fire, such a statute is to be considered as granting a privilege only, and not as recognizing a property right; and if the statute should be repealed, no person whose property was subsequently destroyed in this way would be entitled to any compensation. Therefore, a judgment rendered against a state for damages on account of such destruction does not represent a property right, and the legislature in its discretion may take away all remedy for the enforcement of such a judgment (*Louisiana* v. *Mayor of New Orleans*).

272. Retrospective Legislation.

The state and federal governments are prohibited from passing *ex post facto* laws. These prohibitions found in the state and federal constitutions are construed as referring only to statutes relating to the punishment of crime. (See above, § 59.) Retrospective legislation in general is not expressly prohibited, and unless it impairs vested rights of property or of contract it is not unconstitutional. Thus the legislature may by subsequent statute make valid the recording of a deed which by reason of some informality was not legally recorded; and as to any rights arising after the passing of the legalizing act, the defective record which is legalized will be just as effectual as though the recording had been in the first instance regular and lawful; but as

to any person who has acquired an interest in the property for a good consideration which would be impaired by treating the defective recording as lawful, the legalizing statute can have no effect.

In general the legislature may change or modify the rules of procedure without impairing vested rights. For instance, it may extend the period of limitation within which an action may be brought, and the person against whom it is brought cannot complain; or it may shorten the period, and the person entitled to bring the action cannot complain if a reasonable time has been left to him within which to bring an action for the assertion of his rights (*Mitchell* v. *Clark*). The general rule is this, that remedies for the protection of property rights or for enforcing the obligation of a contract may be modified, even as to property already existing or contracts already made, with this exception that the legislature cannot by such changes or modifications of statutory provisions take away all substantial remedy for the protection of property or the enforcement of contract obligations and leave the property owner or party to the contract without any substantial remedy (*Bronson* v. *Kinzie* and *McCracken* v. *Hayward*).

The right to enact retrospective statutes for the purpose of legalizing acts already done, which are for some technical defect in the method of procedure invalid, is especially recognized with reference to the organization and conduct of municipal corporations (*Mattingly* v. *District of Columbia*). Here no private rights are involved, and the legislature may legalize proceedings which are invalid if they might have been valid had they been duly authorized in the first place.

The retrospective legislation, therefore, which is unconstitutional is that which amounts to an *ex post facto* law or which impairs some vested property or contract right. Legislation is in its nature prospective and not retrospective, and even a so-called retrospective statute is in effect no more than a prospective statute, applicable to conditions which have arisen and are in existence when the statute becomes applicable.

APPENDIX OF DOCUMENTS.

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A.

EXTRACTS FROM MAGNA CHARTA (1215).

[The original charter was in Latin. The translation from which the following extracts are taken is that published in Sheldon Amos' *The English Constitution*, and reprinted in *Old South Leaflets*, No. 5, with explanatory notes. A translation is also given in Mabel Hill's *Liberty Documents, with Contemporary Exposition and Critical Comments drawn from various writers* (1901). Subsequent confirmations of the Charter are referred to in a note at the end of the extracts.]

JOHN, by the Grace of God, King of England, Lord of Ireland, Duke of Normandy, Aquitaine, and Count of Anjou, to his Archbishops, Bishops, Abbots, Earls, Barons, Justiciaries, Foresters, Sheriffs, Governors, Officers, and to all Bailiffs, and his faithful subjects, greeting. Know ye, that we, in the presence of God, and for the salvation of our soul, and the souls of all our ancestors and heirs, and unto the honour of God and the advancement of Holy Church, and amendment of our Realm, by advice of . . . and others, our liegemen, have, in the first place, granted to God, and by this our present Charter confirmed, for us and our heirs for ever:—

1. That the Church of England shall be free, and have her whole rights, and her liberties inviolable;

. . . . . .

2. We also have granted to all the freemen of our kingdom, for us and for our heirs for ever, all the underwritten liberties, to be had and holden by them and their heirs, of us and our heirs for ever:

. . . . . .

12. No scutage or aid shall be imposed in our kingdom, unless by the general council of our kingdom; except for ransoming our person, making our eldest son a knight, and once for marrying our eldest daughter; and for these there shall be paid no more than a

reasonable aid. In like manner it shall be concerning the aids of the City of London.

13. And the City of London shall have all its ancient liberties and free customs, as well by land as by water: furthermore, we will and grant that all other cities and boroughs, and towns and ports, shall have all their liberties and free customs.

14. And for holding the general council of the kingdom concerning the assessment of aids, except in the three cases aforesaid, and for the assessing of scutages, we shall cause to be summoned the archbishops, bishops, abbots, earls, and greater barons of the realm, singly by our letters. And furthermore, we shall cause to be summoned generally, by our sheriffs and bailiffs, all others who hold of us in chief, for a certain day, that is to say, forty days before their meeting at least, and to a certain place; and in all letters of such summons we will declare the cause of such summons. And summons being thus made, the business shall proceed on the day appointed, according to the advice of such as shall be present, although all that were summoned come not.

. . . . . .

17. Common pleas shall not follow our court, but shall be holden in some place certain.

18. Trials upon the Writs of Novel Disseisin,[1] and of Mort d'ancestor,[2] and of Darrein Presentment,[3] shall not be taken but in their proper counties, and after this manner: We, or if we should be out of the realm, our chief justiciary, will send two justiciaries through every county four times a year, who, with four knights of each county, chosen by the county, shall hold the said assizes[4] in the county, on the day, and at the place appointed.

19. And if any matters cannot be determined on the day appointed for holding the assizes in each county, so many of the knights and freeholders as have been at the assizes aforesaid shall stay to decide them as is necessary, according as there is more or less business.

20. A freeman shall not be amerced for a small offence, but only according to the degree of the offence; and for a great crime

[1] Dispossession.

[2] Death of the ancestor; that is, in cases of disputed succession to land.

[3] Last presentation to a benefice.

[4] The word Assize here means an assembly of knights or other substantial persons, held at a certain time and place where they sit with the Justice. "Assisa" or "Assize" is also taken for the court, place, or time at which the writs of Assize are taken.

according to the heinousness of it, saving to him his contenement;[1] and after the same manner a merchant, saving to him his merchandise. And a villein shall be amerced after the same manner, saving to him his wainage, if he falls under our mercy; and none of the aforesaid amerciaments shall be assessed but by the oath of honest men in the neighbourhood.

21. Earls and barons shall not be amerced but by their peers, and after the degree of the offence.

. . . . . .

24. No sheriff, constable, coroner, or other our bailiffs, shall hold "Pleas of the Crown."[2]

. . . . . .

28. No constable or bailiff of ours shall take corn or other chattels of any man unless he presently give him money for it, or hath respite of payment by the good-will of the seller.

. . . . . .

30. No sheriff or bailiff of ours, or any other, shall take horses or carts of any freeman for carriage, without the assent of the said freeman.

31. Neither shall we nor our bailiffs take any man's timber for our castles or other uses, unless by the consent of the owner of the timber.

. . . . . .

36. Nothing from henceforth shall be given or taken for a writ of inquisition of life or limb, but it shall be granted freely, and not denied.[3]

. . . . . .

39. No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.

40. We will sell to no man, we will not deny to any man, either justice or right.

41. All merchants shall have safe and secure conduct, to go out of, and to come into England, and to stay there and to pass as

[1] That by which a person subsists and which is essential to his rank in life.

[2] These are suits conducted in the name of the Crown against criminal offenders.

[3] This important writ, or "writ concerning hatred and malice," may have been the prototype of the writ of *Habeas Corpus*, and was granted for a similar purpose.

well by land as by water, for buying and selling by the ancient and allowed customs, without any unjust tolls; except in time of war, or when they are of any nation at war with us. And if there be found any such in our land, in the beginning of the war, they shall be attached, without damage to their bodies or goods, until it be known unto us, or our chief justiciary, how our merchants be treated in the nation at war with us; and if ours be safe there, the others shall be safe in our dominions.

42. It shall be lawful, for the time to come, for any one to go out of our kingdom, and return safely and securely by land or by water, saving his allegiance to us; unless in time of war, by some short space, for the common benefit of the realm, except prisoners and outlaws, according to the law of the land, and people in war with us, and merchants who shall be treated as is above mentioned.

. . . . . .

60. All the aforesaid customs and liberties, which we have granted to be holden in our kingdom, as much as it belongs to us, all people of our kingdom, as well clergy as laity, shall observe, as far as they are concerned, towards their dependents.

61. And whereas, for the honour of God and the amendment of our kingdom, and for the better quieting the discord that has arisen between us and our barons, we have granted all these things aforesaid; willing to render them firm and lasting, we do give and grant our subjects the underwritten security, namely that the barons may choose five-and-twenty barons of the kingdom, whom they think convenient; who shall take care, with all their might, to hold and observe, and cause to be observed, the peace and liberties we have granted them, and by this our present Charter confirmed in this manner; that is to say, that if we, our justiciary, our bailiffs, or any of our officers, shall in any circumstance have failed in the performance of them towards any person, or shall have broken through any of these articles of peace and security, and the offence be notified to four barons chosen out of the five-and-twenty before mentioned, the said four barons shall repair to us, or our justiciary, if we are out of the realm, and, laying open the grievance, shall petition to have it redressed without delay: and if it be not redressed by us, or if we should chance to be out of the realm, if it should not be redressed by our justiciary within forty days, reckoning from the time it has been notified to us, or to our justiciary (if we should be out of the realm), the four barons aforesaid shall lay the cause before the rest of the five-and-twenty barons; and the said five-and-twenty barons, together with the

community of the whole kingdom, shall distrain and distress us in all the ways in which they shall be able, by seizing our castles, lands, possessions, and in any other manner they can, till the grievance is redressed, according to their pleasure; saving harmless our own person, and the persons of our Queen and children; and when it is redressed, they shall behave to us as before. And any person whatsoever in the kingdom may swear that he will obey the orders of the five-and-twenty barons aforesaid in the execution of the premises, and will distress us, jointly with them, to the utmost of his power; and we give public and free liberty to any one that shall please to swear to this, and never will hinder any person from taking the same oath.

. . . . . .

63. Wherefore we will and firmly enjoin, that the Church of England be free, and that all men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, truly and peaceably, freely and quietly, fully and wholly to themselves and their heirs, of us and our heirs, in all things and places, for ever, as is aforesaid. It is also sworn, as well on our part as on the part of the barons, that all the things aforesaid shall be observed in good faith, and without evil subtilty. Given under our hand, in the presence of the witnesses above named, and many others, in the meadow called Runingmede, between Windsor and Staines, the 15th day of June, in the 17th year of our reign.

[Henry III. during the first year of his reign (1216), granted a Great Charter, essentially the same as Magna Charta, from which extracts have been given, but not including Articles 12, 14, and 61 of those above set out. Substantially the same charter was again granted in 1217, together with a Charter of the Forest, covering some of the provisions of Magna Charta which related to the forests. Again in 1225 a Great Charter of the same substance was granted by Henry III. and this last charter, together with the Charter of the Forest, was confirmed by him in 1237. His successor, Edward I. (1297), confirmed and re-issued the Great Charter of 1225 and the Charter of the Forest of 1217. As distinct from the Charter of the Forest, the Charter of 1225 was designated as the Charter of Liberties, and is the one published in the English Statutes at Large as the Great Charter. The history of the Charters is given by Professor Stubbs in his *Select Charters* (published in 1870), but usually he does not give translations. In Mabel Hill's *Liberty Documents* the translated texts of the Confirmation of the Charters of Edward I. and other illustrative documents are given, with explanations and comments.]

B.

THE BILL OF RIGHTS ENACTED BY THE ENGLISH PARLIAMENT, 1689.

[The following text is taken from the English *Statutes at Large*, Vol. 3 (Part I), 40–43, being 1 William and Mary, Sess. 2, C. II. It may be found also in Mabel Hill's *Liberty Documents*, with the text of the Act of Settlement and critical comments as to each.]

An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown.

Whereas the Lords Spiritual and Temporal, and Commons, assembled at Westminster, lawfully, fully, and freely representing all the estates of the people of this realm, did upon the thirteenth day of February in the year of our Lord one thousand six hundred eighty-eight [o. s.], present unto their Majesties, then called and known by the names and stile of William and Mary, Prince and Princess of Orange, being present in their proper persons, a certain declaration in writing, made by the said Lords and Commons, in the words following; viz.

"Whereas the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion, and the laws and liberties of this kingdom:

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament.

2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the said assumed power.

3. By issuing and causing to be executed a commission under the Great Seal for erecting a court called, The Court of Commissioners for Ecclesiastical Causes.

4. By levying money for and to the use of the Crown, by pre-

tence of prerogative, for other time, and in other manner, than the same was granted by Parliament.

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of Parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed, contrary to law.

7. By violating the freedom of election of members to serve in Parliament.

8. By prosecutions in the Court of King's Bench, for matters and causes cognizable only in Parliament; and by divers other arbitrary and illegal courses.

9. And whereas of late years, partial, corrupt, and unqualified persons, have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons, upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the said late King James the Second having abdicated the government, and the throne being thereby vacant, his Highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from Popery and arbitrary power) did (by the advice of the Lords Spiritual and Temporal, and divers principal persons of the Commons) cause letters to be written to the Lords Spiritual and Temporal; being Protestants, and other letters to the several counties, cities, universities, boroughs, and cinque-ports, for the choosing of such persons to represent them, as were of right to be sent to Parliament, to meet and sit at Westminster upon the two and twentieth day of January in this year one thousand six hundred eighty and eight, in order to such an establishment, as that their religion, laws, and liberties might not again be in danger of being subverted: Upon which letters, elections having been accordingly made,

And thereupon the said Lords Spiritual and Temporal, and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid; do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties, declare;

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the crown, by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law.

7. That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law.

8. That election of members of Parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliament ought to be held frequently.

And they do claim, demand, and insist upon all and singular the

premisses, as their undoubted rights and liberties; and that no declarations, judgements, doings, or proceedings, to the prejudice of the people in any of the said premisses, ought in any wise to be drawn hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of his Highness the Prince of Orange, as being the only means for obtaining a full redress and remedy therein.

Having therefore an entire confidence, That his said Highness the Prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion, rights, and liberties.

II. The said Lords Spiritual and Temporal, and Commons, assembled at Westminster, do resolve, That William and Mary Prince and Princess of Orange be, and be declared, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, to hold the crown and royal dignity of the said kingdoms and dominions to them the said Prince and Princess during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by the said Prince of Orange, in the names of the said Prince and Princess, during their joint lives; and after their deceases, the said crown and royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said Princess; and for default of such issue to the Princess Anne of Denmark, and the heirs of her body; and for default of such issue to the heirs of the body of the said Prince of Orange. And the Lords Spiritual and Temporal, and Commons, do pray the said Prince and Princess to accept the same accordingly.

III. And that the oaths hereafter mentioned be taken by all persons of whom the oaths of allegiance and supremacy might be required by law, instead of them; and that the said oaths of allegiance and supremacy be abrogated.

I, A. B., do sincerely promise and swear, That I will be faithful and bear true allegiance to their Majesties King William and Queen Mary:

So help me God.

I, A. B., do swear, That I do from my heart abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, That princes excommunicated or deprived by the Pope, or any authority of the See of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare, that no foreign prince, person, prelate, state, or potentate hath, or

ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm:

So help me God."

IV. Upon which their said Majesties did accept the crown and royal dignity of the kingdoms of England, France, and Ireland, and the dominions thereunto belonging, according to the resolution and desire of the said Lords and Commons contained in the said declaration.

V. And thereupon their Majesties were pleased, That the said Lords Spiritual and Temporal, and Commons, being the two Houses of Parliament, should continue to sit, and with their Majesties' royal concurrence make effectual provision for the settlement of the religion, laws and liberties of this kingdom, so that the same for the future might not be in danger again of being subverted; to which the said Lords Spiritual and Temporal, and Commons, did agree and proceed to act accordingly.

VI. Now in pursuance of the premisses, the said Lords Spiritual and Temporal, and Commons, in Parliament assembled, for the ratifying, confirming and establishing the said declaration, and the articles, clauses, matters, and things therein contained, by the force of a law made in due form by authority of Parliament, do pray that it may be declared and enacted, That all and singular the rights and liberties asserted and claimed in the said declaration, are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed, and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come.

VII. And the said Lords Spiritual and Temporal, and Commons, seriously considering how it hath pleased Almighty God, in his marvellous providence, and merciful goodness to this nation, to provide and preserve their said Majesties royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto Him from the bottom of their hearts their humblest thanks and praises, do truly, firmly, assuredly, and in the sincerity of their hearts think, and do hereby recognize, acknowledge, and declare, That King James the Second having abdicated the government, and their Majesties having accepted the crown and royal dignity as aforesaid, their said Majesties did become, were, are, and of right ought to be, by the laws of this realm, our Sovereign Liege Lord and Lady, King and Queen of England,

France, and Ireland, and the dominions thereunto belonging, in and to whose princely persons the royal state, crown, and dignity of the said realms, with all honours, stiles, titles, regalities, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining, are most fully, rightfully, and intirely invested and incorporated, united and annexed.

VIII. And for preventing all questions and divisions in this realm, by reason of any pretended titles to the crown, and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquillity, and safety of this nation doth, under God, wholly consist and depend, the said Lords Spiritual and Temporal, and Commons, do beseech their Majesties that it may be enacted, established and declared, That the crown and regal government of the said kingdoms and dominions, with all and singular the premisses thereunto belonging and appertaining, shall be and continue to their said Majesties, and the survivor of them, during their lives, and the life of the survivor of them: And that the intire, perfect, and full exercise of the regal power and government be only in, and executed by his Majesty, in the names of both their Majesties during their joint lives; and after their deceases the said crown and premisses shall be and remain to the heirs of the body of her Majesty; and for default of such issue, to her Royal Highness the Princess Anne of Denmark, and the heirs of her body; and for default of such issue, to the heirs of the body of his said Majesty: And thereunto the said Lords Spiritual and Temporal, and Commons, do, in the name of all the people aforesaid, most humbly and faithfully submit themselves, their heirs and posterities for ever; and do faithfully promise, That they will stand to, maintain, and defend their said Majesties, and also the limitation and succession of the Crown herein specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever, that shall attempt anything to the contrary.

IX. And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this Protestant kingdom to be governed by a Popish prince, or by any king or queen marrying a Papist; the said Lords Spiritual and Temporal, and Commons, do further pray that it may be enacted, That all and every person and persons that is, are, or shall be reconciled to, or shall hold communion with, the see or church of Rome, or shall profess the Popish religion, or shall marry a Papist, shall be excluded, and be for ever incapable to inherit, possess, or enjoy the crown and government of this realm, and Ireland, and the dominions

thereunto belonging, or any part of the same, or to have, use, or exercise any regal power, authority, or jurisdiction within the same; and in all and every such case or cases the people of these realms shall be, and are hereby absolved of their allegiance; and the said crown and government shall from time to time descend to, and be enjoyed by such person or persons, being Protestants, as should have inherited and enjoyed the same, in case the said person or persons so reconciled, holding communion, or professing, or marrying as aforesaid, were naturally dead.

X. And that every king and queen of this realm, who at any time hereafter shall come to and succeed in the Imperial crown of this kingdom, shall, on the first day of the meeting of the first Parliament, next after his or her coming to the crown, sitting in his or her throne in the House of Peers, in the presence of the Lords and Commons therein assembled, or at his or her coronation, before such person or persons who shall administer the coronation oath to him or her, at the time of his or her taking the said oath (which shall first happen), make, subscribe, and audibly repeat the declaration mentioned in the statute made in the thirtieth year of the reign of King Charles the Second, intituled, "An Act for the more effectual preserving the King's Person and Government, by disabling Papists from sitting in either House of Parliament." But if it shall happen, that such king or queen, upon his or her succession to the crown of this realm, shall be under the age of twelve years, then every such king or queen shall make, subscribe, and audibly repeat the said declaration at his or her coronation, or the first day of the meeting of the first Parliament as aforesaid, which shall first happen after such king or queen shall have attained the said age of twelve years.

XI. All which their Majesties are contented and pleased shall be declared, enacted, and established by authority of this present Parliament, and shall stand, remain, and be the law of this realm for ever; and the same are by their said Majesties, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled, and by the authority of the same, declared, enacted, and established accordingly.

XII. And be it further declared and enacted by the authority aforesaid, That from and after this present session of Parliament, no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of Parliament.

XIII. Provided that no charter, or grant, or pardon, granted before the three and twentieth day of October in the year of our Lord one thousand six hundred eighty-nine, shall be any ways impeached or invalidated by this act, but that the same shall be and remain of the same force and effect in law, and no other, than as if this act had never been made.

C.

THE VIRGINIA BILL OF RIGHTS (1776).

[Virginia seems to have been the first of the States to adopt a formal and complete constitution (June, 1776) in response to the recommendation made by the Continental Congress in May of that year, that the different Colonies proceed to provide for governments of their own. New Hampshire had already (in January preceding) adopted a so-called constitution, but it was rather a declaration of principles than a formal instrument of government. In Virginia the Bill of Rights and the constitution containing a plan of government were adopted as separate instruments, and this was done also in Maryland, Delaware, and North Carolina. Pennsylvania was the first of the States to embody Preamble Bill, or Declaration of Rights, and Constitution, or Frame of Government, in one instrument (September, 1776). Massachusetts was the last of the original States (save Connecticut and Rhode Island, which continued government under their charters) to adopt a constitution (1780), and it followed the Pennsylvania plan of a combined instrument; but it was the first to provide for submission of the constitution to the people for ratification. The first constitution thus submitted was rejected (1779). A full account of methods of adoption or ratification of the various State constitutions and the Federal Constitution is given in Jameson's *Constitutional Conventions*. The following text of the Virginia Bill of Rights, which will serve as an example of such instruments, whether adopted separately or embodied as a part of a complete Constitution, is taken from Hening, *Statutes at Large of Virginia*, IX, 109–112. A slightly different text is in Mabel Hill's *Liberty Documents*, pp. 166–169.]

A DECLARATION OF RIGHTS made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them, and their posterity, as the basis and foundation of government.

SECTION 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

SEC. 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

SEC. 3. That government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration; and that whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

SEC. 4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.

SEC. 5. That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

SEC. 6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for publick uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the publick good.

SEC. 7. That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

SEC. 8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that

no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

SEC. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

SEC. 10. That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

SEC. 11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

SEC. 12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments.

SEC. 13. That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

SEC. 14. That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

SEC. 15. That no free government, or the blessing of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

SEC. 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.

D.

THE DECLARATION OF INDEPENDENCE.

In Congress, July 4, 1776.

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA.

[The following text is from a facsimile of the original manuscript.]

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. —— We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to

provide new Guards for their future security. Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world. —— He has refused his Assent to Laws, the most wholesome and necessary for the public good. —— He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them. —— He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only. —— He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures. —— He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people. —— He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within. —— He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands. —— He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers. —— He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries. —— He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our People, and eat out their substance. —— He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. —— He has affected to render the Military independent of and superior to the Civil power. —— He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation: —— For quartering large bodies of armed troops among us: —— For protecting them, by a mock Trial,

from punishment for any Murders which they should commit on the Inhabitants of these States: —— For cutting off our Trade with all parts of the world: —— For imposing Taxes on us without our Consent: —— For depriving us in many cases, of the benefits of Trial by Jury: —— For transporting us beyond Seas to be tried for pretended offences: —— For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies: —— For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments: —— For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever. —— He has abdicated Government here, by declaring us out of his Protection and waging War against us. —— He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people. —— He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation. —— He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands. —— He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions. In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people. Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity,

which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends. ——

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. —— And for the support of this Declaration, with a firm reliance on the Protection of divine providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

[Here follow the signatures.]

E.

ARTICLES OF CONFEDERATION (1781).

[The following is the official engrossed text as printed in *American History Leaflets*, No. 20, from the original parchment rolls.]

To all to Whom these Presents shall come, we the under signed Delegates of the States affixed to our Names send greeting. Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of Our Lord One thousand seven Hundred and Seventy seven, and in the second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia in the Words following, viz. "ARTICLES OF CONFEDERATION and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

ARTICLE I. THE Stile of this confederacy shall be "THE UNITED STATES OF AMERICA."

ARTICLE II. EACH state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

ARTICLE III. THE said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. THE better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the Owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.

IF any Person be guilty of, or charged with treason, felony, or other high misdemeanor in any state, shall flee from Justice, and be found in any of the united states, he shall upon demand of the Governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

FULL faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.

ARTICLE V. FOR the more convenient management of the general interest of the united states, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state, to recal its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the Year.

NO state shall be represented in Congress by less than two, nor by more than seven Members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the united states, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

EACH state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

IN determining questions in the united states, in Congress assembled, each state shall have one vote.

FREEDOM of speech and debate in congress shall not be impeached or questioned in any Court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.

ARTICLE VI. NO state without the Consent of the united states in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King prince or state; nor shall any person holding any office of profit or trust under the united states, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the united states in congress assembled, or any of them, grant any title of nobility.

NO two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue.

NO state shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the united states in congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by congress, to the courts of France and Spain.

NO vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the united states in congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

NO state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the united states in congress assembled can be consulted: nor

shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the united states in congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the united states in congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the united states in congress assembled shall determine otherwise.

Article VII. When land-forces are raised by any state for the common defence, all officers of or under the rank of colonel, shall be appointed by the legislature of each state respectively by whom such forces shall be raised, or in such manner as such state shall direct, and all vacancies shall be filled up by the state which first made the appointment.

Article VIII. All charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to or surveyed for any Person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states in congress assembled, shall from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled.

Article IX. The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article — of sending and receiving ambassadors — entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever — of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the united states shall be di-

vided or appropriated — of granting letters of marque and reprisal in times of peace — appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of congress shall be appointed a judge of any of the said courts.

THE united states in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. WHENEVER the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, congress shall name three persons out of each of the united states, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as congress shall direct, shall in the presence of congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without shewing reasons, which congress shall judge sufficient, or being present shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to congress, and lodged among the acts of congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be

administered by one of the judges of the supreme or superior court of the state, where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no state shall be deprived of territory for the benefit of the united states.

ALL controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdictions as they may respect such lands, and the states which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the congress of the united states, be finally determined as near asmaybe in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

THE united states in congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states — fixing the standard of weights and measures throughout the United States — regulating the trade and manageing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated — establishing and regulating post-offices from one state to another, throughout all the united states, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expences of the said office — appointing all officers of the land forces, in the service of the united states, excepting regimental officers — appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the united states — making rules for the government and regulation of the said land and naval forces, and directing their operations.

THE united states in congress assembled shall have authority to appoint a committee, to sit in the recess of congress, to be denominated "A Committee of the States," and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for manageing the general affairs of the united states under their direction — to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of Money to be raised for the service of the united states, and to appropriate and apply the same for defraying the public expences — to borrow money, or emit bills on the credit of the united states, transmitting every half year

to the respective states an account of the sums of money so borrowed or emitted, — to build and equip a navy — to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expence of the united states; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the united states in congress assembled: But if the united states in congress assembled shall, on consideration of circumstances judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. AND THE officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the united states in congress assembled.

THE united states in congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expences necessary for the defence and welfare of the united states, or any of them, nor emit bills, nor borrow money on the credit of the united states, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine states assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the united states in congress assembled.

THE congress of the united states shall have power to adjourn to any time within the year, and to any place within the united states, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the Journal, when it is desired by any delegate;

and the delegates of a state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states.

ARTICLE X. THE committee of the states, or any nine of them, shall be authorized to execute, in the recess of congress, such of the powers of congress as the united states in congress assembled, by the consent of nine states, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine states in the congress of the united states assembled is requisite.

ARTICLE XI. CANADA acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages of this union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

ARTICLE XII. ALL bills of credit emitted, monies borrowed and debts contracted by, or under the authority of congress, before the assembling of the united states, in pursuance of the present confederation, shall be deemed and considered as a charge against the united states, for payment and satisfaction whereof the said united states, and the public faith are hereby solemnly pledged.

ARTICLE XIII. EVERY state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them. AND the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.

And Whereas it hath pleased the Great GOVERNOR of the World to incline the hearts of the legislatures we respectively represent in congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. **Know ye** that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify

and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: AND we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the united states in congress assembled, on all questions, which by the said confederation are submitted to them. AND that the articles thereof shall be inviolably observed by the states we respectively represent, and that the union shall be perpetual. IN WITNESS whereof we have hereunto set our hands in Congress. DONE at Philadelphia in the state of Pennsylvania the ninth Day of July in the Year of our Lord one Thousand seven Hundred and Seventy eight, and in the third year of the independence of America.

[Signatures.]

F.

THE NORTHWEST ORDINANCE (1787).

[While the Convention which framed the Federal Constitution was sitting in Philadelphia, the Continental Congress sitting in New York July 13, 1787, adopted the following Ordinance, reported by a committee of which Nathan Dane, of Massachusetts, was chairman. The territory described was acquired by cession from Virginia in 1784 and included the territory of the present States of Ohio, Indiana, Illinois, Michigan, and Wisconsin, and a part of that of Minnesota. The text is taken from *Journals of Congress* (XCL. of 1787), XII. 85–93.]

AN ORDINANCE for the Government of the Territory of the United States North-West of the River Ohio.

Be it ordained by the United States in Congress assembled, That the said territory, for the purposes of temporary government, be one district; subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Be it ordained by the authority aforesaid, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among their children, and the descendants of a deceased child in equal parts; the descendants of a deceased child or grandchild, to take the share of their deceased parent in equal parts among them: And where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and, among collaterals, the children of a deceased brother or sister of the intestate, shall have in equal parts among them their deceased parents share; and there shall in no case be a distinction between kindred of the whole and half-blood, saving in all cases to the widow of the intestate, her third part of the real estate for life, and one third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district.—And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in

writing, signed and sealed by him or her, in whom the estate may be (being of full age) and attested by three witnesses; — and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose; and personal property may be transferred by delivery; saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincent's, and the neighbouring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Be it ordained by the authority aforesaid, That there shall be appointed from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress, he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

There shall be appointed, from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office; it shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department; and transmit authentic copies of such acts and proceedings. every six months, to the secretary of Congress: There shall also be appointed a court to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress, from time to time; which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

The governor, for the time being, shall be commander in chief of the militia, appoint and commission all officers in the same, below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same: After the general assembly shall be organized, the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof — and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

So soon as there shall be five thousand free male inhabitante of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: provided that for every five hundred free male inhabitants, there shall be one representative, and so on progressively with the number of free male inhabitants shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: provided that no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee simple, two hundred acres of land within the same: provided also, that a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years residence in the district shall be necessary to qualify a man as an elector of a representative.

The representatives thus elected, shall serve for the term of two years; and in case of the death of a representative, or removal

from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum: and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and, when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress; five of whom Congress shall appoint and commission to serve as aforesaid; and, whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress; one of whom Congress shall appoint and commission for the residue of the term. And every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress; five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives, shall have authority to make laws in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue and dissolve the general assembly, when in his opinion it shall be expedient.

The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the president of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting during this temporary government.

And, for extending the fundamental principles of civil and

religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory: to provide also for the establishment of states, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original states, at as early periods as may be consistent with the general interest:

It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as articles of compact between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent, to wit:

Article the first. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

Article the second. The inhabitants of the said territory, shall always be entitled to the benefits of the writ of habeas corpus. and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide, and without fraud previously formed.

Article the third. Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs

being done to them, and for preserving peace and friendship with them.

Article the fourth. The said territory, and the states which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of confederation, and to such alterations therein, as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory, shall be subject to pay a part of the federal debts, contracted or to be contracted, and a proportional part of the expences of government, to be apportioned on them by Congress, according to the same common rule and measure, by which apportionments thereof shall be made on the other states; and the taxes for paying their proportion, shall be laid and levied by the authority and direction of the legislatures of the district or districts or new states, as in the original states, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts or new states, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States; and, in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Article the fifth. There shall be formed in the said territory, not less than three, nor more than five states; and the boundaries of the states, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to wit: The western state in the said territory, shall be bounded by the Mississippi, the Ohio and Wabash rivers; a direct line drawn from the Wabash and Post Vincents, due north to the territorial line between the United States and Canada; and, by the said territorial line to the lake of the Woods and Mississippi. The middle state shall be bounded by the said direct line, the Wabash from Post Vincents, to the Ohio; by the Ohio, by a direct line drawn due north from the mouth of the Great Miami, to the said territorial line, and by the said territorial line. The eastern state shall be bounded by the last mentioned direct line, the Ohio, Penn-

sylvania, and the said territorial line: Provided however, and it is further understood and declared, that the boundaries of these three states shall be subject so far to be altered, that if Congress shall hereafter find it expedient, they shall have authority to form one or two states in that part of the said territory which lies north of an east and west line drawn through the Southerly bend or extreme of lake Michigan. And whenever any of the said states, shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states, in all respects whatever; and shall be at liberty to form a permanent constitution and state government: provided the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the state than sixty thousand.

Article the sixth. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: provided always, that any person escaping into the same, from whom labour or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labour or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed and declared null and void.

Done &c.

G.

CONSTITUTION OF THE UNITED STATES OF AMERICA* (1789) †.

[The following text of the Federal Constitution, including the Amendments thereto, is reprinted with the accompanying note from *American History Leaflets*, No. 8, in preparing which the original parchment rolls were compared.]

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. [§ 1.] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.‡

[§ 2.] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[§ 3.] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, [which shall be determined

* There is no title in the original manuscript.

† The ninth state ratified June, 21, 1788. The government provided for went into operation March 4, 1789.

‡ Modified by Fourteenth Amendment.

by adding to the whole Number of free Persons,] including those bound to Service for a Term of Years, and excluding Indians not taxed, [three fifths of all other Persons].* The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; [and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.] †

[§ 4.] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[§ 5.] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. [§ 1.] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[§ 2.] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[§ 3.] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[§ 4.] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

* Superseded by Fourteenth Amendment.

† Temporary clause.

[§ 5.] The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

[§ 6.] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[§ 7.] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. [§ 1.] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[§ 2.] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. [§ 1.] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[§ 2.] Each House may determine the Rules of its Proceedings, punish its Members for Disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

[§ 3.] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[§ 4.] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. [§ 1.] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law,

and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[§ 2.] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. [§ 1.] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[§ 2.] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[§ 3.] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power [§ 1.] To lay 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 and Excises shall be uniform throughout the United States;

[§ 2.] To borrow Money on the credit of the United States;

[§ 3.] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[§ 4.] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[§ 5.] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[§ 6.] To provide for the Punishment of counterfeiting the Securities and current coin of the United States;

[§ 7.] To establish Post Offices and post Roads;

[§ 8.] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[§ 9.] To constitute Tribunals inferior to the supreme Court;

[§ 10.] To define and Punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

[§ 11.] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[§ 12.] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[§ 13.] To provide and maintain a Navy;

[§ 14.] To make Rules for the Government and Regulation of the land and naval Forces;

[§ 15.] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[§ 16.] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[§ 17.] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals. dock-Yards, and other needful Buildings; — And

[§ 18.] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. [§ 1.] [The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.]*

[§ 2.] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[§ 3.] No Bill of Attainder or ex post facto Law shall be passed.†

[§ 4.] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[§ 5.] No Tax or Duty shall be laid on Articles exported from any State.

[§ 6.] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[§ 7.] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[§ 8.] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.‡

SECTION 10. [§ 1.] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[§ 2.] No State shall, without the Consent of the Congress, lay

* Temporary provision.

† Extended by the first eight Amendments.

‡ Extended by Ninth and Tenth Amendments.

any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws : and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States ; and all such Laws shall be subject to the Revision and Controul of the Congress.

[§ 3.] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.*

ARTICLE. II.

Section. 1. [§ 1.] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

[§ 2.] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress : but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed ; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State hav-

* Extended by Thirteenth, Fourteenth and Fifteenth Amendments.

ing one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.] *

[§ 3.] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[§ 4.] No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[§ 5.] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[§ 6.] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[§ 7.] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION. 2. [§ 1.] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall

* Superseded by Twelfth Amendment.

have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[§ 2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[§ 3.] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. [§ 1.] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other

public Ministers and Consuls ; — to all Cases of admiralty and maritime Jurisdiction ; — to Controversies to which the United States shall be a Party ; — to Controversies between two or more States ; — between a State and Citizens of another State ; * — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[§ 2.] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[§ 3.] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. [§ 1.] Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[§ 2.] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. [§ 1.] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. †

[§ 2.] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another

* Limited by Eleventh Amendment.

† Extended by Fourteenth Amendment.

State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[§ 3.] [No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.] *

SECTION. 3. [§ 1.] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[§ 2.] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided [that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and] † that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

* Limited by Thirteenth Amendment.

† Temporary provision.

ARTICLE. VI.

[§ 1.] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation. *

[§ 2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[§ 3.] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

[Note of the draughtsman as to interlineations in the text of the manuscript.]

Attest

WILLIAM JACKSON
Secretary.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth **In Witness** whereof We have hereunto subscribed our names. †

GO WASHINGTON —
Presidt and deputy from Virginia.

[Signatures.]

AMENDMENTS.

ARTICLES in addition to and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution. ‡

* Extended by Fourteenth Amendment, Section 4.

† These signatures have no other legal force than that of attestation.

‡ This heading appears only in the joint resolution submitting the first ten amendments.

[ARTICLE I.]*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE VI.]

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and dis-

* In the original manuscripts the first twelve amendments have no numbers

trict wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[ARTICLE IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.*

[ARTICLE XI.]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.†

[ARTICLE XII.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in dis-

* Amendments First to Tenth appear to have been in force from Nov. 3, 1791.

† Proclaimed to be in force Jan. 8, 1798.

tinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States. *

ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. SECTION 2. Congress shall have power to enforce this article by appropriate legislation.†

* Proclaimed to be in force Sept. 25, 1804.

† Proclaimed to be in force Dec. 18, 1865. Bears the unnecessary approval of the President.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.*

ARTICLE XV.†

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. —

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation. —‡

* Proclaimed to be in force July 28, 1868.

† Amendments Thirteenth, Fourteenth and Fifteenth are numbered in the original manuscripts.

‡ Proclaimed to be in force Mar. 30, 1870.

INDEX.

INDEX.

[The names of cases are in italics. The citation for any case may be found at the beginning of the chapter in which the case is referred to.]