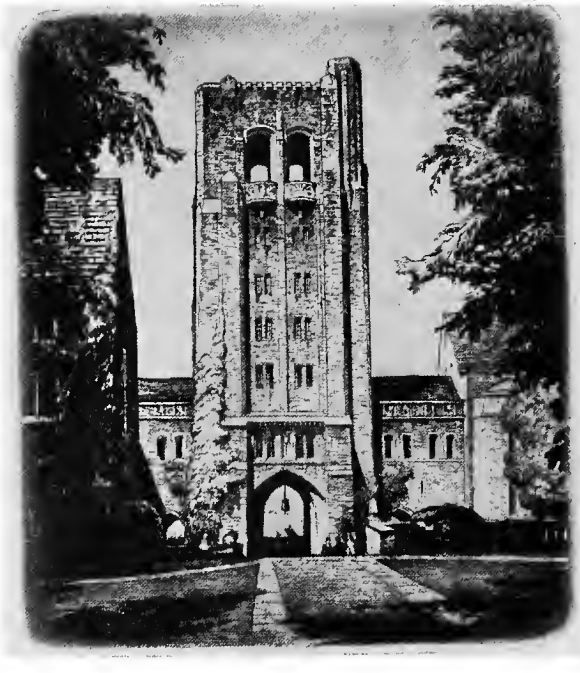

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A TREATISE

ON THE

RULES WHICH GOVERN

THE

INTERPRETATION AND APPLICATION

OF

STATUTORY

AND

CONSTITUTIONAL LAW

BY

THEODORE SEDGWICK,

AUTHOR OF A TREATISE ON THE MEASURE OF DAMAGES.

"*Maximum interpretationis juridicæ mysterium.*"

Heinecc. de Orig. Test. Fact. et Ex. XII. § ix.

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TO THE

MEMORY OF MY WIFE

THIS VOLUME

IS

DEDICATED.

PREFACE.

A VERY slight glance at the field of jurisprudence is sufficient to convince us of the extent to which written law is making inroads upon the field of unwritten, customary, or common law.

One branch after another of the great topics of our science, become subjects of legislation. Statutes, codes, and constitutions succeed each other, and in our time, with greatly-increased rapidity, threaten finally to absorb every topic of jurisprudence.

This process commenced long since, and is now going on, on the continent of Europe, in England, and this country, with equal certainty if not with equal rapidity. Here particularly, in the absence of the State machinery and the social and religious organizations of the old world, the very essence of our system may be said to be the government of Written Law.

This volume then, is an attempt to state the rules which control the interpretation and application of written law as it exists in the shape of Statutes and Constitutions; and if it succeed at all in giving more certainty and facility to the administration of this portion of the great science of justice, my object will have been attained.

It is my duty to refer to those who have preceded me in this path. There are various works on the subject of constitutional law, among which the most prominent is that of Mr. Justice Story, confined, however, to the Constitution of the United States. Mr. Smith's treatise, one of much labor and research, treats of statutory and constitutional law generally, and is the only one we have which can be properly said to treat of the same subjects as this volume. The well-known work of Sir Fortunatus Dwarris, in the second edition of which he has been assisted by Mr. Amyot, is confined to Statutes. It is a work of great soundness as well as of great originality of thought; and my frequent references show at once the extent of my obligations to it, and my profound sense of its ability and value.

In taking leave of a task which has beguiled many hours of their weariness—which has furnished a partial solace for the sadness of many others, it behooves me to say that no one can be more aware than myself of the many imperfections of this volume: just in proportion to my conviction of the importance and

magnitude of the subject, is my sense of the deficiencies in my treatment of it.

It is proper to add that I have intended carefully to avoid the discussion of topics of a political nature, or the expression of opinions having, directly or indirectly, any political bearing. To the best of my ability I have made the treatise one purely of a legal character.

I submit the work to the judgment of the learned and able body of men to whose studies it chiefly appertains,—who are most able to discern and detect its errors and defects, and who at the same time will most readily recognize any claim of merit or utility that it may possess.

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CHAPTER I.

The sources of Municipal or Civil Law usually two-fold: Usage, or Common Law; and Statute Law—In America a third superadded: Constitutional Law—The two last written; of these, the Interpretation and Construction belong to the Judiciary—The object of this volume, to define the limits of legislative and judicial power; and to give the rules which govern the application of Constitutional and Statute, in other words, of written Law.

MAN, in whatever situation he may be placed, finds himself under the control of rules of action emanating from an authority to which he is compelled to bow,—in other words, of LAW. The moment that he comes into existence, he is the subject of the will of God, as declared in what we term the laws of nature. As soon as he enters into society, he finds himself controlled by the moral law (more or less perfect and active according to the condition of the community to which he belongs, and the degree in which it has accepted the divine precepts of our religion), and also by the municipal or civil law.* When States come to be organized as separate and independent governments, and their relations grow frequent and complicated, there is superadded the law of nations. These codes are variously enforced, but each has its own peculiar

* Blackstone, in his introductory lecture, has referred to the inappropriateness of the phrase *municipal* law. "I call it the municipal law," he says, "in compliance with common speech, for though strictly that expression denotes the particular customs of one single municipal or free town, yet it may, with sufficient propriety, be applied to any one state or nation which is governed by the same laws or customs."

sanction. They are curiously interwoven together, and in their combination tend to produce that progress and improvement of the race which we believe Christianity teaches, and to which we hope civilization leads.

Thus, the law of nature, the moral law, the municipal law, and the law of nations, form a system of restraints before which the most consummate genius, the most vehement will, the angriest passions, and the fiercest desires, are compelled to bend, and the pressure of which the individual is forced to acknowledge his incapacity to resist.

Of these various systems of rules for the government and control of men, the municipal or civil law asserts its claim emphatically as a distinct branch of knowledge, and is that to which we refer when we speak of the profession of the law, the study of the law, the science of the law.

Municipal law is defined by the great English commentator, as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." Our American Kent describes it "as a rule of civil conduct prescribed by the supreme power of a state."*

* Kent, Com. i. 446. *Legis virtus hæc est, imperare, vetare, permittere, punire. L. 7 Ff. de Leg.* There has been much scholastic discussion as to the proper definition of the term Law; and when we come to the subject of the boundaries of legislative and judicial power, we shall find that in practice it is not very easy to give the phrase an accurate or fitting interpretation. Cicero, XI. Philip. 12, and after him Bracton, Coke, and Blackstone (as in the text), define it to be a holy sanction commanding whatever is honest, and forbidding the contrary. *Sanctio justa, jubens honesta et prohibens contraria.*—Black. Com., Lib. i. ch. i. Blackstone's citation is incorrect, the precise words are, *Est enim lex nihil aliud nisi recta et a numine deorum tracta ratio, imperans honesta, prohibens contraria.*

Bentham, in his Fragment on Government, attacks Blackstone's doctrines

Both of these definitions are perhaps obnoxious to criticism. Either of them sufficiently answers our present purpose.

Before entering on the precise subject of this treatise, it is necessary to have an accurate idea of the various elements constituting that system of municipal law which controls the conduct of the active millions who compose our race.

The two great sources of municipal or civil law, in all countries of which we have the means of tracing the jurisprudence, are unwritten law or usage, and written or statute law; in other words, custom and positive enactment.

The first general rules of action in all young societies before the working of any central authority is firmly established or extensively recognized, must necessarily result from the adoption of customs or usages recommended by their practical utility, the growth of religious zeal, or local necessity, and established as law

on the subject of the nature of law in general, with great severity. Hobbes defines a law to be "the command of him or them that have sovereign power, given to those that be his or their subjects, fully and plainly declaring what any one of them may do and what they must forbear to do."—*Dialogue between a Lawyer and a Philosopher.* Montesquieu says, (*Esprit des Lois.* Lib. i. ch. i.) "*Les lois, dans la signification la plus étendue, sont les rapports necessaires qui dérivent de la nature des choses; et dans ce sens tous les êtres ont leurs lois.*" Of which Toullier says, (*Droit Civil Francais*, vol. i. p. 3) "*On a observé, avec raison, que cette definition etait plus obscure que la chose à definir.*" See Grotius *de Jure Belli et Pacis*, liv. i. ch. i. as to the distinction between *Jus* et *Lex;* and see also Fortescue *de Laudibus Legum Angliæ.* Amos edition, p. 8, in notes.

As to the origin of the term, Cicero says that *lex* is derived from *legendo*, or *choosing:* "*Ego nostro (nomine) a legendo—nos delectus vim in lege ponimus et proprium legis est.*" De Leg i. 6. "*Quoniam in lege inest vis delectus, jubet enim quæ honesta sunt, prohibet contraria,*" says Vinnius, Comm. Just. Inst., Lib. i. Tit. ii. § 4. Turnebus says (Cicero, Olivet edition, vol. iii. p. 160, note) that it is called Lex, *quod legenda cognoscenda populo proponeretur.*

by gradual and general recognition. Every system of jurisprudence declares this truth. The civil law and its great expounders are all full on the binding force of custom. "*Consuetudinis ususque longævi*," says the Code, "*non vilis auctoritas est.** And again :† *Inveterata consuetudo pro lege non immerito custoditur, et hoc est jus, quod dicitur moribus constitutum. Nam cum ipsæ leges nulla alia ex causa nos teneant, quam quod judicio populi receptæ sunt ; merito et ea quæ sine ullo scripto populus probavit, tenebunt omnes. Nam quid interest suffragio populus voluntatem suam declaret, an rebus ipsis et factis? Quare rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris sed etiam tacito consensu omnium per desuetudinem abrogentur.*‡

"Custom," says Voet, "is in many respects like statutory enactment. It is an unwritten law gradually introduced by the usages of those who adopt it, and thus acquiring the force of enactment." *Legi in multis similis est consuetudo ; jus non scriptum, moribus utentium paullatim introductum, legis habens vigorem.*"§

Forti states well and simply, the manner in which custom establishes its empire. "In the infancy of human society, as writing is little used, and affairs are not yet complicated, differences are adjusted rather according to notions of natural right than statutory enactment. The example of one generation becomes a law for their descendants, and the rules found in the past, furnish a guide for the present and the

* Code, Lib. viii. Tit. 53, Quæ sit long. consuet.

† 32 § Ff. Lib. i. Tit. 3, de Legibus.

‡ "*Consuetudo Regni est communis lex.*"—Anon. Cro. Eliz. 10.

§ Voet, Comm. Lib. i., Tit. iii., § 27, de legibus.

future. Thus is introduced a kind of law that is called custom." *

So France, before the Revolution of 1789, was to no small extent governed by the unwritten customs (*usages*) of her different provinces.†

To this source is also chiefly to be traced the great body of the original English law, "that ancient collection of unwritten maxims and customs called the COMMON LAW"‡ which still exercises such extensive

* "Nell infanzia delle humane societa, perche non vi e uso di lettere ne gran complicazione d'affari le discordie tra gli uomini associati ad uno stesso vivere civile si compongono piutosto secondo la ragion naturale che per autorita di leggi autenticate della scrittura. Poi l'esempio dei maggiori divien legge pei nepoti, e le regole che furon formate pel passato danno norma al presente ed al futuro. In questa guisa s'introduce una specie di gius che dicesi, di consuetudine."—Forti, *Instituzioni Civile*, Lib. i. Cap. ii. § 11, p. 19.

Franceso Forti, of Pescia, a nephew of Sismondi the historian, born in 1806, died in 1838. He is, in the domain of the law, one of the most eminent instances of the inextinguishable genius of his unhappy country.

† Toullier, Tit. Prel., Sect. xi., § 188.

"L'étude du Droit Francois," says Camus, "comprend la connoissance des coutumes, des ordonnances, et de la jurisprudence etablie par les arrêts * * Chaque province a sa coutume particuliere quelquefois diamêtralement opposée à celle d'une province voisine. * * Les coutumes sont plus generales que les ordonnances dans ce sens que leurs dispositions embrassent plus de questions de notre droit. * * C'est l'etude des coutumes qui doit être la premiere, par la raison qui j'ai touchée qu'elles s'appliquent a un plus grand nombre de questions."

These provincial customs, or common law, formed the subject of separate treatises written by the most eminent of the French legists. Thus, the customary law of Normandy was discussed by Basnage; of Orleans, by Pothier; of Paris, by Dumoulin.—Camus, *Etude du Droit Francais*, 4th Letter, pp. 81, 110.

‡ Blackstone, Introd. Sect. 1.

"*Consuetudo*," says Coke, "is one of the main triangles of the laws of England, those laws being divided into common law, statute law, and custom."—Coke, *Inst.* 110, *b*.—"particular customs. I say, particular customs, for if it be the general custom of the realm, it is part of the common law."—Coke, *Inst.* 115, *b*.

sway in both England and America, and on which we daily see engrafted regulations owing their origin to the same principle.* *Sine scripto jus venit, quod usus approbavit, nam diuturni mores consensu utentium comprobati legem imitantur.*†

As, however, societies advance, and become consolidated or crystallized into regular governments, they do not wait for the slow process of custom to establish general rules. In order to create more certain and rapid uniformity, they resort to positive enactments, to statute laws. And these enactments, in many cases, more or less supplant the usages which precede them. Such is the gradual tendency of civilization.

So, the first demand of that extraordinary people which has been to the world the great exemplar of organization and administration, of order and discipline,—its first serious internal struggle, was for a body of written law to replace the vague and undefined customs and usages by which they had till then been governed. This was the origin of the law of the Twelve Tables, which united the functions of a constitution and a code, and was for nearly a thousand years, until the time of Justinian, the basis of the jurisprudence of Rome.‡

* Among the most marked instances of the constant tendency of custom to become law, may be noticed the American Marine Insurance doctrine of one third new for old, entirely the creature of a usage which has gradually grown up with the last half century.

† Inst. Lib. i. Tit. 2, § 9.

‡ "The most striking point," says Arnold (Hist. of Rome, ch. vi. p. 70), "in the character of the Romans, and that which has so permanently influenced the condition of mankind, was their love of institutions and of order; their reverence for law, their habit of considering the individual as living only for that society of which he was a member. This character, the opposite to that of the barbarian and the savage, belongs apparently to that

So, we see in France, the old multifarious customs which, before the Revolution, ruled the various provinces of the kingdom, giving way to the code, the greatest and most permanent work of the central authority of the empire.*

So again in England, although the common law, the great customary law, as fixed by the art of printing, expounded and extended by judicial interpretation, retains, even to our time, so great a sway, still, we daily see it modified by and giving way before the inroads of the lawgiver.

But wherever a great body of customary law exists, or has ever existed, a familiar knowledge of its provisions and its history is indispensable to the jurist. First, in point of time, it is often first in point of importance, as explaining and even to a certain extent controlling the statute law to which it apparently gives place.

The importance of bearing this in view in the consideration of our present subject, will be recognized when it is recollected that the great body of unwritten

race to which the Greeks and Romans both belong, by whatever name, Pelasgian, Tyrrhenian, or Sikelian, we choose to distinguish it."

The *Decemviri legibus scribendis*, were appointed to frame as well a Constitution as a Code of laws. Like the Greek νομόθεται, "they were to provide for the whole life of their citizens, in all its relations, social, civil, political, moral, and religious."—Arnold's *History of Rome*, ch. xiii. p. 146.

* But even this great body of statute or written law bears traces of the controlling force of ancient usage. "Whatever is ambiguous," says the Code (Art. 1159, speaking of the Interpretation of Contracts), "is to be interpreted by the usage of the district where the contract was made." Ce qui est ambigu s'interprete par ce qui est à usage dans le pays où le contrat est passé." And again (Art. 1648), "L'action resultant des vices redhibitoires doit être intenté par l'acquereur dans un bref délai suivant la nature des vices redhibitoires et l'usage du lieu où la vente a été faite." See also, Art. 1736 and 1748.

usages called the Common Law of England, is also the basis of the law of this country. The sources, indeed, of American and English jurisprudence, are identical. This is universally true, with the exception only of those States, like Louisiana, Florida, Texas, and California, which, before they were annexed to the United States, belonged to countries governed by the civil law. The colonists who settled this country, were Englishmen, with the feelings, the attachments, and the prejudices of Englishmen. It became necessary for them to establish or recognize and adhere to some system of law from the moment they landed. That system was of necessity the English, and accordingly, we find the doctrine to have always been that the colonists were subject to, and, as it were, brought with them, the great principles of the common law of the mother country, with such modifications as the legislative enactments of Parliament had at that time introduced into it, or the particular situation of the colonists in their new condition required. It is to be understood, then, as a general principle,—that the basis, the fundamental element, the starting point, of the jurisprudence of the States of the Union, is the common law of England, so far as the same is not actually repugnant to our system. The exceptions we shall hereafter consider; but so it has been repeatedly decided and affirmed in the thirteen old States, as they are called, which in 1776, threw off the English sovereignty. The declaration of rights made by the first Continental Congress, in 1774, declares that "the respective colonies are entitled to the common law of England, and to the benefit of such of the English statutes

as existed at the time of their colonization, and which they have, by experience, found to be applicable to their social, local, and other circumstances."*

This is the uniform language of our judicial decisions, whether of the federal or State tribunals. It has been declared by the Supreme Court of the United States, that our ancestors brought with them the general principles of the common law as in force at their emigration, and claimed them as their birthright.† Nevertheless, that the common law of America is not to be taken in all respects, to be that of England, but that the settlers brought with them, and adopted, only that portion which was applicable to their situation.‡

The Supreme Court has also declared that English statutes passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law,§ and the construction of such statutes which prevailed at the Revolution, is the rule for the Courts of the United States. English judicial decisions, therefore, pronounced previous to our Declaration of Independence, construing or interpreting such statute law of the mother country as we have adopted, are to be received here as a part of such statutes; but judicial decisions on such statutes, pronounced subsequently to our Revolution, though treated with great respect, are not to be admitted as authority.‖

So, the Court of Chancery of the State of New York has said: "It is a natural presumption, and therefore

* Declar. in Shepard's Cons. Text Book, App. p. 262.

† Terrett *vs.* Taylor, 9 Cranch, 43; Town of Pawlet *vs.* Clark, 9 Cranch, 292 and 333.

‡ Van Ness *vs.* Pacard, 2 Peters, p. 137 and 144.

§ Cathcart *vs.* Robinson, 5 Peters, 264—280; Fowler *vs.* Stoneum, 11 Texas, 478.

‖ Patterson *vs.* Winn, 5 Peters, 233; Cathcart *vs.* Robinson, 5 Peters, 264.

adopted as a rule of law, that on the settlement of a new territory, by a colony from another country, and where the colonists continue subject to the government of the mother country, they carry with them the general laws of that country, so far as those laws are applicable to the colonists in their new situation, which thus become the unwritten law of the colony, until altered by common consent or legislative enactment;"* and it was said to be evident that there was a common law existing in the State of New York, restraining religious corporations from alienating church property, which colonial common law resulted from the importation of the English restraining acts in force at the settlement of the colony.†

In Maryland, it has been decided under the constitution of that State,‡ that their adoption of the common law has no reference to adjudications in England anterior to the colonization or to judicial adoptions here of any part of the common law during the continuance of the colonial government, but to the common law in mass, as it existed here either potentially or practically, and as it prevailed in England at the time, except such portions of it as were inconsistent with the spirit of the State Constitution and the nature of our new political institutions; and on this ground it was held that the emigrants brought with them into that colony, the common law of conspiracy.

So it has been held by the Supreme Court of New Hampshire, that the body of the English common law

* De Ruyter *vs.* the Trustees of St. Peter's Church, 3 Barb. Ch. R. 119; S. C. 3 Coms. 238.

† Canal Commissioners *vs.* The People, 5 Wend. R. 445; Canal Appraisers *vs.* The People, 17 Wend. 584.

‡ Decl. of Rights, Sec. 3.

and the statutes in amendment of it, so far as they were applicable to the government and to the condition of the people, were in force as a part of the law of that province, before the Revolution, except when other provision was made by express statute or by local usage; and they decided that an indictment at common law could be sustained for an assault and false imprisonment, and for kidnapping, though there were no statute of the State in force creating the offence.*

In Massachusetts, it has been expressly declared† that the first settlers "on coming to that State, brought with them the rights and privileges of Englishmen and the common law of that country, so far as it should be found applicable to their new state and condition. They brought with them also, a charter containing power to make such new laws as their exigency might require. They could live under the old laws, or make new ones. Whenever they legislated upon any subject, their own law regulated them; when they did not legislate, the law they brought with them was their rule of conduct." And the Supreme Court held "that the law by which the emigrants were governed in regard to waste committed by tenants, was the law in force in England at the time of the emigration. Unless our ancestors can be supposed to have settled this country and to have held real estate without any law to protect and preserve it, the law which was in force in the country which they had left, was the law, and remained so in regard to the descent, alienation, &c., of real property, and the remedies for injury to it, until they saw fit to supersede it by a law of their own making." This principle also, has been held in that State,

* State *vs.* Rollins, 8 N. H. R., p. 550.
† Sackett *vs.* Sackett, 8 Pick. 309, 315.

to apply to the English statutes amending or altering the common law, and in force at the time of the emigration. But the statutes passed subsequently, are only understood to be in force so far as they may have been practically received into their system.* The common law of Massachusetts is also said to embrace some ancient usages originating probably from laws passed by the colony of the Massachusetts Bay, annulled by the repeal of the first charter, but by the former practice of the colonial courts accommodated to the habits and manners of the people.†

And this adoption of the common law, even in criminal cases, appears equally established in Maine,‡ it having been held in that State, that to cast a dead body into a river without the rites of Christian sepulture, is indictable as an offence against common decency.

It is very important to bear in mind the exception already mentioned, that only so much of the English common law was adopted by the colonies as was applicable to their condition. So, the English law of fixtures permitting the tenant to remove trade fixtures, but forbidding him to disturb those made for agricultural purposes, was never the law of this country. "The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil, as well as the public, had every motive to encourage the tenant to devote himself to agriculture, and to favor any exertion that should aid this result." Such is the intimation of the Supreme Court

* Commonwealth *vs.* Knowlton, 2 Mass. 530, 534. See also, Commonwealth *vs.* Leach, 1 Mass. 59.

† Commonwealth *vs.* Knowlton, 2 Mass. R. 530, 534.

‡ Kanavan's Case, 1 Greenl. 226.

of the U. S.;* and in the State of New York, the right of the tenant to remove any "erections that he may have had occasion to make for his own use or enjoyment, if he can do so without injury to the inheritance" and without reference to their particular character, has been specifically declared.†

So, again, on the same principle, it has been held in the same State that the English law of ancient lights was never adopted in this country;‡ and, in the absence of any special covenant, that when an owner of two adjoining lots in a city leased one of them on which was a building receiving its light and air through an open space on the adjacent lot, that the proprietor had a right to build on the lot in question, so as even to darken or stop the windows of his tenant, and that his absolute right of property could not be interfered with by injunction.§

Such then, we learn from the highest authority, was the silent and practical adoption of the common law, by the colonists who on the shores of the Atlantic laid the foundations of empire. But when the Revolution broke out, and the inhabitants of the new States with that provident forecast to which attention will hereafter be called, undertook by solemn instruments, to declare and fence in their rights and liberties, it became necessary to determine the fundamental law of the sovereignties just springing into life. So we shall find that at the Revolution of 1776, by the constitutions of most if not all the States, the great body of the common law, and such of the English

* Van Ness *vs.* Pacard, 2 Peters, 137, 144.
† Dubois *vs.* Kelly, 10 Barb. 496.
‡ Parker *vs.* Foote, 19 Wend. 309.
§ Myers *vs.* Gemmel, 10 Barb. 537.

statutes as were not repugnant to our system, were preserved and adopted as binding on us. But the common law of England is perpetually fluctuating; and it would have been altogether inconsistent with proper notions of national independence to give the law of a foreign country any permanent control over our tribunals or our people. It was, therefore, necessary to fix a time after which any changes effected in the common law of the mother country would have no effect here. And that period is the Revolution. That epoch is the era of our independence, legal as well as political, and we recognize no foreign law posterior to that period, binding on us as authority.

So, the Constitution of the State of New York of 1777 provided (Art. xxxv.) that "such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the Legislature of the Colony of New York, as together did form the law of the said Colony on the nineteenth day of April, in the year of our Lord, 1775, should be, and continue the law of the State, subject to such alterations and provisions as the Legislature of the State should from time to time make concerning the same." The Constitution also adopted such resolves or resolutions of the congresses and of the Colony of New York, and of the Convention of the State of New York, as were then in force, and not repugnant to the new Government, subject also to the power of the Legislature to alter; and they abrogated and abolished all such parts of the English common and statute law, and of the colonial enactments, as established any particular denomination of Christians, or as created allegiance to the king of

Great Britain, or as were repugnant to the new Constitution. The amended Constitution of the same State, of 1821 (Art. 7, § 13), adopted such parts of the common law, and of the acts of the Legislature of the Colony of New York, as formed the law of the Colony on the 19th of April, 1775, and the resolutions of the Congress of the Colony, and of the Convention of the State of New York, in force on the 20th April, 1777, not since expired, repealed, or altered, and not repugnant to the Constitution, and subject to the power of the Legislature. The Constitution of the same State, of 1846 (Art. i. § 17), contained the same provision which, as it will be seen, omits all mention of the statute law of Great Britain.

The Constitution of Maryland (1776) declared (Art. iii.), that the inhabitants of Maryland are entitled to the common law of England, and to the benefit of such of the English statutes as existed at the time of the first emigration, and which, by experience, have been found applicable to their social and other circumstances, and of such others as have since been made in England and Great Britain, and have been introduced and practiced by the courts of law and equity, and also to all acts of Assembly in force on the 1st of June, 1774, except such as may have since expired or have been altered by acts of Convention, or the Declaration of Rights, subject to the revision of the Legislature.

The Constitution of Massachusetts (1780) contained this simpler provision (Chapter vi. Art. vi.) "All the laws which have heretofore been adopted, used, and approved in the province, colony, or State, of Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force until altered or repealed by the Legislature, only excepting those

parts repugnant to the rights and liberties contained in this Constitution." And the Supreme Court of this State, as we have seen, has said that the first settlers of the colony regarded the law of England as their law, and governed themselves by it.*

The Constitution of New Hampshire (1792) adopted substantially the same provision as the one last cited from that of Massachusetts.

The Constitution of New Jersey (1776) declared, § 21, that the laws contained in the edition lately published by Mr. Allison, such only excepted as are incompatible with the Constitution, should be and remain in full force until altered by the Legislature of the colony; and, § 22, that the common law of England as well as so much of the statute law, as has been heretofore practiced in the colony, shall still remain in force till altered by the Legislature, such parts only excepted as are repugnant to the rights and privileges contained in the new constitution.

We see, that by these constitutions the common law, as such, was recognized; and such may be assumed to be generally the law of those States the Constitutions of which contain no such affirmative provision.

At the same time it has been declared by the Supreme Court of the United States, to be clear that there can be no common law of the Union. The federal Government is composed of twenty-four sovereign and independent States, each of which may have its local usages and common law; but there is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or

* *Commonwealth* vs. *Alger*, 7 *Cushing*, 53, 66. See this case for a very interesting discussion on the "Body of Liberties" adopted in 1641, by the Colony of Massachusetts.

Laws of the Union. The common law could be made a part of the federal system only by legislative adoption. It is settled that the federal courts have no jurisdiction of common law offences, and that there is no common law of the Union.* When, therefore, a common-law right is asserted, we must look to the State where the controversy originated. What is common law in one State may not be, and frequently is not so considered, in another. The judicial decisions, the usages and customs of the respective States, must determine how far the common law has been introduced and sanctioned in each.†

It is often said that Christianity is part and parcel of the common law; but this is true only in a modified sense. Blasphemy is an indictable offence at common law; but no person is liable to be punished by the civil power who refuses to embrace the doctrines or follow the precepts of Christianity; our Constitutions extend the same protection to every form of religion, and give no preference to any. Still, though Christianity is not the religion of the State, considered as a political corporation, it is nevertheless closely inter-

* State of Pennsylvania *vs.* The Wheeling Bridge Co., 13 Howard, 519.

† Wheaton *vs.* Peters, 8 Peters, R. 591 and 659. But see the very able opinion of the late Vice-Chancellor Sandford, in Lynch *vs.* Clarke, 1 Sandf. 583, where he says, p. 654, "In my judgment there is no room for doubt, but that to a limited extent the common law (or the principles of the common law, as some prefer to express the doctrine) prevails in the United States as a system of national jurisprudence. To what *extent* it is applicable, I need not hazard an opinion, either in general terms or in particular instances, beyond the case in hand; but it seems to be a necessary consequence, from the laws and jurisprudence of the colonies, and of the United States under the articles of confederation, that in a matter which by the Union has become a national subject, to be controlled by a principle coëxtensive with the United States, in the absence of constitutional or congressional provision on the subject, it must be regulated by the principles of the common law, if they are pertinent and applicable."

woven into the texture of our society, and is intimately connected with all our social habits and customs, and modes of life.*

The great body of the common law of England, and of the statutes of that country as they existed in 1776, are, then, so far as applicable to our condition, the basis of our jurisprudence. Upon this foundation we have erected a great superstructure of law, the fabric of judicial decisions and the product of the numerous legislative bodies to which the government of the States and of the Union is confided. As we shall have occasion to see in the progress of this work, the statute law of the United States, and of the different members of the confederacy, form a vast body of jurisprudence, in many cases complicated, peculiar, and novel, but eminently adapted to our unprecedented situation, and of equal interest for the citizen and the lawyer.

To these two sources of municipal law, viz. common and statute law, must be added in America a third. We have thought it wise to set limits to the law-making authority, and by the direct action of the people themselves to establish certain rules and principles of action which can be varied by no power less than that supreme will which calls the legislator into being. In other words, we have imposed *constitutional* restraints on the legislature.

Something of this same disposition is to be found in the annals of the mother country. The history of the race to which the people of America belong, in all their

* Williams *vs.* Williams, 4 Seld. 525, 553; Ayres *vs.* The Methodist Episcopal Church, 3 Sandf. 351; Andrews *vs.* N. Y. Bible and Prayer Book Society, 4 Sandf. 156; Vidal *vs.* Gerard's Executors, 2 Howard, 127; Going *vs.* Emery, 16 Pick. 107; Executors of Burr *vs.* Smith, 7 Verm. 241; and other cases as to the doctrine of charitable and pious uses in this country.

struggles for the attainment and preservation of freedom, shows their marked and sedulous care in obtaining and preserving formal acknowledgments and records of their rights and liberties, muniments of title, as they might in technical language be termed.

So early as the 1st of Richard III., Parliament "declared that the court of Parliament is of such authority and the people of this land of such a nature and disposition, as experience teacheth that manifestation and declaration of any truth or right made by the three estates of this realm assembled in Parliament, and by authority of the same, maketh before all other things, most faith and certain quieting of men's minds, and removeth the occasion of doubts."*

So, the Barons of England were not satisfied with humbling the power of John. They exacted and obtained the execution of the great Charter. The reformers in the time of Charles I. demanded his assent to the Petition of Right; and the throne of England now rests on the Bill of Rights, the fruit of the revolution of 1688, a bill prepared by the Convention Parliament, in its own emphatic language, "as their ancestors in such cases had usually done."†

These, however, are all but parliamentary enactments, or regal concessions, intended to operate as checks on the kingly prerogative. They furnish no safeguard against abuse of the legislative authority.

Our ancestors went further, and seeking to guard against the abuses of popular, as their English progenitors did against those of monarchical power, both in the formation of the government of the separate States,

* Cotton's Abr. of Records, 713—714, quoted in Maddock's Life of Somers, i. p. 294.

† Bill of Rights, 1 W. and M., Sess. 2, c. 2.

and in laying the foundation of the great confederacy of the Union, they carefully asserted and defined those individual rights which not even the law-making power, not even the people itself, shall be permitted to infringe. But this is not the proper place for an inquiry into the formation of written constitutions. Interesting as that investigation would be, and pregnant with interest to the student of history and the lover of liberty, it is foreign to my present subject. So far, indeed, as our Constitutions relate merely to political organization, they are entirely beyond the limits of this work. It is as forming a system of written limitations or restraints on legislative power that we shall have to consider them, and in this aspect it will be interesting and instructive to study their operation, to compare their analogies, and to observe their interpretation. For the present, it is sufficient to remark, as we shall learn more fully hereafter when we come to consider the true boundaries of legislative and judicial authority, that the parliamentary or legislative history of this country is remarkable for nothing more than for the care with which we have endeavored to define the boundaries of the various powers which in the aggregate form the complex machine of government, and the rigor with which restraints have been imposed by the people itself on its immediate mandataries and agents. Such are some of the most prominent functions of the constitutions of the several States. The Constitution of the United States, designed to operate on State sovereignties, as well as on the people directly, partakes of the character of a league as well as of a constitution, as the latter term is more strictly used.

Of these three great components, then, CONSTITU-

TIONAL LAW, STATUTE LAW, and CUSTOMARY or COMMON LAW, the jurisprudence of our municipal system is chiefly composed. Of the two first of these, this volume is intended to treat. They are entirely written law, governed, like all branches of our science, by rules peculiar to themselves, and subject to the necessity, incident to the imperfection of language, of constant interpretation and construction. The object of this treatise is to explain the technical terminology that belongs to them, to give their classification, describe their incidents, and finally, with what accuracy I can attain, to define the mode of their application, to declare the rules of interpretation by which they are in cases of doubt to be expounded, and to illustrate these rules by the light of adjudged cases.

Both constitutional and statute law have two great attributes common to each other, which render it indispensable to examine them together. They are both written; in cases of doubt they are both submitted to the same judicial arbiter. It is plain that differences will arise in the construction of written laws. The history of private discussions and of public controversies, of contracts and of treaties, and more than all the religious annals of our race, show the feebleness and imperfection of language, and the sad facility with which it lends itself to the various interpretations put upon it by ambition, fraud, or even honest difference of judgment. To settle these differences in regard to the civil conduct of mankind, some tribunal is necessary. On this point, as we shall see more fully hereafter, various systems have existed.

The earliest body of jurisprudence of which we know any thing accurately, is the law of the twelve tables of Rome; wrung from the Patrician

burghers by the courage and constancy of the Plebeians, it was intended to define and declare the whole body of rights, public and private, that constituted the existence of a Roman citizen, and for nearly a thousand years it was the basis of their system; but during that time, it was vastly expanded and altered by the practice of interpretation. The Roman jurisconsults construed or interpreted the written code with a very liberal spirit; and the *responsa prudentum*, as we know, formed one of the leading elements of the law as Justinian compiled it.* When, however, the imperial constitutions had subverted the freedom of the republic and the independence of the law, the despotic dispositions of the empire arrogated to the sovereign alone the power of interpreting as well as of making laws. *Leges condere soli imperatori concessum est, et leges interpretari solo dignum imperio esse oportet.*†

The modern civilians adopted the same maxim. *Ejus est interpretari legem cujus est condere.* Such was the system under the government of the French empire.‡

The terrible absolutism of this doctrine found, however, opposition or at least encountered doubt even among the continental jurists; and Voet, in his commentaries on the Pandects, discusses at length the question whether the right of interpretation belongs to the

* *The jurisprudentes*, "though they professed only to *interpret* the twelve tables, not to make laws, their notion of interpretation was so wide that it included every thing which could be brought within the spirit of any thing which the twelve tables enacted" * * "the *responsa prudentum* thus came to be enumerated among the direct sources of law."—Sanders' *Institutes, Introd. p.* 19 *and* 20.

† Cod., Lib. i. Tit. xiv. de legibus, 12.

‡ See Toullier, Tit. Prel. des lois en general, section x.

sovereign, should be abandoned to usage, or confided to the judiciary.*

In the early ages of the English system, it appears that the line between the Judiciary and the Legislature was not distinctly marked, and that Parliament, consisting of one great chamber in which sat both Lords and Commons, not only made, but interpreted the law.† But it has now long been settled in England, that the interpretation of statute law belongs to the judiciary alone, and in this country they have claimed and obtained an equal control over the construction of constitutional provisions.‡ This treatise is, then, devoted mainly to a consideration of constitutional and statute law, and of the control exercised by the judiciary over it.

It is plain that the matter is of great moment. On the one hand, the nature of the case, the frequency of doubt, the impossibility of recurring to the legislature or to popular sovereignties for the removal of difficulties, and the general analogies of our system, require the power of the judiciary to be extended over the subject; while, on the other hand, unless their authority be very carefully exercised and confined within strict limits, the boundary between the legislature and the judiciary would be gradually effaced and the most valuable parts of the law-making power practically fall into the hands of that branch of the government which

* Comm., Lib. i, Tit. iii. de legibus.

† "Originally, the Houses of Lords and Commons sat together. The courts of law were clearly subordinate to the Parliament. A writ of error lay from them to the Parliament, and they were accustomed even to consult Parliament before they decided points of difficulty and importance."—Sir J. Campbell, *arguendo*, in Stockdale *vs.* Hansard, 9 Ad. and Ell. 1; see, post, ch. v.

‡ Kent, Part iii. Leo. xx. vol. i. p. 449 *et seq.*

is not intended to have any share whatever in the enactment of laws.

Having thus endeavored to give a general idea of the various sources of our jurisprudence, and of the principal objects of this treatise, we proceed now to a more particular examination of our immediate subject, desiring, however, that the results at which we have thus far arrived, may be borne in mind: That the common law is the great basis of both English and American municipal law; that the interpretation or construction of the written law belongs to the judiciary; that the rules governing the application of statutes may, as a general proposition, be considered the same in both countries, but that on the contrary, the head of constitutional law is wholly peculiar to American jurisprudence.

As the authority of Congress is subordinate to that of the Constitution of the United States, and that of each Legislature both to the federal charter and the constitution of its own State, it is plain that the inquiry of the American student in all new cases, must be directed to constitutional provisions before it turns to the statute law. The prominent question in any case of first impression growing out of the provisions of written law, will usually be with every legal mind: does the alleged right interfere with any constitutional provision, State or federal? And it might, therefore, appear proper first to speak of constitutional law; but, as has been observed, the basis of our jurisprudence is the English system, the general rules of interpretation are the same, whether applied to statutes or constitutions; and as constitutions for the purpose of this work will be considered mainly in the light of restraints or limitations upon legislative power, it will be found better

at the outset to examine those rules and discuss those doctrines common to the legal science of both countries. I shall first, therefore, consider the subject of Statutes.

It will be remembered, however, that my leading object is not to give the actual interpretation of particular constitutional or statutory provisions. This would require a work of vast magnitude, and would lead me far beyond my present purpose. That purpose is to consider the rules which govern the application of written law, to exhibit the leading principles of interpretation, and in regard to constitutions, to observe their analogies and study their general operation. The construction of special provisions, whether of statutes or constitutions, will be carried no further than shall appear to be necessary for a complete understanding of the subject.

Before discussing the subject of the construction of statutes in doubtful cases, it is necessary first, however, as I have said, to understand the rules which govern their application where no doubt arises. Having first examined their division and classification, their separate parts and their various incidents, we shall be then better prepared to understand the rules which are adopted where cases of difficult or doubtful interpretation arise.

CHAPTER II.

GENERAL CLASSIFICATION AND DIVISION OF STATUTES.

Division of Statutes—In England divided into ancient and modern—Division in the United States—Public and Private Acts—Declaratory and Innovating Statutes—Affirmative and Negative Statutes—Remedial Statutes—Penal Statutes—Repealing Statutes.

THOSE who desire to know the origin and history of the formation of statutes, from the earliest periods, in the country from which our legislation derives its source, will do well particularly to consult Mr. Dwarris' very valuable work on Statutes.* The inquiry involves some of the most interesting questions connected with the early annals of England, the power of the Norman Conqueror and of his first successors, the rise and progress of parliaments, and many other subjects equally curious and attractive.

For our present purpose it is sufficient to observe, that the original term for all laws was *Assisæ* or

* Treatise on Statutes, by Fortunatus Dwarris, Kt., and W. H. Armyot. Second edition, 1848. The first volume is devoted to the origin and history of statutes, and the course of proceedings in Parliament. The second volume treats of the construction of statutes, their division, parts, authority, and incidents.

This latter part has been republished in the ninth volume of the first series of that valuable compilation, the *Law Library*, and is familiarly known to our legal scholars. The whole work has, I believe, never been republished in this country. Barrington's Observations on the Statutes is also full of curious learning on the same subject.

Constitutiones (*rex precepit vel constituit*); and among the earliest monuments of English legislation, there are statutes which bear the traces of a great council assisting the king, besides ordinances, grants, charters, and patents, emanating from the crown alone. The first statutes appear to have been enacted upon petitions which were presented, discussed, and acted on in Parliament, the statute being, at the end of each parliament, drawn up by the judges, and entered on the statute roll. This was found subject to great irregularity and abuse; and finally, in the time of Henry VI., bills were in the first place, as now, drawn up and presented to the two Houses.* But as this investigation to us would be interesting mainly if not solely in an historical and antiquarian point of view, I shall content myself with this brief notice of so much of my subject as is entirely peculiar to England, and proceed at once to the enumeration of the different classes into which statutes are divided. Here we shall find the basis of the classification to be derived from the English law.

The English have, however, a division of statutes which is unknown to us, viz.: into ancient and modern. The earliest statutes in the printed collections are those of the ninth year of Henry III., A. D. 1225. The statutes from Magna Charta down to the end of Edward II., 1326 (including also, some which, because it is doubtful to which of the three reigns of Henry III., Edward I., or Edward II., to assign them, are termed *incerti temporis*), compose what have been called the *vetera statuta*, or ancient statutes; those from the beginning of the reign of Edward III. (1327) being con-

* Dwarris on Statutes, vol. ii. ch. i.

tra-distinguished by the appellation *nova statuta.* The former also, from some accidental circumstance of collection or publication, are sometimes spoken of as *prima aut secunda pars veterum statutorum.** Of the earlier statutes some are in Latin, some in French. On the accession of Richard III. (1483) the laws were first printed and promulgated in English. Since the time of his successor, Henry VII., all the statutes have been drawn in English.†

* Dwarris on Statutes, p. 460.

† The history of the English language is very curiously illustrated by the history of the law. As late as the middle of the 14th century, all the oral proceedings in open court were in the French tongue, when by the 36th Edward III. c. xv. (1362), the English was introduced into the tribunals. That statute recites that the laws of England are disregarded because the proceedings in court are in French, "a tongue much unknown in the said realm," so that clients do not understand what is said for or against them; that in other countries the laws are better observed because justice is done in the vernacular; and it then goes on to declare that thenceforth all pleas shall be pleaded, showed, defended, answered, debated, and judged in the English tongue. The Latin was, however, by the same statute, preserved as the language of the written pleadings and of the record.

The statutes, however, still continued to be enacted in Law French, till the reign of Richard III., when they first appear in English; and so tenacious was the hold that the language of France had acquired, that it remained the language of the reports till the time of the Commonwealth. Nor did the Latin disappear from the records till the 4 Geo. II. c. 26 (1731); when, the oral discussions and reports being in English, the final triumph of the language was achieved, and Latin was prohibited as the language of the records also. It appears by this, that for nearly 300 years, viz.: from the 36th Edward III. (1362), to the time of the Commonwealth, English was the language of oral discussion; French, of the reports, and Latin of the records; French also being mainly the language of the statutes from 1275, or thereabouts, till the accession of Richard III. (1483). The first laws in the English statute book, are in Latin. The earliest statute in the French language, is the *Statutum de Scaccario*, 51 Hen. III. (A. D. 1266); and it is remarkable not only that French continued to be used as the parliamentary language after it had been abolished in the courts of justice, viz.: from the 36 Edward III. (1362) to the 1st of Richard III. (1483), but still more that it should ever have been the language of the laws. Barrington says there is no other instance of any country in Europe per-

In the early periods of English legislation, all the statutes of each session of Parliament were consolidated and styled one statute, each being called merely a separate chapter. In the time of Henry VIII. it first became usual to prefix a distinct title to each particular chapter of the statute.*

In this country we have no knowledge of the division of statutes into ancient and modern, of which we have spoken. The only divisions which we recognize, spring from the authority to which the statutes owe their origin. We have

The Colonial Statutes, passed by the governments of the old thirteen colonies, before the authority of the mother country was thrown off:

The *Acts of the United States*, passed by the Federal Government:

The Laws of the States, passed by the States respectively; and

mitting their laws to be enacted in a *modern European language.* See his remarks on the subject, under the head of the *Statutum de Scaccario*, 51 Henry III. A. D. 1266, p. 57.

Fortescue, writing in the reign of Henry VI., states that in the Universities of England, the sciences are only taught in Latin, but that the law is taught in the three languages, English, French, and Latin. *Leges terræ illius in triplici lingua addiscuntur, videlicet, Anglia, Gallica, et Latina.* Fortescue *de Laudibus Leg. Angl.* c. 48.

Chaucer's slur at the Anglo-French in common use in his time is well known:

> " And Frenche she spake full fetously,
> After the scole of Stratforde at Bowe,
> For Frenche of Paris was to her unknowe."
>
> PROLOGUE TO THE PRIORESS' TALE.

The great Poet showed at once his sense and patriotism, by using the English tongue. But so slow has been the growth of that strong and nervous speech which now bids fair to assert a successful claim to universal dominion. See Tyrwhitt's Essay on Language of Chaucer.

* Dwarris on Statutes, vol. 2, p. 462.

The Acts of the Territories, passed by the governments of the new territories before they are admitted into the Union as States.

We shall also have occasion to speak of the municipal ordinances of our cities, some of which are quite equal in importance to the acts of legislation of many of the States.*

When we come to consider statutes not as to their origin, but with reference to their subject matter, we find the leading division to be into

Public or *General*, and

Private or *Special*.

Public or General Statutes are in England, those which relate to the kingdom at large. In this country, they are those which relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation, or by constitutional restraints. *Private or Special Statutes* relate to certain individuals or particular classes of men.†

* Coke, Inst. 116, thus enumerates the "divers laws within the realm of England:"

(1) The law of the Crown.
(2) The law of custom of Parliament.
(3) The law of nature.
(4) The common law.
(5) Statute law.
(6) Customs reasonable.
(7) The law of arms, war, and chivalry.
(8) Ecclesiastical or canon law.
(9) Civil law as in the courts of the constable and marshal.
(10) Forest law.
(11) The law of marque.
(12) The law merchant.
(13) The laws and customs of the isles of Jersey, &c.
(14) The law and privilege of the stannaries.
(15) The laws of the east, west, and middle marches—now abrogated.

† Mr. Dwarris, p. 463, gives the English parliamentary division of statutes as follows:—"The first and principal division is into general and special, pub-

Laws which concern the sovereign or heir apparent, all officers in general, the whole spirituality, all lords of manors, such also as relate to trade in general, are in England public acts. A statute concerning all persons generally, though with relation to a special or

lic and private. For the convenience of citation to a practicing lawyer, the printed book is again divided into public general acts; local and personal acts, declared public and to be judicially noticed; private acts printed by the king's printer, and of which printed copies may be given in evidence; and private acts not printed.

"In Parliament are adopted other distinctions resting upon different grounds; there, all bills whatever from which private persons, corporations, &c., derive benefit, are subject to the payment of fees, and such bills are in this respect denominated private bills; while among the public acts are included some merely personal, as acts of attainder and patent acts. Of private acts, some, as has been already shown, are local, as inclosure acts, and some personal, viz.—such as relate to naturalization, names, estates, divorces, &c.; of the latter, some are fiscal, as bills for compounding debts due to the crown, &c. In the Lords, the term 'private' is applied technically to estate bills only, all other bills being distinguished as local and personal.

"After they have received the royal assent, private bills are divided into three classes. 1. Local and personal acts, declared public. 2. Private acts printed by the King's printer. And 3. Private acts not printed.

"Every local and personal act contains a clause declaring that 'it shall be a public act and shall be judicially taken notice of as such, and receives the royal assent as a public act."

Those who are desirous to consider the subject of English statutes, and the ancient laws more particularly, will do well to consult the collections of English statutes. There are several, and they are full of very curious and interesting matter.

The oldest abridgment of the English statutes, comes no lower than the 31st year of Henry VI. (1452), and is understood to have been printed in 1481. It is known as *The Old Abridgement*, and is in French.

There are one or two other, later abridgments, also in French. The first English abridgment of the statutes, is that of John Rastell. This was was first printed in the 19 Henry VIII. (1527).

Petyt's great Abridgment of the Statutes belongs to the year 1542, and Pulton published an Abstract of them in 1577.

Mr. John Cay published his valuable Abridgment of the Public Statutes, 2 vols. folio, in 1739; and in 1743—1765, Mr. Owen Ruffhead published his Statutes at large, in 9 vols. 4to. This last edition is perhaps the most convenient and satisfactory for the purposes of reference.

particular thing, as appeals, assizes, or woods in a forest, is also a public act.

On the contrary, such statutes as concern only a particular species, thing, or person,—as, bishops only; acts for the toleration of dissenters; relating only to specific traders; acts relating to only one particular place or to several particular towns, or to one or more particular counties, or to colleges only in the universities,—have been in England treated as private acts.*

In this country the disposition has been, on the whole, to enlarge the limits of the class of public acts, and to bring within it all enactments of a general character, or which in any way affect the community at large. The subject has been considered, as we shall hereafter see, with reference to the provisions of the federal Constitution; and it has been held that the

* Dwarris on Statutes, 464; Gilb. Evidence, 39, 40; Phil. on Evidence, 238; Com. Dig. Tit. Parliament, R. 6; 4 Rep. 76, b.; Kirk *vs.* Nowill, 1 T. R. 118; 4 Rep. 79; 4 Co. 76, a. b. 79.

Mr. Dwarris, vol. ii. p. 464, gives at length the distinction in England between public and private acts, as I have stated it in the text, and then proceeds:—

"Thus the statute 21 Henry VIII. c. 13, which makes the acceptance of a second living by a clergyman an avoidance of the first, is a general law, because it concerns all spiritual persons (4 Rep. 79).

"In a general act there may be a private clause (1 Salk. 168), as in the statute 3 Jac. I. c. 5 (10 Rep. 57, b.), the clause which gives the benefices of recusants in particular counties, to the University. So, a statute which concerns the public revenue, is a public statute; but some clauses therein, may, if they relate to private persons only, be private; for a statute may be public in one part and private in another.—12 Mod. 249; 12 Mod. 613; Hob. 227; Sid. 24.

"Yet, although a statute be of a private nature (as, if it concern a particular mystery or trade), yet if a forfeiture be thereby given to the king it is a public statute (R. *vs.* Baggs, Skin. 429). And a private act, if recognized by a public act, must afterwards be noticed by the courts as a general law.—2 Term Rep. 569.

"A general or public act, then, regards the whole community; special or private acts relate only to particular persons or private concerns."

establishment of towns and counties and their boundaries, court houses, jails, bridges, and ferries, are all matters of public policy, and acts relating to them are of course public acts.* So, in this country it has been intimated that acts in relation to banks are to be held public,† the reasons assigned being that their bills are a legal tender unless specially objected to, and their charters concern the currency of the country. So in Massachusetts, acts creating public corporations, whether sole or aggregate, are public statutes.‡ Acts, too, which although affecting only a particular locality apply to all persons, are public acts. So, an act passed for the survey of timber in the county of Penobscot, in the State of Maine,§ and an act relating to the preservation of a particular fish in Dunston river, in Massachusetts,‖ were each held public acts.

Although a statute be of a private character, yet if it contain any provisions giving penalties to the State, or declares or punishes any public offense, it will be held a public statute.¶ Generally, if the act affects in any way public interests, it will be held public. So, an act for the creation of a work-house in the county of Middlesex, and for the discharge of certain poor

* East Hartford *vs.* Hartford Bridge Co., 10 Howard, 511; Mills *vs.* St. Clair Co., 8 Howard, 569; Bass *vs.* Fontleroy, 11 Texas, 698; Commonwealth *vs.* Inhabitants of Springfield, 7 Mass. 9.

† Bank of Utica *vs.* Smedes, 3 Cowen, 662; 2 R. S. 374, § 3. In Missouri also, Douglas *vs.* Bank of Missouri, 1 Missouri R. 20; Young *vs.* Bank of Alexandria, 4 Cranch, 384.

‡ Portsmouth Livery Co. *vs.* Watson, 10 Mass. 91.

§ Pierce *vs.* Kimball, 9 Greenleaf, 54.

‖ Burnham *vs.* Webster, 5 Mass. R. 268; Commonwealth *vs.* McCurdy, 5 Mass. 324.

¶ Rex *vs.* Bagg, Skin. 429; Case of Rogers, 2 Greenleaf, 303; Heridia *vs.* Ayres, 12 Pick. 334.

prisoners, were held public acts.* If a private act be recognized by a public statute, it thereby becomes a public act.†

In order accurately to comprehend the distinction between public and private statutes, it is important to understand their incidents. Courts of justice are bound, *ex-officio*, to take notice of public acts without being fully set forth. The tribunals are bound to give them full effect, so soon as they are called to their attention. They cannot, therefore, be denied by a plea of *nul tiel record;* and the existence of a public act is determined by the judges themselves, who, if there be any difficulty, are to make use of ancient copies, transcripts, books, pleadings, or any other memorial, to inform themselves.‡

Of Private Acts, on the contrary, the judges are not bound to take notice unless they be previously shown and pleaded. They may, consequently be put in issue and tried by the record. Such parts of private acts as are essential to an action or defence, must be specially recited in pleading.§ The result of these rules is, that the courts always decide whether an act be public or private.

Such are the general principles. It is not meant, however, that courts of justice are always bound to

* Rex *vs.* Pawlyn, Sid. 209, Bacon Ab. Stat. F.; Jones *vs.* Axen, 1 Lord Raymond, 119.

† Rogers' Case, 2 Greenl. 303; Buller's N. P. 224, Bacon Ab. Stat. F. note.

‡ Dwarris, 467, Kent Com. v. ii, p. 460; Trotter *vs.* Mills, 6 Wend. 512.

§ Dwarris, p. 465. It is probable, however, that these rules are materially modified in this country, in those States which have adopted the recent innovations on the common-law system of pleading. The code of procedure of New York, provides (§ 163) "that in pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof."

take notice of general acts, and that parties will in all cases have the benefit of them unless they set them out in the pleading, and show that they rely on them. Thus, it is necessary to set out and rely on the statute of limitations if the defendant intends to have the benefit of it.* So as to the statute against usury, although under the general issue in assumpsit, this defence might be set up, it could not in debt on bond, unless specially pleaded.† In England, however, by the pleading rules of Hil. Term, 4 William IV., these technical distinctions were very much done away, and a general rule declared, that if a good cause of action at common law appear in the declaration, the defendant must plead any statutable illegality in the contract on which it is founded.‡

The instances which we have been here noticing relate, it will be observed, to *defences*. As a general rule, it may be safely assumed that whether the ground of defence arise on a public or private statute, it must be so far stated as to refer to the act, and apprise the plaintiff of the resistance which he is to meet. In regard to declarations or complaints, the original distinction holds good, the courts being bound to take notice of and give effect to public general laws whether pleaded or not, and not obliged to do so in regard to private laws unless distinctly set forth.

Private acts do not bind or conclude third parties or strangers; and they are not bound to take notice of a private act, though there be no general saving clause of

* Dwarris on Statutes, 467; Puckle *vs.* Moor, 1 Vent. 191; Lee *vs.* Rogers, 1 Lev. 110; Gould *vs.* Johnson, 2 Lord Raym. 838. This was at first doubted.

† Dwarris on Statutes, 467; Hob 72; 5 Rep. 92; Mason *vs.* Fulwood, 1 Lutw. 466; Lord Bernard *vs.* Saul, 1 Strange, 498; Bull N. P. 152, S. C.

‡ Dwarris on Stat. 469, for rule and exceptions.

their rights. This is a rule of ancient date, and has been steadily adhered to.*

In England it is held that words of a statute applying to private rights, do not affect those of the crown. This principle is well established, and is there considered indispensable to the security of the public rights. It has been recognized also in this country; and on this ground it was held in Pennsylvania, in regard to Windmill Island, in the Delaware river opposite Philadelphia, though it was claimed under a legislative grant, that as the rights of the commonwealth were not ceded by the act, no title was acquired as against the State.† But in this country generally, I should doubt whether this construction could be safely assumed as a universal rule. The English precedents are based on the old feudal ideas of royal dignity and prerogative; and where the terms of an act are sweeping and universal, I see no good reason for excluding the government, if not specially named, merely because it is the government.

The next great division-line to which our attention should be directed, is that between those statutes which simply declare or explain the law or the right as it stood previous to the statute, and those which introduce new legislative provisions. The former are termed *Declaratory;* for the latter, no general phrase has been adopted. For want of a better term, I venture to call them *Innovating*, or introductive of new matter.

It will be borne in mind that the earliest legislators

* Lucy *vs.* Levington, 1 Vent. 175; Kent Com. i., p. 459; Dwarris, vol. ii. p. 471; Barrington's Case, 8 Rep. 138; Jackson *vs.* Catlin, 2 J. R. 248; S. C. 8 J. R. 406.

† Jones *vs.* Tatham, 20 Penn. R. 399.

found a great body of law established under cover and color of custom. Such rules are now growing up every day around us. When the attention of the law-making power is turned to new subjects, and a law is enacted in regard to them, defining rights or imposing prohibitions which are new on the statute book, it often becomes a question whether the new law is declaratory of the old, or whether it is intended to introduce any new principle. In this latter case, as I have said, for want of a settled terminology, I call it innovating. Thus, for instance, to give an idea of a declaratory act, an old English law, 25 Edward III., 2, *De natis ultra mare*, recites, "Because that some people be in doubt if the children born in parts beyond the sea, out of the ligeance of England, should be able to demand any inheritance within the same ligeance or not," and then goes on to enact that the children of subjects born abroad, should be deemed liege subjects of the English crown. And it has been held that this does not establish any new rule, but that the act was a merely declaratory statute, and that the rule was the same at common law.*

Declaratory acts, says Mr. Dwarris,† are made when the old custom of the kingdom is almost fallen into disuse, or become disputable, in which case the Parliament thinks proper in *perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Declaratory acts are also passed to explain doubts in previous statutory provisions, and they are then what the old

* Dyer's Reports, 224 a.; Bacon *vs.* Bacon, Cro. Car. 601; Doe dem. Thomas *vs.* Acklam, 2 B. and Cres. 779; Lynch *vs.* Clarke, 1 Sandf. Ch. R. 583, 660; 2 Kent Com. 50, 51.

† Vol. ii., p. 473.

writers on the Roman law called acts of authentic interpretation.

A very nice question arose in regard to declaratory statutes and their effect. The old rule was, that a custom could be alleged or prescribed against the common law; that is to say, although the common law prohibited a particular act, yet as the common law is but custom, if particular and positive evidence could be shown of the antiquity of the practice of the act complained of, the custom might be set up in defence, and would prevail. But if a statute be passed declaratory of the common-law rule, and prohibit the act in question by positive enactment, can the particular custom still be alleged? This seems so, if the statute be in affirmative terms; but if in negative terms, whether declaratory of the common law or introductive of a new law, it seems that no prescription or custom can be set up against it.*

This leads us to the consideration of the division of statutes into affirmative and negative, terms which readily explain themselves.

Affirmative Statutes are statutes passed in the affirmative; and it has been held, with that reverence for the ancient common law which characterizes the early decisions of the English courts, that a statute containing a mere affirmative provision, without any negative expressed or implied, does not alter any common-law rule existing in regard to its subject matter before the statute. Thus, by the 43 Edward III. c. ii. it was enacted "that the panel of assize shall be arrayed four days before the day of assize;" yet if this be done two days before the day of

* Dwarris on Statutes, p. 475, 477; Lord Lovelace's Case, W. Jon. 270; Jones *vs.* Smith, 2 Bulst. 36; King *vs.* Bishop of London, Shower, 420.

assize, it is good, for two days are sufficient at common law, and when the statute is affirmative it does not toll the common law.* So, it is said that a statute authorizing a tenant in fee simple to lease for twenty-one years, would not restrain him from making a lease for sixty years; for this power he had at common law, and there are no negative words.† So, where a remedy is given by an affirmative statute, if a remedy previously existed at common law, and is not prohibited by express words, it is not taken away, but the party has his election.‡ Thus, it has been held in this country, that where a statute authorizing the erection of a mill-dam, provided a summary mode of appraising and paying the damages resulting from such erection, that the common-law redress by action nevertheless still remained.§ If, on the other hand, the statute does not merely affix a new penalty but introduce new rights, then there can be no doubt that the statutory remedy must be strictly followed.‖ If a new power be given by an affirmative statute, to a certain person, by a particular designation, although it be an affirmative statute, still all other persons are in general excluded from the exercise of the power, since *expressio unius est exclusio alterius.* Thus, if an action founded upon a statute be directed to be brought before the justices of Glamorgan in Sessions, it cannot be brought before any other person or in any other place.¶ So by the Scotch law, "stat-

* Dwarris, p. 474; 2 Inst. 200; Bro. Parl. pl. 70.

† Dwarris, p. 475.

‡ Dwarris, p. 474.

§ Crittenden *vs.* Wilson, 5 Cow. 165. See also, Livingston *vs.* Van Ingen, 9 J. R. 507; Bardan *vs.* Crocker, 10 Pick. 383.

‖ Lang *vs.* Scott, 1 Black, Ind. 405; Almy *vs.* Harris, 5 J. R. 175.

¶ 11 Rep. 59, Foster's Case, 64.

utory provisions cannot be supplied by 'equipollents.'"* But the designation of a certain person to whom a new power is given, does not exclude another person who was by a precedent statute authorized to do it, from doing the same thing.†

Negative Statutes are so called because they are penned in negative terms,—as the statute of Marlbridge, which is "*Non ideo puniatur dominus per redemptionem*;" and Magna Charta, "*Nullus capiatur aut imprisonetur*." In regard to these, the rule is that if a subsequent statute, contrary to a former, have negative words, it shall operate as a repeal of the former; and a negative statute controls and takes away any common-law right or remedy previously existing.‡ "The different operation of affirmative and negative statutes," says Mr. Dwarris,§ is thus illustrated:—"If a statute were to provide that it should be lawful for tenant in fee simple, to make a lease for twenty-one years, and that such lease should be good, this affirmative statute could not restrain him from making a lease for sixty years; but the lease for twenty-one years would be good, because it was good by the common law, and to restrain him it ought to have words negative,—as that it shall not be lawful for him to make a lease for above twenty-one years; or, that a lease for more shall not be good." So, an affirmative statute does not repeal a precedent affirmative statute, and if the substance of both may stand together, they should both be enforced. So, the statute 23 Elizabeth, c i. which gave £20 per month against any recusant, did not take away the

* Alison's Practice.

† 11 Rep. 39, Foster's Case, ib. 64; Dwarris, p. 478.

‡ Bro. Parl. pl. 72.

§ Page 475.

penalty of 12d for every Sunday, given by statute 1 Elizabeth, c. ii.* The next head is that of

Remedial Statutes.—Remedial acts are those made from time to time to supply defects in the existing law, whether arising from the inevitable imperfection of human legislation, from change of circumstances, from mistake, or any other cause. The object is sometimes effected by imposing restrictions, in which case the statute is a restraining or disabling statute; sometimes by granting powers, in which case it is an enabling or enlarging statute.†

Penal Statutes.—Penal statutes are acts by which a forfeiture is imposed for transgressing the provisions of the act. A penal law may also be remedial, and a statute may be penal in one part and remedial in another.‡ We shall have occasion hereafter to notice the incidents of penal statutes, but we may here mention the general principle that a penalty implies a prohibition, though there are no prohibitory words in the statute.§

Repealing Statutes are revocations of former statutory enactments;‖ and the effects of the repeal of laws,

* Dwarris, 474, 11 Rep. 63.

† Dwarris, p. 478.

In illustration of this decision and distinction, Mr. Dwarris says,—"A statute which gave bishops and other sole ecclesiastical corporations (except parsons and vicars) a power of leasing which they did not possess before, viz.: Stat. 32 Henry VIII. c. xxxviii. was an enabling statute. The Stat. 13 Elizabeth, c. x. which afterwards limited that power, is on the contrary a disabling statute."—Dwarris, p. 479.

‡ 1 Wils. 126.

§ Griffith *vs.* Wells, 3 Denio, 226.

‖ Mr. Dwarris says, p. 478, "Repeal acts are revocations of former statutory laws authorizing and permitting the parties to whom the repeal extends, to forbear from acts which they were before commanded to do. Hence they are often named permissive laws; or, more briefly, *permissions.*" This, however, seems a very narrow definition of a repeal act. It

we shall have occasion to notice hereafter, when we come to speak of the Incidents of Statutes.*

It may be useful to close this branch of our subject by stating briefly the division of statutes according to the continental jurists, with a brief sketch of their general nature and distinctive qualities. But it is necessary to premise, that by statutes the civilians do not mean merely the positive legislation which in England and America is known by the same name,—viz. Acts of Parliament and of other legislative bodies, as contradistinguished from the common law,—but the whole municipal law of the state, from whatever source emanating. Sometimes the word is used by civilians in contradistinction to the Roman Imperial Law, which they sometimes style, by way of eminence, "The Common Law," since it constitutes the general basis of the jurisprudence of all continental Europe, modified and restrained by local customs and usages, and positive legislation. Paul Voet says, "*Sequitur jus particulare, seu non commune, quod uno vocabulo usitatissimo*, STATUTUM *dicitur, quasi statum publicum tuens.* Merlin says, "*Ce term statut, s'applique en general à toutes sortes des lois et des reglements; chaque disposition d'une loi est un statut,—qui permet, ordonne, ou defend quelque chose.*

Statutes are divided by the civilians into personal, real, and mixed. Personal statutes are those which act upon the person directly, as their subject or object;

would be difficult, for instance, to find any *permission* contained in the act repealing the general bankrupt law of the United States.

* Mr. Dwarris, in his very valuable work, makes one class of statutes to consist of those which are *void*. It seems hardly proper to make a class of statutes which are in the eye of the law no statutes at all; and we shall consider this subject under another head, when speaking of the restrictions upon Legislative Power.

fixing and determining its state and condition, as with reference to birth, legitimacy, freedom, majority, &c., without mentioning things or property, except incidentally. These personal statutes are of general force and obligation everywhere.

Real statutes are those which have for their direct object or motive, things or property, whether movable or immovable, and independently of the personal state of the proprietor or possessor; as laws which concern the disposition which one may make of what belongs to him, while living or by his will.

Mixed statutes affect both persons and property, and constitute a third class, which it has been found necessary to admit; there being so many statutes which are neither purely personal nor purely real, or in regard to which it is doubtful whether the personal or real characteristics prevail. The rules for distinguishing the several kinds, and the application of these rules to the particular case, are much discussed and controverted by the civilians, who have treated the subject with their accustomed learning, acumen, and metaphysical subtlety. *In iis definiendis mirum est quam sudant doctores.*

But this subject has been so fully discussed in that which is perhaps the greatest monument of the intellect and the labors of the late Mr. Justice Story, that I will here only refer to the "CONFLICT OF LAWS."

It would encumber the text too much to go at length into any antiquarian discussion as to the history of the early legislation of this country; but I cannot refrain from giving, in this note, a brief sketch of the mode in which the first laws of at least one of the Colonies were framed.

The State of Massachusetts has, with a commendable liberality and respect for its early history, recently (1853–1855) published, in six handsome 4to. volumes, the legislative records of the Colony, from 1628 to 1686.

"Records of the Governor & Company of the Massachusetts Bay, in New England, printed by order of the Legislature, edited by Nathaniel B. Shurtleff." They are extremely valuable, and throw great light not only on the character but the formation of the laws of the infant State. The early and constant attention to the subject of legislation, the care shown and the modes devised to secure a representation of all the interests to be provided for, the intermixture of the "Word of God" with their temporal administration, and the eminently equal and republican nature of the whole proceedings, are of great interest with reference to the formation of some of the earliest institutions of our empire.

The charter of Charles I. to Sir Henry Rosewell and others, founded on the cession from the Plymouth Council, and creating the corporation called "The Governor & Company of the Mattachusett Bay in Newe England," was granted in March, 1628. It contained the following provision as to the making of laws for the new State. (Colony Records 1, p. 16.) "And wee doe of our further grace, certen knowledg, and mere mocon, give & graunt to the Saide Governor & Company and their successors, that it shall and will be lawful to and for the Governor, or Deputie Governor & such of the Assistants & Freemen of the saide Company for the Tyme being as shall be assembled in any of their Generall Courtes aforesaide, or in any other Courtes, to be specially sumoned and assembled for that purpose or the greater part of them, (whereof the Governor & Deputie Governor and six of the assistants to be alwaies seaven) from tyme to tyme to make, ordeine & establishe all manner of wholesome and reasonable orders, Lawes Statutes & ordinnces, direccons & instruccons not contrarie to the lawes of this our realme of England as well for setting of the formes & ceremonies of government & magistracy fitt & necessary for the said plantacon & the inhabitants there & for nameing & stiling of all sortes of officers both superior and inferior which they shall finde needefull for that government and plantacon & the distinguishing & setting forth of the severall duties powers and lymytte of every such office & place and the formes of such oathes warrantable by the lawes & statutes of this our realme of England as shalbe respectivelie ministred unto them for the execucon of the said severall offices and places, as also for the disposing and ordering of the elecons of such of the said officers as shallbe annuall & of such others as shallbe to succeede in case of death or removeall & ministring the said oathes to the newe elected officers and for imposicons of lawfull fynes & mulcte, imprisonment or other lawfull correcon according to the course of other corporacons in this our realme of England and for the directing ruling and disposeing of all other matters & thinges whereby our said people inhabitante there maie be soe religiously peaceablie & civilly governed as their good life and orderlie conversacon maie wynn and incite the natives of country to the knowledg and obedience of the onlie true God & Saviour of mankinde & the Christian fayth which in our royal intencon and the adventurers free profession is the principall end of this Plantacon."

At a meeting of the Company, held at London on the 30th of April, 1629, the Governor and Company were directed "to make ordeyne and establish all manner of wholsome & resonable orders, laws, statutes, ordinances, directions & instrucktyons not contrary to the lawes of the Realme of England ffor the present gouernment of our plantacon and the inhabitants residinge within ye lymitts of our Plantacon; a coppy of all which orders is from tyme to tyme to bee sent the Comp. in London."—[Colony Records, i., p. 38.]

This charter created a mere Commercial Company, but in 1630 the seat of government of the association was transferred to the Colony. Within four years, says Mr. Bancroft, it was determined that the whole body of the freemen should be convened to elect the magistrates, and that to them, with the deputies of the several towns, the powers of legislation should be intrusted. And thus, in the historian's expressive language, "the trading corporation was become a representative Democracy."—Bancroft, i., p. 365.

I find, however, under date of 19th October, 1630, the following entry. If this be the change to which Mr. Bancroft refers, it was one of the first steps taken after the transfer of the seat of government to this country.

At a general court holden at Boston the 19th of October, 1630, "it was ppounded if it were not the best course that the ffreemen should have the Power of chuseing Assistants when there are to be chosen & the Assistants from amongst themselves to chuse a Gounr. & Deputy Gounr. whoe with the Assistants should have the power of makeing lawes and chuseing officers to execute the same. This was fully assented unto by the gen'all vote of the People and ereccon of hands."—Colony Records, i., p. 79.

A collection of the orders or laws very soon became a subject of consideration. On the 4th March, 1634, Winthrop and Bellingham appointed a committee to prepare a revision of "all orders already made," and report to the next General Court.—C. R., i., p. 137.

On the 6th May, 1635, the Governor, Deputy Governor, Mr. Winthrop and Mr. Dudley "are deputed by the court to make a Draught of such Laws as they shall iudge needefull for the well ordering of the plantacon & to psent the same to the Court."—C. R., i., p. 147.

On the 25th May, 1636, it was ordered (i., p. 174, 175) as follows:

"The Gounr., Deputy Gounr., Tho Dudley, John Haynes, Rich: Bellingham Esqr. Mr Cotton, Mr Peters, & Mr Shepheard, are intreated to make a draught of Lawes agreeable to the word of God wch may be the ffundamentall of this comonwealth and to present the same to the next Genall Court. And it is ordered, that in the meane tyme the magistrates and their associates shall pceede in the courts to heare and determine all causes according to the lawes nowe established & where there is noe law then as neare the law of God as they can, and for all business out of Court for wch there is noe certaine rule yet sett downe those of the standing counsell or some two of them shall take order by their best discrecon that they may be ordered & ended according to the rule of God's Word, and to take care for all military affaires till the nexte Genall Court."

On the 12th March, 1637 (C. R., i. 222) it was ordered as follows:

"For the well ordering of these plantacons now in the begining thereof, it haveing been found by the little time of experience wee have heare had that the want of written Lawes have put the court into many doubts and much trouble in many perticuler cases this Court hath therefore ordered that the freemen of every towne (or some part thereof chosen by the rest) wthin this iurisdiction shall assemble together in their severall townes & collect the heads of such necessary and fundamentall lawes as may bee suta-ble to the times and places whear God by his pvidence hath cast us, & the heads of such lawes to deliver in writing to the Governor for the time being before the 5th day of the 4th month called June next to the intent that the same Governor, together wth the rest of the standing counsell and Richrd Bellingham Esq, Mr Bulkley, Mr Philips, Mr Peters, and Mr Sheopard elders of severall churches, Mr Nathaniell Ward, Mr Willi: Mr Spencer & Mr Will: Hauthorne or the maior part of them may upon the survey of suche heads of Lawes make a compendious abrigment of the same by the Generall Court in autume next adding yet to the same or detracting therefrom what in their wisdomes shall seeme meete that so the whole worke being pfected to the best of their skill it may bee psented to the Generall Court for confir-mation or reiection as the Court shall adiudge."

In 1640, 13th May, it was ordered as follows:

"Whereas a breviate of Lawes was formerly sent to be considered by the Elders of the Churches and other freemen of this Comonwealth it is now desired that they will endeavour to ripen their thoughts & counsells about the same by the Generall Court in the next 8 mo:."—C. R., i., p. 292.

On the 7th October, 1641, "The Gov. & Mr. Hauthorne were desired to Speake to Mr. Ward for a Coppey of the liberties & of the Capitall lawes to bee transcribed & sent to the Generall townes."—C. R., i., p. 340.

It appears from this that the laws were still in manuscript only, and so we find [C. R., v. ii., p. 14] that on the 14th June, 1642, "Goodman Stowe is granted 100 acres of Land where he can find it convenient wthout piudice to any towne for recompence of his paines in writing the lawes already & to write such as are still to bee written."

On the 7th March, 1643, the subject of a modification of the Laws is again considered & committed to the Govr., Mr. Dudley, Mr. Hibbens, the Magistrates residing at Ipswich and Mr. Bellingham.—C. R., ii., p. 61.

On the 14th May, 1645, the subject seems to have been more systemati-cally taken up, and Committees of six members each are raised from the respective counties of Suffolk, Middlesex, and Essex, "to consider & draw up a body of Lawes to present them to the consideration of the next Gen-eral Court."—C. R., ii., p. 109.

On the 1st of October, 1645, these Committees are called together at times and places designated for the accomplishment of the work, so "that the Courte may pceede thereupon to satisfy ye expectation of the Country in establishing a Body of Lawes."—C. R., v. ii., p. 128.

On the 22d May, 1646, is made the following entry:

"This Corte thankfully accepts of ye labors returned by ye sevrall comittees of ye sevrall sheires & being very unwiling such pcious labors should fall to ye ground wthout yt good successe as is genrally hoped for, have thought it meete to desire Richrd Bellingham Esqr, Mr Symonds, Leift Duncan, Leift Johnson, & Mr Ward do cause each comittees returne about a body of lawes to be transcribed, so as each comittee may have ye sight of ye others labors, and that ye psons mentioned in this order be pleased to meete together at or before ye 10th of August at Salem or Ipswich, & on their pusing & examining ye whole labors of all ye comittees, with ye abreviation of ye lawes in force, wch Mr Bellingham tooke greate store of paines & to good purpose, in and upon ye whole & make return to ye next session of this Corte, at wch time ye Cort intends, by ye favor and blessing of God, pceed to ye establishing of so many of them as shalbe thought most fit for a body of Lawes amongst us."—C. R., vol. ii., p. 157.

On the 4th November, 1646, this entry is made:

"The Corte, being deeply sensible of ye earnest expectation of the country in genrall for this Corts compleating of a body of Lawes for ye bettr & more ordely wielding all ye affaires of this comon wealth, wiling also to their utmost to answer their honest & harty desires therein, unexpectedly p'vented by multitude of othr pressing occasions thinke fit & necessary yt this Corte make choyce of two or three of or honored magistrats, wth as many of ye deputies to puse, examine, compare, transcribe, correct, & compose in good order all ye liberties, Lawes, & orders extant wth us, & furthr to puse & pfect all such othrs as are drawne up & to psent such of them as they find necessary for us, as also to suggest what they deeme needfull to be aded, as also to consider and contriue some good methode & order, titles, & tables for compiling ye whole, so as we may have ready recourse to any of them upon all occasions, whereby we may manifest or uttr disaffection to arbitrary govermt, & so all relations be safely & sweetly directed & pfected in all their iust rights and priviledges, desireing thereby to make way for printing or Lawes for more publike & pfitable use of us and or successors. Or honored Govrnr, Mr Bellingham, Mr Hibbens, Mr Hill, & Mr Duncan, as a comittee for ye business above mentioned, or any three of them meeting, ye othr haveing notice thereof, shallbe sufficient to carry on ye worke."—C. R., vol. ii., p. 168.

On the 26th May, 1647, the Court finding that the Committee for perfecting the laws have "through streights of time & other things intervening," not completed their work, commit the task to another committee.—C. R., vol. ii., p. 196.

On the 11th November, 1647, it appears that the work was done, and arrangements were made about printing.—C. R., vol. ii., p. 209.

And it is further "agreed by ye Corte to ye end We may have ye better light for making & pceeding about laws yt yr. shal be these books following pcured for yr use of ye Courte from time to time: Two of Sir Edward Cooke upon Littleton; two of ye Bookes of Entryes; two of Sir Edwd

Cooke upon Magna Charta; two of ye Newe Tearmes of ye Lawe; two Dalton's Justice of Peace; two of Sir Edwd Cook's Reports."—Vol. ii., p. 212.

On the same date, it appears that the "Lawes are now in a manner agreed upon," and a Committee is appointed in regard to alterations.—C. R., vol. ii., p. 217, 218.

On the 10th May 1648 [C. R., vol. ii., p. 246], they are "at presse." And on the 27th October, 1648, the price of the printed copy is fixed.—C. R., vol. ii., p. 262.

I have thus traced the growth of the first body of printed laws in Massachusetts; and on the 17th October, 1649, the Court "finding by experience the great benefit that doth redound to the Court by putting of the law in print," direct the printing of all laws passed since the first publication.—C. R., vol. ii., p. 286.

CHAPTER III.

THE PARTS OF STATUTES.

Blackstone's Enumeration of the Parts of a Statute: Practical Division—Title—Commencement—Preamble—Purview—Clauses—Provisoes—Exceptions—Schedules.

Blackstone says * that every law may be said to consist of four several parts:

The *Declaratory*, or that which defines the rights to be observed and the wrongs to be eschewed;

The *Directory*, commanding the subject to observe the right and abstain from the wrong;

The *Remedial*, pointing out the method to recover the right or redress the wrong; and

The *Vindicatory*, or sanction, declaring the penalty to be inflicted for a violation of the law.

This division is correct and philosophical, but has little practical value. A statute for practical purposes is divided into the following parts:—

The *Title.*

The *Commencement.*

The *Preamble.*

The *Purview, or Body of the Act.*

Special Clauses.

Provisoes.

Exceptions.

Schedules.

* Introduction, § 2.

The Title.—The custom of prefixing titles to statutes, was not regularly introduced prior to the eleventh year of the reign of Henry VII.; though particular instances may have occurred before that time. The title was formerly called the Rubric, from being written in red characters.*

In the early English cases, the courts held the title to be no part of the statute; "no more," says Lord Holt, "than the title of a book is part of the book."† This is not a very good illustration. The reason of the rule in England is better stated by Mr. Dwarris, who says that the title is usually framed only by the clerk of that house in which the bill first passes, and is seldom read more than once.‡ In accordance with this, the title has been said to afford no clue to the legislative intent.§

But it now seems that where the meaning of the body of the act is doubtful, the title may be relied on as an assistance in arriving at a conclusion.‖ The title, however, being, in strictness, no part of the act in a legal sense, it would be absurd to attempt to use it for the purpose of restraining or controlling any positive provision of the act. It can only be used for the fact of the maker's having given the law a certain name, if that fact can render any assistance in doubtful cases. Taken in connection with the other parts of the statute, the title, where the intent is not plain, may somewhat assist in removing ambiguities.¶

* Dwarris, p. 500; Chance *vs.* Adams, Hard. 324.

† Rex *vs.* Williams, I. W. Bl. 85; Poulter's Case, 3 Rep. 33; Wills *vs.* Wilkins, 6 Mod. 62.

‡ Dwarris, p. 501.

§ 1 Ambler, 22.

‖ Stradling *vs.* Morgan, Plowden, 203; King *vs.* Cartwright, 4 T. R. 490; King *vs.* George Marks, 3 East. 160.

¶ Dwarris, p. 502.

In this country it has been said, on the same principle, though the title cannot control the plain intent of the statute, that where the words are doubtful, it may be resorted to to remove ambiguities.*

It seems to me, on the whole, however, that the original rule is the true one. The title is rarely a matter of legislative debate or scrutiny; and though it may, and doubtless does, give a general idea of the purport of the act, still, it is precisely in cases of nicety and doubt that it cannot with safety be relied on.†

In another point of view, the title of the statute has recently received much importance in some of the States of the Union. The 16th Section of the 3d Art. of the Constitution of New York, adopted in the year 1846, declares that "No private or local bill which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title." The design of this constitutional provision has been judicially declared‡ to have been "to prevent the uniting of various objects, having no necessary or natural connection with each other, in one bill, for the purpose of combining various pecuniary interests in support of the whole, which could not be combined in favor of either by itself;" and, on the ground that the provision was to be so construed as to reach this mischief alone, it has been held, that an act entitled "an Act in relation to the fees and compensation of certain officers in the city and county of New York," by which salaries were given to four officers of that city, in place

* U. S. *vs.* Fisher, 2 Cranch R. 386; U. S. *vs.* Palmer, 3 Wheat. 610; State *vs.* Stephenson, 2 Bailey, 334; Burgett *vs.* Burgett, 1 Ham. 219.

† See reference to Title for aid in case of ambiguity; Williams *vs.* Williams, 4 Seld. 525, 535.

‡ Conner *vs.* The Mayor, 1 Seld. 285, 293.

of the fees of their respective offices, and providing also that the fees should be paid into the city treasury and the salaries paid out of them, even assuming it to be a private bill, was not within the constitutional restriction above referred to; that it embraced but one subject, and that the subject was sufficiently expressed in the title.* So again, where an act was passed entitled "For the relief of certain parties," and it contained, besides provisions for their relief, a clause repealing another statute on the same matter, which had been acted on and therefore ceased to be operative, it was held that this did not add another subject to the bill.† So, an act entitled "an Act to enable, &c. to raise money by tax," does not violate this provision, although the law contains special provisions, and designates the objects for which the tax is to be levied; and the Court of Appeals said, "There must be but one subject; but the mode in which the subject is treated, and the reasons which influenced the Legislature, cannot and need not be stated in the title, according to the letter and spirit of the Constitution."‡ The purpose of the provision was, that neither the members of the Legislature nor the public should be misled by the title, not that the latter should embody all the distinct provisions of the bill in detail.

The Constitution of the State of Texas contains the same provision, and makes it applicable to all bills, whether public or private. "Every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title."§ And in that State

* Conner *vs.* The Mayor, 1 Seld, 285.

† Town of Guildford *vs.* Cornell, 18 Barb. 640.

‡ Sun Mutual Insurance Co. *vs.* The Mayor, 4 Selden, 241.

§ Cons. of Texas, 1845, Art. vii. § 24.

also, it is held that the provision is to be liberally construed. So, where an act which was entitled, "to regulate Proceedings in the County Court," gave an appeal from the County Court to the District Court, and regulated proceedings therein, it was held that this was not within the mischief contemplated by the Constitution, and that the act was valid.*

The Commencement.—This clause, with which where there is no preamble each bill commences, varies according to the character of the authority from which the law emanates. In England, says Mr. Dwarris, The mode of stating the enacting authority, has varied at different times. Regulations having the force of laws, assumed multiform shapes, appearing sometimes as ordinances; then as grants, patents, and charters; again, as mere directions or prohibitions of the king, but sanctioned, nevertheless, directly or indirectly, by the Lords and Commons. Formerly, the bill was in the nature of a petition, and these petitions were entered upon the Parliament roll; and upon these rolls the royal assent was likewise entered. Upon this groundwork the judges used, at the end of the Parliament, to draw up the act of parliament into the form of a statute, which was afterwards entered upon the statute roll. In Henry 6th's time, the former method was altered, and bills *continentes formam*

* Murphey *vs.* Menard, 11 Texas, 673.

The evil which these constitutional provisions are intended to correct, is not of recent date. Mr. Barrington says (Obs. on Statutes, p. 449), "It becomes indeed, impossible, when statutes relate to matters of a very miscellaneous nature, that the title can be coëxtensive with the views of the Legislature. It is, therefore, to be wished that such acts of Parliament were distinct laws, and not thrown together in that very strange confusion which hath now obtained the name of a *Hodge Podge* Act."

actus Parliamenti, came to be at once brought into the house.*

The established form of the commencement of a statute in England, now is: "Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that," &c.

The enacting clause of the laws of the American Union, runs thus: "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled."

The enacting clause in the States differs with their different organization. In New York, it runs thus: "The People of the State of New York, represented in Senate and Assembly, do enact as follows."

The Preamble.—Both in England and this country, it was at one time a common practice to prefix to each law a preface, prologue, or preamble, stating the motives and inducements to the making of it; but it is not an essential part of the statute, and is now frequently, if not generally, omitted.

With the civilians, the preamble is a matter of much consequence. They say, *Cessante legis procemio, cessat et ipsa lex.* In our law it holds a far lower rank. A preamble is not only not essential and often, now indeed generally, omitted, but it is without force in a legislative sense, being but a guide to the intentions of the framer. Still, as such guide, it is often of importance. It is in this sense that, as Lord Coke and Lord Bacon say, the preamble is a key to open the understanding of a statute.

"The influence of the preamble," says Mr. Justice

* Dwarris, p. 503.

Story, in his Commentaries on the Constitution of the United States, "has a foundation in the exposition of every code of written law, upon the universal principle of interpretation, that the will and intention of the Legislature is to be regarded and followed. The preamble is properly referred to when doubts or ambiguities arise upon the words of the enacting part. The preamble can never enlarge, it cannot confer any powers *per se.* Its true office is to expound powers conferred, not substantially to create them."* "The preamble to a statute," say the Supreme Court in Illinois, "is no part of the act, still it may assist in ascertaining the true intent and meaning of the Legislature."†

In the modern English cases, it is said that the preamble may be used to ascertain and fix the subject matter to which the enacting part is to be applied.‡ So, the purview or body of the act may even be restrained by the preamble, when no inconsistency or contradiction results.§ But it is well settled that where the intention of the Legislature is clearly expressed in the purview, the preamble shall not restrain it, although it be of much narrower import.‖ "If the words of this section," says Lord Campbell, C. J., in a

* See, to same effect, Crespigny *vs.* Wittenoom, 4 T. R., 193; Edwards *vs.* Pope, 3 Scam. 465.

† Edwards *vs.* Pope, 3 Scam. 465.

‡ Salkeld *vs.* Johnson, 1 Hare, 196; Emanuel *vs.* Constable, 3 Russel, 436; Foster *vs.* Banbury, 3 Sim. 40; Crespigny *vs.* Wittenoom, 4 T. R. 193.

§ Seidenbender *vs.* Charles, 4 S. and R. 166; Kent *vs.* Somerville, 7 Gill and J. 266.

‖ King *vs.* Marks, 3 East. 165; Kinaston *vs.* Clarke, 2 Atk. 205; Holbrook *vs.* Holbrook, 1 Pick. 251; Copeman *vs.* Gallant, 1 P. Wm. R. 320; King *vs.* Athos, 8 Mod. 144; Kent *vs.* Somerville, 7 Gill and J. 265; Lees *vs.* Somersgill, 17 Ves. 510.

recent case, "admitted of any reasonable doubt, we would look to the title and preamble, and endeavor to construe the enactments consistently with them."* So, if a clear and definite remedy is given by the act, the preamble cannot be used to introduce one more extensive.†

A question has arisen as to the effect of the preamble as matter of evidence; or, in other words, whether the allegation by the Legislature in the preamble of a statute, of the existence of certain facts, can be offered as evidence of these facts in courts of justice, when private rights come in question. On this point it has been held in England, where an information for a libel contained an introductory averment that great outrages had been committed in certain parts of the country, that the preamble of an act of Parliament reciting the existence of outrages of that description, was admissible for the purpose of proving the averment.‡

This decision, however, gives more weight to the preamble than would probably be allowed to it in this country. The court of Kentucky, on the question, whether the preamble of a *private* statute could be used as evidence of the matters recited in it, said, "The fact recited in the preamble of a private statute may be evidence between the commonwealth and the applicant or party for whose benefit the act was passed. But as between the applicant and another individual whose rights are affected, the facts recited ought not

* Wilmot *vs.* Rose, 3 Ellis and Blackburn, Q. B. 563; Free *vs.* Burgoyne, 5 B. and C. 400.

† Wilson *vs.* Knubley, 7 East. 128, Bac. Abr. Stat. 1; Adams *vs.* Wood, 2 Cranch, 336.

‡ Rex *vs.* Sutton, 4 Maule and Sel. 532.

to be evidence. We well know that such applications are made frequently *ex parte*. The Legislature, in all its inquiring forms by committees, makes no issue. Once adopt the principle that such facts are conclusive, or even *prima facie*, evidence against private rights, and many individual controversies may be prejudged, and drawn from the sanctions of the judiciary into the vortex of legislative usurpation. The appropriate functions of the legislature are to make laws to operate on future incidents, and not a decision or forestalling of rights accrued or vested under previous laws. Such a preamble is evidence that the facts were so represented to the legislature, and not that they are really true."* This reasoning applies with as much force to public as to private statutes; and the Supreme Court of New York has well said that the legislature has no jurisdiction to determine facts touching the rights of individuals.†

A preamble is sometimes prefixed to a particular clause, the tenor of which it is meant to explain or which it is intended to elucidate.‡

The Purview, or Body of the Act.—The true meaning of the statute is generally to be sought in the purview, providing part or body, of the act. As we have seen, it is well settled that when the words in this part are broad enough to take in the mischief

* Elmendorf *vs.* Carmichael, 4 Litt. R. 47.

† Parmlee *vs.* Thompson, 2 Hill, 77.

‡ Mr. Barrington, in his *Observations on the Ancient Statutes*, a rambling, but shrewd, sensible, and learned work, manifests considerable hostility to preambles. He says, "The most common recital for the introduction of any new regulation, is to set forth that 'doubts have arisen at common law' which frequently never existed." And again, with great truth, "the preamble often dwells upon a pretense which was not the real occasion of the law, when perhaps the proposer had very different views in contemplation."—*Obs. on Stat.* p. 394.

alleged to be included, they shall be so construed though the preamble does not warrant it; in other words, the purview of the statute may carry the act beyond the preamble. "There are a variety of cases," said Lord Mansfield, "where it has been determined that strong words in the enacting part of a statute, may extend beyond the preamble.*

This, then, seems to be the general principle. The title may be resorted to in cases of ambiguity, and is a guide of some, though slight, value. The preamble may be consulted to ascertain the intention of the law-making power. But it is chiefly from the main body, the purview of the act, that the will of the legislature is to be learned; and when this is clear and express, neither preamble nor title will avail to contradict or overrule it. *Absoluta sententia expositore non indiget.* "This is the case," says Lord Coke, "where the words are plain without any scruple, and absolute without any saving."† We shall discuss other branches of this part of our subject, when we come to examine the rules of interpretation.

Clauses.—Of these in bills, there are various kinds. Bills frequently contain an interpretation clause; and this clause, says Mr. Dwarris, should precede the mere body of the act, since, as he says, agreeably to right reason and common sense, definitions should precede the matter to which they have reference. In America, however, the interpretation clause, where it occurs, is generally to be found at the end of the statute.

The practical use of the interpretation clause will

* Dwarris p. 507; Strode *vs.* The Stafford Justices, 1 Brock, 162; 3 Atk. 204; Pattison *vs.* Bankes, Cowper, 540; Doe *dem.* Bywater & Brandling, 7 B. and C. 643.

† 2 Inst. 533; Dwarris, p. 519.

be best understood from an example—thus: "The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall, in this act (except where the nature of the provision or context of the act shall exclude such construction), be interpreted as follows: that is to say, the word *Land* shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, or of other tenure," &c. And again; "Every word importing the plural number, shall extend and be applied to a female as well as to a male," &c. &c.*

In England, the judicial inclination seems to be that interpretation clauses are by no means to be strictly construed.† In a recent case, Lord Denman said, "A difficulty is raised from the interpretation clause, which enumerates all such persons as shall be meant and included in the term overseers. And it is argued that the legislature could not intend the majority of this indefinite and fluctuating body to concur in giving a notice. The argument goes rather to show the inconvenience of requiring the majority to act, than to determine whether a church-warden is an overseer, the real question in these cases. But we apprehend that an interpretation clause is not to receive so rigid a construction, that it is not to be taken as substituting one set of words for another; nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be comprehended within that term, where the circumstances require that they should. We can-

* Dwarris, p. 508, 509.

† Reg. *vs.* Justices of Cambridgeshire, Reg. *vs.* Justices of Shropshire, and Reg. *vs.* Justices of Gloucestershire, 7 A. and E. 480.

not, however, refrain from expressing a serious doubt, whether interpretation clauses of so extensive a range will not rather embarrass the courts in their decision than afford that assistance which they contemplate. For the principles on which they are themselves to be interpreted, may become matter of controversy; and the application of them to particular cases, may give rise to endless doubts."

The purview of an act may be qualified or restrained by a saving clause in the statute.* A saving in the statute is only an exemption of a special thing out of the general things mentioned in the law;† but a saving clause in a statute where it is directly repugnant to the purview or body of the act, and cannot stand without the rendering the act inconsistent and destructive of itself, is to be rejected.‡ This is inconsistent, as we shall presently see, with the rule in regard to provisoes; and the inconsistency has been clearly pointed out by Mr. Chancellor Kent, who well says,§ "A proviso repugnant to the purview of the statute renders it equally nugatory and void as a repugnant saving clause; and it is difficult to see why the act should be destroyed by the one and not by the other, or why the proviso and the saving clause, when inconsistent with the body of the act, should not both of them be equally rejected." But apart from a direct repugnancy, the general words in one clause of a statute may be restrained by the particular words in a subsequent clause of the same statute.‖ When a general intention

* 1 Jon. 339; 10 Mod. 155; Dwarris, p. 513.
† Hollewell *vs.* Corporation of Bridgewater, 2 And. 192.
‡ Plowden, 564; Dwarris, 513; Mitford *vs.* Elliott, 8 Taunt. 13.
§ Kent Com. i., 463.
‖ R. *vs.* Archbishop of Armagh, 8 Mod. 8.

is expressed, and the act also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception.* But a particular thing given by the preceding part of statute, shall not be taken away or altered by any subsequent general words.†

Repealing Clause.—The next clause in order, in those cases in which it is used, should be the repealing clause, showing what prior acts are totally repealed, except so far as they repeal any other act or acts, or part or parts thereof, and what acts are partially repealed; and what statutes are recognized as being in full force, and as having immediate connection with the enactments of such former act. The object of this clause is to point out that either it is the only statute of force upon the subject, by the repeal of all others, or to show what other statutes are to be considered in connection with it, so that the student may be better prepared to enter on the consideration of the details in the last statute.‡ In this country, the repealing clause is too often omitted, owing to the multiplicity of our legislation and the haste consequent thereupon. It would undoubtedly lead to greater care and precision if it were practicable to make it necessary in every statute to refer at length to the prior enactments on the subjects, and to designate such provisions as it was intended to repeal.§

* Churchill *vs.* Crease, 5 Bing. 180; Terrington and Hargraves, ib. 492.

† Stanton *vs.* University of Oxford, 1 Jon. 26.

‡ Dwarris, p. 511.

§ In New York, this was much attended to by the Revisors of the general legislation of the State, and the Codifiers of the system of pleading. In the constitution of some of the new States, there is inserted a provision in regard to the revision and amendment of laws with reference to the *title*, the analogy of which might perhaps be followed in regard to the repeal of statutes. So

The remaining clauses in most general use, are, besides those already mentioned, an appeal clause; a clause showing to what places the operation of the act shall extend; a clause showing from what date the operation of the act is to commence, and how long it shall continue in force; and lastly, in England, the concluding clause of a public general act, the clause providing that the act may be altered and repealed in the same session of Parliament.

We come next to *Provisoes.*—"A proviso in deeds or laws," says the Supreme Court of the United States, "is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate or the other be exercised unless in the case provided."* A curious rule of a very arbitrary nature, to which I have already alluded, prevails with regard to provisoes. It is that when the proviso of an act of Parliament is directly repugnant to the main body of it, the proviso shall stand and be held a repeal of the purview, as it speaks the last intention of the makers.†

Exceptions.—There is a well-known distinction between an exception in the purview of the act and a proviso. If there be an exception in the enacting clause

the Constitutions of California [Art. iv. § 25] and Indiana [Art. iv. § 21], both declare that "no act shall be revised or amended by mere reference to its title, but the act revised or section amended, shall be re-enacted and published at full length;" and the same provision has been adopted in Texas. [Art. vii. § 25.]

* Voorhees *vs.* Bank of U. S., 10 Peters, 449, per Baldwin, J. "The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure to modify the enacting clause." Wayman *vs.* Southard, 10 Wheaton, 1, 30.

† Attorney General *vs.* Chelsea Water Works Co., Fitzgibbon, 195; 2 Dwarris on Statutes, 515; Rex *vs.* Justices of Middlesex, 2 B. and Adol. 818; Supra, p. 60.

of a statute, it must be negatived in pleading, but a separate proviso need not; and, that although it is found in the same section of the act, if it be not referred to, and engrafted on the enacting clause. The rule is, said Mr. Justice Ashurst,* "that any man who will bring an action for a penalty on an act of Parliament, must show himself entitled under the enacting clause; but if there be a subsequent exemption, that is a matter of defence, and the other party must show it to exempt himself from the penalty." Mr. Justice Buller said, "I do not know any case for a penalty on a statute, where there is an exception in the enacting clause, that the plaintiff must not show that the party whom he sues, is not within it." So in a criminal case, Lord Mansfield said, "What comes by way of proviso in a statute, must be insisted on for the purposes of defense by the party accused; but where exceptions are in the enacting part of the law, it must in the indictment charge that the indictment is not within any of them."† This rule as to prosecutions upon penal statutes, that it is necessary to show, by negative averments, that the defendant is not within any of the exceptions of the enacting part of the statute, has been frequently recognized in this country. So, if a statute provides that no person shall retail spirituous liquors except for sacramental, mechanical, chemical, medical, or culinary purposes, an indictment on the statute must negative that the liquor was sold for these purposes.‡

* Spiers *vs.* Parker, 1 Term, 141.

† Dwarris, p. 516; Rex *vs.* Jarvis, Burr, 148; Spiers *vs.* Parker, 1 T. R. 141; The King *vs.* Jukes, 8 T. R. 542, Foster, 430; The King *vs.* Stone, and Rex *vs.* Jarvis, 1 East. 644; Kent Com. i. 462, and People *vs* Berberrich and Toynbee, 11 Howard Pr. R. p. 333.

‡ Chit. Crim. Law, vol. i. p. 284; Brutton *vs* the State, 4 Indiana, 602; People *vs.* Berberrich & Toynbee, 11 Howard Pr. R. p. 289, 333.

Schedules.—When, for the purpose of a more than usually comprehensive enactment, it is deemed necessary to include the intended meaning of numerous words in the arbitrary import of one, or that there should be numerous words bearing the same constructive import, that end should be attained by means of a schedule annexed to the act. But the act of Parliament and the schedule, are sometimes found to differ; and what will be the result of such discrepancy? If there be any contradiction between the two, and they cannot be reconciled, then, said Lord Denman, "upon ordinary principles the form which is made to suit rather the generality of cases than all cases, must give way." "Words in schedules must be received as examples, not as overruling provisions," said Tindal, C. J.*

* Reg *vs.* Baines, 12 A. and E. 227; Dwarris, p. 511.

CHAPTER IV.

THE ATTRIBUTES AND INCIDENTS OF STATUTES.

Applications for the passage of Statutes—Contracts to obtain the passage of Statutes, or to withdraw opposition—Authority and Jurisdiction of Statutes—Time when Statutes take effect—Effect of Statutes to avoid contracts in violation of them—Remedies for the violation of Statutes—Statutory Forfeitures—Ignorance of Statute no excuse—Limitations of actions—Waiver of Statutes by consent—Pleading and Proof of Statutes—Repeal.

We have now to consider the more important attributes and incidents of statutes from the time of the first steps taken for their enactment to that of their repeal. This will embrace, among other subjects, applications to the legislature for the passage of laws; the effect of contracts to obtain or oppose their enactment; their authority and jurisdiction; remedies and waiver; the rules of pleading and of proof with regard to them; and finally, the results of their repeal.

As a general rule, no public notice is necessary previous to the introduction or passage of an act. Bills are framed either upon petitions, or upon the mere motion of members of the legislative body; and parties interested have only such notice of their introduction as the wisdom of the legislator sees fit to require.* To

* The Constitution of New York declares, Art. iii. § 14, "that no law shall be enacted except by bill." The Constitution of Wisconsin contains a similar provision. Art. iv. § 17.

this general practice there is an exception in North Carolina, the constitution of which State provides "that the General Assembly shall not pass any private law unless it shall be made to appear that thirty days' notice of application to pass such law shall have been given, under such directions and in such manner as shall be provided by law";* and also in the State of New York, where the revised statutes declare† that, in regard to applications for acts of incorporation, alteration of county, city, or village boundaries, local taxes, escheats, and certain other public objects, notice of the intention to apply to the legislature shall be given, by newspaper advertisement. But it has been held, in regard to a statute of this class, that it was not necessary to furnish any proof of the publication of the notice having been in fact made; and it was said, "that the notice was a direction to the public, calculated merely to guard the legislature from surprise and fraud, and to prevent hasty and improvident legislation; that the rule was made by the legislature for its own convenience and might be entirely disregarded; and that a law would be valid although no notice whatever of the application was published."‡

This decision, though perhaps sound, is evidently calculated to defeat the intent of the statutory provision; but in general the effort of our law is, as far as possible to guard against undue private interference with the functions of government. So in this country, contracts made with a view to secure the passage of legislative enactments, or the performance of executive acts, have been held to be void, as against public policy.

* Amendments to Constitution, Art. i. § 5.

† 1 R. S. 155, Part i. Ch. vii. Title 3, §§ 1, 2, *et seq.*

‡ Smith *vs.* Helmer, 7 Barbour, 416.

Thus a contract founded on an agreement to obtain signatures for a pardon,* to procure the passage of an act by the legislature by using personal influence,† to pay a sum for withdrawing opposition to the passage of a law touching the interests of a corporation,‡ have all been held void. In like manner, in New York, it has been decided that no action will lie for services as a *lobby agent*, in attending to a claim against the State pending before the legislature; Mr. Justice Hand, in the language of a high-toned morality, alike creditable to himself and to the court of which he is a member, saying, "It is to be intended that the legislature always have truth and justice before their eyes. It would certainly imply a most unjustifiable dereliction of duty, to hold that the employment of individuals to visit and importune the members is necessary to obtain justice."§ In England, however, it seems that an agreement to withdraw opposition to a railway bill for a pecuniary or other consideration, is not illegal in itself; and such an agreement will be upheld unless it contains something against other acts of Parliament, or injurious to the public or the shareholders.‖

An interesting question in regard to the passage of laws, has presented itself in this country, growing out of the constitutional provisions in some of the States, requiring the concurrence and assent of certain prescribed legislative majorities, as two-thirds of the mem-

* Hatzfield *vs.* Gulden, 7 Watts, 152.

† Clippinger *vs.* Hepbaugh, 5 Watts and Serg., 315.

‡ Purgey *vs.* Washburn, 1 Ack., 264.

§ Harris *vs.* Roof's Executors, 10 Barb., 489. But does not the learned judge, too probably, "paint men as they *should* be, not as they *are*?"

‖ Shrewsbury and Birmingham R. Co. *vs.* London and North Western Co., 2 Macnaghten and G. 324.

bers present, or a majority of all the members elected.* In these cases, it was for some time doubted how it was to be ascertained whether the requisite number of votes had been obtained;† whether the printed statute book, or the certificate of the secretary of State, should

* Thus the former constitution of New York (of 1821) declared, Art. i. § 12, that—Where a bill, having once passed the two branches, is returned by the governor for reconsideration, it must be passed by two thirds of the members present of each branch. The same provision exists in the Constitution of 1846, Art. iv. § 9. So again, Art. vii. § 9, declared that "the assent of two-thirds of the members elected to each branch of the legislature, shall be requisite to every bill appropriating the public moneys or property for local or private purposes, or creating, continuing, altering, or renewing any body politic or corporate."

In the same State, the Constitution of 1846 provides, by Art. i. § 9, that "the assent of two thirds of the members elected to each branch of the legislature, shall be requisite to every bill appropriating the public moneys or property for local or private purposes." And again, by Art. iii. § 15, that "no bill shall be passed unless by the assent of a majority of all the members elected to each branch of the legislature." And again, by Art. vii. § 14, that "on the final passage, in either house of the legislature, of every act which imposes, continues, or revives a tax, or creates a debt or charge, or makes, continues, or revives any appropriation of public or trust money, or property or releases, discharges or commutes any claim or demand of the State,—the question shall be taken by ayes and noes, which shall be duly entered on the journals, and three fifths of all the members elected to either house shall in all such cases be necessary to constitute a quorum therein." And again, by Art. xi. § 6, that "in case the mode of election and appointment of militia officers hereby directed shall not be found conducive to the improvement of the militia, the legislature may abolish the same and provide by law for their appointment and removal, if two thirds of the members present in each house shall concur therein."

So in Michigan, "The assent of two thirds of the members elected to each house of the legislature, shall be requisite to every bill appropriating the public money or property for local or private purposes."—Cons., Art. i. § 45.

So in Indiana, Cons., Art. iv. § 25. "A majority of the members elected to each house shall be necessary to pass any bill or joint resolution."

So in Illinois, Art. iii. § 21. "No bill shall become a law without the concurrence of a majority of all the members elect in each house."

† Thomas *vs.* Dakin, 22 Wend., 9; Warner *vs.* Beers, 23 id., 103; The People *vs.* Purdy, 2 Hill, 31.

be received as conclusive evidence, or not. But that doubt is now resolved, and it is settled that the judges may, and if they deem it necessary should, look beyond the printed statute book and examine the original engrossed bills on file in the office of the secretary of State; and it seems that the journals kept by the two houses may also be consulted.*

We have thus far considered statutes in their incipient stages; we are now to consider the attributes and incidents of laws regularly and constitutionally passed; and, first, let us examine their

Authority and Jurisdiction.†—It is well settled, that

* Purdy *vs.* The People, 4 Hill, 384; De Bow *vs.* The People, 1 Denio, 9; Commercial Bank of Buffalo *vs.* Sparrow, 2 Denio, 97.

† Mr. Dwarris (vol. ii. p. 516) thus enumerates the incidents of statutes. His enumeration includes some maxims which are equally applicable to the common law; and those I have omitted:

I. An act of Parliament binds all persons, but such as are specially saved by it.—And. 148, pl. 82.

II. A statute which gives corporal punishment, does not bind an infant. *Contra* of other statutes, if they do not except infants.—Doc. and Stud., lib. 2, fol. 113.

III. Every statute made against an injury gives a remedy by action, expressly or impliedly.—2 Inst., 55.

IV. An act of Parliament cannot alter by reason of time; but the common law may, since *cessante ratione, cessat lex.*—Str. 190.

V. When statutes are made, there are some things which are exempted and *foreprized* out of the provisions thereof, by the law of reason, though not expressly mentioned; thus, things for necessity's sake, or to prevent a failure of justice, are excepted out of statutes.—Plowd. Com., 13 b; 2 Inst., 118.

VI. Whenever an act gives any thing generally, and without any special intention declared or rationally to be inferred, it gives it always subject to the general control and order of the common law.—Show., 455.

VII. Whenever a statute gives or provides any thing, the common law provides all necessary remedies and requisites.—The Protector *vs.* Ashfield, Hard. 62; 1 Inst. 235; 2 Inst. 225; Bac. Ab., Tit. Statute.

VIII. In statutes, incidents are always supplied by intendments; in other words, wherever a power is given by a statute, every thing necessary to the making of it effectual is given by implication, for the maxim is,

while every nation possesses an exclusive jurisdiction within its own boundaries, neither constitutions nor statutes have any intrinsic force, *ex proprio vigore*, beyond the territory of the sovereignty which enacts them, and the respect which is paid to them elsewhere depends on comity alone.* A modification of this principle is contained in the proposition that, although the laws of a country have no direct controlling force except within its own limits, yet that every nation has a right to bind *its own subjects* by its own laws in any place, that is to say when they return within its territorial jurisdiction so as to give an opportunity to exercise sovereignty over them.† This, however, involves the consideration of the question of allegiance and of its duration, which do not properly fall within the scope of this work. As a general proposition, the rule is good, that no nation is bound to respect the laws of another nation, except as to persons or property within the limits of the latter. This is the general rule of our law, and this, too, is the language of the great civilians. "*Constat, igitur*," says Rodenburg,‡ "*extra territorium legem dicere licere nemini, idque si fecerit quis, impune ei non pareri, quippe ibi cessat statutorum fundamentum, robur, et jurisdictio.*" "*Nullum statutum*," says P.

Quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud. 2 Inst., 366; 12 Rep., 130, 131; and *Quando aliquod prohibetur, prohibetur et omne per quod devenitur ad illud.*

IX. If an offense be made felony by a statute, such statute does, by necessary consequence, subject the offender to the like attainder and forfeiture, and does require the like construction as to those who shall be accounted accessories before or after the fact, and to all other intents and purposes, as a felony at the common law does.—Dwarris, p. 517.

* Story, *Confl. Laws*, p. 7, § 7; p. 19, § 18; p. 20, § 20. Commonwealth of Kentucky *vs.* Bassford, 6 Hill, p. 527. Blanchard *vs.* Russell, 13 Mass. 1. Bank of Augusta *vs.* Earle, 13 Peters, p. 519. Op. of Taney, C. J., p. 584.

† Story, *Conflict Laws*, p. 21, § 21; p. 23, § 22.

‡ De Stat., ch. 3, § 1, p. 7; Story, *Confl. of Laws*, § 21.

Voet,* "*sive in rem, sive in personam, si de ratione juris civilis sermo instituatur sese, extendit ultra statuentes territorium.*" And so says Boullenois: "Of strict right, no laws made by a sovereign have any force or authority except within the limits of his dominion."† "A sovereign," says Toullier, "can issue his commands to his own subjects only; his power does not extend to foreigners."‡

Within each jurisdiction, however, the law binds all alike. *Lex uno ore omnes alloquitur.* This maxim, says Lord Coke, is the pride of the English law.§ It is, indeed, proper to bear in mind that this principle, that within the limits of its jurisdiction the law controls alike, without distinction, the property and condition of all those who inhabit the territory, paying no regard, as a general thing, to the birth-place or origin of any particular individual, is of modern introduction, and results from the increased equality and intercourse that our times have created. At Rome, there were two systems of law, one for citizens and the other for foreigners; and in the middle ages the distinction was even more striking. "In the same district," says Savigny, "in the same town, the Lombard lived under the Lombard law, the Roman under the Roman law. The characteristics of personal laws are equally visible in the individuals of the different Germanic tribes; and the Franks, the Burgundians, the Goths,

* De Stat., § 4, ch. 2, n. 7, p. 124. Id., 130, 138; ed. 1661.

† "De droit etroit, toutes les lois que fait un souverain n'ont force et autorité que dans l'etendue de sa domination."—1 Boullenois, *Prin. Gen.*, 6, p. 4.

‡ "Le souverain ne peut commander qu'à ses sujets; sa puissance ne s'etend point sur les etrangers."—Toullier, vol. i. p. 92; Tit. prel. sect. 8, § 112.

§ 2 Inst. 184.

lived on the same soil, each under his own law. This is the explanation of the following passage, in a letter from *Agobardus* to Louis le Debonnaire: 'We often see talking together five persons of whom no two obey the same law.'"* The most prominent remains of this system in our time are to be found in the disabilities of aliens, fast giving way before a more enlightened civilization; but in this country the peculiar and anomalous position of the Indian and African races furnish an illustration of an analogous state of things.

To the general rule thus stated, there exists, however, one marked exception, growing out of what is called international comity. How far the laws of other states or nations will be regarded as a matter of comity, depends on various considerations. "Whatever extra-territorial force," says Mr. Justice Story, "laws are to have, is the result not of any original power to extend them abroad, but of that respect which, from motives of public policy, other nations are disposed to yield to them, giving them effect, as the phrase is, *sub mutuæ vicissitudinis obtentu*, with a wise and liberal regard to common convenience and mutual benefits and necessities."† "Whatever force and obligation," says the same learned writer,‡ "the laws of one country have in another, depend solely upon the laws or municipal

* "Dans le même pays, dans la même ville, le Lombard vivait d'apres la loi Lombarde, le Romain d'apres la loi Romain. L'esprit des lois personelles regnait egalement parmi les individus des divers tribus Germaniques; et les Francs, les Bourguignons, les Goths, vivaient sur le même sol chacun d'apres son droit. Aussi s'explique le passage suivant d'une lettre d'Agobardus à Louis le Debonnaire: 'On voit souvent converser ensemble cinq personnes dont aucun n'obeit aux mêmes lois.'"—Savigny, *Hist. Droit Romain au Moyen Age*, ch. 3, § 30.

† Conflict of Laws, p. 7, § 7. Saul *vs.* His Creditors, 17 Martin, 569.

‡ Confl., § 23, p. 23.

regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent." The principles of comity which regulate the action of the municipal law, in the recognition and application of foreign law, have been so elaborately examined by Mr. Justice Story, that I shall dismiss this branch of my subject with the following extract from his great work.

"No nation," he says,* "can be justly required to yield up its own fundamental policy and institutions in favor of those of another nation. Much less can any nation be required to sacrifice its own interests in favor of another, or to enforce doctrines which, in a moral or political view, are incompatible with its own safety or happiness, or conscientious regard to justice and duty. It is difficult to conceive," he says again,† "upon what ground a claim can be rested to give to any municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other nations or to those of the subjects." And again,‡ "The true foundation on which the administration of international law must rest, is that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconvenience which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done in return." And again,§ "There is, then, not only no impropriety in the use of the phrase 'Comity of Nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is inadmissible when it is contrary to its known policy or prejudicial to its interests. In the silence of any positive rule affirming or denying, or restraining the operations of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation, which is administered and ascertained in the same way and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided."

* Confl. of Laws, p. 25, § 25.
† Page 32, § 32.
‡ Page 34, § 35.
§ Page 36, § 38.

The general principles to which I have been referring have been declared applicable to the States of this Union. While recognizing the central federal authority, resulting from the Constitution of the United States, they hold in regard to each other, with the exception of the cases governed by that instrument, the position of independent and foreign powers. So it has been held, that bills drawn in one of the States on persons in another, are to be treated as foreign bills; and the Supreme Court of the United States has said, "For all purposes embraced by the federal constitution, the States and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the States are necessarily foreign to and independent of each other, their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions,"* and their acts have, consequently, no extra-territorial authority.† But at the same time, the States of the Union recognize in regard to each other, to a certain extent, the existence of the same principles of international comity which, with reference to nations wholly independent of each other, we have already attempted to define. In a case, very elaborately argued in the Supreme Court of the United States, where suit was brought in the State of Alabama by a bank incorporated by the State of Georgia, on a bill of exchange negotiated to the agent of the plaintiffs within the State of

* Buckner *vs.* Finley, 2 Peters, 586. See, to same point, Lonsdale *vs.* Brown, 4 Wash. C. R., 86, and 2 Peters, approving, p. 688. Warder *vs.* Adrell, 2 Wash. R., 283. Bank of U. S. *vs.* Daniel et al., 12 Peters, p. 32; and State of Rhode Island *vs.* Massachusetts, 12 Peters, p. 657.

† Blanchard *vs.* Russell, 13 Mass., 1. Bank of Augusta *vs.* Earle, 13 Peters, 519. Opinion of Taney, p. 584. Commonwealth of Kentucky *vs.* Bassford, 6 Hill, p. 527.

Alabama, it was insisted, that a corporation could not contract in any State of the Union but in that by the law of which it was created, and that its existence would not be recognized on any principle of comity; and the Circuit Court of the United States so decided; but on writ of error to the Supreme Court, the judgment was reversed,* the Court holding this language:—

"It has, however, been supposed that the rules of comity between foreign nations do not apply to the States of this Union; that they extend to one another no other rights than those which are given by the Constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a State has adopted the comity of nations towards the other States as a part of its jurisprudence, or that it acknowledges any rights but those which are secured by the Constitution of the United States. The Court think otherwise. The intimate union of these States as members of the same great political family, the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness toward one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between these States? They are sovereign States; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted toward each other the laws of comity in their fullest extent."

It was certainly very difficult successfully to contend for the principle insisted on in this case by the defendants, for it amounted substantially to the proposition that a corporation of one State can do no commercial business, can make no contract, can, indeed, do

* Bank of Augusta *vs.* Earle, 13 Peters, 519. Mr. Justice McKinley dissented.

nothing in any other State of the Union but in that in which, by the law of the State, it has been created. But the doctrine of comity between the States, presents itself in other and more important aspects.

So in regard to slavery, the question has arisen whether the owner of slaves which are brought from a State where domestic servitude is allowed, and taken into a State where that institution is absolutely forbidden by its municipal legislation, can be protected in his property by the fact that the slaves are merely in transitu, and brought in with the bona fide intention of taking them to some State where their proprietor may lawfully hold them. This proposition has been affirmed in Illinois;* it has been denied in New York,† and has been left in doubt by the Supreme Court of Massachusetts.‡ It is not seriously asserted that the owner's right can be maintained under the Constitution of the United States, nor that in this sense the absolute prohibition of domestic slavery by the State laws is unconstitutional; but it is very earnestly insisted that property in slaves under these circumstances, is protected by the doctrine of comity which we have above discussed.

The point is very far from being free of difficulty, and if the rule of comity is to be considered as settled to the full extent of the language of the Supreme Court above cited, it will be difficult to show that it does not cover this case; but before it shall be so finally determined, much reflection is necessary. The doctrine of comity has been established and applied by powers wholly foreign, entirely distinct from and independent of each other, the mutual relations of

* Willard *vs.* The People, 4 Scammon, 461.

† People *vs.* Lemon, 5 Sandford, 681.

‡ Commonwealth *vs.* Aves, 18 Pickering, 193.

whose citizens are comparatively rare, and almost, if not quite, exclusively commercial, and the rules of whose intercourse rest entirely on the great unwritten law of nations, of which this comity forms in fact but a part.

Such is not at all the condition of the States of this Union. They are mutually dependent on each other in various ways, and all recognize in certain cases, a common sovereign; their intercourse is in the highest degree frequent and intimate; their relations quite as much political as commercial; and they have undertaken by the terms of a carefully prepared instrument, to declare with precision, their relative rights and duties. In this case, to substitute for the clear and definite language of the Constitution any thing so vague and uncertain as the comity of nations, is not only to subject the relations and independence of the States to a condition of alarming perplexity, but to make the judiciary the sole arbiter of the gravest political questions, and to give them, in framing their decisions, no better guide than a fluctuating and unsettled notion of international courtesy.

The federal Constitution contains a provision in regard to the laws of the States, and the judicial proceedings of their tribunals, which, though it gives them no extra-territorial effect, has still some bearing on our present subject. The Constitution of the United States, by Article IV. Section 1 of that instrument, declares 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." In pursuance of this power, the

Congress of the United States, by act of May 26, 1790, ch. 38, provided the mode by which records and judicial proceedings should be authenticated. Under these constitutional and statutory provisions, various decisions have been made, the general result of which is, that a judgment is conclusive in every other State, if a court of the particular State where it was rendered would hold it so.* But Congress has never acted on the power in the Constitution as to the public acts or laws of the States, any further than to declare that they shall be authenticated by having the seal of the respective States affixed thereto;† nor is this method regarded as exclusive of any other which the States may adopt.‡ And the States have differed as to the manner in which they should be proved. In some cases, strict proof of them, as foreign laws, has been required; but the courts of other States, and the Supreme Court of the United States, influenced by the peculiar and intimate connection of the States, have shown a disposition to relax the usual rules of proof in this respect; in regard, however, to the details of this matter, which properly belongs to the domain of evidence, I refer the reader to Mr. Greenleaf's very valuable work, where the authorities will be found collected.§

The student of American law, in his consideration of the subject which we are now discussing, will not forget that the laws of the States, as has been already intimated, are subject in many important cases to

* Mills *vs.* Duryee, 7 Cranch, 481. Hampton *vs.* McConnel, 3 Wheat., 234. 1 Kent Comm., p. 250, and cases there cited.

† Act of 26th May, 1790, ch. 38.

‡ Bank of Augusta *vs.* Earle, 13 Peters, 525. Ogden, *arguendo.*

§ Greenleaf on Evidence, § 489.

the power of the Union; the second section of the sixth article of the federal Constitution declaring that, "The 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." This provision necessarily makes the States subordinate to the government of the Union, in all matters which, by the federal charter, fall within the demesne of Congress; and the supremacy of the federal government, in these respects, is maintained and enforced, as we shall hereafter see, by the Supreme Court of the United States.

While discussing the question of the territorial effect of statutes, we have also to notice an interesting question which has been presented in this country with reference to the jurisdiction of the States over criminal acts, planned or contrived in a State of which the offending party is a citizen, but consummated in another, and without the culprit ever being actually present in the latter State. It is well settled, as a general rule that penal laws have no extra-territorial effect.* And so a State cannot pass an act making the offense of counterfeiting its current bills, committed out of the State, indictable and punishable in its courts.† But, on the other hand, it is equally well settled, that in the case put, where the offense is contrived in one State and executed in another, the party is liable to the

* Scoville *vs.* Canfield, 14 J. R., 338.

† State *vs.* Knight, Taylor's N. C. Rep., 65.

criminal jurisdiction of the State where the offense is consummated, though he have never himself been within the limits of the latter State. So, where an indictment was found in Massachusetts against a resident of New York for uttering forged notes in the first-mentioned State, through an innocent agent, the defendant remaining all the while in New York, the defendant was held guilty in Massachusetts.* So again, where one was indicted in New York for obtaining money by fraudulent pretenses from a firm in that State, by exhibiting to them fictitious receipts for property signed by a person in Ohio, although the defendant was a citizen of Ohio and had never been in New York, and the receipts were drawn and signed in Ohio, and the offense was committed by the receipts being presented in New York by innocent agents employed by the parties in Ohio,—it was held that the culprit was liable to the civil jurisdiction of New York.† It will be observed that these are cases which apply to *mala per se*,—to offenses against persons or property which are such in all civilized countries; and it may well be doubted whether the rule would hold good as to mere *mala prohibita*, as, for instance, laws to protect the revenue or the currency, of which the alleged offender may be not merely ignorant, but not chargeable with knowledge.

An interesting question connected with the present

* Commonwealth *vs.* Harvey, 8 Am. Jur., 69.

† People *vs.* Adams, 3 Denio, 190; S. C. on appeal, 1 Coms. 173. See, to the same point, State *vs.* Ellis, 3 Conn., 185; Barkhamstead *vs.* Parsons, 3 Conn. 1; Commonwealth *vs.* Gillespie, 7 Serg. & Rawle, 469; People *vs.* Rathbun, 21 Wend. 509. In England, the rule that the offense is considered to be committed where it is consummated, holds good as between the different counties, and as between Ireland and England.—King *vs.* Brisac, 4 East, 164; Rex *vs.* Johnson, 6 East., 583; S. C., 7 id. 65.

branch of our subject arises, as to the time when statutes are to take effect. The old English rule was, that if the act was not directed to operate from any particular time, it took effect from the first day of the session at which it passed, though this date was purely fictitious, and might be weeks or indeed months before the act was assented to by the sovereign, or, in fact, even before the bill was brought in; and this extraordinary application of the doctrine of relation was actually adhered to and acted upon in England as late as the latter part of the last century.* The rule was finally altered by the statute 33 George III., c. 13, which declared that laws shall operate from the time of their receiving the royal assent. Where two statutes, passed in the same session and to come into operation on the same day, are repugnant to each other, it is held that the act which last received the royal assent must prevail.† This affords a curious instance how difficult it is to make the ancient rules of law conform to those of logic and reason. It is very plain that both of these provi-

* 33 Henry VI., 18 Bro., 33; 1 Lev., 91, Attorney General *vs.* Panter, 6 Bro. P. C., 486. Latless *vs.* Holmes, 4 T. R., 486. Dwarris on Stat., p. 544. R. *vs.* Bailey, R. & R. C. C. 1; 1 Russ., C. & M., 109. The severity of the old English rule is well illustrated by the trial of Sir William Parkyns for high treason, in 1695, before Lord C. J. Holt, Lord C. J. Treby, and Mr. Justice Rokeby. He prayed to be allowed counsel, but was refused, because the statute, 7 William III. c. 3, allowing counsel to persons indicted for treason, did not go into effect till the next day after that on which he was tried. It was in vain that the prisoner quoted a part of the preamble, which said that such an allowance was just and reasonable. The reply of Lord C. J. Holt was, that he must administer the law as he found it, and could not anticipate the operation of an act of parliament by even a single day. Sir William Parkyns was convicted and executed. See the case reported in the thirteenth volume of the State Trials, Howell's ed. and cited in Mr. Lieber's Hermeneutics, p. 118. See also, Kent's Com., vol. i., p. 456.

† Rex *vs.* Justices of Middlesex, 2 B. & A. 818; 2 Bing. N. C. 682. Dwarris, p. 544.

sions are contrary to common sense, and may often produce great injustice. It is impossible that the citizens or subjects of an extensive and populous country, can obtain any accurate knowledge of the purport of an act on the day of its passage; and the doctrine that the act last signed is to prevail over one assented to a few hours previous, is obviously arbitrary and unreliable. The evils likely to result from the first of these rules are now often obviated by a section declaring when the act shall go into effect; and on a clause of this kind it has been decided, that although in an act it is expressly declared that it shall commence and take effect from a day named, yet if the royal assent be not obtained till a day subsequent, the provisions of a particular section, in its terms prospective, do not take effect till such subsequent day.*

The Code Napoleon first established the true principle as to when laws should take effect. It declared laws to be binding from the moment that their promulgation should be known; and that the promulgation should be considered as known in the department of the consular or imperial residence one day after the promulgation, and in each of the departments after the expiration of the same space of time, augmented by as many days as there were distances of twenty leagues between the seat of government and the place.†

In this country, the mischievous results of the original English rule are usually obviated either by constitutional or statutory provisions. So in Michigan, a constitutional provision declares‡ that "no public act shall take effect or be in force until the expiration of

* Burn *vs.* Carvalho, 4 Nev. and Man, 889.
† Code Civil, Art. i.; Kent Com. i., p. 458.
‡ Cons. Art. iv. § 20.

ninety days from the end of the session at which the same is passed, unless the legislature shall otherwise direct by a two-thirds vote of the members elected to each house." In Mississippi, the constitution provides, "that no law of a general nature, unless otherwise provided for, shall be enforced until sixty days after the passage thereof."* And in New York it is declared, by a general statute,† that "every law, unless a different time shall be prescribed therein, shall commence and take effect throughout the State, on and not before the twentieth day after the day of its final passage, as certified by the secretary of state." But, in regard to federal legislation, the rule is supposed to be identical with that now in force in England: that every law takes effect on the day of its passage.‡ This subject is of no small consequence, as the law is assumed to be known by every citizen from the time fixed for it to go into operation; *ignorantia legis neminem excusat.* This maxim has, however, no more than the laws themselves any extra-territorial application; for the doctrine has been declared to be, that citizens of another country, and even, in America, of another State of the Union, are not chargeable with a knowledge of the laws emanating from any jurisdiction, except that to which they belong. This, however, must be certainly taken with the qualification in regard to *mala prohibita* and *mala per se*, to which I have already referred, and also with the general limitation that it is to apply rather to civil than to criminal law.§

* Cons. Art. vii. § 6.

† 1 R. S. 157, Part i. Ch. vii. Tit. v. § 13.

‡ Matthews *vs.* Zane, 7 Wheaton, 164; The Ann, 1 Gallison, 62; 1 Kent's Com. 455. But see 1 Paine, 23.

§ Curtis *vs.* Leavitt, 17 Barb., 312, 317; and Merchants' Bank *vs.* Spalding, Court of Appeals; cited in the same.

Connected with this branch of our subject is another arbitrary rule of the English law, as to amendatory statutes. An act of Parliament made to correct an error of omission, committed in a former statute of the same session, relates back to the time when the first act passed; and the two must be taken together as if they were one and the same act, and the first must be read as containing in itself, in words, the amendment supplied by the last; therefore, goods *exported* before a second law passed, but only *shipped* before the first, of which the second was an amendment, was enacted, were held liable to duties imposed by the latter statute on the *exportation* of goods.*

It may be observed in this connection, in regard to the authority and operation of laws, that in conquered or ceded countries which have laws of their own, those laws remain in force till actually altered; but it has been said in this country, that this rule "is for the benefit and convenience of the conquered, who submit to the government of the conquerors, or in the case of cession, for the benefit of the people who by treaty submit to the government of those to whom their country is ceded, and was not applicable to the condition of our ancestors, as the Indians did not submit to the government, but withdrew themselves from the territory acquired."†

Contracts in Violation of Statutes.—The principle which enforces obedience to laws, is carried out by declaring contracts growing out of or based upon the infringement of a statute to be void, the courts refusing to aid either party in enforcing them. This is the general course of the decisions in England, and in this

* Att. General *vs.* Pougett, 2 Price, 381; 2 Dwarris, 547.

† State *vs.* Buchanan, 5 Harris and J. R., 317.

country.* So, where sales of spirituous liquors are made in violation of the positive provisions of a statute, the sale being illegal the whole transaction is void, and the seller can sustain no action therefor.† So where contracts are made on Sunday, in violation of the laws forbidding labor and business on that day.‡ Nor is it necessary that the contract should violate the express

* Steers *vs.* Lashley, 6 T. R. 61; Aubert *vs.* Maze, 2 B. & P. 371; Cannan *vs.* Bryce, 3 B. & Ald. 179; Brown *vs.* Duncan, 10 B. & Cres. 93; Armstrong *vs.* Toler, 11 Wheat. 258; Exparte Dyster, in re Moline, 1 Meriv. 155; Bloom *vs.* Richards, 22 Ohio, 388.

† Boutwell *vs.* Foster, 24 Vermt. 485; Bancroft *vs.* Dumas, 21 Verm. 456; Barton *vs.* Port Jackson and U. F. Plank Road Co., 17 Barb. 397; Nellis *vs.* Clark, 4 Hill, 424; Hook *vs.* Gray, 6 Barb. 398; S. C., 4 Comst. 449; Pennington *vs.* Townsend, 7 Wend. 276; Tylee *vs.* Yates, 3 Barb. S. C. R. 222.

‡ Fennell *vs.* Ridler, 5 B. & C. 406; Smith *vs.* Sparrow, 4 Bing. 84; Towle *vs.* Larrabee, 26 Maine, 464; Lovejoy *vs.* Whipple, 18 Verm. 379; Pattee *vs.* Greely, 13 Met. 284; O'Donnell *vs.* Sweeney, 5 Ala. 467; Adams *vs.* Hamell, 2 Doug. Mich. R. 73; Bloom *vs.* Richards, 22 Ohio, 388; overruling, Sellers *vs.* Dugan, 18 Ohio, 489; Omit *vs.* Commonwealth, 21 Penn. 426; and other cases on the Sunday acts.

In Ohio, where the constitution declares the indefeasible right of all men to worship God according to the dictates of their conscience; that no human authority can interfere with the rights of conscience; that no man shall be compelled to attend or support any mode of worship without his consent; that no preference shall be given by law to any religious society; and prohibits all religious tests,—it has been expressly decided, that neither Christianity nor any other system of religion is a part of the law of the State, and that the statute prohibiting labor on the Sabbath is a mere municipal or police regulation; Bloom *vs.* Richards, 22 Ohio, 387. In Pennsylvania and South Carolina, also, the Sunday laws seem to have been sustained on the same ground; Specht *vs.* The Commonwealth, 8 Barr, 312; The City Council of Charleston *vs.* Benjamin, 2 Strob. Law R. 508. The language of the Sunday laws varies in the different States. In New York, the statute, in addition to the prohibition of certain sports and the sale of goods (with certain exceptions), declares that "there shall be no servile laboring or working on that day, excepting works of necessity and charity." [R. S., Part I. Chap. xx., Tit. 8, Art. 8, vol. i., p. 676.] Under this statute it has been held that an attorney's clerk could not recover for work in the office of his employer, done on Sunday, Watts *vs.* Van Ness, 1 Hill, 76; and that an agreement to insert an advertisement in a newspaper published on Sunday, is equally void; Smith *vs.* Wilcox, 19 Barbour, 581.

words of a law, for agreements contrary to the policy of statutes are equally void; so, an agreement to pay a creditor a sum of money if he will withdraw his opposition to an insolvent's discharge, is void, as contrary to the policy of the insolvent act.* Nor does it make any difference whether the law is a general one, or merely of local or municipal application. So, where the amended charter of the city of New York provided "that no member of either board of the common council should, during the period for which he was elected, be directly or indirectly interested in any contract the expenses or consideration whereof are to be paid under any ordinance of the common council," it was held that a note growing out of a purchase for supplying the city alms-house with coal, under a contract in which a member of the city government was interested, given for the share of profits accruing to such member, was void, and could not be enforced either by the party himself or his assignee.† So an agreement to construct a roof, in the city of New York, of a kind prohibited by a statute entitled "an act to amend an act for the more effectual prevention of fires" in that city, is void, and the contract price cannot be recovered.‡

So, on the same principle, in New York, where an act for the enlargement of the canals of that State (July 10, 1851) was declared unconstitutional and void; contracts under the act were also held to be void.§ It has also been decided that the transfer of such a contract did not constitute a good consideration for a

* Nerot *vs.* Wallace, 3 T. R. 17; Murray *vs.* Reeves, 8 B. & C. 421; Hall *vs.* Dyson, 17 Ad. & Ell. N. S. 785.

† Bell *vs.* Quin, 2 Sandf. 146.

‡ Beman *vs.* Tugnot, 5 Sandf. 154.

§ Newell *vs.* The People, 3 Selden, 9; Rodman *vs.* Munson, 13 Barb. 63.

promise to pay money; and the circumstance that the purchasers stipulated to take the risk as to the validity of the act of the legislature, while the question was pending in the courts, and of the contract, does not vary the law of the case.* The pension acts of the United States, generally, provide that the pay allowed by them shall not be in any way transferable, but shall accrue wholly to the personal benefit of the soldier entitled to the same. This is the provision of the act of June, 1832, and any agreement for such transfer, in any way whatever, would be void. But it has been held, that an agreement with a pensioner entitled to an addition to his pension, under the act above referred to, to prosecute the claim for the augmentation, and in consideration to receive one-third of the addition obtained, would be valid.†

We have also to notice the rule, that if a statute inflict a penalty for doing an act, the penalty implies a prohibition and the thing is unlawful, though there be no prohibitory words in the statute. So where a statute inflicts a penalty on a simoniacal or usurious contract; this, *ipso facto*, makes the contract void.‡ This has been said to be subject to the general exception, that where a license is necessary to carry on a particular trade for the sole purpose of raising revenue, and the statute only inflicts a penalty by way of securing payment of the license money, a sale without a license would be valid.§ But if the statute looks beyond the question of revenue, and has in view the protection of

* Sherman *vs.* Barnard, 19 Barb. 291.

† Jenkins *vs.* Hooker, 19 Barb. 435.

‡ Bartlett *vs.* Viner, Skin. 322; Carthew, 351.

§ Johnson *vs.* Hudson, 11 East, 180; Brown *vs.* Duncan, 10 Barn. & Cres. 93.

the public health or morals, or the prevention of fraud, then, though there be nothing but a penalty, a contract which infringes the statute cannot be supported.* So where an excise law does not, in terms, prohibit the sale of strong liquors without a license, nor declare the act illegal, but only inflicts a penalty upon the offender, a contract for the sale of such liquors is void.†

It follows, from these general considerations, that when a party seeks to enforce in the courts of one State a contract which, by its laws, is forbidden and void, he must aver and prove that it was made in a State where, by law, it was authorized and valid. So, where in a suit brought in New York to recover prize money drawn by tickets owned by the plaintiff in a lottery drawn in Maryland, and alleged to be authorized by that State, the complaint did not show where the tickets were sold or purchased, it was held on demurrer that the plaintiff showed no cause of action in New York, where lotteries are absolutely forbidden by law. Gardiner, J., said, "The plaintiff is bound to show, on the face of his complaint, that his title was acquired in a jurisdiction where gambling is authorized by law."‡

A grave question has arisen upon this branch of our subject, and distinctions have been sought to be drawn between contracts violating acts relating to mere police regulations or the revenue, and those contrived to

* De Begnis *vs.* Armistead, 10 Bing. 107; Cope *vs.* Rowland, 2 M. & W. 149; Mitchell *vs.* Smith, 1 Bin. 110; Springfield Bank *vs.* Merrick, 14 Mass. 322; Leidenbender *vs.* Charles, 4 Scog. & Rawle, 159; Hallet *vs.* Noonar, 14 J. R. 273; Griffith *vs.* Wells, and cases there cited, 3 Denio, 226.

† Griffith *vs.* Wells, 3 Denio, 226.

‡ Thatcher *vs.* Morris, 1 Kern. 437. But why should not the objection go further? Why should our courts sit to enforce a contract which the State utterly prohibits as immoral, and the morality of which certainly does not depend on its locality?

defeat the operation of laws intended to declare general principles. In England, however, these distinctions appear no longer to exist; and, in a recent case, Baron Parke said, "Notwithstanding some *dicta* apparently to the contrary, if the contract be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue, or any other object."* This would result in a simple and uniform rule, making void all contracts growing out of acts forbidden by law, and barring all actions upon them; but the Supreme Court of the United States has said "that whatever may be the structure of the statute in regard to the prohibition and penalty, or penalty alone, it is not to be taken for granted that the legislature meant that contracts in contravention of it are void, in the sense that they are not to be enforced in a court of justice; that the statute must be examined as a whole, to find out whether or not the makers meant that a contract in contravention of it was to be void, so as not to be enforced in a court of justice;" and applying this rule of construction to the case of a note given for slaves exported into Mississippi, in violation of the statute of that State regarding the importation of slaves, they held that an action would lie."† I cannot but think that this decision introduces a distinction altogether too nice and refined to be susceptible of practical application.

It does not, however, follow that when an act is forbidden by statute, every thing done in contravention of the act is to be considered void. This would lead to results of too serious a character. So, in regard

* Cope *vs.* Rowland, 2 Mees. & W. 157.

† Harris *vs.* Runnels, 12 Howard, 79.

to marriage, where a statute imposes a penalty on an officer for solemnizing the union, but does not in words declare the marriage void, as in Massachusetts in regard to persons above the age of consent but below certain other periods of life; the marriage is valid, and the penalty only attaches to the officer who performs the act expressly prohibited.*

It must be further borne in mind, that the invalidity of contracts made in violation of statutes, is subject to the equitable exception that, although a corporation, in making a contract, acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust, to permit the defendant to repudiate a contract the fruits of which he retains.† And the principle of this exception has been extended to other cases. So a person who has borrowed money of a savings institution upon his promissory note secured by a pledge of bank stock, is not entitled to an injunction to prevent the prosecution of the note, upon the ground that the savings bank was prohibited by its charter from making loans of that description.‡

* King *vs.* Birmingham, 8 B. & C. 29; Milford *vs.* Worcester, 7 Mass. 48; Parton *vs.* Hervey, 1 Gray, 119.

† Palmer *vs.* Lawrence, 3 Sand. S. C. 162; Steam Navigation Co. *vs.* Weed, 17 Barb. 378; Chester Glass Co. *vs.* Dewey, 16 Mass. 94; M'Cutcheon *vs.* Steamboat Co., 13 Penn. R. 13; Potter *vs.* Bank of Ithaca, 5 Hill, 490; Suydam *vs.* Morris Canal and Banking Co., 5 Hill, 491; Sackett's Harbor Bank *vs.* Lewis Co. Bank, 11 Barb. 213.

‡ Mott *vs.* U. S. Trust Co., 19 Barb. 568.

The deference paid to the statute law is expressed in the rule, that where an instrument contravenes a rule of common law, the invalidity is confined to the particular clause; but where an instrument contains a clause or provision in contravention of a statute, it renders the whole instrument invalid.* A bond, executed in pursuance of a compulsory statute, must be precisely in accordance with it; and if it contains provisions not warranted by the statute, it is void.†

Statutes are not to be evaded, any more than they are to be disobeyed. So, where a law fixes peremptorily the period of taking an appeal from a judgment, the court cannot, by setting aside the judgment and directing it to be entered anew of a later date, effect the object of extending the time to appeal.‡

Of Remedies for the violation of Statutes.—The general rule of the English law is, that where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages.§ This principle is carried out and applied to statutes by an old English enactment, which gives a remedy, by action on the case, to all who are aggrieved by the neglect of any duty created by law.‖

* Nicholson *vs.* Leavitt, 4 Sandf. 252.

† People *vs.* Mitchell, 4 Sandf. 466; People *vs.* Meighan, 1 Hill, 298; in this case, the bond was void by express provision of the statute; and generally, I suppose, if a bond given under a statute contains provisions which the statute does not contemplate, the instrument is void only for the excess. Armstrong *vs.* The United States, 1 Peters, C. C. U. S., p. 46; Van Deusen *vs.* Hayward, 17 Wend. 67.

‡ Bank of Monroe *vs.* Widner, 11 Paige, 529; Humphrey *vs.* Chamberlain, 1 Kern. 274.

§ Com. Dig., Action upon the Case, A.

‖ 1 Stat. 13 Edw. I. c. 50, A. D. 1285. So says Lord Campbell, C. J., in Couch *vs.* Steel, 3 Ellis and Blackburn, Q. B. 402 and *seq.*; but I should think the provision only applied to the acts of that particular parliament,—"*Omnia prædicta statuta.*" See 2d Inst. 486.

And the general rule, that in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the law in question, is declared by the text-writers of our jurisprudence.* If a new right is created by statute, and no remedy prescribed for the party aggrieved by the violation of such right, the court, upon the principle of a liberal or comprehensive interpretation of the statute, will presume that it was the intention of the legislature to give the party aggrieved a remedy by a common-law action for the violation of his statutory right; and he will be permitted to recover in an appropriate action founded upon the statute.† As a general rule, it may be assumed that wherever a power is given by statute, every thing necessary to make it effectual, or requisite to attain the end, is implied;‡ and that where the law requires a thing to be done it authorizes the performance of whatever may be necessary for executing its commands.§ So, where a statute authorized a sheriff to sell the right and interest of a pledgor on execution against him, but did not confer any authority on him to seize or take into his possession the property in the hands of the pledgee, it was held that he had it *ex necessitate*, as another statutory provision declared that no personal property should be exposed for sale by a sheriff unless the same

* Com. Dig., Action upon Statute, F.; Dudley *vs.* Mayhew, 3 Comstock, 9.

† 2 Coke's Inst. 74, 118; Bacon's Abr. 16; Clark *vs.* Brown, 18 Wend. 213, 220; Smith *vs.* Drew, 5 Mass. 514.

‡ 1 Kent Com. 464.

§ Foliamb's Case, 5 Coke, 115.

were produced at the time.* *Quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud.*

Questions often arise as to the election of remedies for the violation of statutes. Where a right originally exists at common law, and a statute is passed giving a new remedy without any negative, express or implied, upon the old common law, the party has his election either to sue at common law or to proceed upon the statute. The statutory remedy is merely cumulative.† So against a witness who neglects to attend in obedience to a subpœna, the injured party may have either an action on the case for damages, or an action on the statute for the penalty.‡ This old English rule has been repeatedly recognized and declared in this country.§ So, the statutory remedy by distress against beasts doing damage, does not take away the common-law action of trespass.‖ So, giving a superadded penalty for the eviction or continuance of a nuisance, does not prevent the common-law right of the public to have it indicted and removed, nor does it prevent its being abated in the usual way by individuals.¶ So, a clause in a railroad act, authorizing the directors to exact a forfeiture of the stock and previous payment, as a penalty for non-payment of installments, does not, before any forfeiture has been declared, impair the remedy of the directors to enforce payment by action at common law

* Stief *vs.* Hart, 1 Coms. 20; decided, however, by a divided court.

† Comyn's Digest, Action on Statute, C.

‡ Pearson *vs.* Isles, 2 Douglas, 556.

§ Almy *vs.* Harris, 5 J. R. 175; Smith *vs.* Drew, 5 Mass. 514.

‖ Colden *vs.* Eldred, 15 J. R. 220. See also, Clark *vs.* Brown, 18 Wend. 213, 220; Stafford *vs.* Ingersoll, 3 Hill, 39.

¶ Renwick *vs.* Morris, 3 Hill, 621, and S. C. in error, 7 Hill, 575.

on the implied promise. The statute remedy of forfeiture is affirmative, and contains no words excluding the common-law relief; in such case it is well settled that both remedies exist.*

But, on the other hand, where by statute a new offense is created and a penalty is given for it, or a new right is given and specific relief given for the violation of such right, the punishment or remedy is confined to that given by the statute.† "Where a new right, says the Supreme Court of New York, or the the means of acquiring it, is conferred, and an adequate remedy for its invasion is given by the same statute, parties injured are confined to the statutory redress."‡ Sometimes, however, doubts will arise as to whether the statute does or does not intend to take away the common-law remedy; and the answer will depend on the subject matter. So, where the charter of a turnpike corporation provided that any person guilty of certain injuries to the road, as breaking down gates or digging up earth, should forfeit and pay a fine of fifty dollars, it was held that this provision was not intended to take away any common-law remedies for such injury or obstruction, upon

* Northern Railroad Co. *vs.* Miller, 10 Barb. 260; Clark *vs.* Brown, 18 Wend. 220; Colden *vs.* Eldred, 15 J. R. 220; Troy and Boston Railroad Co. *vs.* Tibbitts, 18 Barbour, 297. As to the remedies for non-payment of stock, it would seem that if the act of incorporation, or any public statute, declares that the subscriber to the stock shall pay the calls made thereon, or if he actually agree to do so, he is liable, and the remedy of forfeiture for nonpayment is merely cumulative. But where there is a right of forfeiture given, and no duty imposed to pay, and no promise, then the subscriber is not personally liable, and the remedy is limited to the forfeiture. Fort Miller and Fort Edward Plank Road Co. *vs.* Payne, 17 Barb. 567, and cases there cited.

† City of Boston *vs.* Shaw, 1 Met. 130; Crosby *vs.* Bennett, 7 Met. 17.

‡ Smith *vs.* Lockwood, 13 Barb. 209; Dudley *vs.* Mayhew, 3 Coms. 9.

the ground that the penalty fixed by the charter was, in many cases that might occur, wholly inadequate to indemnify the company.* Where a statute does not vest a right in a person, but merely prohibits the doing of some act under a penalty, in such a case the party violating the statute is liable to the penalty only; but where a right of property is vested in consequence of the statute, it may be vindicated by the common-law remedy of action, unless the statute expressly confines the remedy to the penalty. So in Massachusetts, where a party was sued for obstructing the passage of fish up a river, it was objected that the franchise of the plaintiff in the fishing was created by a statute, and that as the same statute imposed a penalty for the infringement, the plaintiff's remedy was confined to the penalty; but the objection was considered bad, and it was held that the plaintiff was at liberty to sue at common law for the injury done to his franchise.† Nor is the common-law right to maintain an action in respect of a special damage resulting from the breach of a public duty whether such duty exists at common-law or is created by statute, taken away by reason of a penalty recoverable by a common informer being annexed as a punishment for the non-performance of the public duty. So, where a statute‡ makes it a duty of a ship-owner to keep on board his vessel a proper supply of medicines, and imposes a penalty recoverable by a common informer as the specific punishment for the breach of that duty as to the public, sailors sustaining a private injury from the breach of the statutable

* Salem Turnpike & C. B. Co. *vs.* Hayes, 5 Cushing, 458.

† Smith *vs.* Drew. 5 Mass. 514; Almy *vs.* Harris, 5 J. R. 175.

‡ 7 and 8 Vict., c. 112, s. 18.

duty, are entitled to maintain an action to recover damages.*

But if the performance of a new duty created by act of parliament, is enforced by a penalty recoverable by the party aggrieved by the non-performance, then there is no other remedy than that given by the act, either for the public or private wrong. So too, if there is no private damage; then if a statute points out a particular mode of procedure, it must be pursued. So it has been decided in regard to the recovery of a high-way rate and a land tax.† It is to be observed in general, that the infraction of a public prohibitory statute, even if passed chiefly for the protection of a particular class, does not confer any individual right unless the party alleging himself to be aggrieved, has sustained a special damage peculiar to himself.‡ As to criminal legislation, it may be remarked, that where a statute prohibits an act to be done under a certain penalty, though no mention is made of indictment, the party offending may be indicted and fined to the amount of the penalty; but where it is merely provided that if any person do a certain act he shall forfeit a sum to be recovered by action of debt, no indictment can be supported.§ If a statute enjoin an act to be done without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the legislature.‖ The

* Couch *vs.* Steel, 3 Ellis and Blackburn, Q. B. 402; Rowning *vs.* Goodchild, 2 W. Bl. 906.

† Underhill *vs.* Ellicombe, M'Clel. and Y. 450; Doe dem. the Bishop of Rochester *vs.* Bridges, 1 B. and Ad. 847. See also, Stevens *vs.* Jeacocke, 11 Q. B. 731.

‡ Butler *vs.* Kent, 19 J. R. 223; Lansing *vs.* Smith, 8 Cowen, 146; Smith *vs.* Lockwood, 13 Barb. 209.

§ Chitty's Criminal Law, i. p. 162; Cro. Eliz. 635, 2 Inst. 131.

‖ Rex *vs.* Davis, Say, 163.

revised statutes of New York,* declare in conformity with these rules of the common law, that where the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed either in the same section containing such prohibition, or in any other section or statute, the doing such act shall be deemed a misdemeanor.

Statutory Forfeitures.—Property is often forfeited by illegal acts. This sometimes results from the rules of the common law, and sometimes from the provisions of statutes. But there is a marked difference in the two cases. A forfeiture at common law does not operate to change the property until some legal step has been taken by the government for the assertion of its rights; but where a forfeiture is given by statute, the rules of the common law are dispensed with, and the thing forfeited may either vest immediately or upon the performance of some future act, according to the will of the legislature;† and if no future time or future act is pointed out then, where, by the words of a statute, a forfeiture is attached to the commission of an offense, its immediate operation is to divest wholly the title of the owner, so as to deprive him of the right of maintaining any action or defence to which, as owner, he would otherwise be entitled. So, where the English navigation act had been violated, it was held that the property was forfeited though there had been no previous condemnation.‡ So, where an act of the Congress of the United States, declaring that

* Part iv. chap. i. title 7, vol. ii. p. 696.

† Bennett *vs.* Am. Art Union, 5 Sandford, 614, 636; U. S. *vs.* Grundy, 3 Cranch, 337.

‡ Wilkins *vs.* Despard, 5 T. R. 112; Roberts *vs.* Wetherall, Salk. 223; S. C., 12 Mod. 92.

whenever certain articles "should be imported into the United States after the 20th day of May next, all such articles shall be forfeited to the U. S.;" it was held that an absolute and instantaneous forfeiture was created by the mere act of importation, that no seizure was necessary to vest the title in the government, and that even a *bona fide* purchaser acquired no title.* So, again, where a statute in New York, in relation to lotteries, provided that "all property offered for sale, distribution, or disposition against the provisions of law, shall be forfeited to the people of the State," it was held that the mere offer for sale worked an immediate change and transfer of the title.†

Several Penalties.—Where a penalty is imposed upon the commission of an act, and the act is committed by several persons, the question sometimes arises whether only one penalty can be recovered against all, or whether the whole amount of the statutory forfeiture can be demanded against each of the offenders. And the rule is, that where the offense is in its nature single, and cannot be severed, there the penalty shall be single; because, though several persons join in committing it, it still constitutes but one offense. So, if a distress is wrongfully impounded, though several may coöperate, it is but one act of impounding. So, under the English game laws, killing a hare is but one offense, whether one or twenty kill it. So again, if partridges are netted by night, though two, three, or more may draw the net, still it is but one offense; and in these cases there can be but one penalty against

* U. States *vs.* 1,960 bags of coffee, 8 Cranch, 398, overruling Mr. Justice Story's decision in the Mars, 1 Gallison, 192; Fontaine *vs.* Phœnix Ins. Co., 11 J. R. 293; Kennedy *vs.* Strong, 14 J. R. 128.

† Bennett *vs.* Am. Art Union, 5 Sandf. 614.

all the parties found guilty.* So too, in this country, with regard to the removal of property liable to rent from off demised premises, before the remedy of distress for rent was abolished, it has been held to be but one act, and to subject all parties concerned to but one penalty.†

But on the other hand, where the statute relates to an offense in its nature several, as, for instance, to the resistance of process, the acts of each are to be severally regarded, and the penalty to be imposed on each. One may resist, another molest, another run away with goods; one may break the offender's arm, another put out his eye; all these are distinct acts, and the offense of each is entire and complete in its nature. Therefore, each person is liable to a penalty for his own separate offense.‡

Good faith no excuse for violation of Statutes.— We have already had occasion to notice the rule, that ignorance of the law cannot be set up in defence. All are bound to know the law; and this holds good as well in regard to common as to statute law, as well in regard to criminal as to civil cases. In regard even to penal laws, it is strictly true that ignorance is no excuse for the violation of a statute.§ So in regard to frequent attempts which have been made to exonerate individuals charged with disobedience to penal laws, on the ground of good faith or error of judgment; it has been held that no excuse of this

* Partridge *vs.* Naylor, Cro. Eliz. 480; S. C., F. Moore, 453.

† Warren *vs.* Doolittle, 5 Cowen, 678; Palmer *vs.* Conly, 4 Denio, 375; Conley *vs.* Palmer, 2 Coms. 182.

‡ Rex *vs.* Clark, Cowp. 610; Palmer *vs.* Conly, 4 Denio, 375; Conley *vs.* Palmer, 2 Coms. 182.

§ Smith *vs.* Brown, 1 Wend. 231; Caswell *vs.* Allen, 7 J. R. 63.

kind will avail against the peremptory words of a statute imposing a penalty. If the prohibited act has been done, the penalty must be paid. So in England, in debt, for a penalty under the game laws, for shooting without license, it was urged that the defendant acted in good faith, and relied on a license which proved insufficient; but it was held that acting *bona fide* was no excuse.* So, where an act directed town supervisors to raise certain sums of money for the erection of public buildings, and declared that if they neglected or refused, each supervisor should forfeit the sum of $250, it was argued that the supervisors had a discretion, and that it must be shown that they abused this discretion or exercised it corruptly; but the act was declared to be imperative, and the supervisors to be liable.† So where supervisors were by law directed to audit and allow the accounts of certain judicial officers, and in case of neglect or refusal were subjected to a penalty of $250; a mayor of a city, acting as supervisor, refused to audit an account of this class; and, in his defence, it was urged that he was not liable unless his intention in not auditing the account was corrupt; and that, in fact, he honestly believed the officers whose account had been offered for audit, had been unconstitutionally appointed; but it was held to be no excuse. "The offense," said Mr. Senator Lott, in delivering the judgment of the Court of Errors, "consists in the refusal to perform the duty required by law, and not in the intent or motive by which the supervisors are actuated."‡ So, a justice of

* Calcraft *vs.* Gibbs, 5 T. R. 19.

† Caswell *vs.* Allen, 7 J. R. 63.

‡ Morris *vs.* The People, 3 Denio, pp. 381 and 402. It was contended that the unconstitutionality of the act under which the judicial officers in question had been appointed, had been settled by the court of last resort

the peace was held liable for a misdemeanor, as for a willful neglect of duty, in refusing to take an affidavit in a cause before him, though he acted in good faith in his refusal. The court said, "The justice knew what was asked of him, and he knew what he refused. There was nothing like surprise, inadvertence, or even apprehension on his part. He refused to administer the oath, and he intended to refuse. This is a willful violation of duty."*

Statutes with regard to Infants.—Where a statute obliges an infant to indemnify the city, town, or county against the expenses of supporting his illegitimate child, and makes it necessary for him to enter into a bond with sureties for the purpose, as the only means by which he can obtain a discharge from arrest; that provision, without further words, gives the infant a legal capacity to make a binding obligation, and his infancy is no defence to an action on the bond.† "Whenever," says Mr. Justice Story, "any disability created by the common law, is removed by the enactment of a statute, the competency of the infant to do all acts within the purview of such statute, is as complete as that of a person of full age. And whenever a statute has authorized a contract for the public service, which, from its nature and objects, is manifestly intended to be performed by infants, such a contract must in point of law be deemed to be for their benefit and for the public benefit, so that when *bona fide*

(Purdy *vs.* The People, 4 Hill, 384), and that this was a conclusive defence; but Mr. Senator Lott held that neither the supervisors nor the court in that suit, to which the officers were not parties, could determine the point.

* People *vs.* Brooks, 1 Denio, 457.

† The People *vs.* Moores, 4 Denio, 518; See also, Winslow *vs.* Anderson, 4 Mass. 376.

made it is neither void nor voidable, but is strictly obligatory upon them."*

Relief against acts of public officers created by Statute.—Questions often arise as to the remedy against persons exercising a statutory authority, for erroneous exercise of power, as, for instance, in regard to the assessment and collection of taxes; and the general principle seems to be that where the officer acquires jurisdiction, then an error of judgment does not render him liable to suit; but if he undertakes to act in cases over which he has no jurisdiction, he commits a trespass and an action lies. So where a statute authorized the trustees of a school district to vote and levy a tax "upon the resident inhabitants of the district," and a warrant was issued to collect the tax of parties who were actually non-residents, it was held that no jurisdiction had been acquired, and that an action would lie against the parties acting under the tax-warrant.† So again, on the other hand, where an action was brought against a tax collector for levying a tax on a theater which had been erroneously assessed as a dwelling house, it was held that the assessors were clothed with power to assess the property according to the class to which, in their judgment, it belonged; that they had jurisdiction of the subject, and that though they might have erred, still no action would lie against parties acting under their authority.‡ This distinction is in analogy to the rule founded on

* United States *vs.* Bainbridge, 1 Mason, 71.

† Suydam *vs.* Keys, 13 J. R. 444.

‡ Henderson *vs.* Brown, 1 Caines, 92. See also, Prosser *vs.* Secor, 5 Barb. 607; and Vail *vs.* Owen, 19 Barb. 22, which leave the question as to the power of assessors in New York, in doubt. See also, as to power of assessors, Weaver *vs.* Devendorf, 3 Denio, 117.

public policy, which has been long and well settled, that a judicial officer is protected whenever he has jurisdiction and a case is presented calling for his decision, no matter how great the error of judgment which he commits, no matter how gross the malice with which he is charged.*

Indeed, even in cases where public officers exceed their authority, there is manifested a disposition by the courts not to interfere, and where their discretionary authority is appealed to, they often refuse. So where writs of certiorari have been applied for to bring up the proceedings of town and county officers in regard to the assessment or imposition of taxes, the courts have declined to grant them. The writ of certiorari, at common law, lies to officers exercising judicial powers, and to bring up proceedings of that character; but the allowance of the writ is discretionary; and on grounds of public policy and convenience, in cases of this kind it is generally denied.† So too, in this country, an indisposition is manifested in regard to officers clothed with statutory powers for the prosecution of great public works, to interfere with them by the preventive power of injunction, unless a very strong case for interference is made out. Thus, where a canal company were authorized to make and maintain a canal of "suitable" width, and they undertook

* Mills *vs.* Collett, 6 Bing. 85; Brittain *vs.* Kinnaird, 1 Brod. & Bing. 432; Dicas *vs.* Lord Brougham, 6 C. & P. 249; Doswell *vs.* Impey, 1 B. & C. 163; Cunningham *vs.* Bucklin, 8 Cowen, 178; Horton *vs.* Auchmoody, 7 Wend. 200; Easton *vs.* Calendar, 11 Wend. 90; Harman *vs.* Brotherson, 1 Denio, 537; Weaver *vs.* Devendorf, 3 Denio, 117, and cases cited; Stanton *vs.* Schell, 3 Sandf., S. C. R. 323; Landt *vs.* Hilts, 19 Barb. 283.

† The People *vs.* Supervisors of Alleghany, 15 Wend. 198; The People *vs.* Supervisors of Queens, 1 Hill, 195; Weaver *vs.* Devendorf, 3 Denio, 117.

to enlarge it, and a mill owner applied for an injunction against the making of a dam, it was refused.*

No relief in Equity against a Statute.—While speaking of the remedies for the violation of a statute, we may briefly refer to the relief which has been sought in equity from the operation of the positive terms of a statute. The limits of this work will not permit me to define the boundaries nor describe the attributes of the two great branches of equity and common law. But it is familiar learning, that from a very early period in English jurisprudence, the courts of equity, proceeding according to the course of the civil law, undertook to enlarge the remedies and modify the rigor of the common-law tribunals. Seeking to act on this idea, attempts have been repeatedly made to obtain the protection which courts of chancery give in cases of attempted fraud, and to induce those tribunals to relieve against express statutory provisions, upon an allegation that they were inequitably or immorally set up. But these efforts have been generally discountenanced; and the rule is, that equity will give no relief against a statute. "There can be no relief in equity," said Lord Eldon, "if the act has positively said so. On the other hand, if that is not expressly declared, nor the relief clearly excluded by the policy of the act, the equitable jurisdiction upon fraud exists."†

Limitation of Actions on Statutes.—We have thus far spoken of the various remedies for the infringement or violation of statutory rights and duties. We have now to consider a restriction upon these remedies, consisting in the limitation of the time within which

* Bruce *vs.* President of Del. and Hudson Canal Co., 19 Barb. 371.

† Mestader *vs.* Gillespie, 11 Ves. 621, 627.

actions of this class must be brought. At common law—and it is among those of its attributes which considerably deduct from the extravagant demands upon our respect and admiration that its devotees have made;—at common law, it would appear that lapse of time in no case formed any bar to the prosecution of a right. A rule so fatal as this to the peace and repose of society, could not long withstand the progress of civilization. But it seems that the first statutory limitations of actions date no farther back than the period of Henry VIII.* In the reign of that monarch, a statute of this description was passed; but it was only of limited application; and it was not until the reign of James I.† that a general act of this nature was introduced into the legislation of England. The details of this statute have been since materially modified; but it asserted the principle of limitation in its broadest terms, and has formed the basis of the analogous legislation of this country. The rule, as now universally adopted, applies as well to actions founded on statutes as to all other suits. The period of limitation, however, depends on the laws of each jurisdiction; and into these questions of local enactment I do not propose to enter. I shall only briefly refer to some questions of more immediate interest connected with this part of my subject.

The old English maxim is, *nullum tempus occurrit regi;* and the rule founded upon it is, that the king is not bound by any statute of limitations unless there be an express provision to that effect.

* Dwarris, vol. ii. p. 805 and 815; 32 Hen. VIII. c. 2, 4 Bl. Com. 431.

† Dwarris, vol. ii. p. 831; 21 Jac. I. c. 16.

This rule also applies to the government of the United States,* which is in nowise affected by the statutes of limitation of the various States† (though in consulting the State laws on this subject, the federal tribunals accept the construction which the State courts have put on them‡); and also to the States themselves, except where the doctrine has been abrogated by statute.§

This rule has been defended on the assertion of the policy of preserving the public rights, resources, and property from injury and loss by the negligence of public officers. But the doctrine rather appears traceable to the old feudal deference for power and prerogative; and if statutes of limitations are to be considered as statutes of repose, and as such favorably regarded, there seems little reason why the government should be excepted from their operation, or why a power so abundantly able to protect itself, should be armed with the formidable weapon of a perpetual claim.

The justness of these observations is confirmed by the practice of some of the States, which, with a wise and liberal policy, have consented to put the government in this respect, on an equality with the citizen. So, the statutes of New York have limited the rights of the people of that State, as well in regard to penalties and forfeitures as with regard to claims for real estate; and in regard to actions other than for the recovery of real property, have declared generally that the limitations prescribed by the statute "shall apply to actions brought in the name of the people of

* United States *vs.* Hoar, 2 Mason, 311.

† Swearingen *vs.* United States, 11 Gill. & J. 373.

‡ Harpending *vs.* Dutch Church, 16 Peters, 455.

§ Inhabitants of Stoughton *vs.* Baker, 4 Mass. 522; Weatherhead *vs.* Bledsoe, 2 Overton (Tenn.) R. 352; People *vs.* Gilbert, 18 J. R., 227.

the State, or for their benefit, in the same manner as to actions by private parties."*

The statutes of the State of New York were revised in 1830. At that time, the period of limitation barring suits for land by the State, was forty years; but the revisors reduced it to twenty years. This, however, has been held to have no retroactive effect where the statute began to run under the former law, although twenty years have elapsed since 1830; as the revised statutes declared that its provisions in this respect should not apply to any actions commenced, nor to any cases where the right of action shall have accrued or the right of entry shall exist, before the time it took effect.†

By the New York Code of Procedure, § 92, it is provided that an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved or to such party and the people of this State, must be brought within three years, except where the statute imposing it prescribes a different limitation.‡ Under the analogous provision in the revised statutes § of the same State, it was held that a

* Code of Procedure, part ii. title 2, § 75, § 96, § 98.

† 2 R. S. 300, § 45; Champlain and St. Lawrence Railroad Co. *vs.* Valentine, 19 Barb. 484, and cases there cited.

‡ This provision as to "such party *and* the people," relates to *qui tam* actions brought by an informer, and was first introduced into the statutes of New York at the time of the revision of 1830. Before that, it was held that there was no statute of limitation to actions of this class. 2 R. S. Part iii. c. iv. Title 2, Article 3, § 31, vol. ii. p. 298, and Revisors' note; Wilcox *qui tam vs.* Fitch, 20 Johnson R. 472; Freeland *vs.* M'Cullough, 1 Denio, 414.

§ "All actions upon any statute made or to be made for any forfeiture or cause the benefit and suit whereof is limited to the party aggrieved, or to such party and the people of this State, shall be commenced within three years after the offense committed or the cause of action accrued, and not after." 2 R. S. 298, § 31, Part iii. c. iv. Title 2, Art. 3.

suit against a stockholder of a corporation, to charge him individually with a debt contracted by it pursuant to a provision in the act of incorporation, is not within the section; and it was intimated, if not decided, that this short statute of limitation is intended only to embrace penalties and forfeitures properly so called, and other causes of action penal in their nature, and where both the cause of action and the remedy are given by statute, but does not extend to cases where the action is partly given by common law and partly by statute.*

We may here take notice of the fact that statutes of limitations belong to a class of legislative enactments, embracing the laws passed for the prevention of usury, and some others, on which the judiciary have generally looked with disfavor. Where they are regularly insisted upon, of course full effect is given to their provisions; but when it becomes necessary, as in case of laches, to apply to the court for leave to set them up, permission has often been refused, on the ground that they are statutes of which it is inequitable, if not immoral, to seek the protection. We shall have to consider this subject again, when we come to speak of the boundaries of legislative and judicial power; but I may here express the opinion, that, however desirous an honest and intelligent judiciary must ever be to repress all attempts at fraud, and to use their powers vigorously for that purpose, still, they should ever remember, that they hold in our system a position subordinate to the legislature; that their duty is to give full effect to the legislative will; and that any effort by them to throw discredit on statutory provisions as unjust or inexpe-

* Corning *vs.* M'Cullough, 1 Coms. 47. This case must, I suppose, be considered as overruling Van Hook *vs.* Whitlock, 2 Edw. 304; S. C., 7 Payge, 373; S. C. again, 26 Wend. 43.

dient, is but to arrogate to themselves a censorship over the law-making power, which our constitutions have nowhere intrusted to them. All laws emanate from the same supreme power; and while they remain on the statute book, all laws are entitled to equal respect and obedience.

Waiver of Statutory Provisions.—It often becomes an interesting question how far a statute can be overreached by private compact or stipulation; how far its requisitions may be waived by private consent, express or implied. The general rule is, that no contract or agreement can modify a law: *jus publicum privatorum pactis mutari non potest.** *Privatorum conventio juri publico non derogat.*† So it is well settled, that not even the most formal and solemn consent can give jurisdiction to a court not authorized to take it. And whenever the objection is raised, although it may be a breach of faith and good morals to insist upon it, still it will be fatal.‡

To this rule, however, there is a large class of exceptions, expressed by the maxim, *Modus et conventio vincunt legem.* These are cases where the party is held at liberty to waive statutory provisions, which, if insisted on, would enure to his benefit; and generally, it is true that where no principle of public policy is violated, parties are at liberty to forego the protection of the law. The maxim here applies as to private acts,—*consensus tollit errorem.* So, in Massachusetts, as to the statutory requisition in actions against absent defendants, of a con-

* L. 38, ff. de Pact.; see also, l. 20, ff. de Religiosis.

† L. 45, § 1, ff. de Reg. Jur.; Domat., Liv. Prel. Tit. i. § 2.

‡ Coffin *vs.* Tracy, 3 Caines' Rep. 129; Davis *vs.* Packard, 7 Peters, 276; Dudley *vs.* Mayhew, 3 Coms. 9; Oakley *vs.* Aspinwall, 3 Coms. 548; Low *vs.* Rice, 8 J. R. 409.

tinuance of suit from term to term, till notice is given, as the court may order; but to have this effect, however, jurisdiction must first have been obtained.* So, in general terms, it has been said in New York, "A party may always waive a right in his favor, created by statute, the same as any other.† And the principle was pplied in regard to a statute requiring railway corporations to fence in their tract; it being held that an adjacent land-owner might waive his right resulting from the statute, as it was passed for his benefit and protection. So, on the same principle, if statutory requisitions in regard to process are disregarded, which would render all subsequent proceedings fatally defective; still, if the party waive the objection, by appearing and contesting the suit on the merits, a valid judgment may be rendered.‡ But the waiver can only be made by the party in interest. So, a mere occupant of lands sold for taxes cannot waive the provisions of law intended for the benefit of the owner.§ The right of waiver is subject, as I have said, to the general control of public policy; whenever the object of the statute is to promote great public interests, liberty, or morals, it cannot be defeated by any private stipulation. So, where the directors of a corporation were prohibited from being concerned, directly or indirectly, in any contract on the road of the corporation, it was held, that a contract made in violation of this provision was void; and it was intimated that neither

* Morrison *vs.* Underwood, 5 Cushing, 52.

† Tombs *vs.* Rochester and Syracuse R. Co., 18 Barb. 583. See also Buel *vs.* Trustees of Lockport, 3 Coms. 197.

‡ Seymour *vs.* Judd, 2 Coms. 464.

§ Jackson *vs.* Esty, 7 Wend. 148.

the directors nor stockholders could waive the prohibition.*

The general rule holds good, as well in regard to constitutions as to statutes. A party may waive a constitutional as well as a statutory provision made for his benefit. So it has been repeatedly decided that a party may waive the right to a trial by jury, although that mode of proceeding be guaranteed to him by the constitution.† So, if a private road be laid out in an unconstitutional manner, if the owner consent, the proceeding will be held valid.‡ It is on this same doctrine of waiver that it has been frequently held, that the acts of a public officer exceeding his legal authority, may be adopted by the party for whose benefit the illegal act is done. So where a sheriff had arrested a defendant on a *ca sa*, and discharged the debtor on receiving his promissory note; though the act of the sheriff was illegal, and the note void in his hands, it was held that the plaintiff might affirm the sheriff's act and claim the note.§

Pleading in actions founded on Statutes.—The heads of pleading and evidence, in regard to statutes, are so fully discussed in various familiar treatises that I shall here only refer to them, and give a brief outline of the general rules relating to this part of my subject.‖

At common law, under the technical system of forms

* Barton *vs.* Port Jackson and Union Falls Plank Road Co., 17 Barb. 397.

† Lee *vs.* Tillotson, 24 Wend. 337; The People *vs.* Murray, 5 Hill, 468.

‡ Baker *vs.* Braman, 6 Hill, 47. See also Keator *vs.* Ulster and Delaware Plank Road Co., 7 Howard Pr. R. 41; Embury *vs.* Conner, 3 Coms. 511, 518.

§ Armstrong *vs.* Garrow, 6 Cowen, 465; Pilkington *vs.* Green, 2 B. & P. 151; Farmers' Loan and Trust Co. *vs.* Walworth, 1 Coms. 433.

‖ Archbold's *Criminal Pleading;* Chitty's *Pleadings;* Chitty on Criminal Law; Greenleaf on Evidence.

of action, the remedy in civil suits brought upon statutes was by assumpsit, debt, or case.* Although a statute is, at common law, in some points of view considered and treated as a specialty, yet assumpsit would lie for money accruing to the plaintiff under its provisions, if he were not, by the statute itself, restricted to any particular remedy.† Debt was also, at common law, frequently the proper remedy on statutes, in actions brought either at the suit of the party grieved or a common informer. And if a statute prohibits the doing an act under a penalty or a forfeiture to be paid to a party grieved, and do not prescribe any particular mode of recovery, it might be recovered in this form of action. Where a penal statute expressly gives the whole or a part of a penalty to a common informer, and enabled him generally to sue for the same, debt might be sustained; and he need not declare *qui tam* unless where a penalty is given for a contempt; but if there be no express provision enabling an informer to sue, debt could not be supported in his name for the recovery of the penalty.‡ An action on the case is frequently given by the express provision of a statute, to a party grieved. Whenever a statute prohibits an injury to an individual, or enacts that he shall recover a penalty or damages for such injury, though the statute be silent as to the form of the remedy, this action (in some instances also the action of debt) may be supported. Thus an action on the case may be supported by implication, and if a statute gives a remedy in the affirmative without a negative, express or implied, for a matter which was actionable at common law, the

* Chitty on Pleading, i. 120, 127, 163.
† Chitty, i. 120, &c. and cases cited.
‡ Chitty, i. p. 127.

party may sue at common law as well as upon the statute.* But, in some instances, the statute, in conferring a new right creating a liability, prescribes a particular remedy; and in that case the remedy pointed out and no other, can be pursued. We have stated above that a common informer cannot sue unless an action be expressly given him.†

These technical and nice distinctions are, however, now rapidly ceasing to be of interest, except as matter of legal history. The great changes recently effected in this country and in England, have laid the ax to the root of the old fabric of the common law as far as its procedure is concerned;‡ and wherever the modern

* Chitty on Pleadings, i. p. 163.

† Chitty, i. p. 164.

‡ Two acts,—15 and 16 Vict., c. 76, and 17 and 18 Vict., c. 125,—commonly known as the Common Law Procedure Acts of 1852 and 1854,—and the new rules of Hilary Term, 1853, have wrought such extensive changes in the English procedure that I hesitate to speak with confidence of any subject to which they relate. I have examined them with some care, but I can find nothing directly on the subject of pleading in actions on statutes, except rule 21, authorizing reference in certain pleas to statutes by date, chapter, and section. §§ lix., xci., and schedule B, of the act of 1852, give the new forms, or rather precedents for declaration. They entirely abolish all the old forms of action; but I find no precedent for declaring on a statute.

The New York Code of Procedure has no particular provision as to how actions are to be brought on public statutes. It simply declares that, in all cases, "the complaint shall contain the title of the cause, specifying the name of the court, the name of the county where trial to be had, and the names of the parties; then is to follow a *plain and concise statement of the facts constituting the cause of action*, without unnecessary repetition, and a demand of the relief sought against the defendant."—*Code*, Tit. vi. § 142. As to private statutes, it declares, § 163, "That in pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its passage, and the court shall thereupon take judicial notice thereof." As to complaints on penal laws, see Morehouse *vs.* Crilley, 8 How. Pr. R. p. 431.

The New York Code of Procedure is, as I understand from my learned friend, D. D. Field, Esq., one of the Commissioners who prepared it, substantially adopted in the following States of the Union: Ohio, Indiana,

and simple mode of pleading has been adopted, actions on statutes are to be brought, no doubt, as in other instances, by a concise statement of the facts on which the alleged claim is sought to be maintained.

How far, in actions at law upon statutes brought under the new system to enforce civil rights and remedies, it will be necessary that the declaration or complaint refer to the statute, does not yet appear to be fully settled. Probably, as we have already seen,* a public statute need not be set out, or even referred to, in the declaration; but must be set up, if relied on, by way of defence.† As we have seen, it is not necessary, at common law, in pleading, to state any matter which the court is bound to know; and so it is unnecessary to state matter of common or public statute law.‡ So, in an action on a statutory security, as a replevin bond, it is not necessary to aver in terms that the bond was taken in pursuance of the statute.§ But in New York, in criminal prosecutions for offenses created by statute, it has been declared, under the old system, that a reference to the statute is necessary, in order to inform the defendant distinctly of the nature of the offense; and so in penal actions founded on a statute. ‖

Kentucky, Missouri, California, Minnesota, and Oregon; and in Iowa, Texas, and Mississippi, systems very similar have been introduced. Massachusetts, by her act of 23d May, 1851, c. 233, reduced personal actions to three,—assumpsit, covenant, and debt,—and all actions of tort to one class, excepting replevin, which was retained. See Sedgwick on Damages, 2d ed. p. 43 in note, for an abstract of the act.—It is very plain, that what is left of the old common-law system of pleading, cannot long survive. Its forms still subsist, however, in some of the federal tribunals, which would, perhaps, be wise to imitate so many precedents of demolition.

* *Ante*, p. 34.

† Lewin *vs.* Stewart et al., 10 Howard Pr. R. 509.

‡ Stephens on Pleading, 351–2–3; Chitty on Bills, 578, Am. ed. of 1836.

§ Shaw *vs.* Tobias, 3 Coms. 188.

‖ Shaw *vs.* Tobias, 3 Coms. 188. In criminal cases, Mr. Chitty gives,

Great, indeed, as are the changes which have been wrought, both in England and the United States, by legislation on this subject, it is still important to bear in mind the old rules, as they will no doubt more or less affect, and in some cases may control, the application of the new system. An indictment for an offense against a statute must, by the ancient rules of pleading, with precision and certainty charge the defendant to have committed or omitted the acts, under the circumstances and with the intent mentioned in the statute; and if any one of these ingredients be omitted, the defendant may demur and move in arrest of judgment, or bring a writ of error. The defect will not be aided by verdict, nor be cured by the formal conclusion that the defendant's acts are *contra formam statuti*.* So in New York, it has been said, that "An indictment on a statute must state all such facts and circumstances as constitute the statute offense, so as to bring the party indicted precisely within the provisions of the statute. If the statute is confined to certain classes of persons, or to acts done at some particular time or place, the indictment must show that the party indicted and the time and place where the alleged criminal acts were perpetrated, were such as to bring the supposed offense directly within the statute. Thus, an indictment under

as the common-law rule, that the parts of a *private* act on which an indictment is framed must be set out specially; but that there is no necessity, in any indictment or information on a public statute, whether the offense be evil in its own nature or only becomes so by the prohibition of the legislator, to recite the statutes on which it is founded; for the judges are bound, *ex officio*, to take notice of all public acts of Parliament, and where there are more than one, by which the proceedings can be maintained, they will refer to that which is most for the public advantage.—Chitty's *Criminal Law*, vol. 1, p. 276.

* Archbold's *Criminal Pleading;* Indictment, p. 51, and cases cited.

the statute against embezzlement by *clerks* and *servants*, is bad if it allege that the defendant received the money or property as an *agent*.* So, in the same State, where the statute against lotteries prohibits any person, unauthorized by special laws, from opening, &c., any lottery, &c., for the purpose of exposing, setting to sale, or disposing of any real or personal property, the indictment must state that the lottery is set on foot for the purpose of disposing of property; and if not, it is bad, on demurrer.† But where the fact appears from the advertisement, set out at large in the indictment, it was held to be sufficient.‡

Mere surplusage in an indictment will not vitiate, and therefore where an indictment alleges facts which constitute a misdemeanor, it will be good for that offense, although it state other facts which go to constitute a felony, but all the facts alleged fall short of the charge of felony, in consequence of some other fact essential to that charge, *e. g.*, the intent of the party accused, not being averred.§

By the Revised Statutes of New York, if property was received contrary to the provisions of any statute, and an action was brought against the offending party, it was declared sufficient without setting forth the special matter, to declare that the property was received or converted, &c., contrary to the provisions of the statute in question, describing it in some brief and general way, as "the statute against betting and

* People *vs.* Allen, 5 Denio, 77; 1 Chit. *Crim. Law*, 281 *et seq.*; Archb. *Crim. Pl.* 50; 3 Chit. *Crim. Law*, 962; Archb. *Crim. Pl.* 275; 3 Maule & Sel. 539.

† People *vs.* Payne, 3 Denio, 88.

‡ Charles *vs.* The People, 1 Coms. 180; see The People *vs.* Rynders, 12 Wend. 425.

§ Lohman *vs.* The People, 1 Coms. 379.

gaming;" and under this act it was held essential that the reference should be made in the declaration; and in an action of this description a new trial was ordered, on the ground that an objection founded on the omission, was taken and overruled.* Sometimes an act is continued by a subsequent statute, and then proceedings may be laid to have been taken by the first act; as "when an act is continued," says Chief Justice Raymond, "everybody is estopped to say it is not in force."†

We have already seen‡ that if there be any exception contained in the same clause of the act which creates the offense,—*i. e.*, by way of proviso,—the indictment must show negatively that the defendant, or the subject of the indictment, does not come within the exception. But if the exception or proviso be in a subsequent clause or statute, it is in that case matter of defence, and need not be negatived in pleading.§ Where, however, a statute makes a deed or agreement or other act void, unless made upon a specified consideration, or under specified circumstances, the plaintiff must show that the circumstances exist under which alone it can have validity. So in New York, where a statute declares all wagers void, but also declares that this shall not apply to insurances made in good faith for the indemnity of a party insured; it was held, that it being the intention of the statute to prevent wager policies, a declaration on a policy must contain an averment of interest. ‖ The rule at common law is, that in

* 2 R. S. 352, §§ 1, 2, and 3; Schroeppell *vs.* Corning, 2 Coms. 132.

† Rex *vs.* Morgan, 2 Str. 1066.

‡ *Ante*, p. 63.

§ Archbold's *Criminal Law*, i. p. 53; Chitty, *Criminal Law*, i. p. 284. This last work contains, under the head of *Indictments on Statutes*, vol. i. p. 275, a very full discussion of this branch of the subject.

‖ Williams *vs.* Insurance Co. of North America, per Woodruff, J., 9 Howard P. R. 365.

suits on bonds or deeds, all the obligees or covenantees, if alive, must join as plaintiff in bringing the action. But this rule may be altered by statute; and where an act declared that a bond given for the benefit of attaching creditors might be prosecuted "by them jointly, or by any one of them separately," it was held that a suit might be brought by a single creditor on the bond, in his own name.*

Proof of Statutes.—We have already had occasion to call attention to some of the rules in regard to the proof of statutes.† Public statutes require, indeed, no proof;‡ the courts are bound to take notice of them, and are assumed to select the best and most accurate mode of informing themselves of their precise tenor. . . .

* Pearce *vs.* Hitchcock, 2 Coms. 388; overruling Arnold *vs.* Tallmadge, 19 Wend. 527.

† *Ante*, p. 34 *et seq.*, and p. 68.

‡ Mr. Dwarris thus states the reason of the distinction between public and private acts, as to the proof of them:—"The probable grounds of the declared difference in the judicial notice of statutes, public and private, may be, besides the solemnity and intrinsic authority of a public act of the legislature and the supposed greater notoriety of a matter of universal concern, the extreme inconvenience of a contrary rule, and the difficulty and uncertainty of which it would be productive.

From the extensive destruction of ancient documents, particularly in the Barons' wars, some early acts are entirely lost, while others are only partially and doubtfully preserved.

A few of the most important of the early statutes (those of Merton and Marlbridge, for instance) are not on record, but have been found in books and memorials. It is important that the existence of these acts should not be put on the issue of *nul tiel record.*

Being made within the time of legal memory, they have authority only, it is important to bear in mind, as statutes; and are not (like statutes passed before that time) a part of the common law.

According, however, to the received doctrine, though not found upon the statute roll, they are held not to lose their force as statutes, if any authentic memorials of their being such are to be found in books, seconded with a generally received tradition attesting and approving the same." Dwarris, vol. ii. p. 466; Hale's *Hist. Com. Law*, p. 16.

So, the courts are bound to take notice of the statutes establishing banks and regulating the rates of exchange.*

Private Statutes, on the other hand, must be proved, either by an examined copy or by an exemplification under the great seal. But if a clause is inserted in a private statute that it shall be taken notice of as if it were a public act, the necessity of proving it is dispensed with.† So, a private act may contain clauses of a public nature; and then the act, so far as those clauses are concerned, is to be regarded as a public act.‡ Thus, a clause relating to a public highway, occurring in a private inclosure act, has been held provable in the same way as a public act.§ In England, the regular proof of private acts of Parliament is by an examined copy, compared with the original in the parliament office at Westminster.‖

These distinctions¶ only apply to the laws of the state or country to which the courts belong in which the question is raised. As to foreign laws, they have always to be proved as facts. And in this country, where the States are held to be, for all purposes not coming within the scope of the federal Constitution, wholly independent of each other, the statutes of the sister States are to be proved as facts;

* Bronson *vs.* Wiman, 10 Barb. 406.

† Beaumont *vs.* Mountain, 10 Bing. 404; see, on this point, Brett *vs.* Beale, 1 M. and M. 416; and Woodward *vs.* Cotton, 1 C. M. and R. 44, 47.

‡ Dwarris, vol. ii. pp. 464 and 472.

§ Rex *vs.* Utterby, 2 Phil. Ev. p. 127; Dwarris, vol. ii. p. 472.

‖ Dwarris, vol. ii. p. 466.

¶ In Biddes *vs.* James, 6 Binney, 321, C. J. Tilgham says, these distinctions as to the proof of public and private laws, are no longer satisfactory in the present state of the world.

and no judicial notice can be taken of them, whether they be public or private.* Nor can they be proved by parol evidence, any more than any other written document the original or a proved copy of which can be obtained.† It is the general practice, however, in this country, to have the laws of each State printed by authority; and official publications of this kind will, it seems, be received in the sister States, and treated with the same respect as exemplifications under seal.‡ In England also, now, by the statute 41 Geo. III., c. 90, s. 9, made for the better and more effectual proof of the statute law, it has been enacted that the copies of the statutes of Great Britain and Ireland prior to the union, printed by the printer duly authorized, shall be received as conclusive of the several statutes in the courts of either kingdom.§

We may notice in this connection, an interesting application of the doctrine of presumptions to the proof of statutes. It has been repeatedly held in England in cases of long and uninterrupted possession, defective, however, in not showing a regular origin of title, that it might be left to the jury to presume the existence of a statute or royal grant in which the occupancy might be supposed to have taken its commencement.‖ And so in an early case, it was said, "For that the possession had gone otherwise ever since, the

* Taylor *vs.* Boardman, 25 Vermont, 581.

† Martin *vs.* Payne, 11 Texas, 292.

‡ Biddes *vs.* James, 6 Binney, 321, where C. J. Tilghman says, "I am for admitting the printed copies authorized by the legislature of this or any other State, whether the laws be public or private." Martin *vs.* Payne, 11 Texas, 292; Young *vs.* Bank of Alexandria, 4 Cranch, 384; Greenleaf on Evidence, § 479 *et seq.*

§ Dwarris, vol. ii. p. 472.

‖ Best on Presumptions, p. 145.

court presumed that there had been such an act of Parliament, though not now to be found. So, the court here was ready to recommend it to the jury as a strong presumption."* So again, in a more modern case; "There is a great difference," said Lord Mansfield, with his usual felicity of style and clearness of reasoning, "between length of time which operates as a bar to a claim, and that which is used only by way of evidence. * * Length of time used merely by way of evidence, may be left to the jury, to be credited or not, and to draw their inference one way or the other according to circumstances."†

Repeal.—If the repeal of a statute is effected by express and positive words, the only question is the effect of the repeal. But statutes are often held to be constructively repealed, and on this subject many nice and important cases have arisen.

It is sometimes laid down as a rule, that a statute cannot be repealed by the mere absence of all practice or proceedings under it, or as it is called by *non user*. *Est conveniens naturali equitati unumquodque dissolvi eo ligamine quo ligatum est.* Nothing short of a statute can repeal a statute.‡ But we shall hereafter see that custom is of great force in the construction of statutes; and on the same principle, it seems difficult to deny that long and uniform disuse might amount in some cases to a practical repeal. So, where there had been a constant practice not to file an affidavit under an old statute, the court held the act unnecessary.§ The

* Viscountess Stafford & Lewellin, Skinn. p. 78.

† The Mayor of Hull *vs.* Horner, Cowper, 102; Eldridge *vs.* Knott, Cowper, 215; Lopez *vs.* Andrew, 3 Man. & Ryl. 329.

‡ Dwarris, vol. ii., p. 529; White *vs.* Boot, 2 T. R. 274.

§ Leigh *vs.* Kent, 3 T. R. 362.

philosophical legislators who in framing the Code Napoleon, raised to their memories an imperishable monument, say, in their preliminary report, "It might be dangerous formally to authorize repeal by desuetude or *non user*. But it is impossible to overlook or underrate the influence and utility of that spontaneous concert of action, that invisible power, by which without shock or commotion a people does justice upon bad laws, protects society against hasty or inconsiderate legislation, and in fact guards the legislator against himself."* In Scotland, indeed, it is said that a statute loses its force by desuetude, if it has not been put in force for sixty years. By others, this term has been extended to a century, and a distinction is made between statutes half obsolete and those *in vividi observantia*.†

In the English houses of Parliament, a rule prevails that no bill can be introduced in repeal of or in opposition to any law passed at the same session. And in order to obviate this, it is there the practice to insert in every bill, a clause providing that the act may be amended or repealed at the same session.‡ No general rule or practice of this kind, prevails in this country. But the constitution of the State of Texas contains

* "Les lois conservent leur effet, tant qu'elles ne sont point abrogées par d'autres lois, ou qu'elles ne sont point tombées en desuetude. Si nous n'avons pas formellement autorisé le mode d'abrogation par la desuetude ou le non usage, c'est qu'il eut peut etre été dangereux de le faire. Mais peut on se dissimuler l'influence et l'utilite de ce concert déliberé, de cette puissance invisible, par laquelle sans secousse et sans commotion, les peuples se font justice des mauvaises lois, et qui semblent proteger la société contre les surprises faites au legislateur, et le legislateur contre lui meme!"—*Discours Preliminaire.*

† Dwarris, p. 529.

‡ Dwarris, vol. i., p. 269.

this clause: "After a bill or resolution has been rejected by either branch of the legislature, no bill or resolution containing the same substance, shall be passed into a law during the same session."*

In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule, that a general statute without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent;† as, for instance, the statute 5 Elizabeth, c. 4, that *none shall use* a trade without being apprentice, did not take away the previous statute 4 & 5 Philip and Mary, c. 5, declaring that *no weaver* shall use, &c. The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all. So where an act of Parliament had authorized individuals to inclose and embank portions of the soil under the river Thames, and had declared that such land should be "free from all taxes and assessments whatsoever." The land tax act, subsequently passed, by general words embraced all the land in the kingdom; and the question came before the King's Bench, whether the land mentioned in the

* Cons. of Texas, Art. iii., § 22.

† Dwarris on Statutes, 532; 6 Rep. 196; Brown *vs.* County Com., 21 Penn. 37; Omit *vs.* Commonwealth, 21 Penn. 427.

former act had been legally taxed; and it was held that the tax was illegal. Lord Kenyon said, "It cannot be contended that a subsequent act of Parliament will not control the provisions of a prior statute, if it were *intended* to have that operation; but there are several cases in the books to show, that where the intention of the legislature was apparent that the subsequent act should not have such an operation, then, even though the words of such statute, taken strictly and grammatically, would repeal the former act, the courts of law judging for the benefit of the subject, have held that they ought not to receive such a construction."* It has been said that, even if there be negative words in the latter statute, it shall not be considered as a repeal of the former, provided they can both reasonably stand together. So it was held that the statute 1 & 2 Philip and Mary, c. 10, declaring that all trials for treason should be according to the course of the common law, *and not otherwise*, did not work a repeal of the statute, 35 Henry VIII. c. 2, which authorized trial for treason beyond the sea.†

But, on the other hand, it is equally well settled that a subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, although it do not do so in terms; and even if the subsequent statute be not repugnant, in all its provisions, to a prior one, yet if the later statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act.

* William *vs.* Pritchard, 4 D. & E. 2; Dwarris, p. 514; Williams *vs.* Williams, 4 Seld. 526; Lyn *vs.* Wyn, Bridgman's *Judgments*, 122; Darcy's Case, Cro. Eliz. 512; Paget *vs.* Foley, 2 Bing. N. C. 679; R. *vs.* Pugh, 1 Dougl. 188.

† Forster's Case, 11 Rep. 63.

*Leges posteriores, priores contrarias abrogant.** "If two inconsistent acts be passed at different times, the last," said the Master of the Rolls, "is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way. Every act of Parliament must be considered with reference to the state of the law subsisting when it came into operation, and when it is to be applied; it cannot otherwise be rationally construed. Every act is made, either for the purpose of making a change in the law, or for the purpose of better declaring the law; and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment."†

It has been repeatedly declared that every statute is, by implication, a repeal of all prior statutes, so far as it is contrary and repugnant thereto, and that without any repealing clause; and, on this principle, when an act prohibited an unlicensed person from selling rum under a penalty of twenty dollars for each offense, and a subsequent statute prohibited the same act on pain of forfeiting not more than twenty dollars nor less than ten dollars for each offense, the old statute being absolute and imperative, and the other allowing a latitude of discretion, it was declared that they were essentially and substantially inconsistent, and the former statute was held to be repealed.‡ So, in general, where a

* Davies *vs.* Fairbairn, 3 How. U. S. R. 636; Dexter and Limerick Plank Road Co. *vs.* Allen, 16 Barb. S. C. R. 15.

† The Dean of Ely *vs.* Bliss, 5 Beavan, 374; Reg. *vs.* Inhabitants of St. Edmunds, Salisbury, 2 Q. B. 72; Brown *vs.* M'Millan, 7 Mees. & Wels. 196; Crisp *vs.* Bunbury, 8 Bing. 394; 11 Rep. 632; Rex *vs.* Lumsdaine, 10 Ad. & Ellis, 160; Rex *vs.* Tooley, 3 T. R. 69; Welsford *vs.* Todd, 8 East, 580.

‡ Commonwealth *vs.* Kimball, 21 Pick. 373; see Rex *vs.* Cator, 4 Bur. 2026, where Lord Mansfield made a similar intimation.

statute imposes a new penalty for an offense, it repeals, by implication, so much of a former statute as established a different penalty. So Lord Mansfield held, that the statute 5 George I. c. 27, inflicting a fine not exceeding £100 and three months' imprisonment, for seducing artificers, was repealed by a subsequent act, 23 George II. c. 13, inflicting a penalty of £500 and twelve months' imprisonment for the same offense.* So, on the same principle, a statute is impliedly repealed by a subsequent one, revising the whole subject-matter of the first.† And in the case of a statute revising the common law, the implication is equally strong. So where an act is an offense at common law, and the whole subject is revised by the legislature, the common law is repealed.‡ So in Pennsylvania, it has been said that when two statutes are so flatly repugnant that both cannot be executed, and we are obliged to choose between them, the later is always deemed a repeal of the earlier. This rule applies with equal force to a case of absolute and irreconcilable conflict between different sections or parts of the same statute. The last words stand, and others which cannot stand with them go to the ground.§

But, though it is thus clearly settled, that statutes may be repealed by implication, and without any ex-

* Rex *vs.* Cator, 4 Burr. 2026; Rex *vs.* Davis, Leach's Cases, 271; Nichols *vs.* Squire, 5 Pick. 168.

† Bartlett *vs.* King, 12 Mass. R. 537; Nichols *vs.* Squire, 5 Pick. 168.

‡ Commonwealth *vs.* Cooley, 10 Pick. 37; Commonwealth *vs.* Marshall, 11 Pick. 350.

§ Brown *vs.* County Com., 21 Penn. 37. But in this case it was also said, that whenever two acts can be made to stand together, it is the duty of the court to give them full effect. And so the act of 10th April, 1834, creating the county board of Philadelphia county, was held not to be repealed by the act of 15th April, 1834, relating to counties and townships.

press words, still the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of legislature together. "It must be known," says Lord Coke, "that forasmuch as acts of Parliament are established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent act, to be abrogated; *sed hujusmodi statuta tanta solemnitate et prudentia edita* (as Fortescue speaks, cap. 18, fol. 21) ought to be maintained and supported with a benign and favorable construction."* So in this country, on the same principle, it has been said that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject; and it is, therefore, but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable; and hence, a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together.† So, in Pennsylvania, it has been decided that repeals by implication are not favored; and it has been declared, that one act of Assembly is held to repeal another by implication only in cases of very strong repugnancy or irreconcilable inconsistency.‡ So again in a recent case in New York, it is said that the

* Dr. Foster's Case, 11 Rep. 63; Dyer, 347; King *vs.* The Justices, &c., 15 East, 377; Dwarris, vol. ii. 533.

† Bowen *vs.* Lease, 5 Hill, 221; Canal Co. *vs.* Railroad Co., 4 Gill. & John. 1.

‡ Street *vs.* Commonwealth, 6 W. & S. 209; Commonwealth *vs.* Easton Bank, 10 Barr, 442; Brown *vs.* County Commis., 21 Penn. 37.

repeal of a statute by implication is not favored. Unless the latter statute is manifestly inconsistent with and repugnant to the former, both remain in force. Courts are bound to uphold the prior law, if the two may subsist together.* So, too, in Massachusetts, to annul the prior statute, the latter act must be clearly repugnant to the former, and the implication by repeal will not be favored. Where an act was passed in 1836, prohibiting the sale of "*spiritous*" liquors, and in 1850 an act was passed professing to amend the prior statute, by inserting the word "*intoxicating*" in the place of the word "*spiritous*," it was argued that the act of 1850 repealed that of 1836; but on the ground that the word "*intoxicating*" includes a larger class of cases than "*spiritous*," that all spiritous liquors are intoxicating but all intoxicating liquors are not spiritous, it was held that they might well stand together.†

On the very opposite of these general principles, it has been said in England, with that deference for the rights of the crown which we have already had occasion to notice, that clauses which limit in any way the right of the sovereign, must be considered as repealed by subsequent statutes, unless expressly re-enacted.‡ But, I believe the principle has never been recognized in this country; nor do I understand why the government should be exempted from the operation of general rules of law, or the fair interpretation of language.

In this country it has been held, that a statute may be repealed by the abrogation of a State constitution. So the statute of the State of New York, passed under the constitution of 1821, which prohibited the judges

* Williams *vs.* Potter, 2 Barb. S. C. R. 316.

† Commonwealth *vs.* Herrick, 6 Cushing, 465.

‡ Attorney General *vs.* Newman, 1 Price, 438.

of appellate courts from taking part in the decisions of causes determined by them when sitting as the judges of any other court, was held to be virtually repealed by the constitution of 1846, which abrogated the constitution of 1821.*

Some special rules may be here noticed. We have already had occasion to observe the doctrine, that if the latter part of a statute be repugnant to a former part of it, the latter part shall stand, and, so far as it is repugnant, be a repeal of the former part, because it was last agreed to by the makers of the statute.† Questions may arise as to whether a repealing act is to operate as a total, partial, or temporary repeal; and it is said that the word repealed is not to be taken in an absolute, if it appear on the whole act to be used in a limited sense.‡ If a statute, originally perpetual, be continued by an affirmative statute for a limited time, this does not amount to a repeal of it at the end of that time.§ But when a statute absolutely repeals a prior law, and substitutes other provisions, to continue only for a limited time, the prior law does not revive at the expiration of the time fixed by the repealing law.‖

We have next to consider the effects of the repeal, which, when it is clear and absolute, are of a very sweeping character. "The effect of a repealing statute," says a very eminent judge,¶ "I take to be, to obliterate

* Pierce *vs.* Delamater, 1 Coms. 17.

† Attorney General *vs.* Governor and Company of Chelsea Water Works, Fitzgibbons, 195; Dwarris, vol. ii. 515 and 534; *Ante*, pp. 60 and 63.

‡ Rex *vs.* Rogers, 10 East, 569; Camden *vs.* Anderson, 6 T. R. 723.

§ Raym. 397.

Warren *vs.* Windle, 3 East, 205.

¶ Tindal, C. J., in Key *vs.* Goodwin, 4 Moore and Payne, 341.

the statute repealed as completely from the records of Parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law."* Upon this principle, the repeal of a statute puts an end to all prosecutions under the statute repealed, and to all proceedings growing out of it pending at the time of the repeal. There can be no legal conviction, unless the act is contrary to law at the time it is committed; nor can there be a judgment, unless the law is in force at the time of the indictment and of the judgment. Hence, a repealing law is sometimes made to operate prospectively, and a saving clause is inserted to prevent the operation of the repeal, and continuing the repealed law in force as to all pending proceedings and prosecutions.† So in the Supreme Court of the United States, it has been held that the repeal of a statute giving a penalty, puts an end to all actions pending for penalties under the act, at the time of the passage of the repealing statute.‡ So in the Circuit Court of the United States, where a man was indicted for perjury under the bankrupt law, which had been repealed before indictment, Washington, J., said, "Every offense for which a man is indicted must be laid against some law, and it must be shown to come within it, and the law must be

* See also, in England, as to effect of repeal of bankrupt laws. Surtees *vs.* Ellison, 9 B. & C. 750; Maggs *vs.* Hunt, 4 Bing. 212; and Kay *vs.* Gordon, 6 Bing. 576.

† Miller's Case, 1 W. Bl. 451; Rex *vs.* Justices of London, 3 Burr. 1456; Commonwealth *vs.* Cooley, 10 Pick. 37; Commonwealth *vs.* Marshall, 11 Pick. 350; see also, Butler *vs.* Palmer, 1 Hill, 324.

‡ Yeaton *vs.* United States, 5 Cranch, 281; Schooner Rachel *vs.* United States, 6 Cranch, 329; Norris *vs.* Crocker, 13 How. 429; United States *vs.* Passmore, 4 Dall. 372.

subsisting. If the legislature has ceased to consider the act in the light of an offense, the purposes of punishment are no longer to be answered."* So the repeal of a law imposing a penalty, though after conviction, arrests the judgment.† And the same rule applies to all proceedings, whether civil or criminal, going on by virtue of a statute at the time of its repeal. So if a statute confers jurisdiction in civil cases, and though suits may be instituted and be pending at the time of the repeal, the jurisdiction is gone, and with it the whole proceeding falls to the ground.‡ So the repeal of an act authorizing a course of proceeding by a public officer, invalidates the proceedings, if unfinished, at whatever stage they had arrived.§ Thus, in Pennsylvania, where an act was passed authorizing the opening of a street in Pittsburgh, and providing for the assessment of damages; it was held, that the repeal of the act before the street was opened, rendered void all proceedings taken, and that the parties in whose favor damages had been assessed could not recover the compensation reported in their favor.‖ So in New York, in May, 1837, a law was passed authorizing mortgage debtors to redeem their property sold under foreclosure decrees, within one year from the date of the sale. In April, 1838, an act was passed repealing the act of 1837, to take effect in November, 1838. In a case where the sale took place in December, 1837, before the repealing law had passed, it was held that no redemption could take place after the time fixed for the

* Anon. 1 Wash. C. C. R. 84.

† Commonwealth *vs.* Duane, 1 Binn. 601, 608.

‡ Stoever *vs.* Immell, 1 Watts, 258; Butler *vs.* Palmer, 1 Hill, 324.

§ Williams *vs.* County Commissioners, 35 Maine, p. 345.

‖ Hampton *vs.* Commonwealth, 7 Harris (Penn.), 329.

act to go into effect; that the right of redemption was a mere inchoate right, and necessarily destroyed by the abrogation of the statute which conferred it.*

In connection with this subject we may observe, that an act declared illegal by statute is not made good by a subsequent repeal of the statute, if it was originally illegal.† And so, the repeal of a prohibitory act does not give validity to acts which were invalid under the operation of the prohibitory act repealed. Thus in New York, the revised statutes declared that no person, unauthorized by law, who should practice physic or surgery for any fee or reward, should be capable of bringing suit for such fees. In 1844 this was repealed. An action was brought by an unlicensed practitioner, in 1845, to recover compensation for services rendered in 1840, prior to the repealing act. It was held that the repeal of the previous prohibitory laws had no effect on cases which arose before the passage of that act.‡

It will be noticed, that the operation of the general rule is to give repealing statutes a very retroactive effect. In regard to criminal matters, this is perhaps unobjectionable; but in regard to civil rights, the case is often very different. Trouble and expense may have been incurred; suits may have been instituted; but the effect of a retrospective construction of repealing statutes is entirely to derange the plans and defeat the arrangements of parties who have proceeded on the faith of the antecedent legislation. Efforts have been

* Butler *vs.* Palmer, 1 Hill, 324.

† Jaques *vs.* Withy, 1 H. Bl. 65; Roby *vs.* West, 4 New Hampshire R. 285.

‡ Bailey *vs.* Mogg, 4 Denio, 60.

made to resist these results, and certain exceptions have been made to this retroactive application. The first is that where a right in the nature of a contract has vested under the original statute, then the repeal does not disturb it.* And, in this country, this principle is carried out and firmly established by the clause in the Constitution of the United States, that no State can pass any law impairing the obligation of contracts; to which we shall have occasion more particularly to refer, when we come to consider the subject of the restrictions imposed upon State legislatures by the federal charter. An unfortunate distinction has been drawn by the highest of the federal tribunals, between the obligation of a contract and its remedy. It has been repeatedly regretted; but the State courts have adopted it, and it is now too late, perhaps, to hope for its abandonment.† What relates to the remedy is understood to be at the mercy of legislation, but the obligation of contracts is covered by the ægis of the federal charter. We shall, as

* Fletcher *vs.* Peck, 6 Cranch, 87; Gillmore *vs.* Shooter's Ex'or, 2 Mod. 310; Couch *q. t. vs.* Jeffries, 4 Burr. 2460–2; Churchill *vs.* Crease, 2 Moore and Payne, 415; 5 Bing. 177, S. C.; Terrington *vs.* Hargreaves, 3 Moore and Payne, 137, 143; 5 Bing. 489, S. C.; Butler *vs.* Palmer, 1 Hill, 324.

† "Were the notion *res nova*, we might feel great difficulty in distinguishing between the obligation of a contract, and a remedy given by the law to enforce it. It is difficult, under the notion that obligation and remedy are essential to each other, to see how the latter can be impaired without producing the same consequence to the former." Cowen, J., in Butler *vs.* Palmer, 1 Hill, 324. Mr. Chancellor Kent has said, "Ch. J. Marshall, in Sturges *vs.* Crowninshield, 4 Wheaton, 200, 207, spoke on this subject in a general and latitudinary manner, which was rather hazardous. It seems to me, that to lessen or take away from the extent and efficiency of the remedy to enforce the contract legally existing when the contract was made, impairs its value and obligation;" Com. i. p. 455, note. See, too, the opinion of Mr. Justice Washington, in Mason *vs.* Haile, 12 Wheaton, 370.

I have above said, have occasion to consider this more fully, when we come to speak of the Constitution of the United States.

There is another class of cases which virtually form a second exception to the general rule, declaring as we have seen, the operation of repealing statutes. It has been held in many instances that enactments of the legislature, creating new exceptions or defences, or modifying previous remedies, shall be so construed as not to affect rights of action which have attached and become vested under the original law, and existing at the time of the repealing statute.* "We are of opinion," said Lord Denman, C. J., in a case of this kind, "that the law, as it existed when the action was commenced, must decide the rights of the parties to the suit, unless the legislature express a clear intention to vary the relation of litigant parties to each other."† So in regard to the limitation of actions, the same learned judge said, in regard to a law changing the period, that the prior law must control. "A different construction, even if the words permitted it, would cause the greatest hardship; for a person who, as the law stood before the passing of this act, was in ample time to bring his ejectment, and recover property that undoubtedly was his, would, by the operation of the statute, be suddenly deprived of the means of asserting his right, there being no clause for the postponement of the operation of the statute for such a period as would enable persons who would be otherwise af-

* Bedford *vs.* Shilling, 4 Serg. & Rawle, 401; Duffield *vs.* Smith, 3 id. 590–9; Butler *vs.* Palmer, 1 Hill, 324.

† Hitchcock *vs.* Way, 6 Ad. & Ell, 943; Paddon *vs.* Bartlett, 3 Ad. & Ell. 884.

fected by it to assert their rights."* So in New York, where distress for rent originally existed, as in England, it was made by statute† a penal offense to remove goods from the demised premises for the purpose of avoiding the payment of rent; a forfeiture being given to the landlord of double the value of the goods removed. In May, 1846, an act was passed abolishing, generally, the remedy of distress, though not in terms repealing the above statute. A suit brought for a violation of the statute, alleged to have been committed in 1844, came on to be tried in June, 1846; and it was suggested that the abolition of the remedy of distress necessarily carried with it the provision as to the removal of goods, and on the general doctrine which we have above stated, that the penalty was gone. But it was said that there were no express words of repeal, that the moment that the offense was committed the penalty became a debt, or duty vested in the plaintiff,‡ and that the action would still lie.§ So it is intimated in a recent case in New York, that the legislature cannot take away a right of appeal which has already attached.‖

It has been attempted to reconcile this class of cases with the others, which we have heretofore in this connection considered, on the ground that they contain no express words of repeal;¶ but, it being settled that

* Doe dem. Evans *vs.* Richard, Q. B. R.; Dwarris, vol. ii. p. 542; Sed vide contra, Freeman *vs.* Moyes, 1 A. & E. 338; Paddon *vs.* Bartlett, 3 A. & E. 884; Surtees *vs.* Ellison, 9 B. & C. 750.

† 2 R. S. 503, § 17, Part iii. Ch. viii. Title 9, Art. 1.

‡ The Company of Cutlers in Yorkshire *vs.* Ruslin, Skinner, 363; Grosset *vs.* Ogilvie, 5 Brown P. C. 527; College of Physicians *vs.* Harrison, 9 Barn. & Cres. 524.

§ Palmer *vs.* Conly, 4 Denio, 374; S. C. on Appeal, 2 Coms. 182.

‖ Grover *vs.* Coon, 1 Coms. 536.

¶ Butler *vs.* Palmer, 1 Hill, 324.

repeals may be as clearly made by implication as by positive words, that position becomes untenable. They are, in fact, far more defensible on the general doctrine, that no statute should ever be permitted to have a retroactive effect, a rule which we shall have occasion to consider in the next chapter. Indeed, no attention can be paid to our statutory law without observing the mischiefs resulting from ill-considered legislation, violent and sweeping innovation, or the hasty repeal of previous enactments. The inconveniences consequent upon retroactive statutes are often of the most serious character, and cannot be too frequently pointed out, nor too often insisted on.*

* We may, however, take some consolation in the consideration that these are no modern evils, nor confined to our country. Those who deplore the haste with which our statutes are drawn, the inaccuracies which they often present, and the injustice they too frequently work, may take comfort in the words of Blackstone: "To say the truth, almost all the niceties, intricacies, and delays, which have sometimes disgraced the English as well as other courts of justice, owe their original not to the common law itself, but to innovations that have been made in it by acts of Parliament, overladen (as Sir Edward Coke expresses it) with provisoes and additions; and many times, on a sudden, penned or corrected by men of none or very little judgment in law;" and he goes on to quote further from Coke, as to the evils resulting from the ignorance and incompetency of the law-makers.—Blackstone, *Com.*, Introductory Lecture. Both Coke and Blackstone, however, were devotees to the common law. But the complaint has been repeated, in England, down to our time. "The same cause," says a writer in the Law Review for August, 1850, "which has produced bad books upon English law (the discontinuance of regular academical institutions in our terms of court) has produced bad statutes." "The real evil," said the Lord Chief Justice, in debate in the House of Lords, July 9, 1850, "under the present system, was, that nine-tenths of the time of the judges was taken up in endeavoring to reduce to intelligibility the ill-digested legislation of their Lordships' House."

In New York, the Revisors of 1830 prepared a very careful general repealing act; 3 R. S. 130, act of December 10, 1828; in which it is enacted by—

§ 5. "That the repeal of any statutory provision by this act, shall not

The question next presents itself as to the effect of the repeal of a repealing statute. The rule of the common law is, that the unqualified repeal of a repealing statute, substituting no other provisions in place of those repealed, revives the original statute; and this is generally received in this country.* The principle has been applied in New York to the resolutions of school districts to lay taxes.† In Massachusetts, also, it has been held, that the repeal of a repealing statute revives the original act; and that the doctrine is the same where the repeal is effected by implication only.‡ But in Ohio§ and Illinois,‖ statutes have been passed abolishing the rule of the common law.¶ If a repealing statute and part of the original statute, be repealed by a subsequent act, the residue of the original statute is revived.**

We have thus far considered the attributes and incidents of statutes, so far as they do not depend on any ambiguity of their own language. We are now better prepared to consider those cases where it is necessary to call in the aid of judicial construction or interpreta-

affect any act done, or right accrued or established, or any proceeding, suit, or prosecution, had or commenced in any civil case previous to the time when such repeal shall take effect; but every such act, right, and proceeding shall remain as valid and effectual as if the provision so repealed had remained in force." See, also, the subsequent sections of the act, and People *vs.* Livingston, 6 Wend. 526; Bradstreet *vs.* Clarke, 4 Wend. 211; and Lansing *vs.* Caswell, 4 Paige, 519.

* Case of the Bishops, 12 Co. 7; 2 Inst. 686; Doe *vs.* Naylor, 2 Blackford, 32; M'Nair *vs.* Ragland, 1 Dev. & Bat. *Eq. Cases*, 525; Wheeler *vs.* Roberts, 7 Cowen, 536; Finch *vs.* M'Dowall, 7 Cowen, 537; Commonwealth *vs.* Churchill, 2 Met. 118.

† Gale *vs.* Mead, 4 Hill, 109.

‡ Hastings *vs.* Aiken, 1 Gray, 165.

§ 14th February, 1809.

‖ 19th January, 1826.

¶ 1 Kent. *Com.* 466.

** Doe dem. Broughton *vs.* Gully, 9 B. & C. 344, 354.

tion. But before quitting this branch of our subject, I permit myself a short digression in order to take notice of the relation of statutes to the law of copyright. It was originally considered, in England, that the crown had a prerogative copyright in the Bible and Common Prayer Book, the Statutes of the realm, the Almanacs, and the Latin grammar; and the sovereign granted, by letters patent, the exclusive right of printing these works. In regard to the statutes, the doctrine has been vindicated on the ground of the necessity of some responsibility for correct printing, and because the laws can only be obtained from the rolls of Parliament, which are within the authority of the crown. Originally, the copies of the statutes of the kingdom were transmitted to the sheriff, who caused them to be publicly read in the county courts. When the introduction of printing produced an increased demand for the laws, and at the same time facilitated the supply, the laws were published by the patentee of the crown; and this exclusive right was not only repeatedly recognized in the earlier cases, but carried so far as to embrace the Reports, Year Books, and Rolle's Abridgment. These latter pretensions have been abandoned, but the exclusive title of the crown to the publication of the statutes has been sustained; and the sole right to print the laws in England, is now held to be vested in the sovereign and his patentee, who shares it, however, in consequence of certain ancient grants, with the universities of Oxford and Cambridge.* But it seems to be settled, that the statutes may be printed

* Baskett *vs.* The University of Cambridge, 1 W. Black. 105, 121; Baskett *vs.* Cunningham *et al.*, 1 Black. 370; Manners *vs.* Blair, 3 Bligh. 391, 402; Curtis on Copyright, 116, 128.

by others than those claiming under a patent, provided the publication is accompanied by *bona fide* notes.*

Of the English doctrine of prerogative copyright, there is, it is believed, no trace in this country. The laws, whether of the Union or of the States, may be published by any one; though, generally, the editor of a newspaper is appointed by the government as state printer, who publishes the first regular copy of the federal or State statutes. In regard to the decisions of the Supreme Court of the United States, it has been determined that, under the act of Congress by which an official reporter is appointed, there can be no copyright in the written opinions of the court; but that the reporter may have a copyright in his own marginal notes, and his arrangement of the arguments of counsel.†

Several of the State constitutions contain provisions on this subject. In California the constitution declares, that "the legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient; and all laws and judicial decisions shall be free for publication by any person."‡ The constitution of Iowa provides,§ that "no law of the General Assembly, of a public nature, shall take effect until the same shall be published and circulated in the several counties of the State, by authority. If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the

* Maugham on Copyright, p. 106; 2 Evan's *Statutes*, 19, note 11.

† Wheaton *vs.* Peters, 8 Peters, 591, 668; Gray *vs.* Russell, 1 Story, 11.

‡ Constitution, Art. vi. § 12.

§ Art. iv. § 27.

State." The constitution of Wisconsin declares,* that "the legislature shall provide, by law, for the speedy publication of all statute laws, and of such judicial decisions, made within the State, as may be deemed expedient. And no general law shall be in force until published." The constitution of Michigan declares,† that "the legislature shall *not* establish a State paper. Every newspaper in the State, which shall publish all the general laws of a session within forty days of their passage, shall be entitled to receive a sum not exceeding fifteen dollars therefor. The legislature shall provide for the speedy publication of all laws of a public nature, and of such judicial decisions as it may deem expedient. All laws and judicial decisions shall be free for publication for any person." In New York, the constitution provides,‡ that "the legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient. And all laws and judicial decisions shall be free for publication by any person."

The greater the publicity that is given to the statute law, of course, the better; but, notwithstanding these constitutional enactments of so many of the States, it appears to me not difficult to prove that our governments should retain some control over the publication of the judicial decisions of their courts. The publication of decisions in individual cases may, indeed, with propriety, be left free; but the publication of collections of reports is a matter too immediately connected with legislation to be left without any supervision whatever. As it is now, we are, in some of the States, flooded with reports of cases, a great

* Art. vii. § 21. † Art. iv. §§ 35 and 36. ‡ Art. vi. § 22.

many of which are entirely trivial, or only tend to increase the uncertainty and perplexity of the law, and greatly to augment the labor of all those concerned in the administration of justice. Our reports are our law, and the publication of reports is, in fact, the enactment of laws.

CHAPTER V.

OF THE BOUNDARIES OF LEGISLATIVE AND JUDICIAL POWER.

Division of Legislative and Judicial functions in England—Bills of Attainder—Division in this country—Disputed power of judiciary, independently of interpretation and constitutional limitation—What is a Law?—Power of the State Legislatures examined—Retrospective Laws—Result of the examination—Judicial power of construing doubtful provisions of written law—History of its exercise in England—In France—Present condition of the law on the subject—Power of the judiciary to enforce constitutional restrictions.

HAVING endeavored, in the preceding pages, to give a general idea of the sources of our jurisprudence, of the classification of laws, and of their various parts and incidents, we now approach the subject of the construction of statutes in doubtful cases. But some preliminary considerations still present themselves. Before entering on the details of interpretation, it is indispensable to have as correct an idea as is practicable of the division of power in the political systems which derive their origin from the great English sources; in other words, to understand, if possible, the precise boundaries of the legislative and judicial functions.* The questions which we are now about to

* Part of Mr. Dwarris' eleventh chapter, pp. 694 to 712, is devoted to a very intelligent treatment of this subject. "*The boundaries of legislation and of judicial interpretation sought to be ascertained.*" He puts it, however, after the discussion of the rules of construction. It seems to me that a correct notion of the division of power should precede the consideration of the exer-

consider have no place in absolutely despotic governments; where all power is centered in a single hand, there now, as under the absolute forms of the later Roman government, the will of the sovereign makes, applies, modifies, and interprets the law: *quod principi placet, legis habet vigorem.* The Emperor Justinian, in a rescript to his prefect, Demosthenes, uses this language: "We declare the imperial construction of laws, whether made on petition or in suits, or in any way whatever, to be absolute and final. For if the sovereign alone can make laws, he alone should interpret them; why else, when questions have arisen in litigated controversies, have they been brought to us? and why, too, have judicial doubts reached our ears, if interpretation does not proceed from us alone? Who, indeed, is competent to solve the enigmas of the law, except he to whom alone the power of legislation is conceded? These absurd cavilings are, therefore, to cease, and the emperor to be regarded the only interpreter, as he is the only maker of laws."* Under a

cise of the power. This part of Mr. Dwarris' eleventh chapter is reprinted by Mr. Smith, and forms his tenth chapter on *Legislation and Judicial Interpretation.*

* *Definimus, autem, omnem imperatorum legum interpretationem, sive in precibus, sive in judiciis, sive alio quocumque modo factam, ratam et indubitatam haberi. Si enim in præsenti leges condere soli imperatori concessum est, et leges interpretari solo dignum imperio esse oportet; cur autem ex suggestionibus procerum, si dubitatio in litibus oriatur, et sese non esse idoneos vel sufficientes ad decisionem litis illi existiment, ad nos decurratur, et quare omnes ambiguitates judicum, quas ex legibus oriri evenit, aures accipiunt nostræ, si non a nobis interpretatio mera procedit? Vel quis legum ænigmata solvere, et omnibus aperire idoneus esse videbitur, nisi is cui soli legislatorem esse concessum est? Explosis, itaque, his ridiculosis ambiguitatibus, tam conditor quam interpres legum solus imperator juste existimabitur.*—Cod. de Legibus, Lib. i. Tit. xiv. § 12. Such was the language that the master of the ancient world could, with impunity, make use of. Christendom now happily offers no parallel, unless, indeed, it be Russia.

system of government which breathes this spirit, all rules of interpretation, indeed, disappear. The questions upon the consideration of which we are now entering, can only present themselves under those forms of government the effort of which is to establish liberty by regulating the exercise of power.* The first step in this regulation consists in the division of authority; and just in proportion to the restraints imposed upon absolute and arbitrary acts of government by the careful distribution of authority, just in that proportion does the science of jurisprudence acquire form and certainty; just in that proportion do the law and its ministers rise in influence and importance.

It is familiar to the student of history that, from an early period, the functions of the English government have been, like those of our own, distributed between the legislative, the judicial, and the executive branches of the system; out of this division arise the questions that we now proceed to consider.† The separation of the functions of government, in the mother country, has, however, been the result of a long struggle, waged

* *Terræ populi omnes ad aquilonem positi, libertatem quamdam spirant.*— Bodin de Reipub., Lib. i. cap. viii. p. 117; ed. 1591.

† We are to recollect, says Mr. Grote, that the division of powers into legislative, executive, and judicial, and especially of the two latter, is quite of modern origin. The archon of Athens was a judge as well as an administrator. The Roman kings and the consuls, before the appointment of the prætors, sat as magistrates, as well as ruled as executive officers; and, in modern Europe, the same confusion of powers is to be found.—*History of Greece*, vol. v. ch. xlvi. pp. 477 and 478.

It would be curious accurately to investigate the results of the division. The community has doubtless gained; but has not the individual lost? Were not the Roman or Grecian public men, who alternately conducted every branch of affairs, more accomplished and complete personages than our moderns, subdivided as we are, into generals, admirals, ministers, diplomatists, and orators?

for centuries, with various fortunes, between its different component parts. So little was the importance of the distribution at first understood, that, originally, the English legislature habitually exercised judicial powers. Cases of first impression, matters presenting serious doubt or difficulty, were adjourned by the courts into Parliament, there to be resolved and decided.* So says Bracton: *Si aliqua nova et inconsueta emerserint, et quæ nunquam prius evenerint, et obscurum et difficile sit eorum judicium, tunc ponantur judicia in respectum usque ad magnam curiam, ut ibi per consilium curiæ terminentur.*† But this jurisdiction has long

* Bracton, lib. i. c. 2; Coke, 2 Inst. 408; Dwarris, 695; and *ante*, p. 23.

† The second chapter of Petyts' *Jus Parliamentarium*, a curious work, to which I shall hereafter again refer, is entitled, "Several authorities to prove that, by the ancient laws and customs of England, when any case of difficulty did happen to arise in Westminster Hall, the judges adjourned such cases *propter difficultatem, usque ad proximum Parliamentum.*" Indeed, we learn from one of the most sagacious, as well as one of the most profound among the students of the early institutions of the mother country, that the primary functions of the representative bodies of the middle ages were to administer or execute their law. Their legislative powers were introduced in a secondary stage. Sir Francis Palgrave says, "It must be recollected, however, that the sphere of action anciently belonging to popular representation, was not that to which we are now accustomed. Legislation was an accidental incident; their primary intent was the administration of the law. The mode, by which the change of functions of the select bodies was effected, can be traced with sufficient distinctness. They were the judges, as well as the witnesses, both of law and fact; for the law itself, unwritten and unrecorded, living in custom and usage, and not gathered from volumes or parchments, was a fact to be ascertained like any other, from the testimony of the judges or representatives of the community. Language, therefore, which is very inaccurate, if considered with reference to the jurisprudence of modern England, may be applied with propriety to the Nœemda or the Echevins; and hence the acquisition of their legislative powers. Called in first for the purpose of delivering the law, they easily accepted the duty of suggesting any amendments which it required; a task for which they were well fitted, both by station and by knowledge."—Palgrave's *English Commonwealth*, vol. i. ch. 3, p. 127.

since disappeared, and the only remains of the exercise of judicial power by Parliament consist in its capacity to pass bills of attainder, and of pains and penalties. These, says Mr. Dwarris,* "are instances of the transcendent power of the legislature to punish offenses otherwise than according to pre-ordained law, by a discretionary severity in lieu of an invariable standard. They furnish an instance of the legislature quitting its proper province and superseding the judicial functions, and that, in order to punish the transgression of laws which they have neglected to propound. In punishing criminals by bill, the king, lords, and commons are accusers and judges, charging, convicting, and condemning *uno flatu.* * * This is the only familiar instance of the legislature quitting its proper province and superseding the judicial functions."†

In this country, this vicious exception has been cut up by the root; our State legislatures are prohibited, by the Constitution of the United States, from using the terrible weapon of attainder; and all our constitutions, State and federal, declare the distinction to be observed between the three great powers of government, without, however, as we shall see hereafter, making any very precise or careful definition of the nature or extent of these powers.

It is, then, as a general rule, equally true of England and of the United States, that while the law-making power is exclusively confided to one branch of the government, that department neither construes nor enforces its own acts. The enactment of laws belongs to the legislature, their construction and application to

* Page 254. † Dwarris, Part i. p. 254, and Part ii. p. 712.

the judiciary, the enforcement to the executive. The first point, then, that solicits our attention is to ascertain if practicable, with precision, the boundaries that separate the legislative from the judicial functions.

In our system there are two certain and unquestioned checks on legislative power, the application of both of which is placed in the hands of the judiciary. The first limitation of legislative power arises from the power of construction vested in the courts, and is applied to written law of every kind of which the language is ambiguous or contradictory. The second limitation, and one peculiar to this country, consists of the constitutional restrictions imposed on the legislature by the people, and the enforcement of which, as we shall hereafter see, is confided to the judiciary.

The subject, therefore, naturally resolves itself into two heads:

First. The judicial power over acts of the legislature, independently of any constitutional restraints on legislative action.

Second. The judicial power as used to apply and enforce constitutional restrictions.

First. *The judicial power over acts of the legislature, independently of any constitutional restraints on legislative action.*—In examining this subject, it is necessary, first, to consider whether the power of the judiciary, in any case, goes beyond that of construction or interpretation, and the enforcement of constitutional restraints; whether, in any instance of heedless, improper, unjust, or immoral legislation, where no doubt exists either as to the meaning of the enactment, or the intention of the legislature, where no question either of constitutional law or interpretation arises,—whether

the courts can, then, on any other ground, interpose to arrest or nullify the action of the legislature.

This discussion necessarily involves the question of the absolute or supreme authority of the legislature, in cases where it is not fettered by constitutional impediments; and is one of much interest. It has been frequently examined in various points of view, and by writers of great authority; some contending for the absolute supremacy of the legislature, others for the superior authority of the courts as competent to declare and enforce the doctrines of natural justice. Much analogous decision has also been had as to the true source of government, the nature of its origin, and the mode in which its functions should be exercised—the rights of man in a state of nature, and the power of society to abridge those rights. For those who are curious in abstract speculations of this kind, the works of Locke, Hooker, Domat, Grotius, Burlamaqui, Puffendorf,* Woodeson, Hall, Paley, and other writers of this class, may be consulted with interest.

Mr. Locke thus defines the limits of the legislative power: "These are the bounds which the trust that is put in them by the society and the law of God and nature, have set to the legislative power of any commonwealth, in all forms of government:

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

"*Second.* These laws, also, ought to be designed ultimately for the good of the people.

* Copious citations from these authors will be found in the 7th chapter of Mr. Smith's work on Statutes.

"*Third.* They must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies.

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

But discussions of this kind throw little light on the question now before us. The great writers of the two last centuries, of the class to which Mr. Locke belongs, were bold and adventurous pioneers in paths in which we now securely and familiarly tread. The truths that they elaborately argued, are our axioms; and the profound disquisitions which have rendered their names immortal, tend but little to solve the novel and complex questions which our age has called into being. The precise question for our consideration is whether, under those governments which, like the English and American, profess to divide the powers of the great machine of government, to give the legislative functions to one and the judicial to another,—whether under these systems the judiciary can arrest the operations of the legislative branch, on the sole ground that they are repugnant to natural justice or morality. The subject of the retroactive effect of statutes will be separately discussed. And, first, let us see how the doctrine stands in the mother country.

It has been there contended, that there are certain fundamental principles of right and justice which even parliamentary power cannot with impunity infringe or disregard; and that if the legislature contemns them and passes acts in violation of them, it is the duty

* Locke on Civil Government, ed. of 1769, vol. ii. p. 273, Book ii. cap. xi.; Of the Extent of the Legislative Power.

of the judiciary to declare such acts null and void. This principle was laid down in England, and at an early period, by persons of high authority. Day sued Savadge, in trespass; the defendant justified, as collector of the city of London, and alleged that the goods were subject to be distrained for wharfage, and that he had thus taken them. The plaintiff replied, that he was a freeman of the city of London; and that, as such freeman, he was by custom of the city, exempt from the payment of taxes; the defendant rejoined, denying the custom, and averring that whenever a custom of the city of London came in issue, it was a custom to refer it to the mayor, &c., to certify as to the alleged custom; and prayed a writ to issue to obtain such certificate. The plaintiff insisted that the case should be heard by a jury, on the ground that the custom alleged for the trial by certificate, was against law and common reason; and on demurrer, judgment was given for the plaintiff, on this among other grounds; that it was against right and justice and against natural equity, to allow the mayor, &c., their certificate, when they are to try and judge their own cause; and this language was used: "By that that hath been said, it appears that though, in pleading, it were confessed that the custom of certificate of the customs of London is *confirmed by Parliament*, yet it made no change in this case, both because it is none of the customs intended, and because even an act of Parliament made against naturall equitie—as, to make a man judge in his own case—is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*."* So again, where a

* Day *vs.* Savage, Hobart, 85; Dr. Bonham's Case, Rep. part viii. p. 118.

physician was arrested for a fine imposed by the College of Doctors, Lord Coke said, "The censors cannot be judges, ministers, and parties; judges to give sentence or judgment, ministers to make summons, and parties to have the moiety of the forfeiture; *quia aliquis non debet esse judex in propria causa; imo, iniquum est aliquem suæ rei esse judicem.* And it appears, by our books, that in many cases the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law controls it and adjudges such act to be void." And Lord Holt, to the dismay, says Mr. Dwarris, "of all mere lawyers, manfully expressed his opinion, that the observation of Lord Coke was not extravagant, but was a very reasonable and true saying."*

These early cases are replete with the spirit of liberty; but they do not seem to be sustained, in England, by the language of modern authority. The English Parliaments have been the chief bulwarks of English liberty,† and the leading aim of liberal minds there has

* City of London *vs.* Wood, 12 Mod. 669; Dwarris, p. 480. Lord Ellesmere, in his observations on Coke's Reports, denounces the opinion with great severity. Dwarris, p. 481. As to parliamentary omnipotence, Lord Holt has quaintly said, "that it may do several things that look pretty odd;" it can make Malta in Europe, and can make a woman a mayor or a justice of the peace; but it cannot change the laws of nature so as to make a woman a man, or a man a woman. 2 Jon. 12; Stephen Elec. L. p. 110; Dwarris, p. 523.

† Mr. Justice Brown has put this well, in the recent case of The People *vs.* Berberrich & Toynbee, 11 Howard Pr. R. 318. "The provisions of the great charter, and the acts of later times for the protection of life, liberty, and property, are statutory regulations which Parliament may repeal or modify at pleasure. They are limitations upon the power of the crown, and not upon that of the Parliament. * * It is an historical truth, that

been to magnify their power and authority. Coke, himself, says,* "That the power and jurisdiction of Parliament is so transcendent and absolute, that it cannot be considered, either for causes or persons, within any bounds;" and, says Blackstone, "It hath sovereign and uncontrollable authority in making, confining, enlarging, restraining, abrogating, repealing, revising, and expounding of laws, covering matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power which must in all governments reside somewhere, is intended by the constitution of these kingdoms." * * "So long as the English constitution lasts, we may venture to affirm that the power of Parliament is absolute and without control."† "There is no court," he says again,‡ "that has power to defeat the intent of the legislature, when couched in such evident and express words as to leave no doubt whether it was the intent of the legislature or no." "Absolute power," says Mr. Dwarris,§ "must be placed somewhere, and to it implicit obedience must be paid. It can nowhere be so safely placed as in the hands of those who frame the laws, though the laws they establish may sometimes be pernicious, opposed to morality, and, as we can collect it, to the divine will as measured by the laws of God, which must be

the struggle there has constantly been, to put the real or pretended prerogatives of the crown under restraint; sometimes by the barons, as in the time of the great charter; sometimes by the judges, as in the time of Lord Coke; and sometimes by the Parliament, and especially the House of Commons, as in the times of the great rebellion, and the act for the settlement of the succession, in 1688."

* 4 Inst. 36.

† Bl. *Com.*, Book i. ch. 2.

‡ Introd. § 310.

§ Page 483.

the ultimate test; however laws may be unjust, but they will still be obligatory." He suggests only two limitations: first, that all laws which attempt to bind future Parliaments are, *ipso facto*, void;* and secondly, that if any provision of a statute conflicts with the law of God and nature, the law itself will be respected, but the vicious part will be deemed excepted out of the statute. He says, "The English lawyers adopt a more cautious and a very characteristic mode of proceeding. They do not inculcate implicit obedience to a law which leads to absurd consequences, or to an infraction of the natural or divine law; neither do they proclaim the law itself (which may be immoral, but cannot be illegal) of no validity, and null and void. They only hold it inapplicable, and declare that the particular case is excepted out of the statute.† For this position Mr. Dwarris cites no more recent authority than a dictum of Lord Coke;‡ nor can I reconcile it with his previous reasoning. The distinction is, I believe one of a metaphysical and not a practical character; and I apprehend that no modern case can be found where the English judiciary have attempted to question the supremacy of Parliament. Mr. Dwarris, himself, closes by saying,§ "The general and received doctrine certainly is, that an act of Parliament of which the terms are explicit and the meaning plain, cannot be questioned, or its authority controlled in any court of justice." In the recent discussion which took place in the English courts, on the subject of the privilege of the House of Commons, the house printer having been

* Dwarris, p. 479; Jenk. Cent. 27.
† Part ii. pages 484 and 623.
‡ 2 Inst. 25; 2 Inst. 84; Dwarris, 624.
§ Page 484.

sued for an alleged libel, and pleading in defence the orders and privileges of the house, though the court of King's Bench denied the validity of the plea, the absolute power of Parliament was admitted. "*Parliament*," said Lord Denman, "is said to be supreme; I most fully acknowledge its supremacy."* It is on this principle too, that it is understood that private acts of Parliament are upheld as a common mode of assurance.†

In this country, however, a disposition has been manifested, and by high authority, to adhere to the doctrine of the earlier English cases which we have cited, to deny the existence of any despotic or arbitrary authority in the legislature, and to assert an inherent power in the judiciary, independently of constitutional provisions, to annul a legislative enactment considered by them to be contrary to the fundamental principles of natural justice or morality. It will be useful to refer to some of the cases. The clause in the Constitution of the United States, Art. 5, of Amendments, that private property shall not be taken for public use without just compensation, relates only to the power of the federal government, and operates as a restraint on that government alone. And no similar provision was introduced into the constitution of the State of New York till the adoption of the constitution of 1821; but in a case decided by the Supreme Court of that State, before the adoption of that constitution, where the canal commissioners had been authorized to take land, but no provision had been made for compensation, the court said that the constitutional pro-

* Stockdale *vs.* Hansard, 11 Ad. & Ell. 253; also, see Mr. Justice Coleridge's opinion in the same case; 11 Ad. & Ell. 253.

† 2 Bl. *Com.* 344; 2 Kent *Com.* 448; Powers *vs.* Bergen, 2 Seld. 358.

vision was merely declaratory of a great and fundamental principle of government, and that any law violating that principle would be deemed a nullity, as against natural right and justice. This case was reversed in the Court of Errors on various grounds, but in doing so, they said, "This equitable and constitutional right to compensation, undoubtedly imposes it as an absolute duty on the legislature to make provision for compensation, whenever they authorize an interference with private right."*

In the same State, Mr. Chancellor Walworth has said :†

"The principle upon which forced sales of private property were compelled by the civil law for the public good, were certainly as extended as any government can ever claim consistently with the private

* Rogers *vs.* Bradshaw, 20 J. R. 735. Language a good deal to the same effect was used in the People *vs.* Platt, 17 J. R. 195; but that case turned more properly on the application of the prohibitory clause in the Constitution of the United States, restraining the States from passing any law impairing the obligation of contracts. The opinion of Mr. Justice Bronson in a familiar case in the State of New York, relating to private roads, Taylor *vs.* Porter, 4 Hill, 140, is sometimes referred to as sanctioning the idea of there being other restraints to be found in our constitutions besides those which their letter contains; but it is no authority for any such inference. That accurate lawyer, as will be seen when we come to analyze the case more closely, puts his decision entirely on the express terms of the constitution; he first shows that the act authorizes the taking of private property for private use, and argues that this does not fall within the phrase "legislative power." He then proceeds to say, "But the question does not necessarily turn on the section granting legislative power;" and the main burthen of his argument is to show that the act in question violated those provisions of the law which guarantee to the citizen, in all questions affecting his rights, the protection of the "law of the land," and "due process of law." The case has often been relied on as claiming for the judiciary a general control over the morality or justice of acts of legislation. It does no such thing. It is only a clear, accurate, and sound exposition of express constitutional provisions. The case is cited with approbation in Powers *vs.* Bergen, 2 Seld. p. 358.

† Varick *vs.* Smith, 5 Paige, 137.

rights of its citizens. And it is not pretended that under the arbitrary government of the Roman emperors, it was lawful or justifiable for the sovereign to take the property of one citizen and give it to another, where the public interest was not concerned in such transfer. Perhaps in England, where the Parliament is said to be omnipotent, so far as the exercise of mere human power is concerned, there may be no remedy for such an abuse of power where it is by a concurrent act of three estates of the realm. But in a State which is governed by a written constitution like ours, if the legislature should so far forget its duty and the natural rights of an individual, as to take his private property and transfer it to another, where there was no foundation for a pretense that the public was to be benefited thereby, I should not hesitate to declare such an abuse of the right of eminent domain was an infringement of the spirit of the constitution, and therefore, not within the general powers delegated by the people to the legislature."

In a recent case in New York, Mr. Justice Barculo reviewed the whole subject, and came to the conclusion, independent of any constitutional restriction, that the power of the legislature was not supreme, and that upon principle as well as upon authority, a legislative act, whether it be a positive enactment or a repealing statute, which takes away the vested rights of property of an individual for any purpose (except where property is taken for public use and upon a just compensation), is to be adjudged invalid, as being above the power and beyond the scope of legislative authority.* And the same learned judge, in a subsequent case, declared that in such cases, the rights of parties "rested not merely upon the constitution, but upon the great principles of eternal justice, which lie at the foundation of all free governments."†

In another case in New York, where land was devised

* People *vs.* Supervisors of Westchester, 4 Barb. 64, 74.

† Benson *vs.* Mayor of New York, 10 Barb. 223.

to trustees for the use of the testator's daughter for life, with remainder in fee to her issue living at her decease, and for want of such issue to all the grand-children of the testator then living, and during the life of the daughter a statute was passed authorizing the trustees to sell the lands to pay certain charges, and to invest the surplus, &c.,—it was held, no necessity being recited in the statute nor appearing by proof *aliunde*, that the act was void as being an unauthorized interference with private property. And Mr. Justice Jewett, delivering the judgment of the Court of Appeals, said,* "Here the sovereign and absolute power resides in the people, and the legislature can only exercise such powers as have been delegated to it. The right of eminent domain or inherent sovereign power, gives the legislature the control of private property for public uses, and only for such uses; it follows that if the legislature should pass an act to take private property for a purpose not of public nature,—as, if it should provide through certain forms to be observed, to take the property of one and give it (or sell it, which is the same thing in principle) to another, or if it should vacate a grant of property under the pretext of some public use,—such cases would be gross abuses of the discretion of the legislature, and fraudulent attacks on private rights, and the law would clearly be unconstitutional and void."†

* Powers *et al. vs.* Bergen, 2 Seld. 358.

† The reasoning of this decision is not very clear. It may be said, however, that it indirectly but evidently arrogates to the court a power of control over the acts of the legislature, independently of constitutional restraint. The reservation of powers to the people is a very doubtful doctrine, for there are no powers specifically delegated to the legislature by the constitution of the State of New York. The case substantially asserts that an

So, says Mr. Justice Strong, in the same State, "I am unwilling to admit that there is any despotic power in any of our political institutions. It is, I conceive, beyond the power of the legislature to tax one man, or the inhabitants of one locality, exclusively for the benefit of another."*

In the State of Connecticut the same doctrine has been declared. Hosmer, J., dissented from the opinion of those who assert the omnipotence of the legislature in all cases where the constitution has not imposed an explicit restraint. He held, if there should exist a case of direct infraction of vested rights too palpable to be questioned, and too unjust to admit of vindication, he could not avoid considering it a violation of the social compact, and within the control of the judiciary. He asked the question, "If a law were made without any cause, to deprive a person of his property, or to subject him to imprisonment, who would not question its legality, or who would carry it into effect?"†

So in Vermont, it has been said "that the exemption of a particular person from a general liability by law attaching to all other persons similarly situated, would be void, probably as an act of special legislation, upon general principles of reason and justice, like a particular act allowing one citizen perpetual exemp-

abuse of discretion or a fraudulent attack on private rights, may render an act unconstitutional, independently of constitutional provisions. And the idea that the facts on which the legislature decides and determines to act, must be set out in the act or otherwise appear, evidently substitutes the judicial sense of discretion and correct dealing in the place of the law-making power and constitutional enactment.

* People *vs.* Edmonds, 15 Barb. 529.

† Goshen *vs.* Stodnington, 4 Conn. 209.

tion from punishment for all offenses, or from all liability for torts."* And in the same State it has been said that, "altogether aside from any express provision of the constitution, a statute taking property without necessity of a public character, or without compensation in some form, would doubtless be regarded as entirely without the just limits of legislative power."† And so it has been decided in North Carolina.‡

"I cannot subscribe to the omnipotence of a State legislature," says Chase, J., in the Supreme Court of the U. S.,§ "or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the States. * * There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."

In the Supreme Court, Mr. Justice Story has held this language: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property, should be held sacred. At least, no court of justice in this country, would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the com-

* Hatch *vs.* Vermont Central R. R. Co., 25 Vermont, p. 49, 61.

† Hatch *vs.* Vermont Central R. R. Co., 25 Vermont, 49.

‡ Railroad Co. *vs.* Davis, 2 Dev. & Bal. 451.

§ Calder *vs.* Bull, 3 Dall. 386.

mon principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be inferred from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security without very strong and direct expressions of such an intention."*

It will be observed that all these cases more or less directly affirm the doctrine that there are certain restrictions on legislative action, not to be found in the State constitutions nor in that of the United States; that these restrictions grow out of certain great principles of right and justice; and that when these principles are infringed, it is the duty of the judiciary to arrest the acts of the law-making power. The question is one full of the gravest interest.

Before attempting, however, to test the reasoning of these cases, or to bring our minds to a correct conclusion in regard to the serious point which they present, it is necessary first to consider the precise manner in which the demarkation between the legislative and judicial functions in this country is made. This is not with us, as in England, the result of long usage, judicial decisions, or parliamentary practice. Here it is a matter of positive and written law. The division of power was a leading idea in the American mind at the time of the Revolution, and all our State constitutions bear its impress. Without, I believe, a single exception, they divide the attributes of government into three great branches, the executive, the legislative, and the judicial. But, though the State constitutions generally attempt to declare, with more or less accuracy, the powers of

* Wilkinson *vs.* Leland, 2 Peters, 627.

the executive branch of the government, they appear to make little effort to describe with precision the character and functions of either the legislative or judicial department; and they confine themselves, in almost every instance,* to the mere declaration that the law-making and judicial powers shall be kept separate and distinct; without endeavoring to define what is the true nature, object, or scope of a law, or what the correct characteristics of a judicial proceeding. In a recent case in New York,† it has been said, "Written constitutions not only declare of what the government shall consist, into what departments it shall be separated, * * but they also prescribe the exact confines within which these functions shall be executed, to what subjects they may or may not extend, and the degree of power, absolute or limited, which each separate department may exert." But this claims for our constitutions much more exactness than they possess. We find their language of a very vague and general character, going, in fact, little beyond the mere creation of the three great departments by name. So the Constitution of the United States declares, Art. III. § 1, "The judicial power of the United States shall be vested," &c. So the constitution of the State of New York (1821) declares, Art. I. "The legislative power shall be vested in a Senate and an Assembly;" Art. III. "The executive power shall be vested in a Governor." The constitution of Maine provides,‡ "The powers of

* In New Hampshire, Constitution, Part II., an effort has been made to define the legislative power, but I think with no very marked success.

† Rodman *vs.* Munson, 13 Barb. 63.

‡ Art. III.

this government shall be divided into three distinct departments, the legislative, executive, and judicial. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed and permitted." So in Massachusetts,* "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws, and not of men." So in Maryland,† "The legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other, and no person exercising the functions of one of said departments shall assume or discharge the duties of any other." So in Virginia,‡ "The legislative, executive, and judicial powers should be separate and distinct." In Alabama, the constitution declares,§ "The power of the government of the State shall be divided into three distinct departments, and each of them confided to a separate body of magistracy, to wit: those which are legislative to one, those which are executive to another, and those which are judicial to another. No person or collection of persons being one of those departments, shall exercise any power properly belonging to either of the others, ex-

* Constitution, Part I. § 30.
† Declaration of Rights, Art. 6.
‡ Bill of Rights, Art. 5.
§ Article II.

cept in the instances hereinafter expressly directed or permitted."*

A very little reflection is sufficient to satisfy us that the mere use of the terms executive, legislative, and judicial, is no satisfactory definition of the respective powers; and experience has already shown the difficulties attendant on this very general language.

What is the legislative power? What is a law? Is it a rule of universal application; is it a rule of prospective application? Can it be made in opposition to the principles of natural justice? Can a law be made to determine private rights? Can a law be enacted to decide private controversies? We shall find these questions, both on abstract inquiry and also in reference to the necessities of our complex political organization, not easy to answer; and yet, unless answered, how are we to say with accuracy in what the the legislative functions consist, or where they stop? The French Code, by a formal and express provision, prohibits all retrospective legislation, and the principle is generally admitted to be sound; but no such universal restriction would answer with us, as our legislatures are constantly passing laws of a retrospective character. Such are the laws declaring certain acts of persons irregularly elected, valid; correcting assessment rolls irregularly made; and many others of like character. These laws have never been questioned; and the denial of the power would, in a new

* Of this constitution, the Supreme Court of the United States has said "that, though somewhat peculiar, it is not substantially different from that of Virginia. The particular inhibition of its constitution only contains, in terms, that which arises from the construction of the more general constitutions of the other States." Watkins *vs.* Holman, 16 Peters, pp. 25 and 60.

country where forms are often overlooked, lead to very serious consequences.* To this we shall again have occasion to refer, when we come to speak of retrospective statutes. So again, as to legislative acts affecting private property. By constitutional provisions generally adopted, private property can be taken for public uses, on certain terms. But can it be taken for private uses? Is an act depriving one man of his property for the benefit of another, a *law?* Does it come within the scope of the legislative, or of the judicial functions?

Nor are these merely speculative or abstract questions. We shall find them presenting themselves in a large class of cases which I am about to examine. The difficulty, generally, appears to have arisen from a want of clear perception as to the true nature of a law; or, in other words, a want of accurate notions as to the boundary line which, under our system, divides the legislative and judicial powers. I now turn to a more detailed consideration of the cases in this country where these questions have been considered, and which, so far as they go, tend to give a practical definition to the term *law*, and to define the boundaries which separate the legislative from the judicial power.

And first, of cases where the legislature has sought to divest itself of its real powers. Efforts have been made, in several cases, by the State legislatures to relieve themselves of the responsibility of their functions, by submitting statutes to the will of the people, in their primary capacity. But these proceedings have been held, and very rightly, to be entirely unconstitu-

* Syracuse City Bank *vs.* Davis, 16 Barb. S. C. R. 188; 1 Kent's Com. p. 455.

tional and invalid. The duties of legislation are not to be exercised by the people at large. The majority governs, but only in the prescribed form; the introduction of practices of this kind would remove all checks on hasty and improvident legislation, and greatly diminish the benefits of representative government. So where an act to establish free schools was, by its terms, directed to be submitted to the electors of the State, to become a law only in case a majority of the votes were given in its favor, it was held, in New York, that the whole proceeding was entirely void. "The legislature," said the Court of Appeals, "have no power to make such submission, nor had the people the power to bind each other by acting upon it. They voluntarily surrendered that power when they adopted the constitution. The government of this State is democratic; but it is a representative democracy, and in passing general laws, the people act only through their representatives in the legislature."* And in Pennsylvania, in the case of an excise statute,† the same stern and salutary doctrine has been applied. In some of the more recent State constitutions this rule has been made a part of the fundamental law. So in Indiana, the principle is now framed into a constitutional provision which vests the legislative authority in a Senate and House of Representatives, and declares that "no law shall be passed, the taking effect of which shall be made to depend upon any authority except as provided in the constitution." And under these provisions it has been held, that so much of an act as

* Thorne *vs.* Cramer, 15 Barb. 112; Barto *vs.* Himrod, 4 Seld. 483.

† Parker *vs.* Commonwealth, 6 Barr. 507.

relates to its submission to the popular vote, was null and void.*

For the same reason, that a legislature cannot return or throw back upon the people the duty of making laws, for the same reason its powers cannot be delegated by it to any inferior authority. "It will not be contended," says Marshall, C. J., in the Supreme Court of the United States, "that Congress can delegate to the courts, or to any other tribunals, powers which are strictly legislative."†

Another sort of departure from the true functions of the law-making power, has been manifested in other cases. While, in the instances we have just noticed, the State legislatures have sought to relieve themselves from the responsibility justly devolving upon them; in other cases they have been induced to trench on the functions of the legal tribunals, and, in the shape and under the name of laws, to assume the right to pass enactments really of a judicial nature. This practice has encountered similar opposition, and has been unfailingly and severely discountenanced. The legislature is to con-

* Maize *vs.* The State, 4 Indiana, 342. See an able and independent opinion by Stuart, J. But I doubt whether, logically, the whole act should not fail. *Non constat* that the legislature would have passed the law without the clause in question. The New York and Pennsylvania decisions appear to me, in this respect, to rest on a sounder basis.

† Wayman *vs.* Southard, 10 Wheaton, pp. 1, 46. Still, it was intimated, in this case, that the federal legislature could delegate to the courts power to make rules for their process; and it was said, "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments; and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." See also, United States Bank *vs.* Halstead, 10 Wheaton, 51, where the delegation of power, as far as the process of the courts was concerned, was expressly held valid.

fine itself to making laws, and cannot make decrees or determine private controversies. It has been said, that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some particular thing already done or happened, while the other is a predetermination of what the law shall be for the regulation and government of all future cases falling under its provisions.* This, like other definitions on this subject, may be defective; but the general idea is correct, and the efforts of the courts to repress the State legislatures within their proper limits, are very curious and instructive. It is difficult precisely to classify these objectionable laws, but they will be found, generally, to range under three heads:† *First*, Where the legislature, by a special act, has sought to dispense with a general law in favor of an individual; *Second*, Where the act is one of legislation for a particular case; *Third*, Where the act is, in its nature judicial, *i. e.* seeks to influence, directly or indirectly, the determination of private controversies. In these cases the judiciary have, with an intelligence and firmness that do them great honor, frequently interposed to arrest the operations of the State legislatures; and the legislatures, with equal intelligence and virtue, have, in a great majority of cases, recognized the wisdom and propriety of the judicial interference, and have, without contest or reluctance, made their action conform to the decisions of the courts. So in Vermont, an act of the Assembly releasing a debtor imprisoned on execution at the

* Bates *vs.* Kimball, 2 Chip. 77.

† Davison *vs.* Johonnot, 7 Met. 389.

suit of a party, from his imprisonment, and freeing his body from arrest for a limited time, has not the characteristics of a law, and is void. And the court say, "A prescribed rule of civil conduct, is the correct and universally approved definition of municipal law."* So in the same State, a special act of the legislature, granting to a party the privilege of an appeal from a decision of the commissioner on claims of an insolvent estate, after the time allowed by law for taking appeals in such cases, is void, "as being in the nature of a sentence or decree rather than a law, wholly retrospective in its operation, and taking away a vested right."† So in the same State, the legislature has been held to have no power to pass an act authorizing a probate court to renew a commission appointing commissioners upon the estate of a deceased person, after the commission has been closed, and after the expiration of the time limited by the general law for its renewal.‡ So in Massachusetts, where the Declaration of Rights declares (Art. 20), that the power of suspending the laws or the execution of the laws, ought never to be exercised but by the legislature or by authority derived from it, to be exercised in such particular cases only (which means upon such particular laws) as the legislature shall expressly provide for,—it has been held, that a resolve of the legislature, empowering a judge of probate to take an administration bond in a mode differing from that prescribed by the general laws of

* Ward *vs.* Barnard, 1 Aik. 121; Keith *vs.* Ware, 2 Verm. 175, decides the same point; see also, Lyman *vs.* Mower, 2 Verm. 517; and Kendall *vs.* Dodge, 3 Verm. 361.

† Staniford *vs.* Barry, 1 Aik. 315. So a general act of the same kind is void, Hill *vs.* Town of Sunderland, 3 Verm. 507.

‡ Bradford *vs.* Brooks, 2 Aik. 284.

the commonwealth, is not imperative; and that if it were, it would be unconstitutional.*

So in Tennessee, an act authorizing a party to prosecute a suit in the name of a deceased plaintiff, without taking out letters of administration, has been held void. The act, it was said, takes away from some their vested rights and gives them to others, changes the nature of obligations, and dispenses with the liabilities which all others in similar situations would lie under.† So in Vermont, an act granting an appeal beyond the time allowed by law, is a decree rather than a law, and void.‡

So an act of divorce giving alimony to the wife, has been declared to be an exercise of judicial powers, and void.§ Legislative divorces, like acts of attainder, are of English origin; and both equally result from a disregard of the true limits of legislation. As we shall see hereafter, in this country attainders are absolutely prohibited, and statutory divorces are coming to be viewed with almost equal disfavor.

So an act by a State legislature declaring that a widow is entitled to dower, is a judicial determination, and void.‖ So an act of a State legislature authorizing a party to sell so much of the lands of a deceased person as would be sufficient to raise a given sum, and directing the proceeds to be applied to the extinguishment of certain claims against the estate of the deceased, is a judicial act, and as such unconstitutional and void.¶

* Picquet, App't., 5 Pick. 65. See also Davison *vs.* Johonnot, 7 Met. 389.
† Officer *vs.* Young, 5 Yerg. 320.
‡ Bates *vs.* Kimball, 2 Chip, 77.
§ Crane *vs.* Meginnis, 1 Gill & J. 463.
‖ Edwards *vs.* Pope, 3 Scam. 465.
¶ Lane *vs.* Dorman, 3 Scam. 238.

In a case where a statute of limitations had run against a demand, an act was passed allowing the plaintiff to commence and prosecute his suit in the same way and manner as he might or could have done if the same had been commenced within the time prescribed by law; but the court gave judgment notwithstanding the law, on the ground that the power of dispensing with the general law in particular cases, was not vested in the legislature.* In Maine, it has been decided that the granting by the legislature of a new trial after the time for appeal was elapsed, is a judicial act and void.† So in Indiana, it was held that the allowance of a new trial was a judicial act, and that an act of the legislature granting one, was unconstitutional and void.‡ And the Supreme Court of New York has well said, "The legislature has no right to determine facts touching the rights of individuals.§

We have next to consider a class of cases where legislative bodies attempt to deal with private rights of property by authorizing sales, by changing or divesting titles. It is conceded that the legislature, in cases of necessity arising from the infancy, insanity, or other incompetency of those in whose behalf its acts are sought, has power to authorize by general laws the sale of private property for other than public uses, and that without the consent of the owner; and on this

* Holden *vs.* James Admor, 11 Mass. 396.

† Lewis *vs.* Webb, 3 Greenleaf, 326; Durham *vs.* Lewiston, 4 Greenleaf, 140. But where an act of the legislature of Connecticut granted a new trial after the term of appealing had elapsed, it was held to be constitutional on the ground that the usage of that State supported it, and that the usage was to be taken as evidence of its judicial law.—Calder *et uxor vs.* Bull, 3 Dall. 386; 1 Peters Cond. R. 172.

‡ Young *vs.* The State Bank, 4 Indiana, 301.

§ Parmelee *vs.* Thompson, 7 Hill, 77.

principle there are, in almost all the States of the Union, general statutes authorizing guardians or administrators, on proper application to sell the property of infants or decedents, when the welfare of the infant or the true interest of the estate appears to require it. And the passage even of a private act authorizing an administratrix to sell real estate for the payment of debts, it being proved that the estate was insolvent, has been held by the Supreme Court of the United States, to be within the competency of the legislature, and not to be a judicial proceeding; and that although there was a general law on the same subject. It was in that case said, "The general law was passed from the knowledge which the legislature had of its expediency and necessity. The special law was passed from a knowledge of its propriety in the particular case. * * The legislature regulates descents and the conveyance of real estate. To define the rights of debtor and creditor is their common duty. The whole range of remedies lie within their province."* On this subject, however, there is considerable conflict between the views of the judiciary in the respective States. In Massachusetts, a resolve of the legislature authorizing the guardian of a lunatic to sell his real estate and apply the proceeds to the payment of debts, has been held valid.† And so, in the same State, a resolve of the legislature authorizing a guardian to sell the real estate of his ward, notwithstanding a general power of the same kind resided in the courts, was held to be a valid law.‡ But in New Hampshire,

* Watkins *vs.* Holman, 16 Peters, 25 and 61.

† Davison *vs.* Johonnot, 7 Met. 388.

‡ Rice *vs.* Parkman, 16 Mass. 326.

the court has given as its opinion, that the legislature can not authorize a guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his wards, on the ground that it is a judicial act.* And in Tennessee, an act authorizing a guardian to sell land of his ward, the proceeds to be assets for the payment of debts, was held to be void on the same ground. "It is difficult," says the court, "to perceive how an act which determines that the property of a party is liable for a given debt, and that it shall be sold for the payment of that debt, is not a judicial act; and yet in substance, that is the case before us. It is true the sale is authorized for the payment of debts generally; but that can make no difference. It is the same thing in principle, whether there be ten creditors or only one."†

Notwithstanding the weight to which the judicial opinions of Massachusetts and of the highest federal tribunal, are justly entitled, I can entertain no doubt that the decisions which deny the propriety of legislative interference in these special cases, are founded on the true principle. There is no difficulty in making general laws for the administration of property in all cases; and to these general laws, and to their application by judicial tribunals, individual cases should be left. A legislative body is, from its character, organization, and habits of business, entirely incompetent to pass discreetly upon questions involving private rights; and unless stringent rules prevent their interposition, it is impossible to say how much fraud, injustice, and oppression may be perpetrated under the guise of law.

* Opinion, 4 New Hamp. 572.

† Jones *vs.* Perry, 10 Yerg. 59.

There is still another class of cases, of this or an analogous kind, where—when by reason of unforeseen contingencies, estates created by will or deed have become insufficient beneficially to manage the property to which they relate, and it is evident that no injury or injustice can be done—the legislature is considered competent to enlarge the powers of the person in the actual enjoyment of the property. So in case of a devise in trust for life to a woman, remainder to her issue, with power of appointment to her by will, and the age of bearing children having passed, it is supposed competent for the legislature to enlarge the power to lease, on the ground that the estate being but for life, the property cannot be advantageously used, and that no one can possibly be injured by the permission. So in Pennsylvania, a private act of Assembly authorizing the guardians of infant children the title to whose real estate is vested in the guardians, to convey the estate to a person with whom the parent of the children, before his death, contracted to sell it, is valid. "A power," says the court, "to supply the want of trustees, to enable some person to complete defective titles, instead of and for the use of infants and others, must exist somewhere in every government."* But the power of the legislature has been held to be limited to cases which, on their face, show a necessity of this nature, and that if neither the statute show any such fact, nor proof is offered of such a state of things, an act interfering in any way with a private right of private property without the owner's consent, will be void. So in New York, in a case already noticed, lands were devised to trustees for the use of the testator's

* Estep *vs.* Hutchman, 14 Serg. & R. 435.

daughter for life, with remainder in fee to certain parties named in the will; and during the life of the daughter a statute was passed authorizing the trustees to sell the lands, out of the proceeds to pay their commissions, &c. &c., and to invest the surplus upon the trusts declared in the will,—the general power of the legislature was not denied; but the act was held void upon the ground of no necessity appearing on the face of the statute, or in any way, that the interests of the remainder-men should be thus disposed of.* Indeed, except in very special cases, the power of the legislature to interfere with private rights of property, has been generally resisted, and it has been declared that the right to make *laws* does not embrace the authority to affect or interfere with private property except where the right of eminent domain is exercised as provided for in the State constitutions. So in a case involving the validity of the statutory provisions of the State of New York, authorizing a private road to be laid out over the lands of a person without his consent; Mr. Justice Bronson, after admitting the right to take private property for public use, making just compensation therefor, held as follows:

"There is no provision in the constitution that just compensation shall be made to the owner when his property is taken for private purposes; and if the power exists to take the property of one man and transfer it to another, it may be exercised without any reference to compensation. The power of making bargains for individuals, has not been delegated to any branch of the government; and if the title of A can be, without his fault, transferred to B, it may as well be done with-

* Powers *vs.* Bergen, 2 Seld. 358; I have already commented on this case, *ante*, p. 157. See another act of this kind in New York, entitled An Act relative to land devised by Jas. Morris, deceased; Laws of 1853, c. 14.

out as with a consideration. This view of the question is sufficient to put us upon the inquiry where can the power be found to pass such a law as that here under consideration. It is not to be presumed that such a power exists, and those who set it up should tell us where it may be found. Under our form of government, the legislature is not supreme; it is only one of the organs of that absolute sovereignty which resides in the whole body of the people; like other departments of government, it can only exercise such powers as have been delegated to it, and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the State who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to take the property of A and give it to B, either with or without compensation? Only one clause in the constitution can be cited in support of the power, and that is the first section of the first article, where the people have declared that '*The legislative power of the State shall be vested in a senate and assembly.*' It is readily admitted that the two houses, subject only to the qualified negative of the governor, possess all the legislative power of this State; but the question immediately presents itself— *What is that legislative power*, and how far does it extend? Does it reach the life, liberty, or property of the citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare? * * * The security of life, liberty, and property, lies at the foundation of the social compact; and to say that this grant of 'legislative power' includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which governments were established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing my mind to the conclusion that the clause under consideration had clothed the legislature with despotic power; and such is the extent of their authority if they can take the property of A either with or without compensation, and give it to B. The 'legislative power of this State' does not reach to such an unwarrantable extent. Neither life, liberty, nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power."*

* Taylor *vs.* Porter, 4 Hill, 140. See the case cited with approbation in Powers *vs.* Bergen, 2 Sel. 358. But as we have already seen, *ante* p. 155, Mr. Justice Bronson does not rest his decision merely on this

We thus find that practice and experience are gradually supplying the definitions which the State constitutions omit. It is, in truth, extremely difficult to define with any precision, the exact nature of a law. *Omnis definitio in jure civili periculosa est; parum est, enim, ut non subverti posset,** says the Digest; and this is eminently true of the subject before us. Laws are usually intended for future cases; but we shall see hereafter, that they are often rightly and necessarily retrospective. They are in one sense general and uniform; but in others they are strictly local and partial. They usually affect public interests; but they often relate only to private objects. So that any attempt to define, by precise terms, the boundaries of the legislative duties, would probably occasion difficulties greater than those resulting from the present imperfect nomenclature. The Supreme Court of the United States has well said, "It is difficult to draw a line that shall show with precision the limitation of powers under our form of government. The executive, in acting upon claims for services rendered, may be said to exercise, if not in form, in substance, a judicial power. And so, a court in the use of a discretion essential to its existence, by the adoption of rules or otherwise, may be said to legislate. A legislature too, in providing for the payment of a claim, exercises a power in its nature judicial."†

We may, however, perhaps, deduce as correct con-

construction of the phrase "legislative power." He rather makes his judgment depend on the true application of the clauses "law of the land" and "due process of law."

* L 202, ff. de Reg. Jur.

† Watkins *vs.* Holman, 16 Peters, 25.

clusions from the decided cases which we have thus far examined:

First. That a law must receive its final sanction and enactment from the legislature, and that the trust of the popular representatives can neither be returned to the people, nor delegated to any other power.

Second. That a statute which dispenses in favor of some particular individual, with the general rules governing similar cases, does not come within the rightful attributes of legislative power, and is not to be regarded as a law.

Third. That a statute which seeks to affect or influence the determination of any private contested right, is for the same reasons equally vicious and void.

Fourth. That a statute which, without some controlling public necessity and for public objects, seeks to affect or interfere with vested rights of private property, is equally beyond the true limits of the legislative power.

To all these rules, the ingenious mind will readily suggest exceptions; but while they do not claim the accuracy of definitions, they will serve, perhaps, as an approximation to correct ideas upon the subject. The correctness of the last rule turns, indeed, on the meaning attached to the words "*vested right.*" It is very certain that the legislature cannot deprive a man of real property in which he has either a vested or a contingent right; but there is, unfortunately, a large class of cases where, by statutes changing remedies, repealing laws, and retroactive enactments, positive and absolute rights are taken away. Thus, in the case of a law abolishing arrest and imprisonment for debt, the remedy is in the power of the legislature; and the law may, if the legislature sees fit, be made

retroactive, and in that case the right of the plaintiff against the bail, unless he is absolutely fixed, is completely defeated. Cases of this and an analogous kind, frequently present great suffering and great loss, resulting from reckless legislation; still, the right of the legislature to interfere has been repeatedly affirmed, and is generally recognized. Until some clearer notion shall be had of the precise extent to which legislative bodies may act upon rights of property, the whole subject must be considered as in a state of very unsatisfactory uncertainty. All that we can do is, as I have said, to approach correct results.

In considering the subject of the supremacy of the legislature in this country, and the power of the judiciary, we have thus far discussed the question as turning on the organization of the three great branches of government; but other considerations present themselves, growing out of the different terms of the State constitutions in other particulars; for though generally alike, they differ in their details. Some confine themselves to the mere organization of the government and the distribution of powers, imposing such limitations as is seen fit, on the legislature; but generally they contain in the shape of a declaration of rights, or bill of rights, the enumeration of certain great political truths essential to the existence of free government. As, for instance, in Maine:* "All men are born equally free and independent, and have certain natural, inherent, and individual rights, among which are those of enjoying and defending life and liberty, acquiring property, and protecting property, and pursuing and obtaining safety and happiness. All power

* Cons. Decl. of Rights, §§ 1 and 2.

is inherent in the people; all free governments are founded on their authority and instituted for their benefit; and they have, therefore, an inherent and indefeasible right to institute government, and to alter, reform, or totally change the same when their safety and happiness require it." So in Illinois, the same principles are announced in the Declaration of Rights, and it is added that "a frequent recurrence to the fundamental principles of civil government, is absolutely necessary to preserve the blessings of liberty."* So in the Pennsylvania Constitution, the 9th Article, in order that the general good and essential principles of liberty and free government may be recognized and unalterably established, declares the rights of the people substantially in the language of the Maine constitution, and goes on to say, § 26, "that in order to guard against transgressions of the high powers which we have delegated, we declare that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate."†

These great truths will thus be found set out in a large majority of the State constitutions. They are of no little value as safeguards against errors and injustice; but I think they must be regarded rather as guides for the political conscience of the legislature, than as texts of judicial duty. Important as they are, still they are expressed in such general terms as necessarily to admit of great and prominent exceptions. All men are born "free and independent;" but we keep Africans in slavery, Indians in subjection, minors in absolute tutelage till twenty-one,

* See in Illinois, the 13th Article of the Constitution; Blackwell on Tax Titles, p. 15.

† Sharpless *vs.* The Mayor of Philad., 21 Penn. 147.

and married women in a state of quasi-dependence all their lives. As to the enjoyment of life and liberty, property, and the pursuit of happiness, all these rights are daily interfered with by the legislature, without scruple, for the common welfare. I suppose it must be admitted that, in a judicial sense, these clauses could not easily be made available. The landmarks of the legislative and judicial authority are rather to be found in the division of power, contained in the constitution, among the three great branches of government, and the specific limitations imposed by the instrument on the law-making branch, than in these general declarations of political truths.

Having thus attempted to consider the true meaning of the term law, and the general language of our State constitutions, we recur to the question: "Shall the judiciary on any ground of general morality and justice, exercise any power over legislative acts, independently of the express restrictions in our constitutions, or necessarily resulting from them?

It will be observed that the principal arguments in favor of the doctrine, that the judiciary may arrest acts of legislation on the ground that they are unjust or immoral, rest on two points: first, that there should be no absolute, despotic, uncontrollable power in a free State; and secondly, that there are certain principles of natural justice which not even the legislature can be permitted to disregard.

I cannot but think both these arguments fallacious. If, by the assertion that absolute power is inadmissible, it is meant to insist that there should be no single supreme authority in which all the functions of government center, and to which all the agents of the government are subordinate, like that of the Roman

empire in its latter stages, the proposition is a mere truism. The bare enumeration of the division of powers under our system, sufficiently answers the complaint. But if it is meant to assert that there should be no absolute power in each department of the government, then it is so far from being true, that, on the contrary, without such power no government could regularly exist an hour; all would be conflict and confusion. It cannot be denied that, practically, despotic power must somewhere exist in every system that assumes to order and regularity. Appeals must terminate, controversies must cease, discussions must end, and the business of life proceed. To effect this, it is indispensable that there be somewhere lodged, in regard to the operations of every department of government, a supreme, inexorable power whose decision is conclusive; and whether the system be that of a monarchy, an oligarchy, a democracy, or that mixed form under which we live, such power will always be found. In the very case before us, what is the result of the reasoning but to claim for the judiciary the very absolutism which is denied to the legislature? If the statute is conclusive, then the legislature is absolute;—granted. But if the judgment of the court is final,—and to be efficacious, it must be so,—then you encounter the same difficulty, at only one remove.

The other argument appears equally erroneous. It is very plausible to say that the legislature ought not to be permitted to do any thing flagrantly unjust, as, to take the property of A and give it to B, to make a man judge in his own case, or to commit any other enormity. But in every case there are disputed questions of fact as well as of principle; and the real point

is whether the legislature shall decide on the nature of the public exigency and the rights of its subjects, or whether the judiciary shall assume that power. It is conceded that the power of the legislature must be confined to "making laws." But the very words of our State constitutions which declare them the law-making power, exclude the judiciary from any share in it; and such share they will undoubtedly have if they are at liberty to refuse to execute a statute, on the ground that it conflicts with their notions of morality or justice. The very vagueness of the power is, moreover, fatal to it. Constitutional provisions may be ambiguous; the doctrine of interpretation is vague; but these branches of the judicial authority are subject to some tests, and can be circumscribed within some limits. But who will undertake to decide what are the principles of eternal justice? And who can pretend to fix any limits to the judicial power, if they have the right to annul the operations of the legislature on the ground that they are repugnant to natural right?

There may be, there always will be, questions not only as to the expediency but the justice of laws. But questions of public policy and State necessity are not meant to be assigned to the domain of the courts; and I cannot but think it unfortunate for the real influence of the judiciary, that this authority has ever been claimed for them. The right of construction, the right of applying constitutional restrictions, are vast powers, which it will always require great sagacity and intelligence to exercise. Let the judiciary rest contented with its acknowledged prerogatives, and not attempt to arrogate an authority so vague and so dangerous as the power to define and declare the doctrines of natural law and of abstract right.

It will be seen on examining the authorities which I now proceed to cite, that the views here urged are those of many of our soundest judges and legal writers: "Strong expressions may be found in the books," says Mr. Justice Cowen, in the Supreme Court of New York, "against legislative interference with vested rights; but it is not conceivable that, after allowing the few restrictions to be found in the federal and State constitutions, any further bounds can be set to legislative power by written prescription."* Kent says,† "Where it is said that a statute is contrary to natural equity or reason, or repugnant or impossible to be performed, the cases are understood to mean that the court is to give them a reasonable construction. They will not readily presume out of respect and duty to the lawgiver, that every unjust or absurd consequence was within the contemplation of the law; but if it should happen to be too palpable to meet with but one construction, there is no doubt in the English law, of the binding efficacy of the statute."‡

In a case where it was contended that an act of the legislature of New Jersey was void as against natural justice, Mr. Justice Baldwin, of the Supreme Court of the United States, used this language:—"We cannot declare a legislative act void because it conflicts with our opinions of policy, expediency, or justice. We are not the guardians of the rights of the people of the State, unless they are secured by some constitutional provision which comes within our judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and

* Butler *vs.* Palmer, 1 Hill, 324.

† 1 Com. p. 408.

‡ See also, 1 Com. p. 488.

patriotism of the representatives of the people. If this fail, the people in their sovereign capacity, can correct the evil; but courts cannot assume their rights." * * "There is no paramount and supreme law which defines the law of nature, or settles those great principles of legislation which are said to control State legislatures in the exercise of the powers conferred on them by the people in the constitution."*

The same conclusion is arrived at in a very able opinion of Mr. Senator Verplanck, in the Court of Errors of New York. He says,—

"It is difficult, upon any general principles, to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written constitution give that authority. There are, indeed, many dicta, and some great authorities, holding that acts contrary to the first principles of right, are void. The principle is unquestionably sound as the governing rule of a legislature, in relation to its own acts, or even those of a preceding legislature. It also affords a safe rule of construction for courts, in the interpretation of laws admitting of any doubtful construction, to presume that the legislature could not have intended an unequal and unjust operation of its statutes. Such a construction ought never to be given to legislative language, if it be susceptible of any other more conformable to justice; but if the words be positive and without ambiguity, I can find no authority for a court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law, settled by the deliberate wisdom of the nation, that I can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of a judiciary, powers too great and too undefined either for its own security or the protection of private rights."

* * * * * * *

"Believing that we are to rely upon these and similar provisions, as the best safeguards of our rights, as well as the safest authorities for

* Bennett *vs.* Boggs, 1 Bald. 74 and 75.

judicial direction, I cannot bring myself to approve of the power of courts to annul any law solemnly passed, either on an assumed ground of its being contrary to natural equity, or from a broad, loose, and vague interpretation of a constitutional provision beyond its natural and obvious sense. There is no provision of the old State constitution that, in my understanding of it, so limits the power of the legislature over the property of its citizens as to enable a court to set aside these statutes, or titles acquired under them, on the ground of unconstitutional enactment."*

In Pennsylvania, on the same principle, it has been held that the courts have no control over the legislative power of taxation, however unequally or oppressively it may be exercised;† and Gibson, C. J., in delivering the judgment of the court, said,—

"In every American State, the people, in the aggregate, constitute the sovereign, with no limitation of its power but its own will, and no trustee of it but its own appointee. But this sovereign, from the nature of its structure, is unable to wield its power with its own hands; whence delegation of it to agents, who constitute the immediate government. But it is a postulate of a State constitution, which distinguishes it from the federal, that all the power of the people is delegated by it, except such parts of it as are specifically reserved; and the whole of it is, without exception, vested in the constitutional dispensers of the people's money. As regards taxation, there is no limitation of it. Equality of contribution is not enjoined in the bill of rights, and probably because it was known to be impracticable." * * "If equality were practicable, in what branch of the government would power to enforce it reside? Not in the judiciary, unless it were competent to set aside a law free from collision with the constitution, because it seemed unjust. It could interpose only by overstepping the limits of its sphere; by arrogating to itself a power beyond its province; by producing intestine discord; and by setting an example which other organs of the government might not be slow to follow. It is its peculiar duty to keep the first lines of the constitution clear, and not to stretch its power in order

* Cochran *vs.* Van Surley, 20 Wend. 381.

† Kirby *vs.* Shaw, 7 Harris, Penn. R. 258.

to correct legislative or executive abuses. Every branch of the government, the judiciary included, does injustice for which there is no remedy, because every thing human is imperfect. The sum of the matter is, that the taxing power must be left to that part of the government which is to exercise it."*

In South Carolina a similar doctrine has been held, in regard to taking private property, though with some division of opinion.† And, when we come to consider the subject of constitutional restrictions on legislative power, in detail, we shall find that the idea of any judicial power over the equity or equality of taxation has been generally denied.‡ So in a late case in Pennsylvania, the whole subject was reviewed, in an able and elaborate opinion, by Mr. Chief Justice Black, of the Supreme Court; and he said;—

"'We are urged to hold that a law, though not prohibited, is void if it violate the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect; and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the constitution; to supply what we might conceive to be its defects; to fill up every *casus omissus;* and to interpolate into it whatever, in our opinion, ought to have been put there by its framers. The constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument; we become ourselves the aggressors, and violate both the letter and the spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar; if we can remove the landmarks which we find established, we can obliterate them; if we can change the constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely. The great powers

* Kirby *vs.* Shaw, 7 Harris (Penn.) R. 258.

† State *vs.* Dawson, 3 Hill R. 100.

‡ People *vs.* Mayor of Brooklyn, 4 Coms. 423; Town of Guilford *vs.* Cornell, 18 Barb. 615.

given to the legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to the true course. In the very best, a great deal must be trusted to the discretion of those who administer it. In ours, the people have given larger powers to the legislature, and relied, for the faithful execution of them, on the wisdom and honesty of that department, and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary."*

In this conflict of opinion we cannot safely pronounce the question settled on authority; but I think, as a matter of reason, that we may safely hold, *First*, That the legislature is to confine itself to its function of "making laws;" and we have considered the general features and characteristics of a law. The imperfection of language does not permit us to define with absolute precision the meaning of the term "*law*," but each case must depend on its peculiar features.

Second, That it is the right and duty of the judiciary to repress and confine the legislative body within the true limits of the law-making power; but that they have no right whatever to set aside, to arrest, or nullify a law passed in relation to a subject within the scope of the legislative authority, on the ground that it conflicts with their notions of natural right, abstract justice, or sound morality.

* Sharpless *vs.* The Mayor, &c., 21 Penn. 147, 162. See this subject also discussed in Braddee *vs.* Brownfield, 2 Watts & Serg. 271; Harvey *vs.* Thomas, 10 Watts, 63; Calder *vs.* Bull, 3 Dallas, 386; Fletcher *vs.* Peck, 6 Cranch, 87; Bloodgood *vs.* Mohawk and Hudson R. R. Co., 18 Wend. 9; Terrett *vs.* Taylor, 9 Cranch, 43; Bowman *vs.* Middleton, 1 Bay, 252; Bonaparte *vs.* Camden and Amboy Railroad Company, 1 Baldw. C. C. R. 205.

In the strict order of the argument that we are pursuing, I should now turn to the judicial power of construction; but, closely connected with the subject which we have just considered, is one which I can in no other place so fitly discuss, that of retroactive or retrospective statutes, the power to pass which has been frequently denied on the ground that they conflict with true notions of justice and right. I shall here examine the question, and then finally arrive at the subject of interpretation.

Retrospective or Retroactive Statutes.—A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, is to be deemed retrospective or retroactive.* The power of a legislature to pass laws having such an effect, has often been denied by philosophical writers. Puffendorf says, "A law can be repealed by the lawgiver; but the rights which have been acquired under it while it was in force, do not thereby cease. It would be an act of absolute injustice, to abolish with a law all the effects which it had produced."† The Civil Law says, "*Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari, nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit.*"‡ From the civil law, Bracton adopted the same maxim. "*Nova constitutio futuris formam debet imponere, non præteritis.*" Lord Bacon says, in his quaint and poetical style, but in a more guarded manner: "*Leges quæ retrospi-*

* Society for Prop. of Gospel *vs.* Wheeler, 2 Gallison, 105.

† Droit de la Nat., L. i. c. 6. § 6.

‡ Cod., L. i. Tit. xiv. § 7.

ciunt raro, magna cum cautione, adhibendæ; neque enim placet Janus in legibus. Cavendum tamen est ne convellantur res judicatæ. Leges declaratorias ne ordinato, nisi in casibus ubi leges cum justitia retrospicere possint."* And one of the standard writers of our law says, it is in general true that no statute is to have a retrospect beyond the time of its commencement.†

From text-writers, the maxim has been incorporated into codes of law. The French code contains a positive provision that laws are made only for future cases, and can have no retrospective effect. "The law directs for the future cases only; it has no retrospective effect."‡ So, the constitution of New Hampshire § declares, "Retrospective laws are highly injurious, oppressive, and unjust. No such laws should, therefore, be made, either for the decision of civil cases or the punishment of offenses."

The principle has, indeed, been generally adhered to with great steadiness, both in England and in this country. So in a case under the statute of frauds, which, as originally passed (29 Car. II. c. 3), enacted that no action should be brought on any parol promise, on and after the 24th June, 1677, an effort was made to extend its operation to a promise made in 1676; but it was held that the statute was not to receive a retroactive effect; the court saying that it would be a great mischief to explain it otherwise, to annul all promises by parol before that time, upon which men had trusted and depended, reckoning them good and

* De Aug. Scient., Lib. viii. c. 3; Aphor. 47, 51.

† Bacon, *Abr. Statute.*

‡ La Loi ne dispose que pour l'avenir, elle n'a point d'effet retroactif.—Code Civil, § 2.

§ Part i. § 23.

valid in law; and judgment was given for the plaintiff.* So again, in an action for a penalty in not paying a stamp duty. After verdict, the defendant moved to stay judgment, urging that he was entitled to relief on the ground that he had paid the duty under a clause of the act which discharged parties who had incurred penalties if they paid their duties before a certain time; and the question being whether the act related to actions commenced before its passage, the King's Bench denied the motion, Lord Mansfield saying, "It can never be the true construction of this act, to take away these vested rights and punish the innocent pursuer with costs."† "All laws," says Blackstone, "should be made to commence *in futuro*, and be notified before their commencement."‡

The effort of the English courts appears, indeed, always to be to give the statutes of that kingdom a prospective effect only, unless the language is so clear and imperative as not to admit of doubt. "The principle," says the English Court of Exchequer, "is one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively."§ This principle may have been lost sight of in some cases,‖ but has, on the whole, been steadily adhered to. So, where a statute (8 and 9 Vic., c. 109, 8 Aug. 1845) en-

* Helmore *vs.* Shuter, 2 Show. 17.

† Couch *q. tam vs.* Jeffries, 4 Burr, 2460.

‡ Com. i. p. 46.

§ Moon *vs.* Durden, 2 Exchequer R. 22.

‖ Towler *vs.* Chatterton, 6 Bing. 258; Freeman *vs.* Moyes, 1 Ad. & El. 338; Pickup *vs.* Wharton, 2 C. & M. 401; Grant *vs.* Kemp, id. 636.

acted that all contracts and agreements by way of gaming or wagering, *shall be null and void*, and that no suit shall be brought or *maintained* in any court upon any wager, it was held that the statute was not to receive a retroactive construction so as to defeat a suit on a wager commenced before the statute passed.*

But it also appears to be clearly settled in England, that the rule to give statutes a prospective operation, is one of construction merely; that it will yield to the intention of the legislature, if clear beyond doubt; and that the only question is, whether the retroactive intention is sufficiently expressed;† and this is in entire harmony with the English doctrine which we have already considered, that Parliament is supreme, and that there is no constitutional check on the supremacy of the law-making power.

In this country, the same opposition to giving statutes a retroactive effect, has been manifested; and such is the general tenor of our decisions. There are, indeed, here, two classes of retroactive laws absolutely forbidden by the federal Constitution. That great charter of our rights and liberties declares (Art. i., Sec. 10) that no State shall pass any *ex post facto* law, or law impairing the obligation of contracts. We shall have occasion hereafter to consider this clause more particularly; but we may here notice that the term *ex post facto* applies only to criminal laws.‡ Many of the State constitutions also contain clauses prohibiting *ex post facto* laws; but this phrase has, I believe,

* Moon *vs.* Durden, 2 Exch. 22; and also, Edmonds *vs.* Lawley, 6 M. & W. 285; and Ashburnham, 2 Atk. 36.

† Moon *vs.* Durden, 2 Exch. 22, per Parke, B.

‡ Calder and wife *vs.* Bull and wife, 3 Dall. 386; Dash *vs.* Van Kleeck, 7 Johnson, p. 477.

been uniformly held to apply only to criminal legislation. And we have already noticed that the obligation of contracts does not include the remedy. With these modifications, however, the power of the federal tribunals has been steadily exercised, and State laws of a criminal nature having a retroactive effect, or laws in any way impairing the obligation of contracts, are held to be void, and their operation arrested by the government of the United States. It is, however, equally well settled, that a law is not unconstitutional under the Constitution merely because it is retrospective in its terms. A conflict arose in the State of Pennsylvania, as to lands held under what were called Connecticut titles; and in 1825, on a case growing out of this question, the Supreme Court of Pennsylvania held that the relations between landlord and tenant could not exist between persons holding under such a title. Immediately after this decision, the legislature of Pennsylvania passed an act by which it was enacted that the relation of landlord and tenant should exist, and be held as fully between Connecticut settlers and Pennsylvania claimants, as between other citizens of the commonwealth; and this act, the Supreme Court, in a subsequent case, held to be retrospective in its effect. A writ of error was taken to the Supreme Court of the United States; but the judgment was affirmed,—the court saying that the act did not impair the obligation of the contract. "It is said to be retrospective. Be it so; but retrospective laws which do not impair the obligation of contracts or partake the character of *ex post facto* laws, are not condemned or forbidden by any part of the Constitution."*

* Satterlee *vs.* Matthewson, 2 Peters, 380.

We have already* considered the retrospective effect of repealing statutes, and the efforts that have been made to limit that operation. It has often, indeed, been said that statutes can never be made to work retrospectively so as to defeat or destroy a vested right; but we have already had occasion to question the correctness of this proposition as a general rule in regard to the operation of statutes. What is a vested right of property? Some vested rights are protected by the Federal Constitution, others by the general limitation of the law-making power to which I have just referred. Other rights again, although created by positive law, are considered entirely under the control of legislation, and, indeed, treated as not being vested at all. The same difficulty of drawing the precise line, and of laying down any definition, exists here that we have already noticed in regard to the term law. The inherent difficulty of the subject can only be mastered by a frequent reference to principles, and a familiar acquaintance with adjudged cases. But we may affirm as a general rule, that—with the exception of those cases outside of the true limits of the law-making power, of those cases growing out of the restrictions of the Federal Constitution; and excepting also where, as in New Hampshire, the States themselves have adopted a positive prohibition—it is in this country considered competent for the State legislatures to pass laws having a retrospective effect; the only judicial check on the power being that the courts refuse to give statutes a retroactive construction unless the intention is so clear and positive as by no possibility to admit of any other construction. But, on the other hand, it is equally true that they are greatly discountenanced, and that the desire

* *Ante*, p. 134.

and effort of the courts is always to give a statute a prospective operation only. The subject was considered at an early day in the State of New York. The Supreme Court of that State, in a case arising on the construction of an act giving prisoners charged in execution certain gaol liberties, held that a return or recaption before suit would be no excuse to the sheriff in an action against him for an escape.* Upon this the legislature passed an act (5th April, 1810, 33 Sess., c. 187) declaring that a return or recaption before suit brought should be a good defence. An action was brought against a sheriff for an escape, in which after issue joined the act in question having been passed, it was insisted that the sheriff was entitled to the benefit of the statute, on the ground that it should be held to operate retrospectively; and it was also strenuously insisted that the act was an explanatory act, and that if it was in any way competent for the legislature to alter the law retrospectively, they had in this case done it. The court was divided; but the majority held that the plaintiff had a vested right of recovery; that the act was not expressly retrospective; that the statute would, if retrospectively construed, operate unjustly, as it would defeat a suit already commenced upon a right already vested, and thus punish an innocent party, with costs, as well as divest him of a right previously acquired under the existing law. Thompson, J., said, "It may in general be truly observed of retrospective laws of every description, that they neither accord with sound legislation nor the fundamental principles of the social compact. How unjust then, the imputation against the legislature, that they intend a law to be of that description, unless the

* Tillman *vs.* Lansing, 4 J. R. 45.

most clear and unequivocal expressions are adopted!" Kent, J., said; "I think it can be shown that the act cannot be adjudged to operate either as a new rule for the government of a past case, or as interpreting a former statute for the direction of the courts; and I should be unwilling to consider any act so intended, unless that intention was made manifest by express words; because it would be a violation of fundamental principles, which is never to be presumed."*

So again, in the same State, more recently, it has been held to be a general rule that a statute affecting rights and liabilities should not be so construed as to act upon those already existing. To give it that effect, the statute should in terms declare an intention so to act.† So again, in another case, the court say, "Notwithstanding the peculiar phraseology of the section relied on by the plaintiffs' counsel, we think it ought not to be so considered as to give it a retroactive effect."‡ So again, in the same State, a statute authorizing a writ of error in behalf of the people, to review a judgment rendered in favor of a defendant, has been held not to authorize such writ to review a judgment rendered prior to the passing of the statute,§ and ‖

* Dash *vs.* Van Kleeck, 7 J. R. 477. Spencer and Yates, were in favor of the retrospective effect. Kent, Thompson, and Van Ness united in the judgment. See this case cited in Wood *vs.* Oakley, 11 Paige, 400.

† Johnson *vs.* Burrell, 2 Hill, 238. In this case it was held that the provision of the revised statutes which declares that all actions upon judgments rendered in any court not being a court of record, shall be commenced within six years next after the cause of action occurred, does not apply to justices' judgments rendered before 1830.

‡ Bailey *vs.* the Mayor, &c., 7 Hill, 146; and it was held that the third section of the act passed May 7th, 1844, authorizing interest to be taxed upon verdicts, &c. (Sess. Laws of 1844, p. 508), does not apply to verdicts rendered before the act was passed, but is to be construed prospectively.

§ The People *vs.* Carnal, 2 Selden, 463.

‖ Lawrence *vs.* Miller, 2 Coms. 245, 251.

Mr. Justice Shankland, in another recent case, well calls the maxim which I have above cited from Bracton, "the primary rule for the interpretation of statutes."

So too, in Mississippi, it has been said that "as a general rule for the interpretation of statutes, it may be laid down that they never should be allowed a retrospective operation where this is not required by express command, or by necessary and unavoidable implication. Without such command or implication, they speak and operate upon the future only; especially should this rule of interpretation prevail when the effect and operation of a law are designed apart from the intrinsic merits of the rights of parties to restrict the operation of those rights." And the court decided that the act of that State, passed in 1846, limiting the effect of foreign judgments against citizens of Mississippi, to three years from the rendition thereof, could have no effect on judgments obtained before the passage of the act; or in other words, that it was not to be construed retroactively, and that a judgment recovered in Louisiana in 1844, was not to be affected by it.*

So in Pennsylvania, a statute allowing a writ of error in cases where none lay before the passage of the act, has been held not to apply to a judgment obtained before the act was passed. "My respect for the legislature," said Rogers, J., in delivering the opinion of the court, "is too great to allow me for a single instant to suppose that they designed so great a wrong as by a retrospective act, to make that right which was clearly wrong. But granting that intention to be clearly expressed, I have no hesitation in saying that the act is unconstitu-

* Boyd *vs.* Barrenger, 23 Miss. R. 270; Garrett *vs.* Beaumont, 24 Miss. R 377; Murray *vs.* Gibson, 15 Howard, U. S. R. 421.

tional and void. The legislature has no power, as has been repeatedly held, to interfere with vested rights. To give the property of A to B, is clearly beyond legislative authority."*

In Maine, by the constitution of which State the right is secured to every citizen, of possessing, acquiring, and enjoying property, it has been decided that a statute of limitation fixing the time within which actions are to be brought for the recovery of lands, can have no retroactive effect on titles existing when it was passed; and the same principle was applied to a disseizin act relating to the mode of adverse possession.†

So in Vermont, it has been held that statutes of limitation are not to have a retrospective operation.‡

In 1850, the legislature of Connecticut passed an act declaring that "all real estate conveyed to a married woman during coverture, in consideration of money or other property acquired by her personal services during such coverture, should be held by her to her sole and separate use;" and it has been held that the statute was not to have a retrospective effect. "The presumption is," said the court, "that all statutes are to operate prospectively, and were not made to impair vested rights. In some cases, statutes may have a retrospective effect; yet, such a construction is never to be given to them unless required in the most explicit terms."§

We have already noticed the clause in the constitution of New Hampshire, prohibiting retrospective legis-

* McCabe *vs.* Emerson, 6 Har. Penn. R. 111.

† Proprietors of Kennebec Purchase *vs.* Laboree *et als.*, 2 Greenleaf Rep. 275; Oriental Bank *vs.* Freese, 18 Maine Rep. 109; Austin *vs.* Stevens, 24 Maine R. 520; Preston *vs.* Drew, 5 Law Reporter, N. S. 189; Webster *vs.* Cooper, 14 Howard, U. S. R. 488.

‡ Wires & Peck *vs.* Farr, 25 Vermont, p. 41.

§ Plumb *vs.* Sawyer, 21 Conn. 351.

lation; and it seems to have been faithfully carried out. So an act of the legislature repealing a statute of limitations, is void with respect to all actions pending at the time of the repeal, and which are barred by the statute.* So, in the same State, where a statute gives a penalty incurred under it to an individual (as certain militia fines to an officer of a company), the right to a penalty incurred under the statute in a civil cause, is within the meaning of the clause in the bill of rights which prohibits the passing of retrospective laws for the decision of civil causes; and the right of such individual can not be taken away by a repeal of the statute under which the penalty was incurred.†

We have thus far considered cases where laws have been denied a retroactive effect. We have now to examine the converse class of decisions. There is, indeed, a large number of cases in which appeals are made for legislative relief or assistance, in which it would be very injurious to assert the doctrine that the legislature is incompetent to pass laws having a retroactive effect. Such are laws declaring valid acts of official persons irregularly elected; amending charters of incorporated companies; correcting assessment rolls irregularly made; extending the time for collection of taxes or for reports required by law; altering and amending judicial procedure. In these, and many other cases, it is difficult to avoid giving the acts of the legislature a retroactive effect; and every such effect must or may influence injuriously some individual case. But the interests of the community are paramount. These cases are not treated as touching vested rights, and the power of the legislature is admitted. We proceed now

* Woart *vs.* Winnick, 3 New Hampshire, 473.

† Dow *vs.* Norris, 4 N. H. 16.

to examine cases of this kind where statutes have been construed retrospectively.

It has been said in Massachusetts, that the legislature may constitutionally enact laws to alter the limits of prison yards; to render valid and legal the doings of public officers; to confirm the acts of towns and other corporations, invalid for some informality, although by such enactments individuals may be deprived of rights previously vested.* So in the Supreme Court of the United States, it has been said, that "every law that takes away or impairs rights vested agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule, that a law should have no retrospect. But there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent their commencement."†

In New York, it has been held, that when the rule of compensation for attorneys and counselors is changed by the legislature, during the progress of a suit, the costs of such suit are to be taxed according to the statute in force at its termination. "It is competent," said Mr. Justice Jewett, "for the legislature, at any time during the progress of a suit, to create an allowance for services not before provided for, and to increase or diminish, or wholly abolish, such allowances as existed at the time the suit was commenced;" and on the ground that the right to costs is created by and depends wholly on statute, and that it does not become fixed till the

* Davison *vs.* Johonnot *et al.*, 7 Met. 389, citing Walter *vs.* Bacon, 8 Mass. 468; Patterson *vs.* Philbrook, 9 Mass. 151, and Locke *vs.* Dane, 9 Mass. 360. These last are all cases on statutes changing the prison limits; and the court decided that they were not *ex post facto* laws, nor laws impairing the obligation of contracts.

† Per Chase, J., Calder *vs.* Bull, 3 Dall. 386, 391.

termination of the suit, the statute in force at the end of the litigation was held to be conclusive.* So in the same State, the act of 22d October, 1779, transferring the seignory and escheat from the crown of Great Britain to the people of the State; and the statute of tenures (1787) abolishing military tenures, and converting all manorial and other tenures into free and common soccage, took effect retrospectively, and operated on all lands and tenures held under colonial grants, from July, 1776.† So when a statute of the same State, altering the common law, declared that a failure or want of consideration might be set up by way of defence to a sealed instrument, it was held that as far as the statute went only to the *remedy*, it might be applied to sealed instruments executed before the law passed; but that as regarded the *obligation* of the contract, it should not be permitted to have a retroactive effect.‡ So in the same State, it has been held that retrospective statutes are valid, which give remedies where none existed before for defects that would have been fatal had the legislature not interfered, and given a perfect remedy by curing intervening irregularities. Thus in an action by a bank, incorporated under the general banking law of New York, it appeared that the certificate of incorporation was defectively proved and acknowledged; that the defect was not remedied until several years afterwards (1852), by an act declaring that the bank should be deemed to be a valid corporation, and to have been duly organized, notwithstanding the original error in the certificate; and that the note in suit was

* Supervisors of Onondaga *vs.* Briggs, 3 Denio, 173; see also, People *vs.* Herkimer C. P. 4 Wend. 210.

† De Peyster *vs.* Michael, 2 Seld. 467, 503.

‡ Mann *vs.* Eckford's Ex'ors, 15 Wend. 519; Wilson *vs.* Baptist Education Society of New York, 10 Barb. S. C. R. 308.

made before the passage of the act. It was held, however, that these facts constituted no defence to the suit; that the defendant had no vested right to be absolved from paying the money which he owed; that a remedy was only wanting, and that the statute of 1852 belonged to that class of retrospective acts which the legislature had a perfect right to pass.*

So in Pennsylvania,† a judgment entered on the *first* instead of the *third* day of January, and void for that reason, was held to be cured by an act of February, 1822. So again,‡ it was there decided that an omission in the certificate of acknowledgment of a married woman to a deed conveying her estate in lands, was remedied by an act passed for that purpose after the death of the wife, and after the lands had descended, and after the court had decided that the acknowledgment was inoperative to pass the lands. In the face of all these facts, the Supreme Court of Pennsylvania held, that the act in question, being remedial in its nature, cured the defective acknowledgment, so that the lands passed and the grantees took the title under it; although without the act no title would have passed by the deed to the grantee.§ The Supreme Court of that State laid down the doctrine, that it is competent for the legislature to pass acts retrospective in their character, notwithstanding their operation may be to affect pending suits, and to give to a party rights he did not before possess; or to modify an existing remedy; or to remove an existing impediment in the way of a recovery by legal proceedings, provided they do not violate any constitutional prohibitions. In Ohio, retrospective laws which violated no principle of natu-

* Syracuse City Bank *vs.* Davis, 16 Barb. S. C. R. 188.

† Underwood *vs.* Lilly, 10 Serg. & Rawle, 97, 101.

‡ Tate *vs.* Stooltzfoos, 16 Serg. & Rawle, 35.

§ Hepburn *vs.* Curts, 7 Watts, 300.

ral justice, were not forbidden by the constitution of that State of 1802.*

The result of this branch of our inquiry is, then, that the legislature is competent to give a statute a retroactive or retrospective effect, unless, first, the act violate the provision of the Federal Constitution in regard to *ex post facto* laws and the obligation of contracts—or, second, unless it so interfere with vested rights of property as not to come within the proper limits of the law-making power—or, third, unless it comes within the purview of some express prohibition contained in a State constitution; that, independently of these exceptions, retrospective statutes are within the scope of the legislative authority; and that the courts are bound to enforce them; but that such laws, as a general rule, are objectionable in principle and unjust in practice; and that the judiciary will give all laws a prospective operation only, unless their language is so clear as not to be susceptible of any other construction. In closing this branch of our subject, we cannot fail to remark that, in practice, the true principle of legislation is frequently lost sight of in regard to the enactment of statutes having a retroactive effect. Laws are constantly passed, either in the shape of repealing or innovating acts, which disturb plans or destroy rights entered into upon the faith of, or created by, previous legislation. Nothing short of some great, paramount emergency of public policy, can justify laws of this kind; and it will be well for all engaged in the business of government, to understand and remember that the steady and uniform rule should be to make statutes operate prospectively only. No exception should be tolerated, but on the ground of a controlling public necessity.

* Trustees of C. F. R. E. A. *vs.* M'Caughy *et al.*, 22 Ohio, 152; 2 Ohio State Rep., 152.

Having thus attempted to define the nature of the law-making power, to declare the true characteristics of a law, to show when it must be a rule of universal application, and how far prospective only,—we now proceed to consider the nature of the judicial power, and to examine those checks upon the legislative authority, which, as has been said, are placed in the hands of the judiciary. Of these, the first is the right of construction assumed in regard to all statutes of which the language is ambiguous.

The right and duty of the judiciary to expound and to interpret doubtful provisions of legislative enactments, is now one of the axioms of our law. But we are not to suppose that this has always been familiar doctrine. On the contrary, like all the other guarantees of liberty, it is the result of long ages of struggle and conflict, of disorder and confusion. The maxim of the Roman law, *Ejus est interpretari legem cujus est condere*, gave to the imperial despot the same control over the construction that he had over the enactment of laws; and the arbitrary manner in which that power was exercised, is well known. "The rescripts of the emperor, his grants and decrees, his edicts and pragmatic sanctions, were subscribed in purple ink, and transmitted to the provinces as general or special laws, which the magistrates were bound to execute, and the people to obey."* Of these, the rescripts were replies to consultations of the judges, and operated in fact like decrees on appeal in litigated cases.

When the lights of English jurisprudence first dawned, we have seen that the imperial power of construing and applying its own laws, was claimed by Parliament; and that litigated cases upon which the judges

* Gibbon, ch. xliv.

doubted, were referred to it for decision.* But the exercise of judicial functions by a popular representative body in modern times, is practically out of the question, nor could it long be submitted to by men so intelligent, and so attached to the rights and privileges of their order, as the judges of England have in all ages shown themselves. Parliament abandoned its control over litigated cases, and the power of construction fell to the judiciary. We have no means of tracing the manner in which the transfer of authority was effected; but at a very early day we find it asserted in even more than its present plenitude. "If you ask me, then," says old Hobart, "by what rule the judges guided themselves in this diverse exposition of the self-same word and sentence, I answer, it was by that liberty and authority that judges have over laws, especially over statute laws, according to reason and best convenience to mould them to the truest and best use."† And Bacon, in his Abridgment, adopting this language, says, "The power of construing a statute, is in the judges, who have authority over all laws, and more especially over statutes, to mold them according to reason and convenience to the best and truest use."

Nor did the judiciary use their new powers sparingly. Taking advantage of the paucity and ambiguity of the statutes, of the inattention of the legislature to the business of jurisprudence and juridical science, and making as their excuse, the existence of daily and admitted abuses, they soon came to exercise powers little short of those of the Parliament itself. "In a great variety of cases," says Mr. Dwarris,‡ "the inva-

* See *ante*, page 23.

† Sheffeild *vs.* Ratcliffe, Hobart, 346.

‡ Dwarris on Stat. p. 708, 792.

sion, by the judges, of the province of the legislature has been quite unjustifiable. When rules of law have been found to work injustice, they have been evaded instead of being repealed. Obsolete or unsuitable laws, instead of being removed from the statute book, have been made to bend to modern usages and feelings. Instead of the legislature framing new provisions as occasion has required, it has been left to able judges to invade its province and to arrogate to themselves the lofty privilege of correcting abuses and introducing improvements. * * Upon a careful investigation of the course actually pursued, it will be found that in general, inconvenient laws were set aside, and required changes were effected, by the use of technical fictions and contrivances to evade inconsistent rules; and if there has been a lamentable want of politic institutions, there has been thought to have been also at times, some defect of judicial principles." And he adds, "It certainly is a remarkable fact that the jurisdiction or method of proceeding in all our superior courts, will be discovered on inquiry to be founded on usurpation, and sustained by fiction." This is a very severe judgment upon the order and philosophy of the English system, and there can be no doubt that there is great foundation for it.*

It would be easy to cite from the reports, instances of interpretation which amount to nothing short of legislation, where, in cases entirely free from doubt, the judges have made rules as the emergency seemed to them to require. Nor was their power exercised without strenuous resistance. The judiciary a century and a half ago, under the English system, was a very

* See First Report of English Real Property Commissioners, for an energetic condemnation of legal fictions.

different institution from that which we have since learned to regard it. Now with the magistracy, we inseparably connect the ideas of integrity, learning, and philosophy. The great names of Eldon, Mansfield, Marshall, Kent, and Story, arise at once before us when we speak of tribunals of justice. But far different was it at the era of the English Revolution. In the minds of the thinking men of that period, the judges were the arbitrary and servile tools of the crown. With them the judiciary was represented by the corruption of Bacon, the servility of Herbert, and the cruelty of Jeffries; the atrocities of the bloody assizes, the lawless despotism of the ship-money judgment, and the scandalous illegality of the dispensing power. It is not to be wondered at that the judicial doctrine of construction was distrusted by the opponents of the abuses of monarchical authority.*

* Clarendon, no lukewarm friend of the crown, says, speaking of the ship-money case, "And here the damage and mischief cannot be expressed that the crown and state sustained by the deserved reproach and infamy that attended the judges by being made use of in this and like acts of power; there being no possibility to preserve the dignity, reverence, and estimation of the laws themselves but by the integrity and innocency of the judges;" and he proceeds to charge the violence of the ensuing Parliament "to the irreverence and scorn the judges were justly in."—*Hist. of Rebellion*, Oxford ed. 1704, vol. i. p. 55.

"Away, then," says a staunch whig writer, about the year 1700, "with that apparently sophistical argument which in late times made so great a noise and bustle in the world, namely, that the King, the Lords' House, and the Commons' House concurring, had not an unlimited power to make laws, it being in the breast of the judges of the realm to determine which acts of Parliament were binding and which void, and to expound the meaning of every act of Parliament. And that, by referring this unto the judges of the realm, the people were better secured from an arbitrary power than by attributing it to the Parliament. A notion which hath been artificially spread abroad, and industriously improved; a notion which is equally pernicious and injurious to all kings and parliaments, whose inherent right it ever was, by joint consent to alter, amend, explain, and interpret their own statutes as they saw cause, and according to public convenience. But how could any thing of all that

So far as the character of the judiciary was concerned, the evils attributed to the doctrine of judicial constructions were corrected by the act whch made

be done, if the judges had ever been invested with such a power inseparably united and annexed to their persons, *quatenus* judges, to invalidate, disannul, and declare but one act of Parliament to be void; since, by the same authority, they might have declared another to be so too, and by like logic, all, without ever adjourning any case *ad proximum Parliamentum propter difficultatem*. And thus we see *uno absurdo dato, infinita sequuntur*."—"*Jus Parliamentarium*, or the Ancient Power, Jurisdiction, Rights, and Liberties of the Most High Court of Parliament, Revised and Asserted by William Petyt." This work was published after the author's death, in 1739. Petyt was a barrister of the Inner Temple, and Keeper of the Records in the Tower. He appears to have died shortly after the accession of William III. The whole of Chapter v. of this work, from which the above is taken, is an elaborate argument against judicial construction. The heading runs thus, "Where former statutes have seemed dark and dubious, and by the subtle and nice wits of learned lawyers, were made liable to several different constructions, the Parliament, as being the highest court and seat of justice, and who best knew their own sense and meaning, wisely provided additional explanatory acts to direct and guide the judges of Westminster Hall, how they ought to expound such statutes, and did not leave them to follow their own arbitrary discretions of interpreting those laws contrary to the true design and intent of the makers thereof." His seventh chapter, entitled, "Of the Original of *Non Obstantes*, and how they came into the Courts of Justice," is an elaborate examination and vehement denial of the dispensing power.

The subject of *Non Obstantes*, as they were at the time of the English Revolution familiarly called, or that of the right then claimed for the king, by virtue of his royal prerogative, to dispense with the provisions of a statute in favor of some particular person, is so interesting that I compress into this note a brief abstract of the case of Godden *vs.* Hales, from Howell's *State Trials*, ed. of 1811, vol. xi., p. 1165. The stat. 25 Charles II., "for preventing dangers which may happen from Popish Recusants, and quieting the minds of his Majesty's good subjects," passed during the religious excitement which prevailed in that monarch's reign, declared that every person appointed to office, civil or military, under the king, should, within three months after acceptance, receive the sacrament according to the usages of the Church of England, and publicly take the oaths of supremacy and allegiance, under a penalty of £500, for executing the duties of the office after the three months expired without the oaths and sacrament being taken. In the year 1686 (2d Jas. II.) Godden, or Godwin, an informer, sued Sir Edward Hales in the King's Bench, in an action of debt of £500, alleging that the defendant, in 1673, was admitted to the office of colonel of a

the tenure of their office dependent on their good conduct alone, and emancipated them from all subordina-

foot regiment, and held it for three months without taking the sacrament or oaths in question, and that he had been indicted for and convicted of the offense. The defendant pleaded that within the three months in the declaration mentioned, the king, by letters patent, did dispense with, pardon, remit, and discharge the defendant from taking the said oaths, &c., and from all crimes, &c., any clause in the said act, or in any other act notwithstanding, and *non obstante* that the defendant was or should be a recusant convict;—demurrer and joinder. On this case the twelve judges were consulted: eleven declared in favor of the demurrer; and judgment was given, *quod querens nil capiat per billam.* The eleven judges have been ever since severely condemned, and the twelfth has not fared much better (see Macaulay's *Hist. of England*, vol. ii., chap. vi.) The dispensing power has been a sort of standing symbol or equivalent for every thing arbitrary and tyrannical; and by the Bill of Rights, 1 W. & M. ses. ii. c. ii. § 12, it was declared that from the then session of Parliament, no dispensation with any statute should be valid unless such statute declared it, &c., and except in such cases as should be specially provided for.

But, perhaps an accurate examination of the subject will lead to a somewhat more charitable judgment, as far at least as the judges are concerned. Mr. Macaulay's account is not very full. As reported in the State Trials, the arguments of the case by the counsel, and the judgment of the court, are feeble enough; but the treatises published on both sides of the question at the time, by Sir Robert Atkins, and the Chief Justice, Sir Edward Herbert, enable us to form a pretty accurate opinion of the subject. These pamphlets are republished in Howell's *State Trials*, at the end of the case.

That the king had a certain dispensing power in regard to the penal legislation of Parliament, was generally admitted. This prerogative is defined and defended by Coke, in the case of the Monopolies: *Dispensatio mali prohibiti est de jure, Domino Regi commissa, propter impossibilitatem providendi de omnibus particularibus, et dispensatio est mali prohibiti provida relaxatio, utilitate seu necessitate.* It was considered as a sort of anticipatory and more extensive pardoning power. Hobart, Plowden, Vaughan, had all treated the existence of the prerogative to some extent as unquestionable, and it had been repeatedly recognized by the courts. On the other side, the right of dispensation in general was, it is true, denied; but the main question raised in the reign of James II., was, admitting its existence, whether the right covered the particular case. It was agreed by the crown lawyers that the dispensation must be confined to the case of an individual, and could not be general; but that presented no difficulty in this instance, the patent being to Hales alone. It was admitted also, that the dispensation could only be of *mala prohibita*, and not of *mala per se;*

tion to the crown. The influence of this alteration was almost immediately perceptible; the same magistrates who, holding their offices *de bene placito* would have been sycophants and time servers, became so soon as they occupied their seats *quamdiu se bene gesserint*, bold and honest public servants.*

and it was strenuously discussed whether the prohibited act in this case belonged to the one or the other class. It was admitted that the dispensing power could not apply to those laws which concern property, but it was insisted that it did cover those relating to the policy of government.

It is curious to observe, that so far as the act of 25 Charles II. imposed a religious test, it would now be almost universally regarded even in England, as unwise and unjust; and that thus a great principle of liberty was established by maintaining and defending in its full violence, a fanatical and arbitrary statute. But the law was the will of the nation, *the non obstante* patent was the act of the king. And there is the true interest and the real merit of the question.

A century before, no lawyer would probably have disputed the dispensing power in its fullest extent. The Parliament that passed the act of 31 Henry VIII., giving the king power to make laws by mere proclamation, would have hardly ventured to quarrel with a *non obstante;* but, in the next century the power of the sovereign had dwindled, the dimensions of the nation had expanded, and that flexible thing called the English Constitution, adapted itself to the new state of things. Looking at the question, however, as it presented itself in the reign of James II., either to the strict technical lawyer of that age, or to men with any tendency to the principle of toleration, the judgment affirming the prerogative does not seem so great an enormity as it is now generally regarded.

* By the 12 and 13 William III. (1700), c. 3, § 3, it was provided that after the said limitation (i. e., of the crown to the House of Hanover) "shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established, but upon the address of both Houses of Parliament, it may be lawful to remove them." And by Geo. III. c. 23, the judges were continued in office during good behavior, notwithstanding the demise of the crown.

Still, the traces of the old distrust of the judiciary are apparent in England, down to a very recent period. Notwithstanding the alteration of their tenure, the judges were still the organs of a system of vicious privilege and of a sanguinary penal code; and it is little more than half a century since Parr called them "the furred homicides" of Westminster Hall. It is not, I think, much more than a generation since this hostility has entirely

The character of the bench being changed, the mischievous abuses of the judicial power gradually tended

disappeared, and since the reputation of the English judiciary for moderation and humanity, has been as generally admitted as it has always been for learning and ability.

It is curious to observe that the same abuse of judicial authority took place in France also; and there the judges carried their power of construction to such lengths that it became necessary to arrest it by positive law. The power of the judiciary to construe the statute law and the authority of judicial decisions or acts generally, has been the subject of great controversy in France; Dupin says, no point more so. (*Jurisprudence des Arrêts*, p. 19.) Under the old monarchy, the judges united certain legislative with their judicial functions; they pronounced their decisions in litigated cases, or *Arrêts*, as they were called, because they arrested (*arrêtaient*) all further controversies, and terminated the cause (Dupin's *Jur. des Arrêts*, p. 1); and they also made *arrêts d'enregistrement*, and *arrêts de reglement*. The former applied to royal edicts, declarations, letters patent, &c., and furnished a practical check on the despotic power of the sovereign, more or less efficacious, as the case might be. *Tel édit enregistré à Paris ne l'aura point été ou à Toulouse ou à Rouen, et n'y fera point loi par consequent; ou bien il n'aura été enregistré qu'avec des modifications qui restreignent ses dispositions.*—Camus, *Etudes d'un Avocat*, 4*me Lettre*, p. 82. The latter, *arrêts de reglement*, decided questions of customary law (*droit coutumier*), police, professional discipline, practice; and had the force of law until the sovereign interfered by an edict or royal ordinance. (Dupin's *Jur. des Arrêts*, p. 48.)

In regard to the *arrêts* or decisions in litigated cases, the judges gradually fell into the mischievous practice of giving their judgments without stating any reasons whatever. (*Jur. des Arrêts*, p. 62.) This, of itself, would naturally tend greatly to diminish, if not entirely destroy, the weight and value of their decisions, and it finally came to be insisted by jurists of high authority, that they should not be cited at all. Camus goes so far as to say, "*On ne devrait jamais citer que des arrêts de reglement; en alleguer d'autres simplement comme des exemples et des prejugés, c'est un abus que les gens sensés devraient bannir, parcequ'un exemple ne saurait être concluant qu'autant que les circonstances sont entierement semblables; or, en supposant la possibilite de cette similitude parfaite, il reste à l'établir, ce qui est ordinairement une chose impossible. Mais ce mauvais usage d'invoquer les arrêts subsistera long temps.*"—Camus' *Etudes d'un Avocat*, p. 101.

The disfavor with which the proceedings of the judges were regarded, was greatly increased by their abuse of the power of making *arrêts de reglement*. Exercising what was truly a legislative function, when a law of the kind we have above enumerated came before them and they found either a

to correct themselves. As the statutes became more plain and explicit, as the legislature ceased to be the

doubt, or a *casus omissus*, or what they considered an error in the law, they removed the difficulty or supplied the omission by an *arrêt de reglement*, which applied to all future cases, and operated like a statutory enactment. This practice, as can easily be imagined, led to great abuses; and an attempt was made to check it by declaring that the business of the judges was simply to obey the law, and a general prohibition was made of judicial interpretation. This prohibition made, originally, so far back as 1667, was renewed by the Constituent Assembly in 1790. (Portalis' *Discours Preliminaire*, Code Civil, Art. 4.) The judges, to take their revenge for this interference, adopted a new line of practice; and whenever the law appeared doubtful or obscure, they refused to decide the cause, and referred the whole matter to the legislature. (*Ib.*) This, however, was speedily condemned as an abuse, by the Court of Cassation; and the Code Civil contains a provision which at first sight looks very odd to the English jurist, declaring that the judge cannot, without rendering himself liable as guilty *de deni de justice*, refuse to decide the cause on the ground of the silence, the obscurity, or the defectiveness of the law; while at the same time it is declared that the judge may construe the statute in the particular case, but cannot make any general regulations. The provisions are very curious. *Le juge qui refusera de juger sous pretexte du silence, de l'obscurité, ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de deni de justice.* (§ 4) *Il est defendu aux juges de prononcer par voie de disposition generale et reglementaire sur les causes qui leur sont soumises.* (§ 5.)

The abuse first above referred to was corrected by a law passed by the Constitutional Assembly in 1790, requiring the judges in deciding causes, in all cases to state the questions of fact and law involved, and the reasons of the judgment they pronounced. (*Jur des Arrêts*, p. 68.) Since this period, the value of the French decisions has generally increased; but the whole subject of the judicial power in France is, or has been till a comparatively recent period, in great uncertainty. Portalis, in his admirable *Discours Preliminaire* to the Code Napoleon (1802) devotes several pages to prove the propriety of judicial construction of legislative acts as opposed to a reference of each litigated case turning on a doubtful point of statute law to the legislature; and in 1822, M. Dupin published his *Jurisprudence des Arrêts*, for the purpose of defining the precise amount of authority rightfully due to judicial decisions. In the course of it, the learned author repeats the arguments of Portalis as to the propriety and necessity of judicial construction (*Jur. des Arrêts*, pp. 10 and 12), and gives minute and copious rules for the choice and mode of citing the arrets of the French courts. It is a curious and interesting, but to the English or American jurist, appears a very rudimentary treatise. The eleventh chapter of the treatise of Mr.

mere arena of political controversy, and devoted itself to framing general rules for the conduct of affairs, the judges themselves set limits to the powers they had arrogated; and abandoning all pretensions of a right to exercise any control over legislation, to correct its errors or supply its deficiencies, they confined their power of construction to admitted cases of doubt. Such is now the settled doctrine both in England and in this country. "The language of the statute is plain and unambiguous, and when such is the case, the will of the legislature must be obeyed."* "It is the office of the courts to administer the law as the legislature has declared it, not to alter the law by means of construction in order to remedy an evil or inconveniences resulting from a fair interpretation of the law."† "It is scarcely necessary, we trust," says Mr. Chief Justice Redfield, in the Supreme Court of Vermont, "at this late day, to say, that the judicial tribunals of the State have no concern with the policy of legislation. That is a matter resting altogether within the discretion of another co-ordinate branch of the government. The judicial power cannot legitimately question the policy, or refuse to sanction the provisions, of any law not inconsistent with the fundamental law of the State. And they would never

Dwarris, is devoted to the subject of the boundaries of legislation and of judicial interpretation; in it he makes copious extracts from the *Discours Preliminaire* of Portalis, and among other things, remarks, "that even among our enlightened neighbors, and at a very recent period, the boundaries of legislation and of judicial interpretation were so vaguely defined and so imperfectly understood, that the judges were constantly either mistaking the principles or erring in their application of them."—Dwarris, p. 697, 783.

* Ellis *vs.* Paige *et al.*, 1 Pick. 43.

† Per Paige, J., in the Court of Appeals; James *vs.* Patten, 2 Selden, p. 9.

attempt to do this even, except upon obvious or satisfactory grounds."*

Thus have the lines of demarkation, as they now exist, been established between these two great branches of government. The legislature gradually ceases to interfere with private rights, and tends more to confine itself to the establishment of uniform, general, and prospective rules. The judges resign and disclaim the power of correcting the errors or supplying the deficiencies of the legislature, and confine themselves strictly to the duty of construction and interpretation in doubtful cases. This power is now fully conceded to them both here and in England. The rules controlling the exercise of this power, we shall shortly examine; but before doing so, we have to consider our second head, *i. e., the limits of the judicial power as used to apply and enforce constitutional provisions.*

This branch of judicial authority deserves particular attention. It is entirely the growth of American jurisprudence; it confers vast powers on the judicial body; and it is one of the surest preservatives of our liberties. In England there exist certain principles of what is there termed constitutional government, to be found in, or deduced from *Magna Carta* of King John, the statute called *Confirmatio Chartarum*, and various

* *In re* Powers, 25 Vermont, p. 265. "If the provision that the legislative and judicial powers shall be preserved separate and distinct, be not found in our own constitution in terms, it exists there in substance, in the organization and distribution of the powers of the departments, and in the declaration that the 'supreme legislative power' shall be vested in the Senate and Assembly. No maxim has been more universally received and cherished as a vital principle of freedom. And without having recourse to the authority of elementary writers, or to the popular conventions of Europe, we have a most commanding authority in the sense of the American people, that the right to interpret laws does, and ought to belong exclusively to the courts of justice."—Dash *vs.* Van Kleeck, per Kent, J., 7 J. R. p. 477, 508–9.

other corroborating statutes passed between the reign of Edward I. and Henry IV.; the petition of right in the time of Charles I., the bill of rights framed at the revolution of 1688, and the act of settlement adopted to fix the succession in the house of Brunswick. From these are derived not only the principal guaranties of public liberty in England, but they are also said to declare and protect those rights of personal security, liberty, and private property, which, taken together, form what is called the English Constitution.*

* See Blackstone's first chapter, on the rights of individuals.

Mr. Creasy, in his valuable work on the English Constitution, says:—"The great primeval and enduring principles of our constitution are as follows:

"The government of the country by an hereditary sovereign, ruling with limited powers, and bound to summon and consult a parliament of the whole realm, comprising hereditary peers and elective representatives of the commons.

"That without the sanction of parliament no tax of any kind can be imposed, and no law can be made, repealed, or altered.

"That no man be arbitrarily fined or imprisoned, that no man's property or liberties be impaired, and that no man be in any way punished, except after a lawful trial.

"Trial by jury.

"That justice shall not be sold or delayed.

"These great constitutional principles can all be proved, either by express terms or by fair implication, from Magna Carta, and its above-mentioned supplement.

"Their vigorous development was aided and attested in many subsequent statutes, especially in the Petition of Right and the Bill of Rights; in each of which the English nation, at a solemn crisis, solemnly declared its rights, and solemnly acknowledged its obligations:—two enactments which deserve to be cited, not as ordinary laws, but as constitutional compacts, and to be classed as such with the Great Charter, of which they are the confirmers and exponents.

"Lord Chatham called these three 'The Bible of the English Constitution,' to which appeal is to be made on every grave political question. The great statesman's advice is still sound. It deserves to be considered by subjects as well as by princes,—by popular leaders without the walls of parliament, as well as by ministers within them."—*Rise and Progress of the English Constitution*, by E. S. Creasy (1856, p. 3).

But these rights all rest either on regal concession or legislative enactment; and, in England, it has never been alleged that there exist any precise written provisions which in any way limit the absolute and supreme power of parliament. It is not difficult to understand why this should be so. The great efforts of the lovers of law and liberty in England, have been to set bounds to the royal prerogative, and to put limits to the authority of the crown. The power opposed to the crown has been the parliament. It has consequently been the interest and duty of all opposed to the arbitrary powers of the sovereign, to seek to amplify the authority of the legislature. If ever parliament shall become the only powerful body in the state, there will be felt the want and there will arise the necessity in England, as with us, of express written constitutional restrictions.

The necessity of checks upon power was perfectly understood by the sagacious men who formed the government of this country; and foreseeing that—in the absence of a church establishment, hereditary classes and standing armies—popular majorities and the popular bodies representing those majorities, would, in this country, unless checked, obtain an absolute and despotic control over the whole business of government, they from the outset imposed upon our legislative bodies, in the shape of constitutions, certain restraints which were devised and intended to protect individuals and minorities from the arbitrary exercise of the power of majorities. Hence it is that in this country the subject of constitutional law has assumed such importance. The Federal Constitution and those of the different States, all declare certain principles and establish certain restrictions for the very purpose

of limiting legislative power. *No State shall pass any law impairing the obligation of contracts. Private property shall not be taken for public use without just compensation.* These are specimens of the peremptory language by which the people have sought to keep their agents in constant control.

The power of applying these checks, is in the hands of the judiciary; and there is nothing more curious in our history, than the fact that without any provision either of constitution or of law giving this power to the courts of justice, they have since the earliest days of our republic, steadily and vigorously applied it.* They decide in any and every case, what the true construction of a doubtful constitutional provision is, and whether any legislative act brought before them does or does not violate it; and their decision that a given law is "unconstitutional," at once destroys its vitality and puts an end to all proceedings under it. The importance of this feature of our system, and its bearing on the character of the judiciary, is at once apparent. It limits the power of the legislature, it erects the judiciary in some sense, into a co-ordinate political authority, it practically associates them with the law-making branch, and has had a very marked effect on the character of the legal mind and education of the country. It has compelled our lawyers constantly to examine, and our judges to keep in view the great principles of government, and has given breadth and depth to our discussion of all legal questions.

We proceed now, in our subsequent chapters, to consider the rules that have been laid down in regard

* The doctrine may be considered as having been finally settled in Marbury *vs.* Madison, 1 Cranch, 137. See also, Kent, Com., vol. i. p. 448, for a review of the cases on the subject.

to the construction of statutes; and shall afterwards examine the manner in which the judicial duty of protecting the Constitution, is exercised. Throughout the investigation on which we are thus about to enter, it will be necessary to keep in view the line of demarkation that we have endeavored to trace, between the legislature and the judiciary. All history teaches that it is too readily lost sight of. There is an inherent and eternal difficulty in confining power of any kind within its proper limits. This general rule holds eminently true in regard to legislative and judicial bodies. The legislature tends to disregard private rights, and to overstep the limits of the Constitution; the judiciary to annul or evade laws which appear to it needlessly or improperly made, and which, when applied to the affairs of life, seem calculated to work injustice. Either practice is an evil strictly to be guarded against. If the legislature should be kept strictly within the bounds of its constitutional provisions, so on the other hand the judiciary should not be permitted to overstep the limits within which the fundamental principles of our system have confined it.

We have seen, in the course of the preceding discussion, how in the earlier ages of English history the judges have abused their power. This has been owing partly, no doubt, to political causes which have prevented the legislature from giving that attention to the details of the law which the general interests of jurisprudence demanded; partly to the narrowness and severity of many of the maxims of the common law; partly to the brevity with which the early statutes were framed and the apparent necessity of applying to them very liberal doctrines of interpretation; partly to the rapid and perpetual changes to which society was subjected

by war, revolutions, and religious controversies; partly to the dependence of the judiciary on the sovereign; but much has been due to the want of keeping before the judicial mind, the true boundary between legislation and interpretation.*

It is to be borne in mind that these excuses no longer exist: the legislator has now time to frame his statute in simple and intelligible language; the demands of commerce have made peace the normal state of the world, and religious toleration is recognized as the true interest of every nation whatever may be its creed; the great interests of society and the duties of government, are better understood; the fundamental doctrine of equality before the law, is recognized in all civilized countries; and it is time that the true line of demarkation between the legislature and the judiciary, should be strongly marked and strictly maintained. Unless this be done, jurisprudence will always fall short of the scientific character to which it aspires.†

The undisputed powers of the judiciary are very great; they not only expound statutes and mold and modify their own judgments, but they declare what is meant by the comity of nations, and apply the laws of foreign countries. The daily habits of business are under their control; new customs every day arising, stand or fall by

* Dwarris, p. 708.

† St. Augustine says (*De Vera Religione*, p. 31), *Non licet judicibus de legibus judicare, sed secundum ipsas.*

Argentré, an eminent French legist, in his work on the customary law of Britanny, says, "*Stulta videtur sapientia quæ lege vult sapientior videri. Cur de lege judicas, qui sedes ut secundum legem judices? Plus sibi sapere visi, insultant legibus et sibi conscientias architectantur contra publicas leges. Aut igitur sedere desinant, aut secundum leges judicent.*—Argentraeus in Antiq. Consuet. Bret. § 323, glos. 1, n. 5; *Nov. Consuet.* art. 627, cited in Dupin's *Jurisprudence des Arrêts*, p. 125.

their decisions; and under cover of the right to enforce public policy and to protect good morals, they exercise a large and undefined authority over private conduct. To all this is added in America, the undisputed right to declare constitutional law, and thus, in certain cases, to over-ride the express will of the legislature itself. These functions are ample enough to qualify the most eager love of power, to demand the exercise of the noblest intellect and the application of the most vigorous industry. Let the magistrate be contented with this large authority; and let him not, by endeavoring to extend it, endanger the power that he now securely possesses. The judicial department should be the most vigilant by its example to resist "that spirit of encroachment which tends to consolidate the powers of all the departments in one, and thus create, whatever the form of government, a real despotism."*

Before leaving this branch of my subject, I may take notice of a subject indirectly connected with it. It has sometimes been the practice for judges to decry certain statutes as being contrary to good morals, such as the usury laws and the statute of limitations; and, going even further than this, they have in many cases manifested their disapprobation of these laws by the mode in which they have exercised their discretionary powers in regard to them. So, they have refused to let these statutes be set up by way of defence when it was necessary for that purpose to apply to the favor of the court.† So again, it has been customary for judges strongly to condemn the permission which our law gives to insolvent debtors to make assignments with preference. So

* Washington's Farewell Address.

† Fulton Bank *vs.* Beach, 1 Paige, 429; Utica Insurance Co. *vs.* Scott, 6 Cowen, 606; Jackson *vs.* Varick, 2 Wend. 294.

in a late case, speaking of the recent change in our legislation as to the rights of married women,* one of the justices of the Supreme Court of New York declares it to be "an extraordinary law, a law which is well calculated in its influences, to embitter the chief springs of social enjoyments; to degrade the sacred relation of man and wife, leaving in full vigor only the secular and sordid companionship of baron and feme." But it may well be considered doubtful if it is competent for the judiciary to make any such distinctions. It is the duty of the bench to expound and construe the law of the country, such as that law is made by the legislature. They are not at liberty to nullify it when once clearly declared. As little can they be considered at liberty to discriminate between one class of statutes and another, and to censure a defendant for acting according to that standard of morality which the law-making power has made the rule of conduct for both judges and litigants.

These ideas have already been expressed by some of our most sagacious magistrates. In New York, Mr. Justice Harris has recently said, "Courts in the exercise of their discretion in allowing amendments, have thought it proper to discriminate between what have been regarded as hard and unconscionable defences, and such as have been considered with more favor.† The soundness of this discrimination may well be doubted. The legislature of this State have thought it wise to declare usury to be a legal defence to an action upon the usurious contract. In doing so they have but followed every other civilized State. With the

* American Home Missionary Society *vs.* Wadhams, 10 Barb. 568.

† Fulton Bank *vs.* Beach, 1 Paige, 429; Utica Insurance Co. *vs.* Scott, 6 Cow. 606; Jackson *vs.* Varick, 2 Wend. 294.

policy of such laws, courts have nothing to do. When a plaintiff willfully violates the law by taking a greater amount of interest than it allows, I do not see upon what principle a court should take it upon itself to pronounce the defence with which the law has provided the defendant, hard or unconscionable. But such has been the practice, and perhaps that practice has now become so inveterate that it cannot be disregarded."*

So again, in the Court of Appeals, when an application was made at the trial under the New York Code of Procedure, to amend a defective allegation of usury in an answer, the Superior Court denied it; but the Court of Appeals held this denial wrong, and said, "We are not, I conceive, warranted in applying a different rule to the defence of usury, from that which we should hold applicable in other cases. It is a defence allowed and provided by law. The defendant did not claim an indulgence from the court, but simply asked for the application of those rules which the legislature has provided for all cases indiscriminately, whether the party invoking their exercise was seeking to visit his adversary with a forfeiture or not. The law has not made any difference between such defences and those where no forfeiture is involved; and the court can make none. If the sense of the legislature is plainly expressed, we have no judgment to pass upon the policy of their provisions."†

* Bates *vs.* Voorhies, 7 How. Pr. Rep. 234.

† Catlin *vs.* Gunter, 1 Kern. 368.

We have in this chapter discussed the subject of legislative power in an entirely practical point of view, considering the actual application of laws to the daily affairs of life; but the subject is often treated in a different aspect, and I give in this note a very brief summary of one of the ablest works on abstract jurisprudence, which this century (not fertile in such treatises) has produced; it will serve to give an idea of this sort of investigation. The work to which I refer is, The Province of Jurisprudence Determined, by John Austin, Esq., Barrister at Law, London, 1832. Mr. Austin's object (Pref. p. 5 and 8), in accordance with his title, is to distinguish positive law, the appropriate matter of jurisprudence, from various objects with which it is connected by resemblance, and from various other objects to which it is allied by analogy, all being connected and often confounded by the common name of "laws." Mr. Austin's leading propositions are these: Laws are a species of commands (p. 21), but the term is often improperly applied to various objects having really nothing of an imperative character; and the writer classes laws as follows:

1st. *Divine Laws*, or the law of God, revealed, and unrevealed or tacit. This branch does not include the natural laws, which come under the fourth or last head.

2d. *Positive Laws*, constituting what is commonly known as Jurisprudence: laws set by political superiors to political inferiors (p. 199); set by a monarch or sovereign number, to a person or persons in a state of subjection to the author.

3d. *Laws of Positive Morality*, embracing positive moral rules proper (distinguished, however, from the laws of God), and also, the moral rules set by opinion, as code of honor, laws of fashion; these last are laws by analogy only; they are really opinions, and are improperly called laws (chap. v., p. 130, note).

4th. *Laws Metaphorical or Figurative.*—Laws of physics or of matter. These, the author says, are not really laws at all. They are only called laws by a figure or metaphor of speech (p. 183).

The law of God consists of the revealed or express commands, and the unrevealed or tacit. As the index to the tacit commands of the Deity, the author adopts the theory of utility, and prefers it to either that of a moral sense, or to one compounded of the two. This is discussed at great and perhaps disproportionate length.

Laws are a species of commands (p. 12). Commands are of two species, "Laws or Rules," and "occasional or particular commands."

A command is a wish expressed by one rational being to another, that the latter do or forbear something, under the penalty of evil proceeding from the former, and to be incurred by the latter in case of non-compliance (p. 11.) Command also implies the idea of superiority on the part of the person uttering it (p. 20). It is a wish, with the power and purpose of enforcing it (p. 6).

Whenever there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and imposes a duty (p. 9).

Command and duty are correlative terms (p. 7).

Command and duty, or obligation and sanction, are inseparably connected terms (p. 11).

Thus far, Mr. Austin's laws are undoubtedly a species of commands, and this division of laws is accurate, though the nomenclature is perhaps inapt. But is the definition of command entirely correct? Command implies a duty, it is said. What of illegal, criminal, or merely hostile commands? Take the decree of a revolutionary or usurping power; the "stand and deliver" of a highwayman; the "surrender" of an enemy; do these impose duty or obligation? If so, in what sense of the word?

In one place in Mr. Austin's work (p. 6), command implies power and purpose to enforce itself, and in another (p. 9), the least chance of the enforcement makes it a command. Is not this a contradiction?

I proceed with the analysis of Mr. Austin's work.

Third Class (p. 143).—The positive moral rules which are laws properly so called, are:

First. Those imperative rules set by men living in a state of nature.

Second. Those set by sovereigns, but not as political superiors.

Third. Those set by subjects as private persons, and not in pursuance of legal rights.

1st. As an instance of this, any imperative rule imposed by man in a state of nature; though, because he is in a state of nature, it is not imposed in pursuance of any legal right.

2d. Laws imposed by one sovereign or supreme government, on another sovereign or supreme government.

3d. Laws or rules set by parents to children, masters to servants; by lenders to borrowers; by patrons to parasites; rules of clubs. These all proceed from determinate sources, but they are set by persons, as private persons, and not in pursuance of legal rights. I may remark, that to class rules set by patrons to parasites, under positive *moral* rules (p. 146), seems not a very happy nomenclature.

The positive moral rules which are laws improperly so called, are such as laws of honor, laws of fashion, law of nations set by opinions current among nations. Here there is no determinate author and no strict sanction; and their chief analogy to a law is that the party violating will suffer some evil consequence, and hence uniformity is produced.

Sect. 6th, p. 196.—In order to complete the explanation of the marks distinguishing positive laws, the author in this chapter defines various terms —such as sovereignty, subjection, independent political society, unconstitutional; and in this he incidentally discusses the division of powers into legislative and executive, or administrative. I cannot but think that this chapter would have been fuller, the analogies more ample, and objections, which naturally suggest themselves, more completely answered, if the writer

had been more familiar with our complex political organization For instance, Mr. Austin says,—"In the State of New York, the ordinary legislation of the State is controlled by an extraordinary legislature. The body of citizens appointing the ordinary legislature forms an extraordinary and ulterior legislature, by which the constitution of the State was directly established, and every law of the ordinary legislature which conflicted with a constitutional law directly proceeding from the extraordinary, would be treated by the courts of justice as a legally invalid act. That such an extraordinary and ulterior legislature, is a good or useful institution, I pretend not to affirm. I merely affirm that the institution is possible, and that in one political society, the institution actually obtains." Not a very audacious affirmation, considering that this "institution" is the fundamental legal idea in thirty-two "political societies" called States of the Union, as well as of the Union itself.

Mr. Austin is a disciple of Bentham. His work is, as I have said, one of the few works which this century has produced in our language, of abstract disquisition on the subject to which it relates. I think his power of reasoning more remarkable than the fitness of his nomenclature. But the work is very valuable, and will well repay a careful perusal. It has never been republished in this country.

CHAPTER VI.

GENERAL RULES FOR THE CONSTRUCTION OF STATUTES.

General rules for the construction and interpretation of statutes—Necessity for construction and interpretation growing out of the ambiguity of language, and other causes—Various rules given by standard writers—Vattel's rules—Domat's rules—Rutherforth's rules—Mackeldey's—Lieber's—Rules of our law—Intention of the legislature, to govern—Mode of arriving at the legislative intention—Lord Coke's rules—Blackstone's rules—Statutes in *pari materia*—Contemporaneous exposition—Legislative exposition—Judicial construction—Usage—Language used in statutes—Technical terms—Liberal and strict construction.

It is hardly necessary to assert the proposition, that in the use of language uncertainty and ambiguity are sure to occur. Contracts, treaties, statutes, and the books of our religion itself, furnish instances that will at once present themselves in numbers to the mind. The imperfection of language is a serious evil when it occurs in those legislative commands on which the repose, discipline, and well-being of society depend. In regard to laws, as in other cases, difficulties will arise, in the first place from the disputed meaning of individual words, or, as is usually said, of the language employed; and in the second place, assuming the sense of each separate word to be clear, doubt will result from the whole context. It is to meet cases of these two kinds that principles of interpretation, or construction, become necessary; and leaving out of view, for the present, the rules by

which the sense of single words, phrases, and technical terms is arrived at, we shall first consider the general principles of interpretation.

Many efforts have been made to lay down precise and positive rules for the construction of statutes; and in order to facilitate this, a nomenclature has been sought to classify different modes or species of interpretation. So, Vattel uses the terms extensive and restrictive interpretation; Rutherforth, liberal, natural, and mixed; and Mackeldey, *authentica*, *usualis*, and *doctrinalis*. Professor Lieber has endeavored to carry this refinement to still greater length. He distinguishes between interpretation* and construction, and divides

* The following is Prof. Lieber's derivation of the word Interpret: "To interpret, as is well known, is derived from the Latin *interpres*, *interpretari*, a compound of *inter* and *pretari*. The latter belongs, as nearly all truly Latin words, according to its root, to that language which was spoken by the original inhabitants or settlers of Europe, and of which the Gothic, ancient High German, Swedish, Icelandic, Latin, &c., are but descended, and which was likewise either the first foundation of the Greek, or so strongly influenced it, that the root of innumerable words is easily traced through all these languages." * * "*Pretari* is of the same root with many words in Teutonic languages: *Prata*, in Swedish, is speaking. We have *prating* and *prattling*. The German *reden* (pronounced *raden*), speaking, is the same; for *d* and *t* easily change, while a consonant before another (*p* in this case) is frequently dropped; or it may be that *reden* is the original. *Praten* signifies to this day, in some parts of Germany, speaking loud and monotonously. *Prædieare*, and the Greek φραζειν, belong to the same family of words. It is very possible that *pretari* and *prating* are of the same root with *broad*—German, *breit*—speak broadly, plainly. The present German word for interpreting is *auslegen*, laying out, laying open, unfolding."—*Lieber's Legal and Political Hermeneutics* (1839), *p.* 20, *in note*. The etymologists, however, do not agree. Richardson's Dictionary (1839) says, "Interpret, interpretari, of uncertain etymology," and gives, with a query, "Pretari, from Πραττειν." I have annexed to this chapter copious extracts from the works of Vattel, Domat, and Professor Lieber, which will serve to illustrate their mode of reasoning on the subject, and to compensate for any error that I may make in underrating the value of the careful classifications and nicely drawn rules of the writers of this class.

the former into close, extensive, extravagant, limited or free, predestinated and authentic; and the latter into close, comprehensive, transcendent, and extravagant.

Under these classifications it has been attempted to frame formal rules for the various modes of interpretation, as—*It is not allowable to interpret what has no need of interpretation.—When we see what is the sense that agrees with the intention of the instrument, it is not allowable to wrest the words to a contrary meaning.—No text imposing obligations is understood to demand impossible things.*

And to elucidate the use of these definitions, and the application of these rules, cases actual or possible are resorted to, exhibiting many varieties of doubt and difficulty. So, if by the terms of a treaty a town is not to be surrounded by walls, the question is asked, whether, upon a proper construction, it may be inclosed with fosses and ramparts. So, the law condemns to death him who strikes his father. Shall we punish him who strikes and shakes his father to recover him from a fit? So, where it was enacted that whosoever drew blood in the public highway should be severely punished, a barber opened a vein of a person taken in the street with apoplexy. Was he guilty or not?

These, and similar discussions, have amused the fancy and exhausted the arguments of text writers. I cannot, however, consider them of much value for the student of jurisprudence. Ours is eminently a practical science. It is only by an intimate acquaintance with its application to the affairs of life, as they actually occur, that we can acquire that sagacity requisite to decide new and doubtful cases. Arbitrary formulæ,

metaphysical subtleties, fanciful hypotheses, aid us but little in our work.

Nor do I believe it easy to prescribe any system of rules of interpretation for cases of ambiguity in written language, that will really avail to guide the mind in the decision of doubt. It is with the utmost difficulty, if at all, that we can define or direct any one intellectual process. How is it to be expected that we can, with success, lay down rules which are generally to govern the operations of the mind? The attempt is ingenious, metaphysically curious, but of little practical utility in the study or the application of the science of the law. What is required in this department of our science is not formal rules, or nice terminology, or ingenious classification, but that thorough intellectual training, that complete education of the mind, which lead it to a correct result, wholly independently of rules, and, indeed, almost unconscious of the process by which the end is attained. It would seem as vain to attempt to frame positive and fixed rules of interpretation as to endeavor, in the same way, to define the mode by which the mind shall draw conclusions from testimony.

Still, although we may reject the curious nomenclature, and the arbitrary rules to which I have referred, it is not to be supposed that a subject so important as the construction and interpretation of laws is to be left to the mere arbitrary discretion of the judiciary. This would be to put in their hands power really superior to that of the legislature itself. There must be some general principles that control the matter; and I believe it will be found, that the principles which control the interpretation of statutes may, for all practical purposes, be not unaptly arranged under the same heads, and reduced analytically to the

same elements, as all other branches of legal inquiry. In all cases of judicial examination we have two great heads of investigation:

1st. The *object* to be attained. This is, in all cases, a question of fact. We do, indeed, distinguish in our ordinary legal language between questions of fact and questions of law; but this is only with reference to the tribunal, *i. e.*, the judge or the jury, which is to decide. The question is always one of fact. The only difference is the nature of the fact. It is not always a physical fact, but it must be a fact. So we say the construction of a doubtful provision in a will is a question of law, but the point to be decided is really one of fact; it is, generally, what was the intention of the testator? So in regard to the construction of statutes, the questions that arise are, in one sense, questions of law, that is to say, they are to be decided by the court; but in reality, as we shall see, the court have, as a general rule, only to discuss and determine a question of fact.

2d. The *means* to be employed. In regard to trials of fact, this is controlled by the rules of evidence; in regard to general questions of law, by positive rules to be found in statutes or in adjudged cases. Such, too, will, I believe, be found the true analysis of our rules in regard to the construction of statutes.

First. *The object to be attained.* This is, as a general rule, the intention of the legislature.

Second. *The means to be employed; i. e.* what facts within and without the statute are to be inquired into to ascertain the intent of the doubtful phraseology. To be more precise:

The object to be attained. We have said that the object of judicial investigation is, as a general rule, to determ-

ine some fact. So is it in regard to the construction of statutes, with the exception of constitutional questions, and also of those cases arising under the doctrine of liberal and strict construction, where, as we shall see hereafter, the judicial function is blended with and lost in the legislative attributes. Where a statute appears to be of a doubtful meaning, the courts have the power to construe it. In discharging this duty, the first thing is to have a clear idea of the object in view. What is doubtful? The answer evidently is, the *intent of the legislature* who passed the act. What did the legislature in fact intend? The doubt does not refer to the *policy* of the act; for with that, as we have seen, the judges have nothing to do. They are judges, and not law-makers. Nor does the doubt regard the *motive* of the legislator, for over that the judges have no right of control. As little does the doubt refer to the *motive* of the parties, or their knowledge of the law; for of these, as we have seen, with the exception of those cases where the essence of crime depends on motive, the judges take no notice. It then follows, necessarily and unavoidably, that if the judges are to execute the will of the legislature, and if they are to disregard the motives and knowledge of the parties, the only doubt that can arise in applying a statute must be as to the meaning of the legislature; subject, however, as has been already said, to the exception of those cases, which will be noticed in the next chapter, where there is no guide to the legislative meaning, and where, consequently, the judicial function is really merged in the legislative.

We may, therefore, affirm, as a general truth, that, independently of constitutional questions, and independently of those doctrines of liberal and strict

construction which really, as I have said, vest a sort of legislative power in the judge, the object and the only object of judicial investigation, in regard to the construction of doubtful provisions of statute law, *is to ascertain the intention of the legislature which framed the statute.* This rule, though often asserted, has been in practice frequently lost sight of; but there is abundant authority to sustain it. "The only rule," says Lord Ch. J. Tindal, "for the construction of acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the act."* The rule is, as we shall constantly see, cardinal and universal, that if the statute is plain and unambiguous there is no room for construction or interpretation. The legislature has spoken; their intention is free from doubt, and their will must be obeyed. "It may be proper," it has been said in Kentucky, "in giving a construction to a statute, to look to the effects and consequences when its provisions are ambiguous, or the legislative intention is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial action."† So, too, it is said, by the Supreme Court U. S.: "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."‡

Thus it is only when the language is ambiguous that

* Dukedom of Sussex, 8 London Jur., 795; Furman *vs.* City of New York, 5 Sandf., 16.

† Bosley *vs.* Mattingly, 14 B. Monroe, Kentucky, 89.

‡ Fisher *vs.* Blight, 2 Cranch, 358, 399; Case *vs.* Wildridge, 4 Indiana, 51.

the courts are called on to construe or interpret; and then, as I have said, the object is to ascertain the intent of the legislature. So, where a statute declared, that if a corporation did not organize and commence its business within a year from the time of the passage of the charter it should become void, a company, formed under the statute, did not organize or commence its business within the year; but within that time, and eighteen days before its expiration, an act was passed amending the charter, continuing the directors in office for a year, and authorizing the stock subscription books to be again opened. It was held, that the fair construction of the amendatory act was to give the company one year from the time of its passage for its organization and the commencement of its business, on the ground that it was wholly improbable that the legislature expected *or intended* that the company should complete its organization and commence its business within "the short space of eighteen days." *

"It is a sound principle," say the Court of Appeals in New York, "that such a construction ought to be put upon a statute as may best answer the intention which the makers had in view; and that is sometimes to be collected from the cause or necessity of making it, at other times from other circumstances. Whenever the intention can be discovered it ought to be followed, with reason and discretion, in its construction, although such construction may seem contrary to its letter." In this case the following point was decided in regard to wills: The *signature* of the testator was always required; but both in England and here it had

* Johnson *vs.* Bush, 3 Barb. Ch. R., 207 & 238; see also Young *vs.* Dake, 1 Selden, 463.

been held that the writing of the name of the testator in the body of the will, if written by himself with the intent of giving validity to the will, was a sufficient signing within the statute. To meet this the Revised Statutes of New York provided, that wills should be subscribed by the testator at the *end* of the will. In a case where a will was made with a map, so annexed as to make part of the instrument, and the testator's signature was affixed at the end of the testamentary part of the document, but not of the whole instrument, it was held, on the ground that the intent of the statute was satisfied, that the will was valid.*

In New York a *quo warranto* being brought against the Utica Insurance Company, for exercising banking powers, the right claimed by the defendant was held to be so manifestly repugnant to the general scope and object of the act of incorporation as to be evidently contrary to the intention of the legislature; and on this ground judgment of ouster was rendered. Thompson, J., said:

"That in construing a statute the intention of the legislature is a fit and proper subject of inquiry, is too well settled to admit of dispute. That intention is to be collected from the act itself, and other acts *in pari materia*. It may not, however, be amiss to state and keep in view some of the established and well-settled rules on the subject. Such construction ought to be put upon a statute as may best answer the intention which the makers had in view. And this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered it ought to be followed, with reason and discretion, in the construction of the statute, although such construction seem contrary to the letter of the statute. Where any words are obscure or doubtful, the intention of the legislature is to be resorted to,

* Tonnele *vs.* Hall, 4 Comstock, 140.

in order to find the meaning of the words. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers; and such construction ought to be put upon it as does not suffer it to be eluded."*

So in the same State, where, by a statute concerning judgments and executions, it was declared not to be lawful for any sheriff or other officer, to whom any writ of execution should be directed, or any of their deputies, to purchase any property at the execution sale, it was held that it never could have been the intention of the legislature to have prevented a deputy-sheriff, when plaintiff in an execution, from bidding, in order to secure his own money. The object, it was said, was to prevent abuse,—that the sheriff or his deputies should not be allowed to make purchases at their own sales, and thereby be induced to conduct themselves corruptly in relation to them. But it never could have been intended to place these persons in a worse situation than others as to the collection of their own demands.†

So again, in the same State, as to the revivor of an act by implication, but not in terms.‡

On the same principle, too, it has been held, in many cases, that the mere change in the phraseology of a statute will not be deemed to alter the law, unless it evidently appears that such was the intention of the legislature. This rule has been frequently laid down in regard to the modified re-enactment of British

* People *vs.* Utica Ins. Co., 15 J. R., 358, 380.

† Jackson ex dem. Scofield *vs.* Collins, 3 Cowen, p. 89.

‡ Crocker *vs.* Crane, 21 Wendell, 211.

statutes, and the revision of our own, in the different States.*

The notion that the intention of the legislature is to govern has, indeed, as we shall see, often been carried, in one sense, much too far, and the judiciary have sometimes endeavored to discover and declare a legislative intent in direct defiance of the language employed, and in utter disregard of the proper means to be used. But the general principle is only perhaps made the more evident by this strained application of it.

Considering it, then, to be clear that the object to be attained in all cases of doubtful construction is the intention of the legislature, we next have to consider *the means to be employed to arrive at that result;* and we cannot, perhaps, better introduce the subject than by the rules laid down in regard to construction by the judges in the reign of Elizabeth. "And it was resolved by the Barons of the Exchequer," says Lord Coke, "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discussed and considered:

"1. What was the common law before the making of the act?

"2. What was the mischief and defect for which the common law did not provide?

"3. What remedy the Parliament hath resolved

* So in New York, in regard to the Statute of Administrators (Taylor *vs.* Delancy, 2 C. C. E., 143), the Habeas Corpus Act (Case of Yates, 4 J. R., 318, 359). So in regard to the act relative to absconding, concealed, and non-resident debtors (Matter of Brown, 21 Wend. 316); and so in regard to the statute regulating the landlord's claim for rent due, under executions (In the matter of Theriat *vs.* Hart, 2 Hill, 380). See also as to point that intention is to govern, Cannon *vs.* Vaughan, 12 Texas, 399.

and appointed to cure the disease of the commonwealth.

"4. The true reason of the remedy.

"And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*."*

* Heydon's Case, 3 Rep., 7.

I may here notice the fact that there is in England a class of exceptions to the usual rules of construction, growing out of what are called, as we have seen, the Ancient Statutes. "Prudent antiquity," says Coke, "included much matter in few words." (2 Inst., 306, 401.) The early English Statutes, written in French or Latin, are expressed with a brevity which renders them now almost unintelligible, and in applying them in modern times the courts have thought themselves free to take great liberties with the contents. It is, therefore, with some excuse that of these statutes, as we have seen, it has been said (Sheffield *vs.* Redcliffe, Hob., 346) "that judges have power over them to mold them to the truest and best use, according to reason and best convenience."

Blackstone's rules of interpretation are as follows:—

"The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequences, or the spirit and reason of the law. Let us take a short view of them all.

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. (Vol. I., p. 59.)

2. If words happen to be still dubious, we may establish their meaning from the context, with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proem or preamble is often called in to help the construction of an Act of Parliament. Of the same nature and use is the comparison of a law with other laws that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point.

3. As to the subject-matter, words are always to be understood as

These resolutions indicate an approach to the true principles on the subject; but, as we shall presently see, the ideas are loosely expressed. In the first place, it seems to be assumed that all statutes are intended to remedy some mischief for which the Common Law did not provide. But this is very far from being true. Again, the notion that the object of interpretation is to arrive at the legislative intent, is very clearly stated; but there is great vagueness in regard to the means to be employed in attaining the end in view. The nature of the means to be made use of is, however, a matter of great importance and nicety. To this we now turn. The means to be employed in arriving at the legislative intent arrange themselves under two heads,—first, those within the statute under consideration; and, secondly, those outside the statute.

Of the means to be found within the statute itself. In the first place, it is an ancient and well-settled rule, that where any cause of doubt arises, although apparently the doubt attaches only to a particular clause, the whole statute is to be taken together, and to be

having a regard thereto; for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end.

4. As to the effects and consequences, the rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. (Vol. I., p. 60.)

5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislator to enact it. (Vol. I., p. 61.)

There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy—that is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the Parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy." (Vol. I., p. 87.)

examined, to arrive at the legislative intent. "The best expositor of all letters patent," says Lord Coke, "and acts of Parliament, are the letters patent and the acts of Parliament themselves, by construction, and comparing all the parts of them together. *Optima statuti interpretatio est (omnibus particulis ejusdem inspectis) ipsum statutum; injustum est nisi tota lege inspecta, una aliqua ejus particula proposita judicare vel respondere.*"

The rule has been repeatedly affirmed. So in Pennsylvania it has been said that in construing any part of a law the whole must be considered; the different parts reflect light on each other; and, if possible, such a construction is to be made as will avoid any contradiction or inconsistency.* So in Massachusetts it has been said that in putting a construction upon any statute, every part shall be regarded; and it shall be so expounded, if practicable, as to give some effect to every part of it.† So again in Michigan it has been decided a cardinal rule that, in the construction of a statute, effect is to be given, if possible, to every clause and section of it; and it is the duty of courts, as far as practicable, so to reconcile the different provisions as to make the whole act consistent and harmonious. If this becomes impossible, then we are to give effect to what was manifestly the intention of the legislature, though by so doing we may restrict the meaning or application of general words.‡

We have already had occasion to notice the rule which allows reference to the preamble, and even the

* Commonwealth *vs.* Duane, 1 Binn., 601.

† Commonwealth *vs.* Alger, 7 Cush., 53, 89.

‡ Attorney-General ex rel. McKay *vs.* Detroit and Erin Plank Road Co. 2 Michigan, 138.

title, of the act.* "If," says Lord C. J. Tindal, "any doubt arise from the language employed by the legislature, it has always been held as a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer, is a key to open the minds of the makers of the act, and the mischiefs which they intended to redress."† And so, where the preamble of an act passed on the petition of the corporation of the city of New York, recited the petition of the corporation on which it was passed, it was held that the preamble containing the petition might be referred to, to ascertain the intention of the legislature.‡

We come next to the *means to be employed outside of the statute.* It is clear that the judges are to inform themselves of the previous state of the law, and of the mischiefs which the statute to be construed was passed to obviate. And the principle has been frequently acted on. The following case presents a strong instance of the application of Lord Coke's rule, that in construing a statute the antecedent legislation is to be kept in view. A junior creditor applied to redeem lands sold under execution, the statute declaring that when this is done the creditor applying to redeem shall present to the sheriff a copy of the docket of the judgment under which he claims. This formality was omitted; and it was insisted that the statute was merely directory, and ought to be dispensed with. But it was decided otherwise; and in so doing reliance was placed on the previous legislation, and this lan-

* *Ante* pp. 50, 51, 54, *et seq.*

† Dukedom of Sussex, 8 Lond. Jur., 795.

‡ Furman *vs.* The City of New York, 5 Sand., 16.

guage was held:—"The act of 1826 did not prescribe the evidence to be produced by a creditor claiming the right to redeem. The consequence was, that this matter was left, in a great degree, to the discretion of the sheriff and his deputies. Different officers were at liberty to adopt different rules of proceeding; and the same officer might sometimes receive, and at other times reject, the same kind of evidence. Besides leaving the parties in doubt and uncertainty about their legal rights, a wide door was left open for favoritism and injustice. To remedy these evils, the legislature, in 1830, specially prescribed the evidence which should be presented by the creditor; and thus made the rights of the parties depend, not on the discretion of the officer, but on the law of the land. That this was a salutory provision can hardly be doubted; but if it were otherwise, the remedy belongs to another branch of the government."* And the bill filed to redeem was dismissed.

But when it is said that the judges are to take into consideration the previous state of the law, and the mischiefs which the enactment was intended to prevent, a doubt at once suggests itself as to the mode to be pursued and the evidence to be required. The judges may be supposed to have, and may perhaps be reasonably charged with, a knowledge of the existing state of the law at any given time; but how are they to know the exact mischiefs which the legislator had in view? They cannot be presumed to have any official knowledge of the general state of the community, or of every local disturbance or local want. What means are they, then, to employ?—what evidence to consult? All

* Waller *vs.* Harris, 20 Wend., 555.

this is left very much in the dark by Lord Coke and his successors. We are not to suppose that the courts will receive evidence of extrinsic facts as to the intention of the legislature; that is, of facts which have taken place at the time of, or prior to, the passage of the bill. So in Pennsylvania, in regard to the construction of a bank charter, where it was contended that the bank was exempt from taxation, it was held that the evidence of public embarrassment, the proclamation and message of the governor, the journals of the House of Representatives, and the reports of committees, should be wholly disregarded.* "The journals are not evidence," say the same court, in a still more recent case, "of the meaning of a statute; because this must be ascertained from the language of the act itself, and the facts connected with the subject on which it is to operate."†

On the other hand, there is no doubt that very eminent judges have, in the construction of statutes, been wont to permit their minds to be influenced, and in fact to take a sort of judicial cognizance of many extrinsic facts, in regard to which evidence certainly would not have been permitted, and which, indeed, could not perhaps be proved.

The English statute, 26 Geo. II., c. 23, declared all marriages of children under age void, unless the consent of the parents or guardians was first obtained. The question was brought before the Kings Bench, whether the act was to be interpreted to include

* Bank of Pennsylvania *vs.* Commonwealth, 7 Penn. State R., 144.

† The Southwark Bank *vs.* The Commonwealth, 26 Penn. State R., 446. But it is also ruled in this last case, that the journals are the highest evidence of the fact of the enactment of a law, or of any other fact connected with its passage.

illegitimate children; and Lord Mansfield, in holding that it did so, put his decision on the ground of the mischiefs which the act was intended to obviate: "This act was passed in order to prevent the illegal practice of clandestine marriages, which were become so very enormous, that places were set apart in the Fleet and other prisons for the purpose of celebrating clandestine marriages. The Court of Chancery, on the ground of its illegality, made it a contempt of the court to marry one of its wards in this manner. They committed the offenders to prison; but that mode of punishment was found ridiculous and ineffectual. Then this act was introduced to remedy the mischief."*

It may very well be that, in the condition of English jurisprudence in former times, when laws were few and rarely passed, when the business of legislation was confined to a small and select class, to which practically the judiciary belonged, when the legislative and the judicial bodies sat in the same place, and, indeed, in the same building,—in such a state of things, it may well be that the judiciary might suppose themselves to possess, that they might indeed really possess, a considerable personal knowledge of the legislative intent, and that they might come almost to consider themselves as a co-ordinate body with the legislature.

But in modern societies, where the division of political attributes is so much more nice and rigorous, where the business of legislation has become multifarious and enormous, and especially in this country where the judiciary is so completely separated from the legislature, it must be untrue in fact that they can have any personal knowledge sufficient really to instruct them as

* The King *vs.* Inhabitants of Hodnett, 1 T. R. 96.

to the legislative intention; and if untrue in fact, any general theory or loose idea of this kind must be dangerous in practice. I believe that, subject to the rules hereafter declared, and subject to the exceptions of equitable construction to be discussed in the next chapter, the tendency of all our modern decisions is to the effect *that the intention of the legislature is to be found in the statute itself*, and that there only the judges are to look for the mischiefs meant to be obviated, and the remedy meant to be provided.

In a case on the embargo laws, the Supreme Court of the United States said, "In construing these laws it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it." And, after saying that the object was to lay an embargo, and to prevent evasions of the law, and that certain acts had been prohibited, the court proceeded: "But should this court conjecture that some other act, not expressly forbidden, and which is in itself the mere exercise of power over property which all men possess, might also be a preliminary step to a violation of the law, and ought therefore to be punished for the purpose of effecting the legislative intention, it would certainly transcend its own duties and powers, and would create a rule instead of applying one already made. It is the province of the legislature to declare, in explicit terms, how far the citizen shall be restrained in the exercise of that power over property which ownership gives; and it is the province of the court to apply the rule to the case thus explicitly described,—not to some other case which judges may conjecture to be equally dangerous."*

* Schooner Paulina's Cargo *vs.* The United States, 7 Cranch, 52, 60.

In a case on the English Bankrupt Act, Lord Tenterden said, "The intention of this act certainly was to prevent voluntary preferences; the words may, probably, go beyond the intention; but if they do, it rests with the legislature to make an alteration; the duty of the Court is only to construe and give effect to the provision."*

In another case where an effort was made to include a writ of *pone* or *distringas* under the term *execution*, which is confined to executions on judgments, the application was denied; and Lord Tenterden said, "Speaking for myself alone, I cannot forbear observing, that I think there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the legislature might possibly have provided for other cases had their attention been directed to them."†

Where an English statute provided, that no indenture of apprenticeship should be "valid and effectual" unless "approved of by two justices of the peace, under their *hands and seals*," an indenture executed by the justices under their *hands* only was held void; and the King's Bench, per Bagley, J., said, "I do not know how to get rid of the words of this section of the act of Parliament, and where the legislature, in a very modern act of Parliament, have used words of a plain and definite import, it is very dangerous to put upon them a construction, the effect of which will be to hold that the legislature did not mean that which they have expressed."‡

* Notley *vs.* Buck, 8 Barn. & Cres. 160, 164.

† Brandling *vs.* Barrington, 6 Barn. & Cres., 467, 475.

‡ The King *vs.* Inhabs. of Sto ke Damerel, 7 Barn. & Cres., 563, 568, 569.

In a case upon the English poor laws, which provided that, in order to gain a settlement, the rent of a tenement "should be paid for one whole year at least," it was insisted, with reference to the great inequality of rents, that this was very absurd and unjust; but the act was strictly construed, and the King's Bench said, "It is very desirable in all cases to adhere to the words of an act of Parliament, giving to them that sense which is their natural import in the order in which they are placed."*

"We are bound," said Lord Denman, "to give to the words of the legislature all possible meaning which is consistent with the clear language used. But, if we find language used which is incapable of a meaning, we cannot supply one. It is extremely probable that the alteration suggested would express what the legislature meant, but we, looking at the word as judges, are no more justified to introduce that meaning than we should be if we added any other provision."†

"The court," said Coleridge, J., "should decline to mold the language of an act for the sake of an alleged convenience, or an alleged equity, upon doubtful evidence of intention."‡ And again, the same learned and experienced judge said—"If I thought the construction we are adopting put any force on the meaning of the act, I should be the last to concur in it; for the longer I sit here the more I feel the importance of seeking only the meaning of a statute according to a fair interpretation of its words, and

* King *vs.* Inhabs. of Ramsgate, 6 Barn. & Cres., 712, 715. See also King *vs.* Inhabs. of Barham, 8 Barn. & Cres., 99.

† Green *vs.* Wood, 7 Q. B., 178, 185.

‡ The King *vs.* Poor Law Commissioners, 6 A. & E. 1, 7.

resting upon that."* Says Patteson, J.,—"I see the necessity of not importing into statutes words which are not to be found there. Such a mode of interpretation only gives occasion to endless difficulty."† "We are required," says Lord Denman, "to add some arbitrary words to the section. We cannot introduce any such qualification; and I cannot help thinking that the introduction of qualifying words in the interpretation of statutes, is frequently a great reproach to the law."‡ Tindal, C. J., says,—"It is the duty of all courts to confine themselves to the words of the legislature—nothing adding thereto, nothing diminishing."§

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

* 6 A. & E. p. 7. † King *vs.* Burrell, 12 A. & E., 468.

‡ Lamond *vs.* Eiffe, 3 Q. B., 910.

§ Everett *vs.* Wells, 2 Scott N. C. 531.

‖ Newell *vs.* The People. 3 Seld. 97. See the subject also discussed in M'Cluskey *vs.* Cromwell, 1 Kernan, 593.

In Michigan it has been said, "It is only where a statute is ambiguous in its terms, that courts exercise the power of so controlling its language as to give effect to what they may suppose to have been the intention of the lawmaker. In the statute before us, the language admits of but one construction. No doubt can arise as to its meaning. It must, therefore, be its own interpreter."*

The result of this investigation then, is, that for the purpose of ascertaining the intention of the legislature, no extrinsic fact, prior to the passage of the bill, which is not itself a rule of law or an act of legislation, can be inquired into or in any way taken into view. We now proceed with the inquiry, *what are the means outside of the statute* which we may legitimately employ to arrive at the desired result, viz. the legislative intent.

Statutes in pari materia, to be taken together.—It is well settled, that in construing a doubtful statute, and for the purpose of arriving at the legislative intent, all acts on the same subject-matter are to be taken together and examined, in order to arrive at the true result. "All acts in *pari materia*," said Lord Mansfield,† "are to be taken together, as if they were one law." "Where," he said, on another occasion, "there are different statutes in *pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other." And in various cases before him, Lord

* Bidwell *et al. vs.* Whitaker *et al.*, 1 Mich. 469, 479.

† The Earl of Ailesbury *vs.* Pattison, Doug., 30.

Mansfield applied this doctrine to the laws concerning church leases, bankrupts, and the poor.*

This sound rule has been frequently recognized in this country. On this principle, "in many instances," say the Court of Errors of the State of New York, "a remedy provided by one statute will be extended to cases arising on the same matter under a subsequent statute."† And so it was held, that a provision for compensation embraced in an original act of 1817, extended to cases arising under an act passed in 1820, conferring additional powers on canal commissioners.

The subject has been considered and explained in Connecticut; and it was there said, "Statutes are in *pari materia*, which relate to the same person or thing, or to the same class of persons or things. The word *par* must not be confounded with the word *similis*. It is used in opposition to it, as in the expression, *magis pares sunt quam similes;* intimating not likeness merely, but identity. It is a phrase applicable to public statutes or general laws, made at different times and in reference to the same subject. Thus, the *English* laws concerning paupers, and their bankrupt acts, are construed together, as if they were one statute, and as forming a united system; otherwise the system might, and probably would, be inharmonious and inconsistent. Such laws are in *pari materia*. But private acts of the legislature, conferring distinct rights on different individuals, which never can be considered as being one statute, or the parts of a general system, are not to be interpreted by a mutual

* Rex *vs.* Loxdale, 1 Burr., 445; Duck *vs.* Addington, 4 Term R., 447.
† Rogers *vs.* Bradshaw, 20 J. R., 735, 744.

reference to each other. As well might a contract between two persons be construed by the terms of another contract between different persons." And so, the charters of various different banks were held not to be in *pari materia*.*

So, in New York it has been recently decided, where an act passed in 1817 for the construction of the Erie Canal vested the fee of the lands taken for the purpose in the people of the State, and lands were taken for the construction of the canal, under an act passed in 1819 omitting any provision as to the title, that the people took the same interest under the act of 1817 as they did under that of 1819.†

So in Kentucky it has been said, that where two statutes of the same date relate to the same thing, but one is more comprehensive than the other, there will be an effort to give to one some operation not embraced in the other, so that each may, if possible, have some effect,—that the legislation may not appear to have been vain and useless. And in that State, where by statute *all* lands held by a seminary are declared free from all taxation whatever, and by another statute of the same date it is declared that the land on which any seminary is erected, to the extent of *five acres* held *severally or individually*, is exempt from taxation, it was held to give effect to both statutes, that lands on which a seminary is erected, *owned* by the seminary, though exceeding five acres, should be exempt, but if not owned by the seminary only five acres should be exempt.‡

* Hosmer, J., United Soc. *vs.* Eagle Bank, 7 Conn., 457, 469, 470.

† Reiford *vs.* Knight, 15 Barb., 627.

‡ Naz. Lit. & Ben. Inst. *vs.* Commonwealth, 14 B. Monroe, 266; Acts in *pari materia* to be taken together, Cannon *vs.* Vaughan, 12 Texas, 399, 402.

So, it has been said that all the acts of Congress relating to the reservation, grant, and sale of the sixteenth section in the several Congressional townships, in the different States of the Union, for the use of schools, being in relation to the same subject-matter, are to be taken in *pari materia* and considered as one act, in ascertaining the purpose of the grant of the sixteenth section of the several townships in any one State.* So, in Indiana, where at the same session an act was passed fixing the salaries of an auditor of a particular county, and also another fixing the salaries of auditors generally, the Supreme Court said that the rule of construction was well settled, viz. to regard these enactments in *pari materia*, to consider them as one statute, and give them such an exposition as will sustain what appears to have been the main intent of the law-makers.†

The rule that statutes in *pari materia* are to be consulted for the construction of each other, holds good though some of the statutes may have expired, or even been repealed, and whether they are referred to or not. "All acts which relate to the same subject," said Lord Mansfield,‡ "notwithstanding some of them may be expired, or are not referred to, must be taken to be one system, and construed consistently."§ "The objection arising from the repeal of the former statutes," says Lord Denman, "is not insisted on,‖ and

* The State of Indiana *vs.* Springfield Township, 6 Indiana, 83.

† Board of Coms. *vs.* Cutler, 6 Indiana, 354. See, also, M'Cartee *vs.* Orphan Asylum Society, 9 Cowen, 437. Dodge *vs.* Gridley, 10 Ohio, 173. M'Mahon *vs.* Cincinnati & Chicago Short Line Railroad Co., 5 Ind., 413.

‡ Rex *vs.* Loxdale *et al.*, 1 Burr. 447.

§ See, also, Reg. *vs.* Merionethshire, 6 Q. B. R., 343.

‖ Reg. *vs.* Stock, 8 Ad. & Ell. 405, 410.

does not seem tenable." "This act of Parliament," says Parke, J.,* "repeals that of 32 George III. and 41 George III., the provisions of which are only so far material as they may aid in the construction of the enactments of the existing statute."

Contemporaneous Exposition. — In seeking aid to construe an obscure or doubtful statute, considerable weight is attached to the opinions in regard to it entertained, by persons learned in the law, at the time of its passage. "Great regard," says Lord Coke, "ought in construing a statute, to be paid to the construction which the sages of the law who lived about the time or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made." And this, in the terse and admirable language of the civil law, is expressed by the maxim *Contemporanea expositio est fortissima in lege.*† As we shall see hereafter, this same principle has been applied in this country to a certain extent in the construction of constitutions.

So in regard to the judges of the Supreme Court of the United States sitting as circuit judges without distinct commissions for the purpose, it was held by the Supreme Court, that a practice and acquiescence under the system for a period of several years, commencing with the organization of the judicial system, afforded an irresistible answer to all objections, and had, indeed, fixed the construction. It was said to be a contemporary interpretation of the highest nature.‡

So, as to the laws of the Colony of Massachusetts

* Bussey *vs.* Story, 4 B. & A., 98, 108.
† Dwarris, p. 562.
‡ Stuart *vs.* Laird 1, Cranch, 299.

in regard to common lands, the Supreme Court of that State has said,—

Of these statutes a practical construction early and generally obtained, that in the power to *dispose* of lands was included a power to *sell* and convey the common lands. Large and valuable estates are held in various parts of the commonwealth, the titles to which depend on this construction. Were the court now to decide that this construction is not to be supported, very great mischief would follow. And although if it were now *res integra*, it might be very difficult to maintain such a construction, yet at this day the *argumentum ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of words.*

So in regard to the construction of the statute of of frauds, the same court has said,—

A contemporaneous is generally the best construction of a statute. It gives the sense of a community, of the terms made use of by a legislature. If there is ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law; and after it has been acted upon for a century, nothing but legislative power can constitutionally effect a change.†

Legislative Exposition.—The exposition of statutes by subsequent legislative bodies, has weight—though not a controlling authority, in regard to the construction of statutes.‡ And in Vermont, it has been said

* Rogers *vs.* Goodwin, 2 Mass. 477, 478.

† Packard *vs.* Richardson, 17 Mass. 121, 143.

‡ Coutant *vs.* The People, 11 Wend. 511. Rex *vs.* Loxdale, 1 Burr. 447.

that the history of the legislation in the State in reference to the subject-matter of a statute, may be referred to as tending to aid in the construction to be given to it.* A declaratory act, or an act declaring the true intent of a previous act, does not control the judiciary in deciding on the true construction of the first act, except in cases arising subsequent to the declaratory act, or except in cases where a retrospective act can properly be passed. In a case of this kind it has been said, "The preamble of the act declares its object to be, the removal of doubts upon a point of law. So far as the future was concerned this was strictly within the constitutional attributes of the legislature,—it being the prerogative and peculiar duty of that branch of the government, to make the law; and consequently, its dictates, when duly promulgated, fix the law from the moment of such promulgation, so far as they do not interfere with vested rights, or impair the obligation of contracts previously made. But the power of expounding the law, which includes the great and responsible duty of deciding whether the legislative assemblies, State and municipal, have transcended in their past action, the limits of their powers as defined by the constitution and the laws,—this belongs to the judiciary alone."†

Judicial Construction.—Stare decisis is the motto of courts of justice, sometimes, it is true, departed from,—for it is claimed for our law as one of its merits, that it silently changes with the changes in the habits

* Henry *vs.* Tilson, 17 Verm., 479.

† Municipality No. 1 *vs.* Wheeler, 10 Louisiana Annual Rep. p. 747. It is the dissenting opinion of Buchanan, J., but, I suppose, with the modification in the text expresses the true idea. The law in this case was retrospective, and sustained as such by the court.

and affairs of men;* but as a general rule, and particularly in regard to the construction of statutes, courts adhere strictly to the decisions of their predecessors. "Thirty-four years have nearly passed," said Lord Kenyon, in construing a penal statute for the observance of the Lord's Day, "since the decision of the case of Rex *vs.* Cox, which informed the public that all bakers have a right to do what is imputed to this defendant as an offense. This circumstance alone ought to have some weight in the determination of this case;" and, the word being doubtful, the original decision was adhered to.† Says Lord Mansfield—"When solemn determinations, acquiesced under, have settled precise cases and a rule of property, they ought for the sake of certainty to be observed, as if they had originally formed a part of the text of the statute;"‡ and this doctrine has been repeatedly recognized.§ "Whatever might be our impressions were the matter *res integra*," says the Supreme Court of Louisiana, "we deem it important in the construction of statutes, to adhere to what has been already adjudged. The judicial interpretation becomes, as it were, a part of the statute, and should not be changed but for the most cogent reasons."‖

* "*Quicquid agunt homines*, is the business of courts," said Lord Mansfield, in Barwell *vs.* Brooks, 3 Doug. 371, 373; "and as the usages of society alter, the law must adapt itself to the various situations of mankind." See also the language of the same great judge, to the same effect, in Corbett *vs.* Poelnitz, 1 Term R. 5, 9.—Lord Kenyon, however, was of the opposite way of thinking; Ellah *vs.* Leigh, 5 Term R. 682; Clayton *vs.* Adams, 6 Term R. 605; and see Ram on Legal Judgment, p. 32, Philadelphia Law Library, vol. 9.

† Rex *vs.* Cox, 2 Burr. 787. King *vs.* John Younger, 5 Term. R. 449, 450.

‡ Wyndham *vs.* Chetwynd, 1 Burrow, 419.

§ Nelson *vs.* Allen and Harris, 1 Yerg. 376. King *vs.* Inhabitants of Corsham, 2 East, 302. Hammond *vs.* Anderson, 4 Bos. and P., 69. King *vs.* Inhabitants of North Nibley, 5 Term R. 21.

‖ State *vs.* Thompson, 10 La. Ann. R. 122, 123.

Usage. — Of a similar value in regard to the construction of statutes is usage, or the construction which custom or practice has put on them. "*Optimus legum interpres consuetudo.** The wisdom of this principle is asserted in the civil law: *Imperator Severus rescripsit, in ambiguitatibus quæ ex legibus proficiscuntur, consuetudinem, aut rerum perpetuo similiter judicatarum auctoritatem, vim legis obtinere debere.*† "It is the common opinion," says Lord Coke, "and *communis opinio* is of good authoritie in law. *A communi observantia non est recedendum.*"‡

These maxims undoubtedly owe their origin to the period when the Common Law, that creature of custom, was formed,—when, in the absence of printing, public opinion being feeble and insufficient, and government divided and distracted, the strong practical minds of the times saw that the best, perhaps the only mode of creating order and system was, to give all possible force and effect to usage, to legalize and establish general habits and practices, and thus to turn custom into law.

In a case of the House of Lords on the statute 27 Henry VIII. Lord Hardwicke said, "The opinion of conveyancers in all times, and their constant course, is of great weight. They are to advise; and, if their opinion is not to prevail, must every case come to law? No; the received opinion ought to govern." And Lord Mansfield said, "Consider also the usages and transactions of mankind upon the statute. The object of all laws with regard to real property is

* 2 Rep. 81.

† L. 38 ff. de Legibus.

‡ Coke on Litt. 186, a. note; see Hargrave's note 69, where it is said that this is the origin of the maxim, *Communis error* facit jus.

quiet and repose. As to practice there has almost been only one opinion. The greatest conveyancers, the whole profession of the law, Sir Orlando Bridgeman, Lord Nottingham, there was not a doubt at the bar in Harvey *vs.* Ashley—Mr. Fazakerley always took it for granted."*

So in the Supreme Court of the United States, the practical construction given to an act of Congress was held to be of great weight in assisting the court to arrive at its true construction.†

In New York where at tax sales the comptroller was directed to execute conveyances in the name of the people of the State, and, disregarding the statutes, deeds were given by the comptroller in his name of office, it was held that these deeds were good to pass a legal title, on the ground of a long and uniform custom to give deeds of this kind in this way.‡ The Chancellor said, "Lord Coke's expression, that common opinion is good authority in law, does not apply to a mere speculative opinion in the community, as to what the law on a particular subject is; but when

* Earl of Buckinghamshire *vs.* Drury, 2 Eden Ch. R. 61, 64, and 74. See as to usage in the matter of the appointment of overseers of the poor, Rex *vs.* Loxdale, 1 Burrows, 445; where Lord Mansfield directed inquiry to be made into the usage of certain parishes in this respect.

The understanding of the bar generally, and especially the usual practice of the conveyancers, have always had great weight in England, and cases—some even on the construction of statutes—have frequently been decided on the mere weight of their authority. See Smith *vs.* the Earl of Jersey, 2 Brod. & B. 598, where Lords Eldon and Redesdale bear strong testimony on this point; and see, also, on this subject generally,—*The Science of Legal Judgment; a treatise designed to show the materials whereof and the process by which the Courts of Westminster Hall construct their judgments*, by James Ram, *of the Inner Temple;* an able and instructive work. It was re-published in 1835, in the 9th vol. of the Philadelphia Law Library.

† U. S. Bank *vs.* Halstead, 10 Wheat. p. 51, 63.

‡ Bank of Utica *vs.* Mersereau, 3 Barb. C. 530, 577.

such opinion has been frequently acted upon, and for a great length of time, by those whose duty it is to administer the law, and important individual rights have been acquired, or are dependent upon such practical construction of the law, this expression of the learned Commentator upon Littleton is entitled to great weight."

But though usage may be employed to construe statutes, it cannot be permitted to defeat the general intent of an act. So said Lord Mansfield: "The use of this practice will avail nothing if meant as an evasion of the statute; for usage certainly will not protect usury."* So again, a particular usage cannot be admitted to interpret a general act, as one relating to the English poor rates.† So, too, in England, the acts of Parliament fixing one standard of weights and measures have been steadily upheld against all local customs and usages.‡ So, in this country, a contract for the sale of lands by the acre, means the statute acre; and parol evidence of a general understanding to the contrary is inadmissible.§ In Pennsylvania, where a statute directs that twenty hundred pounds shall make one ton, a contract was made to deliver forty tons of pig metal; and an effort was made to show that the usual custom of dealers in the article was to buy and sell by a gross ton of two thousand two hundred and sixty-eight pounds; but the court held that the statute entered into the contract, and formed an essential part of it: "It is a statute which

* Floyer *vs.* Edwards, Cowper, 112.

† The King *vs.* John Hogg, 1 T. R. 721.

‡ Noble *vs.* Durell, 3 T. R. 271; Master, &c. of St. Cross *vs.* Lord Howard De Walden, 6 T. R. 338.

§ Paull *vs.* Lewis, 4 Watts, 402.

ought to be enforced; and the local customs up the Alleghany river are certainly insufficient to repeal it."* So in Maine, it has been decided that no prescriptive right can be claimed against an existing statute.†

We have thus enumerated the modes by which the true interpretation of doubtful legislative provisions is to be arrived at. In the first place, if the act be strictly a remedial one, a clear idea is to be had of the law as it existed before the statute, and of the mischief which it was meant to prevent, for the purpose of ascertaining the remedy which the legislature intended to give. In order to arrive at this result the whole statute is to be taken together, and all its parts are to be consulted; acts on the same subject-matter are to be examined; contemporaneous and subsequent legislative exposition may throw some light upon the point; judicial construction may be appealed to; and, finally, established custom will perhaps determine the question. If the law relates to entirely new matter, as for instance a railroad act, the mind must be steadily turned in the same direction, and its efforts employed to ascertain the true intent of the legislature. But in no other case than those above specified can mere extrinsic facts either be proved or in any way taken into view: the intention of the legislature is to be learned from the language they have used.‡

* Evans *vs.* Myers, 25 Penn. R. 114, 116.

† Ham *vs.* Sawyer, 38 Maine, 37.

‡ "We think it much the safer course," said Lord Tenterden, in a case on the Poor Laws, "to adhere to the words of the statute construed in their ordinary import, than to enter into any inquiry as to the supposed intention of the persons who framed it." The King *vs.* The Inhabitants of Great Bently, 10 Barn. & Cres. 520, 526, 527.

If, after all these legitimate aids are called in, the intention of the legislator, as happens in many cases of hopeless ambiguity or of irreconcilable contradiction, is still involved in doubt, it necessarily results that the task of arriving at the meaning of the act, i. e., the meaning of the legislator, is an idle effort; the duty of the judge then becomes different, and he must resolve the doubt by the exercise of his authority, upon what are called the principles of strict or liberal construction, and which we have to consider in the next chapter. The office of the judge then necessarily changes its character, and he assumes to a certain extent the duties of a legislator. He ceases to occupy himself with an endeavor to ascertain the legislative intention, and proceeds to decide the question before him, arising under the statute, as in his judgment it should as a matter of right and reason be determined. Though the term construction may be still applied to this exercise of his authority, it is evident that the mental operation is a very different one from the endeavor to ascertain the intention of the law-maker. The judge practically says, this statute is on its face doubtful. I cannot tell what the legislature intended; but in my judgment they *ought* to have intended this—the statute *ought* to read thus—and so I decide. This is really legislation—a subordinate exercise of the power, but still legislation. Of the mode of exercising this power, of the extent to which it can rightly be carried, and of its frequent abuse, we shall speak more fully in the next chapter.

In the mean time, however, we have to examine the rules which govern the interpretation of particular words, or as it is called,—

The language of a statute.—The rules which we have been thus far considering, relate to ambiguity and contradiction in regard to the general scope and purport of a statute; but serious questions may arise in regard to single words, and with reference to the precise meaning of the language used. The rule in regard to this is expressed in the maxim, *à verbis legis non est recedendum*—the meaning of which is, that statutes are to be read according to the natural and obvious import of their language.* In an early case, the judges said, "They ought not to make any construction against the express letter of the statute, for nothing can so express the meaning of the makers of an act, as their own direct words; for *index animi sermo.*"† The rule is well expressed by Parke, B. in the English Exchequer. "The rule which the courts have constantly acted on of late years, in construing acts of Parliament, or other instruments, is to take the words in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument, or would lead to some other inconvenience or absurdity."‡ "The current of authority at the present day," says the Supreme Court of New York, "is in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. Courts cannot correct what they may deem either excesses or omissions in

* Forrest *vs.* Forrest, 10 Barb. S. C. R. p. 46.

† Edrich's Case, 5 Co. p. 118.

‡ Jones *vs.* Harrison, 6 Exch. 328, 333. S. C. 2 Lowndes, M. & P. 257—see also, Macdougall *vs.* Paterson, 11 C. B. 755.

legislation, nor relieve against the occasionally harsh operation of statutory provisions, without the danger of doing vastly more mischief than good."*

The fundamental reason of the rules, in regard to the language of statutes, which we have thus stated, is to be found in the consideration that unless the courts, as a general thing, construe language in the same sense in which it was used by the legislature, that is, according to its ordinary and natural import, it would be in vain to attempt to preserve any harmony between these two great co-ordinate branches of government; and the contrary doctrine would open the door to intolerable looseness of construction. If the courts could give to phrases new, unusual, forced, or strained interpretations; if they could insert a word here or strike out a word there,—all idea of conforming to the legislative intent would be lost, and cases turning on the construction of doubtful statutes would soon come to be decided either on judicial notions of policy or on the peculiar equities of the particular matter in hand.

Technical Words.—When technical words occur in a statute, they are to be taken in a technical sense, unless it appears that they were intended to be applied differently from their ordinary or legal acceptation.†

So, when legislating upon subjects relating to courts and legal process, we are to consider the legislature as speaking technically, unless from the statute itself it appears that they made use of the terms in a more

* Waller *vs.* Harris, per Bronson, J., 20 Wend. 555, 556, 557. "Words are to be taken in the natural and obvious sense, and not in a sense unnecessarily restricted or enlarged," per Story, J., Martin *vs.* Hunter's Lessee, 1 Wheat. 326. Clark *vs.* City of Utica, 18 Barb. 451.

† 1 Kent Com. 462; Clark *vs.* City of Utica, 18 Barb. 451.

popular sense. Thus, where a statute directed that the coroner should serve process where the sheriff was "*a party*," it was held that he must be technically a party, and that being interested in the suit was not sufficient.* So, where a Massachusetts statute in regard to flowing lands declared that a judgment should be "*final*," it was held that this phrase was to be taken in its technical sense.† Where a Massachusetts act declared that no license to an administrator to *sell* the real estate of his intestate for the payment of debts, should be in force for a longer time than one year, it was said "that though the popular sense may be the true one where the act of the legislature does not relate to a technical subject, yet it being the object to limit the time of sales and prevent estates from being kept open longer than is necessary, the legal sense seems the proper one;" "and it was held that, there being in a legal sense no sale till the deed was delivered, the deed must be delivered within the year."‡

In regard to the word "robbery," used in an act of the United States, Mr. Justice Washington has said, "If a statute of the United States uses a technical term which is known, and its meaning fully ascertained by the common or civil law, from one or the other of which it is obviously borrowed, no doubt can exist that it is necessary to refer to the source whence it is taken for its precise meaning."§ Where the word "*supersede*," was used in a militia act, the Supreme

* Merchants Bank *vs.* Cook, 4 Pick. 405.

† Snell *vs.* Bridgewater Cotton Gin Manufacturing Co. 24 Pick. 296. See this case also as to repeals by implication.

‡ Macy *vs.* Raymond, 9 Pick. 286.

§ The United States *vs.* Jones, 3 Wash. C. C. R. 209.

Court of Massachusetts said, "The only way to ascertain the sense of the legislature in using the word, is to learn the military sense in which the word is commonly used; for in the enactment of laws, when terms of art or peculiar phrases are made use of it must be supposed that the legislature have in view the subject-matter about which such terms or phrases are commonly employed."*

It has been said that courts of justice are presumed to understand the meaning of technical terms in a statute, and that experts need not be called to interpret them.† But in practice I should suppose this assumption would be found to be very erroneous, and that it would be frequently necessary for courts to inform themselves by testimony as to the meaning of terms of art or science.‡

A question has been raised whether the same words in any one statute can receive different meanings, according to a doctrine applied to wills;§ but the Chief Justice of the Kings Bench has said, "We disclaim altogether the assumption of any right to assign

* Ex parte Hall, 1 Pick. 261, 262.

† Fashion *vs.* Wards, 6 M'Lean, 52.

‡ We have but little idea now of the nicety of the early English law, in regard to words; and the difficulty was then increased by the use of a foreign and a dead language. So in assize of nuisance, "The plaintiff counts that *exaltavit domum*, the jury find that *erexit*,—and exception taken to it; but the court was informed *by the grammarians*, that the words were of one sense." Giles *vs.* Ferrers, Cro. Eliz. 59. So see Gerrard *vs.* Dickinson, Cro. Eliz. 196, for the distinction between *talis* and *eadem*. Again in Hopkins *vs.* Stapers, Cro. Eliz. 229, that *ad* and *in* are of the same effect; and in The Warden of All Souls *vs.* Tanworth, Cro. Eliz. 232, it is decided that *Elemosynam* ought to be Eleemosynam, with a double *e*: "The common course is so, therefore it is good."

§ Forth *vs.* Chapman, 1 P. Wm. 667. Crooke *vs.* De Vandes, 9 Vesey, 197. Elton *vs.* Eason, 19 Vesey, 77.

different meanings to the same words in an act of Parliament, on the ground of a supposed general intention in the act. We think it necessary to give a fair and reasonable construction to the language used by the legislature; but we are not to assume the unwarrantable liberty of varying the construction, for the purpose of making the act consistent with any views of our own."* On this subject Vattel says, "It does not follow, either logically or grammatically, that because a word occurs in a sentence with a definite case, that therefore the same sense is to be adopted in every sentence in which it occurs."†

We have thus considered the object to be attained in the process of judicial interpretation, and of the means to be employed. We shall in our next chapter consider a large class of cases, already referred to, where, either from the impossibility of resolving the doubts presented by a statute on the principle of discovering its intent, or from the hardship or peculiarity of the particular matter presented, the judges have been led rather to assume the duties and powers of legislators. We shall inquire how far this exercise of power is legitimate or proper; and under this head we shall examine the subjects of liberal or equitable, and of strict construction.

It is proper here to remark that in considering the subject of this chapter, the mind of the student will frequently be called to the analogies between the construction of statutes and the interpretation of wills. Those analogies are numerous and striking;‡ but on

* Reg. *vs.* Comrs. of Poor Laws Holborn Union, 6 A. & El., 68, 69.

† Vattel, Book 2, ch. 17, p. 285.

‡ I believe that many of the greatest judicial minds have been misled, if I may say so *pace tantorum virorum*, by these analogies. In Gore *vs.*

the other hand, there are many and equally striking discrepancies. Among these latter, the rules governing the evidence to be admitted to explain ambiguities in wills, the arbitrary principles that have been adopted for their construction, and the vague discretion exercised by the courts under the name of the doctrine of *cy près*,* are very prominent. I have thought it inexpedient to enlarge this work to the extent which would have been necessary in order fully to exhibit the relations between these two great classes of subjects.

Brazier, 3 Mass. 523 & 541, Parsons, C. J. says, "Certainly the statute *ought* to have a construction as beneficial to creditors, as a devise to executors of an authority to sell lands for the payment of debts." This seems to assume the power of construing statutes *beneficially*, or in other words, on grounds of equity or policy, a subject which we shall consider in our next chapter.

* For the doctrine of *Cy Près*, see Story, Eq. Jur. § 1169 *et seq.*

The following extracts, *vide supra*, p. 226, notes, are from that part of Vattel's work which relates to *the Interpretation of Treaties*, Liv. II., ch. 17, §§ 262 to 310:

It is necessary to establish rules founded on reason, authorized by the law of nature, capable of diffusing light over what is obscure, of determining what is uncertain, and of frustrating the views of him who acts with duplicity in forming the compact. Let us begin with those that tend particularly to this last end—with those maxims of justice and equity which are calculated to repress fraud, and to prevent the effects of its artifices.

The first general maxim of interpretation is, that *it is not allowable to interpret what has no need of interpretation.* When a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjunctures, in order to restrict or extend it, is but an attempt to elude it.

Those cavillers who dispute the sense of a clear and determinate article, are accustomed to seek their frivolous subterfuges in the pretended intentions and views which they attribute to its author. It would be very often dangerous to enter with them into the discussion of those supposed views, that are not pointed out in the piece itself. The following rule is better calculated to foil such cavillers, and will at once cut short all chicanery. *If he who could and ought to have explained himself clearly and fully has not done it, it is the worse for him;* he cannot be allowed to introduce subsequent restrictions which he has not expressed. This is a maxim of the Roman law: *Pactionem obscuram iis nocere in quorum fuit potestate legem apertius conscribere.* The equity of this rule is glaringly obvious, and its necessity is not less evident.

The third general maxim or principle on the subject of interpretation, is *That neither the one nor the other of the parties interested in the contract has a right to interpret the deed or treaty according to his own fancy.* For if you are at liberty to affix whatever meaning you please to my promise, you will have the power of obliging me to do whatever you choose, contrary to my intentions, and beyond my real engagements; and, on the other hand, if I am allowed to explain my promises as I please, I may render them vain and illusory, by giving them a meaning quite different from that which they presented to you, and in which you must have understood them at the time of your accepting them.

On every occasion when a person could and ought to have made known his intention, we assume for true against him what he has sufficiently declared.

This is an incontestible principle, applied to treaties; for if they are not a vain play of words, the contracting parties ought to express themselves in them with truth, and according to their real intentions.

In the interpretation of a treaty, or of any other deed whatsoever, the question is, to discover what the contracting parties have agreed upon—to determine precisely, on any particular occasion, what has been promised and accepted—that is to say, not only what one of the parties intended to promise, but also what the other must reasonably and candidly have supposed to be promised to him, what has been sufficiently declared to him, and what must have influenced him in his acceptance. Every deed, therefore, *and every treaty, must be interpreted by certain fixed rules calculated to determine its meaning, as naturally understood by the parties concerned at the time when the deed was drawn up and accepted.* This is a fifth principle.

Let us now enter into the particular rules on which the interpretation ought to be formed, in order to be just and fair. Since the sole object of the lawful interpretation of the deed ought to be the discovery of the thoughts of the author or authors of that deed, *whenever we meet with any obscurity in it, we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly.* This is the general rule for all interpretations. It particularly serves to ascertain the meaning of particular expressions whose signification is not sufficiently determinate.

Let us suppose that a husband has bequeathed to his wife all his money. It is required to know whether this expression means only his ready money, or whether it extends also to that which is lent out, and is due on notes and other securities. If the wife is poor, if she was beloved by her husband, if the amount of the ready money be inconsiderable, and the value of the other property greatly superior to that of the money both in specie and in paper,—there is every reason to presume that the husband meant to bequeath her as well the money due to him, as that actually contained in his coffers. On the other hand, if the woman be rich, if the amount of the ready specie be very considerable, and the money due greatly exceeds in value all the other property,—the probability is that the husband meant to bequeath to his wife the ready money only.

The contracting parties are obliged to express themselves in such manner that they mutually understand each other. This is evident from the very nature of the transaction. Those who form the contract concur in the same intentions; they agree in desiring the same thing; and how shall they agree in this instance if they do not perfectly understand each other? Without this, their contract will be no more than a mockery or a snare. If, then, they ought to speak in such a manner as to be understood, it is necessary that they should employ the words in their proper signification—the signification which common usage has affixed to them—and that they annex an established meaning to every term, every expression, they make use of.

From all these incontestable truths, results this rule: *In the interpreta-*

tion of treaties, compacts, and promises, we ought not to deviate from the common use of the language, unless we have very strong reasons for it.

In all human affairs, where absolute certainty is not at hand to point out the way, we must take probability for our guide. In most cases, it is extremely probable that the parties have expressed themselves conformably to the established usage; and such probability ever affords a stronger presumption, which cannot be overruled but by a still stronger presumption to the contrary.

Mahomed, Emperor of the Turks, at the taking of Negropont, having promised a man to spare his head, caused him to be cut in two through the middle of the body. Tamerlane, after having engaged the city of Sebastia, under promise of shedding no blood, caused all the soldiers of the garrison to be buried alive: gross subterfuges which, as Cicero remarks, only serve to aggravate the guilt of the perfidious wretch who has recourse to them. To spare the head of any one, and to shed no blood, are expressions according to common custom, and, especially on such an occasion, manifestly imply to spare the lives of the parties. All these pitiful subtilties are overthrown by this unerring rule: *When we evidently see what is the sense that agrees with the intention of the contracting parties, it is not allowable to wrest their words to a contrary meaning.* The intention, sufficiently known, furnishes the true matter of the convention, what is promised and accepted, demanded and granted.

Is it necessary, in an enlightened age, to say that mental reservation cannot be admitted in treaties? This is manifest, since, by the very nature of the treaty, the parties are bound to express themselves in such manner that they may mutually understand each other. There is scarcely an individual now to be found who would not be ashamed of building upon a mental reservation. What can be the use of such an artifice, unless to lull the opposite party into a false security, under the vain appearance of a contract? It is, then, a real piece of knavery!

Technical terms, or terms peculiar to the arts and sciences, ought commonly to be interpreted according to the definition given of them by masters of the art, or persons versed in the knowledge of the art or science to which they belong. I say commonly, for this rule is not so absolute but that we may and even ought to deviate from it when we have good reasons for such deviation; as, for instance, if it were proved that he who speaks in a treaty, or in any other deed, did not understand the art or science from which he borrowed the term, that he was unacquainted with its import as a technical word, that he employed it in a vulgar acceptation, &c.

If, however, the technical or other terms relate to things that admit of different degrees, we ought not scrupulously to adhere to definitions, but rather to take the terms in a sense agreeable to the context; for a regular definition describes a thing in its most perfect state,—and yet it is certain that we do not always mean it in that state of its utmost perfection whenever we speak of it.

Now, the interpretation should only tend to the discovery of the will of the contracting parties to each term. Would he who had stipulated for the assistance of ten thousand good troops, have any reason to insist upon soldiers of whom the very worst should be comparable to the veterans of Julius Cæsar? And if a prince had promised his ally a good general, must he send him none but a Marlborough or a Turenne?

There are figurative expressions that are become so familiar in the common use of language, that in numberless instances they supply the place of proper terms, so that we ought to take them in a figurative sense, without paying any attention to their original, proper, and direct signification: the subject of the discourse sufficiently indicates the meaning that should be affixed to them. To hatch a plot, to carry fire and sword into a country, are expressions of this sort; and there can scarcely occur an instance where it would not be absurd to take them in their direct and literal sense.

There is not perhaps any language that does not also contain words which signify two or more different things, and phrases which are susceptible of more than one sense. Thence arises ambiguity in discourse. The contracting parties ought carefully to avoid it. Designedly to use it with a view to elude their engagements in the sequel, is downright perfidy, since the faith of treaties obliges the contracting parties to express their intentions clearly. But, if an ambiguous expression has found its way into a deed, it is the part of the interpreter to clear up any doubt thereby occasioned.

The following is the rule that ought to direct the interpretation in this as well as in the preceding case: *We ought always to affix such meaning to the expressions as is most suitable to the subject or matter in question*, For by a true interpretation we endeavor to discover the thoughts of the persons speaking, or of the contracting parties in a treaty. Now, it ought to be presumed that he who has employed a word which is susceptible of many different significations, has taken it in that which agrees with his subject.

Let us illustrate this rule by examples. The word day is understood of the natural day, or the time during which the sun affords us his light, and of the civil day, or the space of twenty-four hours. Where it is used, in a convention, to point out a space of time, the subject itself manifestly shows that the parties mean the civil day or the term of twenty-four hours. It was therefore a pitiful subterfuge, or rather notorious perfidy, in Cleomenes, when, having concluded a truce of some days with the people of Argos, and finding them asleep on the third night in reliance on the faith of the treaty, he killed a part of their number and made the rest prisoners, alleging that the nights were not comprehended in the truce. The word steel may be understood of the metal itself, or of certain instruments made of it; in a convention which stipulates that the enemy shall lay down their steel, it

evidently means their weapons; wherefore, Pericles, in the example related above, gave a fraudulent interpretation to those words, since it was contrary to the nature of the subject manifestly pointed out.

If any of those expressions which are susceptible of different signification occur more than once in the same piece, we cannot make it a rule to take it everywhere in the same signification. For we must, conformably to the preceding rule, take such expression in each article according as the subject requires—*pro substrata materia*, as the masters of the art say. The word day, for instance, has two significations, as we have just observed. If, therefore, it be said in a convention that there shall be a truce of fifty days, on condition that commissioners from both parties shall, during eight successive days, jointly endeavor to adjust the dispute,—the fifty days of the truce are civil days of twenty-four hours; but it would be absurd to understand them in the same sense in the second article, and to pretend that the commissioners should labor eight days and nights without intermission.

Every interpretation that leads to an absurdity ought to be rejected; or, in other words, we should not give to any piece a meaning from which any absurd consequences would follow, but must interpret it in such a manner as to avoid absurdity.

Those fanatic Jews who scrupled to defend themselves when the enemy attacked them on the Sabbath day, gave an absurd interpretation to the fourth commandment. Why did they not also abstain from dressing, walking, and eating? These also are "works," if the term be strained to its utmost rigor.

It is said that a man in England married three wives, in order that he might not be subject to the penalty of the law which forbids marrying two.

It is not to be presumed that sensible persons in treating together, or transacting any other serious business, meant that the result of their proceedings should prove a mere nullity. The interpretation, therefore, which would render a treaty null and inefficient cannot be admitted. We may consider this rule as a branch of the preceding; for it is a kind of absurdity to suppose that the very terms of a deed should reduce it to mean nothing. It ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory. And in this interpretation we proceed.

Thucydides relates that the Athenians, after having promised to retire from the territories of the Bœotians, claimed a right to remain in the country under pretense that the lands actually occupied by their army did not belong to the Bœotians; a ridiculous quibble, since, by giving that sense to the treaty, they reduced it to nothing, or rather to a puerile play upon words.

If he who has expressed himself in an obscure or equivocal manner, has spoken elsewhere more clearly on the same subject, he is the best interpreter of his own words. We ought to interpret his obscure or equivocal expres-

sion in such a manner that may agree with those clear and unequivocal terms which he has elsewhere used, either in the same deed or on some other similar occasion.

Let us suppose, for instance, that two allies have reciprocally promised each other, in case of necessity, the assistance of ten thousand foot soldiers, who are to be supported at the expense of the party that sends them; and that by a posterior treaty they agree that the number of auxiliary troops shall be fifteen thousand, without mentioning their support: the obscurity which remains in this article of the new treaty, is dissipated by the clear and express stipulation contained in the former one.

As the allies do not give any indication that they have changed their minds with respect to the support of the auxiliary troops, we are not to presume any such change; and those fifteen thousand men are to be supported as the ten thousand promised in the first treaty.

It frequently happens that, with a view to conciseness, people express imperfectly, and with some degree of obscurity, things which they suppose to be sufficiently elucidated by the preceding matter, or which they intend to explain in the sequel; and, moreover, words and expressions have a different force, sometimes even a quite different signification, according to the occasion, their connection, and their relation to the words. The connection and train of the discourse is therefore another source of interpretation. *We must consider the whole discourse together, not so much the signification which it may individually admit of, as that which it ought to have from the context and spirit of the discourse.* Such is the maxim of the Roman law, *Incivile est, nisi tota lege perspecta, unâ aliqui particulâ ejus propositâ judicare, vel respondere.*

The very connection and relation of things in question helps also to discover and establish the true sense of a treaty, or of any other piece. The interpretation ought to be made in such a manner, that all the parts may appear consonant to each other—that what follows may agree with what preceded, unless it evidently appear that, by the subsequent clauses, the parties intended to make some alteration in the preceding ones. For it is to be presumed that the authors of a deed had an uniform and steady train of thinking—that they did not aim at inconsistencies and contradictions, but rather that they intended to explain one thing by another—and, in a word, that one and the same spirit reigns throughout the same production or the same treaty. Let us render this more plain by an example.

A treaty of alliance declares, that in case one of the allies be attacked, each of the others shall assist him with a body of ten thousand foot, and supported; and in another article it is said that the ally who is attacked shall be at liberty to demand the promised assistance in cavalry rather than in infantry. Here we see that, in the first article, the allies have determined the quantum of the succor, and its value, that of ten thousand foot; and in the latter article, without appearing to intend any variation in the value or number, they leave the nature of the succors to the choice of the

party who may stand in need of them. If, therefore, the ally who is attacked calls upon the others for cavalry, they will give him, according to the established proportion, an equivalent to ten thousand foot. But it appears that the intention of the latter article was, that the promised succors should in certain cases be augmented—if, for instance, it be said, that in case one of the allies happens to be attacked by an enemy of considerably superior strength, and more powerful in cavalry, succors should be furnished in cavalry and not in infantry. It appears that, in this case, the promised assistance ought to be ten thousand horse.

The reason of the law or of the treaty—that is to say, of the motive which led to the making of it, and the object in contemplation at the time—is the most certain clue to lead us to the discovery of its true meaning; and great attention should be paid to the circumstance, whenever there is question either of explaining an obscure, ambiguous, indeterminate passage in a law or treaty, or of applying it to a particular case. When once we certainly know the reason which alone has determined the will of the person speaking, we ought to interpret and apply his words in a manner suitable to that reason alone.

But we ought to be very certain that we know the true and only reason of the law, the promise, or the treaty. In matters of this nature, it is not allowable to indulge in vague and uncertain conjectures, and to suppose reasons and views where there are none certainly known. If the piece in question is in itself obscure—if, in order to discover its meaning, we have no other resource than the investigation of the author's views or the motives of the deed—we may then have recourse to conjecture; and in default of absolute certainty, adopt, as the true meaning, that which has the greatest degree of probability on its side. But it is a dangerous abuse to go, without necessity, in search of motives and uncertain views, in order to wrest, restrict, or extend the meaning of a deed which is of itself sufficiently clear, and carries no absurdity on the face of it. Such a procedure is a violation of that incontestable maxim—that it is not allowable to interpret what has no need of interpretation. Much less are we allowed—when the author of a piece has in the piece itself declared his reasons and motives—to attribute to him some secret reason which may authorize us in giving an interpretation repugnant to the natural meaning of the expressions. Even though he should have entertained the views which we attribute to him, yet if he has concealed them and announced different ones, it is upon the latter alone that we must build our interpretation, and not upon those which the author has not expressed: we assume as true against him what he has sufficiently declared.

We ought to be the more circumspect in this kind of interpretation, as it frequently happens that several motives concur to determine the will of the party who speaks in a law or in a promise. Perhaps the combined influence of those motives was necessary, in order to determine his will—perhaps each one of them, taken individually, would have been sufficient to

produce that effect. In the former case, if we are perfectly certain that it was only in consideration of several concurrent reasons and motives that the legislature, or the contracting parties, consented to the law or the contract, the interpretation and application ought to be made in a manner agreeable to all those concurrent reasons, and none of them must be overlooked. But in the latter case, when it is evident that each of the reasons which have concurred in determining the will was sufficient to produce that effect, so that the author of the piece in question would, by each of the reasons separately considered, have been induced to form the same determination which he has formed upon all the reasons taken in the aggregate, his words must be so interpreted and applied as to make them accord with each of those reasons taken individually. Suppose a prince has promised certain advantages to all foreign Protestants and artisans who will come and settle in his estates; if that prince is in no want of subjects, but of artisans only, —and if, on the other hand, it appears that he does not choose to have any other subjects than Protestants, his promise must be so interpreted as to relate only to such foreigners as unite those two characters, of Protestants and artisans. But if it is evident that this prince wants to people his country, and that, although he would prefer Protestant subjects to others, he has in particular so great a want of artisans, that he would gladly receive them of whatever religion they be, his words should be taken in a disjunctive sense, so that it will be sufficient to be either a Protestant or an artisan in order to enjoy the promised advantages.

The consideration of the reason of a law or promise not only serves to explain the obscure or ambiguous expressions which occur in the piece, but also to extend or restrict its several provisions independently of the expressions, and in conformity to the intention and views of the legislature, or the contracting parties, rather than to their words. For, according to the remark of Cicero, the language invented to explain the will ought not to hinder its effect. When the sufficient and only reason of a provision, either in a law or a promise, is perfectly certain and well understood, we extend that provision to cases to which the same reason is applicable, although they be not comprised within the signification of the terms. This is what is called interpretation. It is commonly said that we ought to adhere rather to the spirit than to the letter. Thus the Mohamedans justly extend the prohibition of wine in the Koran to all intoxicating liquors: that dangerous quality being the only reason that could induce their legislator to prohibit the use of wine.

But we should here observe the caution above recommended, and even still greater, since the question relates to an application in no wise authorized by the terms of the deed. *We ought to be thoroughly convinced that we know the true and only reason of the law or the promise, and that the author has taken it in the same latitude which must be given to it in order to make it reach the case to which we mean to extend the law or promise in question.*

The rule just laid down serves also to defeat the pretexts and pitiful evasions of those who endeavor to elude laws or treaties. Good faith adheres to the intention; fraud insists on the terms, when it thinks that they can furnish a cloak for its prevarications. The isle of Pharos, near Alexandria, was, with other lands, tributary to the Rhodians. The latter having sent collectors to levy the tribute, the queen of Egypt amused them for some time at her court, using in the meanwhile every possible exertion to join Pharos to the mainland, by means of moles; after which she laughed at the Rhodians, and sent them a message, intimating that it was very unreasonable in them to pretend to levy on the main land, a tribute which they had no title to demand except from the islands. There existed a law which forbade the Corinthians to give vessels to the Athenians. They sold them a number at five drachmæ each. The following was an expedient worthy of Tiberius: custom not permitting him to cause a virgin to be strangled, he ordered the executioner first to deflower the young daughter of Sejanus, and then to strangle her.

Restrictive interpretation, which is the reverse of extensive interpretation, is founded on the same principle. As we extend a clause to those cases which, though not comprised within the meaning of the terms, are nevertheless comprised in the intention of that clause, and included in the reasons that produced it, in like manner we restrict a law or promise, contrary to the literal signification of the terms—our judgment being directed by the reason of that law or that promise; that is to say, if a case occurs to which the well-known reason of a law or promise is utterly inapplicable, that the case ought to be excepted, although, if we were barely to consider the meaning of the terms, it should seem to fall within the purview of the law or promise.

It is impossible to think of every thing, to foresee every thing, and to express every thing; it is sufficient to enounce certain things in such a manner as to make known our thoughts concerning things of which we do not speak; and, as Seneca, the rhetorician, says, there are exceptions so clear, that it is unnecessary to express them. The law condemns to suffer death whoever strikes his father: shall we punish him who has shaken and struck his father, to recover him from a lethargic stupor? Shall we punish a young child, or a man in a delirium, who has lifted his hand against the author of his life? In the former case, the reason of the law does not hold good; and to the two latter, it is not applicable.

We have recourse to restrictive interpretation in order to avoid falling into absurdities. A man bequeaths his house to one, and to another his garden, the only entrance into which is through the house. It would be absurd to suppose that he had bequeathed to the latter a garden into which he could not enter; we must therefore restrict the pure and simple donation of the house, and understand that it was given only upon the condition of giving a passage to the garden.

When a case arises in which it would be too severe and too prejudicial

to any one to interpret a law or a promise according to the rigor of the terms, a restrictive interpretation is then also used, and we except the case in question agreeably to the interpretation of the legislature, or of him who made the promise; for the legislature intends only what is just and equitable; and, in contracts, no one can enter into such engagements in favor of another as shall essentially supersede the duty he owes to himself.

Thus, towards the end of the last century, Victor Amadeus, Duke of Savoy, found himself under the necessity of separating from his allies, and of receiving law from France, to avoid losing his states. The king, his son, would have had good reasons to justify a separate peace in the year 1745, but, upheld by his courage, and animated by just views of his true interest, he embraced the generous resolution to struggle against an extremity which might have dispensed with his persisting in his engagements.

We have said above that we should take the expressions in the sense that agrees with the subject or the matter. Restrictive interpretation is also directed by this rule. If the subject or the matter treated of will not allow that the terms of a clause should be taken in their full extent, we should limit the sense according as the subject requires. Let us suppose that the custom of a particular country confines the entail of fiefs to the male line, properly so called: if an act of enfeoffment in that country declares that the fief is given to a person for himself and his male descendants, the sense of these last words must be restricted to the males descending from males, for the subject will not admit of our understanding them also of males who are the issue of females, though they are reckoned among the male descendants of the first possessor.

The following question has been proposed and debated:—Whether promises include a tacit condition of the state of affairs continuing the same; or, whether a change happening in the state of affairs can create an exception to the promise, and even render it void? The principle derived from the reason of the promise must solve the question. If it be certain and manifest that the reason of the consideration of the present state of things was one of the reasons which occasioned the promise—that the promise was made in consideration or consequence of that state of things—it depends on the preservation of things in the same state. This is evident, since the promise was made only upon that supposition. When, therefore, that state of things which was essential to the promise, and without which it certainly would not have been made, happens to be changed, the promise falls to the ground when its foundation fails. And in particular cases where things cease for a time to be in the state that has produced or concurred to produce the promise, an exception is to be made to it. An elective prince, being without issue, has promised to an ally that he will procure his appointment to the succession. He has a son born. Who can doubt that the promise is void by this event?

But we ought to be very cautious and moderate in the application of the present rule. It would be a shameful perversion of it to take advantage of

every change that happens in the state of affairs, in order to disengage ourselves from our promises. Were such conduct adopted, there could be no dependence placed on any promise whatever. That state of things alone in consideration of which the promise was made, is essential to the promise, and it is only by a change in that state that the effect of the promise can be lawfully prevented or suspended. Such is the sense in which we are to understand that maxim of the civilians, *Conventio omnis intelligitur rebus sic stantibus.*

What we say of promises must also be understood as extending to laws. A law which relates to a certain situation of affairs can only take place in that situation. We ought to reason in the same manner with respect to the emperor, turned back on being informed of the death of Galba.

In unforeseen cases, that is to say, when the state of things happens to be such as the author of a deed has not foreseen, and could not have thought of, we should rather be guided by his intention than than by his words, and interpret the instrument as he himself would interpret it if he were on the spot, or conformably to what he would have done if he had foreseen the circumstances which are at present known. This rule is of great use to judges, and to all those in society who are appointed to carry into effect the testamentary regulations of the citizens. A father appoints by will a guardian for his children who are under age. After his death the magistrate finds that the guardian he has nominated is an extravagant profligate, without property or conduct; he therefore dismisses him and appoints another, according to the Roman laws, adhering to the intention of the testator and not to his words; for it is but reasonable to suppose —and we are to presume it as a fact—that the father never intended to give his children a guardian who should ruin them, and that he would have nominated another had he known the vices of the person he appointed.

When the things which constitute the reason of a law or convention are considered not as actually existing, but simply as possible,—or in other words, when the fear of an event is the reason of a law or a promise,—no other cases can be excepted from it than those in which it can be proved to demonstration that the event is really impossible. The bare possibility of the event is sufficient to preclude all exceptions. If, for instance, a treaty declares that no army or fleet shall be conducted to a certain place, it will not be allowable to conduct thither an army or fleet, under pretence that no harm is intended by such a step; for the object of a clause of this nature is not only to prevent a real evil, but also to keep all danger at a distance, and to avoid even the slightest subject of uneasiness.

We have already observed, that men's ideas and language are not always perfectly determinate. There is, doubtless, no language in which there do not occur expressions, words, or entire phrases, susceptible of a more or less extensive signification. Many a word is equally applicable to the genus or the species. The word fault implies intentional guilt or simple error. Several species of animals have but one name common to

both sexes, as partridge, lark, sparrow, &c. When we speak of horses merely with a view to the services they render to mankind, mares also are comprehended under that name. In technical language, a word has sometimes a more or sometimes a less extensive sense than in vulgar use. The word "death," among civilians, signifies not only natural death, but also civil death. *Verbum*, in the Latin grammar, signifies only that part of speech called the verb; but in common use, it signifies any word in general.

But it is to this head that the famous distinction between things of a favorable, and those of an odious nature particularly belongs.

When the provisions of a law or a convention are plain, clear, determinate, and attended with no doubt or difficulty in the application, there is no room for any interpretation or comment. The precise point of the will of the legislature, or the contracting parties, is what we must adhere to. But if their expressions are indeterminate, vague, or susceptible of a more or less extensive sense—if that precise point of their intention cannot, in the particular case in question, be discovered and fixed by the other rules of interpretation—we must presume it, according to the laws of reason and equity; and, for this purpose, it is necessary to pay attention to the nature of things to which the question relates. There are certain things of which equity admits the extension rather than the restriction: that is to say, that, with respect to those things, the precise point of the will not being discovered in the expressions of the law or the contract, it is safer, and more consistent with equity, to suppose and fix that point in the more extensive than in the more limited sense of the terms,—to give a latitude to the meaning of the expressions, than to restrict it. These are the things called favorable. Odious things, on the other hand, are those of which the restriction tends more certainly to equity than the extension. Let us figure to ourselves the intention or the will of the legislature, or the contracting parties, as a fixed point. At that point precisely should we stop, if it be clearly known; if uncertain, we should, at least, endeavor to approach it. In things favorable, it is better to pass beyond that point than not to reach it; in things odious, it is better not to reach it than to pass beyond it.

It will not now be difficult to show, in general, what things are favorable and what are odious. In the first place, every thing that tends to the common advantage in conventions, or that has a tendency to place the contracting parties on a footing of equality, is favorable. The voice of equity, and the general rule of contracts, require that the conditions between the parties should be equal.

For the same reason, every thing that is not for the common advantage —every thing that tends to destroy the equality of a contract—every thing that burthens only one of the parties, or that burthens one more than the other, is odious. In a treaty of strict friendship, union, and alliance, every thing which, without being burthensome to any of the parties, tends to the common advantage of the confederacy, and to draw the bonds of union closer, is favorable.

In unequal treaties, and especially in unequal alliances, all the clauses of inequality, and principally those that burthen the inferior ally, are odious. Upon this principle,—that we ought, in case of doubt, to extend what leads to equality, and restrict what destroys it,—is founded that well known rule, *Incommoda vitantis melior quam commoda petentis est causa:* The party who endeavors to avoid a loss, has a better cause to support than he who aims at obtaining an advantage.

All those things which, without proving too burthensome to any one in particular, are useful and salutary to human society, are to be ranked in the class of favorable things; for a nation is already under a natural obligation with respect to things of this nature.

On the other hand, let us consider as odious every thing that is, in its own nature, rather injurious than useful to mankind. Those things which have a tendency to promote peace are favorable; those that lead to war are odious.

Every thing that contains a penalty is odious. With respect to the laws, it is universally agreed that, in case of doubt, the judge ought to incline to the merciful side, and that it is indisputably better to suffer a guilty person to escape. Penal clauses in treaties lay a burthen upon one of the parties: they are, therefore, odious.

Whatever tends to render a deed void and ineffectual, either in the whole or in part, and consequently whatever introduces any change in things already agreed upon, is odious; for men treat together with a view to their common benefit; and if I enjoy any particular advantage, acquired by a lawful contract, I must not be deprived of it except by my own renunciation.

Whatever tends to change the present state of things, is also to be ranked in the class of odious things; for the proprietor cannot be deprived of his right except so far, precisely, as he relinquishes it on his part; and in case of doubt, the presumption is in favor of the possessor.

Finally, there are things which are at once of a favorable or odious nature, according to the point of view in which they are considered. Whatever derogates from treaties, or changes the state of things, is odious; but if it is conducive to peace, it is, in that particular, favorable. A degree of odium always attaches to penalties; they may, however be viewed in a favorable light, on those occasions when they are particularly necessary for the safety of society.

When there is question of interpreting things of this nature, we ought to consider whether what is favorable in them greatly exceeds what appears odious—whether the advantage that arises from their being extended to the utmost latitude of which the terms are susceptible, will materially outweigh the severe and odious circumstances attending them; and if that is the case they are to be ranked in the class of favorable things. Thus, an inconsiderable change in the state of things, or in conventions, is reckoned as nothing when it procures the inestimable blessings of peace. In the same manner, penal laws may be interpreted in their most extensive meaning, on

critical occasions, when such an instance of severity becomes necessary to the safety of the state.

1. When the question relates to things favorable, we ought to give the terms the utmost latitude of which they are susceptible according to the common usage of the language; and if a term has more than one signification, the most extensive meaning is to be preferred; for equity ought to be the rule of conduct with all mankind, wherever a perfect right is not exactly determined and known in its precise extent. When the legislature or the contracting parties have not expressed their will in terms that are precise and perfectly determinate, it is to be presumed that they intended what is most equitable.

Thus, Cicero, in pleading the cause of Cæcina, justly maintains that the interlocutory decree ordaining "that the person expelled from his inheritance be reinstated in the possession," should be understood as extending to the man who has been forcibly prevented from entering upon it; and the Digest decides in the same manner.

In questions relating to favorable things, all terms of art are to be interpreted in the fullest latitude of which they are susceptible not only in common usage, but also as technical terms, if the person speaking understands the art to which those terms belong, or conducts himself by the advice of men who understand that art.

But we ought not, from the single reason that a thing is favorable, to take the terms in an improper signification: this is not allowable, except when necessary in order to avoid absurdity, injustice, or the nullity of the instrument, as is practiced on every subject; for we ought to take the terms of a deed in their proper sense, conformably to their custom, unless we have very strong reasons for deviating from it (§ 271).

Though a thing appears favorable when viewed in one particular light, yet where the proper meaning of the terms would if taken in its utmost latitude lead to absurdity or injustice, their signification must be restricted according to the rules given above (§ 293, 294). For here, in this particular case, the thing becomes of a mixed nature, and even such as ought to be ranked in the class of odious things.

For the same reason, although neither absurdity nor injustice results from the proper meaning of the terms, if nevertheless manifest equity or a great common advantage requires their restriction, we ought to adhere to the most limited sense which the proper signification will admit, even in an affair that appears favorable in its own nature—because here also the thing is of a mixed kind, and ought, in this particular case to be esteemed odious.

Since odious things are those whose restriction tends more certainly to equity than their extension, and since we ought to pursue that line which is most conformable to equity, when the will of the legislature or of the contracting parties is not exactly determined and precisely known,—we should, when there is question of odious things, interpret the terms in the most limited sense; we may even to a certain degree adopt a figurative meaning,

in order to avert the oppressive consequences of the proper and literal sense, or any thing of an odious nature which it would involve; for we are to favor equity, and do away every thing odious, so far as that can be accomplished without going in direct opposition to the tenor of the instrument or visibly wresting the text.

Now, neither the limited nor even the figurative sense offers any violence to the text. It is said in a treaty that one of the allies shall assist the other with a certain number of troops, at his own expense, and that the latter shall furnish the same number of auxiliary troops at the expense of the party to whom they are sent: there is something odious in the engagement of the former ally, since he is subject to a greater burden than the other; but the terms being clear and express, there is no room for any restrictive interpretation. But if it were stipulated in this treaty, that one of the allies shall furnish a body of ten thousand men, and the other only of five thousand, without mentioning the expense, it ought to be understood that the auxiliary troops shall be supported at the expense of the ally to whose assistance they are sent; this interpretation being necessary, in order that the inequality between the contracting powers may not be carried too far.

Let us conclude this subject of interpretation with what relates to the collision or opposition of laws or treaties. We do not here speak of the collision of a treaty with the law of nature: the latter is unquestionably paramount. There is a collision or opposition between two laws, two promises, or two treaties, when a case occurs where it is impossible to fulfill both at the same time, though otherwise the laws or treaties in question are not contradictory, and may be both fulfilled under different circumstances.

They are considered as contradictory in this particular case, and it is required to show which deserves the preference, or to which an exception ought to be made on the occasion. In order to guard against all mistakes in the business, and to make the exception conformably to reason and justice, we should observe the following rules:—

1. In all cases where what is barely permitted is found incompatible with what is positively prescribed, the latter claims a preference; for the mere permission imposes no obligation to do or not to do. What is permitted is left to our own option: we are at liberty either to do or to forbear to do it. But we have not the same liberty with respect to what is prescribed: we are obliged to do that. Nor can the bare permission in the former case interfere with the discharge of our obligation in the matter; but, on the contrary, that which was before permitted in general ceases to be so in this particular instance, where we cannot take advantage of the permission without violating a positive duty.

2. In the same manner, the law or treaty which permits ought to give way to the law or treaty which forbids; for the prohibition must be obeyed, and what was, in its own nature or in general, permitted, must not be attempted when it cannot be done without contravening a prohibition; the permission, in that case, ceases to be available.

3. All circumstances being otherwise equal, the law or the treaty which ordains gives way to the law or the treaty which forbids. I say "all circumstances being otherwise equal," for many other reasons may occur which will authorize the exception being made to the prohibitory law or treaty. The rules are general: each relates to an abstract idea, and shows what follows from the idea without derogation to the other rules. Upon this footing it is evident that, in general, if we cannot obey an injunctive law without violating a prohibitory one, we should abstain from fulfilling the former, for the prohibition is absolute in itself, whereas every precept, every injunction, is in its own nature conditional, and supposes the power, or a favorable opportunity, of doing what is prescribed. Now, when that cannot be accomplished without contravening a prohibition, the opportunity is wanting, and this collision of laws produces a moral impossibility of acting; for what is prescribed in general, is no longer so in the case where it cannot be done without committing an action that is forbidden.

Our meaning will be better explained by an example. It is expressly forbidden, for reasons to me known, to pass through a certain place under any pretense whatsoever. I am ordered to carry a message. I find every other avenue shut; I therefore turn back, rather than take any message over that ground, which is so strictly forbidden. But if the prohibition to pass be only a general one, with a view to prevent any injury being done to the productions of the soil, it is easy for me to judge, that the orders with which I am charged ought to form an exception.

4. The dates of laws or treaties furnish new reason for establishing the exception in cases of collision. If the collision happen between two affirmative laws or two affirmative treaties, concluded between the same persons or the same states, that which is of a more recent date claims preference over the older one; for it is evident that, since both laws or both treaties have emanated from the same power, the subsequent act was capable of derogating from the former. But still, this is upon the supposition of circumstances being in other respects equal. If there be a collision between two treaties made with two different powers, the more ancient claims the preference; for no engagement of a contrary tenor could be contracted in the subsequent treaty. And if this latter be found, in any latter case, incompatible with that of more ancient date, its execution is considered as impossible, because the person promising had not the power of acting contrary to his antecedent engagements.

5. Of two laws or two conventions, we ought (all other circumstances being equal) to prefer the one which is less general, and which approaches nearer to the point in question; because special matter admits of fewer exceptions than that which is general. It is enjoined with greater precision, and appears to have been more pointedly intended. Let us make use of the following example from Puffendorf. One law forbids us to appear in public with arms on on holidays; another law commands us to turn out under arms, and repair to our posts as soon as we hear the sound of the

alarm bell. The bell is rung on a holiday. In such case we must obey the latter of the two laws, which creates an exception to the former.

6. What will not admit of delay is to be preferred to what may be done at any other time; for this is the mode to reconcile every thing and fulfill both obligations. Whereas, if we gave the preference to the one which might be fulfilled at another time, we would unnecessarily reduce ourselves to the alternative of failing in our observance of the other.

7. When two duties stand in competition, that one which is the more considerable, the more praiseworthy, and productive of the greater utility, is entitled to the preference. This rule has no need of proof. But as it relates to duties that are equally in our power, and, as it were, at our option, we should carefully guard against the erroneous application of it to two duties which do not really stand in competition, but of which the one absolutely precludes the other. For instance, it is a more praiseworthy deed to defend one nation against an unjust aggressor, than to assist another in an offensive war. But if the latter be the more ancient ally, we are not at liberty to refuse her our assistance and give it to the former, for we stand pre-engaged. There is not, strictly speaking, any competition between these two duties—they do not lie at our option; the prior engagement renders the second duty, for the present, impracticable. However, if there were question of preserving a new ally from certain ruin, and that the more ancient ally were not reduced to the same extremity, this would be the case to which the foregoing rule should be applied.

As to what relates to laws in particular, the preference is undoubtedly to be given to the more important and necessary ones. This is the grand rule to be observed whenever they are found to clash with each other. It is the rule which claims the greatest attention, and is therefore placed by Cicero at the head of all the rules he lays down on the subject. It is counteracting the general aim of the legislature, and the great end of the laws, to neglect one of great importance, under pretense of observing another which is less necessary and of inferior consequence. In fact, such conduct is criminal; for a lesser good, if it exclude a greater, assumes the nature of an evil.

8. If we cannot acquit ourselves, at the same time, of two things promised to the same person, it rests with him to choose which of the two we are to perform; for he may dispense with the other on this particular occasion, in which case there will no longer be any collision of duties. But if we cannot obtain a knowledge of his will, we are to presume that the more important one is his choice, and we should, of course, give that preference. And, in case of doubt, we should perform the one to which we are the more strongly bound; it being presumable that he chose to bind us more strongly to that in which he is more deeply interested.

9. Since the stronger obligation claims a preference over the weaker, if a treaty that has been confirmed by an oath happens to clash with another treaty that has not been sworn to—all circumstances being in other

respects equal—the preference is to be given to the former; because the oath adds a new force to the obligation. But as it makes no change in the nature of treaties, it cannot, for instance, entitle a new ally to a preference over a more ancient ally whose treaty has not been confirmed by oath.

For the same reason, and all circumstances being in other respects equal, what is enjoined under a penalty, claims a preference over that which is not enforced by one, and what is enjoined under a greater penalty, over that which is enforced by a lesser; for the penal sanction and convention gave additional force to the obligation. They prove that the object in question was more earnestly desired, and the more so in proportion as the penalty is more or less severe.

DOMAT'S RULES.

The following extracts are taken, and very freely translated, from Domat's Loix Civiles, Liv. Prel. des Regles du Droit en Général, tit. I. sec. II. In order to understand them, it is necessary to bear in mind the author's distinction between natural and arbitrary laws. He says, Liv. Prel. lit. I. Sect. I. Sec. 2,—"Laws or rules are of two sorts; the one, laws of natural right or equity, and the other positive, human, or arbitrary laws: thus the rule that a gift may be revoked on the ground of the ingratitude of the donee, is a rule of natural law; the rule that gifts *inter vivos* must be recorded, is a rule of positive or arbitrary law." Without undertaking to vindicate or to criticize this classification, we proceed to Domat's rules for the application and interpretation of laws. The illustrations are in some cases omitted, both because they are not always clearly intelligible to modern jurisconsults, and because the mind will very readily suggest others drawn from our own law.

Sec. 1. All laws, whether natural or arbitrary, are intended to produce results conformable to that general idea of justice in which they originate. Consequently, their application must be governed by the demands of this general spirit of justice; or in regard to natural laws by equity, and in regard to positive or arbitrary laws by the intention of the legislator. In this distinction and discrimination, the science of law mainly consists.

Sec. 2. If a rule of natural justice is applied to a case that it apparently embraces, and the result is contrary to equity, we are bound to conclude that the rule is improperly applied, and that the case should fall under some other law.

Sec. 3. If an arbitrary or positive rule is applied to a case which it apparently embraces, and the result is contrary to the intent of the legislator, the rule should not be applied to the case.

Sec. 4. But we must not consider as unjust and repugnant to equity, or to the legislator's intention, those decisions which appear rigorous and severe, where it is evident that rigor or severity is the essential characteristic of the law in question, and that it could not be mitigated without impairing its effect; so in regard to the formalities prescribed relating to the execution

of wills, the severity and arbitrary character of the rule which annuls all wills where these formalities are neglected, is in those cases an indispensable part of the law.

Sec. 5. If, however, the severity of the law is not a necessary and indispensable part of it, but it can be carried into effect by a milder interpretation and one more conformable to equity and natural justice, then this is to be preferred to the strict and harsh construction.

Sec. 6. It follows from the preceding rules, that we can not declare as a fixed and invariable rule, either that the strictness of law is to be followed against a more equitable interpretation, or the reverse. Rigor becomes injustice when the law will bear an equitable interpretation; rigor should be practiced when an equitable interpretation would defeat the law. Thus rigor or strictness is either an unjust and odious severity, contrary to the spirit of the law, or it furnishes a just but inflexible rule. These two ideas are never to be confounded; and the strict or the equitable construction ought to be adhered to according to the rules here given.

Sec. 7. It is never a matter of indifference whether we apply a strict or a liberal construction. In each case we are to inquire whether the rule in question calls for a strict interpretation or will bear a liberal one, and decide accordingly.

Sec. 8. Although the strictness of law appears at first sight opposed to equity, it is nevertheless true that where it ought to be applied it is only on account of its inherent justice. What is equitable cannot be contrary to justice; and so what is just cannot be contrary to equity.

Sec. 9. The obscurities, ambiguities, and other defects of expression, which may render the meaning of a law doubtful, and all other difficulties in its construction and application, should be resolved by the natural sense of the language, according to the nature of the subject, so as if possible at once to conform to the intent of the legislator and to equity. This is to be arrived at by the different consideration of the nature of the law, its object, its connection with other laws, the exceptions to which it may be subject, and other similar considerations.

Sec. 10. To arrive at the meaning of a law, we are to weigh its terms and examine its preamble, if there be one, in order to judge of its provisions by its object and the whole context, and not to limit its interpretation to what would appear different from its intention, either in a single portion of the law, or in a single defective expression. We must prefer the evident meaning of the whole law, to the inconsistent meaning of a defective expression.

Sec. 11. If in any law, we find the omission of something essential to it, or which is a necessary result of its provisions and requisite to give the law its full effect, we may supply what is wanting but not expressed, and extend the law to what it was manifestly intended to embrace but in its terms does not include.

Sec. 12. If the language of a law clearly expresses its meaning and intention, that intention must be carried out; but if the true sense of the law

cannot be arrived at by the interpretation which may be made according to the rules here given, or the meaning be clear and inconvenience appear to result, then we must have resource to the sovereign to interpret, to declare, or modify the law.

SEC. 13. If the provisions of a law are clear, but its object not understood, and in its application inconveniences appear to result, we are bound to presume that the law is useful and just; and its meaning and its authority are to be preferred to mere abstract reasoning. Otherwise many useful and well-contrived rules would be overturned on grounds of alleged equity or ingenious argument.

SEC. 14. Laws which favor what public utility, humanity, religion, freedom of intercourse (*liberté des conventions*), and other similar interests regard favorably, as well as those intended to favor particular individuals, ought to be interpreted with all the liberality to which these interests are justly entitled, in an equitable point of view, and ought not to be interpreted severely, nor be applied in a manner calculated to prejudice the persons intended to be favored.

SEC. 15. Laws which restrain natural liberty, as those which prohibit what is not of itself illicit, or which derogate otherwise from common right, laws fixing the punishment of crimes and offenses, or penalties in matters of a civil nature which prescribe formalities that seem severe, those which permit parents to disinherit children, and others of a similar character,—ought to be so interpreted as not to extend their provisions to cases which they do not embrace; and, on the contrary, they should receive all practical mitigation of equity and humanity.

SEC. 16. If any law or custom is established for particular reasons, contrary to other rules or to common right, it ought not to be applied except to those cases for which it is expressly intended.

SEC. 17. The grants and gifts of sovereigns are to be favorably regarded, and to have that extension to which they are entitled from the natural presumption of princely liberality, provided, however, that they are not to be so liberally construed as to injure other individuals.

SEC. 18. If laws of doubtful meaning be connected with or related to other laws which throw any light on their purport, the interpretation thus derived is the one that should be adopted.

SEC. 19. If the doubts or difficulties in regard to the interpretation of a law or a custom are solved by an old usage which has fixed the meanings, and which is supported by a uniform series of adjudications, we should adhere to the usage, which is the best interpreter of laws.

SEC. 20. In case any provinces or districts are without certain rules to decide difficulties in regard to matters which are there governed by usage, if these difficulties are not determined by natural justice, or by written law, but depend on custom and usage, we ought to adopt the principles which result from the customs or usages of the province or district.

SEC. 21. All laws necessarily bear with them all the powers or incidents

necessary to fully carry out their intention. Thus, as the law permits boys to contract marriage at the age of 14, and girls at the age of 12, it necessarily results from this law that those who marry can, although infants and not of full age, bind themselves in regard to the settlement, community of goods, and the like.

SEC. 22. In laws which confer power, the greater authority implies the less. Thus, those who have the right to give their property, have with still greater reason, the right to sell it.

SEC. 23. In laws which prohibit acts, the lesser prohibition implies the greater. Thus, spendthrifts who are forbidden to manage or control their property, *a fortiori* cannot alienate or transfer it.

SEC. 24. The implications spoken in of the two last sections, are to be restricted to subjects of the same nature as those to which the law applies, or to which it ought to apply, according to the preceding rules. Thus, the liberty that a minor adult enjoys to make *a donatio causa mortis* should not be extended so as to sustain a gift *inter vivos*.

SEC. 25. If a law grants an amnesty, or pardon for past offenses, it is to be understood as prohibiting similar acts for the future. *Cum lex in preteritum quid indulget, in futurum vetat.*—*L.* 22, *Ff. de Legibus.*

SEC. 26. If a right be vested in a person by reason of a law, it is of no consequence whether the person so vested be cognizant or ignorant of the law, or whether he know or be ignorant of the fact on which the vesting of the right depends. Thus, the son is heir to his father, though he be both ignorant of the law of succession and of his father's death.

SEC. 27. Person scompetent in law to act, may waive any benefit or privilege created by law in their favor. Thus, one of full years may renounce an inheritance devolved on him by law. But this liberty of renunciation or waiver does not extend to the rights of third persons, nor to those cases in which the waiver would be contrary to equity, or to good morals, or to any other law.

SEC. 28. The rules of law cannot be modified by any private contract or agr eement. *Jus publicum privatorum pactis mutari non potest.*

Professor LIEBER, in his work on Legal and Political Hermeneutics gives the following rules for interpretation and construction. I have, *supra*, p. 226, referred to the distinctions drawn by him between these two operations of the mind, and the classifications which he adopts.

1. A sentence, or form of words, can have but one true meaning.

2. There can be no sound interpretation without good faith and common sense.

3. Words are, therefore, to be taken as the utterer probably meant them to be taken. In doubtful cases, therefore, we take the customary signification, rather than the grammatical or classical; the technical, rather than the etymological—*verba artis ex arte*—tropes as tropes. In general

the words are taken in that meaning which agrees most with the character of both the text and the utterer.

4. The particular and inferior cannot defeat the general and superior.

5. The exception is founded upon the superior.

6. That which is probable, fair, and customary, is preferable to the improbable, unfair, and unusual.

7. We follow special rules, given by proper authority.

8. We endeavor to derive assistance from that which is more near, before proceeding to that which is less so.

9. Interpretation is not the object, but a means; hence superior considerations may exist.—*Lieber's Hermeneutics*, p. 120.

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XVII. Recapitulating the general principles of construction, we find the following to be most essential points:—

1. All principles of interpretation, if at all applicable to construction, are valid for the latter.

2. The main guide for construction is analogy, or rather, reasoning by parallelism.

3. The aim and object of an instrument, law, &c., are essential, if distinctly known, in construing them.

4. So also may be the causes of a law.

5. No text imposing obligations is understood to demand impossible things.

6. Privileges, or favors, are to be construed so as to be least injurious to the non-privileged, or unfavored.

7. The more the text partakes of the nature of a compact, or solemn agreement, the closer ought to be its construction.

8. A text imposing a performance expresses a minimum, if the performance is a sacrifice to the performer,—the maximum, if it involves a sacrifice or sufferance on the side of the other party.

9. The construction ought to harmonize with the substance and general spirit of the text.

10. The effects which would result from one or the other construction, may guide us in deciding which construction we ought to adopt.

11. The older a law, or any text containing regulations of our actions, though given long ago, the more extensive the construction must be in certain cases.

12. Yet nothing contributes more to the substantial protection of individual liberty, than a habitually close interpretation and construction.

13. It is important to ascertain whether words were used in a definite, absolute, and circumscribed meaning, or in a generic, relative, or expansive character.

14. Let the weak have the benefit of a doubt, without defeating the general object of a law. Let mercy prevail, if there be real doubt.

15. A consideration of the entire text, or discourse, is necessary, in order to construe fairly and faithfully.

16. Above all, be faithful in construction. Construction is the building up with given elements, not the forcing of extraneous matter into a text."—*Lieber's Hermeneutics*, p. 144.

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The author subsequently gives, pp. 167–172, the following as the most general rules and principles applicable to all interpretation:—

1. The true meaning of words can be but one.

2. Honest, faithful, *bona-fide* interpretation is all important; common sense must guide us.

3. Words are to be taken according to their customary, not in their original or classical signification.

4. The signification of a word, or the meaning of a sentence, when dubious, is to be gathered from the context, or discovered by analogy, or fair induction. Yet the same word does not always mean the same in the same discourse or text. This would, in fact, militate with the important rule, that we are to take words in their natural sense, according to custom and their connection.

5. Words are always understood as having regard to the subject-matter.

6. The causes which led to the enactment of a law are guides to us. If one interpretation would lead to absurdity, the other not, we must adopt the latter. So, that interpretation which leads to the more complete effect which the legislature had in view, is preferable to another.

For the above rules, see Blackstone and Puffendorf. As to rule 6, sec Dig. L. 50, Tit. 17, 67.

7. Two chief objects of all government, are peace and security; the state can never be understood to will any thing immoral, so long as there is any doubt. Laws cannot, therefore, be construed as meaning any thing against the one or the other. Security and morality are the supreme law of every land, whether this be expressly acknowledged or not.

8. The general and superior prevails over the specific and inferior; no law, therefore, can be construed contrary to the fundamental law. If it admits of another construction, this must be adopted.

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9. A law contrary to the fundamental or primary law, may at any time be declared so, though it has already been acted upon; for that which was wrong in the beginning, cannot become valid in the course of time. Dig. L. 50, Tit. 17, 24.

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10. If, therefore, the law admits of two interpretations, that is to be adopted which is agreeable to the fundamental or primary law, though the other may have been adopted previously.

11. Custom of the country, where the law was made, supplies the deficiency of words.

12. In dubious cases, the fairer interpretation is to be adopted. "Everywhere, especially in law, equity is to be considered."—Dig. L. 50, Tit. 17 90, 192, 200.

13. That which is probable, or customary, is preferable to that which is less so, wherever obscurity exists.

14. If two laws conflict with each other, that must yield the effect of which is less important; or, that is to be adopted by the adoption of which we approach nearest to the probable or general intention of the legislator. Specific rules, adopted for the protection of private individuals, must be followed.

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15. The more general the character of the law is, the more we ought to try strictly to adhere to the precise expression. Without it, it would be a wavering instead of a stable rule, and we must presume that the words have been the better weighed. Many considerations, however, may exist, which would oblige us to follow a different course; *e. g.*, the cruelty of a law, its antiquity, and consequent unfitness.

16. If any doubt exists in penal laws or rules, they ought to be construed in favor of the accused; of course, without injury to any one else.

17. In cases of doubt between the authority and an individual, the benefit of the doubt, all other reasons being equal, ought to be given to the individual, not to the authority,—for the State makes the laws, and the authority has the power; yet it is subversive of all good government, peace, and civil morality, if subtlety is allowed to defeat the wise object of the law, or if a morbid partiality for an evil-doer guides the interpreter.

18. The weak (hence the individual arraigned by the State) ought to have the benefit of doubt; doubt ought to be construed in mercy, not in severity. A law may be rendered milder, but not more severe.—*Lieber's Hermeneutics*, p. 172.

Copious extracts from the writers on the civil law in regard to the subject of this note, will be found in the 12th chapter of Mr. Smith's work on Statutes.

Mr. Robert Phillimore, in his very able and useful work upon International Law, devotes a chapter (part v., Chapter viii.) to the subject of the Interpretation of Treaties. He arranges the principles and rules appertaining to this subject, under three heads.

Authentic Interpretation; or, the exposition supplied by the lawgiver himself.

Usual; or, that founded on usage and precedent.

Doctrinal; or, that founded on a scientific exposition of the terms of the instrument—this being subdivided into, 1. Grammatical, and 2. Logical Exposition.

The learned and sagacious SAVIGNY, in his recent work on Contracts, remarks that, with respect to agreements, the principles of interpretation to be found in the Civil Law—which are substantially those of Vattel and Domat—are of a very general and superficial character, and scarcely afford any aid, beyond that which an intelligent and dispassionate consideration of each particular case would furnish. His words are as follows:—

"Für die Auslegung nun in Anwendung, auf die meisten Fälle dieser letzten lassen sich durch greifende Grundsätze der Auslegung nicht wohl aufstellen. Auch sind die meisten Aesserungen der Römischen Juristen herüber von einem sehr allgemeinen Character, und ziemlich auf der Oberfläche liegend, so dasz sie in zweifelhaften Fällen nicht leicht weiter führen werden, als wohin die besonnene Erwägung des einzelnen Falles ohnehin führen musste. Folgende Aussprüche werden diese Behauptung anschaulich machen, und zur Ueberzeugung bringen."—*Das Obligationen Recht*, ii. 189.

I refer to this with satisfaction, as it goes to confirm what has been said in the text as to the practical utility of these minute and precise Codes of Interpretation.

See also Mr. Justice STORY's criticisms on Vattel's Rules of Interpretation.—*Story on the Cons.*, vol. i., p. 291.

CHAPTER VII.

OF STRICT CONSTRUCTION, AND OF LIBERAL OR EQUITABLE CONSTRUCTION.

The line separating judicial construction from judicial legislation—Strict construction, and liberal or equitable construction—Statutes when strictly construed—Statutes conflicting with a constitution or fundamental law—Statutes prescribing forms of procedure, modes of proof and of practice—Statutes of frauds—Statutes of wills—Statutes of limitations—Statutes in derogation of the Common Law—Penal statutes—Revenue laws—Usury laws—Statutes granting franchises and corporate powers—Statutes granting exemptions from general burthens—Statutes authorizing summary judicial proceedings—Statutes authorizing summary administrative proceedings—Statutes of explanation—The stamp acts—Statutes giving costs—Statutes when to be liberally or equitably construed—Remedial statutes—Equity of a statute—When statutes treated as directory merely—General Rules.

I HAVE in the preceding chapter, endeavored to state the general rules of construction with regard to the means to be employed, for the purpose of solving doubts in regard to the true intent of a given legislative act. We have now to consider a very different class of cases. There are, as have been already observed, many cases of ambiguity or irreconcileable contradiction, where all aids fail and the task of arriving at the intent of the legislator may be said to be hopeless. Still, the doubt is to be resolved, the case to be decided, the statute to be interpreted and applied; and the functions of the judge in these cases necessarily approach those of the legislator. There are again other cases of great apparent hardship, where the statute is on its face sufficiently intelligible, but where its provi-

sions are sweeping and arbitrary, and where its literal operation and application involve really innocent parties in great suffering and, it may be, remediless disaster. Out of these cases has grown the idea already stated, that the judiciary have the right to make a distinction between different statutes, or classes of statutes; and that while some are to be strictly construed and rigidly enforced according to their letter, others are to be liberally expounded and to be molded and interpreted according to judicial notions of policy or equity.

This branch of our subject is one of the most important in the whole range of jurisprudence; for while on the one hand it is proper, and indeed indispensable to the intelligent administration of justice, that the judiciary should, to a certain extent, possess and exercise this power, still, on the other, it is one extremely liable to abuse; and, indeed, it has been so much abused as at times almost to obliterate the important line between the judicial and legislative functions. "Equitable constructions," say the Supreme Court of Massachusetts, "though they may be tolerated in remedial and perhaps some other statutes, should always be resorted to with great caution, and never extended to penal statutes or mere arbitrary regulations of matters of public policy. The power of extending the meaning of a statute beyond its words, and deciding by the equity and not the language, approaches so near the power of legislation that a wise judiciary will exercise it with reluctance, and only in extraordinary cases."*

* In this case, the statute declared that if a citizen had an estate, which should be appraised at a certain sum, and be assessed thereon, he should obtain a settlement; and it was held that mere residence and possession of the

I shall endeavor briefly to state what I suppose to be the true principles of our law in connection with this subject, and then, by an examination of the adjudged cases, illustrate how far the correct rule has been observed, and how far departed from.

The duty of the legislature is to make the law, or a general rule for all cases; that of the judge, to declare and apply the law to particular instances. When a

estate would not give a settlement, where the appraisement and assessment had not been made. Monson *vs.* Chester, 22 Pick. 385.

Bentham's hostility to the usurpations of the judiciary, is expressed at once with his usual force of thought and peculiarity of language; he says, "A statement of the instances in which the authority of Parliament has been, and continues to be, trampled upon by its sworn servants, might fill volumes upon volumes."—Bentham's *Evidence*, vol. ii. chap. xxv. p. 395.

"An equal degree of contempt for the authority of the legislator is manifested by every application of the principle of nullification. On a former occasion, the principle of nullification was considered in its character of an engine of fraud; in respect of its particular and more immediate effects on each particular occasion, to the prejudice of the party having right on its side. On the present occasion, the character in which it presents itself to view, is that of an engine of usurpation."—*Evidence*, vol. iv. p. 402.

"On the part of the judge, the mass of substantive law in question being the work of the legislator, every application made of the principle of nullification is a contempt, an act of insurrection against the authority of his constitutional superior. Condition, extension, limitation, modification, exception, expressions interconvertable (expressions in effect the same), by the legislator; none at all annexed, none at any rate to the effect in question. To this declaration of the will of the legislator—the genuine and lawful legislator—the judge, by help of the principle of nullification, attaches exceptions of his own at pleasure. To the extent of these exceptions, the will of the legislator is in effect frustrated, the law repealed."—*Evidence*, vol. iv. chap. xxv. p. 403.

"For thus it is that on pretense of being declared, laws upon laws, laws fighting with laws, are made throughout the manufactory of common, that is of judge-made law. That B may receive warning (warning which it is neither designed or expected should ever reach him), A must first have been consigned to distress or ruin. Gulphs by the side of gulphs cover in its whole expanse; the field of jurisprudential law; nor can any of them take its chance of being closed, till the property or liberty of some involuntary Curtius has been thrown into it.—*Evidence*, vol. ii. chap. ii. p. 28.

case of doubt arises in regard to a statute, the first duty of the judge is to ascertain the meaning of the legislator who framed it, that is, to construe or to interpret the statute as the legislator himself would have done; and so long as by any legitimate means the intent of the legislator can be ascertained, the judge is not permitted to seek any other mode of solving the difficulty. But if the language employed is such, or for any other reason the case is such, that the judge cannot pretend to say what the meaning of the lawgiver was, his duty becomes different.

The question is still to be decided, but he must resolve the doubt on some other principle. The judge then ceases to explore and discover the purpose of another mind; he acts on the case before him by his own intellect, he determines the question as he thinks it ought to be determined. In doing this he acts, truly, not as a judge, but as a legislator. An attempt has been made to frame a rule: from the ambiguity of language or other causes, the attempt has failed; and what the lawgiver has not succeeded in doing, the judge proceeds to do. But, as I have said, this proceeding is only legitimate in cases where the effort to ascertain the intent of the legislator must be abandoned as hopeless.

Now, in exercising this truly legislative power, it is evident that two leading considerations will have weight. *First* the general policy of a given construction will be contended for; and *secondly*, the hardships of the particular case will be urged. Pressed by these arguments, and really embarrassed by the very greatness of their power, the courts have frequently attempted to define and limit it, by declaring in what cases statutes are to be strictly construed, and in what to be liber-

ally interpreted. Indeed, in no other sense than in this which I have here stated, can the terms strict and liberal construction be used; for to admit as a general thing, that statutes are to be loosely or rigidly construed as the judges think fit, without reference to the intention of the legislature, in cases where that intention can be arrived at in a legitimate way, is really to place all legislation in the power of the judiciary, or in other words, to efface the line between these two branches of the government.

But notwithstanding all the efforts which have been made to set bounds to this authority, we shall find, as might naturally be supposed, that a power so liable to abuse has often been warped and perverted; and this we shall better understand when we examine the adjudged cases. We shall see that the exercise of the power has not been confined to its legitimate sphere,—those cases where the task of discovering the legislative intent was hopeless; but that the judges, pressed by considerations of policy on the one hand and of hardship on the other, have often entirely disregarded all the legitimate modes of discovering the meaning of the lawmaker, and have even decided against that intention expressed as plainly as words can express it.

I suppose the true rules to be, *first*, that the intention of the legislator is to be learned from the words he has used, and the other legitimate aids enumerated in the last chapter; *second*, that if that intention is expressed in a manner devoid of contradiction and ambiguity, there is no room for interpretation or construction, and the judiciary are not at liberty, on consideration of policy or hardship, to depart from the words of the statute; that they have no right to make exceptions or

insert qualifications, however abstract justice or the justice of the particular case may seem to require it. Let us now see how the matter stands upon authority.

The idea of an authority vested in the judges to disregard the letter of a statute in order in a given case to attain the ends of justice, is familiar to the authors of the civil law; and by them this vague and undefined power is called *Æquitas*. Puffendorff says, *Circa rectam applicationem sententiæ legis ad casus particulares in qua officium judicis vertitur, diligenter observanda quae communiter dicitur æquitas. Hæc in eo consistit, ut prudenter declaretur, casum aliquem peculiaribus vestitum circumstantiis a legislatore sub generali lege non fuisse comprehensum. Sæpenumero enim contingit, ut ex litera legis in adplicatione ad casus speciales sequatur absurdum aliquod, eo quod legislatores eos ob varietatem ac multitudinem perspicere et peculiariter excipere non potuerint. Cum, autem, nemo præsumatur absurda lege constituisse, intelligitur utique legislator tales cases noluisse comprehendere; ideoque non adversatur legislatori judex, sed potius prudenter voluntatem ejus ex analogia et sensu ceterarum legum colligit, qui universalitatem literæ per æquitatem restringit.**.

This idea of a natural equity to be observed in the construction of a statute, runs through all the great authors of the civil law; and we have also had occasion to observe it in connection with the distinction between things odious and things favorable, insisted on in the copious extracts from Vattel, in the last chapter.

From the civil the maxim was imported into the common law. Lord Coke, partly speaking for himself

* Puffendorf, *Elem. Jur. Univ.* lib. i. def. xiii. § 22.

and partly citing Bracton, says, "Equitie is a construction made by the judge, that cases out of the letter of a statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedie that the statute provideth; and the reason hereof is for that the lawgivers could not possibly set down all cases in express terms. *Æquitas est convenientia rerum quæ cuncta cœquiparat, et quæ in paribus rationibus paria jura et judicia desiderat.* And againe, *Æquitas est perfecta quædam ratio quæ jus scriptum interpretatur et emendat, nullâ scripturâ comprehensa, sed solum in verâ ratione consistens. Æquitas est quasi æqualitas. Bonus judex secundum æquum et bonum judicat, et æquitatem stricti juri præfert. Et jus respicit æquitatem.*"* And the proposition, that in construing a statute the judges have a right to decide in some cases even in direct controvention of its language, has been repeatedly asserted and practiced upon by the highest authority.

"Acts of Parliament," says Lord Coke, are to be so construed as no man that is innocent and free from injury or wrong, be by a literal construction punished

* Coke, Inst. 24 b.

The rules of interpretation given by Lord Chancellor Ellesmere in the *Postnati* Case are often referred to, as exhibiting the latitudinary ideas of construction that at one time infested the judicial minds of England. He says, "Words are taken and construed; 1, sometimes by extension; 2, sometimes by restriction; 3, sometimes by implication; 4, sometimes a disjunctive for a copulative; 5, a copulative for a disjunctive; 6, the present tense for the future; 7, the future for the present; 8, sometimes by equity out of the reach of the words; 9, sometimes words taken in a contrary sense; 10, sometimes figuratively as *continens pro contento;* and many other like." And of all these he says, "Examples be infinite, as well in the civil law as common law." *Petyt, Jus Parl.* ch. v. p. 66.

or endangered."* So in Maryland, it has been said that the intent and meaning of the makers should be followed, although it may seem to be contrary to the letter of the statute.† "The words of an act," says the Supreme Court of the same State, "may be disregarded when that is necessary to arrive at the intention of the lawmakers, but not where the act admits of only one interpretation."‡ So, too, in New York, it has been said, that such a construction ought to be put upon a statute as may best answer the intention the makers had in view; and the intention is sometimes to be collected from the cause or necessity of such statute, and sometimes from other circumstances; and whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.§

The precise meaning of the rule will be best understood by a more minute reference to the adjudged cases, where a construction has been put on laws in opposition to their plain and positive language; for it is perhaps more in this branch than any other that it may be said, that legal accuracy cannot be attained by any abstract rules, but only by impregnating, or as it were

* Margate Pier Co. *vs.* Hannam, 3 B. & Ald., 266.

† Canal Co. *vs.* R. R. Co., 4 Gill & Johns. R., 152. In this case many other points as to statutes and their construction are raised and decided.

‡ Brown *vs.* Somerville, 8 Maryland, 444, 456.

§ Bacon's Abr. Statute I. Jackson *vs.* Collins, 3 Cowen, 89, 96; People *vs.* Utica Ins. Co. 15 J. R. 358, 380, 381.

saturating, the mind with judicial decisions, and with that learning tempered by sagacity which so eminently distinguishes the English and American tribunals.

By the act of 51 George III. c. 36, it was declared that no person named as a justice of the Cinque Ports, *should be authorized to act*, unless he had taken and subscribed certain oaths, and delivered at some general sessions a certain certificate. A person appointed justice had taken the oath, but had filed no certificate; it was held nevertheless that the effect of the statute was only to make it unlawful for the justice to act, and not to render his acts invalid.* It was there said, "many persons acting as justices of the peace in virtue of offices in corporations, have been ousted from their office from some defect in their election or appointment; and although all acts properly corporate, and officially done by said persons are void, yet acts done by them as justices, or in a judicial character, have in no instance been thought invalid."

Again, it has been said, that the words of a statute are not to be construed so as to extend beyond the mischief contemplated by the act, where such construction would be injurious to third persons. So, where an English statute directed in regard to ecclesiastical leases, that all leases therein specified should be *utterly void and of none effect, to all intents, constructions, and purposes;* yet, upon the ground that the object of the statute was to prevent the impoverishing of the successor, it was held that a lease by a dean and chapter, though within the act, was good during the life of the dean.†

* Margate Pier Co. *vs.* Hannam, 3 B. & Ald., 266. This case, as is evident, was decided mainly on the *argumentum ab inconvenienti*, or general policy.

† Edwards *vs.* Dick, 4 B. & Ald., 212.

So, where an English statute, 26 Geo. III. c. 60, § 17, declared that a bill or other instrument of sale of a vessel, which did not recite the certificate of registry, should be utterly null and void to all intents and purposes, it was held that where a bill of sale transferred a ship by way of mortgage without reciting the certificate of registry, the instrument should be treated as void so far forth as it was meant to convey the property in the ship; but that the mortgagor might be sued upon his personal covenant in the instrument for the repayment of the money lent.*

So, an English statute, 9 Anne, c. 14, § 1, declared that all notes, &c. given for money won at gaming, *shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever.* Notwithstanding this strong language, it was held that a draft accepted for a gaming debt by the loser, and passed by the winner as endorser for a valuable consideration to a third party was good as against the winner and endorser, on the ground that otherwise a gross fraud would be committed.†

An English statute (2 Geo. III. c. 19, § 1, and 39 Geo. III. c. 34), enacts that no person shall upon any pretense whatsoever take, kill, or have in his possession any partridge, between the first day of February, and the first day of September. The defendant had partridges in his possession several days after the first of February; but the King's Bench refused to construe the statute according to its plain letter, because, as they said, it might lead to the absurd consequence, that a party who should

* Dwarris, p. 638, & 639.

† Edwards *vs.* Dick, 4 B. & Ald. 212. This seems to be decided on the equity of the particular case.

on the last moment of the first of February kill a partridge, would be guilty of an offense by having the same partridge in his possession at the earliest moment of the second of February.*

The statute 46 Geo. III. § 4, enacts that every person who shall appraise any estate, real or personal, in expectation of any hire or reward, shall be deemed an appraiser within the act. In construing it, Lord Ellenborough admitted "that if those words are to be construed literally, the consequence will be that every person who in one single instance only, shall happen to make a valuation, must without regard to circumstances be subject to the appraisers' duty;" and on the ground of the inconvenience and hardships of such construction, held that it was to be *limited to the persons who pursued the calling or occupation of an appraiser.*†

A statute, 5 & 6 Wm. IV. c. 50, § 98, conferred a power of certifying for the costs of a special jury, on the court before which an indictment should be "*preferred.*" This was held to mean "*tried,*" on the ground that if the words were taken as they stood, it would be determined that the legislature had been guilty of a very great omission; for in a great majority of cases it was known that the indictment is preferred before a different court from that by which it is tried.‡

By an English statute (8 & 9 Wm. III. c. 70), it was declared that no servant should gain a settlement in any parish, unless he should continue and abide in the

* Simpson *vs.* Unwin, 3 B. & Adol. 134.

† Atkinson *vs.* Fell, 5 Maule & S. 240, 241.

‡ Rex *vs.* Upper Papworth, 2 East, 413. Reg. *vs.* Pembridge, 12 Law J. (1843), part 2, Q. B. 47; *contra* Reg. *vs.* Preston, 7 Dowl. P. C. 593. It is to be noticed that the corresponding clause in a former act, 13 Geo. III., c. 78, § 65, used the word "tried," instead of "preferred." Dwarris, 592.

same service for one whole year. But a constructive service, pursuant to a hiring for a year, has been held to confer a settlement; though this interpretation has been repeatedly regretted.*

So, on a statute declaring that a judge's certificate that an action was really brought to try a right, must be given *immediately* after the verdict is delivered, it has been held, that the word "immediately" does not mean as soon as ever the verdict is delivered, but that the judge must necessarily have some little time for reflection.†

So, "null and void" have been construed to mean "*voidable.*" "It is extraordinary," said Lord Denman, "that there should be cases in which it has been held that the words, 'null and void,' should not have their usual meaning; but the word void has certainly been construed as voidable, when the proviso was introduced in favor of the party who did not wish to avoid the instrument."‡

In this country, many cases exhibiting the same laxity of construction are to be found. A Massachusetts statute declared all usurious mortgages *utterly void;* but the court held that this meant void only as against the mortgagor and those holding under him, and that a usurious mortgage could not be avoided by a mere

* Dwarris, p. 608.

† Thompson *vs.* Gibson, 8 Mees. & Wel. 288. Page *vs.* Pearce, 8 Mees. & Wel. 677. But see Grace *vs.* Clinch, 4 Q. B. 606, and Shuttleworth *vs.* Cocker, 1 M & G. 829.

‡ Pease *vs.* Morrice, 2 A & E. 94. See also Reg. *vs.* Inhabitants of Fordham, 11 A. & E. 83. See also Reg. *vs.* Justices of Leicester, 7 B. & C. 6. Reg. *vs.* Inhabitants of Birmingham, 8 B. & C. 29. The King *vs.* Inhabitants of St. Gregory, 2 Ad. & Ell. 99. Rex *vs.* Inhabitants of Hipswell, 8 B. & C. 466. Gye *vs.* Felton, 4 Taunt. 876. Barber *vs.* Dennis, 1 Salk. 68. Crosley *vs.* Arkwright, 2 T. R. 605. Dwarris, pp. 606, 639, & 640.

stranger or trespasser.* So, in the same State, the statute of wills provided that *all persons*, of full age and of sound mind, might dispose of their real estate, as well by last will and testament in writing, as otherwise by any act executed in his or her lifetime. But this language was held not to include *married women*, on the ground that it was not the design of the legislature to alter the relation between husband and wife, or the legal effect of that relation.†

So, where a statute gave treble damages against any person who should commit waste on land pending a suit for its recovery, the court held that the act did not apply to a party wholly ignorant that any suit was pending, saying, "We can hardly suppose the legislature intended to punish so severely, a trespasser wholly ignorant of the pending of the suit. The statute is highly penal, and should therefore be limited in its application to the object the legislature had in view."‡

* Green *vs.* Kemp, 13 Mass. 518; affd. in Commonwealth *vs.* Weiher, 3 Met. 445. In Smith *vs.* Saxton, 6 Pick. 483, where a statute prohibited sheriffs from filling up process, and declared that "all such acts done by them should be void," an attempt was made to have the word read *voidable;* but it was defeated.

† Osgood *vs.* Breed, 12 Mass. 530; Wilbur *vs.* Crane, 13 Pick. 284.

In Vermont, where it was provided by one section of an act, that if an attorney should *knowingly* receive a greater sum for fees than provided for by law, he should pay a tenfold penalty, and the next section declared that if any officer or other person should receive any greater fees than provided for by law, he should pay a penalty,—it was held that the word *knowingly* was to be construed as incorporated in the latter section; and in regard to another section of the sam eact it was said, "The necessity of the case *compels* us to *include* these additional words, at the expense of *forcing* the construction of the *words* of the act, in order to avoid so gross an absurdity as the literal interpretation would lead us into." Henry *vs.* Tilson, 17 Verm. 479, 486, 487. See also The Schooner Harriet, 1 Story, 251, 255, where a word in one section was inserted in another by construction.

‡ Reed *vs.* Davis *et al.* 8 Pick. 516, 517.

So, in New York, a statute prohibited any sheriff or any deputy sheriff, or any one for them, from purchasing any property at any execution sale, and declared all purchases so made, void. In an action of ejectment, certain premises had been sold by one deputy sheriff, on an execution issued under a judgment owned by another deputy of the same sheriff, and were bid off, as was alleged, by the deputy who owned the judgment. It was contended, that under the statute, the purchase was void. It was conceded that if the facts were as alleged, the case came within the letter of the act; but it was held by the Supreme Court of New York that the statute should not apply, on the ground that the manifest object of the law was to prevent abuse, and to prohibit sheriffs and their deputies in *their official* capacity, from being purchasers at their own sales, and thus being induced to act corruptly in relation to them; but that it could never have been intended to place those persons in a worse situation than others as to the collection of their own demands.*

The words, "beyond seas," in a State statute of limitations, incautiously borrowed from an English act, has been construed by the Supreme Court of the United States, to mean *out of the State*.† So again, in Maryland, an act authorizing attachments on judgments, to be laid in the hands of any "person or persons whatever, corporate or sole," has been held not to include *municipal* corporations, they being considered to be excepted on grounds of public policy and convenience, municipal corporations being parts of the State govern-

* Jackson *vs.* Collins, 3 Cowen, 85, 96.

† Murray *vs.* Baker, 3 Wheat. 541. See also Shelby *vs.* Guy, 11 Wheat. 361.

ment, exercising delegated political powers for public purposes.*

In the same State, the charter of a cemetery company, provided that a certain number of acres of land should be forever appropriated and set apart as a cemetery, which so long as used as such should not be liable *to any tax or public imposition whatever*. Notwithstanding this general and sweeping language, it has been held by the Court of Appeals, that a paving-tax for paving the street in front of the property in question, was not embraced in the exemption,—on the ground that the intention of the legislature was to exempt the property from all taxes or charges imposed for the purpose of revenue, but not to relieve it from impositions inseparably incident to the location in regard to other property.†

A review of the decisions which we have thus grouped together, can hardly fail to bring to the lips of the student the motto of this volume: "Great is the mystery of judicial interpretation." Here we find cases in numbers, and the numbers might be easily increased, where laws have been construed, not merely without

* Mayor of Balt. *vs.* Root, 8 Maryland, 95. See on this point of policy, Divine *vs.* Harvie, 7 Monroe, 444; Chealey *et al. vs.* Brewer, 7 Mass. 259; and Bulkley *vs.* Eckert, 3 Barr (Penn.) Rep. 368. The general doctrine is that money in the hands of a public officer, cannot be arrested at the suit of a private creditor, on account of the derangement which would be thus produced in the service of the government.

* Mayor of Baltimore *vs.* Greenmount Cemetery, 7 Md. 517. This case was decided on the authority, or weight, of the cases determined in the State of New York, where it has been held, that an exemption from taxes did not include assessments for opening streets. Matter of the Mayor, &c. of New York, 11 Johnson, 81. Bleecker *vs.* Ballou, 3 Wendell, 263. The People *vs.* Mayor &c. of Brooklyn, 4 Comstock, 429. But the analogy does not seem complete; an assessment for street opening is founded on the idea of benefit conferred, and in that point of view certainly differs from a simple tax.

regard to the language used by the legislator, but in defiance of his expressed will. Qualifications are inserted, exceptions are made, and omitted cases provided for, and the statute is in truth remolded, by the mere exercise of the judicial authority. It is vain to seek for any principle by which these decisions can be supported, unless it be one which would place all legislation in the power of the judiciary. They are indeed all condemned by the terse and expressive maxim, *divinatio est, non interpretatio, quæ omnino recedit a litera.**

The mode in which these decisions are arrived at is obvious. Take, for instance, the case where the statute declares all gaming paper absolutely void.† The court simply inserts the words, "except in the hands of a bona-fide endorsee for value." Take again the case where the statute declares all usurious mortgages void.‡ The court merely incorporates the exception, "except as against a stranger or trespasser." It is, too, to be observed that these are not cases of contradiction or ambiguity. The words of the statute are perfectly plain and intelligible. There is no propriety in calling the process, construction or interpretation. It consists in inserting a clause, to provide for a class of cases which the court thinks ought, as a matter of justice, to be excepted out of the statute. Nor is there any ground for asserting, that if the subject had been called to the attention of the legislator he would have made the ex-

* It is very difficult, in examining these cases, to accede to the remark of Chief Justice Marshall, that "on the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles that the difference discovers itself." United States *vs.* Fisher *et al.*, 2 Cranch., 358.

† *Ante*, p. 300.

‡ *Ante*, p. 302, 303.

ception. On the contrary, it is utterly impossible to say that the legislature did not intend to do precisely what it has done, viz. to establish a sweeping and universal rule, which it is true may act hardly in some cases, but which on the other hand certainly diminishes the chances for fraud or perjury to evade the statute. The process, therefore, in these cases, is not obedience to legislative commands; it is not an effort to arrive at the legislative intention; it is not construction of a doubtful provision; it is a violation of the words of the statute, in order to make a rule according to the judicial notion of right. It is purely and strictly judicial legislation. And, fortunately, we are not without abundant authorities in our law which steadily, it may be sternly applied, will establish in its proper place the line that separates the judicial from the legislative functions. In analyzing the above cases, it will be found, as I have said, that they almost all consist in simply excepting out of the statute some particular class of cases, either on the ground of policy or hardship, or on the notion that the case before them is a *casus omissus*, or omission on the part of the legislature. All these practices have been condemned by the tribunals of both England and America, in language which leaves little to be done but to collect and collate the authorities. "We are bound," says Mr. J. Buller, in an early case in the King's Bench, "to take the act of Parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider, whether such a law that has been passed, be tyrannical or not."*

* Jones *vs.* Smart, 1 T. R. 44, 52; a case on the game laws, and the qualifications required under them.

In a case in Massachusetts where it was attempted to evade the absolute prohibition in a statute prohibiting the sale of liquor, by showing that it was sold to be used as medicine, the learned and able Mr. Chief Justice Shaw used this impressive language: "The decisive answer is, that the legislature has made no such exception. If the law is more restricted in its present form than the legislature intended, it must be regulated by legislative action."* "It would be going too far," said the Supreme Court of the United States, in a case which we shall presently examine under another head, "to make exceptions which the legislature has not made."†

As to cases being decided on the grounds of policy or hardship, the idea has been repeatedly and vigorously condemned. "Policy," says Mr. Justice Taunton, "is a very questionable and unsatisfactory ground; because men's minds differ much on the nature and extent of public policy." "The ground of public policy is a very unsafe one, it is best to adhere to the words used in the act of Parliament."‡

"Arguments drawn from impolicy or inconvenience," says Mr. Justice Story, "ought to have little weight. The only sound principle is to declare *ita lex scripta est*, to follow and to obey; nor if a principle so just could be overlooked, could there be well found a more unsafe guide or practice than mere policy and convenience. Men on such subjects complexionally differ from each other, the same men differ from themselves at different times. The policy of one age, may

* Commonwealth *vs.* Kimball, 24 Pick. 370.

† M'Iver *vs.* Ragan, 2 Wheat. 25.

‡ The Inhabitants of St Gregory, Dwarris, p. 597.

ill suit the wishes of another; the law is not subject to such fluctuations.*"

So, the idea that any regard is to be paid to the consequences that may flow from a given construction, has been rejected in very decided language. "I cannot tell what consequences," says Patteson, J. "may result from the construction which we must put upon the statute; but if mischievous, they must be remedied by the legislature."† "A court of law," says Lord Abinger, "ought not to be influenced or governed by any notions of hardship; cases may require legislative interference, but judges cannot modify the rules of law."‡

When, in a case on the rates in England, the question was whether the inhabitants of Sergeant's Inn should be rated, and the hardship of the case was dwelt on, Lord Campbell, C. J., said, "Hardship can only be urged before us, when we are construing doubtful language, to assist us in getting at the real intention of the legislature. Here we think that the language imposing the liability is not doubtful." And the rate was held good.§

In Massachusetts, a statute provided that where a person charged in execution desired to take the poor debtor's oath, in order to obtain his liberation from imprisonment, the keeper of the prison should apply to a justice, and a notice "should be served on

* Conflict of Laws, 17. "It is not for courts of justice, *proprio marte* to provide for all the defects or mischiefs of imperfect legislation;" per Story, J., Smith *vs.* Rues, 2 Sumn. 354. 355.

† The Queen *vs.* Justices of Lancashire, 11 A. & E. 157.

‡ Rhodes *vs.* Smethurst, 4 Mees. & W. 63. See to same point, Hall *vs.* Franklin, 3 Mees. & Wels. 259.

§ Moss *vs.* Commissioners of Sewers, 4 Ellis & Black. (Q. B.) 670, 679.

the creditor or creditors, if he, she, or they were within the commonwealth," and it was held that notice must be served on *all* the creditors. "It is said," said Shaw, C. J., "that this construction will be attended with great inconvenience, especially where the creditors are numerous, and could not have been intended by the legislature. The argument from inconvenience may have considerable weight upon a question of construction, where the language is doubtful; it is not to be presumed, upon doubtful language, that the legislature intended to establish a rule of action which would be attended with inconvenience. But where the language is clear, and where of course the intent is manifest, the court is not at liberty to be governed by considerations of inconvenience."* "Inconvenience can have weight in the construction of a statute but in doubtful cases."†

"By the rules, which are laid down in England," says the Supreme Court of the United States, "for the construction of statutes, and the latitude which has been indulged in their application, the British judges have assumed a legislative power; and on the pretense of judicial exposition, have, in fact, made a great portion of the statute law of the kingdom. Of those rules of construction, none can be more dangerous, than that, which distinguishing between the intent and the words of the legislature, declares, that a case not within the meaning of a statute according to the opinion of the judges, shall not be embraced within the operation of statute although it is clearly within the words; or, *vice versa*, that a case within the meaning, though not

* Putnam *vs.* Longley, 11 Pick. 487, 490.

† Per Parsons, C. J., Gore *vs.* Brazier, 3 Mass. 523—539. S. P., Langdon *vs.* Potter, 3 Mass. 215, 221.

within the words, shall be embraced. We should invariably deem it our duty to defer to the expression of the legislature, to the letter of the statute, when free from ambiguity and doubt, without indulging in speculations, either upon the impropriety or hardship of laws."*

Indeed, the idea that the judges in administering the written law, can mold it and warp it according to their notions, not of what the legislator said, not even of what he meant, but of what in their judgment he *ought* to have meant,—in other words, according to their own ideas of policy, wisdom, or expediency,—is so obviously untenable that it is quite apparent that it never could have taken rise, except at a time when the division lines between the great powers of government were but feebly drawn, and their importance very imperfectly understood. In the present condition of our political systems, this practice cannot be acted on with either propriety or safety. It must inevitably be attended by two great evils. It gives the judiciary a power almost arbitrary and which cannot fail to be abused, and it leads to unbounded carelessness in the matter of legislation. There can be little inducement to caution or precision in drawing legislative enactments, if it is understood that all errors can be supplied, and, indeed, all provisions be overridden, by the mere exercise of the powers of judicial construction.

These considerations apply, as I have said, where the language of statutes is clear. If, however, by reason of ambiguity or contradiction, the intent cannot be ascertained, then as I have said the case alters, and the

* Priestman *vs.* The United States, 4 Dallas, 30, *n.* (1.) per Chase, J.

duty of the judge is very different. The judge must decide; but the law has not spoken. It is evident that his functions necessarily become to a certain extent legislative. There is no alternative, he must make the rule in a new matter; and these cases present some of the most embarrassing questions that can occur in the whole range of juridical science; for to the responsibilities of a judge they add those of a legislator. To these cases the rules and nomenclature of strict and equitable construction properly apply, and to these they should carefully be restricted. Where the judge has an admitted and necessary discretion, considerations of policy and wisdom, hardship and inconvenience, become as indispensable, as they are out of place where the matter has been definitively decided by the legislature. Such, however, has not been the language of our law; and the notion of a restricted or an enlarged construction has been introduced and practiced upon rather with reference to the kind or class of laws to which the statute in question belonged than to the clearness or ambiguity of the letter of the enactment. The subject will be better understood after a careful examination of the decisions that have been made up on various classes of statutes.

We shall, then, first consider in what cases it has been held that statutes are to be strictly construed, next examine the cases in which it has been said that they are to be equitably interpreted, and thus finally endeavor to discover the true boundaries of the judicial and legislative attributes.

Statutes conflicting with a constitution or with a fundamental law.—It has been said that it is a safe and wholesome rule, to adopt the restricted construction

of a statute when a more liberal one will bring us in conflict with the fundamental law.* So in England it has been held that acts of Parliament which take away the trial by jury or abridge the liberty of the subject, ought to receive a strict construction.† So, there too, it has been said in regard to the Court of King's Bench, that it cannot be ousted of its jurisdiction but by express words or by necessary implication, any more than an heir at law of his inheritance. Yet where a clause was clearly inserted for the benefit of parties prosecuted, saying, that it "shall and may" be lawful for justices to hear complaints under the statute, it was held that the penalty could be recovered *only* before a justice, because otherwise the defendant might be saddled with unmerciful costs by a merciless prosecutor.‡

Statutes in derogation of the common law.—It has been repeatedly declared that statutes which alter common-law remedies or affect common-law rights must be strictly complied with. Says Lord Coke: "The wisedome of the judges and sages of the law have alwayes suppressed new and subtile inventions in derogation of the common law."§ So of a statute extending the common-law right of distress by preferring the landlord over an execution creditor provided

* People *vs.* Board of Education of Brooklyn, 13 Barb. 400, 409.

† Looker *vs.* Halcomb, 4 Bing. 183; Dwarris, p. 646; a case on the act of 1 Geo. IV. c. 56, empowering justices of the peace to award satisfaction for damages done by malicious and willful trespassers.

‡ Cates *vs.* Knight, 3 Term. R., 442. See Crisp *vs.* Banbury, 8 Bing. 394, where it was held that proceedings against the trustee of a benefit society could be taken by arbitration only, the courts being ousted of their jurisdiction by the express words of the act.

§ Coke, Inst. 282, b. L. 3. § 485. Crayton *vs.* Munger, 11 Texas, 234.

notice was given to the officer of rent due *before* the sale, it was held that being in derogation of the common law it must be strictly pursued, and that a notice *after* the sale would not answer.*

So, where a statute giving a summary proceeding to recover possession of land, directs a trial by jury, a jury cannot be waived even by consent. In this case it was said, "The statutory remedy by way of a summary proceeding is in derogation of the common-law remedy by action, and must be strictly pursued. A peculiar and limited jurisdiction is thereby conferred on certain magistrates, which can be exercised only in the way prescribed. They have no jurisdiction to try the cause except by the mode pointed out."†

So it has been said, that statutes in derogation of the common-law rules of evidence should be so construed if possible as to preserve the principles deemed essential in the reception of testimony.‡ Thus it has been held in Maryland, that an act permitting a party to prove his own account by oath or affirmation is in derogation of the common law and, like all such legislation, to be construed strictly.§ So again it has been said, that statutes exempting portions of a debtor's property from liability for his debts are in derogation of the common law, and not to be extended by an equitable construction; and it has been held that where a statute declared a *team* should be exempt from execution this did not exempt the necessary food for them,

* Bussing *vs.* Bushnell, 6 Hill, 382.

† Benjamin *vs.* Benjamin, 1 Seld. 383. It will be observed, however, that the opinion in this case is *obiter*.

‡ The People *vs.* Hadden, 3 Denio, 220.

§ Warner *vs.* Fowler, 8 Maryland, 25. Dyson *vs.* West's Exec. 1 Har. and J. 567.

although a previous act of exemption did exempt a cow and two swine and the necessary food.* So, too, acts restrictive of common-law rights, as giving exclusive power to portwardens to survey vessels unfit to go to sea, and to decide on the extent of repairs wanted, are to be construed strictly.†

Where a statute for the more effectual protection of property of married women provided, "that any married female might take by inheritance or by gift, grant, devise, or bequest from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with the like effect as if she were unmarried," it was held that the provision to *convey* should be limited, like the provision to *take*, to persons other than her husband, in order to prevent a wife from surrendering her dower right to her husband, and also to "preserve, to some extent, that invaluable principle of the common law by which husband and wife are regarded, during coverture, as one person, incapable of contracting with and conveying lands to each other."‡

To understand the meaning and present value of the rule that statutes in derogation of the common law are to be strictly construed, we must keep in mind the feelings of our ancestors in regard to that system of jurisprudence. They invariably spoke of it with a reverential awe, blended with a tender attachment. Says Lord Coke, "This is another strong argument in

* Rue *vs.* Alter, 5 Denio, 119.

† Port Wardens of N. Y. *vs.* Cartwright, 4 Sandf. 236.

‡ Graham *vs.* Van Wyck, 14 Barbour, 531, 582.

law, *Nihil quod est contra rationem est licitum;* for reason is the life of the law; nay, the common law itselfe is nothing else but reason, which is to be understood by an artificiall perfection of reason gotten by long study, observation, and experience, and not of every man's natural reason. This legall reason *est summa ratio*;"* and again, "*De common droit*—of common right—this is by the common law; because the common law is the best and most common birthright that the subject hath for the safeguard and defense not only of his goods, lands, and revenues, but of his wife and children." * * "The common law of England sometimes is called right, sometimes common right, and sometimes *communis justitia.* In the grand charter, the common law is called right. *Rectum nulli vendemus, nulli negabimus aut differemus justitiam vel rectum.*"† And again, says an old reporter, "The statute law is like a tyrant, where he comes he makes all void; but the common law is like a nursing father, makes only void that part where the fault is, and preserves the rest."‡

It is difficult, if not impossible, now to understand this enthusiastic loyalty to a body of law the most

* Coke, Inst. 97 b.

† Coke, Inst. 142 a.

‡ 1 Mod. 35; Collins *vs.* Blantern, 2 Wils. 351; Dwarris, 638. It is curious to contrast with these tender laudations of the old law, Bentham's savage denunciation of the same system: "Will you believe Lord Mansfield, judges are higher, better, fitter legislators, than king, lords, and commons. 'Common law' (says he in so many words) 'is superior to an act of Parliament.'—Atkyns, 1, 33. Superior? how so! The reason is not the less brilliant for being unintelligible. 'It works itself pure from the fountains of justice:' fountains abundant on the ground floor of the great hall, unknown (it seems) above stairs. Send a man to common law for purity! Send him to the common sewer to cleanse himself." Bentham's *Rationale of Judicial Evidence*, vol. iv.

peculiar features of which the activity of the present generation has been largely occupied in uprooting and destroying. But to our ancestors the common law represented the old customs of the country, the ancient landmarks of their property; and, what was more dear to them still, the common law as opposed to the civil law represented, imperfectly it is true, that irrepressible desire for absolute liberty of thought and speech and action—the chief glory of our race. This is the reason why the common law is the subject of the fervid eulogy of our ancestors, and why the courts saw fit to regard every statutory innovation on its ancient observances with distrust and disfavor.

But in regard to the common law now, while insisting strenuously upon the propriety in all cases of adhering strictly to the expressed intention of the legislature, let us not attach too much value to maxims which really belong to another age. The condition of things has very essentially altered since the time of Lord Coke. The procedure of the law in which he gloried, is almost wholly effaced; as far as it relates to real estate, its maxims are in a great measure abrogated; in regard even to private relations, its doctrines are materially changed, and the liberties of that portion of our race at least which occupies American soil, rest upon a surer basis than ancient customs. It would appear, therefore, that the doctrine that statutes in derogation of the common law are to be strictly construed, has now truly no solid foundation in our jurisprudence; and, though it will long, no doubt, be familiar to the forensic ear, that there is really no reason whatever why the innovating statutes of our day should be regarded with any peculiar severity, or be subjected to any particularly stringent rules of interpretation, because they abro-

gate some ancient rule of that renowned, but somewhat obsolete, system of jurisprudence.*

These ideas have indeed been already partially sanctioned by judicial authority. The Supreme Court of Massachusetts has held this language: "It is said that statutes made in derogation of the common law are to be construed strictly. This is true, but they are also to be construed sensibly, and with a view to the object aimed at by the legislature." And so it was held that a statute exempting one cow and one swine from exemption, applied to the animal whether alive or dead.† In another case the same court said, "The rules of the common law are not to be changed by doubtful implication;"‡ and to this extent the idea of the sanctity of the old jurisprudence may safely be admitted. An ancient and settled system ought not to be overturned, except by clear, unambiguous, and peremptory language.

While on this subject, I may refer with advantage to the decisions made in New York upon the statute giving landlords summary proceedings to recover possession of premises where tenants hold over. Before the passage of that statute (13 April, 1820), the remedy where the tenant held over was expensive and dilatory; but in one case under the law it was held, that this being a summary proceeding in derogation of the common law, the statute should be strictly pursued.§ In another case, however, it was said, "The legislature

* The New York Code of Procedure, § 467, says, "The rule of common law that statutes in derogation of that law are to be strictly construed, has no application to this act."

† Gibson *vs.* Jenney, 15 Mass. 205, 206.

‡ Wilbur *vs.* Crane, 13 Pick. 284, 290.

§ Farrington *vs.* Morgan, 20 Wend. 207.

have prescribed a summary proceeding calculated to save rights of parties, and insure a speedy decision. This remedial act must be construed liberally, to carry into effect the intent by suppressing the mischief, and advancing the remedy."* Finally, in another case, it was said that the act was to be construed liberally in looking to the remedy so as to make it effectual, but strictly and rigidly in scanning the proceedings to attain that remedy.† Whether this last nice distinction can be carried out, I am not prepared to say; but these cases appear to furnish a good illustration of the confusion likely to result from the assumption of power to construe a statute strictly or liberally as circumstances seem to require.‡

Statutes prescribing forms of procedure, or modes of proof. In regard to these the maxim holds good, *Non observata forma, infertur adnullatio actus.*§ So, where a statute declared, "that the form of proceedings set forth in the schedule should be used," a material variance from the form was held fatal.‖

Of the statutes of the class now under consideration the most marked are the statutes of frauds, of wills, and of limitations. In these cases the proof, or the procedure required by the law is rigidly exacted, the restriction strictly insisted on without regard to the facts or the hardship of the case; and this with abundant reason, for it is the evident intention of these statutes to prescribe fixed forms or rules to guard against

* Lynde *vs.* Noble, 20 J. R. 80, 82.

† Smith *vs.* Moffat, 1 Barb. S. C. R. 65.

‡ See also in regard to this statute, Roach *vs.* Cozine, 9 Wend. 227.

§ 2 Inst. 388; Dwarris, 611.

‖ Davison *vs.* Gill, 1 East. 64.

certain abuses likely to occur from the absence of an arbitrary and peremptory provision; and a liberal or equitable construction of the statute would completely defeat its object by letting in precisely the kind of testimony that the act means to exclude. The New York statute of frauds declares, that "whenever goods are sold at public auction, and the auctioneer shall *at the time of sale*" make a memorandum, such memorandum shall be considered as a note of the sale for the purpose of charging both parties. It has been held that this provision must be strictly construed and strictly complied with, and that the memorandum must be completed by the proper entries in the proper book as soon as the goods are struck down to the purchaser and before the auctioneer enters upon any other business or transaction whatever.* Such, too, is the general construction of acts permitting or requiring instrument to be recorded and giving priority according to the date of the registry.

Efforts have, indeed, repeatedly been made, especially in courts of equity, to get rid of the rigor of these statutes,—and to a certain extent with success, as we shall see again when we come to consider the subject of the equity of a statute,—on the ground, in regard to the registry acts, that enactments which were intended to prevent frauds should never be used as a means to cover them, and in regard to the statute of frauds, that as it was made with a design to prevent perjury and contradiction of testimony, the cases not liable to those mischiefs should be exempted from its severe opera-

* Hicks *vs.* Whitmore, 12 Wend. 548. Goelet *vs.* Cowdrey, 1 Duer, 132.

tion.* But these decisions have been greatly regretted as breaking in upon and diminishing the utility of these statutes; and the sound opinion would seem to be that where, for the very purpose of preventing frauds, a certain form or mode of proof is prescribed by the legislature, the form or mode prescribed shall be steadily maintained by the judiciary.†

To this same class belong statutes of limitation, or statutes limiting the time within which certain actions must be brought. These statutes, intended to guard against the loss of evidence, and the mischiefs arising from lapse of time, are to be strictly construed without any reference to the hardships of the particular case. It was at one time held in regard to these statutes, that where by reason of the defendant's fraud the existence of a cause of action was concealed, it would furnish an equitable exception to the express language of the statute. This was intimated *obiter* by Lord Mansfield‡ and expressly held in Massachusetts;§ but the contrary has been decided in New York;‖ and the idea that implied and equitable exceptions, which the legislature has not made, are to be engrafted by the courts on a statute of limitations is now generally abandoned.¶ So, in a case on a statute of this class the Supreme Court of the United States has said, "Wherever the situa-

* Cheval *vs.* Nichols, 1 Str., 664. Worseley *vs.* De Mattos, 1 Burr., 467. Le Neve *vs.* Le Neve, 3 Atk., 646. Knight *vs.* Crockford, 1 Esp., 190. Laragne *vs.* Stanley, 3 Lev., 1. Dwarris, pp. 629, 630, and 653.

† Doe ex dem. Robinson *vs.* Allsop, 5 B. and A., 142. Doe *vs.* Routledge, Cowp., 712. Dwarris, p. 628 *et seq.*

‡ Bree *vs.* Holbeck, Doug. 656.

§ First Massachusetts Turnpike *vs.* Field *et al.*, 3 Mass. 201. Homer *vs.* Fish *et al.*, 1 Pick. 435.

‖ Allen *vs.* Miller, 17 Wend, 202.

¶ Dozier *vs.* Ellis, 28 Mississippi, 730. M'Iver *vs.* Ragan, 2 Wheat. 25.

tion of a party was such as in the opinion of the legislature to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far for this court to add to those exceptions." And even in a case where a survey which would have taken the case out of the statute was prevented by positive legislation, the lands lying in the Indian country, it was held no excuse.*

So, too, it has been repeatedly held, that courts have no dispensing power, even in matters of practice, when the legislature has spoken. Thus, where a statute declares that a judge at chambers may direct a new trial if application is made within ten days after judgment, it has been said that "he can no more enlarge the time than he can legislate in any other matter."† When a statute fixes the time within which an act must be done, the courts have no power to enlarge it, although it relates to a mere question of practice. So where an appeal, to be valid, must be made within ten days, it is void if taken on the eleventh.‡ So when an act declared that a special jury, when struck, shall be the jury for the trial of the issue, and the defendant had a special jury struck and afterwards willfully abandoned it, it was still held that the act was imperative, that a common jury could not try the case, and that the plaintiff should have summoned the special jury.§ Where a statute requires an oath

* M'Iver *vs.* Ragan, 2 Wheat. 25.

† Seymour *vs.* Judd., 2 Comst., 464. Bleeker *vs.* Wiseburn, 5 Wend., 136.

‡ *Ex parte* Ostrander, 1 Denio, 680, 681. Seymour *vs.* Judd., 2 Coms., 464. Jackson *ex dem.* Bleecker *vs.* Wiseburn, 5 Wend., 136. Barclay *vs.* Brown, 7 Paige, 245. Caldwell *vs.* The Mayor, &c. of Albany, 9 Paige, 572.

§ Montague *vs.* Smith, 17 Ad. & Ell. N. S., 688. A special jury involves, in England, a considerable expense.

from the principal, it cannot be satisfied by the oath of an agent.* So, statutes enabling creditors to redeem, as against prior judgments, must be complied with strictly. Where an act authorizing a creditor to redeem required an affidavit of the amount due to be made by the creditor or his agent, it was held the affidavit must state in express terms that the deponent was the agent, and merely naming him as such in the affidavit would not answer; and that the affidavit of the amount should also show that the agent had the means of knowledge, and state the amount *positively*, not according to his belief.† In the municipal corporation act,‡ where the words are "shall publish not later than two of the clock," a publication cannot be made after two o'clock, even for the purpose of correcting an error.§ The English statute of 43 Eliz. c. 2, s. 1, which has been called the *Magna Carta* of the poor, declared that the churchwardens of every parish, and four, three, or two householders, should be nominated by the justices of the peace to be overseers of the poor. Motion was made to quash an order of the justices appointing *five* overseers. Usage was invoked in support of the order, but the facts did not sustain the alleged custom of augmenting the number, and after a careful examination of the statutes in *pari materia*, the number was held imperative, and the order was quashed.‖

* The People *vs.* Fleming, 2 Comstock, 484, 485.

† *Ex parte* Bank of Monroe, 7 Hill, 177.

‡ Hob., 298; Sid., 56; Stra. 1125; 2 T. Rep., 395.

§ The Queen *vs.* Mayor, &c. of Leeds, 11 A. & E., 512; Dwarris, p. 477. "It is as a maxim," says Mr. Dwarris, "generally true, that if an affirmative statute, which is introductory of a new law, direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner." It seems to me this decision should be rather referred to the present branch of our subject.

‖ Rex *vs.* Loxdale, 1 Burr, 447.

To this rule, that statutes prescribing modes of procedure are to be strictly construed, however, there exists a large class of exceptions, of which we shall speak when we consider the cases in which the positive language of enactments is treated as directory merely.

Penal Statutes.—In regard to penal statutes, we shall find the same oscillation of judicial opinion that we have already had occasion to observe in other cases and we shall notice the same difficulties and perplexities that must ever result from any attempt by the judiciary to insert exceptions in acts of legislation, or in other words practically to exercise a discretionary control over legislative provisions.

The ancient rule of our law, often reiterated, was that penal statutes were to be construed strictly. "The general words of a penal statute shall be restrained," says Mr. Dwarris, "for the benefit of him against whom the penalty is inflicted."* And this maxim in the early stages of English jurisprudence was often invoked and acted upon by the judges—partly, no doubt, from a humane desire to mitigate the rigors of the criminal law as it then stood. Thus, the stat. 1 Ed. VI. c. 12, having enacted that those who were convicted of stealing horses should not have the benefit of clergy, the judges held that this did not extend to a party guilty of stealing but *one* horse; and a new act was procured for that purpose.† So it is said, if the law be that for a certain offense a man shall lose his right hand, and the offender hath had his right hand before cut off in the wars, he shall not lose his left hand, but the crime shall rather pass unpunished than the letter of the law be extended.‡

* Dwarris, p. 634.

† Dwarris, p. 364.

‡ Dwarris, p. 634; Bacon's Maxims, 58, 59.

"If we had the power of legislation," says Lord Kenyon, applying the penalties for non-residence, "perhaps we should think it proper to extend the penalties created by the statute of Hen. VIII. c. 13, to all benefices with cure of souls; but as it is our duty to expound and not to make acts of Parliament, we must not extend a penal law to other cases than those intended by the legislature, even though we think they come within the mischief intended to be remedied."* "This is a penal act," said he again, when considering the question, whether tumblers came within the 10 Geo. II. c. 28, "and we cannot extend it to entertainments that did not exist when the statute was made, though perhaps it is desirable that the prohibitions should be extended."† "If this rule is violated," said Best, C. J. "the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws."‡ So, if a penalty given by a statute is to be recovered in a court of record, this can only be done in one of the superior courts of Westminster; for, being a penal law, it must be construed strictly, and those are the courts in which the king's attorney is supposed to attend. §

And the general rule has been frequently declared in this country. So in New York, it has been said that penal statutes, in declaring what acts shall constitute an offense, and in prescribing the punishment to be

* Jenkinson *vs.* Thomas, 4 T. R., 666; Dwarris, p. 636.

† Rex *vs.* Handy, 6 T. R. 288. See, also, Warne *vs.* Varley, 6 T. R. 443 Martin *vs.* Ford, 5 T. R. 101.

‡ Fletcher *vs.* Lord Sondes, 3 Bing. 580.

§ Rex *vs.* Hymon, 7 T. R. 536. Walwin *vs.* Smith, 1 Salk. 177, 178. Cro. Eliz. 480. Noy, 62. Dwarris, 642.

inflicted, are certainly to be construed rigorously.* So, in Massachusetts also, penal statutes must be construed strictly according to the intention of the legislature as discovered by the import of the words, and when not remedial, are not to be extended by equitable principles.†

But the rule that statutes of this class are to be construed strictly, is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away, as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope. Indeed, this was said in England at an early day. "It is not true," said Mr. J. Buller, "that the court in the exposition of penal statutes are to narrow the construction. We are to look to the words in the first instance, and where they are plain, we are to decide on them. If they be doubtful, we are then to have recourse to the subject-matter; but at all events, it is only a secondary rule."‡

So the Supreme Court of the United States has said,

* The Watervliet and Turnpike Co. *vs.* M'Kean, 6 Hill, 616.

† Melody *vs.* Reab, 4 Mass. 473.

‡ The King *vs.* Inhabs. of Hodnett, 1 T. R. 96, 101. The enactment that made killing a master, treason, was extended so as to include a mistress. Hard. 208; Plowd. 86; Dwarris, 635. So, under the English bribery acts, to satisfy the term "procuring," it is necessary that the vote should be actually given; but as to "corrupting," that is not necessary; the corruption has been held to be complete without the vote being given. 3 Burr. 1235; Dwarris, p. 635.

"In expounding a penal statute, the court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction.* We are to ascertain the true legislative intent of the words used; and that sense being once ascertained, courts of justice are bound to give effect to that intent, and are not at liberty to fritter it upon metaphysical niceties."† "We are undoubtedly bound," says Mr. Justice Story, "to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs, to be within the remedial influence of the statute."‡

And the rule has been coupled with this reasonable modification in a large number of the tribunals of this country. So in New Hampshire, it has been said, that by the phrase strict construction, as applied to penal statutes, it is not meant that the judges will disregard the intention of the legislature; it is only intended that where there is a doubt, the judiciary will not so construe them as to inflict a punishment which the legislature may not have intended. The strict construction is only to be applied where the law is rea-

* U. S. *vs.* Morris, 14 Peters, 464. Indictment under the acts to prohibit the slave trade. See also on this same point American Fur Company *vs.* the United States, 2 Peters, 358. Indictment for selling ardent spirits to Indians.

† The Schooner Nymph, 1 Sumner, 516, 518; where "trade" was held to include "cod-fishery."

‡ The Schooner Industry. Information for landing goods without a permit, under the revenue laws. 1 Gall. 114, 117, 118.

sonably open to question.* So in New York it is said that, "The rule that penal statutes are to be construed strictly when they act on the offender and inflict a penalty, admits of some qualification. In the construction of statutes of this description it has been often held, that the plain and manifest intention of the legislature ought to be regarded. A statute which is penal to some persons, provided it is beneficial generally, may be equitably construed."† So again, "Although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature; and it is well settled that a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction."‡

In a case in Massachusetts, Parker, C. J., said,—

> In this, as in all other statutes, if there be any ambiguity of expression, the meaning and intent of the legislature must be sought for in the statute itself, if from a consideration of other parts of it, it is capable of explanation,—and from other statutes relating to the same subject, if it be necessary to resort to any thing extrinsic in order to obtain an explanation. If a statute, creating or increasing the penalty, be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty, is to be adopted; but it is not justifiable in this, any more than in any other case, to imagine ambiguities merely that a lenient construction may be adopted. If such were the

* Wilton *vs.* Wentworth, 5 Foster N. H., 247; Fairbanks *vs.* Antrim, 2 N. H. 105; Woodbury *vs.* Thompson, 3 N. H., 194; Pike *vs.* Jenkins, 12 N. H., 255.

† Sickles *vs.* Sharp, 13 J. R., 498, 499.

We may remark that every penal statute must be intended to be "generally beneficial;" the only ground on which punishments or penalties can be inflicted on individuals is, that the community is thereby to be generally benefited.

‡ The People *vs.* Bartow, 6 Cowen, 290, 293; Indictment for violating the banking law. And here again we may inquire, whether any penal statute can be regarded as not made for "the good of the public"?

privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms, as to preclude the exercise of ingenuity in raising doubts about its construction.*

So, where a statute provided that if any person not being authorized by the selectmen of *any* town in the commonwealth, should dig up any human body, should be prosecuted, &c., it was held to be sufficient to aver and prove that the defendant was not authorized by the selectmen of the town where the body had been buried; and it was said by Parker, C. J., delivering the opinion of the court:—

The question in this case arises from an unfortunate obscurity in the terms of the statute on which the indictment is founded. Taken strictly, without reference to subject-matter and the manifest intention and object of the legislature, it would appear that in order to sustain an indictment on the statute, it must be averred and proved that the board of health, or selectmen, of no town in the commonwealth had given license to do the act complained of. The consequence would be, as oral testimony alone can be admitted, on criminal trials, of facts provable by witnesses, that the officers of every town to the number of three or four hundred, must be summoned and give their personal attendance in the court where such prosecution is pending. We hazard nothing in saying, that the legislature never intended such an absurdity.

But it is said that penal statutes admit of no latitude of construction; that they are to be taken strictly, word for word, let the consequences be what they may. It is true, it is so laid down as a general rule; and the reason is, that the court shall not be allowed to make that an offense which is not made so by the legislative enactment. But the rule does not exclude the application of common sense to the terms made use of in the act, in order to avoid an absurdity which the legislature ought not to be presumed to have intended. There are cases which show this, although precedents would not be required to sustain so

* Commonwealth *vs.* Marton, 17 Mass. 359, 362, 363.

reasonable a doctrine. Bac. Abr. statute i., 9; Heydon's Case, 3 Coke, 7; Rex v. Gage, 8 Mod. 65; Plowd. 86; and The Soldier's Case, Cro. Car. 71—all of which are cited by Bacon—go to show that even penal statutes, though to be construed strictly as the general rule, yet are to receive such a construction as will conform to the intention of the legislature; some of them are stronger cases than this.*

Where a statute provided that if any master or other officer should, without justifiable cause, &c., beat, &c., any one of the *crew*, he should be punished by fine, &c., it was held that the word *crew* should be held to include the officers, and was not restricted to the common seamen; and Mr. Justice Story said,—

Now, I do not think any thing material in the construction of this statute can turn upon the rule so ably and strenuously expounded at the bar, that penal statutes are to be construed strictly. I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the Court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute which has various known significations, I know of no rule that requires the Court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.†

* Commonwealth *vs.* Loring, 8 Pick. 370, 374.

† U. S. *vs.* Winn, 3 Sumner, 209, 211, 212.

In another case the same learned judge said,—

Penal statutes are to be construed strictly; and cases within the like mischief are not to be drawn within a clause imposing a prohibition or forfeiture, unless the words clearly comprehend the case. * * But in construing a statute we are to take into consideration all the provisions thereof, and to look to all the objects and the entire intent of the statute. If, then, a clause is found in one section which in its general language and import is equally as applicable to other sections and provisions of the same act as it is to the very section in which it is found, if the true intent and policy of the act will be best promoted by reading it as applicable to all those sections, and if public mischiefs equally within the scope of the statute would be thereby prevented, and upon a different construction those mischiefs would be left without redress,—there certainly is very strong ground to say that the clause ought to be so interpreted as to suppress the mischiefs, and not promote or protect them; that as its language is appropriate, so it shall be construed as intended to include them.*

The subject has been well discussed by Mr. Justice Livingston, on the first circuit. He used this language:

But while it is said that penal statutes are to receive a strict construction, nothing more is meant than that they shall not, by what may be thought their spirit or equity, be extended to offenses other than those that are specially and clearly described and provided for. A court is not, therefore, as the appellant supposes, precluded from inquiring into the intention of the legislature. However clearly a law be expressed, this must ever, more or less, be a matter of inquiry. A court is not, however, permitted to arrive at this intention by mere conjecture, but it is to collect it from the object which the legislature had in view, and the expressions used, which should be competent and proper to apprise the community at large of the rule which it is intended to prescribe for their government. For although ignorance of the exist-

* The schooner Harriet, 1 Story, p. 251, 255, 256. Case under the act giving bounties to vessels licensed for the cod-fisheries. See *ante*, p. 303, note †, Henry *vs.* Tilson, 17 Vermont, 479, where a word in one section of a statute was inserted by construction in another.

ence of a law be no excuse for its violation, yet if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it. It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the legislature. If this be involved in considerable difficulty, from the use of language not perfectly intelligible, unusual circumspection becomes necessary, especially if the consequences be so penal as scarcely to admit of aggravation. When the sense of a penal statute is obvious, consequences are to be disregarded; but if doubtful, they are to have their weight in its interpretation. . It will at once be conceded that no man should be stripped of a very valuable property—perhaps of his all, be disfranchised and consigned to public ignominy and reproach, unless it be very clear that such high penalties have been annexed by law to the act which he has committed. If these principles be correct, as they are deemed to be, a court has no option where any considerable ambiguity arises on a penal statute, but is bound to decide in favor of the party accused. "It is more consonant to the principle of liberty," says an eminent English judge, "that a court should acquit when the legislature intended to punish, than that it should punish when it was intended to discharge with impunity."*

The rule and the qualification have been very ably considered by the Supreme Court of the United States. The 8th section of an act of the United States (30th April, 1790, c. 36) provided for the punishment of certain crimes committed *upon the high seas, or in any river, haven, basin, or bay*, out of the jurisdiction of any particular State. The 12th section provided for the punishment of manslaughter committed *upon the high seas;* manslaughter not being mentioned in the 8th section. Upon an indictment for manslaughter com-

* Schooner Enterprise, 1 Paine's Reports, p. 33, 34.

mitted on board an American vessel, in the river Tigris, in China, thirty-five miles from its mouth, it was held that the United States had no jurisdiction under the 12th section; and the court said,—

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment.

It is said that, notwithstanding this rule, the intention of the lawmaker must govern in its construction of penal, as well as other statutes. This is true. But this is not a new, independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.*

We admit that it is extremely improbable, that Congress could have intended to make those differences with respect to place, which their words import. But probability is not a guide which a court in construing a penal statute can safely take. We can conceive no rea-

son why other crimes which are not comprehended in this act, should not be punished; but Congress has not made them punishable, and this court cannot enlarge the statute.

These decisions, as I have said, materially modify the old rule that penal statutes are to be construed strictly. The more correct version of the doctrine appears to be that the statutes, of this class, are to be fairly construed and faithfully applied according to the intent of the legislature, without unwarrantable severity on the one hand, or equally unjustifiable lenity on the other; in cases of doubt the courts inclining to mercy.

Revenue Laws.—In regard to the laws for the collection of the revenue, we find the same contradictions that we have already noticed in other cases, as to whether they are to be strictly or liberally construed, growing out of the different light in which they may be regarded,—that is, as laws imposing penalties and forfeitures, of a highly important character on which the operations of government mainly depend, or as laws intended to regulate the great subject of commercial intercourse, and chiefly to regulate the operations of commercial men.

In England, it has been said that statutes made for the advancement of trade and commerce, and to regulate the conduct of merchants, ought to be perfectly clear and intelligible to persons of their description, and that otherwise they would be mere snares. Where clauses, therefore, are obscure, the courts will lean against forfeitures; and in this view the ship registry acts, so far as they apply to defeat titles and to create forfeitures, are to be construed strictly as penal laws.

* U. S. *vs.* Wiltberger, 5 Wheat. 76, 95, 96, 105.

"The legislature," says Heath, J., "is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed."*

In the same spirit in this country, on the first circuit, in construing a revenue law, Mr. J. Story said, "Laws imposing duties are never construed beyond the natural import of the language; and duties are never imposed upon the citizen upon doubtful interpretations; for every duty imposes a burthen on the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute."†

The Supreme Court of the United States has said on this subject,—

> In one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed, and truly deserve to be called, remedial. It must not be understood, that every law which imposes a penalty is therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not in the strict sense penal acts, although they may inflict a penalty for violating them. It is in this light we view the revenue laws, and we would construe them so as most effectually to accomplish the intention of the legislature in passing them."‡

And again, on the first circuit, Mr. Justice Story has used this language:—

> Revenue and duty acts are not in the sense of the law penal acts, and are not, therefore, to be construed strictly. Nor are they, on the

* Hubbard *vs.* Johnston, 3 Taunt., 177. Dwarris, p. 641.

† Adams *vs.* Bancroft. 3 Sumner, 386, 387.

‡ Taylor *vs.* The U. S., 3 Howard, 109. It may be permitted us to ask with deference, whether all laws must not be supposed intended to "effect a public good;" and whether the effort "to accomplish the intention of the legislature" should be any more earnest in this case than in all others.

other hand, acts in furtherance of private rights and liberty, or remedial, and therefore to be construed with extraordinary liberality. They are to be construed according to the true import and meaning of their terms; and when the legislative intention is ascertained, that and that only is to be our guide in interpreting them. We are not to strain to reach cases not within their terms, even if we might conjecture that public policy might have reached those cases; nor, on the other hand, are we to restrain their terms so as to exclude cases clearly within them, simply because public policy might possibly dictate such an exclusion.*

These decisions show the gradual tendency of the judicial mind to disavow and renounce any right to construe statutes according to considerations of policy or hardship, and to recognize the duty of conforming on all occasions to the will of the lawmaking body.†

Usury Laws.—"Before the statute of Henry VIII." (37 Henry VIII., c. 9), says Lord Mansfield,‡ "all interest on money lent was prohibited by the canon law, as it is now in Roman Catholic countries."§ This statute was

* U. S. *vs.* Breed *et al.*, 1 Sumner, 159, 160.

† Some rules as to forfeitures may be here noticed:

"When a statute gives a forfeiture or a penalty against him who wrongfully detains the property of another, or dispossesses him of his duty or interest, he that has the wrong shall have the forfeiture or penalty, and shall have an action therefor on the statute at common law, and the king shall not have the forfeiture."—Co. Litt., 159 a.

"If an act of Parliament give a forfeiture for a collateral thing, the king shall have it; but where it is given in lieu of property and interest, it shall go to the person injured. Where, however, it is given for a crime, the king shall have the forfeiture, though he be not named."—13 Vin. Abrid. tit. Forfeiture.

"The words 'shall forfeit' vests only a right or title, and not the freehold or deed, or in law, without an office to find the certainty of the land."—Pl. Com. 486.

"Where a statute gives a forfeiture 'of all inheritance,' it does not extend to an estate tail; but where it is 'of all manner of inheritances,' estates tail are comprehended."—Jenk. 287, pl. 21. Hob. 334. Dwarris, 641.

‡ Lowe *vs.* Waller, 2 Douglas, 736, 740.

§ See also Renss Glass Factory *vs.* Reid, 5 Cow., 587 and 604.

repealed in the reign of Edward VI., but re-enacted in the reign of Elizabeth,* and, since that period, with occasional modifications, has retained its place in England, and obtained a footing, more or less secure, in this country.

There are few things which better show the power claimed by the courts over statutes, than the course pursued by them in regard to these laws. The act of 12, Anne, § 2, c. 16, declared all securities and contracts affected by usury, void. But when the courts of equity were appealed to for aid by a borrower on usury, they did not hesitate to brand the statute as inequitable, if not dishonest, and, declaring that he who sought equity must do equity, refused relief except upon the terms of payment of the principal and legal interest.† The courts of common law followed in part in the same track, and when their discretionary powers were appealed to, refused interference except on the same terms.‡ Finally, however, the King's Bench came to the true rule on the subject, and in compliance with and obedience to the statute, treated usurious contracts as void for all purposes.§ I have already had occasion to refer to the course pursued on this subject in our tribunals, and have noticed the fact that in the later decisions the courts appear disposed to give full effect to the legislative will.‖

In construing a statute of this class in Massachusetts, the following language has been held. It is valuable, as showing the curious niceties into which the

* Dwarris, p. 65.

† Benfield *vs.* Solomons, 9 Ves., jun., 84; Scrivener, *Ex parte*, 3 Ves. and B. 14.

‡ Hindle *vs.* O'Brien, 1 Taunt. 413.

§ Roberts *vs.* Goff, 4 B. and Ald. 92. Dwarris, p. 855.

‖ *Ante*, p. 220.

courts have been drawn, in their efforts to explain and to methodize their notions of strict and liberal construction :—

General statutes or written laws of the government, are usually arranged under three great divisions: *Declaratory*, which are expressive of the common law; *Remedial*, which are required in consequence of the errors in human judgments, or are rendered necessary by the various changes which are constantly taking place as the community enlarges and its concerns increase; *Penal*, or acts for the prevention and punishment of offenses;—and in ascertaining their meaning it soon grew to be an axiom in the law, that remedial statutes should be construed liberally and penal statutes strictly. But the rule prescribing the line between remedial and penal statutes was not well defined; and the statutes against frauds were often both held to be remedial and penal: as where the statute acted on the offender it was taken strictly, but where it acted upon the offense, by setting aside the fraudulent transaction, it was to be expounded liberally. [1 Bl. Com., 88.] Admitting, then, as the fact was, that the original statutes [against usury] were clearly penal, the present law, while it is penal to some extent in its consequences, is in fact so modified that it may be said to be adopted into the family of remedial statutes, and, though a brother of the half blood, is nevertheless entitled to its share of the inheritance, or, in other words, has the like privilege of a liberal construction with those statutes which are wholly remedial.*

Of Statutes creating monopolies, granting franchises, and charters of incorporation.—We have seen† that the civil law inclined to consider grants made by the sovereign with a favorable eye, and to give them an enlarged and liberal interpretation. The common law, however, in obedience to its instinctive sympathy with equal rights and its jealousy of prerogative, has always adopted a widely different and much sounder rule. The uniform language of the English and American law is that all grants of privilege are to be liberally construed in favor

* Gray *vs.* Bennett, 3 Met., 522, 527, 529, per Hubbard, J.

† *Ante*, p. 285, Domat's Rules, § 17.

of the public, and as against the grantees of the monopoly, franchise, or charter to be strictly interpreted. Whatever is not unequivocally granted in such acts, is taken to have been withheld; all acts of incorporation, and acts extending the privileges of incorporated bodies, are to be taken most strongly against the companies.*

It is interesting to observe the vigilance with which this principle has been applied. Where a company was incorporated by statute for the purpose of inland navigation, and they acquired lands forming a reservoir, which lands were to vest in the company in fee, "to and for the use of the said navigation company and to or for no other use or purpose whatever," it was held by the Court of Queen's Bench that a railway company which succeeded to the rights of the navigation company could not let out boats for hire on the reservoir.†

* Lees *vs.* The Manchester & Ashton Canal Company, 11 East, 652; Scales *vs.* Pickering, 4 Bingham, 452; Dock Company at Kingston-upon-Hull *vs.* Browne, 2 Barn. & Adol. 43; The Providence Bank *vs.* Billings & Pittman, 4 Peters, 514; Charles River Bridge *vs.* Warren Bridge, 11 Peters, 420; Parker *vs.* Sunbury and Erie R. R. Co. 19 Penn. State R 211.

In regard to public grants of franchises, the rules of construction are said by the Supreme Court to be these: *First*, that where the grant is designed by the sovereign power to be a general benefit and accommodation to the public, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the government; and therefore the grant is not to be extended by implication in favor of the grantee beyond the natural or obvious meaning of the words employed. *Second*, if the grant admits of two interpretations, one of which is more extended and the other more restricted, so that a choice is fairly open, and either may be adopted without any violation of the apparent object of the grant, if in such a case, one interpretation would render the grant inoperative, and the other would give it force and effect, the latter if within a reasonable construction of the terms employed should be adopted. Charles River Bridge *vs.* Warren Bridge, 11 Peters, 544; Mills *vs.* St. Clair County, 8 Howard, 581.

† Bostock *vs.* The North Staffordshire Railway, 4 Ellis & Black. 799; a case certified on a question sent down from the Court of Chancery. Campbell, C. J., Coleridge and Wightman, JJ., unitedin the certificate; Earle, J. gave a contrary opinion.

So again it has been said, that statutes interfering with the general rights of the subject, establishing monopolies and imposing penalties, are to be strictly construed. Thus, where an act of Parliament imposed a penalty on all but freemen of the Waterman's Company, for navigating any wherry, lighter, *or other craft*, on the Thames, it was held that a steam-tug was not within the description and prohibition of the act.* Where a company was authorized to take lands for a railway, and a jury was to be summoned to fix the value of the lands, and to award *separately* for injury sustained, and a jury so summoned gave a verdict for an entire sum,—it was held that the company could not treat the verdict as a nullity, the provision being for the benefit of the claimant.†

In this country, the same doctrine has been steadily adhered to. So, the Supreme Court of the United States says, "A corporation is strictly limited to the

* Reed *vs.* Ingham, 3 Ellis & Blackburn Q B. p. 889.

† *In Re* London and Greenwich Railway Co, 4 Nev. & Mann. 458. Gildart *vs.* Gladstone, 11 East, 685; The Leeds & Liverpool Co. *vs.* Hustler, 1 B. & Cres. 424; Kingston-upon-Hull Dock Co. *vs.* La Marche, 8 B. & Cres. 51; Priestly *vs.* Fould, 2 Scott N. R. 205; Portsmouth Floating Bridge Co. *vs.* Nance, 6 Scott N. R. 823; Stourbridge Canal Co. *vs.* Wheeley, 2 Barn. & Ad. 792,—are all cases to the effect, that in grants of franchises or privileges, any ambiguity must operate against the grantees, and in favor of the public. See, to S. P., Barrett *vs* The Stockton and Darlington R. Co., 2 Scott N. R. 337; Stockton and Darlington R. Co. *vs.* Barrett; S. C. in Exchequer Chamber, 3 Scott N. R. 803. *Verba chartarum fortius accipiuntur contra proferentem.*

See also Blakemore *vs.* The Glamorganshire Canal Navigation, 1 Mylne & K. 154, as to the construction of acts creating companies to construct public works.

In regard to the strictness with which, in England, the railway companies are held to a performance of their chartered obligations, see the Railway Cases generally, and Commonwealth *vs.* Pittsburg and Connelsville R. R. Co., 24 Penn. S. R. 159, where they are reviewed per Lowrie, J.

exercise of those powers which are specially conferred upon it. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation."* So again, in the same court, it is said that in regard to charters of incorporation, it has always been held that a corporation takes nothing except what is plainly expressed and unequivocally granted. The charter is held to be a contract between the State and the corporation, and no clause of power or privilege can be inserted by implication. This has been repeatedly declared in cases where the corporation has contended for implied immunities, such as an exemption from taxation. This privilege can only be granted by express words.*

The language in Connecticut is the same: "The rules of construction which apply to general legislation, in regard to those subjects in which the public at large is interested, are essentially different from those which apply to private grants to individuals, of powers or privileges designed to be exercised with special reference to their own advantage, although involving in their exercise incidental benefits to the community generally. The former are to be expounded largely and beneficially, for the purposes for which they were enacted. The latter liberally in favor of the public, and strictly as against the grantees."‡

* Beaty *vs.* Lessee of Knowler, 4 Peters, 152, 168.

† Charles River Bridge *vs.* Warren Bridge, 11 Peters, 420. Bank of Easton *vs.* Commonwealth, 10 Penn. State R. 422. Bank of Pennsylvania *vs.* Commonwealth, 7 Penn. State R. 144. But see, *contra*, State of Ohio *vs.* Commercial Bank of Cincinnati, 7 Ohio R., 125; Union Bank *vs.* State of Tennessee, 9 Yerger, 490.

‡ Bradley *vs.* N. Y. & N. Haven R. R. Co, 21 Conn., 294, 306.

So, too, in Pennsylvania it is said, "Corporate powers can never be created by implication, nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. * * In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation.*

So, in the same State, in regard to a statute authorizing a railroad company to take land upon a report of viewers, which, among other things, should state the quality and value of the land taken,—it was held that a report of the viewers omitting to state the quality and value of the land is fatally defective; and the court said, "It is most manifest equity, that he who claims a special privilege must submit to a strict construction of it. He who claims the right to be tried before a special tribunal and in a special form, both of which are out of the general course of the law, must expect that the special mode of trial shall be strictly pursued as to the forms prescribed, and not be allowed to innovate upon the general principles of law further than is indicated by the law that prescribes it."†

In New York, it has been said a statute conferring privileges upon individuals should not be so construed as to work a public mischief, unless required by explicit and unequivocal language. So where an act authorized a proprietor of lands lying on the East River, which is an arm of the sea, to fill up and construct wharves and bulkheads in front of his lands, and there was at the

* Pennsylvania R. R. Co. *vs.* Canal Com'rs, 21 Penn., 9.
† Zack *vs.* Penn. Railroad Co., 25 Penn. State R., 394.

time a public highway through the land to the river, it was held that the proprietor could not by filling up, obstruct the public passage from the land to the water, and that the street, by operation of law, extended from the former terminus over the new-made land to the water."*

So in Pennsylvania, a grant of a right of way of fifty feet wide, for a railway, through a small slip of land in a densely populated city, will only convey so much ground as is necessary for the line of the road, and will not carry by implication the right to erect within such line depots, car-houses, or other structures for the business of the road; and such a grant does not confer on the railroad company the right to permit their cars or locomotives to remain on the track of the road within the fifty feet for a longer time than is necessary to receive and discharge freight and passengers.†

"Private statutes," says Parsons, C. J. of the Supreme Court of Massachusetts, speaking of an act granting a fishing right to a town, "made for the accommodation of particular citizens or corporations, ought not to be construed to affect rights or privileges of others, unless such construction results from express words or necessary implication."‡

In New York, in regard to the ferry franchise conferred on the municipal government of the city of New York by its charter, it is held that it is not a mere authority to administer the ferry franchise as a political trust, liable to be resumed by the legislative power;

* The People *vs.* Lambier, 5 Denio, 1.

† Mayor, &c. of Allegheny *vs.* Ohio and Penn. R. R. Co., 26 Penn., 355.

‡ Coolidge *vs.* Williams, 4 Mass., 140. Case on an alewife-fishing statute.

but that it is a vested right, and a valuable interest, which cannot be taken away by the legislature; while it was at the same time admitted, that charters or grants conveying to municipal bodies rights of a private nature, should be strictly construed, and that in case of ambiguous phraseology, the presumption should be in favor of construing the same as a public grant.*

Statutes conferring particular exemptions from general burthens, or against common and general right.— The statutes which fall in this class are, like those which we have just considered, regarded with a jealous eye and strictly construed. So in Indiana, it has been said, the sound principle is that all persons should bear the burdens of taxation alike. Consequently, any statute which exempts persons or property from taxation, is to be construed strictly. So, a statute exempting the lands whereon any building erected for religious worship is situate, not exceeding ten acres, does not include any part of the ten acres which is actually used for secular purposes for gain.†

So in the same State it has been said, in reference to the compulsory assignment of counsel, that a statute requiring the services of the citizen gratuitously is against common right, and therefore to be strictly construed; and consequently a statute requiring gratuitous services in civil cases would not be extended to criminal cases.‡

* Benson *vs.* The Mayor, &c. of New York *et al.* 10 Barb., 224, per Barculo, J.; and see (page 243) his remarks on the case of the town of East Hartford *vs.* Hartford Bridge Co. See also as to ferry franchises, Mills *vs.* St. Clair County, 8 Howard's (U. S.) Rep. 569.

† Orr *vs.* Baker, 4 Indiana, 86.

‡ Webb *vs.* Baird, 6 Indiana, 13.

In Maryland, the bill of rights gives the legislature power to compel a party to give evidence against himself; and in regard to this, the Court of Appeals in that State have said, "Although it is competent to the legislature to alter the rule of evidence so as to compel a party to give testimony against himself, it is nevertheless a power of such transcendent and overwhelming operation that a just regard for the liberties of the citizen should at all times induce the most jealous and cautious exercise of it by the legislature. And especially should courts of justice anxiously and narrowly watch it, and never under any pretense whatever extend it beyond the limits to which the strictest interpretation of the legislative act confines it in the particular case.*

So, in construing a Massachusetts statute avoiding "every gift, bargain, sale, or transfer, of any real or personal estate" by a spendthrift after appointment of a guardian, it was said, "Every man of full age and sound mind is at liberty to make contracts; and if made upon good consideration and without fraud he must be bound by them, unless by statute provision he is disabled; and disabling statutes of that nature should be construed strictly; for, though founded in policy and a just regard to the public welfare, they are in derogation of private rights;" and the statute was held not to avoid a promissory note of the spendthrift, although it might indirectly affect his real or personal estate.†

In the same State, a statute providing that all real and personal estate which shall at any time be exposed to *sale* at public auction or vendue shall be subject to

* Broadbent *vs.* The State, 7 Maryland, 416.

† Smitt *vs.* Spooner, 3 Pick. 229, 230.

duty, was held not to apply to a lease of real estate by auction; and it was said that statutes which imposed restrictions upon trade or common occupations or which levy an excise or tax upon them, must be construed strictly."*

It has been attempted to bring statutes in derogation of the common rights of creditors, within this rule. So it has been said in England, that a statute for the discharge of insolvent debtors ought to be construed strictly, *quoad* the cessio bonorum, and the rights of the creditors. "Let a statute be ever so charitable," said Holt, C. J., "if it gives away the property of the subject it ought to be construed strictly."† And in this country it has been said, that statutes in derogation of the common rights of creditors to secure their debts out of the property of their debtors, as statutes exempting property from execution, ought to have a strict construction. So in Massachussets, a statute exempting the *tools* of a debtor from execution does not apply to a printing-press, and types.‡ But I doubt if any such general rule can be asserted to exist; on any construction the word "tools" can be hardly said to include printing-presses and types; and in a subsequent case this law has been called a "humane and beneficial statute, not to be too narrowly construed."§ We have here again an illustration of the dangers of construction resting on motives of policy. Policy is a shifting and varying element; and it is evident that judicial notions of the wisdom or expe-

* Sewall *vs.* Jones, 9 Pick. 414.

† 12 Mod. 513.

‡ Buckingham *vs.* Billings, 13 Mass. 80; Danforth *vs.* Woodward, 10 Pickering, 423.

§ Howard *vs.* Williams, 2 Pick. 80, 83.

diency of an act of the legislature, can with no propriety be permitted to override the authentic declarations of the will of the governing power.

Statutes authorizing summary judicial proceedings.—It is a well-settled and wholesome rule, that statutes authorizing summary proceedings, and by which extraordinary powers are given to courts or officers of justice, are to be strictly construed; and that the powers conferred must be strictly pursued, so far as regards all the steps and proceedings necessary to give jurisdiction, or the whole proceedings will be void. So, where a statute authorizing justices to stop up an old foot-way and substitute a new one, required "that the forms of proceedings set forth in the schedule annexed shall be used on all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case," a strict observance of these forms was held essential; and Lord Kenyon, C. J., said, "I cannot say that these words are merely directory. Power is given to the magistrate to take away on certain conditions a right which the public before enjoyed; and this is to be done in a certain prescribed form, with such additions and variations only as the locality of the description may require. Now, here there is a material variance in the order from the form prescribed, for it does not set forth the length and breadth of the new path set out in lieu of the old one." The court therefore held the order void, and the public still entitled to the use of the old path through the plaintiff's land.*

So, where a statute required that on petition for the

* Davison *vs.* Gill, 1 East, 64.

sale of lands, a guardian should be appointed for infants, and it was not done, it was held that the sale was void as to such infants.* So, when a statute confers a new power on a justice of the peace, he must proceed strictly in the mode prescribed by statute.† In New York, where before an attachment can be issued by a justice of the peace, against a non-resident of the county, a bond must be given by the applicant, the giving this bond is a condition precedent to the power which the statute confers; and if the justice undertakes to execute the power by issuing the attachment, without exacting a prior performance of the condition, his acts are utterly void, and the process affords him no protection for what is done under it.‡

So, a justice authorized to take jurisdiction of certain offenses on complaint under oath or view, cannot convict on confession.§ So again, where a statute requires a justice's summons to be served by reading it to the defendant and delivering him a copy, a service by delivering the summons personally to the defendant is bad, and gives the magistrate no jurisdiction.‖ So in New York, the proceedings to obtain judgment, upon an award of arbitrators are summary, and must be complied with. And when it was provided that where there had been a submission to arbitrators under the statute, judgment might be rendered on the award, upon such submission being proved by the affidavit of

* Bloom *vs.* Burdick, 1 Hill, 130. Rea *vs.* M'Eachron, 13 Wend., 465. Babbitt *vs.* Doe, 4 Indiana, 355. Atkins *vs.* Kinnan, 20 Wend., 241.

† Bigelow *vs.* Stearns, 19 J. R. 39.

‡ Davis *vs.* Marshall, 14 Barb., 96.

§ Bargis *vs.* The State, 4 Indiana, 126.

‖ Campau *vs.* Fairbanks, 1 Michigan, 151.

a *subscribing witness* thereto, the affidavit of a witness who subsequently attested it was held not sufficient.*

In the same State it has been decided, that a sale of an intestate's real estate to pay debts, by virtue of a surrogate's order under a statute declaring that in such cases a guardian shall be appointed for infant heirs, is void unless such guardian be appointed. The statute is imperative, and leaves nothing to the discretion of the surrogate. Public policy demands that the safeguard which the legislature has provided for the protection of the helpless, against negligence, oppression, and fraud, should be maintained.† On the same ground, the Supreme Court of the United States has decided that executors and administrators, in making sale of property, must comply strictly with the requisites of all statutory provisions on the subject; and that unless every essential direction of the law is complied with, those whose interests are affected are not affected by the sale, unless, from a long acquiescence, a foundation is laid for a fair and reasonable presumption that the requisites of the law have been complied with. So, where an Alabama statute declared that it should not be lawful for an executor to dispose of the estate of the decedent at private sale, such a sale was held absolutely void.‡

So, too, in Michigan it has been held, that when a court exercises a special jurisdiction under a statute, the mode of proceeding must be strictly pursued; thus, where a statute requires that before a writ of attach-

* Hollenback *vs.* Fleming, 6 Hill, 303.

† Per Gardiner, J., in Schneider *vs.* McFarland, 2 Coms. 459. See also on this subject M'Pherson *vs.* Cunliff, 11 Serg. and Rawle, 429, and Grignon's Lessee *vs.* Astor, 2 Howard's (U. S.) R. 319.

‡ Ventress *et al. vs.* Smith, 10 Peters, 161.

ment shall issue, an affidavit of indebtedness, shall be made and annexed to it, it was held that a writ issued without any affidavit, but to which an affidavit made ten days afterwards was annexed before actual service, was irregular and void.* So again in New York, in a proceeding by an insolvent debtor for a discharge, where the petition set forth that the petitioners had given a bond pursuant to the tenth section of the act on the subject, and the tenth section made mention of two bonds, only one of which gave the officer jurisdiction; it was held that jurisdiction was not acquired, and the proceedings were reversed on certiorari.†

On the other hand, it has been frequently decided that where a court once obtains jurisdiction, its proceedings cannot be collaterally impeached, although they appear to have been irregular and contrary to law.‡ The distinction appears to be, and it is one which distinguishes this class of cases from the administrative proceedings which we shall consider under the next branch of our subject, that in regard to summary judicial proceedings, it is indispensable that all the statutory directions in regard to the steps required to give the officer jurisdiction, whether over the person or over the subject-matter as the case may be, must be strictly observed, otherwise the whole proceedings are void, *coram non judice;* and the objection may be taken wherever they are set up and relied on; but if jurisdiction be once acquired, then any subsequent errors or irregularities committed by the officer are

* Buckley *vs.* Lowry, 2 Mich., 419.

† The People *ex rel.* Comter *vs.* Reed, 5 Denio, 554.

‡ Voorhees *vs.* Bank of U. S., 10 Peters, 449. Grignon's Lessee *vs.* Astor, 2 Howard's (U. S.) R. 319.

treated like other judicial errors, and can only be corrected in the particular matter, on appeal to the proper tribunal. In regard to administrative proceedings, on the other hand, no judicial discretion or authority is recognized: they are treated as ministerial throughout; and any departure from the directions of the statute is fatal, whether the objection be taken directly, or indirectly in any collateral matter. In regard to summary judicial proceedings, the line which divides the steps necessary to give jurisdiction from those subsequent is often very difficult to define with precision, and depends on the nature of the proceedings and the language of the statute.

Statutes authorizing summary administrative proceedings affecting rights of property.—Where summary proceedings are authorized by statute the effect of which is to divest or affect rights of property, the rule holds good that they are to be strictly construed. The power conferred must be executed precisely as it is given, and any departure will vitiate the whole proceeding. It is, indeed, a general rule that all statutes conferring special ministerial authority by which any man's estate may be affected, must be strictly pursued. So, where certain loan commissioners are authorized on the default of payment of moneys loaned by them, to sell the premises mortgaged to secure the debt, a sale by one only is void.† So again, where a statute in New York authorized loan commissioners in default of payment to advertise and sell on a certain day (the first Tuesday of February), and if not sold or struck off, and the bid not paid, then, to enter and to lease till the third Tuesday of September following, and then

† Powell *vs.* Tuttle, 3 Comst. 396; Olmsted *vs.* Elder, 1 Seld. 144.

to sell again,—it was held that the lands being struck off on the first day and the bid not paid, it was not competent for the commissioners to re-sell them on the same day to another person, but that they were bound to wait till the second day named in the statute; and where the sale was directed to be for cash, it was held that the commissioners could not sell on credit.*

In this country, there is a large and important class of cases falling under this branch of our subject, where ministerial officers, either the direct agents of the state, or of corporations clothed with certain attributes of local sovereignty, are authorized to sell the property of private individuals for non-payment of taxes, or charges imposed on them. The proceedings contemplated by these enactments are generally directed to be taken without giving the party alleged to be in default any opportunity of defence; and their validity has been denied, on the ground of their being in conflict, as it has been urged, with the constitutional provision which, in most if not all the States, guarantees to every citizen the protection of "the law of the land." This objection has been, however, overruled, and the

* Sherwood *vs.* Reade, 7 Hill, 431; overruling the decision of Mr. Chancellor Walworth in same case, 8 Paige, 633.

We may here notice some general rules as to powers. As a general thing, in the exercise of an authority whether ministerial or judicial, *all* the persons to whom it is committed must confer and act together. Downing *vs.* Rugar, 21 Wend. 178.

So the concurrence of four justices is necessary to execute a valid warrant appointing oversecrs of the poor. King *vs.* Forrest, 3 D. and E. 38; King *vs.* Inhabs. of Haverstall Redware, *ibid.* 380.

An authority to do acts merely ministerial, as filling up an advertisement of sale, may be delegated; or when one overseer of the poor in the name and behalf of two, applies for process. Downing *vs.* Rugar, 21 Wend. 178; but not so when any discretion is to be executed; Powell *vs.* Tuttle, 3 Comst. 396.

power has been sustained on grounds of immemorial usage and state necessity. But while asserting the power, it has, in all cases, been held that it must be strictly pursued, and that its exercise will be vigilantly watched.* So, the Supreme Court of the United States has said, in regard to the sale of lands for taxes, that every prerequisite to the exercise of the power should precede it; that the party who sets up a title under such a sale, must furnish the evidence necessary to support it; and that the marshal's deed is not even *prima facie* evidence that the prerequisites required by law have been complied with.† A statute authority, by which a man may be deprived of his estate, must be strictly pursued. Thus, where by the law of Tennessee it is made essential to the validity of a sale of land for taxes, that the sheriff should make a certain return and certain publications, it was held by the Supreme Court of the United States that those steps must be strictly taken, and that they must also appear on the face of the record. And as they did not, the sale was held absolutely void.‡ So, where an Arkansas statute provides that before a sheriff can assess land for taxes, he shall file an affidavit by a certain day, and the assessment by a certain other day, non-compliance with these requisitions has been held by the Supreme Court of the United States, to make the assessment, and of course the sale for taxes, invalid, and the deed void.§

* State *vs.* Allen, 2 McCord, 55. Harris *vs.* Wood, 6 Monroe, 643. Willard *vs.* Wetherbee, 4 N. H. R., 118. See other cases cited in Blackwell on Tax Titles, p. 38 *et seq.*

† Williams *vs.* Peyton's Lessee, 4 Wheat., 77. See also, S. P., M'Clung *vs.* Ross, 5 Wheat., 116.

‡ Thatcher *vs.* Powell, 6 Wheat., 119. See also Jackson *vs.* Esty, 7 Wend., 148.

§ Parker *et al. vs.* Overman, 18 Howard, 137.

In cases of this nature, it has been held by the States generally that the steps prescribed by the statute must all be strictly followed, and that the burthen of proof is on the party who claims a right under the summary proceedings. It is the business of the purchaser to collect and preserve all the facts and muniments of title on which the validity of his claim depends. It will be useful to notice the strictness with which these wholesome rules have been applied. So, in New York it has been held that a power to sell lands for taxes imposed thereon, will not authorize a sale for taxes imposed not on the land, but on the owners and occupants. Nor will a power given to sell for taxes, authorize a sale for a mere assessment for the construction of a well and pump. So, if a tax be only authorized on the petition of a majority of a certain class of parties interested, the purchaser under the tax sale must show that those who signed the petition were a majority. So, where a demand of payment is made necessary before sale, it must be made; so, where the statute directs notice of an assessment to be given before the sale, proof is required that the requisite notice was given, and it must be given for the precise time required by the statute. So too, of a notice to redeem.*

In the same State, lands are under various statute provisions sold for unpaid taxes by the State comptroller; and in order to authorize him to do so, the lands must have been assessed in due form by the town assessors, taxed by the county supervisors, a certified

* Sharp *vs.* Speir, 4 Hill, 76; Sharp *vs.* Johnson, 4 Hill, 92; Striker *vs.* Kelly, 7 Hill, 25; and 3 Duer, 323. Doughty *vs.* Hope, 3 Denio, 594; and 1 Coms., 79.

transcript of the assessment must be transmitted by the county treasurer to the comptroller, with the collector's affidavit that the taxes are unpaid, and the tax must be unpaid for two years from the first of May following the imposition of the assessment, and so remain at the time of the sale.* But the assessment is fatally defective where there is a misdescription of the property, such as might probably mislead the owner if his object were to pay the taxes or to redeem after the sale. So, where a lot was described by a wrong number.†

Again, where the township in which the land is situated was incorrectly described,‡ the sales were held invalid and void. So, where a statute in regard to sales on execution provided that the time and place of sale should be advertised publicly, and previously for six weeks successively, first by the posting of a notice in three public places, and secondly by publishing the notice once a week in a country newspaper,—the notice was properly posted; but the notice in the newspaper, though published six weeks, was first published only thirty-nine days previously to the day of sale; it was held that the statute was imperative, and the sale void;§ and it was also held that the circulation of the notices of sale in slips headed, "Plattsburg Republican Extra," would not aid the plaintiff: it was not a publishing in a newspaper, within the statute.

* 1 R. S. 391, §§ 11, 12, 13, 1st ed., p. 395, § 33, p. 399, § 10, p. 402–3, § 26, p. 407, § 52; and Jackson *vs.* Morse, 18 J. R. 441.

† Dike *vs.* Lewis, 4 Denio, 237; 2 Barb. Ch. 344.

‡ Tallman *vs.* White, 2 Comst. 66.

§ Olcott *vs.* Robinson, 20 Barb. 148.

So where a statute requires personal service, a notice by mail though it reaches the party is not good.*

Thus, too, in Connecticut, it has been held in regard to the power of taxation, that statutory requirements must be strictly complied with. So, where the assessors omitted to lodge an abstract of the assessment lists in the town clerk's office by the first of December, as they were required by law to do, though they lodged it on the twentieth of the month, it was held that the assessment lists were invalid, and that no tax could be lawfully laid or collected thereon.† And so in Michigan also, it has been decided that the auditor general cannot assume the power to convey lands sold for taxes on foreclosure unless it is expressly conferred u pon him by the statute.‡

As to the very important matter of evidence connected with this subject we may notice, that a deed executed by a city corporation, purporting to be given on a sale of land for taxes, and reciting a compliance with the statutory provisions, does not dispense with proof of the facts. The recitals in the conveyance are not evidence against the owner of the property sold.§ But on the other hand it has been held in New York to be competent for the legislature to enact that any conveyance of lands sold for taxes executed by the comptroller, shall be presumptive evidence that the comptroller had authority to sell and convey the

* Rathbun *vs.* Acker, 18 Barb. 393.

† Thames Manuf. Co. *vs.* Lathrop, 7 Conn. R. 550. Where also held that to a statute explicitly retrospective to a certain extent and for a certain purpose, the court will not by construction give a retro-active operation to any greater extent or for any other purpose.

‡ Sibley *vs.* Smith *et al.*, 2 Michigan, 486.

§ Sharp *vs.* Speir, 4 Hill, 76; Striker *vs.* Kelly, 2 Denio, 323; Beekman *vs.* Bigham, 1 Selden, 366; Hoyt *vs.* Dillon, 19 Barb. 644.

land described in it for arrears of taxes, and that all the previous proceedings required by law had taken place; but that such presumption may be repelled by legal evidence.* Perhaps the legislative power in this case cannot be denied; but it is obvious that the tendency of this decision is to defeat the salutary tendency of the wholesome rules which we have just considered. In cases of this kind where the question, whether the individual is divested of his property by the summary proceedings of the government, depends on the regularity of the proceedings, to declare that the execution of a deed or any other similar formality is *prima facie* proof of regularity, and by doing this to throw the burthen of proving a negative on the original owner, is in a multitude of cases to strip him of all protection whatever. It is comparatively easy for the state and its agents to prove that certain steps have been taken. In many cases it is impossible to prove that they have not been taken, however certain the fact may be. "The negative," Chief Justice Marshall has said in a case of this kind, "will not admit of proof."†

* Hand *vs.* Ballou, 2 Kern. 541.

† Williams *vs.* Peyton's Lessee, 4 Wheat. 77.

In regard to this branch of my subject, I take pleasure in referring to Blackwell on Tax Sales—*A Practical Treatise on the power to sell land for the non-payment of taxes assessed thereon*—by Robert S. Blackwell, Esq., of the Illinois Bar: Chicago, 1855. Mr. Blackwell has exhausted the important subject of tax sales. In discussing it he has been led to consider the true boundaries of judicial and legislative power; and his two first chapters, *on the fundamental principles which control the taxing power*, and *of the nature of the power to sell land for the nonpayment of taxes, and of the strictness required in such sales*, contain a close and searching discussion of the whole subject. He arrives at the result that the only safe and tolerable rule of interpretation in cases free from ambiguity is, that the judiciary should confine themselves to a strict obedience to the legislative will.

Statutes of Explanation.—It has been said that statutes of explanation shall be construed only according to their words, and not by any manner of intendment; for it is incongruous, it is said, for an explanation to be explained. "If any exposition," said the judges, "should be made against the direct letter of the exposition made by Parliament, there will be no end of expositions." But the rule has been denied; and, indeed, it seems to be founded rather on a conceit than a reason.*

Stamp Acts.—The English acts imposing stamp duties are, it is said, to be construed strictly;† so, too, there it has been said, that *Statutes giving costs* are to be regarded as inflicting a kind of penalty, and to be construed strictly.‡ There would be little interest or instruction in giving any minute or detailed attention to the very numerous decisions of statutes giving costs; but I cannot refrain from calling attention to the illustration which the idea, that statutes awarding costs are to be construed strictly, furnishes of the frequent unreasonableness of the distinction between liberal and strict construction. Costs are not in any proper sense a penalty. They are a partial remuneration to a prevailing party for the injury he has sustained by the presentation of an illegal demand, or the resistance to legal claim. If the decisions of the law are in a majority of cases equitable, costs are in most cases due not only in law, but in justice; and it seems very

* Dwarris, 628. Butler and Baker's Case, 3 Rep. 31 a. Dean and Chapter of Norwich's Case, 3 Rep. 75.

† Tomkins *vs.* Ashby, 6. B. & C. 541. Warrington *vs.* Furbor, 8 East, 242. Dwarris, 646.

‡ Cone *vs.* Bowles, 1 Salk. R. 205. Rex *vs.* Inhab. of Glastonby, Cases Temp. Hardw. 357. Dwarris, p. 644.

extraordinary to say that a remedy of this kind is to be strictly construed, which means unfavorably regarded. But the truth is, that the judges have perpetually taken refuge in the clouds and mists of strict and liberal construction whenever they have been pressed by the hardship or injustice of a particular case. *

We have thus far considered those classes of statutes which are, as it has been said, to be strictly construed. In doing this, we have had occasion to see how much uncertainty and contradiction there is in the rule; and that as applied and expounded by our modern tribunals, it seems to tend to take the form of the doctrine that in all cases statutes are to be faithfully construed, so as to carry out the intention of the legislature whenever the intent can be ascertained. Pursuing the same examination of the authorities, we now turn to a contrary class of cases, in which it has been held that statutes are to be liberally construed.

Remedial Statutes.— "There can be no question says Mr. Dwarris, "that the words of a remedial statute are to be construed largely and beneficially, so as to suppress the mischief and advance the remedy."† It is by no means unusual in construing a remedial statute, it has been said, to extend the enacting words beyond their natural import and effect, in order to include cases

* In regard to costs, the New York Code of Procedure declares what seems to be the true rule, § 303: All statutes establishing or regulating the costs and fees of attorneys, solicitors, and counsel, in civil actions, and all existing rules and provisions of law, restricting or controlling the right of a party to agree with an attorney, &c. for his compensation, are repealed; and the measure of such compensation is left to the agreement, express or implied, of the parties; but there may be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which allowances are called costs;—and there may be in certain cases additional allowances.

† Dwarris, p. 632.

within the same mischiefs."* On this ground in the Magdalen College case, notwithstanding the general rule that the crown is not affected except by express words, it was held that the queen was bound by an act couched in general terms. "It was never seen" says Lord Coke, "that an act made for the maintenance of religion, advancement of learning, and exhibitions of poor scholars, and therefore to be favorably expounded, should be so construed that a byway should be left open, by which the said great and dangerous mischiefs should remain, and the necessary and profitable remedy be suppressed, and the queen made an instrument of injury and wrong."† "In remedial cases" says Lord Mansfield "the construction of statutes is extended to other cases within the reason and rule of them."‡

So again, it has been held in the case of a remedial act that every thing is to be done in advancement of the remedy that can be given, consistently with any construction that can be put upon it.§ So, under the statute against frauds (13 Eliz., c. 5), the words "good consideration" were held to exclude the consideration of nature or blood, and to mean money, or other valuable consideration, on the ground that otherwise the statute would serve for little or nothing, and

* St. Peters, York, Dean and Ch. *vs.* Mideborough, 2 Y. & J. 196.

† 11 Reports, 67, 716.

‡ Atcheson *vs.* Everitt, Cowp. 382, 391. "But," adds his Lordship, "where it is a hard, positive law, and the reason is not very plainly to be seen, it ought not to be extended by construction." In this case, the question was whether a Quaker could be received to testify on his affirmation in an action of debt on a statute against bribery; the affirmations of Quakers were at that time (1776) received in civil but not in criminal cases. It turned therefore on the point whether the case was a criminal one; and Lord Mansfield holding it to be a penal and not a criminal action, the affirmation was received. The report is a very interesting one.

§ Johnes *vs.* Johnes, 3 Dow, 15. Dwarris, 654.

no creditor would be sure of his debt.* So, too, statutes against frauds are, it is said, always liberally and beneficially expounded. "Chancery will aid remedial laws," said Lord Keeper Wright, "though they are called penal, not by making them more penal, but by letting them have their course."†

In this country, too, it has been repeatedly held that remedial or beneficial statutes are to be liberally construed.‡ So, an act "to prevent the insolvency of moneyed corporations," has been declared to be a beneficial statute, not to be defeated by a narrow construction; and held that any act which the *directors* were prohibited from doing, would be equally illegal and void if done by any *other officer or agent of the bank*.§ So, in Maryland an act passed, as its preamble declared, to do away "a most oppressive and pernicious practice," was declared a remedial statute, and to be liberally construed. ‖ In New York, also, in regard to the act for the incorporation of religious societies, it had been said by the Supreme Court—"We must give the statute a reasonable and liberal construction, for the benefit of the churches."¶

Sometimes the act itself declares that it shall be liberally construed. So, the act incorporating the House of Refuge in the city of New York, declares "that it shall be construed in all courts and places

* Dwarris, 654, 655.

† Ch. Prac., 215; Dwarris, 653.

‡ Admx. of Tracy *vs.* Admr. of Card., 2 Ohio State Rep. N. S. 431.

§ Gillet *vs.* Moody, 3 Coms., 479. The remark was, it is true, *obiter*.

‖ State, use of Sprigg, *vs.* Jones *et al.*, 8 Maryland, p. 88.

¶ The People *vs.* Runkel, 9 J. R., 147. Where held under a statute requiring the trustees of a religious corporation to be annually chosen, that an annual election held each year on Pinxter Monday (Monday after Whitsunday), though a movable holyday, and not a day certain, was good.

benignly and favorably, for every humane and laudable purpose therein contained."* Indeed, in one case in New York, a very able and learned judge claimed for statutes generally a liberality and flexibility that would put an effectual end to all rules of interpretation or construction. "My judgment," says Mr. Chancellor Jones, "must be borne down by the force and weight of authority, before I can deny to legislative enactments the liberal, benign, and equitable construction which will give them the attributes of a nursing mother equally with the common law."†

A statute may be penal in one part, and remedial in another part.‡ And in the same act of Parliament a strict construction may be put on a penal clause, and a liberal construction on a remedial clause. This has been done in regard to the statutes which make it a felony to burn a house, or other property, and, at the same time, give those who suffer from the felony a remedy against the hundred.§

The equity of a statute is immediately connected with this branch of our subject. This doctrine which has been applied, as we have seen, to the statute of frauds and the registry laws and the statute of limitations, grew out of the peculiar ideas that were engendered in the minds of the English lawyers by the double organization of the tribunals of justice: while the common-law courts sat to administer the strict rules of law, the courts of equity arrogated to themselves the duty of doing justice on a more enlarged

* Act of 29th March, 1824, c. 126, § 7.
† White *vs.* Carpenter, 2 Paige, 217, 229.
‡ Hyde *vs.* Cogan, Douglas, 702; Dwarris, 655.
§ Dwarris, 656.

and liberal scale, and in the early days of their organization carried their power so far as to override the express words of statutes where in the particular case it appeared to them to work hardship or inconvenience. This power in regard to statutes is, however, now looked on with distrust; and courts of chancery endeavor to adhere to the much more logical rule that equity follows the law. It cannot be denied, however, that a large class of exceptions has been introduced and established. Indeed, there is nothing more curious in the history of jurisprudence than the successful efforts of courts of equity to defeat the operation of the statute of frauds requiring agreements for the sale of lands to be in writing.* So, the statute was disregarded in cases where the contract though not in writing, was admitted in the answer, subject, however, to the question whether the benefit of the statute was insisted on. So again, where the bargain has been in part performed, subject, however, to the question what is a part performance. In cases of this kind and in others the courts of equity treated the statute very much as if it had never been made, not, however, without the protest of very able judges.† Mr. Justice Story says, "It is obvious that courts of equity are bound as much as courts of law by the provisions of this statute, and therefore they are not at liberty to disregard them. That they do, however, interfere in some cases within the reason of the statute is equally certain."‡

At law a judgment is a general lien upon all the

* The subject is treated at large by Mr. Justice Story, in his work on Equity Jurisprudence, § 753 *et seq.*—See *ante*, p. 104.

† See Lord Redesdale, in Lindsay *vs* Lynch, 2 Sch. and Lef. 5, 7, 8.

‡ Story, Eq. Jurisprudence, § 754.

legal interest of the debtor in his real estate; but in chancery that general lien is controlled by equity so as to protect the rights of those who are entitled to an equitable interest in the lands or in the proceeds thereof.*

Some other cases where statutes have been liberally construed, may here be noticed. The Massachusetts statute of trustee process, or for reaching the property of a debtor in the hands of third persons, declares that every person having any goods, effects, or credit of the principal defendant, intrusted or deposited in his hands or possession, may be summoned as trustee. In an action under the statute the alleged trustee admitted that he had a cow of the defendant's in his possession, but averred that he had no claim to her of any kind whatever, and insisted on this ground that he could not be summoned as a trustee. It was said by the court that, admitting that according to the letter of the statute the defendant was liable, still "that statutes are to be construed according to the intentions of the makers, if these can be ascertained with reasonable certainty, although such construction may seem contrary to the ordinary meaning of the letter of the statute;" and it was added, "We think it never could have been the intention of the legislature that the possession of property by a party having no claim to hold it against the owner should render him liable therefor as trustee, and thereby subject him to trouble and expense in answering a claim in which he has no interest. Such a construction of the statute would be prejudicial in many cases, and cannot be admitted."†

An interesting question on the construction of rail-

* White *vs.* Carpenter, 2 Paige, 217; Keirsted *vs.* Avery, 4 Paige, 9; Buchan *vs.* Sumner, 2 Barb. Ch. R. 165.

† Staniels and another *vs.* Raymond, &c., Trustee, 4 Cush. 314.

road acts, has arisen in Massachusetts. A charter, passed in 1845, authorized a railroad corporation to make a branch from the village of Cabotville to that of Chicopee Falls, without defining the route. The road was laid down on a main street or highway in Cabotville. On a bill filed for an injunction, it was said that, by a railroad grant in such general terms, *prima facie* the power to run on the highway could not be inferred; as the use of it by the railroad was inconsistent with its original destination. That such power could only be given by express words or necessary implication. That such necessary implication might arise from the application of the act to the subject-matter, as for instance if the railroad could not by reasonable intendment be laid on any other line; and it was referred to commissioners to ascertain the fact.*

In a great fire which took place in the city of New York, in December, 1835, a building owned by Rufus L. Lord, and occupied by Daniel N. Lord as his tenant for a year from 1st May, 1835, was destroyed by the order of the mayor, to prevent the spreading of the conflagration. The statute authorizing the action of the mayor in similar cases, provided if any building was so destroyed, that, upon the application of any person *interested in such building*, a precept should

* Inhabs. of Springfield *vs.* Conn. River R. R. Co., 4 Cush. 63. I may be permitted to say, that unless the Supreme Court of Massachusetts have some statutory power peculiar to themselves, and to that State, the true course would seem to have been to decide the case on the words of the act. To refer the case to commissioners on a *question of fact as to the practicability of running the road on the street*, if that question had not been considered before the passage of the act, was to substitute the judgment of the commissioners for that of the legislature. If the legislature had considered the question, it was a revision of their decision on a matter of which they should be the sole judges.

issue for a jury to inquire of and assess the damages which the *owner of such building, and all persons having any estate or interest therein*, should have sustained by the destruction, and after inquiry and assessment, the sum assessed should be paid *in full satisfaction of all demands of such persons respectively by reason of the destruction of the buildings;* the sum assessed for any *building so destroyed* as aforesaid, to be borne and defrayed by the city government. The damages of the owner of the building were assessed at $7,168 50, and of the tenant, for his goods, $156,274 80; but it was insisted that, by the words of the statute, no recovery could be had for any thing but the *building*, and that injury to personal property in it was not covered. The entire assessment was, however, sustained, on the ground that the statute was remedial, and should be liberally construed.*

In regard to the New York act, enabling limited partnerships to be formed by making certain publications specified by the statute, and declared necessary in order to restrict the liability of the special partner, it has been held, that the terms of the statute must

* Mayor of New York *vs.* Lord, 17 Wend. 285; 18 *ibid.* 126. See Mr. Justice Bronson's able dissenting opinion.

In a subsequent case, Stone and others *vs.* the Mayor &c. of New York, 25 Wend. 177, an effort was made to carry the construction of the statute so far as to entitle the lessee of a building destroyed by order of the mayor to recover for merchandise destroyed which did not belong to the lessee, but was the property of others, in his possession as a factor, or merely on storage; but this interpretation was rejected.

In Russell *vs.* The Mayor, &c. of New York, 2 Denio, 461, the authority conferred on the Mayor, by this statute, was said not to be a grant of the right of eminent domain, and therefore not within the constitutional provision as to private property; but that it was only a regulation of the right which individuals possess, in cases of inevitable necessity, to destroy property to prevent an impending calamity.

be substantially complied with, but that mere errors of form, either unintentional, or not calculated to mislead, will be overlooked. So, the mistake in the printed notice of one month for another,* or the misprint of a name,† not likely to lead into error, will be disregarded; but a misprint of the sum put in as capital, as where it is asserted to be *five* thousand instead of *two*, is regarded as fatal, and converts the special into a general partner.‡

A statute relating to principals and factors declared, that one intrusted with the possession of the goods of another for the purpose of sale, should be deemed the true owner, so far as to give validity to a disposition thereof for money advanced, upon which it has been held in New York, that this does not protect a party who had made advances to such a factor, with a knowledge that he was not the owner of the goods, on the ground that a contrary construction would authorize the agent or factor, by connivance to commit a fraud on the principal.§

So, where the United States bankrupt act declares, (act of 1841, § 4), that the certificate may be *pleaded* as a full bar, it has been held that the word pleaded was not to be strictly construed, and that the certificate might be proved under a notice attached to the plea, under the old system of pleading.‖

A statute restraining any *person* from doing certain

* Madison Co. Bank *vs.* Gould, 5 Hill, 309.

† Bowen *vs.* Argall, 24 Wend. 496.

‡ Smith. *vs.* Argall, 6 Hill, 479.

§ Stevens *vs.* Wilson, 3 Denio, 472, 475.

‖ Campbell *vs.* Perkins, 4 Selden, 430. Ruckman *vs.* Cowell, 1 Comstock, 505.

acts, applies equally to corporations or bodies politic, although not mentioned.*

We have thus far examined two classes of decisions, one in which statutes have been strictly construed, and another in which they have been liberally or equitably interpreted. Our consideration of the subject will not, however, be complete, till we shall have discussed the very curious class of cases in which the legislative enactment is neither strictly nor liberally construed, but simply disregarded altogether. This takes place where the mandate of a statute is called, and regarded as, directory.

Statutes when held to be directory.—When statutes direct certain proceedings to be done in a certain way or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed. In these cases, by a somewhat singular use of language, the statute is said to be *directory*. In other cases the statute is held to be imperative or mandatory.†

* People *vs.* Utica, Ins. Co. 15 J. R. 358, 381, 382. By the Revised Statutes of New York, in certain criminal cases, the word *person* embraces the State, foreign governments, and corporations, *i. e.* when the word *person* is used to designate the party whose property may be the subject of any offense. 2 R. S. part iv. chap. i. title 7. § 36. The Revised Statutes have in many cases, defined the meaning of the terms made use of by the Revisors. See Index, tit. Definitions.

† *Directions* given by a sovereign in regard to a matter over which his power is conceded, would, according to the ordinary use of language, be held to involve, as its correlative, *obedience*. But, as in the cases now under consideration, obedience is dispensed with by the judiciary, the statute might be better called advisory. The phrase is the more calculated to mislead, as it is frequently used in the strict and proper sense of the

The great importance of this branch of our subject is at once apparent; and conceding as we must the power, it is equally apparent that the questions which arise under this head are not properly those of construction or interpretation. They are questions rather of application. The statute is sufficiently clear; the only point is, what shall be the consequence of a disobedience of its directions.

Neither the idea that statutory provisions may, to a certain extent, with impunity be disregarded, nor the phrase that in these cases they are treated as *directory*, is of any recent origin. In an early case on a municipal election, the mayor was to be chosen out of the aldermen who were "*annuatim eligend*;" but it appeared that the aldermen present at the mayor's election had been in office several years, and none of them had been re-elected within a year. The King's Bench held the election void; but upon error in the Exchequer Chamber and two solemn arguments, the judgment was reversed, and the words "*annuatim eligend*" were held to be directory only; and the reversal was affirmed in Parliament.* So, in an early

word. So, when a commercial letter of instructions contained the phrase "you *may* invest the proceeds as follows, &c., &c.," the Court of Exchequer interpreted these words as conveying a peremptory mandate, saying, "These words are to be construed to be directory." Entwistle *vs.* Dent., 1 Exch., 811, 823, per Pollock, C. B.

* Foot *vs.* Prowse, Mayor de Truro, Strange 625, 11 George I. In the preface of this volume, I may here remark in passing, Sir John Strange, who was Master of the Rolls, complains that "the profession of the law is already overburthened with reports"!

In the case of the Queen *vs.* Corporation of Durham, 10 Mod., 146, 147, the K. B. said that though a town clerk be *annuatim eligibilis*, he remains town clerk after the year, and until another was chosen; but if he had been *eligibilis pro uno anno tantum*, his office would have expired at the end of the year.

case Lord Mansfield said, "There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of Parliament, and clauses merely *directory*. The precise time in many cases is not of the essence."*

From the English jurisprudence the doctrine was adopted in our own; and of late years, owing partly to the immense multiplicity of statutes, and the haste and carelessness with which they are drawn, partly to the want of education and system on the part of subordinate officers clothed with important trusts, this practice of treating statutes has been carried to a very great extent. In order to give an accurate idea of the state of the law in this respect, our attention will now be given to some of the prominent decisions made in both countries.

In some cases it has been intimated that the character and construction of the statute would be determined by the use of affirmative or negative words. That is to say, that a mere affirmative command would be held to be directory; but that if the statute declared the act should be done in no other way, it would be held to be imperative or mandatory.

Again, the decision has turned on the mere phraseology of the act. So, where a marriage act declared that "the consent of the father, etc., is hereby *required* for the marriage" of a child under age, the words were held directory only; Lord Tenterden saying, "The language of this section is merely to *require*

* Rex *vs.* Loxdale, 1 Burr. 447. See, also, as to the different effect of affirmative or negative words as to making a statute imperative or directory, Savage *et al. vs.* Walshe *et al.* 26 Alabama, 619. Rex *vs.* Justices of Leicester, 7 B. & C. 6; S. C., 9 D. & R., 772.

consent; it does not proceed to make the marriage void if solemnized without consent."*

Again, it may turn on whether the direction is inserted in the shape of a proviso, and upon the mode in which the proviso is framed. Where a statute declared that guardians of the poor should have power to bind as apprentices, "*provided* that the children should not be bound for a longer term than" till a certain age,—an indenture binding a child for a longer term than that allowed by the act, was held not absolutely void, but merely voidable, on the ground, that this proviso "was only as mild a form of directing, and only directing, as could be;" that the act did not declare the binding null and void, nor contain any penalty, nor any words to make it illegal; nor was public policy in any way concerned in setting the bond aside.† By a paving act, commissioners were empowered to enter into contracts for the work, *provided* that no contract should be made for a longer term than three years; and the act then went on to declare that ten days' notice of proposals should be given, that the contracts should specify the work, the price, and the time of completion, and should be signed by at least three of the commissioners, and that copies should be kept. It was held that the proviso as to the term of the contract was imperative, but that all the other clauses were merely directory (Tindal, C. J., saying, "The act says that the contracts *shall* be signed by the commissioners, &c.; it does not say that they shall be void unless so

* Rex *vs.* Inhabts. of Birmingham, 8 B. & C. 29, 35.

† The King *vs.* Inhabts. of St. Gregory, 2 Ad. & Ell., 99. See Rex *vs.* Inhabts. of Hipswell, 8 B. & C., 466.

signed"), and that a contract was good without them. Here it is obvious that provisions inserted by the legislature for the protection of tax-payers, were nullified by a judicial decision.*

In New York, an effort has been made to declare a rule for cases of this class. Where a statute authorized the commanding officer of each brigade of infantry, on or before the first day of June to appoint a brigade court martial, in an action for fines imposed by a court martial it appeared that the court was not appointed till July, and it was objected that the fines were illegally imposed; but the statute was held to be directory merely; and it was said, "There is nothing in the nature of the power showing that it might not be as effectually exercised after the first of June as before, and the act giving it contains no prohibition to exercise it after that period." It was considered a mere direction, and not a limitation; and the Court proceeded to add, "The general rule is, that where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory merely, unless the nature of the act to be performed, or the language used by the legislature, shows that the designation of the time was intended as a limitation of the power of the officer."†

* Cole *vs.* Green, 6 Man. & G., 872, 890. This seems clear as to the clauses requiring notice of the proposals, and detailed contracts; and yet it was difficult to hold that the contracts should be violated if the clerks kept no copies. The embarrassment in these cases, as I shall have occasion again to observe, appears chiefly to arise from the statute either connecting together provisions of very unequal importance, or from its omitting to prescribe the consequences of a violation of its directions.

† The People *vs.* Allen, 6 Wendell, 487, 488, per Marcy, J. The act regulating sales of real property on an execution, makes it the duty of sheriffs

In Massachusetts, where a statute required the assessors to assess a tax within thirty days after the vote of the tax being certified to them, it was held that the naming the time for the assessment was to be considered as directory to the assessors, and not as a limitation of their authority.* So in New York, where a school-tax was voted at a meeting of which no notice was given as required by statute, and afterwards levied, the act was held to be directory merely, and the tax to be well laid.† A statute requiring a tax to be assessed, and the tax-list therefor to be made out by the trustees, and a proper warrant attached thereto within thirty days after the district meeting in which the tax shall have been voted, is merely directory as to time. It being for the benefit of the public, those acts may be done after the time specified in the statute has elapsed.‡ It may perhaps be doubted whether these cases do not conflict with the wholesome strictness required, as we have seen, in summary administrative proceedings. So again, where a city ordinance required a superintendent of streets to keep an account of the expenses done under an assessment, and to report the same in ten days, the provision was held to be merely directory, and not a condition precedent to the making of a valid assessment.§

to file a certificate of sale in the clerk's office in ten days after the sale takes place; but this omission does not affect the validity of the sale. Jackson *ex dem.* Hooker *vs.* Young, 5 Cowen, 269. See The People *vs.* Kunkle, 9 J. R. 147 and The People *vs.* Peck, 11 Wend. 604, for cases where church elections have been held good though statutory provisions as to time and notice of holding, &c. have not been complied with.

* Pond *vs.* Negus *et al.* 3 Mass. 230. Williams *vs.* School District, 21 Pick. 75.

† Marchant *vs.* Langworthy, 6 Hill, 646; 3 Denio, 526.

‡ Gale *vs.* Mead, 2 Denio, 160. Thomas *vs.* Clapp, 20 Barb. 165.

§ City of Lowell *vs.* Hadley, 8 Met. 180.

The Revised Statutes of New York* provide that every person elected to the office of sheriff shall within twenty days after he shall receive notice of his election, execute a bond, &c., to the people of the State. This provision also has been held to be a direction, and not a limitation.† In another recent case in the same State, it was said that statutory requisitions are deemed directory only when they relate to some immaterial matter, where a compliance is a matter of convenience rather than of substance.‡

Indeed, the rule has been carried so far as to hold, where a statute directed the vote of the common council of the city of New York to be taken by ayes and nays, that this provision is merely directory.§ And, again, it has been decided that the provision of a statute requiring inspectors of corporate elections to take an oath, is only directory.‖ The rule has also been applied to popular elections; and an election has been held valid, though the inspectors were sworn not on the Bible but on some other book, though they kept open the polls after the time fixed by law, and committed other minor irregularities,—on the ground, that in all these respects the enactments of the statute were directory; that provision was made for the punishment of the officers for willful or corrupt conduct; that no actual evidence of fraud was adduced, nor any proof that the irregularity complained of had produced an improper result.¶

* 1 R. S. 378, § 67.

† The People *vs.* Holley, 12 Wend., 481.

‡ The People *vs.* Schermerhorn, 19 Barb., 540.

§ Striker *vs.* Kelly, 7 Hill, 9.

‖ In the Matter of the Mohawk and Hudson R. R. Co., 19 Wend., 143.

¶ People *vs.* Cook, 14 Barbour, 259; S. C., 4 Seld., 88, 89, 93.

I think it may well be doubted whether in the desire to sustain proceedings against which no bad faith has been alleged, a proper regard for form and regularity has not been lost sight of. It is extremely difficult in these cases to prove actual fraud; the very object of forms of proceeding is to secure regularity and fair dealing, and the recognition of the doctrine that explicit provisions of statutes can be disregarded with entire impunity as to the result of the particular proceeding, is likely to lead to unbounded negligence and indifference on the part of public officers, who have, as a general rule, little to fear from criminal proceedings directed against themselves personally.

The general principle, that statutory provisions may in certain cases be treated as purely directory, has been recognized in all the States. In regard to capital trials for murder in Michigan, a statute requiring a circuit judge to assign a day for the trial, has been held clearly directory, so far as time is concerned.* So in Indiana, an act authorizing the governor of the State to appoint arbitrators, in regard to a railroad, "two of whom shall be men of legal attainments," was held from its vagueness to be merely directory, and that his action in the premises could not be reviewed, although no two of the arbitrators appointed by him had the prescribed qualifications.† So, too, in Louisiana, it has been held that a provision in an act providing for the subscription by municipal corporations, to the stock of companies undertaking works of

* The People *vs.* John Doe, 1 Michigan, 452, 453.

† The State *vs.* McGinley, 4 Indiana Reports, p. 7.

internal improvement, requiring that the commissioners of election should be furnished with a properly certified list of the authorized voters, is directory merely.* In Connecticut, it has been said that, when a duty is required by statute to be performed on a certain day, and the object contemplated by the legislature cannot otherwise be carried into effect, the time prescribed must be considered imperative; but if there is nothing indicating that the exact time is essential, it is to be considered as directory. So, where a city charter required that a certain number of jurors should be chosen on the first Monday of July, and they were not chosen till the first of August, it was said that the provision was directory, and the jury was held to be legal.† In Alabama, a clause in an act for the final settlement of the affairs of a bank, requiring the trustees to sell the remaining property, "within thirty days from the first Monday in November," has been held not to be mandatory, but directory merely; and that a sale made after the expiration of the time specified was good, on the ground that the act contained merely affirmative, and not negative words.‡

* City of New Orleans *vs.* St. Rowes, 9 La. Ann. R. 573. *Vide* the dissenting opinion of Buchanan, J.

† Colt *vs.* Eves, 12 Conn. 243.

A statute in Texas provided that certain lands therefore located, should be surveyed within twelve months, or the location should be null and void. The locator applied to the surveyor to survey, and the surveyor refused. A mandamus was applied for within the twelve months to compel the surveyor to survey, and obtained; but the survey was not completed within the twelve months. It was held, nevertheless that the survey was valid, on the ground that it was not intended to compel a party to do an act wholly out of his power. Edwards *vs.* James, 13 Texas, 52.

‡ Savage *et al. vs.* Walsh *et al.* 26 Ala. 620. For other cases see *Ex parte*

I may here notice that this same principle has been applied to the construction of constitutions. The constitution of New York provides, in regard to all laws, "that the question upon the final passage shall be taken immediately upon the last reading, and the yeas and nays entered in the journal." (Cons., art. iii. § 15.) It has been held, in regard to this provision, with what, I say it in all deference, appears to me an extreme laxness, that it is merely directory, and that the disregard of it would have no effect upon the law.*

It seems to me difficult to deny that the practice of sanctioning the evasion or disregard of statutes which, we have had occasion to notice in the cases thus examined, has been carried beyond the line of sound discretion. This idea has been repeatedly expressed. "I am not very well satisfied with the summary mode of getting rid of a statutory provision, by calling it directory," says Hubbard, J. in the Supreme Court of Vermont. "If one positive requirement and provision of a statute may be avoided in that way, I see no reason why another may not."† But it is not to be denied that the practical inconveniences likely to result from insisting with literal severity on strict compliance with all the minute details which modern statutes contain, create a pressure on the judiciary very difficult to be resisted by sagacious and practical men who desire to free the law from the reproach of harshness or absurdity. If it should be thought, on a review of these

Heath and others, 3 Hill, 42; People *vs.* Holley, 12 Wend. 481; Jackson *vs.* Young, 5 Cowen, 269; Holland *et al. vs.* Osgood, 8 Verm. 276, and Corliss *vs.* Corliss, *ibid.* 373.

* The People against the Supervisors of Chenango, 4 Seld., 317.

† Briggs *vs.* Georgia, 15 Verm., 61, 72.

cases, that the judiciary have, in regard to the construction of statutes as directory, really infringed on the province of the legislature, the only practical remedy for it appears to be a more careful preparation of the statutes, and an habitual insertion of the precise consequence which the lawmaker intends to follow from the disregard of his directions. "Perhaps," says Lord Denman, in a case of this kind, "this discussion may incline the legislature to say, on future occasions, in what respect they mean any particular provisions to be void which they declare to be so in general terms, and what consequences they intend should result from this invalidity. In the absence of this, we have great difficulty in all such cases."*

We approach the end of a path which the careful reader must have long since perceived to be beset with difficulties, contradictions, and perplexities. In the cases that we have examined in this chapter, we find that sometimes laws are construed strictly, and sometimes liberally,—sometimes liberally for one purpose, or in one aspect, and strictly in another,—sometimes exceptions are inserted to obviate suggestions of hardship or inconvenience, and sometimes the courts refuse to make such qualifications,—sometimes statutes are interpreted with strict and literal severity, and sometimes obedience to their mandates is declared to be a matter of entire indifference. It is obvious that in this state of things it is impossible to arrive at any rules of interpretation other than those which are derived from a classification such as we have attempted to make.

It is equally obvious, however, that serious evils are

* Reg. *vs.* Inhabs. of Fordham, 11 A. & E., 88.

sure to result from a latitude of construction so considerable as we find to exist; and I, therefore, attempt, with great deference for the able and learned magistrates who are practically engaged in the administration of justice, to frame the following rules as those which ought to govern in this department of our science.

The intention of the legislature should control absolutely the action of the judiciary; where that intention is clearly ascertained, the courts have no other duty to perform than to execute the legislative will, without any regard to their own views as to the wisdom or justice of the particular enactment.*

The means of ascertaining that intention, are to be found in the statute itself, taken as a whole and with all its parts,—in statutes on the same subject, antecedent jurisprudence and legislation, contemporaneous and more recent exposition, judicial construction, and usage; and to the use of these means, and these alone, the judiciary is confined. No other extrinsic facts are in any way to be taken into consideration.

It is not until these means fail, and until the attempt to ascertain the legislative intent is hopeless, that the judiciary can with propriety assume any power of construing a statute, strictly or liberally, with reference either to the particular character of the statute, or to

* "No principle is more firmly established, or rests on more secure foundations, than the rule which declares, when a law is plain and unambiguous, whether it be expressed in general or limited terms, that the legislature shall be intended to mean what they have plainly expressed, and consequently no room is left for construction;" "resort is not permitted to extrinsic facts to ascertain the meaning of a statute otherwise clear."—Per Goldthwaite, J., in Bartlett *vs.* Morris, 9 Porter Ala. 268, 269. See this case, also, with reference to the point that the title of a statute may explain what is doubtful, but cannot control what is contained in the body of the act.

their own ideas of policy or equity. Where the meaning of the statute, as it stands, is clear, they have no power to insert qualifications, engraft exceptions, or make modifications, under the idea of providing for cases in regard to which the legislature has omitted any specific provisions.

In cases where the intent of the legislature is ambiguous, and the effort to arrive at it is hopeless, and in these cases only, does the power of construing a statute strictly or liberally exist; and in regard to its exercise, as of discretionary power generally, no other rule can be laid down than that it must be exerted under the guidance of learning, fidelity, and practical sagacity.

In regard to the cases where statutes are held to be directory, the greatest difficulty exists; and in these there appears no mode of obviating it until legislative enactments shall be framed so as to specify with precision the consequences intended to follow upon a disregard of their provisions.

To the practiced mind these rules may at first sight appear useless or trivial; but perhaps they will not be so considered on a careful consideration of the labyrinth of cases in which we have been wandering, and on observing the difficulty of obtaining or of giving a clue to its dark and tortuous passages. That difficulty appears to me mainly to arise from the abuse of the power of strict and liberal construction, to which our attention cannot be too often called.

The idea that an act may be strictly or liberally construed, without reference to the legislative intent, according as it is viewed either as a penal or a remedial statute, either as in derogation of the common law or a beneficial innovation,—is, in its very nature,

delusive and fallacious. Every statute may be said to have two aspects: if it be severe in regard to an individual, it is beneficial to the community; if it punishes crime, it also prevents fraud; if it infringes on some venerable rule of the ancient law, it also introduces more simple, rapid, and less expensive modes of procedure;—so that every act is capable, if this doctrine be admitted, of being construed in two ways diametrically opposed to each other, according to the temper of the magistrate to whom the task is confided.

Again, the same act will be differently viewed under different circumstances. The acts diminishing the severity of imprisonment for debt, will be at one time looked upon as loose and profligate enactments, impairing the rights of creditors; and at another as laws in favor of freedom and humanity. The usury laws will be at one period regarded as salutary restraints on the rapacity of capitalists, and at another as absurd restrictions on the commercial dealings of mankind; so that, if construed according to the different lights in which they are viewed, the same laws will be differently interpreted at different times, and even in different places at the same time.

The inconsistences and discrepancies, as they now exist, do, in truth, too often arise from a desire, often an unconscious one, to substitute the judicial for the legislative will; and they can only be corrected by adhering to the cardinal rule that the judicial functions are always best discharged by an honest and earnest desire to ascertain and effect the intention of the law-making body.*

* See the opinion of Chief Justice Edwards, in Hardin *vs.* Owings, 1 Bibb, 215 Kentucky,—a case on the form of an appeal bond,—for a clear and forcible statement of the evils resulting from the loose notions of construction which have heretofore prevailed.

The Intention of the Legislature.—We have had repeated occasion to make use of this term in the course of the two last chapters, and it may not be amiss here to analyze the phrase more closely than has been done in the text. Where, then, in what minds, can the *intent* of a given legislative act be found, and how can its existence be proved? The question is asked as an abstract one, and without reference to any technical rule of any kind.

In regard to the general purport, or object, or intention of an act, no difficulty presents itself. If an act be passed to make a railroad, or to raise troops, no doubt can arise that every member of the majority which votes for the bill, concurs in the intention to accomplish the general object of the laws, viz.—to make the road, or to raise the levies. But in regard to the particular meaning of particular phrases or clauses—those out of which all the difficulties of construction grow—the case is very different. Take for instance the statute forbidding sheriffs to buy at sales on executions issued to them (*ante*, p. 304), which has been construed to mean, "excepting in cases where sheriffs are plaintiffs,"—or the statutes authorizing all persons to make wills (*ante*, p. 303), and which has been construed not to include married women,—or any still nicer cases. Did the legislature in these cases mean to exclude sheriff-plaintiffs, or to include married women? What was the legislative intent?

In seeking for an answer, many things are to be considered. In the first place, the intention is to be found in the acts of the majority, and the objects or purposes of those voting against the bill are to be left out of view. Of those who voted for the bills, how many considered the precise question,—as that a sheriff might be a plaintiff? How many knew any thing of the rule of the common law, that married women are incompetent to make wills? How is it to be known in the case of the sheriffs' statute, that some one or more of the majority, even if they considered that a sheriff might be a plaintiff, did not intend, having this in their minds, to make an arbitrary and peremptory rule, like the statute of frauds, to prevent collusion or perjury. Again, if the clause be inserted by amendment, is the majority who voted for the amendment the same as the majority who voted for the bill? Amendments are very frequently voted for by members hostile to a bill, for the purpose of defeating it, and yet the bill passes. Again, a committee reports a bill with one object, and it is completely or partially altered by amendments in its passage through the legislative body. These considerations, moreover, all apply to two bodies, thereby doubling the difficulty of arriving at the real intention of the lawmaking power.

Illustrations of this kind might be extended almost indefinitely. They appear to me to be quite sufficient to show that even if the utmost latitude of proof was allowed, if reports and journals were consulted, if even the members themselves were put on the stand, it would be utterly impossible

in the great majority of cases to prove what the intent of the legislative body actually was in framing or inserting any given particular clause or provision.

These considerations are not without practical weight. They go to show the only safe rule to be, that the legislative intent must be taken as expressed *by the words which the legislature has used*, that all attempts by any kind of evidence to get at a legislative meaning different from that embodied in the words of the enactment, would from the nature of things prove illusory and vain; that interpretation in these cases is necessarily conjecture, tending to assume the shape of mere arbitrary discretion; and that construction should be strictly confined to cases of ambiguity or contradiction. "I hold that in respect to the intention of the legislature, where the language of the act is explicit, the courts are bound to seek for it in the words of the act, and are not at liberty to suppose that they intended any thing different from what their language imports."—Mr Senator Porter, in The Supervisors of Niagara *vs.* The People, 7 Hill, 511.

CHAPTER VIII.

THE CONSTRUCTION AND APPLICATION OF STATUTES IN PARTICULAR CASES.

Statutes delegating public authority—Revenue laws—Penal Laws—Laws as affecting the rights of the government—Effect of statutes on contracts in violation of them—Cumulative remedies and penalties—Retroactive effect of laws—Waiver—Rule that the last statute in point of time prevails—Computation of time in statutes—Subject matter—General words—Misdescription and surplusage—Remoteness of effect—Statutes against wagers—Corporations—The interpretation and proof of foreign laws—Revision of statutes—State-laws, how construed in the courts of the United States—Interpretation of particular words—Miscellaneous cases—Grants or Patents.

HAVING in the previous chapters considered the general principles of interpretation applicable to statutory law, I now proceed, for the more complete understanding of the subject, to examine the construction and application of statutes in particular cases. This will lead me, perhaps at the risk of a repetition of matters already somewhat discussed under the head of the incidents and attributes of statutes, to consider certain classes of enactments, the application of certain general rules or maxims of our law to this special branch of it, to speak of certain arbitrary rules of interpretation which have been adopted, and finally to examine the sense in which particular words are received.

Statutes delegating authority to public officers.—We have already* called attention to the subject of public

* *Ante*, pp. 102, 103.

officers created by statute; and although the general disposition of the judiciary seems to be to treat such agents with liberal confidence, so long as they appear to be acting in good faith, with due discretion, and within the limits of their conceded powers, and although in the exercise of mere discretionary authority, the courts are unwilling to interfere,—yet where public officers overstep the bounds of their authority, and the courts are appealed to as matter of strict right, the actions of these agents are vigilantly watched, and their infringements of private right unhesitatingly repressed. This doctrine we have already partially considered under the heads of summary judicial and administrative proceedings.*

So where a statute of the State of Illinois authorized certain commissioners to borrow money and issue bonds, but the stock or bonds of the State were in no case to be sold for less than their par value,—it appearing that the securities had been sold for less than par, the sale was held to be void, and an injunction against the purchaser ordered.† So in Michigan, where a statute authorized the agent of the State-prison to let out convicts, and required him to give notice in a public newspaper for sealed proposals for letting the convicts, it was held that the statute must be strictly pursued; and a contract made without the statutory notice was adjudged void.‡ So again, where county commissioners were authorized to loan money on mortgage, and upon nonpayment the commissioners were directed by statute to advertise for sale in three places, it was held that a

* *Ante*, p. 360.

† The State of Illinois *vs.* Delafield, 8 Paige, 527. See this case for a discussion of the meaning of the word *par*, and of the subject of exchange.

‡ Agent of State-Prison *vs.* Lathrop, 1 Michigan, 438.

compliance with the statute was indispensable; and the directions of the act having been neglected the sale was held void.*

In cases of authority of this kind, where personal trust or confidence is reposed in the agent—where his discretion is to be exercised—the authority is purely personal, and cannot be delegated. Thus, where authority was conferred upon canal commissioners to enter upon lands, &c., it was held that the power could only be exercised by them in person, or by *their express direction*, and that an engineer, or other sub-agent could not exercise the power without the express directions of the commissioners. "It is of the greatest public importance," says Mr. Senator Verplanck, "to establish the general rule of agency, that 'delegated authority cannot be delegated again without special power so to do,' as governing the official powers, acts, and contracts of our State officers."†

Where a public body or officer has been clothed by statute with power to do and act concerning the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, even though the phraseology of the statute be permissive only; and

* Denning *vs.* Smith, 3 J. C. R. 332; Nixon *vs.* Hyserott, 5 J. R. 58.

In regard to these questions of the power and jurisdiction of public officers, we may here notice the rule that process regular on its face, and apparently within the jurisdiction of the court or officer issuing it, is a complete justification to the ministerial officer by whom it is executed, though in fact the court or officer had no jurisdiction. So it has been decided in regard to an execution, regular on its face, issued on a justice's judgment in a case where the justice had no jurisdiction; Savacool *vs.* Boughton, 5 Wend. 170; and also in regard to a school-district tax-warrant regular on its face, though the district meeting at which the tax was voted, was illegal; Abbott *vs.* Yost, 2 Denio, 86.

† Lyon *vs.* Jerome, 26 Wend., 485, 496.

if the duty is not performed, an action will lie. So, where the corporation of the city of New York were empowered to cause sewers to be made in that city, and to cleanse the same, it was held that it was their duty to keep them clean, and that an action would lie for negligence in relation thereto.* But in order to succeed in such an action, it must be clear that a duty is imposed by law. So, where in New York the officers and agents of a city corporation assumed to build a bridge, under the authority of a statute not constitutionally passed for want of the required legislative majority, and the bridge fell by reason of its negligent construction, the corporation was held not to be liable.†

In regard to the number requisite to constitute a *quorum* of the members of a public body, or the number requisite to do business, it has long been settled that, where a statute constitutes a board of commissioners or other officers to decide any matter, as to open books, to receive subscriptions, and distribute the stock of a railroad company, but makes no provision that a majority shall constitute a *quorum;* all must be present to hear and consult, though a majority may then decide.‡

* The Mayor of N. Y. *vs.* Furze, 3 Hill, 612; Henley *vs.* Mayor *et al.* of Lyme Regis, 5 Bing. 91, 3 Barn. & Adol. 77; 1 Bing. N. C. 222, S. C. in error.

† The Mayor, &c. of Albany *vs.* Cunliff, 2 Coms. 165. It must, however, be admitted that in this case it is not easy to ascertain from the opinions of the different members of the court, what was the precise point which they intended to decide. I give the substance of the marginal note. See also People *vs.* Cooper, 6 Hill, 516.

‡ Withnell *vs.* Gartham, 6 T. R. 388. Grindley *et al. vs.* Barker *et al.* 1 B. and P. 229; *Ex parte* Rogers, 7 Cow. 526. Crocker *vs.* Crane, 21

Revenue Laws.—We have already referred* to the language which has been held in regard to laws passed for the collection of revenue, with reference to the principles of strict and liberal construction. We have here to consider the general principles of interpretation which are to be applied to them. The Supreme Court of the United States has said that "laws imposing duties on the importation of goods, are intended for practical use and application, by men engaged in commerce. Merchants are not supposed to be men of science,—naturalists, geologists or botanists; and it is a settled rule in the interpretation of statutes of this description, to construe the language adopted by the legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used."†

Wend. 211. Babcock *vs.* Lamb, 1 Cowen, 238. In New York the Revised Statutes provide, "Whenever any power, authority or duty is confided by law to three or more persons, and whenever three or more persons or officers are authorized or required by law to perform any act, such act may be done, and such power, authority or duty may be exercised and performed by a majority of such persons or officers, upon a meeting of all the persons or officers so entrusted or empowered, unless special provision is otherwise made." 2 R. S. part iii. chap. viii. title 17, § 27, vol. ii. p. 555.

In New York the act of 1848, creating the office of Auditor of the Canal Department, conferred on him no power to look behind a draft drawn by one of the canal commissioners, and adjudge that the commissioner was without the authority to make it. His powers and duties are strictly of a ministerial character. People *vs.* Schoonmaker, 19 Barb. 657.

* *Ante*, p. 334.

† Two Hundred Chests of Tea, 9 Wheat. 430, 438. Elliott *vs.* Swartwout, 10 Peters, 137; see this case, as to the distinction between woolen goods and worsted goods.

"Public policy, national purposes, and the regular operations of government, require that the revenue system should be faithfully observed and strictly executed," says Mr. J. Chase, in Priestman *vs.* The United States, 4 Dallas, 28, 34.

Mr. Justice Story, on the first Circuit, has said that,—

Acts of this nature are to be interpreted, not according to the abstract propriety of language, but according to the known usage of trade and business, at home and abroad. If an article has one appellation abroad, and another at home, not with one class of citizens merely, whether merchants or grocers or manufacturers, but with the community at large, who are buyers and sellers,—doubtless our laws are to be interpreted according to that domestic sense. But, where the foreign name is well known here and no different appellation exists in domestic use, we must presume that, in a commercial law, the legislature used the word in the foreign sense. I say nothing, as to what rule ought to prevail where an article is known by one name among merchants and another by manufacturers or the community at large, in interpreting the legislative meaning of the Tariff Act. Congress, under such circumstances, may perhaps be fairly presumed to use it in the more general or more usual sense, rather than in that which belongs to a single class of citizens. But this may well be left for decision until the very question arises.

I agree in the law as laid down in the case of Two Hundred Chests of Tea, Smith, Claimant, 9 Wheaton R. 435. That case was as fully considered, and as deliberately weighed, as any which ever came before the Court. It was there laid down, that in construing revenue laws, we are to consider the words not as used in their scientific or technical sense, where things are classified according to their scientific characters and properties, but as used in their known and common commercial sense in the foreign and domestic trade. Laws of this sort tax things by their common and usual denominations among the people, and not according to their denominations among naturalists or botanists, or men in science.*

Penal Laws.—Under the head of incidents and attributes of statutes in our fourth chapter, and under that of strict and equitable construction in the last, we have already had occasion to consider many questions in regard to penal statutes. Certain other rules remain, which more properly belong to this place.

* U. S. *vs.* Breed, 1 Sumner, 159, 163, 164.

The question is often raised, whether a given statute is properly to be classed as a penal or a remedial law; and it does not seem clearly settled what constitutes a penal statute. A statute declaring that an indictment for an offense committed on board of a boat navigating a river or canal, may be found in any county through which the vessel shall pass, has been said not to be properly speaking a penal statute, as it neither creates the offense, prescribes the punishment, nor alters the mode of trial; it merely changes the venue.* In Maine, it has been said, that a statute declaring that any person who assists a debtor to defraud his creditor by making a fraudulent concealment or transfer of his property, shall be answerable in a special action on the case to any creditor, in double the amount so fraudulently concealed or transferred, is not a penal statute.† A statute giving double damages to a landlord against a stranger for assisting a tenant in carrying off and concealing his goods, by which the plaintiff was prevented from distraining for his rent, has been said in England to be a purely remedial statute.‡ And so, in Massachusetts, a statute giving double damages against a town, for an injury to the plaintiff caused by a defect in a highway, has been similarly regarded. Shaw, C. J., in delivering the opinion of the court said, "We think the action in the present case is purely remedial, and that it has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty, operate to a certain

* The People *vs.* Hulse, 3 Hill, 309.

† Frohock *vs.* Pattee, 38 Maine, 103; see also, Quimby *vs.* Carter, 20 Maine, 218; Philbrook *vs.* Handley, 27 Maine, 53; Thacher *vs.* Jones, 31 Maine, 528.

‡ Stanley *vs.* Wharton, 9 Price, 301.

extent as punishment; but the distinction is (in the case of a penal action), that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here, the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but they are recoverable to his own use, and in form and substance, the suit calls for indemnity."* So, too, it has been said, a statute giving four times as much damage as is allowed by law for the detention of other debts, is penal in its character; but as it is given to the party injured, who seeks the recovery of a just debt to which the increased damages are made an incident, a suit therefor is not properly to be regarded as a penal action.†

But on the contrary, where a statute gave treble damages against any person who should commit waste on land pending a suit for its recovery, the court said, that the act did not apply to a party wholly ignorant that any suit was pending, saying, "We can hardly suppose the legislature intended to punish so severely, a trespasser wholly ignorant of the pendency of the suit. The statute is highly penal, and should therefore be limited in its application to the object the legislature had in view."‡ Where a bridge company act declared

* Reed *vs.* Northfield, 13 Pick. 94, 100, 101. And on the ground that it was not a penal action, it was held in this case not to be necessary that the declaration should conclude, *contra formam statuti.*

See to this latter point, Wells *vs.* Iggulden, 5 Dowl. & Ryl. 13; S. C. 3 Barn. & Cres. 186; Peabody *vs.* Hayt, 10 Mass. 36; Nichols *vs.* Squire, 5 Pick. 168; Lee *vs.* Clark, 2 East, 333; Newcomb *vs.* Butterfield, 8 J. R. 266.

† The Suffolk Bank *vs.* The Worcester Bank, 5 Pick. 106; Reed *vs.* Northfield, 13 Pick. 94; Palmer *vs.* York Bank, 18 Maine, 166; Bayard *vs.* Smith, 17 Wend. 88.

‡ Reed *vs.* Davis *et al.* 8 Pick. 515, 516.

that it should not be lawful for any person to cross the lake over which the bridge was constructed, within three miles of it, without paying toll, a person entered the lake on the ice six miles from the bridge, and came off on the other side sixty rods from it. In an action brought to recover back tolls paid, the court held that no toll could be demanded, saying, "The act is in a measure penal, and ought to be strictly construed. In the construction of statutes made in favor of corporations and particular persons, and in derogation of common right, care should be taken not to extend them beyond their express words and their clear import."*

Some special rules are to be noticed. Where a penalty is imposed by statute upon a party for entering into a contract, the imposition of the penalty in law amounts to an implied prohibition of the act for which the penalty is inflicted, and the contract is thereby rendered illegal and void.†

In penal suits, unless a general form of declaration is expressly authorized by statute, the declaration must set forth the particular acts or omissions which constitute the cause of action, and by which the alleged penalty was incurred. This is the general rule.‡

* Spague *vs.* Birdsall, 2 Cowen, 419, 420.

† Williams *vs.* Tappan, 3 Foster, 385. Brackett *vs.* Hoyt, 9 Foster, 264. It was decided in this case that it was the offer for a sale of pressed hay, and not the sale unaccompanied by an offer, that was made illegal by the statute.

‡ 1 Chit. Pl. 405; Cole *vs.* Smith, 4 John. 193; Bigelow *vs.* Johnson, 13 John. 428; Collins *vs.* Ragrew, 15 J. R. 5; The People *vs.* Brooks, 4 Denio, 469. The Revised Statutes of New York authorize a more compendious mode of declaring in proceedings of this class, by merely alleging the "indebtedness" of the defendant, with a reference to the statute. 2 R. S. 482, § 10. But this is abolished by the Code of Procedure, § 140, and the old rule, as stated in the text, is revived. Morehouse *et al. vs.* Crilley, 8 Howard Pr. R. 431.

Where a statute authorizes any person on giving security for costs to prosecute for penalties against an excise law in the name of the overseers of the poor, where those officers had neglected for ten days to prosecute, the defendant cannot object that the ten days had not elapsed, nor that sufficient security had not been given.*

In Pennsylvania where a statute forbids the sale of liquors on Sunday, and prescribes a penalty of fifty dollars against any one who shall be duly convicted thereof, the proper proceeding under it is a criminal proceeding, and not a *qui tam* action.†

It has been said that the same expressions may be differently construed, according to their appearing in a civil or a criminal action. So in a prosecution for libel, where the defendant was convicted, motion was made in arrest of judgment, on the ground that the act under which the conviction was obtained, had been repealed after conviction. Its language was doubtful; but, it was said by Tilghman, C. J., "It is said, the law is not drawn so clearly as it might have been. If the same expressions had been applied to a civil action, I should have thought myself warranted in giving it a different construction, because then it would have operated in a retrospective manner, so as to take away a vested right. But there is a wide difference between a civil and a criminal action. In nothing is the common law which we have inherited from our ancestors more conspicuous, than in its mild and merciful intendment toward those who are objects of punishment; we apply the principles of the law to

* Thayer *vs.* Lewis, 4 Denio, 269.

† Specht *vs.* The Commonwealth, 24 Penn. 103.

the construction of statutes." And the judgment was arrested.*

It has been said that although legislative enactments of an ordinary remedial or directory character in reference to corporations, may perhaps be applicable to some stock associations formed by articles of copartnership, provisions creating misdemeanors and imposing penalties and forfeitures can not be so extended by implication without violating a fundamental rule in the interpretation of statutes, and enacting an *ex post facto* law by judicial legislation.†

A question has been raised, whether two penalties can be incurred in one and the same day; and it seems to depend much on the nature of the offense and the language used. So, for keeping or injuring greyhounds, it was held that but one penalty could be demanded.‡ But for selling books illegally, it was held that where there had been two distinct acts of sale on the same day this constituted two different offenses, for which two penalties were recoverable.§

In England it has been decided in regard to what are called *qui tam* actions, or those brought by informers for the violation of statutes, that the right to the penalty vests in the informers immediately on filing the information; and therefore though the king may pardon the offense so as to discharge the share of the crown, he cannot deprive the informer of his portion.‖

* Commonwealth *vs.* Duane, 1 Binney, 601.

† Curtis *vs.* Leavitt, 17 Barb. 39, 362.

‡ Marriott *vs.* Shaw, Com. 274; The Queen *vs.* Mathews, 10 Mod. 27; Hardyman *vs.* Whitaker, Bull. N. P. 189 *n.* (*b.*); Rex *vs.* Bleasdale, 4 T. R. 809; Dwarris, p. 642. So too, for exercising a trade on Sunday, Cripps *vs.* Durden, Dwarris, p. 643.

§ Brooke, *q. t. vs.* Milliken, 3 T. R. 509.

‖ Grosset *vs.* Ogilvie, 5 Bro. P. C. 527.

The Revised Statutes of New York declare, that where the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed either in the same section containing such prohibition, or in any other section or statute, the doing such act shall be deemed a misdemeanor.*

Laws as affecting the state or government.—We have already had occasion to call attention to the force and meaning of the maxim *nullum tempus occurrit regi* (*ante*, p. 105); and also to the general rule in the construction of statutes declaring or affecting rights and interests, not to interpret them so as to embrace the sovereign power of the state unless that idea be distinctly expressed, or result by necessary implication. So in Mississippi it has been said to be the settled doctrine that the general words of a statute do not include the state or affect her rights, unless she be specially named, or it be clear and indisputable from the act that it was intended to include the state.†

* 2 R. S., part iv. chap. i., title 6, vol. ii., p. 696, § 55. [Sec. 39.]

† Josselyn *vs.* Stone *et al.*, 28 Mississippi, 753; *ante*, p. 36. See also p. 62, as to provisions; 1 Black. Com., 261; Com. Dig. tit. Parliament, R. 8; The King *vs.* Allen, 15 East, 333; The King *vs.* Inhabitants of Cumberland, 6 Term R. 194; United States *vs.* Hoar, 2 Mason R. 314; Commonwealth *vs.* Baldwin, 1 Watts Penn. R. 54; People *vs.* Rossiter, 4 Cowen, 143; United States *vs.* Hewes, U. S. D. C. for Pennsylvania, July, 1840; 1 Kent Com. p. 460.

In regard to royal grants, the old rule appears to have been that they were taken, contrary to the present rule in regard to grants, most strongly in favor of the grantee, 2 Bl. Com. 347; Stanhope *vs.* Bishop of Lincoln *et al.* Hob. 243; Turner & Atkyns, B. Hard. 309; Bro. Abr., Patent, 62. But the rule appears subject to many qualifications. Sir John Molyn's Case, 6 Co. 5.; Alton Woods Case, 1 Coke, 26. See opinion of Mr. Justice Story in Charles River Bridge *vs.* Warren Bridge, 11 Peters, 589. The idea seems to have resulted from a notion of the impropriety of setting strict bounds to royal munificence. See Domat's rules, § 17, *ante*, p. 285.

Effect of statutes on contracts, or acts in violation of them.—We have already* called attention to the rule which declares void all agreements made in contravention of statutes; the subject is of sufficient importance to demand here more particular attention. The general principle is that an individual shall not be assisted by the law in enforcing a demand originating in a breach or violation on his part of its principles or enactments.† This is expressed in the maxims *Ex turpi contractu oritur non actio; Ex dolo malo non oritur actio*, and other similar and familiar forensic adages. The rule finds frequent application in the common law and has decided a great number of cases. So, agreements in consideration of future illicit cohabitation; for the sale of libelous or immoral works; immoral wagers; agreements in restraint of trade or of marriage, for the sale of offices, affecting the course of justice, relating to trading with an enemy; and generally all contracts tainted in any way with fraud, are absolutely void and incapable of being enforced.‡

The general principle is the same in regard to legislative enactments, and is uniformly true in regard to all statutes made to carry out measures of general policy. This often results from the terms of the statutes themselves. So, the statutes against usury, against gaming, against stock-jobbing, and in many other cases, peremptorily declare all contracts in violation of their provisions void. And the rule holds equally good if there be no such express provision, in regard to all statutes intended generally to protect the public interests or to vindicate public morals.

* *Ante*, p. 84.

† Chitty on Contracts, ch. iv.; Parsons on Contracts, 382 note a.

‡ Chitty on Contracts, ch. iv.

So, policies effected in England on vessels sailing during war, in contravention of the convoy acts, were held void.* So where the voyage was against the provisions of the East India Company acts,† or the South Sea Company acts.‡ So, a note discounted by the teller of a bank for his own benefit, in violation of the statute of the State of New York (1 R. S., 595, § 28) concerning the discounting of commercial paper by officers and agents of banking corporations, is void.§

It is very important, however, to observe the modifications and qualifications by which this, like almost all the general rules of our system, is hedged about. We have already‖ had occasion to notice that when the statute violated is only passed to secure the *revenue*, —as for instance, prohibiting sales of certain articles without a license, and containing a penalty by way of securing payment of the license-money,—the mere violation of this revenue statute can not be set up as avoiding a contract.¶ So again, a sale of property out of England, the seller not being a British subject, is held valid, though he knows that the purchaser intends to smuggle the property into England.**

* Wainhouse *vs.* Cowie, 4 Taunt., 178. Darby *vs.* Newton, 6 Taunt., 544.

† Johnson *vs.* Sutton, 1 Doug., 254. Camden *vs.* Anderson, 5 T. R., 709. Chalmers *vs.* Bell, 3 B. & P., 604.

‡ Toulmin *vs.* Anderson, 1 Taunt., 227. Hodgson *vs.* Fullarton, 4 Taunt., 787.

§ Henry *vs.* Salina Bank, 1 Coms., 83. ‖ *Ante*, pp. 87 and 89.

¶ Johnson *vs.* Hudson, 11 East, 180. Brown *vs.* Duncan, 10 Barn. & Cres. 93. Cope *vs.* Rowlands, 2 Mees. & Wels. 157. See Harris *vs.* Runnels, 12 Howard, 79.

** Holman *vs.* Johnson, Cowp. 341; Biggs *vs.* Lawrence, 3 D. & E. 454; Clugas *vs.* Penaluna, 4 D. & E. 466; Warnell *vs.* Reed, 5 D. & E. 599; Pellicat *vs.* Angel, 2 C. M. & Ros. 311.

It has been said that even though a statute merely inflicts a penalty for doing a certain act, without expressly prohibiting it, a contract having such matter for its consideration or object is wholly invalid.* But this seems subject to qualification, dependent on the point whether the act is prohibited, or whether a penalty is merely attached to its violation.

It has been said that the merely selling goods knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; and that to effect this it is necessary that the vendor should be a sharer in the illegal transaction.† This was said in a case where the act prohibited was forbidden for the purposes of revenue; but when we take into view the formidable consequences of the rule that every one is presumed to know the law, the doctrine may not be unjust in general application. A seller, for instance, may know the destination intended by the purchaser for the articles which he sells, that destination may be illegal, the law presumes that the seller knows the fact of the illegality as well as the fact of the sale, although in truth he may be perfectly ignorant of the legal objection, or his attention may be in no way called to the point.

We may here notice a point bearing upon this branch of our subject, as connected with the conflict of laws. We have just seen that sales of property out of England by a foreigner, of goods intended to

* Seidenbender *vs.* Charles, 4 Serg. & R. 150. De Begnis *vs.* Armistead, 10 Bing. 187, citing Lord Holt's dictum in Bartlett *vs.* Vinor, Carthew, 252, that a penalty implies a prohibition. *Vide* p. 398, also *ante*, pp. 392 and 41.

† Hudson *vs.* Temple, 5 Taunt. 181.

be smuggled into England is valid; and so in this country, as to contracts of sale, mere knowledge on the part of the seller that the goods are to be used in another State, contrary to the laws of such State, does not make the sale illegal in a State where the sale is not prohibited, and consequently the contract is valid. So, where spirituous liquors were sold in Massachusetts, where the sale was legal, upon an action being brought in New Hampshire, where such sales are illegal, it was held that mere knowledge on the part of the vendor that the purchaser intended to sell them in New Hampshire, contrary to the laws of that State, was not a defence to the action.*

Again, where a statute is framed merely for a special or collateral purpose, as an act passed to give to a certain class a readier mode of redressing their rights, a violation of this statute will not render the whole transaction illegal, nor deprive the violator of the statute of his legal remedies in other respects.† Thus, where a statute prohibited masters of vessels under a penalty, from shipping seamen without a certain agreement being signed, but did not declare the voyage rendered illegal by reason of the violation of the statute,—an insurer on the ship was held not to be thereby relieved from his contract.

So again, a buyer of spirits cannot refuse payment because the seller violated the revenue laws in the sale, by not transmitting a permit truly specifying the strength of the spirits. "Where the consideration and the matter to be performed are both legal," says the King's Bench, "we are not aware that the plaintiff

* Smith *vs.* Godfrey, 8 Foster, 379.

† Redmond *vs.* Smith, 7 Man. & Gr., 457.

has ever been precluded by an infringement of the law not contemplated by the contract, in the performance of something to be done on his part."*

So on the same principle, in Pennsylvania, it has been held that a party who erects an obstruction in a navigable stream, and thereby occasions an injury to another, cannot, in an action for such injury, set up as a defence that the plaintiff was unlawfully engaged in worldly employment on Sunday, when the injury occurred. The law relating to the observance of the Sabbath defines a duty of the citizen to the State, and to the State only.† "We should," says the Supreme Court of Pennsylvania, "work a confusion of relations, and lend a very doubtful assistance to morality, if we should allow one offender against the law to the injury of another, to set off against the plaintiff that he, too, is a public offender."

We have already had occasion‡ to call attention to the rule that where an instrument contains a clause or provision in contravention of a statute, it renders the whole instrument invalid. I may here remark that the rule is in its nature arbitrary, and calculated to work injustice, and that it appears to be subject to exceptions. So, where there are different and independent covenants in the same instrument, part may be good and part bad. So, a personal covenant to pay a rent charge may be good, and the security of the rent charge on the living may be bad.§

* Wetherell *vs.* Jones, 3 Barn. & Ad., 221.

† Mohney *vs.* Cook, 26 Penn., 342.

‡ *Ante*, p. 91.

§ Mouys *vs.* Leake, 8 T. R., 411. Kerrison *vs.* Cole, 8 East, 234. Dwarris, p. 638. See Chitty on Contracts, p. 536.

Cumulative Remedies and Penalties.—Where a precise remedy for the violation of a right is provided by statute, it often becomes a matter of interest to know whether the statutory remedy is the only one that can be had, or whether it is to be regarded as merely cumulative, the party aggrieved having also a right to resort to his redress for the injury sustained, at common law, or independently of the statute. In regard to this we have already noticed the rule that where a statute does not vest a right in a person, but only prohibits the doing of some act under a penalty, in such a case the party violating the statute is liable to the penalty only; but that where a right of property is vested by virtue of the statute, it may be vindicated by the common law, unless the statute confines the remedy to the penalty. So, where a statute vested in a town the right of disposing of the privilege of taking alewives in a river within the limits of the town, and enacted that persons obstructing the passage of the fish should be subject to a penalty, it was held that the remedy prescribed by the statute was cumulative, and that a common-law action on the case would lie, by the vendee of the privilege against any person obstructing the passage of the fish.*

So, too, in England, under the original copyright statute, 8 Anne, c. 19, it was held that the penalties and forfeitures imposed by the act were merely cumulative remedies, and that a common-law action on

* *Ante*, p. 95; Barden *vs.* Crocker, 10 Pick. 383, 389. The regulation and preservation of the alewive fishery, has been an object of the particular attention of the legislature in Massachusetts; see Coolidge *vs.* Williams, 4 Mass. R. 144, where it is said to be a part of the common law of the State, that a town may appropriate the fish in its waters, if not appropriated by the legislature.

the case would lie for an infringement of the owner's right of property.* So also in New York, in the act giving R. R. Livingston an exclusive right to the navigation of the Hudson River, the statutory forfeitures imposed on parties infringing his privilege were held to be cumulative, and an injunction was sustained.†

We have also noticed the rule, that if a statute gives a remedy in the affirmative, without a negative expressed or implied, for a matter which was actionable at the common law, the party may sue at the common law as well as upon the statute; for this does not take away the common-law remedy.‡ So, where the legislature authorized the erection of a milldam, and provided a summary mode of appraising the damage of those who might be injured by it, it was held that the remedy was merely cumulative, and did not take away the common-law right of action on the case for the injury; and stress was laid on the fact that the act was not couched in negative terms.§

But on the other hand, it is a rule of great importance, and frequently acted upon, that where by a statute a new right is given and a specific remedy provided, or a new power and also the means of executing it are provided by statute, the power can be executed and the right vindicated in no other way than that prescribed by the statute. So, an indebitatus assumpsit will not lie for the benefit derived from a sewer, where the law has

* Beckford *vs.* Hood, 7 T. R. 620, cited with approbation in Barden *vs.* Crocker, 10 Pick. 383.

† Livingston *vs.* Van Ingen, 9 J. R. 506, 562, 571. The acts creating the monopoly were deemed by the Supreme Court of the United States to be unconstitutional, so far as they conflicted with the general coasting system of the United States, Gibbons *vs.* Ogden, 9 Wheat. 1.

‡ Com. Dig. Action upon Statute C. 2 Inst. 200. *Ante*, p. 93.

§ Crittenden *vs.* Wilson, 5 Cowen 165

provided for its construction by tax or assessment.* So, where a party by subscribing an act of association, as for the purpose of making a road or building a bridge, simply engages to become the proprietor of a certain number of shares, without any distinct or specific promise to pay such assessments as may be imposed, the only remedy in case of non-payment is by a sale of the shares to raise the sum assessed on them, upon the ground that the corporation has no power at common law to make any assessments of this kind, and that, when a statute gives a new power and at the same time provides a means of executing it, those who claim the power can execute it in no other way. Where on the other hand there is an express promise to pay the assessment, then the party is answerable to the corporation on the promise, and an action will lie.† So in Massachusetts when an action was given by stat-

* City of Boston *vs.* Shaw, 1 Met. 130, 138.

† In Massachusetts, see New Bedford and Bridgewater Turnpike Co *vs.* Adams, 8 Mass. 138; Andover and Medford Turnpike Co. *vs.* Gould, 6 Mass. 40; Worcester Turnpike Co. *vs.* Willard, 5 Mass. 80. In Franklin Glass Co. *vs.* White, 14 Mass. 286, the same rule was applied to a manufacturing Co.; see also Essex T. Co. *vs.* Collins, 8 Mass. 292. In Taunton and S. B. T. Co. *vs.* Whiting, 10 Mass. 327, the subscriber was held liable. See also Ripley *vs.* Sampson, 10 Pick. 370, and Chester Glass Co. *vs.* Dewey, 16 Mass. 94; see also Trustees of Phillips Limerick Academy *vs.* Davis, 11 Mass. 113, where it was held that no action would lie on a voluntary subscription to erect an academy. In Connecticut the whole subject has been very elaborately examined, in the Hartford and New Haven R. R. Co. *vs.* Kennedy, 12 Conn. 507, *et seq.* per Huntington, J., where assumpsit for an assessment was held to lie against the stockholder of a corporation. In New York, see Jenkins *vs.* Union Turnpike Co., 1 Caines' Cases in Error, 86; The Goshen and Minisink Co. *vs.* Hurtin, 9 J. R. 217; The Dutchess Cotton Manufactory *vs.* Davis, 14 J. R. 238; and Spear *vs.* Crawford, 14 Wend. 20, where the defendant was held liable. The question seems generally to turn on the precise form of the association or corporation, and whether a promise to pay is to be implied or not. As to assessments on pews, see Trustees of F. P. C. in Hebron *vs.* Quackenbush, 10 J. R. 217.

ute against the directors of an insolvent bank, it was held that no action would lie against them at common law, on the same ground that where a new right is given or a new duty imposed by statute, and a remedy provided to enforce such duty or for the violation of such right, the remedy given must be pursued.* So, too, in the same State an action of debt does not lie upon an award of damages of a committee of the sessions for locating a highway; a remedy by distress warrant being provided by the statute. "Where a statute gives a right and furnishes the remedy, that remedy must be pursued."† And so, as at common law and before the statutes of 18 Eliz. and 6 Geo. II. the putative father of an illegitimate child was under no legal liability to maintain his illegitimate offspring, and as that liability has been created wholly by statute, the remedy prescribed must be followed: the father is liable under the filiation order, but no action of assumpsit for the support of the child will lie.‡ So too, in Indiana where the exclusive privileges of ferries were not known till they were created by statute, the owners of ferries must rely on the provisions of the act for their security.§ So, too, it has been said in Michigan, that where a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued and the party is confined to that remedy only,—as to recover threefold the amount

* Hinsdale *vs.* Larned, *et al.* 16 Mass. 65.

† Gedney *vs.* Inhabitants of Tewksbury, 3 Mass. 307, 309, per Sedgwick, J. *vide ante*, p. 94.

‡ Monerief *vs.* Ely, 19 Wend. 405. Cameron *vs.* Baker, 1 Carr & Payne, 268. Furillio *vs.* Crowther, 7 Dowl. & Ryl., 612.

§ Lang *vs.* Scott, 1 Blackford, 405; approved Almy *vs.* Harris, 5 John. R. 175.

of usurious interest paid.* In New Hampshire it has been said that where a statute authorizes the doing of certain acts (such as the destruction of a highway by a railway company), the necessary consequence of which will be to injure the property of another, and at the same time provides a remedy for the recovery of the damages, the party injured is confined to the statute remedy for such damages, and no remedy can be had upon a common-law declaration.†

In Maine, it has been said that if a statute gives merely a new remedy where one before existed at common law, it is cumulative, and the party injured is at liberty to pursue either. If a statute give the same remedy which the common law does, it is merely affirmative, and the party has his election which to pursue. But if a statute withhold the remedy which before existed at common law, the common-law right ceases to exist.‡

The analogy of these rules holds good in the criminal law. Thus, where an offense intended to be guarded against by a statute, is punishable before the making of any statute prescribing a particular method of punishing it, then such particular remedy is merely cumulative, and does not take away the former remedy; but where the statute enacts that the doing of any act not punishable before shall for the future be punishable in such and such a particular manner, there it is necessary that the particular method prescribed by the act be specifically pursued, and not the common-law mode of an indictment.§

* Thurston *vs.* Prentiss, *et al.* 1 Michigan, 193.

† Henniker *vs.* Contoocook Valley R. R., 9 Foster, 147.

‡ Gooch *vs.* Stephenson, 13 Maine (1 Shepley) 371.

§ By Lord Mansfield, in Rex *vs.* Robinson, 2 Burr. 799, where held that an indictment would lie for disobedience to a filiation order of the quarter

It has been said, however, to be a clear and established principle, that when a new offense is created by act of Parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause, upon the ground of its being a misdemeanor.*

It is no objection in this country to an indictment for an offense against a statute of a State, that the defendant is liable to punishment for the same act under a law of the United States. A State may pass laws declaring acts criminal, and may punish the violation of the law, although the offender may be again prosecuted by the Federal Government for violating her laws by the same act which violated the law of the State. In other words, a party in committing a wrongful act, may by one act violate the laws of the two governments, and render himself amenable to both.†

Retroactive effect of laws.—We have already spoken‡ of laws in this aspect; and we have stated the general rules to be, that retrospective laws which conflict with a State constitution,§ which violate the

sessions, though a particular forfeiture of twenty shillings per month was affixed to any disobedience of the statute under which the order was made. See Castle's Case, Cro. Jac., 644. In Stephens *vs.* Watson, 1 Salk. 45, it was held that an indictment would not lie for keeping an ale-house without a license, because it was no offense at common law, and the statute making it an offense had made it punishable in another manner. See Rex *vs.* Robinson, approved in Sturgeon *vs.* The State, 1 Blackf., Ind. 39.

* The King *vs.* Harris, 4 T. R., 205. See this case cited and commented on in the Hartford & N. H. R. R. Co. *vs.* Kennedy, 12 Conn., 499, 527.

† The State *vs.* Moore, 6 Indiana, 436.

‡ *Ante*, p. 188.

§ The Constitution of Tennessee, art. xi., § 20, contains a positive declaration, "That no retrospective law, or law impairing the obligation of contracts, shall be made."

provisions of the Constitution of the United States by impairing the inviolability of the obligation of contracts, or which tend to divest vested rights of property, are absolutely void, as not being within the scope of the legislative power; and that the courts will always struggle to give laws a prospective construction or interpretation. But in cases which do not come within the foregoing exceptions, it is in the power of the legislature to pass retroactive laws; and the judiciary will not interfere with them. The question is of so much practical importance, that the following decisions ought not to be overlooked.

"It is not in the power of the legislature," says the Supreme Court of Maryland, "to give a statute a retrospective operation, so as to divest vested rights acquired under a will."* Says the Supreme Court of Louisiana,—"However repugnant to logic and sound policy retrospective laws may be, retrospective laws in civil matters do not violate the constitution unless they tend to divest vested rights, or to impair the obligation of contracts.†

In Pennsylvania, it has been held that no statute should be held to operate retrospectively, unless its language admits of no other construction; and so it was decided that the act of 26th of April, 1850, in regard to the lien of judgments on the estates of decedents, was not retrospective.‡

* Wilderman *vs.* Mayor and City Council of Baltimore, 8 Maryland, 551.

† Municipality No. 1 *vs.* Wheeler, 10 La. Ann. R. 745, 746. And the court cites Marçadé, § 62: "Mais enfin, tant qu'une loi existe, si mauvaise, si peu logique qu'elle puisse être sous tel ou tel rapport, le pouvoir judiciaire ne peut pas ne point l'appliquer. *Dura lex, sed est lex.* En fait, donc, le législateur peut porter une disposition rétroactive; et toute irrationnelle que sera cette disposition, elle n'en devra pas moins s'appliquer."

‡ Neff's Appeal, 21 Penn., 243.

In Michigan, this language has been held: "In these United States, it is said that in a private case between individuals, the court will struggle hard against a construction which, by a retroactive operation, will affect the rights of parties; and statutes are generally to be construed to operate in future, unless a retrospective effect be clearly intended;" but the mere fact of a statute being clearly retrospective does not of itself make it unconstitutional.*

In Connecticut, an act authorizing a sale by the courts of equity of real estate, and of any rights corporeal or incorporeal existing or growing out of the same, which are held in joint tenancy or coparcenary, whenever partition cannot be made in any other way, has been held "not to be retroactive within the legal import of that term, but to be purely a remedial law acting upon existing rights, and providing a remedy for existing evils;" and it was added, "if this were in fact a retroactive law it would not for such reason be an unconstitutional one."†

In Massachusetts, where a statute was passed giving towns a remedy against paupers for expenses incurred for their support, it was held that, as prior to the act no such suit could be maintained, the act must be construed to have a prospective operation only, on the ground that the legislature could not have entertained the opinion that a citizen free from debt by the laws of the land, could be made a debtor merely by a legislative act declaring him one.‡

The subject of the retroactive effect of statutes

* Scott *vs.* Smarts' Exrs., 1 Mich., 295.

† Richardson *vs.* Muryson, 23 Conn. 94.

‡ Medford *vs.* Learned, 16 Mass. 216.

constantly presents itself in connection with the subject of vested rights and their immunity from legislative interference. We have already* considered the difficulty of drawing a line between those vested rights that are absolutely sacred, and those held to be under the control of the legislature. The subject is of vast importance in reference to the daily exercise of legislative power; but until some clear and settled rules are declared by authority, we can only hope to arrive at an approximation to correct principles by a careful examination of the adjudged cases.

In Ohio, it has been held that a retrospective act passed in March, 1835, to render valid previous conveyances by married women, which were then void as not complying with a statute of 1820, is an unauthorized exercise of legislative power, and as such null—on the ground that the act divested married women of their property, without consent, without compensation, and not for crime.†

A Pennsylvania act of Assembly, declaring the children of a particular bastard child "able and capable" to inherit and transmit the estate of the deceased mother of the bastard as fully as if the bastard had been born in wedlock, has been construed not to divest real estate which had previously passed by descent from the mother to her brother, so as to vest it in the children of the deceased bastard. Such a construction would be in hostility to the rule of the common law, that a bastard cannot inherit; if construed retrospectively, the act would divest vested rights, and be in direct hostility to the provision of

* *Ante*, p. 177.

† The Lessee of Good *vs.* Zercher, 12 Ohio, 394.

the bill of rights of the State, which declares that no citizen shall be deprived of his property, unless by the law of the land.*

Prior to 1848, the courts of Pennsylvania had decided that a testator's mark to his name at the foot of a testamentary paper, but without proof that the name was written by his express direction, was not a valid signature under their statute of wills of 1833. To overrule this, an act was passed in 1848, directing, that every will theretofore made, or thereafter to be made, to which the testator had made his mark, except such as might have been finally adjudicated prior to the passage of the act, should be valid. A question arose as to the applicability of the act to a will executed in 1840; and the court held that the act of 1848, if retroactive, was an exercise of judicial power in settling a question of interpretation, and as such was void; and moreover, if construed retroactively, it was void on the further ground that it violated the constitutional provision giving to property the protection of the law of the land; they consequently held that the act was merely prospective in its operation.†

The subject of the retroactive effect of statutes with reference to vested rights, has been examined in a very interesting case in Maryland. Suit was brought in 1846 on a single bill executed by the defendant in 1840. The defendant pleaded that the note was usurious and void, under an act of 1704. The plaintiff replied a statute passed on the 10th of March, 1846, declaring substantially that in any suit or

* Norman *vs.* Heist, 5 Watts & Ser. 171.

† Greenough *vs.* Greenough, 11 Penn. 489. See C. J. Gibson's interesting opinion, and cases cited.

action thereafter to be brought in any court of law or equity upon any contract, the plaintiff should be at liberty to recover the principal and legal interest. It was insisted on behalf of the defendant, that the act of 1846 should not be construed retrospectively; that if retrospective, it was unconstitutional, or beyond the sphere of legislative power, so far as operating on existing contracts, upon the ground that it divested the vested right of pleading usury as it existed before the act of 1846.

But the act was held valid. The court admitted the rule to be that an act is to be construed as prospective in its operation in all cases susceptible of doubt; but held that this could have no application to a case where the legislature had directed, in language too express and plain to be mistaken, that they designed to give the statute a retroactive operation,—that in such a case there was no room for interpretation.* The objection as to the unconstitutionality of the law was also overruled, on the ground that it was obvious that no provision of the Constitution of the United States was violated;† and as to the provision in the Maryland Bill of Rights, art. 15, declaring "retrospective laws punishing acts committed before the existence of such laws, to be oppressive and unjust," that it related solely to retrospective *criminal* laws, and was an express recognition of the legislative power to pass retrospective laws in regard to civil cases and contracts, as laws healing imperfect deeds or validating defective acknowledgments. The objection that the

* See also on this point Goshen *vs.* Stonnington, 4 Conn. 220.

† Satterlee *vs.* Matthewson, 2 Peters, 413; Watson *vs.* Mercer, 8 Peters, 110.

right to plead usury under the act of 1704 was a vested right, and that the act of 1846 was void as tending to divest it, shared a similar fate. The court admitted the sacredness of vested rights, and declared that an act which divested a right under the pretense of regulating the remedy was as objectionable as if aimed at the right itself. But they held that when vested rights were spoken of as being guarded against legislative interference, they were those rights to which a party may adhere, and upon which he may insist, without violating any principle of morality. They held that the borrower had no moral right to repudiate his contract so as to escape the payment of the sum actually received, and that the act in question was no more than an exercise of legislative authority on the subject of remedies, a power which the legislature might exercise in relation to past as well as future contracts.*

A New York act of 1850, chap. 172, declares, that "no corporation shall hereafter interpose the defence of usury" in any action. It has been said that this is in the nature of a penalty or forfeiture remitted by the legislature; and held, that the act was applicable to an equity case where the defence was set up, and the proofs taken and closed, before the act was passed.† The defence of usury is so odious in all highly civilized and especially in all commercial communities, that it is very difficult to obtain for it an impartial hearing; but as long as the prohibition stands on the statute book, it certainly is the duty of the judiciary fairly to carry out the legislative will; and I cannot

* Baugher *vs.* Nelson, 9 Gill, 299. The case is indexed as Grinder *vs.* Nelson.

† Curtis *vs.* Leavitt, 17 Barb. 311.

understand how an act can be considered within the just limits of the legislative power, nor how it can be regarded otherwise than as an invasion of the judicial prerogative, which by a sweeping change of the law, not only affects the interests of parties litigant, but absolutely controls the determination of suits at the time of its passage pending for decision in the proper forum. If the legislature has this power, it is very obvious that a valid law might be framed general in its terms, but really intended to affect private objects, and calculated to work the grossest injustice.

In connection with this subject, the following case in New York is important: Clark and Cornell, commissioners of highways in a town, by direction of the voters of the town sued a turnpike company; they were unsuccessful, and obliged to pay costs. These costs the town refused to pay. The commissioners then sued the town; and the court of last resort held that they had no remedy. The legislature then (1851) passed an act directing the question, whether the commissioners should be paid or not, to be submitted at the next meeting of the voters of the town. The voters decided that they would not tax themselves for the purpose. The legislature was then again appealed to; and in 1852 a law was passed, appointing three commissioners to determine the amount of costs, &c., due Clark and Cornell, to make an award thereof; and declaring it the duty of the supervisors of Chenango county, in which the town was situated, to apportion the amount upon the taxable property of the town, and to provide for its collection like other taxes. Suit was brought by the town against the supervisors, to restrain the levy of the tax, on the ground of its being unconstitutional, as

infringing the vested rights of the tax payers of the town. But the law was sustained, as a mere exercise of the power of taxation, and on the ground that the act of 1851 was not in the nature of a contract, nor judicial in its character. Perhaps the decision may be sustained on the grounds on which it is put; but it is obvious that the result of the matter is that the legislature compels payment out of the pockets of the defendants of a claim which the law had already pronounced they were not bound to pay. Clark and Cornell were the agents of the town. They present to their principals a claim which is rejected and contested. The courts decide that the principal is not liable. The legislature then steps in, and in effect compels the payment of the claim by the defendants. This may be called taxation, but in truth it is the reversal of a judicial decision.* The power of taxation is a great governmental attribute, with which the courts have very wisely, as we shall hereafter see, shown extreme unwillingness to interfere; but if abused, the abuse should share the fate of all other usurpations.

In England, on the subject of retrospective statutes, it has been held, that an act in regard to practice—declaring that when a new trial was granted on the ground that the verdict was against evidence, the costs of the first suit should abide the event, unless the court should otherwise order—was retroactive; but a clause in the same act, that error might be brought upon a special case unless the parties agreed to the contrary, was held not to be so; and Maule, J., said, "As a general rule an act is to be construed so as to be prospective only; for

* Town of Guilford *vs.* Supervisors of Chenango Co., 3 Kernan, 147.

if it were otherwise construed, it would often defeat the intention of the parties who acted under the old law."*

Last statute in point of time controls.—We have already† had occasion to remark, that importance is attached to the time of the expression of the will of the legislature. So, if two statutes repugnant to each other be passed in the same session, the latter only shall have effect.‡ So again it is said, if the latter part of a statute be repugnant to the former part thereof it shall stand, and so far as it is repugnant be a repeal of the former part; because it was last agreed to by the makers of the statute.§ And this principle has been declared by the Supreme Court of the State of New York.‖ So in Kentucky it has been said, "If there be an absolute inconsistency between these statutes, the act of 1825 being posterior in date, and also more comprehensive in its terms, must have superseded the other so far as they conflicted."¶ So in Pennsylvania it has been said, that in cases of irreconcileable repugnancy the rule is to let the last part determine the intentions of the lawgiver.**

But it is only in cases of irreconcilable repugnancy that this rule applies; it gives way to the fundamental principle, that the intention of the legislature is to govern. "A subsequent statute," says Parsons, C. J. "generally will control the provisions of former stat-

* Hughes *vs.* Lumley, 4 Ellis & Blackb. 358, 359; Jenkins *vs.* Betham, 15 C. B. 169 and 190.

† *Ante*, pp. 60, 62, 81, 129.

‡ Bacon, Abr. Stat. D.

§ Bacon, Abr. Stat. D.

‖ Harington *vs.* Trustees of Rochester, 10 Wend. 547.

¶ Naz. Lit. & Benev. Inst. *vs.* Commonwealth, 14 B. Munroe, 266.

** Packer *vs.* Sunbury & Erie R. R. Co., 7 Harris (Penn.) R. 211.

utes, which are repugnant to it according to its strict letter. But there are exceptions to this rule, depending on the construction of the last statute agreeably to the intention of the legislature."* "The general rule is conceded to be," it has been said in Pennsylvania, "that where two statutes contain repugnant provisions, the one last signed by the governor is a repeal of one previously signed. But this is so merely because it is presumed to be so intended by the law-making power. Where the intention is otherwise, and that intention is manifest upon the face of either enactment, the plain meaning of the legislative power, thus manifested is the paramount rule of construction. It is no part of the duty of the judiciary to resort to technical subtleties to defeat the obvious purposes of the legislative power in a matter over which that power has a constitutional right to control."†

Misdescription and surplusage.—The maxim, *Falsa demonstratio non nocet*, applies to statutes as well as in other cases. It was early held that, in an act of Parliament, the misnomer of a corporation where the express intention appears shall not avoid the act, any more than in a will, when the true corporation intended is apparent.‡ So, where a statute is referred to by general descriptive particulars, some of which are manifestly false and others true, the former may be rejected as surplusage, provided the remainder is sufficient to show clearly what is meant.§ Thus again, where a statute referred to the vote of a town by a wrong date,

* Pease *vs.* Whitney, *et al.* 5 Mass. 380, 382.

† The Southwark Bank *vs.* The Commonwealth, 26 Pennsylvania Reports, pp. 448, 449.

‡ The Chancellor of Oxford's Case, 10 Rep. 57.

§ The Watervliet Turnpike Co. *vs.* M'Kean, 6 Hill, 616.

where the reference would have been good without any date at all, it was held that the erroneous date might be rejected as surplusage.*

Connection between cause and effect.—The relation of cause and effect sometimes presents itself in regard to the construction of statutes; and here we find a class of questions analogous to those growing out of the subject of remoteness or consequentiality of damages, and dependent on the maxim, *proxima causa non remota spectatur*.† So, where the embargo act of 22d December, 1807, required a bond conditioned to reland certain goods in some port of the United States, "the dangers of the seas only excepted," it was held by the Supreme Court of the United States, where a vessel was driven by stress of weather into one of the West Indies, and there detained by the government of the island, that this was a casualty within the exception; the court saying, "an effect which proceeds inevitably and of absolute necessity from a specified cause, must be ascribed to that cause."‡

In Pennsylvania it is provided by statute (act of 22d April, 1846), that when money is collected on a recognizance given for the appearance of a person charged with a criminal offense, it shall be applied, after payment of costs and expenses, to satisfy the damages sustained by any person by reason of the misdemeanor. A party being indicted for keeping a gambling-house, and his recognizance being forfeited, a person who lost money at play in the house claimed a part of the moneys collected on the recog-

* Shrewsbury *vs.* Boylston, 1 Pick. 108.

† Sedgwick on the Measure of Damages, chap. iii.

‡ The United States *vs.* Hall, 6 Cranch, 171, 178.

nizance; but he was held not to be so entitled, on the ground, among others, that his misfortune was not the natural consequence of the misconduct of the keeper of the gambling-house; "the direct and immediate cause of the loss, was his own inexcusable folly."*

Computation of Time.—Where the computation of time, as prescribed in statutory enactments, is to be made from an act done, much controversy has taken place as to whether the first day—that on which the act is done, that on or from which the time is to begin to run,—is to be included in the reckoning. The earlier English decisions included the day.† But in New York from an early period, it was decided to exclude the day on which the act is done, and the same rule applies to notices; and such is, I believe, now the English rule.‡ In New York, it has been said, that "in questions of the computation of time arising under our own rules, our statutes, and upon promissory

* Commonwealth *vs.* Robbins, 26 Penn. 165, 167.

† The King *vs.* Adderley, Doug. 463; Castle *vs.* Burditt, 3 T. R. 623; Glassington *vs.* Rawlins, 3 East, 407. In Lester *vs.* Garland, however, 15 Ves. 248, the day was excluded, and it was intimated that no general rule existed.

‡ 3 Chit. Practice, 109. Pitt *vs.* Shew, 4 Barn. & Ald. 208. *Ex parte* Dean, 2 Cowen, 605. Jackson *vs.* Van Valkenburgh, 8 Cowen, 260. Comml. Bank of Oswego *vs.* Ives, 2 Hill, 356. Homan *vs.* Liswell, 6 Cowen, 659. Columbia Turnpike Road *vs.* Haywood, 10 Wend. 422. See Small *vs.* Edrick, 5 Wend., 137, where a contrary construction was given to peculiar phraseology. Comml. Bank of Oswego *vs.* Ives, 2 Hill, 355. The decisions in the other States do not seem uniform. Sims *vs.* Hampton, 1 S. & R. 411. Portland Bank *vs.* Maine Bank, 11 Mass. 204. Presbrey *vs.* Williams, 15 *ibid.* 193. Bigelow *vs.* Willson, 1 Pick. 485. Commonwealth *vs.* Keniston, 5 Pick. 420. Hampton *vs.* Erenzeller, 2 Browne's R. 18. Ryman *vs.* Clark, 4 Blackf. 329. Jacobs *vs.* Graham, 1 *ibid.* 392. Arnold *vs.* The U. States, 9 Cranch, 104. Pierpont *vs.* Graham, 4 Wash. C. C. R. 232. Cornell *vs.* Moulton, 3 Denio, 12.

notes, the day of the date is excluded."* In the same State, where a statute requires fourteen days, notice of trial; fourteen days are required exclusive of the first day of the court.† And in the same State, the day on which the Revised Statutes took effect was excluded, in computing the time in regard to the statute of limitations.‡

In Alabama, it has been held that, in the computation of time from an act done, the day of performance is to be excluded; the court saying that the law refuses to recognize the parts or fractions of a day. So, where a statute provided that the lien acquired by an execution should not be lost if an alias execution should issue without interval of more than ninety days, an original execution was returned on the 14th April, and an alias issued on the 14th July next thereafter, or on the ninety-first day, held that the lien was not lost; § the court saying that the statute must be construed as if it had said that the lien should not be lost if an execution issued to the sheriff without interval of *more days than ninety days.* But this rule as to disregarding fractions of a day, does not apply to statutes which as between different acts, give a preference or priority to the one which is first done.‖ In the same State it is said to be the practice of the courts in the computation of time, to include one day and exclude the other, except where the statute requires

* Wilcox *vs.* Wood, 9 Wend. 348, per Savage, C. J.

† Columbia Turnpike Road *vs.* Haywood, 10 Wend. 422.

‡ Fairbanks *vs.* Wood, 17 Wend. 329.

§ Lang *vs.* Phillips, 27 Ala., 311. Judd *vs.* Fulton, 10 Barb. 117.

‖ Lang *vs.* Phillips, 27 Ala., 311.

specially a given number of entire days to intervene, in which case both are excluded.*

When the last day for the performance of a given act falls on a Sunday, the act must be done on the preceding day.†

It was early settled in England, that in all acts of Parliament where "months" were spoken of without the word "calendar," and nothing added from which a clear inference could be drawn that the legislature intended calendar months, they should be understood to mean lunar months, or a month of twenty-eight days.‡ Lord Kenyon regretted this; but the rule was early adopted, though with equal reluctance, in New York. "The courts," it was said in one case, "have taken the rule as they found it settled, that where there is nothing in a statute from which they can infer that calendar time was intended, the month must be considered a lunar one." But as the legislature never in fact intended a lunar month, the courts have relied on any circumstances inducing the belief, that calendar time was in fact in their contemplation.§ All doubt has now been removed in New York, by a statutory provision,‖ which declares, that wherever the word

* Owen *vs.* Slatter *et al.*, 26 Alaba. 547. See, in N. Y. Fairbanks *vs.* Woods, 17 Wend. 329; Snyder *vs.* Warren, 2 Cow. 518.

† Broome *vs.* Wellington, 1 Sandf. Sup. Ct. Rep. 664; *Ex parte* Dodge, 7 Cowen, 147; Anon. 2 Hill, 376.

‡ Bishop of Peterborough *vs.* Catesby, Cro. Jac. 167, 168. Barksdale *vs.* Morgan, 4 Mod. 185. Sir Wollaston Dixie's Case, 1 Leon. 96. The King *vs.* Peckham, Carth. 406. The King *vs.* Adderley, Doug. 462. Castle *vs.* Burditt, 3 T. R., 623. Lacon *vs.* Hooper, 6 T. R. 224, per Lord Kenyon.

§ Loring *vs.* Halling, 15 J. R. 119. Snyder *vs.* Warren, 2 Cowen, 518. Parsons *vs.* Chamberlin, 4 Wend. 512. People *vs.* Mayor, &c. of New York, 10 Wend. 393. In the last three cases the statute was interpreted to mean calendar months. See also Jackson *vs.* Van Valkenburgh, 8 Cow. 260.

‖ 1 R. S. 606, § 4.

month is used in a statute, it shall mean a calendar month. In Massachusetts and Pennsylvania, the rule appears to be, that where the word month is used generally in a statute or contract, it will be considered to mean a calendar month.*

A year is the time in which the sun completes his circuit through the twelve signs of the zodiac, viz. 365 days and about six hours; but in leap-year, the statute 24 Geo. II. c. 25 enacts that the year shall consist of 366 days, the intercalary day being accounted with the day preceding it as one day; and in New York, the same provision has been adopted.†

Waiver.—Under this head we have already noticed the general rule‡ that statutory provisions designed for the benefit of a party may be waived; but that where the enactment is to secure general objects of policy or morals, no consent will render a non-compliance with the statute effectual. In Connecticut, a law of 1850 provided, that auditors might be appointed in actions of assumpsit, if the cause of action embraced *matters of account.* An auditor was appointed by consent, in an action brought by a declaration embracing a count on a note and the common counts. No other claim was in fact made than on the note, but the parties went to trial before the auditor, without objection; after a report by the auditor, the defendant opposed its acceptance by the court, on the ground

* Hunt *vs.* Holden, 2 Mass. 170; Avery *et al. vs.* Pixley, 4 Mass. 460; Churchill *vs.* Merchants' Bank, 19 Pick. 532; Brudenell *vs.* Vaux, 2 Dall. 302; Commonwealth *vs.* Chambre, 4 Dall. 143; Moore *vs.* Houston, 3 S. & R. 144.

† 2 R. S. part i. chap. xix. tit. 1, § 3; See The King *vs.* Inhabitants of Worminghall, 6 Maule & Selw. 350, a case on a yearly hiring.

‡ *Ante*, chap. iv. p. 109.

that the case did not come within the act of 1850; but the objection was considered bad, and it was said to be like the cases where parties are held by their acts to waive objections to judges, commissioners, to a juror, or the panel of jurors.*

In the same State it has been held under a statute declaring a contract made on a usurious consideration to be utterly void, that the statute was made for the benefit of the party liable upon the contract, and that he might at his option avoid the security or waive the benefit of the law.† So, the provisions of a statute requiring a bond with surety to be given by the party appealing from the judgment of a justice of the peace, is made solely for the benefit of the obligee, who may waive a strict compliance therewith.‡

Consent, however, will never give jurisdiction. Thus, where an appeal is taken in a cause not appealable, or to a court not having jurisdiction, it is not in the power of the parties to confer jurisdiction by waiving all objections.§

Subject-matter.—It is a general and very sound rule, applicable to the construction of every statute, that it is to be taken in reference to its subject-matter. In this way often the operation of general words may be limited. So, the stock-jobbing acts are general, and their terms would apply to transactions in foreign

* Andrews *vs.* Wheeton, 23 Conn. 142. See also, King *vs.* Lacey, 8 Conn. R. 499; Selleck *vs.* Sugar Hollow T. P. Co. 13 Conn. 453; Smith *vs.* The State, 19 Conn. 493; Crone *vs.* Daniels, 20 Conn. 331; Quinebaug Bank *vs.* Leavens, 20 Conn. 87; Groton and Ledyard *vs.* Hurlburt *et al.* 22 Conn. 178.

† Wales *vs.* Webb, 5 Conn. R. 154.

‡ Ives *vs.* Finch, 22 Conn. 101.

§ Ives *vs.* Finch, 22 Conn. 101.

stock; a construction, however, which the courts have rejected, in obedience to the obvious intention of the legislature that the provisions of these enactments are to apply only to British stocks.*

General words how qualified by particular words.—It is a rule of right reason that general words may be qualified by particular clauses of a statute, but that on the other hand a thing which is given in particular shall not be taken away by general words. This in the civil law is expressed by the phrase, *In toto jure generi per speciem derogatur, et illud potissimum habitum quod ad speciem directum est.* In the less classical Latin of the early English law, the same idea is conveyed in the words, *generalis clausula non porrigitur ad ea quæ specialiter sint comprehensa.* In conformity to this doctrine it is held that where a general intention is expressed in a statute, and the act also expresses a particular intention, incompatible with the general intention, the particular intention shall be considered as an exception.† Where general words follow particular words, the rule is to construe the former as applicable to the things or persons particularly mentioned.‡ So, a statute treating of persons or things of an inferior rank, cannot by general words be extended to those of a superior.§

Statutes in regard to wagers.—At common law, wagers are not unlawful, unless immoral or against public policy; but the tendency of legislation in this

* Salkeld *vs.* Johnston, 1 Hare, 196; Henderson *vs.* Bise, 3 Starkie, 158; Wells *vs.* Porter, 2 Bing. N. C. 722; Elsworth *vs.* Cole, 2 M. & W. 31.

† Churchill *vs.* Crease, 5 Bing. 180—492–3.

‡ Sandiman *vs.* Breach, 7 B. & C. 100.

§ 4 Rep. 4; 2 Rep. 46; 2 Inst. 478; Dwarris, 656. But see, *contra*, 2 Inst. 136.

country, is to make them so without exception. In New York, a statute* declares all wagers, bets, or stakes, on racing, gaming, or any lot, chance, or unknown or contingent event, void, and all contracts for or on account of any money or property, &c. wagered, bet, or staked, void; the act, however, being declared not to apply to insurances on interest, nor to contracts on bottomry or respondentia. Under this statute it has been held, that an agreement in the sale of a horse, —that the animal should on or before a given day trot a certain distance at a certain rate of speed, and in case he failed, then that the vendor should deduct or pay back to the purchaser one half of such sum as the failure might take from the market value of the horse,—is an agreement in the nature of a stake or wager on a race, and as such void under the statute.†

Corporations.—The Revised Statutes of New York declare that the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal in the discre-

* 1 R. S. part i. chap. xx. title 8, art. 3.

† Hall *vs.* Bergen, 19 Barb. 122.

The policy of different countries varies very much on the subject of wagers. In England, at common law wagers are valid contracts, unless contrary to public policy, or immoral, or in any way tending to the detriment of the public; or, unless they affect the interest, feelings, or character of a third person (see Chitty on Contracts, in voc. Wagers). But the courts have frequently expressed their disapprobation of these contracts, and in some cases, where trivial or contemptible, have refused to try actions upon them. Gaming debts and securities are void by statute.

The French Code declares as a general rule the invalidity of wagers: "*La loi n'accorde aucune action pour une dette du jeu ou pour le paiement d'un pari.*"—Code Civil, Liv. 3, Tit. 12, Chap. Prem. § 1965. But a class of exceptions is created in favor of martial sports, foot and horse races, tennis, &c., subject, however, to the discretionary exercise of the judicial power, where the demand appears exorbitant.

tion of the legislature.* In construing this provision, it has been said that the legislature could not convert a railroad company into a banking, insurance, or mining company, for the obvious reason that such an act would create a new company of a new and distinct character; but that an act authorizing the railroads of the State, with the consent of two thirds in value of the stockholders, to subscribe to a railroad in Canada, was constitutional, as the subscribing companies would remain the same as before as to their character, structure, objects, and business.†

But in cases where no such power is reserved by the legislature, the true doctrine is that no radical change or alteration can be made or allowed in the charter of a corporation, by which new and additional objects are to be accomplished, or new responsibilities incurred, so as to bind the individuals composing the company without their assent.‡

Interpretation and proof of foreign statutes.—When the statutes of other countries, or of other States of this Union, come up for construction, the decisions of the courts of the State enacting the law are held to be a conclusive or authentic interpretation;§ and this very rightly, for it must always be impossible for any tribunal to have the same means of judging of the true intention, scope, and purport of a foreign statute as the courts of the State or country where it was framed, and the institutions of which it was intended to fashion or control.

* 1 R. S. 600, § 8.

† White *vs.* Syracuse and Utica Railroad Co., 14 Barbour, 561.

‡ Hartford and New Haven Railroad Company *vs.* Croswell, 5 Hill, 384. Middlesex Turnpike Company *vs.* Locke, 8 Mass. R. 268.

§ Thompson *vs.* Alger, 12 Met. p. 428.

The Supreme Court of the United States has said, that where English statutes, such for instance as the statute of frauds and the statute of limitations, have been adopted into our legislation, the known and settled construction of those statutes by their courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority. It was said that this rule did not strictly apply to the English statute of monopolies, under which the grants of patents have there issued; but that the principles and practice which had regulated their grants of patents, as being tacitly referred to in some of the provisions of our patent statute, afforded materials to illustrate it.*

Connected with this subject, another and very interesting question has arisen, which is whether the interpretation of foreign laws is a question for the jury, or for the court. In some cases it has been intimated that the interpretation of foreign law is matter of fact, for the jury. "The question in such a case," says the Supreme Court of Ohio, "is not what is the just and true interpretation, but what is the actual interpretation of the statute by the foreign tribunal. It is a matter of fact."† In a case in Massachusetts, turning on the construction of a statute of the State of Georgia, the statute itself was proved, and the depositions of eminent lawyers in that State, relating to the construction given there to the statute in question, were also read, and the court was requested to decide what was the law of Georgia in regard to the matter in hand; but the application was

* Pennock & Sellers *vs.* Dialogue, 2 Peters, 1, 18.

† Ingraham *vs.* Hart, 11 Ohio, 255; Burchard, J. dissented.

denied, and it was held to be a question of fact, for the jury to decide, as to what had been the construction given by the courts in the State of Georgia, to the statute before them.* But on the contrary, it has been expressly decided in Pennsylvania and Alabama, that the interpretation of a foreign statute belongs to the court.†

As to the proof of foreign laws, it has been said in Massachusetts, that a volume purporting on the face of it to contain the laws of a sister State is admissible as *prima facie* evidence to prove the statute law of that State: "The connection, intercourse, and constitutional ties which bind together these several States, require that this species of evidence should be sufficient, until contradicted." But it was said at the same time, that the court did not mean to decide that the law of any country merely foreign could be so proved.‡ In Michigan, it has been said that the court will presume the law of a sister State to be the same as their own State, unless the contrary is shown.§ It has been held in Pennsylvania, that judicial cognizance will be taken of the law of another State, no proof of it whatever having been given.‖ It appears to me very

* Holman *vs.* King, 7 Met. 388.

† Bock *vs.* Lauman, 24 Penn. 435. In Connecticut it is regulated by a statute; see Hale *vs.* N. J. Steam Nav. Co. 15 Conn. 539; Lockwood *vs.* Crawford, 18 Conn. 361. Inge *vs.* Murphy, 10 Alab. 885.

‡ Raynham *vs.* Canton, 3 Pick. 293.

§ Crane *vs.* Hardy, 1 Michigan, 56.

‖ Bock *vs.* Lauman, 24 Penn. 435. See, on the subject of proving foreign law as matter of fact, Bristow *vs.* Sequeville, 5 Exch. 275. A student in a foreign university is incompetent to prove the law of that country. See also Trimbey *vs.* Vignier, 1 Bing. N. C. 151. In this case, in the Kings Bench, the question being on a point of French law, growing out of the construction of the Code de Commerce, and the opinions of French

proper that the interpretation of a foreign law, as of a domestic, should be confided to the court; and equally dangerous to assume the existence of the law of another jurisdiction, whether of another State or a wholly foreign country, as a fact, without submitting it to the ordinary tests of proof.

We may remark, as connected with the question of foreign statutes, in regard to the rule which we have already (p. 99) had occasion to notice, that ignorance of law is no excuse, that the principle does not apply to foreign law. *Juris ignorantia est cum jus nostrum ignoramus;* and it has been held that ignorance of the law of a foreign government is ignorance of fact; and the laws of the other States of the Union being in this respect regarded as foreign laws, it has been decided in Massachusetts that money paid by mistake, through ignorance of the law of another of the United States, can be recovered back.*

Revision of statutes.—It is proper here to notice some principles peculiar to this country, growing out of the frequent revision of our statutory law, and the changes consequent thereupon.

In New York it has been said that "it has long been a cardinal and controlling maxim, that where a law antecedently to a revision of the statutes is settled either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall

advocates having been taken by consent, but appearing contradictory, the court examined the Code itself, and decided the case upon its own construction of the clause in question. Vander Donckt *vs.* Thellusson, 8 C. B. R. 817: Belgian laws proved by a merchant and stock-broker. Inglis *et al. vs.* Usherwood, 1 East, 515, turned upon a question of Russian law, but the construction or meaning seems to have been admitted.

* Haven *vs.* Foster, 9 Pick. 112.

not be deemed or construed a change of the law, unless such phraseology evidently purport an intention in the legislature to work a change.* So in New Hampshire, it has been held that upon the revision of the statutes the construction will not be changed by such alterations as are merely designed to render the provisions more concise.†

In the adoption of the Code, it has been said in Alabama that, the legislature must be presumed to have known the judicial construction which had been placed on the former statutes; and therefore the re-enactment in the Code of provisions substantially the same as those contained in a former statute, is a legislative adoption of their known judicial construction.‡

In Massachusetts it has also been held in regard to the revision of statutes, to be a well-settled rule that when any statute is revised or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled; to hold otherwise would be to impute to the legislature gross carelessness or ignorance, which is altogether inadmissible. So, in that State a very useful statute passed in 1754, concerning donations and bequests to pious, and charitable, &c. was decided not to be in force, on the ground that the legislature

* Yate's Case, 4 J. R., 359. Matter of Theriat *vs.* Hart, 2 Hill, 380. Parmelee *vs.* Thompson, 7 Hill, 77. Taylor *vs.* Delancy, 2 C. C. in Error, 150. Goodell *vs.* Jackson, 20 J. R., 722. Croswell *vs.* Crane, 7 Barb., 191. Young *vs.* Dake, 1 Seld., 463. Elwood *vs.* Klock, 13 Barb., 50. Douglass *vs.* Howland, 24 Wend., 35. Dominick *vs.* Michael, 4 Sand. S. C. R. per Duer, J. 374, 409.

† Mooers *vs.* Bunker, 9 Foster, p. 421.

‡ Duramus *vs.* Harrison & Whitman, 26 Ala., 326.

had in 1785 legislated on the same subject, and omitted to re-enact the provisions of the statute.*

Another rule connected with the subject of the revision of statutes, may be appropriately stated here. In this country the State statutes have been frequently revised and altered upon the report of officers appointed for the purpose, revisors or commissioners; and in submitting their proposed revision or alteration to the legislature, the legal advisers of the State have stated in the shape of a reports or of notes their reason for the proposed change of phraseology or provision, and the meaning which they affixed to it; but it has been held that such reports or notes are not to be taken as an authoritative construction of the revised or amended law, as the revisors might have meant one thing and the legislature another; and that the meaning of the statute is to be obtained and arrived at in the usual way.†

State statutes how construed in the United States courts.—One great object of the Federal Constitution among others, was by the creation of a national judiciary to secure a tribunal free from all local influences to decide on controversies between the States themselves, between citizens of different States, and between citizens and foreigners. Besides this, in order to secure the supremacy of the Constitution of the United States, an appeal lies, in cases affecting the construction of the Federal charter or of acts of Congress, from the highest State courts to the Supreme

* Ellis *vs.* Paige *et al.* 1 Pick. 43; Bartlett, *et al. vs.* King, Exr., 12 Mass. R. 537; Nichols *vs.* Squire, 5 Pick. 168.

† Forrest *vs.* Forrest, 10 Barb. 46.

Court of the United States.* It necessarily results that statutes of the several States, come constantly under revision in the Supreme Court of the United States. The rules of construction which are there applied to them, become therefore a matter of the highest interest.

On this subject the general doctrine is, that in construing the statutes of the several States, so far as those statutes belong to the local law of the States, the Supreme Court of the United States looks to the decisions of the highest courts of the State; and where the construction is settled by such tribunal, the Federal tribunal adopts it as its own.† And the same principle has been declared to hold good in regard to State constitutions.‡ So, in an early case in the Supreme Court of the United States, turning on the Pennsylvania acts respecting the registry of deeds, C. J. Marshall said, "Were this act of 1715 now for the first time to be construed, the opinion of this court would certainly be, that the deed was not regularly proved. But in construing the statutes of a State on which land-titles depend, infinite mischief would ensue should this court observe a different rule from that which has been long established in the State;" * * * "the court yields the construction which would be put on the words of the act, to that which the courts of the State have put on it, and

* Martin *vs.* Hunter's Lessee, 1 Wheat. 304; Cohens *vs.* Virginia, 6 Wheat. 413, where the appellate jurisdiction was sustained in an elaborate opinion by Marshall, C. J.

† M'Keen *vs.* Delancy's Lessee, 5 Cr. 22; Polk's Lessee *vs.* Wendell *et al.* 9 Cr. 87; Gardner *vs.* Collins *et al.* 2 Pet. 58; Shelby *vs.* Guy, 11 Wheat. 361; Green *vs.* Lessee of Neal, 6 Pet. 291; Nesmith *vs.* Sheldon, 8 How. 812.

‡ Webster *vs.* Cooper, 14 How. 488.

on which many titles may probably depend."* "The laws imposing a tax on lands, and regulating its collection, in perhaps almost all the States," says Mr. Justice M'Lean speaking for the Supreme Court of the United States, "are peculiar in their provisions, having been framed under the influence of a local policy. And this policy has to some extent influenced the construction of those laws. There can be no class of laws more strictly local in their character, and which more directly concern real property, than these. They not only constitute a rule of property, but their construction by the courts of the States should be followed by the courts of the United States, with equal, if not greater strictness than the construction of any other class of laws."†

The rule of adoption of State construction by the Federal judiciary has been said to grow out of the constitution of the Federal tribunal. The jurisdiction of the Supreme Court, over cases where citizens of another State than the one in which the suit arises are concerned, rests upon the ground that the Federal courts, in applying the law, will be more free from undue influence. But the law to be applied is the local law, and that law is to be administered as it is, not reviewed or altered. And the tribunals of each State are rightly considered best to understand what is

* M'Keen *vs.* Delancy's Lessee, 5 Cranch, 22, 32, 33.

It has been said, that the Supreme Court adopts the local law of real property as ascertained by the decisions of the State courts, whether those decisions are upon the construction of the statutes of the State, or form a part of the unwritten law of the State. Jackson *vs.* Chew, 12 Wheat. 153; Also see Shelby *vs.* Guy, 11 Wheat. 361, as to the adoption of State law generally; and Swift *vs.* Tyson, 16 Peters, pp. 1 and 18.

† Games *et al. vs.* Stiles, 14 Peters, 322, 328.

the law of the State.* This course is pursued, it has been again said, "not on the ground of authority, but of policy.† It would be injurious to the citizens of a State to have two rules of property. Such a course by the courts of the Union would produce unfortunate conflicts, and encourage litigation."

But the rule is not without exceptions. It does not apply to decisions on charters granted by the British crown, under which certain rights are claimed by the state on the one hand and by private individuals on the other; and in regard to these, the Supreme Court reserves its absolute independence of judgment.‡ So, again, it has been said by the Supreme Court of the United States, that the rule of that court recognizing the decisions of the highest courts of the States made in regard to State statutes, as containing an authoritative exposition of their true meaning, does not relate to private statutes, relating to particular persons, or to statutes giving special jurisdiction to a State court for the alienation of private estates, "for the reason that whatever a State court may do in such a case, its decision is no part of the local law."§ But I may be permitted to doubt whether the same reasons of comity, policy, and practical expediency which recommend the rule as to public statutes, should not make it operate with equal effect on private statutes; every statute affecting the tenure of real property in a State, whether public or private, is certainly in some sense a part of the local law.

* Wood *arguendo*, in Martin *vs.* Waddell, 16 Peters, 367, 390; Elmendorf *vs.* Taylor, 10 Wheaton, 152; Bell *vs.* Morrison, 1 Peters, 359; Green *vs.* Neal, 6 Peters, 301.

† Woolsey *vs.* Dodge, 6 M'Lean, 142.

‡ Martin *vs.* Waddell, 16 Peters, 367, 418.

§ Williamson *et al. vs.* Berry, 8 How. 495, 543.

So, too, where the Supreme Court of the United States have first decided upon State laws, the Federal tribunal does not feel bound to surrender their convictions on account of a contrary decision of a State court.* So, again, when the decisions of a State court are conflicting, the Supreme Court of the United States does not consider itself bound to follow the last case contrary to their own convictions, and especially, they have said, where after a long course of decisions some new light springs up, or an excited public opinion has brought out new doctrines subversive of former safe precedent. In Michigan, the original manuscript of the statute of limitations left out the saving clause "beyond seas;" but the published law contained the exception, and had been so received and construed by the people and the courts for a long series of years, and a subsequent legislature sanctioned the law as published; nevertheless, the Supreme Court of Michigan decided that the printed statutes did not form a part of the laws of that State, but that the original roll must be received as the exact record of the legislative will. But the Supreme Court of the United States disregarded the decision of the Michigan tribunal, and decided that the printed statute might control the case.†

In a case before the Supreme Court of the United States, it was contended that the decisions of the local tribunals on questions of general commercial law were to be treated as having the binding force of statutory enactments. But the court rejected the proposition.‡

* Rowan *vs.* Runnells, 5 Howard, 139.

† Pease *vs.* Peck, 18 Howard, 595.

‡ Swift *vs.* Tyson, 16 Peters, pp. 1 and 18. As to harmony between the decisions of tribunals of co-ordinate jurisdiction in regard to the con-

Having, in the previous pages, endeavored to give a general outline of the system of our law in regard to the interpretation and application of statutes, I close this branch of my subject by some instances of the power of interpretation and construction as applied to particular words. It is not designed to do more than to give an idea of the mode in which the judicial authority in this respect is exercised.

Banking Principles.—A statutory authority to a corporation to loan and negotiate their moneys and effects upon banking principles, has been said, "if the phrase has any peculiar meaning, to be an authority to deduct the interest at the commencement of loans, or to make loans upon discounts, instead of the ordinary forms of security for an accruing interest."*

Billiards.—A license by the legislature of billiard tables, cannot be understood to authorize any other species of gaming.†

Burglary at common law means the crime of breaking into a house in the night time, with the intent to steal or commit a felony; and it has been held in Alabama, that this term, when used in their Code, must receive the same construction.‡

Cattle.—Various cases have been decided as to

struction of statutes, I may notice that in Merville *vs.* Townsend, 5 Paige, 80, Mr. Chancellor Walworth said "that where the Supreme Court had given a judicial construction to a provision of a recent statute, that decision, if not clearly wrong, should be followed by the Court of Chancery, so that different rules of construction might not prevail in the courts of law and equity in relation to the same statutory provisions."

* Maine Bank *vs.* Butts, 9 Mass. 49.

† Barker *vs.* The State, 12 Texas, 273.

‡ *Ex parte* Vincent, 26 Ala. 145, the court say, "When words are used by the legislature in relation to a matter or subject, which, when used in reference to the same subject at the common law, have obtained a fixed and definite meaning, the inference, we think, is irresistible, that they were intended to be used in the common-law sense."

what are considered cattle in England; and the construction varies with the statutes in which they are used.*

Corporate Name.—Where an act required certain suits to be brought in the corporate name of cities or villages, it was held that the phrase meant the name by which the city or village was designated in its charter, and a suit brought in the name of the "President and trustees" of the village, &c. was held improperly commenced.†

Curtilage.—This term, which is peculiar to England, and not very applicable to this country, has been held in Michigan to embrace a barn standing eighty feet from a dwelling house, in a yard or lane with which there was a communication from the house by a pair of bars.‡

Deny.—Where, in case of an alleged encroachment on the highway, the occupant must, within a limited time after notice, deny the encroachment, his denial must be in writing.§

Descent.—"Descent from the mother" can not be held to mean descent from the maternal grandfather.‖

From.—The word "descent *from* a parent," cannot be construed to mean "descent through a parent."¶

* 3 Bing. 581. 2 W. Black. 723. *Ex parte* Hill, 3 C. & P. 225. Dwarris, p. 750.

† The President & Trustees of the village of Romeo *vs.* Chapman, 2 Mich. 179.

‡ The People *vs.* Taylor, 2 Michigan, 250.

§ Lane *vs.* Cary, 19 Barb. 537. See to same effect, Gilbert *vs.* Col. Turnpike Co. 3 John. Cas. 107; and Matter of Cooper, 15 John. 533. In M'Ewen *vs.* Montgomery Insurance Co., 5 Hill, 101, it was held that a verbal notice is good, unless the notice be a legal proceeding, and then it must be in writing.

‖ Case *vs.* Wilbridge, 4 Indiana, 51.

¶ Gardner *vs.* Collins, 2 Peters, 58.

High Seas.—This word, as used in the Crimes Act of the United States (1825, ch. 276, § 22), is used in contradistinction to arms of the sea, and bays, creeks, &c. within the narrow headlands of the coast; and comprehends only the open ocean which washes the seacoast, or is not included within the body of any county in any particular State.* It has been held that by the same phrase, under the act of 30th April, 1790, is meant any waters on the seacoast which are without the boundaries of low-water mark.†

Improvidence.—As to what improvidence is, for which a person will be held incompetent to be an administrator, see Coope *vs.* Lowerre, 1 Barb. Ch. R. 45.

Justifiable cause.—Where an act declares it to be a crime for a master to force a seaman on shore in a foreign port without justifiable cause, these words do not mean such a cause as in the mere maritime law might authorize a discharge, but such a cause as the known policy of the American laws on the subject contemplates as a case of moral necessity for the safety of the ship and crew, and the due performance of the voyage.‡

Maliciously.—When an act declares it to be a crime to force a seaman on shore "*maliciously* and without justifiable cause," the word maliciously is not limited to acts done from hatred, revenge, or passion, but it includes all acts wantonly done, or willfully done, that are against what any man of reasonable knowledge and ability must know to be his duty.§

* U. S. *vs.* Grush, 5 Mason, 290.* U. S. *vs.* Robinson, 4 Mason, 307.

† U. S. *vs.* Ross, 1 Gall. 624.

‡ Per Story, J., U. S. *vs.* Coffin, 1 Sumner, 394.

§ Per Story, J., U. S. *vs.* Coffin, 1 Sumner, 394. U. S. *vs.* Ruggles, 5 Mason, 192. Phillips' Case, 1 Moody's Crown Cases, 264, 273.

May and shall. Shall and may. Shall or may.—These words have been a fertile source of difficulty. In an early case on the construction of an English statute, empowering churchwardens and overseers to make a rate to reimburse constables, it was insisted that the statute only put the act in their power by the word "*may*," and did not require the doing it as a duty. "*Sed non allocatur;* for where a statute directs the doing of a thing for the sake of justice, or the public good, the word *may* is the same as the word *shall:* thus, the 23 Hen. VI. says the sheriff *may* take bail; this is construed *shall*, for he is compellable to do so."* So, under the acts giving the chancellor power and authority to grant a commission of bankruptcy, it was held not to be discretionary but *de jure.*†

This subject has been recently much considered in England on the true construction of the act called the County Courts Extension Act, which declares that in certain cases "a judge at chambers *may*, by rule or order, direct that the plaintiff shall recover his costs." The word *may* was here held not to be discretionary, but to mean *shall;* and the court said that "when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application; that the word *may* is not used to give a discretion, but to confer a power upon the court and judges,—and the exercise of such power depends not upon the dis-

* Rex et Regina *vs.* Barlow, 2 Salk. 609.

† Alderman Backwell's Case, 1 Vern. 152; 1 Cas. in Eq. Abr., 52; 2 Ch. Cases, 143–190. Stamper *vs.* Miller, 3 Atk. 211.

cretion of the court or the judge, but upon the proof of the particular case out of which such power arises."*

The Supreme Court of the State of New York, has said that where a statute declares that a public officer or public body "*may*" have power to do an act which concerns the public interests or the rights of third persons, *may* means *shall*, and the execution of the power may be insisted on as duty; and so it was decided in regard to a power conferred on the corporation of the city of New York, to repair sewers, &c.†

Thus the rule that "*may*" is to be interpreted as "*shall*" or "*must*" is not by any means uniform; its application depends on what appears to be the true intent of the statute. So, in a case upon a bank charter, where it was said "that the capital stock of said corporation *may* consist of 500,000 dollars," the Supreme Court of the United States said, "Without question such a construction (viz. *shall* for *may*), is proper in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power." But no general rule can be laid down upon this subject, further than, that exposition ought to be adopted, in this as in other cases, which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning

* MacDougall *vs.* Paterson, 11 C. B. 755. This decision of the Common Pleas is at variance with the rulings of the Court of Exchequer on the same act in Jones *vs.* Harrison, 6 Exch. 328, 2 L. M. & P. 257, and Latham *vs.* Spedding, 20 Law Journal, N. S., Q. B. 302, where the court held the grammatical rule to govern, and that the use of the word *may* left the whole matter discretionary with the judges. See also on this subject The King *vs.* The Mayor of Hastings, 1 Dowl. & Ryl. 53.

† The Mayor, &c., of N. York *vs.* Furze, 3 Hill, 612.

of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions. Now, we cannot say that there is any leading object in this charter which will be defeated by construing the word "may" in its common sense."*

Where the words of a statute were "It *shall and may* be lawful for the president, &c., to remove a toll-gate," the words were held not to be imperative, but that the removal was left to the discretion of the company, on the ground that *may* in statutes means *shall* only in cases only where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the power be exercised.†

So too, where a statute was in these words, "If any person die, &c., his heirs '*shall or may*' recover in one action,"—it was held that they were not bound to unite in one proceeding, but that they might bring several suits.‡

Navigate.—The words "navigating a river," should be construed in reference to the understanding of persons engaged in the business of navigation.§

Notice.—Where a statute requires service of a notice on an individual, it means personal service, unless some other mode of service is specified.‖

* Minor *vs.* Mech's. Bk. of Alex'a, 1 Peters, 46, 64.

In the King *vs.* the Bailiffs, &c., of Eyre, the words "shall and may" were held to be permissive and not mandatory. Smith on Statutes, p. 726; 2 D. & R., 172.

† The Newburgh Turnpike Co. *vs.* Miller, 5 John. Ch. R. 112.

‡ Malcolm *vs.* Rogers, 5 Cow. 188. See Attorney General *vs.* Lock, 3 Atk. 164, where the words "*shall and may*," were held to be obligatory.

§ The People *vs.* Hulse, 3 Hill, 309.

‖ Ruthbun *vs.* Acker, 18 Barb. 393.

Steal.—The word steal, in a statute implies a simple larceny.*

I may here notice a few miscellaneous cases of general interest. In Alabama it has been said that where a statute affects a community, and requires as a condition to its validity that something should be done before it goes into operation, in such a case the act has no force or effect until the thing required to be done is performed. But where the statute affects one or more designated persons, it matters not whether they are natural or artificial, those interested in the object of the act, may always dispense with a preliminary step, and may claim the benefit of its provisions without requiring the performance of a condition which can affect themselves alone.†

We have already had occasion to notice the ancient rule of the English system, which holds a judge exempt from all responsibility, civil or criminal, for any act done or omitted to be done by him in his judicial capacity. This rule, however, has been infringed upon in some of the States by statute. So in Alabama, the county court judges are required to give official bonds, on which actions at law will lie "for any injury, waste, or damage sustained in any estate in consequence of any neglect or omission of taking good and sufficient security from guardians, executors, or administrators;" but under this statute no suit can be maintained on the bond for the failure of the judge to require a guardian to renew his bond, or to give fur-

* Alexander *vs.* The State, 12 Texas, 540.

See Dwarris 670, 693, for the construction of many particular words in the English statutes.

† Savage *et al. vs.* Walshe *et al.* 26 Ala. 619.

ther security on account of the insolvency or removal of the original sureties.*

The Supreme Court of Massachusetts have said, "That the language of a statute is not to be enlarged or limited by construction, unless its object and plain meaning require it." And a statute declaring that in case a collector of customs should *die or resign*, the collector so resigning, or the representative of the collector so dead, should divide the fees with the successor in office, was held not to apply to a collector *removed* from office.†

Where a party was sentenced on the 6th of October, 1825, to solitary confinement for ten days, and hard labor for two years, and committed on the same day, it was held that the commitment was to be reckoned as part of the term; for, as the liberty of the subject is concerned, the statute ought to receive a construction favorable to the prisoner.‡

* Hamilton *vs.* Williams, 26 Ala., 527.

† Doane *vs.* Phillips, Currier *vs.* Phillips, 12 Pick. 223.

‡ Commonwealth *vs.* Keniston, 5 Pick. 420.

See the People *vs.* Hennessey, 15 Wend., 147, for a case upon a statute against embezzlement by servants.

The Banking System of New York.—I have thought it desirable to compress into this note the principal decisions interpreting and applying the statutes of the State of New York, on this important subject. Prior to the year 1838, an act commonly called the Restraining Act, 1 R. S., 589, part 1st, ch. xx., tit. 20, prohibited in New York under heavy penalties almost every branch of banking, such as receiving deposits, making discounts, issuing notes for circulation, &c., to all persons, associations, institutions, or companies, not specially authorized by law. In consequence, it became the practice to grant special charters conferring the privilege of banking. And to regulate this corporate banking so carried on under

special charters, a system of elaborate checks, restraints, and penalties was imposed; see R. S., 589, part i. ch. viii. tit. 2, "Of Monied Corporations. Art. 1 being entitled, Regulations to prevent the insolvency of monied corporations, and to secure the rights of their stockholders and creditors; and Art. 2, Regulations concerning the election of directors of monied corporations.

The granting of these charters in time became tainted with favoritism and abuse; and the State Convention of 1821 inserted in the Constitution then framed a provision requiring the assent of two thirds of the members elected to each branch of the legislature, to every bill creating, altering, &c., any body politic or corporate. Cons. of 1821, Art. 7, Sec. IX.

This, however, was not found sufficient to reach the root of the evil. In February, 1837, the Restraining Act was in part repealed; and on the 18th of April, 1838, the whole system was remodeled, and the business thrown open to general competition, by the passage of an act entitled "An Act to authorize the business of banking," permitting all persons on certain conditions to form associations for the purpose of carrying on the business. It has been a subject of great interest to know how far the provisions of the old system attach to the new; see Tracy *vs.* Talmadge, 18 Barb., 456, where a history of the changes are given, per Roosevelt, J. The first question that arose was, whether the associations formed under the act were *corporations.* In Thomas *vs.* Dakin, 22 Wend., 9, the Supreme Court held, that they possessed all the essential features of corporations, and that they were corporations; that it was competent, however, for the legislature to create corporations or authorize their creation by a general law; that the act of the 18th of April, 1838, was valid and constitutional, on the assumption that it received the assent of two thirds of the members elected to each branch of the legislature, that being the majority requisite to the valid creation of a corporation; and they also held that it would be presumed to be thus passed, unless the fact was denied by plea; and they refused to pass on the question upon demurrer. Nelson, C. J., dissented, on the ground that the legislature could not pass a bill of this kind as a majority bill. In Warner *vs.* Beers, 23 Wend., 103 (April, 1840), the Court of Errors held that the associations organized under the general banking law, and in conformity with its provisions, were not bodies politic and corporate *within the spirit and meaning of the constitution*, and that the act of the 18th of April, 1838, to authorize the business of banking, was constitutionally passed, although it might not have received the assent of two thirds of the members elected to each branch of the legislature. It was admitted that the associations formed under the free banking law had corporate powers; and whether they were corporations, mere partnerships, or joint-stock companies, and whether, if corporations, a law permitting corporations to be formed *ad libitum* came within the spirit of a constitutional restriction on corporations with grants of exclusive privileges, were the chief points discussed in the Court of Errors. From the nature of that tribu-

nal, however, it is impossible to learn the precise views of the majority of the court on the subject. The strongest argument was probably the *argumentum ad inconvenienti* growing out of the capital already invested in the free banks. See the result of the decision stated in Gillet *vs.* Moody, 3 Comst., 485.

In Purdy *vs.* The People, 4 Hill, 384, the case was whether a law altering the charter of the city of New York was constitutionally passed, it not having received a vote of two thirds of the members of both houses. The court decided that the law was void; and language was used which has been often relied on as going to show that all corporations being within the constitutional prohibition, it necessarily followed that the banking associations were not corporations; but the only point really decided was, that municipal corporations came within the constitutional restrictions upon the creation of corporations. See The People *vs.* Purdy commented on in The Supervisors of Niagara *vs.* The People, 7 Hill, 510.

In The Supervisors of Niagara *vs.* The People, 7 Hill, 504, it was, however, finally decided that the associations under the act of 1838 were "monied or stock corporations" within the meaning of statutes passed long anterior to the act of 1838, subjecting such corporations to taxation on their capital. Senator Porter, in delivering the prevailing opinion of the court, said it was obvious that Warner *vs.* Beers, and Purdy *vs.* The People, decided only that the banking associations were not corporations *within the spirit and meaning of the State constitution*, and that municipal corporations were embraced in the State constitution; for the purposes of the principal case, he was of opinion that the banking associations were corporations within *the tax laws*. For that purpose, however, he went into an elaborate investigation of the principal points of difference between corporations and partnerships, and insisted that the free banks were evidently endowed with a corporate character.

The decision of this involved question may be stated to be, that the free banking associations are corporations to all intents and purposes; but that the intent of the State Constitution being to impose restraints on special grants of privilege, and these associations being, on the contrary, a modified form of free banking, they did not come within the *spirit* of the constitution as if the constitutional clause had stood, "Corporations shall not be created unless, &c., *provided the charters contain any exclusive grants of privilege*." See Gillet *vs.* Moody, 3 Com., 485, for C. J. Bronson's statement of the result of the controversy.

The question, however, still remains, assuming these institutions to be corporations, how far they are subject to the details of the old system devised to regulate chartered banks. In The matter of the Bank of Dansville 6 Hill, 370, it was endeavored to apply to the free banks the provisions of the Revised Statutes (I. 598) which gave the Supreme Court power, by summary proceeding, to review the elections of the specially-chartered institutions. It was insisted that the free bank in question was a corporation; but the summary jurisdiction was denied on the ground, among others, that "the only monied corporations in existence at the time those powers

were conferred, were such as had an organization prescribed by law." A board of directors or trustees was provided by the old charters, elected at stated periods, and for a stated time, and in a specified manner; whereas the general banking law provided in terms for no other officers than a treasurer and cashier; and it was said that it could not be supposed that the legislature intended the court should have a summary jurisdiction over the contracts upon which the banking associations were organized under the free banking law.

In Gillet *vs.* Campbell, 1 Den., 320, it was held that an assignment by the president and cashier of part of the effects of a free bank exceeding $1,000 in value, did not come within the 8th section of the statute to prevent the insolvency of moneyed corporations, and that the assignment was valid although not authorized by a previous resolution of the board of directors. But the decision has been questioned by the same learned judge who delivered it. See Gillet *vs.* Moody, 3 Coms., 486.

Gillet *vs.* Moody, 3 Comst., 479, was a bill filed by a receiver of a banking association against a stockholder and director to set aside a transfer of certain state bonds made in exchange of his stock, and which came within tit. ii. art. 1, § 1) declaring it unlawful for the directors of any monied the terms of the provisions of the Revised Statutes (part i. ch. xviii. corporation to divide, withdraw, or in any manner pay to the stockholders or any of them any part of the capital stock, &c., or to reduce the capital stock, without the consent of the legislature, and; it was held by the Court of Appeals that the banking associations were not corporations in any qualified sense, as within the intent and meaning of some particular statute, but corporations to all intents and purposes; and that the transaction was illegal and void, although a doubt was intimated whether the provisions of the 10th section applied to the directors personally. It may be noticed that in this case it was also held that stopping payment by a bank is *prima facie* evidence of insolvency; and also that the title of the Revised Statutes in regard to moneyed corporations was a beneficial statute, not to be defeated by a narrow construction.

Talmadge *vs.* Pell, 3 Seld., 328, was a bill filed to set aside an operation in stock, on the ground that traffic in stock did not come within banking power. The transaction was held illegal on that ground, and it was further held that the free banking associations were moneyed corporations, and as such liable to all general laws relating to that class of corporations, except in so far as those laws or some of their particular provisions have been modified or superseded by, or are inconsistent with, the free banking act of 1838.

In Tracy *vs.* Talmadge, 18 Barbour, 456, Mr. Justice Roosevelt, who was in the legislature in 1838, and who is very familiar with the whole matter, said, speaking of this subject, "The only question is, Did the legislature in forming these associations, or rather in authorizing their self-formation, intend that certain penal provisions of law previously enacted to govern the action of chartered banks, undisputed corporations,

should apply to these new forms of limited partnership; and is that intention, if entertained by the law-making power, expressed in a manner so clear as to require no implication or interpretation to discover it?—the rule being inflexible, and as just as it is inflexible, that penal enactments when not perfectly clear admit of no extension by judicial interference."

I have no room for a discussion of the question; but considering the differences between the organization of the old safety-fund banks, as they were called, and the free banks, it must be admitted that the precise extent to which the provisions of the revised statutes are to be applied to the new institutions, and especially to their officers, is still unsettled.

Since writing the above note, and while this sheet is passing through the press, I have received a work specially devoted to "The Banking System of New York," for which I am indebted to the kindness of the learned author, John Cleaveland, Esq. The volume contains a vast quantity of information, both of a legal and historical character, which is nowhere else to be found collected, and must undoubtedly prove of great value to all persons, whether in or out of this State, who occupy themselves in any way with matters relating to this most important branch of finance. Mr. Cleaveland's long familiarity with this particular subject, his devotion to his profession, and his reputation as an accurate jurist, are sufficient guarantees in regard to the execution of the work.

CHAPTER IX.

OF THE INTERPRETATION AND APPLICATION OF TREATIES, OF PATENTS OR GRANTS OF LAND, AND OF MUNICIPAL ORDINANCES.

Treaties—Part of the Supreme Law of the Union—How far they affect State Legislation—How far they may have a retrospective effect—Patents or Grants of Land—Resumptions of, in early times—Rules of construction applicable to Municipal Ordinances—Centralization and Local Sovereignty—Instance of the former in Rome and France. Development and application of the latter in America. Towns and Cities. Delegation of Legislative Sovereignty. Mode of the exercise of the delegated authority. Cases—General authority of the Courts—Contracts in violation of Ordinances void—Passage of Ordinances.

In treating of the interpretation and application of written law, we have thus far considered the exercise of legislative power in regard to the enactment of statutes, in cases in which that power is unrestrained by any paramount or fundamental law. Before passing to the subject of constitutional limitations upon legislative action, we have to examine some topics which are so intimately connected with our general subject, that they cannot with propriety be omitted. Treaties, Patents or Grants of Land, and Municipal Ordinances, form a part of our written law, and are all in some respects governed by considerations and rules of the same kind as those which apply to statutes.

Treaties.—The Constitution of the United States* declares that all treaties made or to be made under the authority of the United States, shall form a part of "the supreme law of the land;" and the construction of these instruments thus necessarily enters into the scope of this work. The subject has been so fully discussed by writers on international law, that any elaborate examination of it here would be out of place. Some brief observations must, however, be made.

The effect produced by the grant of the treaty-making power to the Federal Government and by the recognition of treaties as a part of the supreme law, is very important in regard to questions affecting State sovereignty, and vested rights of property. Thus, it has even been intimated that the stipulations in the treaty of Peace between the United States and England, of 1783, were, in regard to the confiscation laws, paramount to the constitution of Pennsylvania.†

It has been insisted that the Federal Government had no power to make a treaty that could operate to annul a legislative act of any of the States, or to destroy vested rights; but the contrary has been expressly decided. So, it has been held that the treaty of peace of 1783 with England repealed an act of the legislature of Virginia, of 1777, concerning sequestrations and forfeitures, and that a suit might be brought for the recovery of a debt, though it was barred by the State law.‡ So again in New York, a State statute inconsistent with a treaty has been held to be repealed by it.§

* Art. 6, § 2.

† Lessee of Henry Gordon *vs.* Kerr, 1 Wash. C. C. R. 323.

‡ Ware *vs.* Hylton, 3 Dall. 236.

§ Denn ex dem. Fisher *vs.* Harnden, 1 Paine C. C. R., 54.

It has even been decided that a treaty may operate retrospectively, so as to destroy rights not only vested, but fixed by judicial action. In 1800, an American ship captured a French schooner, and a decree of condemnation was pronounced by the Circuit Court on the 23d of September, 1800. Pending a writ of error, on the 21st of December 1801, a convention was ratified with France, by which it was agreed that all property captured should be mutually restored. The Supreme Court held that they were as much bound by a treaty as by an act of Congress, and reversed the judgment on this ground alone; and Marshall, C. J. said,

> The Constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. * * It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction, which will, by a retrospective operation, affect the rights of parties; but in great national concerns where individual rights acquired by war are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court but for the government to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.*

On the other hand, in regard to the effect of the war of 1812, with England, on the treaty of 1794, with that country, it has been determined by the

* U. S. *vs.* Schooner Peggy, 1 Cranch, 109.

Supreme Court of the United States, without deciding the general point whether treaties in all cases become extinguished *ipso facto* by war, that the termination of a treaty even if effected by war, cannot divest rights of property already vested under it. "If real estate," said the Court, "be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed that rights of property already vested during its existence were gone by such repeal. Such a construction would overturn the best-established doctrines of law, and sap the very foundation on which property rests."*

A treaty is in many cases merely a contract, and not a legislative act; in cases of this kind it addresses itself to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the court.† But there are many other cases where the treaty is to be regarded not as a contract but as a rule; and in these cases it has the effect of an act of the legislature.‡

It is important to notice the rule that in the construction of this class of documents the judiciary, in one respect, do not occupy the same position nor hold the same language that they do in regard to other matters of written law. Whenever the nation, by

* Society, &c. *vs.* New Haven, 8 Wheat., 494.

† Foster & Elam *vs.* Neilson, 2 Peters, 314; See United States *vs.* Percheman, 7 Peters, 51.

‡ United States *vs.* Arredondo, 6 Peters, 735.

its properly constituted agents has declared its interpretation of a treaty, that interpretation becomes binding on the courts. The Supreme Court of the United States has said, "However individual judges might construe a treaty, it is the duty of the court to conform itself to the will of the legislature, if that will has been clearly expressed; the courts cannot pronounce the course of their own nation erroneous."*

Grants or Patents of Land.—The doctrine of the English law is, that the king was the original owner of all the land in the kingdom, and that the crown is the only source of title. We declare and apply the same principle in regard to our republican government; and it is our fundamental rule that all individual title to land within the United States must derive either from the grants of our own local state or territorial governments, or from that of the United States, or from royal governments established here prior to the Revolution, or from the English Crown.† Grants or patents of land, therefore, emanating as they do directly from the sovereign power, though, like charters of incorporation, they are in some respects mere private instruments,—in other respects they so largely affect public interests as to approach the dignity of statutes, and cannot with propriety be altogether omitted in a work like the present.

* Foster *et al. vs.* Neilson, 2 Peters, 253, 307, a case upon the construction of the treaty of San Ildefonso of 1st Oct., 1800.

Many cases have been decided, both in the Supreme Court of the United States and in the courts of the several States, upon the construction of particular treaty stipulations; but they do not fall strictly within the province of this work, and a notice of them would swell this volume far beyond its intended limits.

† See 2 Black Com., 51–59, 86, and 105; See also Kent Com., part vi., ch. li., vol. iii., p. 378.

The tenure by grant or patent from the crown in early times, partook of the precarious character which then attached to all political power. A pretext or a reason being found in the allegation that the liberality of the government was abused or misapplied, these grants were frequently resumed, sometimes by the executive, sometimes by the legislative branch. There are cases of the same kind in the colonial periods of this country; and their history in both instances bears strong traces of that want of a proper understanding of the true limits of the lawmaking power, and of those loose notions of the sacredness of vested rights, from the influence of which we are not yet altogether emancipated.*

* See *A Discourse upon Grants and Resumptions; showing how our ancestors have proceeded with such ministers as have procured to themselves grants of the crown revenue; and that the forfeited estates ought to be applied towards the payment of the public debts. By the author of the Essay on Ways and Means: London*, 1700. It is a history of various resumptions of crown grants, cited as authorities for the resumption, then proposed, of the Irish grants. This, which is one of the most recent instances of the vicious exercise of legislative power in England in disregard of private right on a large scale, deserves more particular notice.

The estates of the adherents of James II., in Ireland, were, upon the triumph of William III., forfeited to the crown, and distributed by him among his favorites, male and female, in the shape of grants. A strong opposition to the government existed in Parliament; they laid hold on this abuse, as they considered it, of the royal power; a bill was introduced into the Commons to resume the grants, tacked to a bill of supply, in that way forced through the Lords, and, notwithstanding the great reluctance and indignation of the king, became a law. Smollett's Hume, ch. vi., § 25, 26; Lord Campbell's Chan., vol. iv., pp. 146, 7. In order to do justice to purchasers and creditors, or rather to mitigate the injustice of the act, trustees were appointed to hear and determine all claims; and they were also empowered to sell the lands to the best purchaser, and the proceeds were appropriated to the army arrears. The act is the 11 and 12 William III., c. 2, and is entitled, an Act for granting an aid to his majesty by sale of the forfeited and other estates and interests in Ireland, and by a land tax in

I have said that the governments of the Union and of the States have succeeded to the right of the British sovereign in the public lands. That right was frequently exercised during the colonial power, and

England for the several purposes therein mentioned of two shillings in the pound.

Speaking of this transaction, Mr. Hallam says "that as the grants had been made in the exercise of a lawful prerogative, it is not easy to justify the act of resumption passed in 1699. The precedents for resumption of grants were obsolete and from bad times. * * Acts of this kind shake the general stability of possession, and destroy that confidence in which the practical success of freedom consists, that the absolute power of the legislature, which in strictness is as arbitrary in England as in Persia, will be exercised in conformity with justice and lenity. * * There can be no doubt that the mode adopted by the Commons of tacking, as it was called, the provisions for the purpose to a money-bill, so as to render it impossible for the Lords even to modify them without depriving the king of his supply, tended to subvert the constitution and annihilate the rights of a co-equal House of Parliament. * * If the Commons have desisted from encroachments of this kind, it must be attributed to that which has been the great preservative of the equilibrium in our government, the public voice of a reflecting people averse to manifest innovation, and soon offended by the intemperance of factions."—*Const. Hist.* vol. iii., ch. 15, § 192, '3.

A striking case of the same disregard of private rights occurs about the same time in the history of the colony of New York.

An act of the Colonial Assembly of New York, entitled an act "for the vacating, breaking, and annulling several grants of land made by Colonel Fletcher, the late governor of this province under his majesty," passed the 12th of May, 1699, recites in the preamble that, "their excellencies, the lords justices of England have, by their instructions unto his excellency the governor, bearing date the 10th day of November, 1698, directed his said excellency to use all legal measures for the breaking of extravagant grants of lands in this province." It then goes on to recite eight grants to Godfrey Dellius, Dellius and others, Nicholas Bayard, John Evans, The Churchwardens, &c., of Trinity Church, and Caleb Heathcote; declares them all extravagant within the meaning of the lord justices' instructions; breaks, vacates, and annuls them, and directs the records to be obliterated, and declares the crown to be re-seized and possessed of the premises. Whatever may be thought of the right to annul these grants; as to their extravagance a notion may be formed from the first to Godfrey Dellius, which contained about seventy miles on the Hudson river, by twelve broad, at the reserved rent of one racoon-skin per annum! Van Schaick's Laws, vol.

many titles grow out of royal grants or patents. In regard to these, it has been said that in England nothing passes as against the crown by implication, and that royal grants are always to be strictly construed.* But we have already had occasion to notice that on this subject the cases are somewhat conflicting. In regard to this rule of strict construction, so far as it exists, the Supreme Court of the United States has said that the decisions and authorities on this point apply properly to a grant of some prerogative right to an individual to be held by him as a purchase, and which is intended to become private property in his hand.

i., pp. 31 and 51. This act was repealed on the 27th of November, 1702, and the repealing act was itself repealed, or rather disapproved by the queen on the 26th of June, 1708. The act of 1699 also contained a clause that it should not be in the power of the provincial governors to grant or demise certain lands for any longer period than for their own time in the government, and in regard to this, in Bogardus *vs.* Trinity Church, 4 Sandf. Ch. R., 737, it was contended that the effect of the repeal or disapproval of the repealing act was to undo all that had been done while the repealing law continued in force; but it was held not to be so. "Such a rule of construction," said Mr. V. C. Sandford, "applied to private rights, would be deemed most tyrannical, arbitrary, and unjust. For instance, we have an act of Congress requiring a residence of five years to entitle an alien to naturalization. Suppose that Congress at its late session had repealed this law, and enabled aliens at once to become citizens, and an alien now arriving here should take the necessary oaths, become a citizen and purchase lands, and at the next session of Congress the act of the late session should be repealed,—would not the doctrine that thereby all that was done under the statute while it existed was avoided, be deemed monstrous and absurd? The principle is the same in respect of the repeal act of 1702. Rights acquired under it prior to the Queen's disapproval were as valid and effectual as if the act of 1699 had never been enacted."

I ought not to close this long note, without saying that my attention has been drawn to the subject of it by the kindness of my very learned friend, M. S. Bidwell, Esq.

* Banne Case, Davies Rep., 157; Jura Coronæ, 117; 7 Conn. R. 200. See also Charles River Bridge *vs.* Warren Bridge, 11 Peters, 420.

For instance, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant still remains in the crown for the benefit and advantage of the whole community. Grants of that description, are therefore construed strictly."*

There are in the State of New York, many grants from colonial governors, which have been upheld to pass the land under water if within the grant, on the ground that the king of England was originally the proprietor of the soil under navigable waters, that his title extended to the province of New York, that he had power to grant such title to a subject, and that the power was delegated to the colonial governor, as the immediate representative of his sovereign.† And in cases of this kind the conveyance of land by the sovereign authority invests the grantees with the requisite power to take and hold them.‡

The subject of grants or patents of land is still one of great importance in this country. Vast districts of land still belong, in this country, in fee simple to the government of the United States. Other tracts belong to the separate States. The legislative bodies

* Martin *et al. vs.* Waddell, 16 Peters, 367, 411.

But with great deference for that high tribunal, it is to be doubted whether this be the origin of the rule. In the times when it originated, there was but little regard for the interest of the community, little respect paid to private rights where they came in conflict with the government, and the profoundest deference for the royal power and dignity. It is rather in the old feudal notions of this class that the doctrine will, I think, be found to have originated.

† Gould *vs.* James, 6 Cowen, 369. Rogers *vs.* Jones, 1 Wend. 237. The People *vs.* Schermerhorn, 19 Barb. 540.

‡ Goodel *vs.* Jackson, 20 J. R. 706. Jackson *vs.* Lervey, 5 Cowen, 397. North Hempstead *vs.* Hempstead, 2 Wend. 109.

exercising the power of these sovereignties, which have succeeded to the rights of the British Crown,* have appointed certain public officers to sell and grant these lands, and have provided many forms and checks to secure regularity and to protect equally the public and private rights. But the general principle is, that when these proceedings are consummated by a grant the earlier steps can no longer be inquired into, and that in the absence of fraud a good title is acquired. The patent or grant establishes the fact of every prerequisite having been performed.†

In New York it is now declared (1 R. S. 198, part i., chap. ix., title 5, art. 1), that the commissioners of the land office shall have the general care and superintending of all lands belonging to the State, the superintendence whereof is not vested in some other office or board; and they have also the power to direct the granting of the unappropriated lands of the State according to the directions from time to time to be prescribed by law. This includes the power to grant

* Martin *vs.* Waddell, 16 Peters, 367.

† Polk's Lessee *vs.* Wendell *et al.* 9 Cranch, 87; Polk's Lessee *vs.* Wendell *et al.* 5 Wheat., 293; Bouldin *vs.* Massie's Heirs, 7 Wheat., 122, 149; Stringer *et al. vs.* Lessee of Young *et al.* 3 Pet., 320, 340; Patterson *vs.* Winn, 11 Wheat., 380; Patterson *vs.* Jenks *et al.* 2 Pet., 227; Sampeyreac and Stewart *vs.* The United States, 7 Peters, 222; New Orleans *vs.* The United States, 10 Peters, 662; Pollard and Pickett *vs.* Dwight *et al.* 4 Cranch, 421; Bodley and others *vs.* Taylor, 5 Cranch, 191; Massie *vs.* Watts, 6 Cranch, 148; Blunt's Lessee *vs.* Smith and others, 7 Wheat., 248; Boardman and others *vs.* The Lessees of Reed and Ford *et al.* 6 Peters, 328; Bagnell *et al. vs.* Broderick, 13 Peters, 436; The Philadelphia and Trenton Railroad Co. *vs.* Stimpson, 14 Peters, 448; Brush *vs.* Ware *et al.* 15 Peters, 93; Stoddard *et al. vs.* Chambers, 2 Howard U. S. R., 284; The People *vs.* Mauran, 5 Denio, 389; Jackson *vs.* Marsh, 6 Cowen, 281; See Mr. Blackwell's able work on Tax Titles, p. 99.

lands under the waters of navigable waters, or lakes.* The New York statute provides that every applicant for a grant of land under water shall, previous to his application, give notice thereof, by newspaper advertisement, for six weeks; and it has been held that this preliminary notice, directed by the statute, is absolutely necessary to confer jurisdiction of any particular case on the commissioners, and that without it any grant by them is void.† No grant of land under water can be made to any person other than the proprietor of the adjacent land, and every such grant that shall be made to any other person shall be void; and it has been decided that ejectment will lie for the interest conveyed by these State grants of land under water.‡ The statute requires that letters patent shall contain an exception and reservation to the people of the State of all gold and silver mines;§ but the omission of this reservation does not vitiate the letters patent.

* 1 R. S. 208, part i., chap. ix., title 5, art. 4. Gould *vs.* James, 6 Cowen, 369. Rogers *vs.* Jones, 1 Wend. 237. The People *vs.* Schermerhorn, 19 Barb. S. C. R. 540.

† People *vs.* Schermerhorn. 19 Barb. 540. We have already seen that a somewhat analogous provision in regard to application to the legislature, has been held to be merely directory. *Ante*, p. 66. Smith *vs.* Helmer, 7 Barb. p. 416, and the People *vs.* Mauran, 5 Denio, 389, decide also, that the notice is not essential, on the ground that *omnia solemnia presumuntur rite acta*, and on the general doctrine which makes State grants conclusive evidence of the correctness of the previous proceedings. This rule we have already had occasion to notice.

‡ 1 R. S. *ut supra;* Champlain and St. Lawrence R. R. *vs.* Valentine, 19 Barb. 484.

See Furman *vs.* The City of New York. 5 Sandf. 16, as to grants of land under water by the corporation of that city. The act authorizing the corporation to make these grants was based on the petition of the city government; and the preamble of the act referred to, and in part recited, the petition. It was held that both the preamble and the petition might be referred to, to remove ambiguities in the act.

§ 1 R. S. p. 198, § 5, *ut supra.*

The authority of the commissioners may be executed by their issuing letters patent under the seal of the State; or the commissioners may grant land under their own seals.*

Where the legislature authorizes owners of lands on the shore of a river or sea to fill up and dock out in front of their lands to a designated exterior line, the shore being irregular and crooked, and the exterior line straight, questions of difficulty have presented themselves as to the relative share of the proprietors in the new front; the Superior Court of New York has declared that the following rule, previously applied by the Supreme Court of Massachusetts to the formation of alluvial deposits on a river, is sound and just:†—(1) Measure the bank or line of the river opposite to the newly-formed line, and compute how many rods, yards, or feet each proprietor owns on the original river line; (2) then let the number of feet or rods on the newly-formed line to which each proprietor is entitled, bear the same proportion to the number he owns on the old line, as the whole length of the new line bears to the whole length of the old. This principle, however, could not be applied if the whole line were not to be adjusted, but only a boundary between two conterminous proprietors. This latter case has been considered both in Maine and in New York; but as the matter is one of detail, I refer to the cases.‡

* The People *vs.* Mauran, 5 Denio, p. 389.

† Deerfield *vs.* Ames, 17 Pick. 45; O'Donnell *vs.* Kelsey, 4 Sandf. 202.

‡ Emerson *vs.* Taylor, 9 Greenleaf. 44; O'Donnell *vs.* Kelsey, 4 Sandford, 202.

In Maine, as to the rules for apportioning flats to the owners of uplands, see Treat *vs.* Chapman, 35 Maine, p. 34, and cases there cited both in that State and Massachusetts.

Municipal Ordinances.—The remaining branch of this portion of our subject is one of much interest in many points of view, and especially in this country. In the application of authority and intelligence to the administration of public affairs, two great systems have, from the earliest times, divided the minds of men,—centralization, and local or distributed power. With reference to our peculiar system, we sometimes call the latter local sovereignty. Of the former, or the concentration of authority in one single, central head and hand, in the old world Imperial Rome presents the greatest exemplar. In the modern world, France offers the most favorable specimen. This system, by whatever name the government be called, republic, monarchy, or empire, and whether nominally administered by a consul, a king, or an emperor, is practically a despotism. Its essential idea is complete subordination of all interests to the predominance of a single will. Under some circumstances, under certain conditions, when by some rare fortune virtuous intentions, moderation, and intelligence inspire and actuate the master, such a system may result in that tranquillity and prosperity which are the certain evidences of good government.* Cases of this kind, however, are but exceptions to the great rule which teaches that

* "If a man," says Gibbon, "were called upon to fix the period of the world during which the condition of the human race was most happy and prosperous, he would without hesitation name that which elapsed from the death of Domitian to the accession of Commodus. The vast extent of the Roman empire was governed by absolute power, under the guidance of virtue and wisdom. The army was restrained by the firm but gentle hand, of four successive emperors whose characters and authority commanded involuntary respect. The forms of the civil administration were carefully preserved by Nerva, Trajan, Hadrian, and the Antonines, who delighted

permanent prosperity can only flow from equality and justice. Centralization or despotism corrupts the sovereign, debilitates and demoralizes the subject; and history affords no instance where, within a brief period, it has not ended in convulsion and disaster.

Of the other scheme, or the distribution of power among local authorities, England affords the only signal instance in the Old World. Notwithstanding the theoretical despotism of her Parliament, her system practically secures that division of authority, those checks and counter-checks, which are only another name for liberty. But to obtain a correct idea of the full extent and operation of local action and local sovereignty, a wider range of observation must be taken. Beyond all doubt, this country affords the strongest and best instance of its operation. American freedom is based on the idea of local action, localized power, local sovereignty, and has received its best developments from the intelligence and energy of its people, fostered to the highest degree by a system which seeks, as far as safely possible, to strip the central authority of influence, and to distribute its functions among local agents and bodies.*

The two great national governments, then, which have been thus far the most successful in forming a

in the image of liberty, and who were pleased to consider themselves as the accountable ministers of the laws."—*Hist.* ch. iii.

Gibbon surveyed the ancient world with an eye of wonderful scrutiny and wisdom. His authority is now as absolute as when he wrote. But in regard to the affairs of his own time, he appears to have had little more philosophy or independence than any other placeman.

* Of this system, perhaps the convention of the State of New York of 1846 presents the strongest illustration of what is commonly called decentralization. By the means of frequent local elections and division of power, it has carried local sovereignty to a point never tried before. It cannot yet be said with confidence, whether the line of wisdom has not been passed.

compromise between the principles of local action and centralization, are England and the United States. Their aim has been to combine the benefits of order and discipline resulting from a central authority, with that freedom of thought and action which can only be obtained in the highest degree, by the absence of authority and supervision. Of these two, however, our system, based as it is on a federation of state sovereignties supreme in the great mass of their domestic affairs, these state sovereignties again sedulously endeavoring to distribute authority among the smaller political and geographical subdivisions, is far the most conspicuous as exhibiting the benefits resulting from localized power and action.

It is in connection with these considerations, that the subject of municipal ordinances has its chief interest to us in this country. Corporations or associations endowed with certain artificial attributes relating to their management and duration were borrowed from the civil law, and very early applied to the administration of many kinds of business. And the same system, *i. e.*, grants of charters, was extended to the government of boroughs and towns in England. In this country, the town governments or organizations are among the most important parts of the machinery by which the local action and independence of the country is preserved. When the towns become populous they generally receive charters of incorporation, and act upon the interests of person and property confided to them by means of what are called municipal ordinances. The rules governing this branch of written law thus become matters of great importance.*

* The account which the learned and sagacious historian of the Anglo-Saxon period in England gives, of the condition of the boroughs or towns

So far as these municipal institutions fall under the general rules applicable to corporations, a highly fertile and complex branch of our law, they have been very ably treated by various writers, and fall outside of the scope of this work. But municipal ordinances or laws regarded as the enactments of the governing power of towns or cities made by virtue of a delegated sovereignty, fall directly within the limits of our subject, and by reason of the multiplicity of these institutions and the immense number of individuals and the masses of property under their control, are of very great importance. I shall, therefore, in this chapter, state some of the prominent rules that govern enactments of this kind, which, within the sphere of their authority, have all the force of statutes.

We have had occasion (*ante*, pp. 164, 166) to notice the general rule that a legislative body is not

at that early period, is very curious. He says, "What, then, was the situation of the Anglo-Saxon burghs? Rendering a light and easy tribute, and performing moderate services, they were protected against compulsory taxation. Beyond their settled and accustomed contribution, no pecuniary aid could be required, except by an illegal exertion of power. As a body, they were often, if not always, freed from the feudal bond. The rights of the territorial magistracy resulted from their own internal condition, and not from the nomination of the crown. The Laghman acted as judge, not by virtue of the king's 'writ' and 'seal,' but because he owned the Mansus to which the judicial right or duty appertained; and if, as there is every reason to suppose, the election of Reeves and other similar officers by the Leet juries has descended from the Anglo-Saxon age, the other functionaries were virtually appointed by the people. Legislation was the prerogative of the sovereign and his Witan; yet, though the laws thus enacted, extended in general terms to all those who were subjected to his supremacy, still, the mode of accepting the statutes and of carrying them into effect, depended upon the deliberations of the burghmoot, and the discretion of its members; and London was as much entitled to the name of a distinct state or community as the Kentish kingdom."—Palgrave's *Commonwealth*, vol. i., ch. 21, pp. 632 and 633.

competent to delegate its functions. But this is subject, like most of the general rules in our complex and artificial system, to a large class of exceptions. It is well settled that in many cases, a certain amount of legislative power may be entrusted to municipal corporations. So in New York, a city ordinance in regard to the sale of coal by weight, fixing the number of weighers and imposing a penalty on those who should sell coal not weighed, has been sustained.* So in New Hampshire, it has been said that the legislature may constitutionally authorize a city to enact, and a city may enact, an order that no intoxicating liquors shall be used or kept in any refreshment saloon or restaurant within the city, for any purpose whatever.† So in the same State, it has been held that an act declaring that a bowling-alley within twenty-five rods of certain specified buildings should be deemed a public nuisance, but that the act should only be in force in such towns as should adopt it, has been held constitutional; and an indictment for keeping a bowling-alley in the situation contemplated by the statute, in a town where the act had been adopted, has been sustained on the general ground that powers of local legislation may be granted to cities, towns, and other municipal corporations.‡

So, too, it has been held that the taxing power for local purposes may be delegated to the local authorities; and on this ground acts authorizing municipal corporations to subscribe to railroad corporations have been sustained, against the objection that they

* Stokes & Gilbert *vs.* The Corporation of New York, 14 Wend., 87.

† The State *vs.* Clark, 8 Foster, 176.

‡ The State *vs.* Noyes, 10 Foster, 279.

were void as being a delegation of the supreme authority.* But I confess that it appears to me, notwithstanding the weight of authority on this head, that a delegation of the power to municipal corporations to tax their citizens for works of such large and general utility as railroads, cannot be fairly called a taxation for local purposes, nor justified on that ground. The road may benefit the locality, but it is not easy to see how it can be properly called a local object.

Again, the highest powers of the State are sometimes delegated to these corporations for purposes of general safety. So in New York, on an order of the mayor and two aldermen of the city, buildings may be destroyed to prevent the spread of a conflagration.† In this act provision was made for compensation to the owner; and it seems to be settled, under the general constitutional clause declaring that private property shall not be taken for public use without compensation, that when acts in connection with measures of municipal regulation authorize the taking of private property, compensation must be provided, or the appropriation will be unconstitutional and void.‡ But if private property is not absolutely taken, it seems clear that cities acting within the powers conferred by their charter, may, when necessary to the health of the city, direct and control the occupation of prop-

* Sharpless *vs.* The Mayor of Philadelphia, 21 Penn., 147; Moers *vs.* City of Reading, 21 Penn., 188; State of Louisiana *vs.* Executors of John McDonogh, 8 La. Ann. R., 171; New Orleans *vs.* Graihle, 9 La. Ann. R., 561; Slack *vs.* Maysville and Lexington R. R., 13 B. Monroe, 1; The Justices of Clarke Co. *vs.* The P. W. and R. R. Turnpike Co., 11 B. Monroe, 143.

† The Mayor, &c. of New York *vs.* Lord, 17 Wend. 285; S. C., 18 ibid., 126; Russell *vs.* The Mayor, &c. of New York, 2 Denio, 461.

‡ Baker *vs.* The City of Boston, 12 Pick, 184; Clark *vs.* The Mayor, &c., of Syracuse, 13 Barb., 32.

erty, and may in so doing, to some extent, interfere with private rights without providing for compensation.* So in Boston it was held that the city authorities were authorized to fill up a creek in the exercise of their powers for the preservation of the health of the city.†

The same power is exercised in regard to nuisances. So the city of Albany being authorized by its charter to remove and abate nuisances in and about the docks and wharves, and to prevent obstructions in the Hudson river opposite the city, it has been held to have the power to remove an ark or float moored in the basin and obstructing the navigation.‡ So again when at the time of the first appearance of the Asiatic cholera in this country, the Board of Health of Albany declared certain buildings a nuisance and they were pulled down, it was held to be rightly done. But this power of abolishing nuisances by mere municipal ordinances, without any judicial investigation and without any obligatory notice to the party in interest, involves great interference with private property; and it is well settled that it will not be permitted, unless the charter clearly confers the authority;§ and on this principle it has been recently decided that the city of Syracuse, in the State of New York, had not the power.‖

In regard to the exercise of judicial construction with respect to the powers delegated to these subordinate bodies, it has been said in England generally,

* Clark *vs.* The Mayor of Syracuse, 13 Barb., 32.
† Baker *vs.* The City of Boston, 12 Pick., 184.
‡ Hart *vs.* The Mayor of Albany, 9 Wend., 571.
§ The People *vs.* The Corporation of Albany, 11 Wend., 539.
‖ Clark *vs.* The Mayor of Syracuse, 13 Barb., 32.

in speaking of by-laws framed by corporations, that they ought to have a reasonable construction; that they are not to be construed so strictly as to make them void, if every particular reason of making them does not appear.* But in regard to corporations of a public character, this does not seem to be the modern English doctrine. "When public functionaries," says Lord Cottenham, speaking of the Poor-Law Commissioners, "depart from the powers which the law has vested in them, and assume a power which does not belong to them, the court no longer considers them as acting under their commission, but treats them, whether a corporation or individuals, as persons dealing with property without legal rights; and when such persons infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction."†

In this country, in regard to the ordinances of municipal corporations, and the exercise of their delegated sovereignty, the doctrine is in conformity with the general rule which we have elsewhere noticed in regard to special powers, as well as with the principles in regard to corporations generally, that the authority conferred upon these subordinate bodies is to be strictly construed, and must be closely pursued. In New York it is declared by statute, in regard to towns and corporations, that they shall not possess any power except such as was specially given, or as

* The Master, &c., of Vintner's Co. *vs.* Passey, 1 Burr. 235, 239.

† Frewin *vs.* Lewis, 4 M. & Craig, 249; see also Agar *vs.* Regent's Canal Co. Cooper's Equity Cases, 77; The River Dun Navigation Co. *vs.* North Midland Railway Co., 1 Railway Cases, 135; Attorney General *vs.* Aspinwall, 2 M. & C., &c., 613; Same *vs.* Corporation of Poole, 4 M. & C., 30; Same *vs.* Mayor of Dublin, 9 Bligh, 395.

shall be necessary to the exercise of the powers so given;* and these provisions are in general strictly construed. So the common council of a city, under general words which give it power to provide for the *good government* of the city, have no authority to furnish an entertainment for the citizens and guests of the city at the public expense. A contract for such purpose is absolutely void, and even if performed by the party with whom it is made, payment cannot be enforced against the city.† So a town, which is only authorized to sue and be sued in its own name, cannot authorize commissioners of highways to bring a suit in their own names for injuries to the property of the town. A resolution to that effect is void, and the commissioners who bring the suit are remediless for their costs and expenses.‡ Nor can there be any subsequent ratification of an act or proceeding which the town has no authority to order. So where a municipal corporation was recognized as having an exclusive right to control and regulate the use of the streets of a city, and as being endowed in that respect with legislative sovereignty, it was held that an ordinance making a perpetual grant of a right to lay down a railway in a street of the city was not a legislative act, but a practical surrender of the power of the corporation, and void.§ When the supervisors of the city of New York refused to pay certain salaries, on the ground of the unconstitutionality of the law under which the salaries were claimed, and the common

* 1 R. S., 337, § 22; 1 R. S., 599, § 1, 3.

† Hodges *vs.* City of Buffalo, 2 Denio, 110.

‡ Cornell *vs.* Town of Guilford, 1 Denio, 510; see the continuation of the controversy, Town of Guilford *vs.* Cornell, 18 Barb., 615.

§ Milhau *vs.* Sharp, 17 Barb., 435.

council assumed the defence of the suits brought against the supervisors for the penalty incurred by the violation of their duty, it was held that they had no right to do so, and that the drafts given for the expenses of the suits were void.*

So a common council authorized to make and publish ordinances for the purpose of abating nuisances, has no power to direct the removal of a person sick with an infectious or contagious disease, from one place to another, without his consent; and still less to order the forcible seizure of a person's house and its occupation as a pest-house against his will.† In the same State the Court of Appeals has said, "The ordinance of a municipal corporation must conform strictly to the provisions of the statute giving power to pass the ordinance in question, or its proceedings will be void." So when the Common Council of the city of Schenectady was authorized by ordinance to pitch, level, and flag streets "in such manner as they might prescribe," and they passed an ordinance delegating this power to a city superintendent, and directing the expenses to be paid by the owners of the property in front of which the improvement was made, it was held that the ordinance was void.‡

In Massachusetts, however, the rule that the delegated power is to be strictly construed, does not seem so severely adhered to. Where a city ordinance was passed directing an assessment for certain work, and the

* Halsted *vs.* The Mayor, &c. of the City of New York, 3 Com., 431; for other cases growing out of this same matter, see Purdy *vs.* The People, 4 Hill, 384; and Morris *vs.* The People, 3 Denio, 392. The unconstitutionality of the appointment of the officers in question was left open by the latter case.

† Boom *vs.* City of Utica, 2 Barb., 104.

‡ Thompson *vs.* Schermerhorn, 2 Selden, 92.

work was done, but not in conformity to the ordinance,* the Supreme Court of Massachusetts said, "The general principle that the city ordinance must be adhered to, is a sound one;" but the assessment was held binding, and the court in deciding the cause used this language: "Without prescribing any general rule on this subject, and conceding that the subject of deviation from the ordinance is not free from difficulties in limiting the extent to which departures may be permitted in the mode of construction, the court are of opinion, that the grounds of defence here relied upon are insufficient; and that, when the deviation is made at the request, or with the assent of the land-owner liable to be assessed, he should be estopped from setting it up; and also when the departure is not substantially and palpably an intended deviation from the ordinance, especially when not attended with any substantial increase of expense, and an assessment is made therefor by the city authority, it is not competent for one who is otherwise duly assessed to avoid the payment of his assessment by raising the objection of a departure from the ordinance in the mode of construction."

It is a general rule that municipal by-laws and ordinances must not be in conflict with the general law; and on this ground it has been held in Connecticut, that a by-law of a borough prohibiting the taking of oysters from the waters within the borough during a certain period of the year, under a penalty therein prescribed, which the borough is authorized by its charter to make, is abrogated by a general law of the State, passed subsequent to the granting of the charter

* City of Lowell *vs.* Hadley, 8 Met., 180.

prohibiting the doing of the same act under a penalty prescribed in the statute, so far as such by-law prohibits the act, whether such by-law was made before or after the passing of the general law; and therefore no action for the doing of the act after the passing of such general law can be maintained upon the by-law.*

A case of great interest has presented itself in New York, in regard to the general powers of municipal corporations and the control of the courts over them. While an application was pending before the Common Council of the city of New York, in 1853, for leave to construct a railroad in Broadway, the main avenue of the city, suit was brought in the Superior Court for an injunction restraining the members of the Common Council from making the grant. The complaint charged that the corporation had no power in the premises under their charter; that the grant would create an injurious monopoly; that the road would be a public nuisance, and that the members of the city government were actuated by fraudulent and corrupt motives. The injunction was granted, and served on the members of the Common Council. That body, however, totally disregarded it; declared by resolution, "that the courts had no power to interfere with the municipal legislation of the city; that the Common Council would not allow any other body to interfere unlawfully with the authority which it held from the people, and which it was bound to exercise according to its own judgment and on its own responsibilities, and not according to the views and directions of any judge or any other individual citizen;" and proceeded to pass the grant. The authority of the court thus being

* Southport *vs.* Ogden, 23 Conn. R., 128.

set at defiance, an application was made for an attachment against all the members of the Common Council, as for a contempt.

The course taken by the Common Council necessarily involved the precise question whether the courts could exercise any jurisdiction over a municipal corporation for a breach of trust, violation of general principles of law, or bad faith. The question was one of very great interest, and attracted the attention which its importance deserved. Many objections were urged to the application for the attachment; but the one of principal importance was, that the resolution in question was an act of legislation, with which the courts could not rightfully interfere. And it was contended that no court of equity could interfere in any case, or for any purpose, with the legislative action of a municipal corporation, no matter how gross the violation of law, or even of the provisions of its own charter, or how great the nuisance threatened, or how corrupt the motive.

But the doctrine was denied: it was declared that there was no distinction between a municipal corporation or any other corporation aggregate in respect to the powers of courts of justice over its proceedings; and that "although such a municipal body is clothed with legislative and even political powers, yet in the exercise of all its powers, it is just as subject to the authority and control of courts of justice to legal process, legal restraint, and legal correction, as any other body or person, natural or artificial." This doctrine was asserted on the uniform authority of the English cases and those of our own courts, and also on the constitutional provision, "that all corporations

shall have the right to sue and shall be subject to be sued in all courts, in like cases as natural persons;"* while it was admitted that the court had no right to interfere with the proper legislative discretion of the corporation, it was declared that it could interpose its authority whenever it was necessary to prevent abuse, injustice, or oppression, the violation of a trust, or the consummation of a fraud. On the ground, therefore, that the complaint alleged sufficient cause to give the court jurisdiction, that the injunction was rightly issued, and that as long as in force it was entitled to obedience, an attachment was granted.†

Where a municipal corporation has power to make reasonable by-laws, it has been said that the question whether a given by-law is reasonable, is a question for the court, and not for the jury, and evidence on the subject is inadmissible.‡ If unreasonable, the court holds them void.§ So, a by-law of the city of Boston

* Cons. of N. Y., 1846, art. 8, § 3.

† Davis *vs.* The Mayor, &c. of the City of New York, 1 Duer, 451.

The cause came up again on the return to the attachment. People *vs.* Compton, 1 Duer, 512. The doctrine of the previous case was sustained; one of the aldermen was imprisoned for fifteen days, and the rest, with the exception of one who apologized, were fined $100 and costs.

‡ Commonwealth *vs.* Worcester, 3 Pick. 462. But how is the court to obtain the necessary knowledge? In Vandine's Case, 6 Pick. 191, it is said, "To arrive at a correct decision, whether the by-law be reasonable or not, regard must be had to its object and necessity. Minute regulations are required in a great city, which would be absurd in the country." Necessity is certainly a fact; and how is the judicial knowledge of this fact to be arrived at? I believe it may be said that there is a deficiency in our system of the administration of justice, in not providing the courts with means to obtain for themselves satisfactory evidence or instruction in regard to questions of fact which are left to them to decide. The difficulty presents itself in regard to the construction of technical words in statutes, as well as in the matter above referred to.

§ Vandine's Case, 6 Pick. 187, 191.

in regard to sewage, has been held in that State to be void for inequality and unreasonableness.*

We have already seen that a statute of a local or municipal character is as fatal to the validity of all contracts based on a violation of it, as if the act be one of a general character. And it has been intimated that a corporation ordinance was equally efficacious.†

In regard to the enforcement or sanction of by-laws, the rule is that they can only be enforced by a pecuniary penalty, unless there is some express act giving power to inflict other punishment.‡

As to the passage of municipal ordinances, the following decision is to be observed. It is a general rule of practice in legislative bodies which consist of two branches, that all business before them, and unfinished at the end of a session, is discontinued; and that if taken up at all at a session following, it must be taken up *de novo*. It has been held in New York, that the analogy of this rule applies to acts of a municipal corporation of a legislative character; and consequently an ordinance granting to a city-railroad company leave to use the streets for that purpose, which passed the Board of Assistant Aldermen of the city of New York in 1852, but was not passed by the Board of Aldermen till 1853, after a new Board had been elected, has been decided to be void.§

* City of Boston *vs.* Shaw, 1 Met. 130.

† *Ex parte* Dyster *in re Moline*, 1 Merivale, 155; Bell *vs.* Quin, 2 Sandford, 146; Beman *vs.* Tugnot, 5 Sandf. 154, *ante*, p. 86.

‡ Gee *vs.* Wilden, 2 Lvtw. 1320; Bosworth *vs.* Budgen, 7 Mod. 459; 2 Str. 1112; Leathley *vs.* Webster, Sayer, 251; Gray on Corporations, 8; Hills *vs.* Hunt, 15 Com. B. 1, 6 J. Scott, 1, 25.

§ Wetmore *vs.* Story, Abbott's Practice Cases, vol. iii. p. 263.

Some points of local municipal interest may here be noticed. In New

In reference of the admissibility of the books of a municipal corporation as evidence, the Supreme Court of the State of New York has said, "that the corporation of the city of New York more nearly resembles the legislature of an independent state, acting under a constitution prescribing its powers, than an ordinary private corporation. The acts of this corporation concern the rights of the inhabitants of the city; it exercises a delegated power, not for its own emolument, but for the interests of its constituents; and while it keeps within the limits of its authority, the constituents are bound by the acts of the corporation. When the citizen wishes to show those acts, he must resort to the authentic record of them; which is the original minutes of the corporation."*

York, as to the power of the corporation as to the construction of piers and bridges, see Marshall *vs.* Guion, 4 Denio, 581.

In the same State it has been held that an arrest cannot be made on Sunday for a violation of a corporation ordinance. Wood *vs.* City of Brooklyn, 14 Barb. 425.

See Trustees of Clintonville *vs.* Keeting, 4 Denio, 341, for a decision on the validity of a trustee's ordinance imposing a fine for selling ardent spirits.

For a long and interesting case on the subject of the powers of municipal corporations, see the Attorney General of the State of New York *vs.* The Mayor, &c., of New York, 3 Duer, 119.

* Denning *vs.* Roome, 6 Wend., 651, note 800; 3 Phillips on Evidence, p. 1150.

CHAPTER X.

LIMITATIONS IMPOSED UPON LEGISLATIVE POWER BY THE CONSTITUTIONS OF THE SEVERAL STATES OF THE UNION.

The general character of constitutional provisions regarded as limitations upon legislative power—Principal restrictions imposed by the State constitutions—Guarantee of private property—Trial by jury—Protection of law—Searches and seizures—Taxation—Police regulations—Titles of bills—Amendments—Repeal—Constitutional majorities—Religious tests—Religious societies—Creation of judges—Incorporations—Trust funds—Divorces—Suits against the State.

We have thus far examined the subject of written law with reference to the general principles of the jurisprudence which we have derived from the English stock, and which govern wherever that system obtains. We now proceed to consider a branch of the great topic which is confined exclusively to this country—I mean Constitutional Law.

The late chief justice of the United States, in his survey of the events leading to the Declaration of Independence, on which he looked with almost a contemporary eye, when speaking of the first State governments organized in 1776, says that "the untried principle was everywhere adopted of limiting the constituted authorities by the creation of a written constitution prescribing bounds not to be transcended

by the legislature itself."* It is in this point of view that I have now to examine the subject of our constitutional law.

The provisions of the constitutions of the several States of the Union, as well as those of the Federal charter itself, may be divided into two great heads: those which relate to political power and organization; and those which are intended to serve as securities for private rights, and which are specially framed as checks on legislative action. Of the constitutional provisions which distribute, arrange, and determine political power, this work is not intended to treat. It is confined to the consideration of those clauses which, for the purpose of protecting private and personal rights are inserted as limitations upon legislative action.

This great head of Constitutional Law is peculiar to American jurisprudence.† It is full of importance

* Marshall's Life of Washington, vol. ii., p. 871. He makes an exception as to the novelty of the idea, in favor of "Connecticut and Rhode Island, whose systems had ever been in a high degree democratic."

† I have already (*ante*, p. 214) had occasion to notice what are called the principles of the English Constitution, and have stated the fact that they do not in any wise interfere with the theoretical supremacy of the British Parliament. Mr. Justice Story has said, "According to the theory of the British Constitution, their Parliament is omnipotent. To annul corporate rights might give a shock to public opinion which that government has chosen to avoid; but its power is not questioned." Dartmouth College *vs.* Woodward, 4 Wheat., 518. "The absolute power of the legislature," says Mr. Hallam, speaking of the resumption of the Irish grants in 1699, "in strictness is as arbitrary in England as in Persia." Hallam's *Const. Hist.*, vol. iii., p. 198, ch. xv.

In regard to Canada, I may notice that an act was passed in 1840, entitled an act to re-unite the provinces of Upper and Lower Canada, and for the government of Canada, 23d July, 1840—3 and 4 Vict., c. xxxv.—which operates as a sort of constitution for the united provinces. The act declares that from and after the re-union of the two provinces, there shall

to every citizen of the Republic; to the lawyer it is a matter of commanding interest; nor will it ever be possible to understand the character or to write the history of our people, without a complete knowledge of this fertile and complex subject.*

It is not possible that the eminently sagacious men who framed our systems of administration supposed that they would remain forever inviolate; and it is one of the most curious circumstances connected with their formation, that in laying down these barriers against legislative invasions of private right they wholly omitted to provide any positive guarantee or specific protection for them. No sanction or penalty is attached. A prohibition or command not to do certain things is laid on the legislature, but not a word is said as to the mode in which the fact of violation is to be established, or how the prohibition is to be enforced.

be in the province a Legislative Council and Assembly, and that within the province Her Majesty shall have power, by and with the advice and consent of the Council and Assembly, to make laws for the province,—such laws *not being repugnant* to this act or such parts of an act of the 31 Geo. III., as are not repealed, or to any act of Parliament made or to be made and not hereby repealed, which does or shall by express enactment or by necessary intendment extend to the provinces of Upper and Lower Canada, or to either of them, or to the province of Canada. The act, however, mainly relates to the arrangement and distribution of political power, including the subject of the church, taxation, and the judiciary and does not seem to contain, except incidentally, any such guaranties of private rights as are to be found in our State constitutions. It is interesting, however, as containing the germ of the great principle of constitutional limitation upon legislative power.

* The term Constitution, like many others in our law, appears to claim a Latin original, and to have been primarily used for the will of the sovereign declaring, decreeing, and expounding the law. "*Quodcumque, igitur, Imperator per epistolam et subscriptionem statuit, vel cognoscens decrevit, vel de plano interlocutus est, vel edicto præcepit, legem esse constat. Hæc sunt quas vulgo Constitutiones appellamus.*"—Dig. de Constitutionibus Principum, l. 1, § 1; Vicat. Vocab. Utriumq. Juris in voo.

If the draughtsmen of our Constitutions thought it wisest to leave this important point to be decided by the practical sagacity of the people for whom they were framing new institutions, the event has thus far justified their confidence. No difficulty whatever has as yet resulted from the absence of any specific provision on the subject; the authority to determine the constitutionality of a law, or in other words, to decide whether the legislature has in a given case overstepped the line of the Constitution, and the power to arrest the action of the ministerial officers of justice when a decision adverse to the validity of a law is arrived at, have been claimed by and surrendered to the judiciary. Nor is it less curious to observe that this is the result of the action of the judiciary itself.

The subject was early considered in a case in Pennsylvania; and Mr. Justice Patterson asserted the power of the judiciary in very distinct and emphatic terms. He said, "It is an important principle which, in the discussion of questions of the present kind, ought never to be lost sight of, that the judiciary in this country is not a subordinate but co-ordinate branch of the government; and whatever may be the case in other countries, yet in this there can be no doubt, that every act of the legislature repugnant to the constitution is absolutely void."*

In New York, the rule was asserted in 1791;† in South Carolina, in 1792;‡ and in 1802, in Maryland.§

* Van Horne's Lessee *vs.* Dorrance, 2 Dallas, 304, a case in relation to the territorial controversy between Pennsylvania and Connecticut.

† Hayburne's Case.

‡ Bowman *vs.* Middleton, 1 Bay, 252; Lindsay *vs.* The Charleston Commissioners, 2 Bay, 38.

§ Whittington *vs.* Polk, 1 Harr. & Johns. 236.

Finally, the whole subject was elaborately examined and discussed by the Supreme Court of the United States, and the principle deliberately and definitively settled, that the power of determining whether a given law is repugnant to the principles of a constitution with which it is alleged to conflict belongs to the judiciary, and that their decision is conclusive.*

* Marbury *vs.* Madison, 1 Cranch, 137; Kent Com., 1, 451.

The point, however, seems to have been open in Pennsylvania as late as 1825. In that year, the power of the judiciary over unconstitutional acts of the legislation was much discussed in Eakin *vs.* Raub, 12 Serg. & Rawle, 330. By the Pennsylvania act of 26th of March, 1785, § 2, the right of entry into lands was taken away after the expiration of twenty-one years next after the title of the claimant accrued; but the fourth section saved the rights of persons beyond seas, and gave them ten years after coming into the United States to commence an action. An act of the 11th of March, 1815, repealed the fourth section of the act of 1785, so far as the same related to persons beyond the seas, and extended the limitation of the second section of the act of 1785 to them. A court of Common Pleas held this act to be retrospective in its operation, so as to form an immediate bar to the claims of persons beyond sea, who had been out of possession twenty-one years prior to the passage of the act of 1815. The Supreme Court of Pennsylvania held, that if the act were retrospective it would be unconstitutional and void, but that it must be construed to be prospective in its operation; and they reversed the judgment below. In delivering the opinion, however, much care was taken in the discussion of the true functions of the judges in regard to laws clearly unconstitutional. Tilghman, C. J., and Duncan, J., asserted the power of the judiciary to declare such laws unconstitutional and void; but Gibson, then J., but afterwards C. J., denied it so far as it related to laws conflicting with a State constitution, while he admitted it as to laws conflicting with the Constitution, laws, or treaties of the United States, under the clause of the Federal Constitution declaring their supremacy. But in regard to the State constitutions, he held that no such power was conferred by them on the judges, and that it rested with the people alone to correct abuses in legislation, by instructing their representatives to repeal the obnoxious acts. He says, up to that time, though the power had been asserted (Austin *vs.* The University of Pennsylvania, 1 Yeates, 260), it had never been exercised. Since that period (1825), however, the doctrine seems as firmly established in Pennsylvania as in the other States. See in this case Mr. J. Duncan's opinion in regard to the retrospective effect of repealing acts on vested rights, for many cases cited.

Since this period the power has been repeatedly asserted and universally recognized. "It is the duty of the judiciary, as the appropriate means of securing to the people safety from legislative aggression, to annul all legislative action without the pale of our written constitutions."*

The constitutions of the several States of the American Union generally contain, sometimes, in the shape of a declaration or bill of rights, the enunciation of certain general principles of free government which are intended to be, as it were, the foundations, or to serve as the landmarks, of liberty and law. Such are the declarations of the natural equality of man—of the abstract right to life, liberty, and the pursuit of happiness. To these I have already had occasion to call the attention of the reader.† And of these, as I have remarked, many are framed in such general terms as scarcely to be susceptible of judicial application; other constitutional clauses have as yet given rise to no question of legislative power or judicial construc-

Indeed, the learned chief justice himself seems subsequently to have given his complete adhesion to the generally received doctrine. In a more recent case, he says, "It is idle to say that the authority of each branch of the government is defined and limited by the Constitution, if there be not an independent power able and willing to enforce the limitations. * * From its very position it is apparent that this conservative power is lodged in the judiciary, which, in the exercise of its undoubted rights, is bound to meet every emergency, else causes would be decided not only by the legislature, but sometimes without hearing or evidence." De Chastelleux *vs.* Fairchild, 15 Penn., 18. In Georgia, the power of the judiciary over unconstitutional enactments, as necessarily flowing from the character of our institutions, was declared in Grimball *vs.* Ross, Charlton's Rep., p. 175.

"The right of all courts, State as well as national, to declare unconstitutional laws void, seems settled beyond the reach of judicial controversy." Story Comm., § 1842.

* Beebe *vs.* The State, 6 Indiana, 501.

† *Ante*, p. 179.

tion, or are matters of local or comparatively minor interest. None of these are within the necessary scope of this work. I shall, consequently, chiefly confine myself to the consideration of those prominent constitutional provisions which are to be generally found in the constitutions of all the States, and which, from their importance and the frequent necessity of recurring to them, have been often discussed and interpreted. The most important of these appear to be that class of constitutional restrictions on legislative power which declare,—

That private property shall not be taken for public uses without compensation; taking in connection with this the subject of taxation and police regulations;

That the right to trial by jury shall be inviolate;

That no citizen shall be deprived of life, liberty, or property, except by the law of the land, or by due course of law;

That unreasonable searches and seizures shall not be permitted.

Some of the decisions upon these clauses, I shall now proceed to examine, in order to exhibit the practical operation and effect of these constitutional limitations. Before doing so, however, it is necessary to consider the general doctrines upon which the courts act in construing the provisions of the State constitutions. Whether there be any check on legislative power independent of, or in addition to those which are to be found in the constitution, is a question which we have already examined elsewhere; and I need only here refer to that discussion.*

* Vide *ante*, ch. v. "No court can pronounce any act of the legislature void for any supposed inequality or injustice in its operation, provided

The leading rule in regard to the judicial construction of constitutional provisions, is a wise and sound one which declares that in cases of doubt every possible presumption and intendment will be made in favor of the constitutionality of the act in question, and that the courts will only interfere in cases of clear and unquestioned violation of the fundamental law. It has been repeatedly said that the presumption is that every State statute the object and provisions of of which are among the acknowledged powers of legislation, is valid and constitutional; and such presumption is not to be overcome unless the contrary is clearly demonstrated.* "Courts ought not," says the

it be on a subject-matter fairly within the scope of legislative authority, and the provisions of the law be general. Hence it is true no doubt, that the legislature, by general enactment, might tax any given species of property, either private or corporate, to the full value of the property itself; for the power of taxation, when once conceded to the legislature over any given subject, "implies the power of destruction even," as was declared in the case of M'Culloch *vs.* The State of Maryland, 4 Wheat. 316." Armington *et al. vs.* The Towns of Barnet, Ryegate, *et al.* 15 Verm. 745.

In Indiana, it has been held that so much of the act to prohibit the manufacture and sale of spirituous and intoxicating liquors, approved February 16, 1855, as is prohibitory of the right to manufacture such liquors, and also so much thereof as relates to the establishment of agencies and the appointment of agents to sell such liquors, is unconstitutional and void, as conflicting with the right to the enjoyment of property, with which the legislature had no right to interfere. Beebe *vs.* The State, 6 Indiana, 501. See this case for an elaborate discussion of the power of the State legislature independent of the State constitutions.

In Pennsylvania it has been said that "the General Assembly cannot pass any law to conflict with the rightful authority of Congress, nor perform a judicial or executive function, nor violate the popular privileges reserved by the Declaration of Rights, nor change the organic structure of the government, nor exercise any other power prohibited in the constitution." Sharpless *vs.* Mayor of Philadelphia, per Black, C. J., 21 Penn. 147, 161.

* Fletcher *vs.* Peck, 6 Cranch, 87; *Ex parte* M'Collom, 1 Cowen, 564; Morris *vs.* The People, 3 Denio, 381; Newell *vs.* The People, 3 Seld. 109, per Edmonds, J.; De Camp *vs.* Eveland, 19 Barb. 81.

learned Chancellor of the State of New York, "except in cases admitting of no reasonable doubt, take upon them to say that the legislature has exceeded its power and violated the constitution, especially where the legislative construction has been given to the constitution by those who framed its provisions and contemporaneous with its adoption."* "It has been always said," says the Supreme Court of New York, "that the power of the courts of justice to declare the nullity of legislative acts which violate the provisions either of the Constitution of the United States or of the State, while it is undoubted, shall be exercised with extreme caution, and never where a serious doubt exists as to the true interpretation of the provisions alleged to be repugnant. Especially has this been said to be so when the objections do not touch the substance of the law or the authority of the legislature, but are merely criticisms on its sense and phraseology."† So in Illinois, it has been said, the inquiry into the validity of an act on the ground that it is unconstitutional, is an inquiry whether "the will of the representative as expressed in the law, is or is not in conflict with the will of the people as expressed in the constitution. And unless it be clear that the legislature has transcended its authority, the courts will not interfere."‡ In Massachusetts it has been said that "acts

* Clark *vs.* The People, 26 Wend. 599.

† The Sun Mutual Insurance Co. *vs.* The City of New York, 5 Sandford, 10.

‡ Lane *et al. vs.* Dorman *et ux.*, 3 Scam. 238. In Maryland it has been said, that it is the province of the judiciary to decide upon the law arising in questions before them, and upon the constitution as the paramount law. But it is more in fulfillment of their own duty than to restrain the excesses of a co-ordinate department of the government. Crane *vs.* Meginnis, 1 Gill & Johnson, 463.

of a legislature constitutionally organized are to be presumed constitutional, and it is only where they manifestly infringe some of the provisions of the constitution, or violate the rights of the subject, that their operation and effect can be impeded by the judicial power."* In Pennsylvania it has been expressly de-

* Foster *et al. vs.* The Essex Bank, 16 Mass. 245. See this case for a discussion of the power of the legislature to pass retrospective laws. A banking company was incorporated in 1799 for the term of twenty years. In 1819, before the term had expired a general law was passed whereby all corporations then existing and thereafter to be established, whose power would expire at a given time, were to be continued in existence as bodies corporate, for three years after the time limited by the charter, for the purpose of suing and being sued, settling and closing their concerns, and dividing their capital stock, but not for continuing their business. After suit brought by the plaintiff, the twenty years for which the bank was originally chartered expired, and a suggestion was filed that the corporation was dissolved. It was insisted that the act of 1819 was retrospective, and that it impaired the obligation of contracts, and that it violated vested rights,—on the ground that the right of the corporation was to exist for twenty years, that this right could in no way whatever be interfered with, and that the contract was altered. The objection, however, was overruled. It was decided that the law was within the constitutional power of the legislature, and the banking corporation were held to answer. Parker, J., said, "If the legislature were to enact that A. B. was guilty of treason, and that he should suffer the penalty of death, it would be the sworn duty of the court, or of any member of it, to grant a *habeas corpus* and discharge him. Or if they should enact that his estate should be confiscated or transferred, or taken for the use of the public without an equivalent, such acts would not be laws, and they never could be executed but by a court as corrupt or as passionate as the legislature which should have passed them.

"So, if the legislature should attempt to destroy or impair the legal force of contracts, by declaring that those who were indebted should be discharged without paying their debts, or on paying a less sum than they owed, or in something different from what was agreed, such acts would be unconstitutional although not expressly prohibited; because, by the fundamental principles of legislation, the law or rule must operate prospectively only, unless in cases where the public safety and convenience require that errors and mistakes should be overruled; the power to do which has been immemorially exercised, and is, we believe, within the constitutional power of the legislature, for it is doing no one wrong to prevent his taking advantage of a mere error or mistake. The law complained of is a general law, oper-

clared to be an established principle of construction, that where the meaning of the constitutional clause is doubtful, a statute alleged to conflict with it must be held valid.*

Where, however, the violation of the constitution is clear, no argument of inconvenience has any weight. So in Indiana, it has been said, "It is urged in argument that this ruling may be a deadly blow to the common-school system of Indiana. We do not so

ating upon all bodies corporate; and it is convenient for them and the public that their power of suing and being sued should be continued beyond the period within which they are empowered to make contracts, in order that their concerns may be properly adjusted. Upon the whole, we cannot discern any principle by which it can be decided that this statute is void. It is not retrospective in the proper sense of that term, for it provides for a future existence of the corporation for limited and specific purposes. It does not infringe or interfere with any of the privileges secured by the charter, unless it be considered a privilege to be secured from the payment of debts or the performance of contracts; and this is a kind of privilege which we imagine the constitution was not intended to protect. It does not impair the force or obligation of contracts, but on the contrary provides a way of enforcing them both in favor of and against the corporation.

"Many statutes have been referred to in the argument, which are much more questionable as to their constitutionality, than the one under consideration: The statutes of limitation, operating upon contracts already in force; The suspension of those statutes after the debtor may have considered that he had a right to be discharged within a certain period; The statutes made for curing defects in the proceedings of courts, towns, officers, &c., when the party to be affected might be said to have a vested right to take advantage of the error. The truth is, there is no such thing as a vested right to do wrong; and a legislature which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty or exceeding its authority. Had they provided that all corporations should cease to transact business three years before the time for which they were created, expired, in order that they might bring their affairs to a close, it might justly be said that their privileges were taken away, and the grant of the government was impaired. But to provide for their continuance for such purpose, three years beyond their term, is no breach of their privileges, and is in fact nothing more than establishing a mode by which their business may be closed and their contracts carried into execution."

* The Farmers and Mechanics' Bank *vs.* Smith, 3 Serg. & R. 63, 73.

regard it. However that may be, the responsibility does not lie with the judiciary. If the legislative department will infringe on the constitution, the duty of the courts may be arduous and unpleasant, but it is a plain one regardless of the consequences.* So in the same State, "It will not be for us," says the Supreme Court of Indiana, "to inquire whether the law be a good or a bad one in the abstract, unless the fact, as it might turn out to be, should become of some consequence in determining a doubtful point on the main question, that is, whether it is a violation of the constitution."†

The subject has been examined by a very learned and accomplished jurist in New York, and the following language held:—

> It is highly probable that inconveniences will result from following the constitution as it is written. But that consideration can have no weight with me. It is not for us, but for those who made the instrument, to supply its defects. If the legislature or the courts may take that office upon themselves, or if, under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set a boundary to the powers of the government. Written constitutions will be worse than useless.
>
> Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power,—some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure

* The State *vs.* Springfield Township, 6 Indiana, 84.

† Beebe *vs.* The State, 6 Indiana, 501.

defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."*

As in regard to statutes, so in regard to constitutions: contemporaneous and legislative exposition are frequently resorted to, to remove and explain ambiguities. So, in regard to the Constitution of the United States, it was objected that the judiciary act of 1789 was unconstitutional, on the ground that it assigned circuit duty to the judges of the Supreme Court. But the Supreme Court said, in 1803, "To this objection, which is of recent date, it is sufficient to observe that practice, and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has, indeed, fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."† And the same language has been held in regard to State constitutions. In Pennsylvania, it has been said that "the uniform construction given to a provision of the constitution by the legislature, with the silent acquiescence of the people, including the legal profession and the judiciary, and the injurious results which would ensue from a contrary interpretation, are proper elements of a legal judgment on the subject."‡ So in New York,—"Great deference," says

* Bronson, J., in Oakley *vs.* Aspinwall, 3 Coms., 547, 568.

† Stuart *vs.* Laird, 1 Cranch, 299.

‡ Moers *vs.* The City of Reading, 21 Penn., 188; Norris *vs.* Clymer, 2 Penn, 277.

Marcy, J., in the Supreme Court, "is certainly due to a legislative exposition of a constitutional provision, and especially when it is made almost contemporaneously with such provision, and might be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded."* "Upon a question of real doubt," says Chancellor Walworth, in the Court of Errors in New York, "as to the meaning of a particular clause in the constitution, a legislative construction, if deliberately given, is certainly entitled to much weight, although it is not conclusive upon the judicial tribunal."†

As to the general rules of construction and interpretation to be applied to the particular phraseology of a statute, it has been said by the Court of Appeals of Maryland, "that constitutions are not to be interpreted according to the words used in particular clauses. The whole must be considered with a view to ascertain the sense in which the words were employed; and its terms must be taken in the ordinary and common acceptation, because they are supposed to have been so understood by the framers and by the people who adopted it. This is unquestionably the correct rule of interpretation. It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judged it by the meaning apparent on its face according to the general use of the words employed, when they do not appear to have been used in a legal or technical sense."‡

* People *vs.* Green, 2 Wend., 266, 274.
† Coutant *vs.* The People, 11 Wend., 511.
‡ Manly *vs.* The State, 7 Maryland, 135.

The principle that a statute is void only so far as its provisions are repugnant to the constitution, that one provision may thus be void and this not affect other provisions of the statute, has been frequently declared.* "The principle is now well understood," says the Supreme Court of the State of Massachusetts, "that where a statute has been passed by the legislature under all the forms and sanctions requisite to the making of laws, some part of which is not within the competency of the legislative power, or is repugnant to any provision of the constitution, such part thereof will be adjudged void and of no avail; whilst all other parts of the act, not obnoxious to the same objection, will be held valid and have the force of law. There is nothing inconsistent in declaring one part of the same statute valid and another part void."†

It seems to be settled in regard to constitutions as to statutes, that no extrinsic evidence can be received as to their intent or meaning. "A constitution or a statute is supposed to contain the whole will of the body from which it emanated; and I would just as soon resort to the debates in the legislature for the constitutionality of an act of Assembly, as to the debates in the convention for the construction of the Constitution."‡

I have already had occasion to notice, that constitutions, like statutes, are in some cases construed

* Edwards *vs.* Pope, 3 Scam., 465; 3 Marshall, 73; Ely *vs.* Thompson, 3 Wash. C. C. R., 313; Gibbons *vs.* Ogden, 9 Wheaton, 1, 203; City of New York *vs.* Miln, 11 Peters, 102; Clark *vs.* Ellis, 2 Blackf. 8.

† Fisher *vs.* M'Girr, 1 Gray 22; Commonwealth *vs.* Kimball, 24 Pick., 361; Norris *vs.* Boston, 4 Met., 288; Clark *vs.* Ellis, 2 Blackford, 10.

‡ Per Gibson, J., in Eakin *vs.* Raub, 12 Serg. & Rawle, 352. It is, however, a dissenting opinion.

to be directory merely.* Indeed, the following language has been used by a very accomplished judge in Pennsylvania: "That every thing in the Constitution addressed to the legislature by way of positive command is purely directory, will hardly be disputed. It is only to enforce prohibitions, that the interposition of judicial authority is thought to be warrantable."†

In regard to the change of a State constitution, it has been held that the new constitution creates no new State, that all laws in force when the latter took effect, and which were not inconsistent with it, remained in force without an express provision to that effect, and that all inconsistent or repugnant laws were repealed by implication; and where the new constitution of the State of Ohio contained a clause to this effect, "The General Assembly shall never authorize any county, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation, or association;" it was held that a law enacted before the adoption of the new constitution, authorizing such subscription, was not repealed by implication, as the new clause referred only to future laws.‡

The Supreme Court of Louisiana has very discreetly expressed its unwillingness to decide a question as to the unconstitutionality of the law of another State, when the question was still open in the State which

* *Ante*, ch. vii., p. 378.

† Per Gibson, J., in Eakin *vs.* Raub., 12 Serg. & Rawle, 354. It is, however, a dissenting, and without any disrespect to this able and lamented jurist, I may add, a very heterodox opinion; *vide ante*, p. 479.

‡ Cass *vs.* Dillon, 22 Ohio, 607. But see Mr. J. Ramsay's able dissenting opinion.

passed the law, and the case could be decided on other grounds.*

In regard to the subject of strict and liberal construction, considerations analogous to those which we have discussed under this head as to the interpretation of statutes present themselves, in regard to the interpretation of constitutions. Where a constitutional provision is of doubtful import, it is frequently susceptible of two interpretations, one the more restricted or severe, and the other more enlarged or equitable. Questions of this kind have presented themselves in the history of many if not all the individual States; but we are more familiar with them in regard to the Federal Constitution. So in regard to the Bank of the United States, it was contended by the advocates of an enlarged or equitable construction, that the clause giving Congress power to make all laws necessary and proper to carry into execution the powers specifically granted, conferred on that body the power to create the institution; while on the other hand the advocates of a stricter interpretation, insisted that this general clause could only be used to enlarge powers already expressly given, and could not be construed to give a new and distinct head of authority. So again, the advocates of a protective tariff have found the congressional authority in the clause giving power to regulate commerce; while the friends of free trade have insisted upon a stricter construction, and asserted that the authority to regulate commerce could not be so exerted as to protect manufactures.

These questions have given rise to two great schools of construction: the topics which they involve are of

* Shelden *vs.* Miller, 9 La. Ann. R. 187.

perpetual and vital interest; but they approach so near the demesnes of politics, and are so much influenced by the organization and shape of parties, that they are out of place here. Still, some general considerations are too apparent to be overlooked. An arbitrary or equitable power over acts of ordinary legislation, has been resisted on the ground "that the legislature is ever at hand," as it has been said, to explain its meaning. This consideration in favor of a restricted interpretation of statutory enactments, has less weight in regard to constitutional law. There are, as a general rule, no regular or frequent convocations of the people to revise or consider the fundamental law; and in regard to the Constitution of the United States, any serious amendment, requiring as it would the concurrence of two thirds of the legislatures of all the States, can scarcely be thought within the regions of hope or probability; so that it is apparent that the arguments of hardship, irregularity, injustice, and inconvenience, will address themselves to the judiciary in constitutional cases with more force than in regard to ordinary legislative acts, just in proportion as it is more difficult to revise a constitution or to escape its power, than to amend or to evade a statute. Another consideration will impress itself still more forcibly on the minds of those who are called to consider questions connected with the interpretation of constitutional law. Statutes can and do enter into the details of our daily transactions, they can and do prescribe minute directions for the control of those affected by them. Constitutions, on the other hand, from the nature and necessity of the case, in many instances go little beyond the mere enunciation of general principles; and it is impossible and would lead to endless absurdity, to endeavor to

apply to a declaration of principles the same rules of construction that are proper in regard to an enactment of details. In regard to a statute, the general duty of the judge is that of a subordinate power, to ascertain and to obey the will of a superior; in regard to a constitution, his functions are those of a co-ordinate authority, to ascertain the spirit of the fundamental law, and so to carry it out as to avoid a sacrifice of those interests which it is designed to protect. No absolute rules of interpretation in such a matter, can be framed. Still, I cannot refrain from saying, as a general rule, while a strict adherence to the mere letter of a written constitution would render our system practically intolerable, that on the contrary, a loose and careless mode of interpretation is attended by the most serious dangers. It puts all our institutions in the power of the judiciary; it abolishes all restraints on legislation, and tends directly and inevitably to alter the very nature of our government.*

Having thus considered the general principles to be applied to the construction of constitutional limitations upon legislative power, we approach the examina-

* The analogies of history often throw light upon the annals of remote and obscure periods; and our schools of strict and liberal construction may tend to render intelligible the sects or schools of Roman law. "The freedom of Labeo was enslaved by the rigor of his own conclusions. He decided according to the letter of the law the same questions which his indulgent competitor (Capito) resolved with a latitude of equity more suitable to the common sense and feelings of mankind." See Gibbon, ch. xliv. Our Labeos and Capitos, our Sabinians and our Proculeans, might easily be named. Indeed, the analogies between the whole body of Roman jurisprudence and the English, are most curious and striking. The division into two great bodies, of strict and equitable law; the formulæ by which questions of fact were distinguished from questions of law; the severe regard to mere symbolical forms, are as apparent in the one system as the other.

tion of particular provisions; and of these, as I have said, there is none more important than that which declares that—

Private property shall not be taken for public purposes without compensation.—In considering the subject of constitutional checks as imposed in this country on legislative power, we find two limitations of paramount importance: the one guaranteeing the inviolability of private property, the other protecting the obligation of contracts; the one intended to guard present ownership and enjoyment, the other to secure future transactions, or rights of property not yet converted into possession. These provisions are both to be found in the Constitution of the United States, and the latter in some of the State constitutions; but as the one in regard to private property is to be found, with the exception of New Hampshire and South Carolina,* in all the State constitutions, I shall con-

* The constitution of New Hampshire is silent on the subject of compensation; but it has been held that the duty to provide remuneration is none the less imperative. Bristol *vs.* New Chester, 3 N. H. R. 535. In South Carolina there is no constitutional provision whatever; and it has been there held that the legislative power over private property is supreme and absolute. The State *vs.* Dawson, 3 Hill, 100. This was an indictment for obstructing road commissioners in cutting down timber to repair a road; the act giving them general power to take so much timber, earth, or rock as should be necessary to keep roads in repair. The case was chiefly put on the question whether the act infringed the constitutional guarantee of the "*law of the land*," which we shall hereafter consider. It was upheld chiefly on the ground of long usage and acquiescence; and Evans, J., delivering the prevailing opinion of the court, says expressly, that the general power of the legislature to appropriate private property, is not involved. Since the decision of this case, however, the precise question seems to have been considered and determined. It was held in a case growing out of a right to a ferry, that the legislature has the constitutional right to deprive an individual of his property for great national purposes. Stark *vs.* M'Gowan, 1 Nott and M'Cord, 387.

On the other hand, in New Hampshire the abstract right to compen-

sider it under our present head, reserving the clause in regard to the obligation of contracts till we come to the subject of the Constitution of the United States.

In discussing the constitutional guarantee of private property, I shall first consider the precise nature of the legislative power over private property, and to what branch or branches of the sovereign power of the State the restricting clause is intended to apply; Secondly, consider, under the head of delegation of the power, by whom it can be exercised; Thirdly, examine the question, what is a *taking* of private property within the meaning of the clause; and lastly, speak of the rules which determine how and when compensation must be made. Before entering, however, into this examination, it is proper to give the leading provisions of the different State constitutions on the subject, in order the more fully and accurately to understand the precise nature of the question as it presents itself in the several States:

Maine.—"Private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it."*

New Hampshire.—"No part of a man's property shall be taken from him or applied to public uses, without his own consent or that of the representative body of the people."†

sation, independent of all constitutional provision, has been declared. "The power of the legislature is limited, undoubtedly, in its nature, by the public exigencies; but it is a power recognized by the constitution. There is no doubt that when this power is exercised, a just compensation is to be made. The constitutions of some of the States expressly declare that such compensation shall be made; and natural justice speaks on this point when a constitution is silent." Bristol *vs.* New Chester, 3 N. H. 535.

* Cons. of Maine, art. 1, § 21.

† Cons. of New Hampshire, Bill of Rights, § 12.

Vermont.—"Private property ought to be subservient to public uses when necessity requires it; nevertheless when any person's property is taken for the use of the public, the owner ought to receive an equivalent in money."——"No part of any person's property can be justly taken from him or applied to public uses without his own consent or that of the representative body of freemen."*

Massachusetts.—"No part of the property of any individual can with justice be taken from him or applied to the public use, without his own consent or that of the representative body of the people."——"And whenever the public exigencies require that the property of any individual shall be appropriated to public uses, he shall receive a reasonable compensation therefor."†

Rhode Island.—"Private property shall not be taken for public uses without just compensation."‡

Connecticut.—"The property of no person shall be taken for public use without just compensation therefor."§

New York.—"Nor shall private property be taken for public use without just compensation." "When private property shall be taken for any public use, the compensation to be made therefor when such compensation is made by the State, shall be ascertained by a jury or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damages to be sustained by the opening thereof, shall be first determined by a jury of freeholders; and such amount, together with the expenses of the proceedings, shall be paid by the persons to be benefited."‖

New Jersey.—"Private property shall not be taken for public use without just compensation; but land may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made."¶

Pennsylvania.—"Nor shall any man's property be taken or applied

* Cons. of Vermont Decl. of Rights, ch. i., art. 1, §§ 2, 9.
† Cons. of Massachusetts Decl. of Rights, art. 10.
‡ Cons. of Rhode Island, art. 1, § 16.
§ Cons. of Conn., art. 1, § 11.
‖ Cons. of New York, art. 1., § 6 and 7.
¶ Cons. of New Jersey, art. 1, § 16.

to public use, without the consent of his representatives, and without just compensation being made."*

Delaware.—"Nor shall any man's property be taken or applied to public use, without the consent of his representatives, and without compensation being made."†

Maryland.—"The legislature shall enact no law authorizing private property to be taken for public use without just compensation, as agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation."‡

Virginia.—"The General Assembly shall not pass any law whereby private property shall be taken for public use without just compensation."§

Louisiana.—"No *ex post facto* law, nor any law impairing the obligation of contracts, shall be passed, nor vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made."‖

Ohio.—"Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency imperatively requiring its immediate seizure, or for the purpose of making or repairing roads which shall be open to the public without charge, a compensation shall be made to the owner in money; and in all other cases where private property shall be taken for public use, a compensation therefor shall be first made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."¶

Indiana.—"No man's particular services shall be demanded without just compensation. No man's property shall be taken by law without just compensation, nor, except in case of the State, without just compensation first assessed and tendered."**

Illinois.—"Nor shall any man's property be taken or applied to public use, without the consent of his representatives in the General Assembly, nor without just compensation being made to him."††

* Cons. of Pennsylvania, art. ix., § 10.
† Cons. of Delaware, art. 1, § 8.
‡ Cons. of Maryland, art. iii., § 46.
§ Cons. of Virginia, art. iv., sect. 5, § 15.
‖ Cons. of Louisiana, art. 105. ¶ Cons. of Ohio, art. 1, § 19.
** Cons. of Indiana, art. 1, § 21. †† Cons. of Illinois, art. xiii., § 11.

Florida.—"We declare—that private property shall not be taken or applied to public use, unless just compensation be made therefor."*

Alabama.—"Nor shall any person's property be taken or applied to public use, unless just compensation be made therefor."†

Mississippi.—"Nor shall any person's property be taken or applied to public use without the consent of the legislature, and without just compensation being first made therefor."‡

Tennessee.—"No man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor."§

Kentucky.—"We declare—nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."‖

Having thus given the leading provisions of the State constitutions on the subject, I now proceed to consider first, the precise nature of the power of the State over private property, and the precise extent of the constitutional limitation. The language of the clauses above cited is very broad and sweeping, and a hasty consideration is sufficient to satisfy us that the words cannot be taken in a strict or literal sense. It may be here remarked at the outset, that this clause furnishes a good illustration of the impossibility of construing constitutional provisions in a spirit of literal strictness. When a tax is levied, "private property" is clearly taken for public use, and taken without "compensation;" and so in other cases which will present themselves in the examination of the subject. If, therefore, the clause was rigidly interpreted, it would at once arrest the operations of any government to which it was applied. Such, however,

* Cons. of Florida, art. 1, § 14.
† Cons. of Alabama, art. 1, § 13.
‡ Cons. of Mississippi, art. 1, § 13.
§ Cons. of Tennessee, art. 1, § 21.
‖ Cons. of Kentucky, art. xiii, § 14.

is not its construction. The restriction on taking private property without making compensation, is confined to only one branch of the public authority over private rights of property, and does not apply to the power of taxation or to the general police powers of the legislature. These legislative powers are not limited by it, and there are other less important exceptions which we shall be obliged to notice.

We have, therefore, to keep as clearly as we can in view, the exact nature of the powers of the State over property. They embrace not only the power of taxation, as well as general control for the purposes of police, public health, and public morals, but also the power of taking private property when any public interest of whatever degree calls for it; and of this demand or exigency, the legislature or sovereign power of the State being the sole and absolute judge, whether in part or the whole, whether required for the ordinary expenses of government or for rare and extraordinary emergencies, whether absolutely required for the public safety or called for by mere considerations of convenience, the subjection of private property to the State or government is complete and universal. This absolute power of the State over the property of its citizens or subjects, seems to be conceded by all writers, and to be declared under all systems of government. Differences exist as to the right to compensation; but all agree that when the government demands, private rights must give way, that the property of the individual must be surrendered to the general welfare. The power which commands and enforces these concessions, seems to derive its

name from a French original, and is known by the term EMINENT DOMAIN.*

The abstract power is, as I have said, universally recognized. As to the limitations on the power, different systems recognize very different rules. In France, the right to compensation is universally and peremptorily declared.† In England, though in no country is a wiser and more scrupulous respect paid to private rights, still their doctrine of parliamentary supremacy recognizes no absolute right to remuneration. "If the legislature thought it necessary," said Lord Kenyon, speaking of turnpike acts, paving acts, and navigation

* Vattel says, sec. 1, c. xx., § 244, "*Le droit qui appartient à la societé ou au souverain, de disposer en cas de necessité et pour le salut public de tout bien renfermé dans l'etat, s'appelle Domaine Eminent. Ce droit fait partie du souverain pouvoir.*" See Domat as to the right to take private property, Des Loix Civiles, lib. i., tit. ii., sect. xiii., 432, *et seq.* He cites a curious old ordinance of 1303, in the time of Philippe le Bel; *Et possessores illarum possessionum ad eas demittendum justo pretio compellantur.*

"All separate interests of individuals in property are held by the government under the tacit agreement or implied reservation that the property may be taken for public use upon paying a fair compensation therefor, whenever the public interests or necessities require that it should be so taken. Notwithstanding the grant to individuals, the *eminent domain*, the highest and most exact idea of property, remains in the government or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property in the manner directed by the constitution and laws of the State, whenever the public interests require it. The only restriction upon this power is, that the property shall not be taken for the public use without just compensation to the owner, and in the mode prescribed by law. The right of *eminent domain* does not, however, imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interests will be in no way promoted by such transfer." Beekman *vs.* Saratoga and Schenectady R. R. Co., 3 Paige, 73. See also, as to eminent domain, Varick *vs.* Smith, 5 Paige, 159.

† The Code Napoleon (book ii. tit. ii. 545) says, "No one can be compelled to give up his property except for the public good, and for a just and previous indemnity." See also Kent's Comm. ii., 339, note.

acts, "as they do in many cases, they would enable the commissioners to award satisfaction to the individuals who happen to suffer. But if there be no such power the parties are without remedy, provided the commissioners do not exceed their jurisdiction."*

In this country, we have thought it wise to put restraints on the exercise of this power, and these restraints are expressed in the constitutional clauses which I have above cited. But, as I have said, the constitutional limitation which requires compensation for the sacrifice of private property, does not apply to every branch of the power of eminent domain. It is only intended to operate on the exercise of the legislative power where property is taken for objects of general necessity or convenience, such as roads, canals, public buildings, public works of all kinds, and does not attach to the power of taxation, or the general authority over property with reference to public health or public morals. As we shall see hereafter, certain special constitutional limitations have been imposed by some of the States on the power of taxation; but neither that nor the general police powers are affected by the clauses in regard to the taking of private property.

In regard to taxation, it is well settled that neither the provision that private property shall not be taken for public use without just compensation, nor the other clause, which we shall hereafter examine, declaring that no person shall be deprived of his property without due process of law, limits the legislative power. Therefore, an act of the legis-

* Governor, &c. of Cast Plate Manufacturers *vs.* Meredith, 4 Term, 795; action against defendants as commissioners under a paving act; and held that they were not liable.

lature directing a certain tax to be assessed upon a particular town, is constitutional and valid.* So, too, in Pennsylvania, in a case already cited (*ante*, p. 185), it has been decided that, no matter how unequally or oppressively the power of taxation be exercised, the courts have no power to interfere.†

Under this head of taxation is now generally understood to be embraced, the mode usually practiced in this country of assessing the expense of local improvements; and thus property is daily taken for opening streets and other objects of a similar nature, often without any pecuniary compensation, and the burthen thrown on a particular and small locality. In opening streets and making other similar local improvements in the United States, it is the general practice when authorizing the work to be done, to cause the expense, which includes the value of the property taken, to be assessed exclusively upon the owners of real estate immediately adjacent to the projected improvement. These lands are adjudged to be benefited by the improvement, and are taxed in proportion to the amount of such benefit; and the whole tax and expense is levied upon them. It has been urged that this mode of disposing of private property was a violation of the clause declaring that private property was not to be taken without just compensation, and that it disregarded the proper principles of taxation. But all these objections have been overruled, and it has been decided in many of the States, that in the absence of any express constitutional

* People *vs.* Mayor of Brooklyn, 4 Coms., 423; Town of Guilford *vs.* Cornell, 18 Barb.. 615; Town of Guilford *vs.* Supervisors of Chenango Co., 3 Kernan, 147; *Ante*, p. 414.

† Kirby *vs.* Shaw, 19 Penn. (7 Harris), R., 258.

provision upon the subject of taxation, the power to tax implies the power to apportion the taxation; and that the remedy against unwise and unjust modes of taxation lies with the legislature and with the people, and not with the judiciary.* So in Pennsylvania, the doubts seem now set at rest, and the constitutionality of these proceedings maintained.†

In Connecticut, also, it has been decided that a statute authorizing a municipal corporation to grade and improve streets, and to assess the expense among the owners and occupants of land benefited by the improvement, in proportion to the amount of such benefit, is a constitutional law; that such an assessment is an exercise of the power of taxation vested in the State government, and is not in conflict with any provision of the constitution. The same rule applies where power is given to lay out highways, streets, and avenues; and though in cases of this kind the assessment for benefit, as it is called, may equal the value of the property taken for the improvement, still it is said not to conflict with the provision that private property shall not be taken without compensation. Where an assessment for benefit falls on the same person from whom property is taken, it is said that

* People *vs.* Mayor of Brooklyn, 4 Comstock, 419; overruling the People *vs.* The Mayor of Brooklyn, 6 Barb., 214; Livingston *vs.* The Mayor of New York, 8 Wend., 85; In the Matter of Opening Furman Street, 17 Wendell, 649. See in Kentucky, Sutton's Heirs *vs.* Louisville, 5 Dana, 30; City of Lexington *vs.* M'Quillan's Heirs, 9 Dana, 513.

† M'Master *vs.* Commonwealth, 3 Watts, 292; In the Matter of the District of the City of Pittsburgh, 2 Watts & Serg., 320; In the Matter of Fenelon's Petition, 7 Penn. 173; and Extension of Hancock Street, 18 Penn. (6 Harris) 26, where it is declared to be no longer an open question in Pennsylvania; Schenley and Wife *vs.* City of Allegheny, 25 Penn., 128, affirms Sharpless *vs.* City of Philadelphia, 9 Harris, 147, as to the paving and grading of streets in cities, and the assessment of the expense of the same.

the estimated benefit is the compensation for the land taken; but that this is only a mode of taxation.*

In Michigan, too, it has been decided that the terms "private property" and the "property of individuals," in the constitutional provisions prohibiting the taking of property for public use without compensation, &c., were not intended to include money raised by assessment for the purpose of paving streets; and that money attempted to be raised for these purposes is not sought to be taken by virtue of the sovereign right of eminent domain, but in the exercise of the sovereign power of taxation. And the provisions of the constitution relative to taking private property for public use or improvement, and the mode of ascertaining the compensation therefor, does not apply to to such assessment.†

In Louisiana, however, where the constitution (art. 105) provides that "taxation shall be equal and uniform throughout the State,"‡ the system of assessing the expense of street assessments and other municipal improvements on such neighboring proprietors as are most benefited by them, has been pronounced unconstitutional, on the ground that in that State the right of eminent domain and the power of taxation are both limited under the constitution; and that the legislature has no power of apportioning taxation for

* Nichols *vs.* Bridgeport, 23 Conn., 189; The People *ex rel.* Griffin *vs.* The Mayor, 4 Coms., 419.

† Williams *vs.* Mayor of Detroit, 2 Michigan, 560. A distinction is here taken between the power of eminent domain and that of taxation. I believe that in strict language the power of eminent domain, as the general phrase, expresses the absolute power of the State over private property for all purposes; and that the power of taxation is but a branch of it. But see *post*, p. 508; Commonwealth *vs.* Alger, 7 Cushing, 53, 85.

‡ See also Cumming *vs.* Police Jury, 9 La. Ann R., p. 503.

public purposes whatever, of a local nature, except on the principles of equality and uniformity.*

In Pennsylvania, it has been decided that an act authorizing municipal corporations to subscribe to the stock of a railroad corporation, is within the constitutional powers of the legislature; that it is not a taking of private property for public use without compensation, because though the property of the citizen may be more heavily taxed than before, it is not taken; and that the acts of this kind fall within the scope of the legislative power to permit the appropriation of a local tax within the consent of the local authorities,† and the same point has been decided in Louisiana, after much deliberation.‡

It being thus settled that the clause in regard to private property does not apply to taxation, we have next to notice a further limitation of its sweeping phraseology. The clause prohibiting the taking of private property without compensation, is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full

* Municipality No. 2 *vs.* White, 9 La. Ann. R., 447.

† Sharpless *vs.* The Mayor of Philadelphia, 21 (9 Harris) Penn., 147. Black, C. J., Woodward, and Knox, concurred in the judgment. See to same point, Moers *vs.* City of Reading, 21 Penn., 188. In the last case, Lewis and Lowrie, JJ., dissented. The discussion is able and interesting.

‡ Police Jury *vs.* M'Donogh's Succession, 8 La. Ann. R. 341; New Orleans *vs.* Grarble, 9 L. Ann. R., 561. See also in Kentucky, Slick *vs.* Maysville and Lexington R. R. Co., 13 B. Munroe, p. 1; Justices of Clarke Co. *vs.* The P. W. & K. R. Turnpike Co., 11 B. Munroe, 143.

enjoyment of private property, and though no compensation is given. So, an act authorizing harbor-masters to direct vessels where to station, though interfering with private engagements, is not a violation of the constitution.* A statute of Massachusetts which, without compensation, imposes a penalty on any person who shall take, carry away, or remove any stones, gravel, or sand from any of the beaches in the town of Chelsea for the protection of the harbor of Boston, and the prohibition of which extends as well to the owner of the soil as to strangers, has been held constitutional and valid; this is not such a taking of private property and appropriating it to public use, as to render it void because no compensation is provided for the owners, upon the ground that it is only a just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be injurious to the public.†

In the same State, it is well settled that the legislature has power to make regulations in the nature of police regulations, which, though affecting the value and even the enjoyment of private property, are held not to conflict with the constitutional provisions devised to secure and protect private property. By an ordinance passed in 1641, by the colony of Massachusetts, the proprietors of upland bordering on the sea have an estate in fee in the adjoining flats above low-water mark, and within one hundred rods of the upland; but notwithstanding this right, the legislature has power to establish lines in the harbor of Boston,

* Vanderbilt *vs.* Adams, 7 Cowen, 349.

† Commonwealth *vs.* Tewksbury, 11 Met. 55. It was well said in this case, to be extremely difficult to lay down any general rule.

beyond which no wharf shall be extended or maintained, and to prohibit building beyond such lines; and such statutes, although they make no compensation to the proprietors, are not unconstitutional as taking private property and appropriating it to public uses without compensation.*

In this case the Court said:

We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide-waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

This is very different from the right of *eminent domain*,—the right of a government to take and appropriate private property to public use whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.

It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious that all

* Commonwealth *vs.* Alger, 7 Cush. 53, per Shaw, C. J.

well-regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for the carrying on of noxious or offensive trades; to prohibit the raising of a dam and causing stagnant water to spread over meadows near inhabited villages, thereby raising noxious exhalations, injurious to health and dangerous to life.

Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land than if obliged to build of stone or brick, with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a small-pox hospital or a slaughter house, he might obtain an increased rent. But he is restrained, not because the public have occasion to make the like use or to make any use of the property, or to take any use of the property, or to take any benefit or profit to themselves from it,—but because it would be a noxious use, contrary to the maxim, *sic utere tuo ut alienum non lædas.* It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner; and it is therefore not within the principle of property taken under the right of eminent domain. The distinction, we think, is manifest in principle; although the facts and circumstances of different cases are so various that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers.*

There is now no occasion and no ground to deny or question the full and sovereign power of the commonwealth, within its limits, by legislative acts to exercise dominion over the sea and the shores of the

* Commonwealth *vs.* Alger, 7 Cush. 53, 84. I have already, *ante*, p. 500, called attention to what I suppose to be the true rules of terminology in regard to eminent domain and taxation.

sea, and all its arms and branches, and the lands under them, and all other lands flowed by tide-water, subject to the rights of riparian ownership. Whether any portion of this sovereignty remained in the British crown, it is now immaterial to inquire; for it is quite certain that the entire right of property in the soil, was granted to the colonists in their aggregate capacity; and if any power remained in the crown, it was that of dominion and regulation of the public right; and this was wholly determined by the Declaration of Independence, acknowledged and acceded to by the treaty of peace, sanctioned by an act of Parliament. This right of dominion and controlling power over the sea and its coasts, shores, and tide-waters, it is settled that it vested in the several States in their sovereign capacity respectively, and was not transferred to the United States by the adoption of the Constitution intended to form a more perfect union. Special jurisdiction has been from time to time vested in the General Government for special purposes; but the general jurisdiction remains with the several States, subject, however, to such regulations as Congress may make in the exercise of their admitted powers to regulate foreign commerce and commerce among the States. Such is the principle determined by the Supreme Court of the United States, the ultimate tribunal to decide questions of this kind.*

So it has been expressly decided in the same State that the clause in the constitution declaring that private property is not to be taken for public use without compensation, does not apply to the laws declaring that certain property shall be destroyed or confiscated as being injurious to the interests of public policy, as liquor or gunpowder. It is competent for the legislature to declare the possession of certain articles of property, either absolutely or when held in particular places and under particular circumstances, to be unlawful, because they would be injurious, dangerous, or obnoxious.†

* Commonwealth *vs.* Alger, 7 Cushing, 53, 82, citing New Orleans *vs.* The United States, 10 Pet. 662, 737; Pollard *vs.* Hagan, 3 How. 212.

† Fisher *vs.* M'Girr, 1 Gray, pp. 26, 41.

On the same general grounds, the power of the legislature over the great internal communications of a State, whether by land or water, has been asserted. It has been contended that a navigable river is a public highway, and that the legislature cannot interfere with its use without adequate indemnity. But the contrary has been decided. In Massachusetts, an act of the legislature authorizing the building of a bridge over navigable waters within the limits of the commonwealth, has been held not unconstitutional. The legislature are to determine when the public convenience and necessity require such an obstruction to navigation, and upon what terms and conditions it shall be allowed. It has power to regulate and control by law, all public highways and navigable waters.* So in Maine, it has been held that the legislature may lay out a highway or change the course of a public river, when the public convenience requires it, although private rights may be thereby affected.†

We have next to consider another limitation on the general words of the clause under consideration. The constitutional restriction on legislative action in regard

* Commonwealth *vs.* Breed, 4 Pick. 464. In this case it was insisted that the act was obtained by fraud. The court said, "If a legislative act may be avoided for this cause, yet fraud is always a question of fact peculiarly within the province of a jury, and cannot be inferred by the court." The question whether and to what extent it can be shown that a given legislative act was obtained by fraud, seems still open. In regard to strictly private bills, strong arguments may be urged; but there seems, even in these cases, great difficulty in asserting the power of the judiciary over the subject. See Stark *vs.* M'Gowan, 1 Nott & M'Cord R. 400, n.

† Spring *vs.* Russell *et al.*, 7 Greenleaf, 292; where held that a plaintiff had no right of action against certain canal proprietors who, under the authority of the legislature, had turned the channel of Saco River, and thus prevented the plaintiff from floating his logs down the river, as he otherwise would have done.

to private property, does not prevent the sovereign power from acting upon personal rights that are not vested at the time of the passage of the law. So in regard to the husband's interest in the wife's property, it has been held that as to real property belonging to her at the time of the marriage, he takes, by the rules of the common law, a vested interest which no subsequent legislation can defeat; but as to her future acquisitions they may be regulated by law,—in other words, he takes whatever interest, if any, that the legislature before she is invested with them may think proper to prescribe. All prospective possible rights arising from existing legislation, are liable to be abridged or revoked by future legislation;* and consequently they do not conflict with the legislative provisions as to the obligation of contracts, nor with those relating to the inviolability of property.† So again in regard to mere inchoate rights, as of dower during coverture, the right can be divested or regulated by an act of the legislature, at any time during the husband's life.‡

Having arrived, therefore, at the result that the constitutional restrictions upon the power of eminent domain do not apply to those branches of it which regulate taxation and police enactments, nor affect rights not actually vested, we have next to observe that the power to take is universal and absolute: it applies to every species of property, and the legislature is the sole judge of the exigency calling for the interposition of its authority.

* Sleight *vs.* Read, 18 Barbour, 159.

† White *vs.* White, 5 Barb. 474; Blood *vs.* Humphrey, 17 Barb. 660.

‡ Moore *vs.* City of New York, 4 Sandf. 461.

First, *all* property can be taken, no matter whether real or personal, whether susceptible of manual possession or a mere chose in action. So in Pennsylvania, it has been held, where land is taken for a railroad, that the interest which tenants hold under a covenant for a renewal of their leases, is a proper subject of compensation.* Thus a franchise to build and maintain a toll-bridge, may be appropriated, and the right of an incorporated company to maintain such a bridge under a charter from a State, may, under the right of eminent domain, be taken for a highway; and so of a railroad.† So too in Vermont, it has been decided that an act of the legislature authorizing the Supreme and County Courts to take the franchises of a turnpike corporation for a public highway, on making compensation, is constitutional.‡ So in New Hampshire, it has been held that the franchises of a corporation may be taken by virtue of the exercise of the power of eminent domain.§

As the power to take is universal, so it is absolute: that is to say, the legislature are the sole judges of the existence of the exigency which demands the sacrifice of the rights of individuals. "I admit," says Mr. Chancellor Walworth, "that the legislature are the sole judges as to the expediency of exercising the right of eminent domain for the purpose of making

* North Penn. R. R. Co. *vs.* Davis, 26 Penn. R. (2 Casey) 238.

† West River Bridge *vs.* Dix, 6 How. 507; Richmond F. and P. R. R. *vs.* Louisa R. R., 13 How. 83; Boston and Lowell R. R. Corp. *vs.* Salem and Lowell R. Co. 2 Gray, 1.

‡ Armington *et al. vs.* Barnet *et al.*, 15 Verm. 375; see the sagacious remarks of Mr. J. Redfield, in this case, on the Charles River Bridge Case, 11 Peters, 539.

§ Backus *vs.* Lebanon, 11 N. H. R. 19.

public improvements either for the benefit of the inhabitants of the State generally, or of any particular section thereof."* "It is the undoubted and exclusive province of the legislature," says the Supreme Court of the State of Maine, "to decide when the public exigencies require that private property be taken for public uses."†

In New York, it has been decided that an act authorizing commissioners to enter upon and appropriate the lands of individuals for the purpose of draining a swamp, is a lawful exercise of the power of eminent domain, and the taking of such lands as far as is necessary, is a lawful taking of the same for public use. It is for the legislature to judge of the degree of the necessity which exists for the exercise of the right of eminent domain; and the courts will not interfere to restrain the commissioners by injunction, unless they are violating the plain and manifest intent of the statute, or are proceeding in bad faith.‡

Thus far we have observed that the clause in regard

* Varick *vs.* Smith, 5 Paige, 160.

† Spring *vs.* Russell, 7 Greenl. 292.

‡ Hartwell *vs.* Armstrong, 19 Barb. 166. But the condition of providing a full compensation to the owner, is fundamental and imperative; and where an act authorizing the draining of a swamp, provided that the damages or compensation to the owners of lands taken, should be made collectable and payable by assessing the same on the several owners of the land drained, according to the number of acres respectively owned by each,—it was held that this was not the just compensation required by the constitution, because the burden ought to be borne by the public at large benefited by the improvement, and because the apportionment by area of surface was inequitable; and the act was held void. The constitutionality of a law to drain wet lands at the expense of others, is discussed in Woodruff *vs.* Fisher, 17 Barb. 224; and it was intimated that unless the work was for the public good and not for private benefit, the act could not be sustained; but it was said that perhaps after such an act of legislation, it is to be presumed that the work will be beneficial to the owners of the lands generally.

to private property has no effect upon legislative supremacy in regard to taxation or general police powers —however these powers may be affected by other special constitutional clauses,—nor in regard to rights not vested at the time of the passage of any given legislative enactment. We have also stated that the power to take private property applies to all property, and that the legislature is the sole judge as to the fact whether the public welfare demands the sacrifice of the private right. We have still to consider certain other questions which have presented themselves in regard to the power of the State legislatures over private property. And of these the most important is whether, under our forms of government, and under the operation of the constitutional clause above cited, private property can be taken for any but public purposes.

It seems to be the sounder construction, that the declaration that private property shall not be taken for public use without compensation, impliedly prohibits private property being taken for *private* use at all. So, in New York, the Supreme Court has said, "The constitution, by authorizing the appropriation of private property to *public use*, impliedly declares that, for *any other use*, private property shall not be taken from one and applied to the private use of another.* So, again, in the Court of Errors, Mr. Senator Tracy said, that the words "private property shall not be taken for public use without just compensation, should be construed as equivalent to a constitutional declaration that private property, without the consent of the

* In the matter of Albany Street, 11 Wend., 151. In this case it was held that the corporation of the city of New York had no power to take more of the land of an individual for the purpose of a street than was actually required for that purpose.

owner, shall be taken only for the public use, and then only upon a just compensation."* This accords with the principles in regard to the nature of a *law*, which we have already discussed at length. An appropriation of private property for private purposes, is a mere abuse of the powers of legislation. An act framed for such purposes has not the character of a law, and is prohibited by the general ideas which define and limit the proper functions of the legislature. Indeed, in the same State it has been expressly decided that a statute which authorizes the transfer of one man's property to another, without the owner's consent, is unconstitutional and void although compensation be made. So, a city corporation cannot, for the purpose of making a street, take the whole of a lot, if a portion only be wanted for the object; and the act under which the proceedings are had must be read as if containing a proviso that the owners consent as to the part not actually needed,—otherwise the act is unconstitutional and void.†

Having thus considered the nature of the power of eminent domain so far as it is intended to be limited by the constitutional restriction, before proceeding to the second head—that of delegation of the power—some other decisions in regard to this constitutional clause, growing out of circumstances peculiar to the several States of the Union, may be noticed here. In New York it has been held that the stat-

* Bloodgood *vs.* The Mohawk and Hudson R. R. Co. See 18 Wend. 9 and 59.; see, also, matter of John and Cherry streets, 19 Wend. 659, and Varick *vs.* Smith, 5 Paige, 137.

† Embury *vs.* Conner, 3 Coms. 511, and cases cited. The same doctrine is asserted in Taylor *vs.* Porter, 4 Hill, 140 (*ante*); Beekman *vs.* Saratoga and Schy. R. R. Co., 3 Paige, 73; and Varick *vs.* Smith, 5 Paige, 159.

utory provisions which authorize towns to determine when cattle may run at large on highways, are unconstitutional and void, inasmuch as they authorize the appropriation without compensation of the grass and herbage on the track of highways, which, subject to the public right of way, are the property of private proprietors.*

In the same State, the general highway act giving to commissioners of highways the power to lay out new roads through wild or unimproved lands, without the consent of the owner of the lands taken, is pronounced unconstitutional and void, because no compensation is made to the proprietors; and has been so recently held, although the power has been sanctioned by statutes and exercised nearly ever since the State had an existence or a government.†

In Pennsylvania, it has been the invariable usage, from the first settlement of the commonwealth down to the present day, to reserve six acres out of every hundred for roads; and it is held that this six per cent. belongs to the State, and she may constitutionally appropriate it to the use for which it was meant without compensation.‡ In the same State, it has been held, in regard to turnpikes or plank roads, that a person on whose land such a road is located can recover damages to an amount which, if added to the present value of his land, would make it worth as much as it was before the road was made.§

An act of the legislature of Massachusetts incorpo-

* Tonawanda Railroad Co. *vs.* Munger, 5 Denio, 255.

† Wallace *vs.* Karlenowefski, 19 Barb. 118; Gould *vs.* Glass, *ib.* 179.

‡ Plank Road Company *vs.* Thomas, 20 Penn. R., 93.

§ Plank Road Co. *vs.* Thomas, 20 Penn. R., 93.

rated an aqueduct company for the purpose of supplying a village with pure water, with authority to take springs; but the act did not in terms require the corporation to supply, on reasonable terms, all persons applying for water. It was insisted that this act was unconstitutional, on the ground that it authorized the taking of private property for a use not public. But it was held good, on the ground that if such a corporation should undertake, capriciously and oppressively, to enhance the value of certain estates by furnishing them with a supply of water, and depreciate that of others by refusing them, it would be a plain abuse of their franchise.*

Delegation of the Power of Eminent Domain.— Having thus attempted to define the limits of the legislative power in regard to private property, the next important question arises, by whom the power must be exercised. It has been insisted that the power of taking property by virtue of the right of eminent domain, must be exercised by the State directly, without the intervention of any intermediate agents; but all doubts in regard to this are now put at rest, and the contrary doctrine firmly established. So, it has been decided in New York, that the right of eminent domain may be exercised in regard to railroads and other similar public works, either directly or through the medium of corporations or joint-stock companies; while at the same time it has been held, as we shall see hereafter, that statutes authorizing the appropriation, in order to be constitutional and valid, must make provision for the assessment and

* Lumbard *vs.* Stearns, 4 Cush., 60.

payment of the damages of the land owner.* "In all the cases where individuals or corporate bodies are authorized to take private property for the purpose of making highways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes, and of bringing water to cities and villages, the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies or of individual enterprise."† In Connecticut, it has been said, "It is now established by the current of decisions, that the property of individuals taken by railroad companies and similar corporations under their charters is, from the public benefits resulting therefrom, to be deemed to be taken for the public use within the constitutional provision on that subject."‡ In Michigan, it has been said, "In the second of the articles of compact, the ordinance of 1787, it is among other things provided that no man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; or 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. This provision was evidently framed with a jealous eye to arbitrary executive power, and was not designed to restrict *judicial*

* Bloodgood *vs.* Mohawk and Hudson R. R. Co., 18 Wend., 9; S. C. in error, 18 Wend., 17, 78.

† Beekman *vs.* The Saratoga and Sch'y R. R. Co., 3 Paige, 75, per Walworth, Ch.

‡ Bradley *vs.* N. Y. and N. H. R. R. Co., 21 Conn., 294.

or *legislative* authority, but rather to limit and confine the power over persons and property to them;" and under the above clause it was held, that the territorial legislature could lawfully authorize a railroad corporation to take private property for their use; in other words, that the power of eminent domain could be delegated.*

In Tennessee, it has been held that the taking of the land of an individual for the erection of a grist-mill thereon, at which all the inhabitants of the neighborhood should be entitled to have their grinding done in turn, and at fixed rates, was such a public use as to authorize the exercise of the right of eminent domain, though the whole property and profits of the mill were to belong to the individual proprietors,—on the ground of the public utility of having such a mill, where each individual had an equal right to be served.†

When property is deemed to be taken.—The next principal subject of inquiry in regard to the guarantee of private property, is as to what taking or appropriation the limitation applies.

It seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damage, no matter how serious or how clearly and unquestionably result-

* In this case, it was also held that it was no objection to the charter of a railroad, in a constitutional point of view, that it did not provide for notice to the owners of the lands, of proceedings to assess the damages for taking the same. Swan *vs.* Williams, 2 Michigan, 427.

† Harding *vs.* Goodlet, 3 Yerger, 41. In New Hampshire it has been said by the Supreme Court of that State, that the power of eminent domain may be exercised either through the action of general laws or of judicial tribunals. Bachus *vs.* Lebanon, 11 N. H. 19.

ing from the exercise of the power of eminent domain. This rule has been repeatedly declared in many of the States of the Union. So, in New York, the consequential damages resulting from the raising of the grade of a city street sustained by adjacent proprietors gives no action against the railroad corporation, acting under the authority of the legislature and with the consent of the city government.* So, in the same State, in taking land for railroad purposes, the only right of the party whose property is entered on is to be paid for the land taken, and that without any reference to the fact that the land of which he is deprived is taken for the construction of a railroad, and that its use by the railroad company may be seriously injurious to the rest of his adjacent property.† So, again, the damage likely to result from a road to a mill on the proprietor's adjacent land, is not a subject of inquiry.‡ So, again, in New York, a franchise may be said to be "taken within the meaning of the constitutional guarantee of private property, when the owner is deprived of the power or means of exercising it;" but it is not "taken" when its emoluments are merely diminished by an improvement which does not destroy or impair such power or means. This is on the ground that, when the public good calls for new grants, it is right they should be made, although they may become rivals to pre-existing establishments made under legislative authority. And thus it has been held, that where a public avenue was opened across a

* Radcliff's Ex'rs. *vs.* Mayor &c., of Brooklyn, 4 Comstock, 195; Chapman *vs.* Albany and Schenectady R. R. Co., 10 Barb., 360; see, also, First Baptist Church *vs.* Utica and Schenectady R. R. Co., 6 Barb., 313.

† Albany Northern Railroad Company *vs.* Lansing, 16 Barb., 68.

‡ Canandaigua and Niagara Falls R. R. Co. *vs.* Payne, 16 Barb., 273.

stream, and nearly alongside of a toll-bridge, the apprehended diminution of the tolls on the bridge is not a grievance for which the bridge proprietors are entitled to redress, the statute granting their franchise not having conferred an exclusive right; and it was also held that, as the proposed avenue did not occupy any part of the site of the bridge, but merely passed over one end thereof, and occupied a portion of the causeway leading to it, the proprietors were not entitled to compensation, it not appearing that the appropriation of the part of the causeway required for the avenue would, of itself, diminish the travel over the bridge or throw any physical obstacles in the way of crossing it.*

So, in Pennsylvania, in regard to taking private property for railroads, it has been decided, in making compensation, that consequential damages are not to be estimated unless provided for in the act of incorporation; and acts of incorporation are constitutional though no provision be made for such damage.† So, in the same State, it has been held that, under the constitutional provision declaring that "private property shall not be taken or applied to public use without just compensation being made," no remedy is provided for damages done by cutting down the grade of a street, although such cutting down destroy a building on adjacent property. The Supreme Court, Gibson, C. J., delivering this opinion, said that they grieved to say there was no redress; "the constitu-

* Matter of Hamilton Avenue, 14 Barb., 405.

† Monongahela Navigation Co. *vs.* Coons, 6 W. & Serg. 114; Henry *vs.* Pittsburgh and Allegheny Bridge Co., 8 Watts & Serg. 85; Miffin *vs.* Railroad Company, 16 Penn. 193; Reitenbaugh *vs.* Chester Valley Railroad Co., 21 Penn, 100.

tional provision for the case of private property *taken* for public use extends not to the case of property injured or destroyed."* So, in the same State, it has been held the legislature has the power to vacate or close a public street without the consent of those whose private interests may be affected by it, and without providing compensation for the injury. The value of property may be taken away by closing the avenues which lead to it; but it is a consequential loss, and must be borne by those who suffer it.†

So, in Connecticut, it has been decided that, to entitle a person to the assessment of damages in his favor sanctioned by the laying out of highways, the damages must be direct and immediate, producing a legal injury, and not remote and consequential. Thus the loss of the use of a creek, crossed by the highway, for the transportation of merchandise in common with the public, is not a damage for which the claimant is entitled to be indemnified.‡

In Massachusetts it has been held that a mere entry of commissioners, under an act of the legislature, authorizing certain boundaries to be ascertained, is not unconstitutional though no compensation is provided for the entry. No property is appropriated.§

In Maine the compensation provided by statute for damages occasioned by the location and construction of railroads, has been said to extend only to real estate or materials taken; and it has been held that for damages indirectly resulting from the legal acts of a char-

* O'Connor *vs.* Pittsburgh, 6 Harr. Penn. R., 187.
† Paul *vs.* Carver, 26 Penn. 223.
‡ Clark *vs.* Saybrook, 21 Conn. 313.
§ Winslow *vs.* Gifford, 6 Cushing, 327.

tered corporation, the law affords no remedy.* The true construction of the provision has been elaborately examined in the State; and the Supreme Court has there decided that by the taking of property within the scope of this clause, is meant such an appropriation of it as deprives the owner of his title or a part of his title, and that it does not prevent the legislature from authorizing acts operating injuriously to private property and without compensation, unless such property is taken and appropriated or attempted to be taken and appropriated, for the owner.†

In Vermont too, the course is to limit the compensation to damages sustained by the actual taking of property, all other loss sustained by individuals comes under the head of *damnum absque injuria*, or under the head of sacrifices which individuals must bear for the common benefit.‡

*. Rogers *vs.* Kennebec and Portland Railroad Co., 35 Maine, 319.

† Cushman *vs.* Smith, 34 Maine, 247.

‡ See Hatch *vs.* Vt. Central R. R. Co., 25 Vermont, 49, where the subject is discussed in an able opinion of Redfield, J..

For other cases where private property is injured by the construction and grading of highways and railways, when it is not taken within the clause, see Day *et al. vs.* Stetson, 8 Greenl. 365; Callender *vs.* Marsh, 1 Pick. 418; Canal Appraisers *vs.* The People, 17 Wend. 571; Susquehanna Canal Co. *vs.* Wright, 9 Watts & Serg. 9.

In England, the disposition seems to be to extend the protection of private property so as to reach every thing that injuriously affects it, as where high embankments are made in front of adjacent premises, or where annoyance and injury is caused by the close proximity of a railroad, or by the noise of its engines, and in many other cases. Queen *vs.* Eastern Counties R. Co., 10 Ad. and El. 531; Glover *vs.* North Staff. R. Co., 5 Eng. Law and Eq. R. 335. The act of the 6 and 7 Will. IV. c. 109, gives remuneration to proprietors for lands taken, used, damaged, or injuriously affected, in the construction of the Sheffield and Rotherham Railway Company; Turner *et al. vs.* The Sheffield and Rotherham Railroad Co., 10 Mees. & Wels. 425, where held that the Company was liable to make compensation for dust and

To differ from the voice of so many learned and sagacious magistrates, may almost wear the aspect of presumption; but I cannot refrain from the expression of the opinion, that this limitation of the term *taking* to the actual physical appropriation of property or a divesting of the title is, it seems to me, far too narrow a construction to answer the purposes of justice, or to meet the demands of an equal administration of the great powers of government.

The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property of which it destroys or impairs the value, as well as for what it physically takes. If by reason of a consequential damage the value of real estate is positively diminished, it does not appear arduous to prove that in point of fact the owner is de-

drifting from the railway station and embankment into the plaintiff's house. The statute 8 and 9 Victoria, c. 18, 8th May, 1845, entitled "An act for consolidating in one act, certain provisions usually inserted in acts authorizing the taking of lands for undertakings of a public nature," and commonly called the Land Clauses Consolidation Act, provides compensation for land or any interest taken or injuriously affected by the execution of public works; and the right to compensation extends to consequential damage. East and West India Docks and Birmingham Junction Railway *vs.* Gattke, 3 Man. & G. 155; 6 Railway Cases, 371. See also, Glover *vs.* North Staffordshire Railway Co., 15 Jur. 673, 20 L. J., Q. B. 376; where lands held to be injuriously affected by the proximity of the railway and passage of the trains. See also, Shelford's Law of Railways, by the Hon. Milo L. Bennett, of the Supreme Court of Vermont, where the American cases are also to be found on many subjects connected with railroads. It is not an agreeable observation to make, but I believe it cannot be denied, that the protection afforded by the English government to property, is much more complete in this respect than under our system; although Parliament claims to be despotically supreme, and although we boast our submission to constitutional restrictions; so difficult is it to judge of systems until their practical operation is carefully observed.

prived of property, though a particular piece of property may not be actually taken. Objections of the same kind might be urged to our system of assessment for local improvements, by which, in too many cases, the only compensation for real estate actually taken, is in an hypothetical and imaginary benefit conferred. It may be true that if the benefit conferred by an improvement on adjacent proprietors were not taken into consideration, some inequality would result; but it seems more conformable to equity, and indeed to the language of the constitutional clause, that an individual advantage should be conferred in a few cases on a citizen, than that in many he should be a direct and certain loser, in consequence of public improvements.

But considerations of this kind have been silenced by the universal demand for works tending to develop the internal resources of the country; a general disposition has been felt not to cramp these enterprises by a too sweeping or extensive compensation; and the matter can only be now remedied by the insertion of carefully drawn clauses in our legislative acts, which shall give to property the full protection that the constitutional guarantee has failed to secure.

Compensation.—In our examination of the clause which we are now discussing, the last head to be considered is in regard to the time and mode of making compensation. On this subject much diversity of opinion has existed, as to whether payment or tender of compensation should be made a condition precedent to any act of interference with private property. The only certain guarantee, of course, would be to make compensation, in all cases, precede the first act of interference with individual property; but it is at once

apparent, in this as in many other acts of administrative power, that conflicting interests present themselves, difficult to be reconciled. In the construction of works of public improvement, as railroads or canals for instance, before it is known what lands will be wanted, preliminary steps, such for instance as surveys, are indispensably necessary. These preliminary steps are, in themselves, a trespass, and may sometimes, as by the felling of trees, work actual injury to the proprietor. On the other hand, if payment be not made before the work is actually begun, then, if it be discontinued or left in an imperfect state, the owner might be entirely remediless. In such a conflict of interests the current of decisions seems to tend to establish the rule that, the preliminary steps in regard to public works may be taken without making compensation, but that, before any definitive act be done toward the construction of the improvement which is in the nature of the assertion of ownership, payment must be made or tendered, or a certain and adequate remedy be provided; and, unless this is done in the act authorizing the work, the statute is wholly unconstitutional and void, and any step taken under it is an unauthorized trespass.*

So, in New York, it has been decided, in regard to the exercise by the State of its right of eminent domain, not to be necessary that payment or compensation should be made before entry; all that is requisite is that the law should provide a certain and adequate remedy by which the individual can obtain compensa-

* In Mississippi, as we have seen above, the clause is explicit that compensation shall be first made; and under that provision it has been there held that payment is a condition precedent to the seizure for public use. Thompson *vs.* Grand Gulf R. R. and Banking Co., 3 How. Miss. R. 240.

tion without unreasonable delay. The owner is not to be left dependent on the future justice of the legislature to provide compensation for his property.* It is sufficient, however, that the law provides for compensation, and it is not necessary that the payment of such compensation should be made a condition precedent to entry upon appropriation of the premises.†

In Maryland, the constitution provides (art. iii., § 46; *ante*, p. 497) that the compensation, as agreed on between the parties or awarded by a jury, shall be first paid or tendered to the party entitled to such compensation; and under this it has been held that it is sufficient if provision be made for compensation, first to be paid or tendered to the owner, to be fixed either by contract with him or by the assessment of commissioners, giving the owner the right of appeal from their decisions and securing a trial by jury in the appellate court; and the neglect or refusal to appeal is held as a waiver of the right to a jury trial; and on payment or tender of the compensation assessed, the property may be taken for public use. The prohibition against taking private property for public use until compensation be paid or tendered, means *taking* the property from the owner and actually applying it to the use of the public, and does not prevent a survey and other necessary preliminary steps. The owner is secure in the use and enjoyment of his property until his damages are regularly ascertained and paid

* Bloodgood *vs.* Mohawk and Hudson R. R. Co., 18 Wend., 9; Baker *vs.* Johnson, 2 Hill, 342; People *vs.* Hayden, 6 Hill, 359; Rexford *vs.* Knight, 1 Kern. 308.

† People *vs.* Hayden, 6 Hill, 359; Smith *vs.* Helmer, 7 Barbour, S. C., R. 416.

or tendered; and this satisfies the constitutional provision.* So, in Maine, it has been held that the legislature may authorize a temporary occupation of property, as an incipient proceeding, without compensation; but before the taking is completed, payment must be made or tendered.†

When the power of taxation in a municipal corporation is so limited as to be inadequate to pay the damages occasioned by the laying out of a street within a reasonable time, the Supreme Court of Pennsylvania has held that it would restrain the opening of the street by injunction till security for proper compensation should be given.‡

The mode of making compensation is next to be considered. It was said, in an early case, that the legislative discretion was absolute only as to the existence of the necessity to take private property; that as to the amount of compensation, it could only be arrived at in one of three ways: (1.) By the parties: that is, by stipulation between the legislature and the proprietor. (2.) By commissioners mutually elected by the parties. (3.) By the intervention of a jury. And in this case it was held, that an act appointing commissioners at the mere pleasure of the legislature,

* Stewart *vs.* The Mayor, 7 Maryland, 501.

† Cushman *vs.* Smith, 34 Maine, 247. For cases as to whether payment must precede or be simultaneous with taking, see Hooker *vs.* The New Haven and Northampton Co., 14 Conn. 146; Smith *vs.* Helmer, 7 Barb., 416; People *vs.* Hayden, 6 Hill, 359; Rubottom *vs.* M'Clure, 4 Blackf., 505; Thompson *vs.* Grand Gulf R. R. and Banking Co., 3 How. Miss., 240; Pittsburgh *vs.* Scott, 1 Penn. 309. In England it has been decided, under a railroad act providing for compensation to be made for all injury done, that trespass could not be brought till damage was actually sustained, Thicknesse *vs.* Lancaster Canal Co., 4 Mees. and Wels. 472.

‡ Keene *vs.* The Borough of Bristol, 26 Penn., 46.

and to make compensation in vacant lands, was for both reasons unconstitutional and void.*

But it does not seem now to be necessary that the compensation should be assessed by a jury, in the common-law sense of the phrase. Mr. Chancellor Walworth, in the Court of Errors in the State of New York, has used this language: "The mode of ascertaining damages by commission (i. e. commissioners appointed by the governor) has been adopted by the legislature in a great variety of cases; and I can see nothing in the provisions of the constitution which render such a course exceptionable." * * * "The provision of the constitution as to the right of trial by jury, has no relation to cases of the kind now under consideration."†

The constitution of New York declares that when private property is taken the compensation shall be ascertained by a jury or by not less than three commissioners appointed by a court of record.‡ This provision is not satisfied by a city charter which authorizes the common council to appoint five disinterested freeholders to appraise and fix the compensation in regard to a public work; and the act is unconstitutional.§ Under this same provision, it has been also decided that by this section is not meant a common-law jury, and that unanimity is not required; but that the action of a majority of twelve appraisers satisfies the clause, the Court of Appeals using this language:‖

* Van Horne's Lessee *vs.* Dorrance, 2 Dall. 313, 315.

† Beekman *vs.* Saratoga and Schy. R. R. Co., 3 Paige, 75.

‡ Cons. art. i., § 7, *ante*, 496.

§ Clark *vs.* City of Utica, 18 Barb. 451.

‖ Cruger *vs.* Hudson R. R. Co., 2 Kern. 196, per Johnson, J.

The question then remains, whether these appraisers are a jury within the meaning of the constitution. If that term had not acquired a peculiar meaning when applied to this class of cases, by prior legislative usage, and had not been continually in use in that special sense up to the time of the convention by which the constitution was framed, I should, without any doubt resting on my mind, be of opinion that the peculiar tribunal provided by this act, was not a jury. That term, when spoken of in connection with trial by jury in the second section of the same article, imports a jury of twelve men whose verdict is to be unanimous. Such must be its acceptation to every one acquainted with the history of common law, and aware of the high estimation in which that institution so constituted, has for so long a period been held. But from an examination of the statutes upon the subject of taking private property for public purposes, during a period of twenty years immediately preceding the sitting of the convention, it is apparent that the term "a jury" had been in frequent use, as descriptive of a body of jurymen, drawn in the ordinary mode of drawing juries, to whom was committed the appraisement of damages for private property taken for public uses, and whose decision was to be made by a majority. It seems to have been thus used because the term was descriptive of the civil condition of the persons composing it, and by way of distinguishing between such a body of jurymen and the commissioners appointed by courts, under many other acts, to perform the same functions. We have been furnished with references to many of these acts, by the counsel for the defendants.

These instances are certainly sufficient to establish the position that at the time of the convention there was a known legislative usage in respect to this subject, according to which the term "jury" did not necessarily import a tribunal consisting of twelve men acting only upon a unanimous determination, but on the contrary was used to describe a body of jurors of different numbers, and deciding by majorities or otherwise, as the legislature in each instance directed. The convention ought, therefore, to be deemed to have used this term in the sense in which it was then known to the law, and to have selected out of the modes of proceeding theretofore in use in taking private property, those two modes which they thought best calculated to secure both public and private rights,—appraisement by commissioners, or by juries, giving to this latter term not the restricted meaning which belongs to it when used in reference to trial, civil or criminal, but the broader sense which it had acquired by legislative use. Had they intended to confine it to

the narrower meaning, familiar as they were with the previous practice upon the subject, I think they would have found clear terms to express that intention.

As to the kind of property or currency in which compensation should be made, it was intimated in an early case by the Supreme Court of the United States, that no just compensation could be made except in money, on the ground that money is the common standard by which all values are ascertained;* but in New York it has been expressly decided that the benefit accruing to a person whose land was taken for a street, might be set off against the loss or damage sustained by him by the taking of his property for a street, and if equal to the damage or loss, it was a just compensation for the property taken, to the extent of such benefit;† and a similar result has been arrived at in Pennsylvania.‡ Indeed, in the latter case, it was intimated "that it should rest in the wisdom of the legislature to determine the nature and kind of compensation to be made;" but there seems no good reason for permitting the mere legislative discretion to be the supreme arbiter of the meaning of the constitutional provision in this, any more than in any other respect. The compensation, to be constitutional must be a just one.

Some special rules have here to be noticed. In Massachusetts, in estimating the damages for land taken for a highway or railroad, any direct or peculiar benefit or increase of value accruing therefrom to land

* Van Horne's Lessee *vs.* Dorrance, 2 Dall. 313, said in Satterlee *vs.* Matthewson, 16 Serg. & Rawle, 179, to have been questioned.

† Livingston *vs.* The Mayor, &c., 8 Wend. 85.

‡ M'Master *vs.* The Commonwealth, 3 Watts, 292.

of the same owner adjoining or connected with the land taken, and forming part of the same parcel or tract, is to be considered by the jury and allowed by way of set-off; but not any general benefit or increase of value received by such land in common with other lands in the neighborhood, or any benefit to other land of the same owner, though in the same town. And the time at and from which the benefit accruing to the owner of land taken for a highway or railroad, is to be estimated, in assessing his damages for such taking, is that of the actual location of the work.*

It has been held in New York, that where the right of eminent domain is once exercised and lands taken for a public use, as for a canal, the fee is divested, and though the use may be abandoned, the property does not revert to the original owner.† In Massachusetts too, it has been held that where the land of an individual is taken under the authority of the legislature for public use, and a full compensation is paid to the proprietor for a perpetual easement therein, and the same land is afterwards appropriated by legislative authority to another public use of a like kind, the owner of the land is not entitled to any further compensation. So, where a turnpike has by law been converted into a common highway, no new claim for compensation can be sustained by the owner of the land over which it passes. So, too, where a canal company paid full damages for the flowing of the plaintiff's land, and the canal was afterwards discontinued, and the land was flowed by another company, it was held that

* Meacham *vs.* Fitchburg R. R. Co., 4 Cush. 291.

† Heyward *vs.* The Mayor, &c., of N. Y., 3 Seld. 314; Rexford *vs.* Knight, 1 Kern. 308.

the plaintiff was not entitled to redress, and his complaint was dismissed.*

Under the act of the State of New York of 1851, in relation to railroad companies, such companies have no right to enter upon and occupy, or cross, a turnpike or plank road, without the consent of the owners, except upon the condition of first paying the damages sustained by the turnpike or plank-road company, after the same shall have been ascertained under the statute.†

It may not be amiss to sum up the result of our examination. If the brief and sweeping clause, "*Private property shall not be taken for public use without just compensation*," be made to express the modifications and qualifications which construction has inserted in it and added to it, it will stand nearly as follows: *Private property shall in no case be taken for private use. Private property may be taken for public use in the exercise of the general police powers of the State, or of taxation, without making compensation therefor. And the power of taxation includes the power of charging the expense of local improvements exclusively upon those immediately benefited thereby. Private property may also be taken for public use in the exercise of the power of eminent domain, but not without just compensation being made or provided for before the taking is absolutely consummated. The right of compensation, however, does not attach in cases where the value of property is merely impaired and the title to it not divested, nor does it exist in cases where the right to the property taken is not*

* Chase *vs.* Sutton Manufacturing Co., 4 Cush. 152.

† The Ellicottville and Great Valley Plank Road Co. *vs.* The Buffalo and P. R. R. Co., 20 Barb. 644.

absolutely vested at the time of the legislative act affecting it. This is substantially the form that the constitutional provision has assumed in the hands of the courts; and upon a careful examination of the process by which this result has been arrived at, it must be admitted that in practice our constitutional guarantees are very flexible things, and that the judicial power exerts an influence in our system which makes the subject of interpretation one of the first magnitude.

The Law of the land, and due course of law.—We next come to the great constitutional provision which guarantees to life, liberty, and property the protection of law. Magna Carta declares, "*Nullus liber homo capiatur vel imprisonetur, aut dissaisietur, aut relegatur, aut exulatur, aut aliquo modo destruetur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel* PER LEGEM TERRÆ."* And deducing its origin from this grand original, this important limitation of legislative power is to be found, I believe, without exception, in the constitution of all the States of the Union.† In order to understand precisely how private rights are in this respect secured, I give the clause as it stands in the fundamental law of several of the States :—

New Hampshire.—"No person shall be held to answer for any crime or offense, until the same is fully and plainly, substantially and formally described to him, nor be compelled to accuse or furnish evidence against himself. And every person shall have a right to produce all proofs that may be favorable to himself, to meet the witnesses against him face to face, and to be fully heard in his defence, by himself and counsel. And no person shall be arrested, imprisoned,

* Magna Carta, § 29.

† As to the identity of meaning between the phrases "Law of the land" and "due process of law," see Mayo *vs.* Wilson, 1 N. H. R. 55.

despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or *the law of the land*."*

Vermont.—"That in all prosecutions for criminal offenses, a person hath a right to be heard by himself and his counsel, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favor, and a speedy public trial by an impartial jury of his country; without the unanimous consent of which jury, he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any person be justly deprived of his liberty, except by the *laws of the land* or the judgment of his peers."†

Massachusetts.—"No person shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally described to him, or be compelled to accuse or furnish evidence against himself. And every person shall have a right to produce all proofs that may be favorable to him, to meet the witnesses against him face to face, and be fully heard in his defence, by himself or his counsel, at his election. And no person shall be arrested, imprisoned, or despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the *law of the land*."‡

Rhode Island.—"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, 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 them in his favor, to have the assistance of counsel in his defence; and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers or the *law of the land*."§

Connecticut.—"In all criminal prosecutions the accused shall have a right to be heard, by himself and by counsel, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process to obtain witnesses in his favor,—and in all prosecutions by indictment or information, a speedy public trial

* Constitution of New Hampshire, part i. § 15.
† Constitution of Vermont, ch. i., § 10.
‡ Constitution of Massachusetts, part i., § 12.
§ Constitution of Rhode Island, art. i., § 10.

by an impartial jury. . He shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, *but by due course of law.* And no person shall be holden to answer for any crime the punishment of which may be death or imprisonment for life, unless on a presentment or an indictment of a grand jury, except in the land or naval forces, or in the militia when in actual service, in time of war or public danger."*

New York.—"No member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the *law of the land* or the judgment of his peers."†

"6. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he 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."‡

Pennsylvania.—"That he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the *law of the land.*"§

"That all courts shall be open, and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by the *due course of law*, and right and justice administered without sale, denial, or delay."‖

Delaware.—"The accused shall not be compelled to give evidence against himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers or *law of the land.*"¶

"All courts shall be open; and every man for an injury done him in his representation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the *law of the land*, without sale, denial, or unreasonable delay or expense."**

Maryland.—"That every free man, for an injury done him in his person or property, ought to have remedy by the course of the *law of the land*, and ought to have justice and right, freely without sale, fully

* Constitution of Connecticut, art. i., § 9.
† Constitution of New York, art. i., § 1.
‡ Constitution of New York, art. i., § 6.
§ Constitution of Pennsylvania, art. ix., part of § 9.
‖ Constitution of Pennsylvania, art. ix., part of § 11.
¶ Constitution of Delaware, art i., part of § 7.
** Constitution of Delaware, art. i., part of § 9.

without any denial, and speedily without delay, according to the *law of the land.*"*

"That no free man ought to be taken and imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers, or by the *law of the land;* provided, that nothing in this article shall be so construed as to prevent the legislature from passing all such laws for the government, regulation, and disposition of the free colored population of this State as they may deem necessary."†

Virginia.—"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."‡

South Carolina.—"No freeman of this State shall be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the *law of the land.*"§

Much discussion has taken place in regard to what is meant by the phrase, the law of the land. Perhaps, in most respects, there is nowhere to be met with a better definition of it than is to be found in the argument of Mr. Webster, in the Dartmouth College case. "By the law of the land is most clearly intended the general 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 general rules which govern society. Every thing which may pass under the form of an enactment is not the law of the land."

The same doctrine has been declared in a very elab-

* Constitution of Maryland, art. i., § 17.

† Constitution of Maryland, art. i., § 21.

‡ Constitution of Virginia, Bill of Rights, § 8.

§ Constitution of South Carolina, art. ix., part of § 2.

orate case in the State of New York. An act of that State authorizing private roads to be laid out over the lands of an owner without his consent, provided for the damages to be assessed by a jury of six freeholders, and declared that the road should, when laid out, be for the use of the applicant and his assigns; and in an action of trespass the validity of this statutory provision came up for consideration. The constitution of the State, as it then stood, provided "that no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers" (Cons. of 1821, art. vii., § 1); and also, that "no person shall be deprived of life, liberty, and property, without due process of law" (*Ib.* § 7). After showing that the act worked a transfer of property from one individual without his consent to another, the Supreme Court held that no such legislation was compatible with "the law of the land," nor such a proceeding compatible with "due process of law." They said, "The words 'by the law of the land,' as used in the constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two Houses, 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for the purpose.' In other words, You shall not do the wrong unless you choose to do it." * * * "The meaning of the section is, that no member of the State shall be disfranchised or deprived of any of his rights and privileges,

unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation." So, of the phrase "due process of law," it was said, "It cannot mean less than a prosecution or suit, instituted and conducted according to the prescribed forms and solemnities for asserting guilt or determining the title to property. The same measure of protection against legislative encroachment is extended to life, liberty, and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A and transfer it to B, they can take A himself, and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be due process of law."* In North Carolina and Tennessee, the term law of the land has received the same construction.†

In New York, the subject has been again recently considered, in reference to the temperance laws. An act, passed in 1855 (9th April), entitled An Act

* Taylor *vs.* Porter, per Bronson, J., 4 Hill, 140. Nelson, J. dissented, on the ground of the antiquity of the system of laying out private roads in the State of New York, and the universal acquiescence in its propriety.

† Hoke *vs.* Henderson, 3 Dev., 12; Jones *vs.* Perry, 10 Yerg., 59. See also, in Iowa, Reed *vs.* Wright, 2 Greene, Iowa, 22. In Texas, James *vs.* Reynolds, 2 Texas, 251. In Pennsylvania, Brown *vs.* Heummel, 6 Barr, 87, and Ervine's Appeal, 16 Penn. R., 256; Kinney *vs.* Beverly, 2 Hen. & Munf., 336; Arrowsmith *vs.* Burlingim, 4 M'Lean R., 498; and Blackwell on Tax Titles, 27, 34.

for the prevention of intemperance, pauperism, and crime, declared substantially that intoxicating liquor should not be sold, or kept for sale, except for medical, sacramental, chemical, and mechanical purposes; and a violation of this provision was declared a misdemeanor, punishable by fine and imprisonment. It was further enacted that, upon complaint of a violation of this prohibition, liquor illegally kept should be seized, and if found to be kept in violation of the act, or if not claimed, should be adjudged forfeited and destroyed. Proof of the sale of liquor was to be considered sufficient to sustain an averment of an illegal sale, and proof of delivery to be *prima facie* evidence of sale. No person was to be allowed to maintain an action to recover for any liquor sold or kept by him, unless he could prove that the liquor was lawfully sold or kept within the act; and finally, it was declared that all liquor kept in violation of the act should be deemed a public nuisance. Toynbee and Berberich having been found guilty of violating the act, appealed to the Supreme Court; and the act was held to be in conflict with the constitutional provision above cited. It was considered that the object of the statute was to prohibit the common and ordinary use of a species of property long and familiarly known; that liquor came clearly within the definition of property; that the prohibition of its sale worked a virtual deprivation of property; that to do this by fines, forfeitures, and imprisonment, coupled with a presumption against nuisance, was not due process of law; that the right of protection belonging to the citizen was seriously impaired by requiring him, preliminarily, to prove that the liquor was lawfully kept; that it was not competent for the legislature to declare any recog-

nized species of property a nuisance; and that the whole act was void as being an arbitrary interference with the rights of property guaranteed by the constitution.*

Some other decisions may be noticed. The vested interest of a husband in a legacy bequeathed to his wife cannot be altered by subsequent legislation; and the act of 1848, by which it was attempted so to operate retrospectively, is unconstitutional on the ground that it takes away property without due *process of law*.†

We have already‡ had occasion to notice that certain summary administrative proceedings, have been sustained against the objection that they did not conform to the law of the land. So, in Louisiana, the constructive service of a tax bill, by advertisement in the official newspaper, without any personal service whatever, has been held not to conflict with the provision in the State constitution that "no person shall be deprived

* People *vs.* Berberich & Toynbee, 11 Howard Pr. R. 289. Mr. Justice Brown delivered the leading opinion. Mr. Justice Strong, concurring with him, adverted to the invasion of the rights of property effected by the abolition of slavery, and observed that the question whether it was competent for the legislature to prohibit the manufacture of liquors, was not before them. Mr. Justice Rockwell concurred in the reversal on a minor point—that of the defendant being tried at the special sessions; but dissented from his brethren in their general views of the constitutionality of the act, holding it to be a legitimate exercise of the discretion of the legislature, founded on considerations of public policy tending to promote the morals, health, and safety of the community. The whole discussion is very able, and of great interest to all persons investigating the fundamental principles of our government. The decision has been affirmed on appeal, and has been reported while these pages are passing through the press. Wynehamer *vs.* The People, 3 Kernan, 378.

† Westervelt *vs.* Gregg, 2 Kernan, 202.

‡ *Ante*, p. 352.

of life, liberty or property, without due process of law."*

The Superior Court of New Hampshire has said, "There is no doubt of the great fundamental principle that parties shall be heard before judgment shall be passed against them; but when the legislature have fixed the particular time and manner of giving notice to parties, it is not for us to set aside the statute unless it is clearly unconstitutional."†

Trial by Jury.—The trial by jury is very dear to the race to which we belong. There can hardly be named any institution which has survived so many changes, or existed under such various forms of government. *Nullus liber homo capietur, vel imprisonetur, nisi per legale judicium parium suorum*, are the words of *Magna Carta*, more than six centuries ago. When this country threw off the government of England, the passionate attachment of our people to this form of procedure was repeatedly and energetically declared; and the constitution of the youngest State of the American confederacy adopts the trial by jury as a part of its fundamental law. Springing up under the feudal despotism of the Plantagenets, it has survived alike their rule, that of the house of Tudor, and of the house of Stuart, and now flourishes with all its original vigor under the mildest and wisest form of monarchy of which history makes mention; while during the same period, transplanted to a different hemisphere, it has struck deep its roots into the new soil, and is, perhaps, the most cherished institution of the greatest exemplar of free and intelligent government that the world has ever seen.‡

* City of New Orleans *vs.* Cannon, 10 La. Ann. R., 764.

† Webster *vs.* Alton & N. D., 9 Foster, 369, 384.

‡ The Declaration of Rights made by the first Continental Congress, in

The following extracts from some of the State constitutions, will give a sufficient idea of the manner in which this institution has been incorporated into the fundamental law of the several States. It is proper to remark that the clauses here given apply, as a general rule, to civil cases, and that the State constitutions contain special provisions in regard to the trial by jury in criminal cases :—

Maine.—"In all civil suits and in all controversies concerning property, the parties shall have a right to *a trial by jury*, except in cases where it has heretofore been otherwise practiced; the party claiming the right may be heard by himself and his counsel, or either, at his election."*

New Hampshire.—"In all controversies concerning property, and in all suits between two or more persons, excepting in cases wherein it hath been heretofore otherwise used and practiced, the parties have a right to *a trial by jury*, and this right shall be deemed sacred and inviolable; but the legislature may by the constitution be empowered to make such regulations as will prevent parties from having as many trials by jury in the same suit or action, as hath been heretofore allowed and practiced, and to extend the civil jurisdiction of justices of the peace to the trials of suits where the sum demanded in damages doth not exceed four pounds, saving the right of appeal to either party. But no such regulations shall take away the right of *trial by jury*, in any case not in this article before excepted, unless in cases respecting mariners' wages."†

Vermont.—"That when an issue in fact, proper for the cognizance of a jury, is joined in a court of law, the parties have a right to *trial by jury*, which ought to be held sacred."‡

1774, declares that "the respective colonies are entitled to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of the common law." And the Declaration of Independence, in its eloquent recital of the causes of separation, commemorates among others, "acts of legislation for depriving us, in many cases, of the benefits of trial by jury." Shepard's Const. Text Book, p. 262.

* Constitution of Maine, art. i., § 20.

† Constitution of New Hampshire, part i., § 20.

‡ Constitution of Vermont, ch. i., § 12.

Massachusetts.—"In all controversies concerning property, and in all suits between two or more persons (except in cases in which it has heretofore been otherwise used and practiced), the parties have a right to a *trial by jury;* and this method of procedure shall be held sacred; unless in cases arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."*

Rhode Island.—"The right of trial by jury shall remain inviolate."†

New York.—"The trial by jury in all cases in which it has been heretofore used, shall remain inviolate for ever. But a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law."‡

New Jersey.—"The right of trial by jury shall remain inviolate; but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men."§

Pennsylvania.—"That trial by jury shall be as heretofore, and the right thereof remain inviolate."‖

Delaware.—"Trial by jury shall be as heretofore."¶

Virginia.—"That in controversies respecting property, and in suits between man and man, the ancient trial by jury of twelve men, is preferable to any other, and ought to be held sacred."**

South Carolina.—"The trial by jury, as heretofore used in this State, and the liberty of the press, shall be for ever inviolably preserved."††

Michigan.—"The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties in such manner as shall be prescribed by law."‡‡

"The legislature may authorize a trial by a jury of a less number than twelve men."§§

* Constitution of Massachusetts, part i., § 15.
† Constitution of Rhode Island, art. i., § 15.
‡ Constitution of New York, art. i., § 2.
§ Constitution of New Jersey, art. i., § 7.
‖ Constitution of Pennsylvania, art. ix., § 6.
¶ Constitution of Delaware, art. i., § 4.
** Constitution of Virginia, Bill of Rights, § 11.
†† Constitution of South Carolina, art. ix., § 6.
‡‡ Constitution of Michigan, art. vi., § 27.
§§ Constitution of Michigan, art. iv., § 46.

Georgia.—"Trial by jury, as heretofore used in this State, shall remain inviolate."*

Florida.—"The right of trial by jury shall for ever remain inviolate."†

Alabama.—"The right of trial by jury shall remain inviolate."‡

Mississippi.—"The right of trial by jury shall remain inviolate."§

Tennessee.—"The right of trial by jury shall remain inviolate."‖

Kentucky.—"We declare—that the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this constitution."¶

Ohio.—"The right of trial by jury shall be inviolate."**

Indiana.—"In all criminal cases whatever, the jury shall have the right to determine the law and the facts. In all civil cases the right of trial by jury shall remain inviolate."††

Illinois.—"The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy."‡‡

The general idea intended to be conveyed by the constitutional guarantee of the trial by jury, undoubtedly is, that all contested issues of fact shall be determined by a jury, and in no other way; and this doctrine has been very faithfully carried out by the judiciary. Indeed, it may be claimed for them as a merit in this country, that they have never evinced any jealousy of the great co-ordinate power of the jury, and that they have always striven to carry out the theory of our system in regard to it. So, in Indiana, where a statute exists for the relief of *bona-fide*

* Constitution of Georgia, art. iv., § 5.
† Constitution of Florida, art. i., § 6.
‡ Constitution of Alabama, art. i., § 28.
§ Constitution of Mississippi, art. i., § 28.
‖ Constitution of Tennessee, art. i., § 6.
¶ Constitution of Kentucky, art. xiii., § 8.
** Constitution of Ohio, art. i., § 5.
†† Constitution of Indiana, art. i., §§ 19 and 20.
‡‡ Constitution of Illinois, art. xiii., § 6.

occupants of land who make improvements while holding under a title which proves defective. In cases of this class, where the *bona-fide* occupant has put improvements on his land, and a superior title is established against him, if he is willing to pay for the value of the land without the improvements, the successful claimant can not obtain possession until he pays the value of the improvements made by the occupant. But where a statute of this kind provided that the value of the improvements, and of the land without the improvements, should be assessed by three persons to be appointed by the court, it was held that this part of the law was unconstitutional and void, on the ground that the assessment should be made by a jury; and the court said, "Where facts are to be found, or the value of property assessed, the method must be determined in accordance with the clause in the constitution."*

In Ohio, it has been held that this constitutional limitation places the essential and peculiar features of the institution, as known to the common law, beyond the reach of legislative control; and, consequently, an act directing certain cases to be tried by a jury of six men was decided to be unconstitutional and void, the court saying that both the number and the unanimity of the jury were inherent attributes secured by the constitutional provision.† The same general principle has been declared in Kentucky, and in many other of the States.‡

* Armstrong *vs.* Jackson, 1 Blackf., 375.

† Work *vs.* The State of Ohio, 22 Ohio State R., 296. It was, however, admitted that in regard to proceedings in which a jury was not required at common law, the legislature might in its discretion authorize a jury of any umber.

‡ Enderman *vs.* Ashby, Pr. Dec., 65; Stidger *vs.* Rodgers, Pr. Dec., 64;

Indeed, the constitutional provision has been in some of the States very largely construed; and it has been held that any improper interference with the functions of the jury comes within the spirit of the clause. So, as to the power to discharge a jury, it has been held in Alabama, that within the meaning of the constitutional provision, a court has no power arbitrarily to interfere and arrest a jury trial; and that this can only be done in cases of pressing and legal necessity. An unauthorized discharge, whether in the case of a murder or a felony, is equivalent to an acquittal.*

But, on the other hand, the guarantee is to be reasonably interpreted. It was not intended by this provision to tie up the hands of the legislature, so that no regulations of the trial by jury could be made; and it has been decided that the provision is not violated, so long as the trial by jury is not substantially impaired, although it be made subject to new modes and even rendered more expensive.†

It is also to be understood, that when the constitution guarantees the right of trial by jury, it does not mean to secure that right in all possible instances, but only in those cases in which it existed when our consti-

Carson *vs.* Commonwealth, 1 A. K. Marsh. 290; Hughes *vs.* Hughes, 4 Monroe, 43.

* Ned *vs.* The State, 7 Porter, 187; Cobia *vs.* The State, 16 Ala., 781; M'Cauley *vs.* The State, 26 Ala., 135. The rule seems substantially the same in the other States. See as to the power of discharging a jury, or entering a *nolle prosequi* in criminal cases, Commonwealth *vs.* Tuck, 20 Pick. 356; Mount *vs.* The State, 14 Ohio, 295; Mahala *vs.* The State, 10 Yerg., 532; The People *vs.* Denton, 2 Johns. Cases, 275. The People *vs.* Olcott, 2 J. C., 301; The People *vs.* Barrett, 2 Caines, 305. In civil cases, the courts possess an unlimited power to order new trials; and to these, therefore, the rule does not at all apply. *Ex Parte* Edward Henry, 24 Ala., 638.

† Beers *vs.* Beers, 4 Conn. R., 539; Colt *vs.* Eves, 12 Conn., 243, 253.

tutions were framed. It is well settled that the constitutional guarantee of a trial by jury, in the usual terms that "the trial by jury shall remain inviolate," does not apply except to offenses which at the time of the adoption of the constitution were such, either by statute or common law; and that it is competent for the legislature to make offenses created by statute since that period triable by summary proceedings without a jury.*

So, on the same principle, it has been settled in Virginia that where, by statute passed previous to the adoption of the constitution, the Court of Chancery had jurisdiction to try a matter without the intervention of a jury, that right was not taken away by the adoption of the constitution.† And in Kentucky it has been decided that the constitutional clause does not enlarge the right of trial by jury, so as to extend it to cases where, previous to the constitution, that mode of trial did not belong to the party as a matter of right.‡ So, too, in the State of Pennsylvania, it has been held that an act prohibiting the sale of intoxicating liquors on Sunday, and authorizing a conviction for the violation of the statute, is not unconstitutional by reason of not providing for a trial by jury. The legislature may declare a new offense, and prescribe the mode of trial.§ Indeed, extensive and summary police powers are constantly exercised in all the States of the Union for the repression of breaches of

* Boring *vs.* Williams, 17 Ala., 510; Tims *vs.* The State, 26 Ala, 165.

† Watts *vs.* Griffin, 6 Litt., 247.

‡ Harris *vs.* Wood, 6 Munroe, 642; Creighton *vs.* Johnson, 6 Litt, 241; Ewing *vs.* Directors of the Penitentiary, Hardin R., 5; Harrison *vs.* Chiles, 3 Litt. R., 200. See in Pennsylvania, Emerick *vs.* Harris, 1 Binney, 416.

§ Van Swartow *vs.* The Commonwealth, 24 Penn., 131.

the peace and petty offenses; and these statutes are not supposed to conflict with the constitutional provisions securing to the citizen a trial by jury; and so it has been held, in Vermont, in regard to drunkenness and the sale of intoxicating liquors.* Statutes giving summary remedies against public officers and their sureties have, in Kentucky, been held not to be within the constitutional limitation;† but in Indiana, a contrary opinion has been expressed.‡

Where a law creates or extends a summary jurisdiction for the trial of causes without a jury, it does not violate the constitutional provision securing that right, provided on an appeal the party is entitled to a jury as of right,—upon the ground that the defendant, if he thinks proper, can have his case decided by a jury before it is finally settled.§

In Connecticut, the Bill of Rights declares "that in all criminal prosecutions the accused shall have a right to be heard by himself and by counsel, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, and to have compulsory process to obtain witnesses in his favor." But this has

* *In re* Powers, 25 Vermont R., 261; Murphy *vs.* The People, 2 Cowen, 815; Jackson ex. dem. Wood *vs.* Wood, 2 Cowen, 819. See in Massachusetts, Mountfort *vs.* Hall, 1 Mass., 443; Inhabs. of Shirley *vs.* Lunenburgh, 11 Mass., 379.

† Murry *vs.* Askew, 6 J. J. Marsh. 27; Wells *vs.* Caldwell, 1 A. K. Marsh. 441.

‡ Dawson *vs.* Shaver, 1 Blackf., 204.

§ Morford *vs.* Barnes, 8 Yerger, 444; Beers *vs.* Beers, 4 Conn., 535; Emerick *vs.* Harris, 1 Binney, 416; M'Donald *vs.* Schell, 6 Serg. & Rawle, 240; Stewart *vs.* Mayor, &c., 7 Maryland, 501. As to trial by jury, generally, see Mr. J. Strong's opinion in People *vs.* Berberrick & Toynbee, 11 Howard P. R., 333, and Wynehamer *vs.* The People, 3 Kernan, 378; The People *vs.* Duffy, 6 Hill, 75.

been held not to apply to the proceedings of a grand jury in finding an indictment.*

As to the question of interest in a juror, in Massachusetts, it has been held to be no sufficient exception to an indictment for an offense to which the law annexes a fine for the use of the town where the offense is committed, that the foreman of the grand jury who found the indictment is a taxable inhabitant of the town.†

In connection with this subject, it is proper to call attention to the provision to be found in some of our more recent constitutions, forbidding the court to instruct juries in regard to the facts of a cause. So, the constitution of California declares that "judges shall not charge juries with respect to matter of fact, but may state the testimony and declare the law."‡ I cannot but regard this as a very unfortunate innovation. The jury loses no small portion of its value when deprived of the aid of an upright and intelligent judge, accustomed to scrutinize, to compare, to analyze and to weigh testimony. Indeed, so long as the right to state the testimony is left, the prohibition becomes almost nugatory; it would be difficult, if not impossible, for the most skillful magistrate so to sum up the evidence as to avoid communicating to the jury his view of the verdict which should be rendered. The provision, I think, comes from a jealousy of the bench, for which no adequate reason can be alleged.§

* The State *vs.* Wolcott, 21 Conn., 272.

† Commonwealth *vs.* Thos. Ryan, 5 Mass. R., 90.

‡ Cons., art. 6, § 17.

§ The Constitution of Tennessee, art. vi., § 9, contains the same provision in the same words.

In Massachusetts, it has been held that a statutory provision authorizing

Searches and Seizures.—The provisions in regard to search-warrants, to be found in both the State and Federal constitutions, were no doubt suggested by the abuses which experience had shown to result in England, from the practice of granting general warrants issued on suspicion, and without any specification whatever, to search any house, to break open any receptacle, seize, and carry away all or any property. These general warrants were declared illegal in the last century; and Lord Camden's reputation derives no small portion of its luster from the vigor with which he on that occasion defended some of the fundamental principles of liberty.* I give below the provisions of several of the State constitutions on this important subject:—

Maine.—"The people shall be secure in their persons, houses, papers and possessions, from unreasonable *searches and* seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause supported by oath or affirmation."†

Vermont.—"That the people have a right to hold themselves,

additional punishment to be inflicted on a convict upon an information, is not unconstitutional. Ross's Case, 2 Pick. 165. The statute permitting a judge of probate to appoint a guardian to a spendthrift is not unconstitutional, on the ground that the spendthrift might appeal to the Supreme Court, where a trial by jury can be ordered. Bond *vs.* Bond, 2 Pick., 382. A strong opinion has been expressed in that State, that a pecuniary penalty cannot be constitutionally imposed by a court-martial without a jury. Brooks *vs.* Daniel, 22 Pick., 498. Morton, J., said, "It assuredly is a novelty to find a court-martial dealing with mulcts and forfeitures, or a common-law court sustaining an action upon the sentence of a court-martial." But the case was decided on another ground.

* Entick *vs.* Carrington, 19 Howell's State Trials, No. 1029; Commonwealth *vs.* Dana, 2 Met. 335.

† Constitution of Maine, art. i., § 5.

their houses, papers, and possessions, free from *search or* seizure; and therefore, warrants without oath or affirmation first made affording sufficient foundation for them, and whereby an officer or messenger may be commanded or required to search such suspected places, or to seize any person or persons, his, her, or their property, not particularly described, are contrary to that right, and ought not to be granted."*

Massachusetts.—"Every person has a right to be secure from all unreasonable *searches and* seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in a warrant to a civil officer to make search in all suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in such cases, and with the formalities prescribed by the laws."†

Rhode Island.—"The right of the people to be secure in their persons, papers, and possessions, against unreasonable *searches and seizures* shall not be violated; and no warrant shall issue but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the person or things to be seized."‡

Connecticut.—"The people shall be secure in their persons, houses, papers, and possessions, from unreasonable *searches or seizures;* and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."§

New Jersey.—"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 warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the papers and things to be seized."‖

Pennsylvania.—"8. That the people shall be secure in their persons, houses, papers, and possessions, from *unreasonable searches and*

* Constitution of Vermont, ch. i., § 11.
† Constitution of Massachusetts, part i., § 14.
‡ Constitution of Rhode Island, art. i., § 6.
§ Constitution of Connecticut, art. i., § 8.
‖ Constitution of New Jersey, art. i., § 6.

seizures; and that no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation."*

Delaware.—"The people shall be secure in their persons, houses, papers, and possessions, from unreasonable *searches and seizures;* and no warrant to search any place, or to seize any person or things, shall issue without describing them as particularly as may be, nor then, unless there be probable cause, supported by oath or affirmation."†

Maryland.—"That all warrants, without oath or affirmation, to *search suspected* places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places or to apprehend suspected persons, without naming or describing the place or the person in special, are illegal, and ought not to be granted."‡

The provisions above cited are of great importance as guarantees of private right against lawless invasion; but very few cases have arisen in regard to them. I notice some of the most prominent.

Where a search-warrant recites an information on oath, that certain described goods have been stolen by A and B, and are in the house of C, it is not necessary that the warrant should state the name of the owner of the goods.§ But the warrant must describe the persons whose houses are to be entered and the goods which are the object of search.‖ If a search-warrant for lottery tickets, and a complaint correctly describing the things to be seized, be on the same paper, and the warrant direct the officers to search for the things mentioned in the complaint, the warrant is legal and

* Constitution of Pennsylvania, art. ix., § 8.

† Constitution of Delaware, art. i., § 6.

‡ Constitution of Maryland, art. i., § 23.

§ Bell *vs.* Clapp, 10 J. R. 263; see also, as to search warrants in New York, Beaty *vs.* Perkins, 6 Wend. 382.

‖ Sandford *vs.* Nichols, 13 Mass. 288, decided with reference to the provision of the Constitution of the United States on this point, 6th art. of Amendments.

sufficient, though the warrant itself contain no further description.*

The clauses which we have thus considered, together with that in regard to the obligation of contracts, which we shall examine in the next chapter, are by far the most important provisions that our State constitutions contain for the protection of the property, liberty, and life of the citizen. They are, indeed, the principal safeguards that our system contains. Many other minor checks upon legislation have, however, been suggested by the gradual acquisition of experience; and to some of the more important of these I now turn the attention of the reader.

Taxation.—Under the head of the clause in regard to private property we have had occasion to notice,† that the restraining effect of that limitation has never been applied to taxation; and that, as a general rule, the taxing power has been treated by the judiciary as vested in the absolute discretion of the legislative bodies.

This doctrine has been repeatedly declared, both by the State and Federal tribunals. So it has been said in New Hampshire, that the power of taxation is essentially a power of sovereignty or eminent domain.‡ So, the Supreme Court of the United States have said, that there is no limitation whatever upon the legislative power of the States, as to the amount or objects of taxation. In truth, the wisdom and justice of the representative body, and its dependence on its constituents, furnish the only security against unjust and

* Commonwealth *vs.* Dana, 2 Met. 329.

† *Ante*, p. 500.

‡ Brewster *vs.* Hough, 10 N. H. R. 143.

excessive taxation, except only in those States where express provisions have been inserted in their constitutions, intended to secure equality and uniformity in the exercise of the power. In these cases, of course the construction and application of the constitutional check bring the matter, to a certain extent, within the control of the courts.* So, in the State of Vermont, the Supreme Court has said, "If the legislature have the right of taxation over any given property or possession, that power is admitted to be unlimited and uncontrollable, except by their own discretion."†

In several of the States, however, owing perhaps to the results of experience in regard to the abuse of the legislative power, various precise and specific constitutional restrictions have been laid upon the taxing power. The insertion of these clauses of course brings the subject of taxation within the ultimate control of the judiciary; and the matter is so important that I annex some of the provisions on the subject, to be found in the more recent constitutions.

Michigan.—"The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."‡

Illinois.—"The General Assembly shall provide for levying a tax by valuation, so that any person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, bro-

* Providence Bank *vs.* Billings, 4 Peters, 514; Brewster *vs.* Hough, 10 N. H. 138; Mack *vs.* Jones, 1 Foster, 393; Blackwell on Tax Titles, p. 9.

† Herrick *vs.* Randolph, 13 Verm. 529. Taxes are neither judgments nor contracts, and are not the subject of set-off as such. Peirce *vs.* City of Boston, 3 Met. 520.

‡ Constitution of Michigan, art. xiv., § 11.

kers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, toll-bridges, and ferries, and persons using and exercising franchises and privileges in such manner as they shall from time to time direct."*

Tennessee.—"All property shall be taxed according to its value; that value to be ascertained in such manner as the legislature shall direct, so that the same shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; but the legislature shall have power to tax merchants, peddlers, and privileges, in such manner as they may from time to time direct. A tax on white polls shall be laid in such manner and of such an amount as may be prescribed by law."†

Louisiana.—"Taxation shall be equal and uniform throughout the State. All property on which taxes may be levied in this State shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied. The legislature shall have power to levy an income tax, and to tax all persons pursuing any occupation, trade, or profession."‡

California.—"Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law."§

Wisconsin.—"The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe."‖

Texas.—"Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law, except such property as two thirds of both houses of the legislature may think proper to exempt from taxation. The legislature shall have power to lay an income tax, and to tax all persons pursuing any occupation, trade, or profession, provided that the term "occupation" shall not be construed to apply to pursuits either agricultural or mechanical."¶

Arkansas.—"All property subject to taxation shall be taxed accord-

* Constitution of Illinois, art. ix., § 2.
† Constitution of Tennessee, art. ii., § 28.
‡ Constitution of Louisiana, tit. vi., § 123.
§ Constitution of California, art. xi., § 13.
‖ Constitution of Wisconsin, art. viii., § 1.
¶ Constitution of Texas, art. vii., § 27.

ing to its value; that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value; provided, the General Assembly shall have power to tax merchants, hawkers, peddlers, and privileges, in such manner as may from time to time be prescribed by law; and provided further, that no other or greater amounts of revenue shall at any time be levied than required for the necessary expenses of government, unless by a concurrence of two thirds of both houses of the General Assembly. No poll-tax shall be assessed for other than county purposes. No other or greater tax shall be levied on the productions or labor of the country, than may be required for expenses of inspection."*

Missouri.—"All property subject to taxation in this State shall be taxed in proportion to its value."†

Massachusetts.—"And, further, full power and authority are hereby given and granted to the said General Court, from time to time, to impose and levy proportionable and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident and estates lying within, the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandises, and commodities whatsoever, brought into, produced, manufactured, or being, within the same."‡

In construing these provisions it has been held, in many of the States, that the words "equal and uniform" apply only to a direct tax on property; and that the clause in regard to uniformity of taxation does not limit the power of the legislature as to the objects of taxation, but is only intended to prevent an arbitrary taxation of property, according to kind or quality, without regard to value. Specific taxes have therefore been sustained as a valid exercise of the legislative power. Thus a road tax in Illinois,§ a bank tax

* Constitution of Arkansas, art. ix., Revenue, § 2.
† Constitution of Missouri, art. xi., § 19.
‡ Cons. of Massachusetts, § 1, art. iv.
§ Sawyer *vs.* City of Alton, 3 Scammon, p. 127.

in Massachusetts,* and a tax on merchants and bankers' licenses in California,† have all been held legal and binding.‡

In construing the clause in regard to uniformity of taxation in Louisiana, it has been held that this provision applies as well to municipal and parochial as to State taxes, and that an ordinance of a parish police jury, to compel the inhabitants of a particular portion of the parish to pay for certain embankments, is unconstitutional.§

Many interesting cases have arisen on the subject of exemption from taxation. It has been decided that, where exemption from taxation is made a condition of a grant, it is in the nature of a contract: the grant and its conditions are equally inviolable.‖ But where the exemption results from a general law, and does not form a portion of a grant, any subsequent legislature

* Portland Bank *vs.* Apthorp, 12 Mass., p. 252.

† People *vs.* Dorr, Same *vs.* Hussey, not yet reported.

‡ See, also, in Texas, Aulanier *vs.* Gov., 1 Texas, 653; see contra, Crow *vs.* The State of Missouri, 13 Miss. R.

§ Cumming *vs.* Police Jury, 9 La. Ann. R. 503.

In regard to "*proportional taxation*" in Massachusetts, see City of Lowell *vs.* Hadley, 8 Met. 181; City of Boston *vs.* Shaw, 1 Met. 137. An act providing that the expense of building a particular bridge shall be borne in part by the county within which it is situated, when by the operation of the general laws of the commonwealth the expense would be borne wholly by the town within which it is situated, does not violate the constitutional provision of Massachusetts requiring taxation to be proportional and reasonable. The Inhabitants of Norwich *vs.* The County Commissioners of Hampshire, 13 Pick. 60. A city by-law requiring the owners or occupants of houses to clear the snow from the side-walks in front of their property, is not strictly a by-law levying a tax. It is rather to be regarded as a police regulation. The duty required is a duty upon the person in respect to the property which he holds, and is valid under the constitution of Massachusetts. Goddard, Petr., 16 Pick., 504.

‖ State of New Jersey *vs.* Wilson, 7 Cranch., 164.

may repeal the exemption.* In New Hampshire, it has been said that the legislature could pass laws conferring exemptions from taxation, which would be valid till repealed. But it was intimated that it was not competent for the legislature to make any contract by which a party should be perpetually exempted from taxation, upon the ground that no such power was delegated to the legislature,—that it could not grant away the essential attributes of sovereignty or right of eminent domain; that these did not seem to furnish the subject matter of a contract.†

By a statute of 1793, in Massachusetts, all persons who had held the office of a subaltern, or of higher rank, were exempted from militia duty. This statute was repealed on the 4th of March, 1800, and the future exemption of militia officers was limited to such as should complete a term of five years' service, or be superseded. In March, 1810, the last statute was repealed and a new class of exempts defined, including the subalterns and officers mentioned in the act of 1793, on condition of an annual payment of two dollars. The case was presented of a subaltern officer, honorably discharged in May, 1799, and who, under the operation of the act of 1793, was exempted from militia duty. Under the act of 1810 a fine was imposed on him, and it was resisted on the ground that an exemption once acquired under existing laws could not be revoked; it being argued that the defendant had

* Herrick *vs.* Randolph, 13 Verm., 525. See cases in Connecticut as to exemption from taxation, Atwater *vs.* Woodbridge, 6 Conn., 223; Osborne *vs.* Humphrey, 7 Conn., 335; Parker *vs.* Redfield, 10 Conn., 490; Langdon *vs.* Litchfield, 11 Conn., 251.

† Brewster *vs.* Hough, 10 N. H., 145.

a vested right to his exemption. But the objection was overruled; and while admitting that there might be cases in which it would be deemed a breach of the public faith to revoke such exemptions, the court said that they were not authorized to weigh those motives, nor interfere with the right of the State to the military services of the citizen.*

The constitution of Indiana contains a provision, that no man's particular services shall be demanded without just compensation:† under this it has been held that a statute requiring professional services to be gratuitously rendered, would be unconstitutional and void; and it was also said, that a law which requires gratuitous services from a particular class in office, imposes a tax upon that class clearly in violation of the fundamental provision for a uniform and equal rate of assessment and taxation upon all citizens.‡

The constitution of Tennessee contains the same provision declaring "that no man's particular services shall be demanded, or property taken *or* applied to public use without the consent of his representatives, or without just compensation being made therefor." The use of the disjunctive conjunction is worthy of notice.§

Religious Toleration.—Most, if not all of our State constitutions contain provisions designed to secure the great principle of freedom of conscience. But there has been so little disposition to infringe this class of guarantees, that, like the other clauses in regard to attainder, freedom of the press, the right to bear arms, and standing armies, they have been very rarely

* Commonwealth *vs.* Baird, 12 Mass., 443.
† Constitution of Indiana, art i., § 21.
‡ Webb *vs.* Baird, 6 Indiana, 13.
§ Cons. of Tennessee, art. i., § 21.

brought within the range of judicial interpretation. Some few cases may be noticed.

In Maine, the constitution declares substantially that all men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience; that no one shall be hurt, molested, or restrained in his person, liberty, or estate for worshiping God after his own conscience; and that no subordination or preference of any sect or denomination to another shall ever be established by law; nor shall any religious tests be required as a qualification for any office or trust under the State.* It also provides, as follows: "A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people, to promote this important object the legislature are authorized, and it shall be their duty, to require the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools."† Under this general authority an act was passed in that State giving to school committees the power to "direct the general course of instruction, and what books shall be used in the respective schools." In a case arising upon this act, it has been held by the Supreme Court of Maine, that a requirement by a superintending school committee, that the Protestant version of the Bible should be read in the public schools of the town, by the scholars who are able to read, is in violation of no constitutional provision, and is binding on all the members of the schools, though composed of divers religious sects; and it was said, "The legislature establishes general rules

* Constitution of Maine, art. i., § 3.

† Constitution of Maine, art. viii.

for the guidance of its citizens. It does not necessarily follow that they are unconstitutional nor that a citizen is to be legally absolved from obedience, because they may conflict with his conscientious views of religious duty or right. To allow this, would be to subordinate the State to the individual conscience. A law is not unconstitutional because it may prohibit what a citizen may conscientiously think right, or require what he may conscientiously think wrong. The State is governed by its own views of duty. The right or wrong of the State is the right or wrong as declared by legislative acts constitutionally passed;" and it was held, that for a refusal to read the books thus prescribed, the committee might, if they saw fit, expel the disobedient scholar.*

In the State of Massachusetts, it has been held, on consideration of the second article of their Bill of Rights, which is similar to the constitutional provisions of Maine in regard to religious liberty above cited, that the rejection of a witness as incompetent by reason of his want of religious belief, was not in violation of it; the court saying, "It was intended to prevent prosecutions by punishing any one for his religious opinions, however erroneous they might be."†

Connected with this subject, I may here call attention to the original provisions of the constitution of Massachusetts; which, to a certain extent, recognized and declared a relationship and connection between the church and the State. The third article of the original Massachusetts Declaration of Rights was as follows:—

* Donohoe *vs.* Richards, 38 Maine, 379, 410. This is the only judicial decision of which I am aware, which touches on what has been familiarly called the *Higher Law.*

† Thurston *vs.* Whitney, 2 Cush. 104.

"The people have a right to invest their legislature with power to authorize and require, and the legislature shall from time to time authorize and require, the several towns, parishes, precincts, and other bodies corporate and politic, and religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily." And it was further declared in the same article, "that the people of this commonwealth have a right to, and do, invest their legislature with authority to enjoin upon all their subjects, an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend." In Adams *vs.* Howe *et al.*, 14 Mass. 346, the object and purpose of these clauses is stated as follows:—"Three great objects appear to have been the influential causes of this solemn declaration of the will of the people: 1. To establish at all events, liberty of conscience and choice of the mode of worship; 2. To assert the right of the State, in its political capacity, to require and enforce the public worship of God; 3. To deny the right of establishing any hierarchy, or any power in the State itself to require conformity to any creed or formulary of worship."

The provision was soon, however, considered unfriendly to the great interests of religious liberty; several statutes were passed designed to relieve individuals from any necessity of supporting the dominant religious sect in the State; and various cases are to be found in the Massachusetts reports, which are of much interest upon the subject to which they relate. So, under this

clause it was held that a person claiming ministerial taxes must be the public teacher of one, and that an incorporated, society.*

But these decisions are now of little practical importance, as the provision was struck from the Bill of Rights by a popular amendment of the constitution in the year 1833. It may be that as the cycles of human affairs revolve, the interest of the questions connected with these decisions, will again become actual and pressing.†

Under the first constitution, or charter, of the State of Connecticut also, provision for the support and maintenance of religious worship was treated as a

* See Barnes *vs.* First Parish in Falmouth, 6 Mass. 400, where the general character of the constitutional provision is discussed; Turner *vs.* Second Precinct in Brookfield, 7 Mass. 60. See also, Kendalls *vs.* The Inhabitants of Kingston, 5 Mass. 524; see Adams *vs.* Howe, 14 Mass. 341, as to the constitutionality of certain exemptions from the operation of the constitutional clause created by statute. See also, Holbrook *vs.* Holbrook, 1 Pick. 248, for another case on exemptions. See also, Gage *vs.* Currier, 4 Pick. 399.

† Many points of a general bearing will be found decided in the cases to which this controversy gave rise. So, in a case on the Massachusetts statute, exempting parties from the constitutional obligation to support the church, the Supreme Court of that State said, per Wilde, J.—"In many statutes it will be found that the preamble states imperfectly the views of the legislature, and can afford but little aid in the construction of the enacting parts. It is not unfrequently merely introductory to the first section, and it appears to me that it was so used in this statute." Holbrook *vs.* Holbrook, 1 Pick. 248.

In another case it was said, "Where the provisions of two statutes are dissimilar but not repugnant, a party may pursue the provisions of either. As if by one statute jurisdiction of a matter be given to one court, and afterwards by a new statute the same matter is made cognizable by another court, a party may select either tribunal. So, if a special statute providing that the inhabitants of a particular town may separate from a religious society on certain conditions, and a general statute is passed dissimilar but not repugnant, it is sufficient for a person to bring himself within the provisions of either." Gage *vs.* Currier, 4 Pick. 399.

duty resting on the State; and that provision was made and carried into effect through the instrumentality of local ecclesiastical societies, established by the State, through its legislative power; and under that constitution the General Assembly constantly exercised the power of establishing and dividing local ecclesiastical societies; but the present constitution of the State provides* that "no person shall, by law, be compelled to join or support, nor to be classed with or associated to, any congregation, church, or religious association;" and under this constitution it has been there decided that it is not competent for the legislature to divide an ancient local ecclesiastical society.†

Divorces.—Legislative acts granting divorces from the marriage tie, like the still more objectionable class of acts of attainder, derive their origin from the early periods of English history, when the line between legislative and judicial power was feebly drawn and ill understood, and when private rights were almost completely at the mercy of violent and reckless partisan legislation. But that age has fortunately passed, and the marked improvement that is visible in our jurisprudence on the subject of legislative divorces deserves special comment. The facility with which laws annulling the marriage contract were obtained from the legislatures of the several States, in our early history, was discreditable to our system; but many of our recent constitutions have shown their increased respect for the sacred institution of marriage by prohibiting, expressly and absolutely, all divorces, except

* Cons. of 1818, art. viii. § 1.

† The Second Eccl. Socy. of Portland *vs.* The First Eccl. Socy. of Portland, 23 Conn. 255.

such as are granted by courts of justice. Some of the clauses are here given:—

New York.—"Nor shall any divorce be granted otherwise than by due judicial proceedings."*

California.—"No divorce shall be granted by the legislature."†

Missouri.—"The General Assembly shall not have power to grant a divorce in any case."‡

Arkansas.—"The General Assembly shall not have power to pass any bill of divorce, but may prescribe by law the manner in which such cases shall be investigated in the courts of justice, and divorces granted."§

Texas.—"No divorce shall be granted by the legislature."‖

Wisconsin.—"The legislature shall never grant any divorce."¶

Tennessee.—"The legislature shall have no power to grant divorces, but may authorize the courts of justice to grant them for such causes as may be specified by law; provided that such laws be general and uniform in their operation throughout the State."**

Indiana.—"The General Assembly shall not pass local or special laws in any of the following enumerated cases:

"Granting divorces. * * * * * * *

"In all the cases enumerated in the preceding sections, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."††

Michigan.—"Divorces shall not be granted by the legislature."‡‡

Louisiana.—"No divorce shall be granted by the legislature."§§

Iowa.—"No divorce shall be granted by the General Assembly."‖‖

These changes in the fundamental law of so many

* Constitution of New York, art. i., § 10.
† Constitution of California, art. iv., § 26.
‡ Constitution of Missouri, art. iii., § 32.
§ Constitution of Arkansas, art. iv., § 24.
‖ Constitution of Texas, art. vii., § 18.
¶ Constitution of Wisconsin, art. iv., § 24.
** Constitution of Tennessee, art. xi., § 4.
†† Constitution of Indiana, art. iv., § 22.
‡‡ Constitution of Michigan, art. iv., § 26.
§§ Constitution of Louisiana, art. vi., § 114.
‖‖ Constitution of Iowa, art. iv., § 28.

of our States, are very curious and interesting; they show the facility with which our institutions lend themselves to improvement, and, at the same time, the rapidity with which a regulation or a law that commends itself to the national judgment is propagated from one member of the confederacy to another, thus keeping in harmony, though under various governments, the general organization and jurisprudence of the component parts of the empire.

Titles of Laws.—Some of the most important of the recent additions to our constitutional guarantees, are to be found in the restrictions imposed on what may be called the practice and procedure of our legislative bodies. Great abuses have been found to result from a practice, already mentioned, of ancient date, of incorporating in the same bill subjects of a very heterogenous nature, resorted to either for the purpose of surprising the good faith of the lawmaking body, or of enlisting hostile interests in support of the proposed act.* To put a stop to this practice, many States of the Union have incorporated into their fundamental laws, the provisions some of which I proceed to give.

* Acts of this kind are called, in the country from which we derive most of both our virtues and our defects, hodge-podge acts. The English statute, 17 Geo. II., c. 40, is entitled thus: "An act to continue the several laws therein mentioned, for preventing theft and rapine on the northern borders of England; for the more effectual punishing wicked and evil disposed persons going around in disguise, and doing injuries and violences to the persons and properties of his Majesty's subjects, and for the more speedy bringing the offenders to justice; for continuing two clauses, to prevent the cutting or breaking down the bank of any river or sea-bank, and to prevent the malicious cutting of hop-binds; and for the more effectual punishment of persons maliciously setting on fire any mine, pit, or delph of coal or cannel coal; and of persons unlawfully hunting or taking any red or fallow deer in forests or chafes, or beating or wounding the keepers or other officers in forests, chafes, or parks; and for granting a liberty to

California.—"Every law enacted by the legislature shall embrace but one subject, and that shall be expressed in the title."*

Missouri.—"No private or local bill which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title."†

Iowa.—"Every law shall embrace but one object, which shall be expressed in its title."‡

Wisconsin.—"No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."§

Michigan.—"No law shall embrace more than one object, which shall be expressed in its title."‖

Indiana.—"Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."¶

carry sugars of the growth, produce, or manufacture of any of his Majesty's sugar colonies in America, from the said colonies directly to foreign ports in ships built in Great Britain, and navigated according to law; and to explain two acts relating to the prosecution of offenders for embezzling naval stores, or stores of war; and to prevent the retailing of wine within either of the Universities in that part of Great Britain called England, without license." I take this from a very interesting "Report from the Committee upon Temporary Laws, Expired or Expiring," ordered to be printed 13 May, 1796, Parl. Reg., vol. xliv., p. 822. The Report contains a general review of the condition of the statute law of the kingdom, and severely censures it as "discordant, perplexed, incongruous, verbose, tautologous, and obscure." See also, *ante*, p. 51.

* Constitution of California, art., iv., § 25.

† Constitution of Missouri, art. iii, § 34.

‡ Constitution of Iowa, art. iv., § 26.

§ Constitution of Wisconsin, art. iv., § 18.

‖ Constitution of Michigan, art. iv., § 20.

¶ Cons., art. iv., § 19. This section deserves notice for its precise statement of the consequences of a disregard of the constitutional mandate, and is well worthy of imitation. It puts an end to the mischievous consequences which might flow from the idea of construing a constitutional direction as directory merely; and it asserts very distinctly, though indirectly, the power of the judiciary over unconstitutional acts. The constitution of Indiana, in other respects, bears the marks of more accurate legal knowledge than is always manifest in our constitutions.

Ohio.—"No bill shall contain more than one subject, which shall be clearly expressed in its title."*

Kentucky.—"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."†

Louisiana.—"Every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title."‡

The evils which these provisions are intended to prevent, are well stated by the Supreme Court of Louisiana. "The title of an act often afforded no clue to its contents. Important general principles were found placed in acts private or local in their operations; provisions concerning matters of practice or judicial proceedings, were sometimes included in the same statute with matters entirely foreign to them; the result of which was, that on many important subjects the statute law had become almost unintelligible, as they whose duty it has been to examine or act under it can well testify. To prevent any further accumulation to this chaotic mass, was the object of the constitutional provision under consideration."§

In the same State, it has been said to be improper to give this provision "too rigorous and technical a construction." If in applying it we should follow the rules of a nice and fastidious verbal criticism, we should often frustrate the action of the legislature, without fulfilling the intention of the framers of the constitution; and so it has been said, that an act entitled an act to "*provide a homestead* for widows and children" was good, though in fact the statute only

* Constitution of Ohio, art. ii., § 16.

† Constitution of Kentucky, art. ii., § 37.

‡ Constitution of Louisiana, tit. vi., § 115.

§ Walker *vs.* Caldwell, 4 Ann. R., 298.

*provided the pecuniary means sufficient to purchase a homestead.** In the State of Maryland, it has been said that the provision that "every law enacted by the legislature shall embrace but one subject, and that shall be designated by the title," was to prevent grafting upon subjects of great public benefit and importance foreign and pecuniary matters for local and selfish purposes.†

In California, much less importance has been attached to the provision, the court saying, "We regard this section of the constitution as merely directory; and if we were inclined to a different opinion, would be careful how we lent ourselves to a construction which must in effect obliterate almost every law from the statute book, unhinge the business and destroy the labor of the last three years. The first legislature that met under the constitution, seems to have considered this section as directory; and almost every act of that and the subsequent sessions would be obnoxious to this objection. The contemporaneous exposition of the first legislature, adopted or acquiesced in by every subsequent legislature, and tacitly assented to by the courts, taken in connection with the fact that rights have grown up under it so that it has become a rule of property, must govern our decision."‡

Amendment of Laws.—Serious confusion is constantly caused by the great looseness which prevails in our legislative bodies in regard to the practice

* Succession of Lanzetti, 9 La. Ann., 329. See, also, Læfon *vs.* Dufrocq, *ibid*, 540.

† Davis *vs.* The State, Court of Appeals, 7 Maryland, 151. In Texas, as to the provision that every law must embrace but one object, which shall be expressed in the title, see Battle *vs.* Howard, 13 Texas, 345.

‡ Washington *vs.* Murray, 4 California, 388.

pursued by them on the subject of repealing or amending laws.* The former branch of the subject has not yet received with us the general attention which it merits; but at least one State (Maryland)has acted on it, and many of our recent State constitutions contain provisions on the subject of amending legislative enactments which are well worthy of careful attention and of general adoption. I give some of them :—

Maryland.—"The style of all laws of this State shall be, 'Be it enacted by the General Assembly of Maryland;' and all laws shall be passed by original bill; and every law enacted by the legislature shall embrace but one subject, and that shall be described in the title; and no law, or section of law, shall be revised, amended, or repealed, by reference to its title or section only."†

* "Perhaps the greatest evil of all, as it affects the interests of the community at large, is the utter uncertainty that prevails as to what is, and what is not, repealed. This arises from the vicious practice already noticed, and which pervades the whole body of the statute law, of repealing some former acts or enactments, not by express reference, but by provisions that '*so much of any former act of Parliament, heretofore made, as is inconsistent with or repugnant to the act in question, shall be, and is thereby, repealed;*' or, as continually occurs, by clauses upon the same subject, and for the most part to the same effect, as other clauses in former acts (but without any express reference to former acts), leaving it doubtful whether the later enactments supersede and repeal the earlier, or whether both are still to remain in force and constitute distinct provisions in the statute law. The doubts and difficulties, and, consequently, the vast amount of litigation, of which this uncertainty is the cause, are quite beyond calculation. It has been thought that more than half of the business of all the courts of law and equity in the Kingdom consists of disputed questions upon the construction of acts of Parliament; and, if that be so, it is certain that more than a fourth of the whole is caused entirely by this mischievous course of legislation. It is often found impossible to reconcile these accumulations of enactments; hence the multiplicity of suits, arguments, and discussions, and, at length, difference among the judges themselves, and, ultimately, appeals to tribunals of the last resort."

I take the above extract from a very interesting letter by Sir Fitzroy Kelly, recently placed at the head of the new commission upon the consolidation of the statute law of England, as I find it extracted in the Boston Law Reporter for January, 1857.

† Cons. of Maryland, art. iii., § 17.

Texas.—"No law shall be revised or amended by reference to its title; but in such case the act revised, or section amended, shall be re-enacted, and published at length."*

Michigan.—"No law shall be revised, altered, or amended, by reference to its title only; but the act revised, and the section or sections of the act altered or amended, shall be re-enacted, and published at length."†

Indiana.—"No act shall ever be revised or amended by mere reference to its title; but the act revised, or section amended, shall be set forth and published at full length."‡

Ohio.—"No law shall be revised or amended unless the new act contain the entire act revised or the section or sections amended; and the section or sections so amended shall be repealed."§

Louisiana.—"No law shall be revised or amended by reference to its title; but, in such case, the act revised or section amended shall be re-enacted, and published at length."‖

In regard to the subject of repeal, it has been decided, in Maryland, that the constitutional provision that "no law, or section of law, shall be revised, amended, or repealed, by reference to its title or section only," is not inconsistent with the doctrine of repeal, by implication, of all laws inconsistent with an independent act of the legislature establishing a new or revising some previous policy of the State. And, in regard to the general policy of the restriction, it has been said, in the same State, that "this clause was inserted in the constitution for the purpose of preventing incautious and fraudulent legislation, and to enable members to act knowingly upon all subjects, and to guard them from the contingency of voting for the repeal or revival of laws, through mistake or acci-

* Constitution of Texas, art. vii., § 25.
† Constitution of Michigan, art. iv., § 25.
‡ Constitution of Indiana, art. iv., § 21.
§ Constitution of Ohio, art. ii., § 16.
‖ Constitution of Louisiana, tit. vi., § 116.

dent, under the deceptive language often employed in the title of acts."*

Constitutional Majorities.—The constitutions of most of the States contain provisions in regard to certain subjects deemed of special importance, by which no legislative action can be had unless positive and specific majorities are obtained†. Some of the most prominent are as follows:—

Texas.—"No private corporation shall be created unless the bill creating it shall be passed by two thirds of both Houses of the legislature; and two thirds of the legislature shall have power to revoke and repeal all private corporations, by making compensation for the franchise."‡

Michigan.—"The legislature shall pass no law altering or amending any act of incorporation heretofore granted, without the assent of two thirds of the members elected to each house; nor shall any such act be renewed or extended. This restriction shall not apply to municipal corporations."§

"The assent of two thirds of the members elected to each house of the legislature, shall be requisite to every bill appropriating the public money or property for local or private purposes."‖

* Davis *vs.* The State, 7 Maryland, 151. In Indiana, as to the construction of the clause, see Rogers' Admrs. *vs.* The State, 6 Indiana, 31. The Constitution of Tennessee contains a provision to the effect, that after a bill has been rejected, no bill containing the same substance shall be passed into a law during the same session.—Cons., art. ii., § 19.

† For cases decided on these provisions, as to the requisition of a certain number of votes, and how the fact is to appear, see Thomas *vs.* Daken, 22 Wend. 112; Warner *vs.* Beers, 23 Wend. 103; Hunt *vs.* Vanbelstyer, 25 Wend. 605; Purdy *vs.* The People, 4 Hill, 384; Buffalo and N. Falls R. R. *vs.* Buffalo, 5 Hill, 209; People *ex rel.* Lynch *vs.* Mayor, 25 Wend. 680; People *vs.* Morris, 13 Wend. 325; Lansing *vs.* Smith, 8 Cowen, 146; Coml. Bk. of Buffalo *vs.* Sparrow, 2 Denio, 97; De Bow *vs.* The People, 1 Denio, 9; Gifford *vs.* Livingston, 2 Denio, 380; Russell *vs.* The Mayor, 2 Denio, 461; Warner *vs.* The People, 2 Denio, 272; Supervisors of Niagara *vs.* People, 4 Hill, 20; Supervisors of Niagara *vs.* People, 7 Hill, 504; see, also, *ante*, ch. iii., p. 68.

‡ Constitution of Texas, art. vii., § 31.

§ Constitution of Michigan, art. xv., § 8.

‖ Constitution of Michigan, art. iv., § 45.

Indiana.—"A majority of all the members elected to each house shall be necessary to pass every bill or joint resolution."*

In Michigan, under the clause above cited,—that the legislature shall pass no act of incorporation, unless with the assent of at least two thirds of each *house*,—it has been decided that by this phrase is meant the legislative body, or quorum to do business, comprising a majority of the members elected, to and qualified to act as members of the body.†

The Judiciary.—Most of the State constitutions, as has been elsewhere said, seek to draw a clear line between the legislative and judicial functions; but in hardly any thing have they less agreed than in regard to the creation and the tenure of judicial office. In some cases the States disagree with each other; and in others their own policy, at different times, is irreconcilably variant and discrepant. In New Hampshire, the constitution in noble language declares it to be "essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, that the judges of the Supreme Judicial Court should hold their offices so long as they behave well,—subject, however, to such limitations, on account of age, as may be provided by the constitution of the State; and that they should have honorable salaries, ascertained and established by standing laws."‡

* Constitution of Indiana, art. iv., § 25.

† Southworth *vs.* Palmyra and Jackson R. R. Co., 2 Michigan, 287.

‡ Constitution of New Hampshire, part i., art. 35.

On the other hand, the constitution of Mississippi holds this language: "No person shall ever be appointed or elected to any office in this State for life, or during good behavior; but the tenure of all offices shall be for some limited period of time, if the person appointed or elected thereto shall so long behave well."*

The practice of the States has been equally discrepant. In some, the judges have been appointed for a term of years; in some, during good behavior; in some, till a specified age; in some, they have been created by a governor and senate; in some, by the legislature; and now, within the last ten years, since the adoption of the New York constitution of 1846, many of the States have made them eligible by the popular voice, and for terms of office varying from six to fifteen years.

I have intended to avoid, in this volume, the discussion of any questions having any political bearing; nor can it justly be said that these various systems have been as yet sufficiently tried to furnish a complete test of what may be the best mode of creating these officers; or as to that which is probably more important, what should be the tenure of judicial office in this country; but all will agree that there is no subject of greater importance; and that every other consideration must finally give way to the paramount necessity of securing an honest and an able judiciary.

In Louisiana, the provisions of the State constitution creating the judiciary, and prescribing the mode of their appointment or election, have been held to be incompatible with the statute authorizing a judge who is incompetent, or who declines to try a cause,—or, in the language of that State, recuses himself,—to appoint

* Constitution of Mississippi, art. i., § 30.

a member of the bar for the purpose; and the act has been declared void.*

Suits against the State.—Several of the States have, by special constitutional clauses, abolished the old feudal doctrine which forbids all judicial redress against the government. These provisions are so much the more important, because they tend to diminish the number of those applications to legislative consideration which are among the most fertile sources of that corruption which is one of the great evils of our age. I annex the provisions as they stand in several of the State constitutions:—

California.—"Suits may be brought against the State in such manner and in such courts as shall be directed by law."†

Wisconsin.—"The legislature shall direct, by law, in what manner and in what courts suits may be brought against the State."‡

Arkansas.—"The General Assembly shall direct, by law, in what courts and in what manner suits may be commenced against the State."§

Missouri.—"The General Assembly shall direct, by law, in what manner and in what courts suits may be brought against the State."‖

Illinois.—"The General Assembly shall direct, by law, in what manner suits may be brought against the State."¶

Indiana.—"Provision may be made, by general law, for bringing suit against the State as to all liabilities originating after the adoption of this constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed."**

In New York, the old rule prevails, that the State cannot be sued, in her own courts, for any cause of

* The State of Louisiana *vs.* Judge of Sixth District, 9 La. Ann. R. 62.

† Constitution of California, art. xi., § 11.

‡ Constitution of Wisconsin, art. iv., § 27.

§ Constitution of Arkansas, art. iv., § 22.

‖ Constitution of Missouri, art. iii., § 25.

¶ Constitution of Illinois, art. iii., § 34.

** Constitution of Indiana, art. iv., § 24. *Vide ante*, p. 568, note, as to the Constitution of Indiana.

action. In conformity with this principle, it has been decided, that the State courts have no power to restrain, by injunction, the acts of officers of the State who are proceeding under the authority of law; and that the fact of the statute in question being unconstitutional forms no ground for granting the injunction.* The courts of the Federal government, however, are the legal superiors of the States in cases in which they have jurisdiction; and it has been held that an injunction may be granted by the United States courts to restrain State officers from collecting a State tax which was unlawful under the laws of the United States.†

A few interesting miscellaneous provisions of our State constitutions may be noticed. By art. iv., § 11, of the constitution of Alabama, the power to remit fines and forfeitures is given to the governor; and in that State it has been held, that this power cannot be exercised by the legislature, and that, therefore, any act which attempts, directly or indirectly, to

* Thompson *vs.* The Commissioner of the Canal Fund, 2 Abbott's Pr. Rep. 248.

In regard to municipal corporations, the contrary doctrine is held; and where an act of such a corporation is clearly illegal, and the necessary effect of the act will be to injure or impose a burthen on the property of a corporator, it will warrant the interference of the court by injunction; Christopher *vs.* The Mayor, &c. of N. Y., 13 Barb. 567. So, if the municipal corporation is guilty of a breach of trust; Milhau *vs.* Sharp, 15 Barb. 193. So, again, the same principle has been decided where the act of the corporation was in violation of an express law, and tended to increase the taxes; De Baun *vs.* The Mayor, 16 Barb. 392. In this case Edmonds, J., and Morris, J., dissented.

Under the former judicial system of the State, the Court of Chancery had no power to enjoin proceedings for the collection of an illegal assessment; Meserole *vs.* Mayor of Brooklyn, 8 Paige, 198; reversed on appeal, by the Court of Errors, 26 Wend. 132.

† Osborn *vs.* The U. S. Bank, 9 Wheat. 738.

remit a fine, either before or after it has been paid, is unconstitutional.*

In Louisiana, the constitution declares that the State shall not become a subscriber to the stock of any corporation or joint-stock company;† but it has been held that this does not take from the legislature the power to authorize a subscription by a municipal corporation to a corporation or joint-stock company.‡

The constitution of New York, of 1846, making an effort to eradicate the manorial tenures or long leases, reserving rents in money, produce, or services, which, in the language of Mr. Justice Gridley, "experience had proved to be prejudicial to the prosperity and interests of the State, as a question of political economy," prohibited leases or grants of agricultural land for more than twelve years, in which any rent or service should be reserved. It has been held, that this provision applies only to such rents and services as are certain, periodical, and which issue out of the land, and not to covenants for the performance of duties not certain nor periodical, nor confined to the use of the land alone.§

The constitution of the State of Indiana declares‖ "that all trust funds held by the State shall remain inviolate, and be faithfully applied to the purposes for which the trust was created;" and under this clause

* Haley *vs.* Clark, 26 Ala. 439.

† Art. 121.

‡ Police Jury *vs.* McDonogh's Succession, 8 La. Ann. R. 341; City of New Orleans *vs.* Graihle, 9 La. Ann. R. 561.

§ Stephens *vs.* Reynolds, 2 Seld. 454. The constitution of Michigan contains a similar proviso: "No lease or grant hereafter of agricultural land, for a longer period than twelve years, reserving any rent, or service of any kind, shall be valid."—Cons., art xviii., § 12.

‖ Cons., art. viii., § 7.

it has been held, that a law diverting the proceeds of the sixteenth section, granted by Congress to the inhabitants of each township for the use of schools, from the use of schools in the congressional township where the land was situated to the use of the school system of the State at large, is unconstitutional and void.*

In terminating the examination, necessarily extremely partial and incomplete, of this interesting subject, the most superficial observer cannot fail to be struck with the great and growing uniformity in the fundamental organization of so many governments which, in their several spheres, are absolutely independent. Provisions inserted in the revision of one State constitution are adopted by others; the judicial interpretation adopted by the courts of one member of the Union is followed by its sister States; so that the similarity between our institutions is daily becoming more and more manifest. In regard to the division and general arrangement of political power, the right of suffrage, the guarantees of private property, the protection of private rights,—the gradual result of the three quarters of a century which have elapsed since the foundation of our institutions was laid, aided by the active intercourse and communication of our citizens, and by a press of great intelligence and vigor, has been to bring the members of the confederacy to a similarity of condition greater than any other age or any other people can show. So marked a uniformity of language, laws, and institutions, prevailing through territories so vast or among populations so numerous, the world has never before beheld.

* The State *vs.* Springfield Township, 6 Indiana, 83.

On one subject alone does any considerable diversity of condition or difference of opinion exist. That subject is rendered embarrassing beyond all others by disparity of race, and by dissimilarity of climate and production. But our past history affords us reasonable grounds to hope and to believe that if the question be approached in the fraternal spirit which our history inculcates, and in the humane temper which marks our national character, a solution of the difficulties attendant upon it will be found, worthy of the practical sense to which we lay claim, and calculated to perpetuate that Union on which not only our dearest interests, but the best hopes of humanity depend.

As to the power of the judiciary to investigate the correctness of legislative action founded on a question of fact, the following case may be noticed: The constitution of New York, of 1846, provided that every county should be entitled to a member of Assembly; and that no new county should be hereafter created, unless its population shall entitle it to a member. The county of Schuyler was created by laws of 1854, c. 386. The question was, whether the legislature, in determining the question of population, was confined to the decennial State census, taken in 1845, or whether its own decision on the point was to be considered conclusive,—De Camp *vs.* Eveland, 19 Barb. 81.

A repealing clause in an unconstitutional statute, declaring that all laws contravening the provisions of this act be, and the same are hereby, repealed, does not affect the previous laws,—Tims *vs.* The State, 26 Ala. 165.

Where an act is void because unconstitutional, an amendatory act is of no effect to give it validity,—Bradley *vs.* Baxter, 15 Barb. 131; M'Spedon & Baker *vs.* Stout, Sup. Court, N. Y., by Davies, J. (not reported.)

Mr. Rawle's work on the Constitution, published in 1825, contains the following statement:—"The provincial constitutions of America were, with two exceptions, modeled with some conformity to the English theory; but the colonists of Rhode Island and Providence Plantations were empowered to choose all their officers—legislative, executive, and judicial; and, about the same time, a similar charter was granted to Connecticut. And thus, complains Chalmers, a writer devoted to regal principles, 'a mere democracy, or rule of the people, was established. Every power, deliberative

and active, was invested in the freemen or their delegates; and the supreme executive magistrate of the empire, by an inattention which does little honor to the statesmen of those days, was wholly excluded.' He expresses his own doubts whether the king had a right to grant such charters.

"But, although in all the other provinces the charters were originally granted, or subsequently modified, so as to exclude the principle of representation from the executive department, these two provinces, at the time of our Revolution, retained it undiminished. The suggestion of the full, unqualified extension of the principle of representation may, therefore, be justly attributed to the example of Rhode Island and Connecticut, which when converted into States, found it unnecessary to alter the nature of their governments, and continued the same forms in all respects, except the nominal recognition of the king's authority, till 1818, when Connecticut made some minor changes and adopted a formal constitution. Rhode Island, however, is still satisfied with the charter of Charles II., from which it has been found sufficient to expunge the reservation of allegiance, the required conformity of its legislative acts to those of Great Britain, and the royal right to a certain portion of gold and silver ores, which, happily for that State, have never been found within it."—Rawle on the Constitution, p. 9.

"Connecticut," says the Federalist, Letter 38, "has always been considered as the most popular State in the Union."

Mr. Hoffman, in his Legal Outlines, defines the Constitution of a State to be "The fundamental regulations which determine the manner of executing the public authority, and which define the relation between the political body and its members."—Lect. ix. p. 365.

Mr. Hoffman's work was, unhappily, left incomplete, the first volume only, relating to the elements of natural, political, and feudal jurisprudence, was published. The second and third volumes, intended to treat of the elements of municipal law, never appeared. The volume which we have is the production of an accomplished lawyer and scholar, full of the marks of extensive reading and accurate reflection. The seventh chapter, of law and its general properties, is particularly valuable.

CHAPTER XI.

LIMITATIONS IMPOSED UPON LEGISLATIVE POWER BY THE CONSTITUTION OF THE UNITED STATES.

Clauses of the Federal Constitution which operate as checks on legislative action—General nature of the Legislative Power of the Union—General Principles of Constitutional Construction or Interpretation—Interpretation and application of Particular Clauses—Habeas Corpus—Bills of Attainder—Ex-post-facto Laws—Fugitives from Justice—Fugitives from Labor—Religious Freedom—Freedom of Speech and of the Press—Search Warrants and Seizures—Only one Trial for Offenses—Due Process of Law—Compensation for Private Property taken for Public Purposes—Trial by Jury—Excessive Bail and Cruel Punishments—The Obligation of Contracts—Vested Rights—Conclusion.

In my consideration of the Constitution of the United States, with reference to the subject of this work, I shall pursue the same general course which I have followed in regard to the Constitutions of the several States. I shall, therefore, not treat of the organization of political authority, nor of the distribution of power between the State legislatures and the general government, resulting from the provisions of the Federal charter. I shall, on the contrary, confine myself mainly to the consideration of those clauses of the instrument which act as limitations on the action either of Congress or of the legislatures of the several States, in regard to matters of private right.

I omit, therefore, as falling outside of the scope and province of this work, all the interesting cases growing out of the clauses of the Federal Constitution in regard to the judiciary, the regulation of commerce, emission of bills of credit, the borrowing of money, levying of taxes, naturalization, bankruptcy, coinage, the post-office, patents, copyrights, and the like. These belong, strictly, to a treatise on the Constitution of the United States, a subject that has already been treated by a hand far abler, far more familiar with the theme, but which now, unhappily, rests from its useful and incessant labors.*

My chief object, as I have said, being to treat of written law as settling and declaring private rights and duties, I shall, after an examination of the general principles of interpretation applicable to the Constitution of the United States, limit myself almost exclusively to a consideration of those clauses which have no direct connection with the organization or distribution of political power, but are intended, by limiting legislative supremacy, to operate as definitions of private duty or guarantees of private right,—to those clauses, by virtue of which it has been said, that the Constitution of the United States contains what may be deemed a Bill of Rights

* In addition to the great work of Mr. Justice Story, and the volumes of Mr. Rawle and Mr. Sergeant, the student of constitutional law who wishes *haurire fontes* will recur to the Madison Papers and the Federalist, Mr. Tucker's Blackstone, the writings of Jefferson and Hamilton *passim*, and to our truly national work, the Commentaries of Mr. Chancellor Kent. In recent days, the speeches and writings of Mr. Webster and of Mr. Calhoun, great rival chiefs of widely adverse schools, furnish most important instruction. There is no better or more pleasing compend for popular use or elementary instruction, than the Constitutional Jurisprudence of the Hon. Wm. Alexander Duer, 2d edition, 1856.

for the people of each State;* and in regard even to these, I shall discuss them in a brief and summary way, for the same reason that they may be found ably and amply discussed elsewhere.

The sections of the Constitution of the United States, containing the clauses designed to perform the functions to which I have referred, will be found to be the following:—

Article I., Section 9.

(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.

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.

Article III., Section 2. § 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

* Fletcher *vs.* Peck, 6 Cranch, 138. "In like manner," says the Federalist, "the proposed Constitution, if adopted, will be the Bill of Rights of the Union." (Letter 84.) That it did not contain a Bill of Rights in form, was, as is well known, one of the chief arguments used against its adoption. Story *Com.* § 1858.

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.

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of any 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 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 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.

Article VI.

(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.

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 offense, 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 district 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 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.

Before proceeding to discuss the interpretation of these clauses in detail, it is desirable to have a general idea of the nature of the legislative power of the Union, as well as of the leading principles of construction applicable to the Constitution of the United States. Rules of interpretation vary with the instrument to be expounded. A statute is not controlled by the same maxims as those applicable to State constitutions; and State constitutions are subjected, in some respects, to different principles of construction from those which are held proper in regard to the Constitution of the United States.*

* Mr. Justice Story, in the fifth chapter of the second book of his Commentaries on the Constitution, states the rules of interpretation applicable to the Constitution of the United States, to be:

I. That it is to be construed according to the sense of the terms and the intention of the parties.

II. We are to consider its nature and objects, its scope and design as apparent from the structure of the instrument viewed as a whole, and also viewed in its component parts, taking into view the antecedent situation of the country and its institutions, the existence and operations of the State governments, the powers and operations of the confederation, contemporary history, contemporary interpretation, and practical exposition.

III. It is to receive a reasonable interpretation of its language and its powers, not straining its words beyond their common and natural sense, but giving their exposition a fair and just latitude.

The great political idea, if it may be so called, on this subject of the Federal Charter, is the one expressed in the tenth amendment above cited, and repeat-

IV. Where a power is granted in general terms, the power is to be construed as co-extensive with the terms, unless some clear restriction upon it is deducible from the context.

V. A power given in general terms is not to be restricted to particular cases, merely because it may be susceptible of abuse.

VI. A given power is not to be extended by construction beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous.

VII. No construction of a given power is to be allowed which plainly defeats or impairs its avowed objects.

VIII. Where a power is remedial in its nature, there is much reason to contend that it ought to be construed liberally.

IX. In the interpretation of a power, all the ordinary and appropriate means to execute it are to be deemed a part of the power itself.

X. Powers may be implied.

XI. As between the States and general government, some of the powers conferred on the latter are concurrent, and some exclusive.

XII. The maxims which have found their way not only into judicial discussions but into the business of common life, as founded in common sense and common convenience, are applicable to the construction of the Constitution.

XIII. The rational import of a single clause is not to be narrowed so as to exclude implied powers resulting from its character, simply because there is another clause enumerating certain powers which might otherwise be deemed implied powers within its scope.

XIV. Every word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.

XV. Where words have different meanings, resort must be had to the context to determine the construction.

XVI. Where technical words are used, the technical meaning must be given them.

XVII. The same word is not necessarily to be construed in the same sense wherever it occurs in the same instrument.

XVIII. A constitution does not, and cannot from its nature, depend in any great degree upon mere verbal criticism, or upon the import of single words.

Some of these rules are, it will be observed, principles of what may be called political construction; others, very sound and sagacious maxims applicable to all interpretation, and especially to that of constitutional law.

edly in various ways affirmed,* that as to the general outline of the instrument, and the government created by it, the Constitution of the United States is a grant and not a limitation of power. Congress can exercise no powers except those expressly delegated. Of course, however, this idea does not apply to the express prohibitions contained in the instrument, whether imposed upon the States or on the general government. In regard to these, the Constitution of the United States, like those of the several members of the confederacy, is a limitation on legislative power.

This broad line of distinction between the powers of the Federal government and that of the States, leaves little room in regard to the government of the Union,

The learned author also elaborately discusses the subject of the formation of the government, whether created by the States as such or by the people directly, as well as the general question whether the Constitution is to be strictly construed. These questions are of the deepest interest, but they relate more particularly to the distribution of political power; and I therefore content myself here with a bare reference to them.

A Constitution, from its nature, deals in generals, not in details. Its framers cannot perceive minute distinctions which arise in the progress of the nation; and therefore confine it to broad and general principles. Bank U. S. *vs.* Deveaux, 5 Cranch, 87, a case as to the citizenship of corporations aggregate.

* The Federal government is one of delegated powers. All powers not delegated to it, or inhibited to the States, are reserved to the States or the people. Briscoe *vs.* Bank of Commonwealth of Kentucky, 11 Peters, 257; see this case in regard to the clause prohibiting the States to issue bills of credit.

"A different rule obtains in interpreting the powers in the constitutions of the United States and the States. In ascertaining the powers of the former, we examine to see what powers are expressly granted or are necessarily implied for their exercise. In the latter we only examine to see what are denied by the Federal and State constitutions; and my view of the law-making power of these State governments is, that they can do any legislative act not prohibited by the Constitution; and without and beyond these limitations and restrictions, they are as absolute, omnipotent, and uncontrollable as Parliament." Mason *vs.* Waite, 4 Scammon, 134.

for the discussion of some of the general questions in regard to the exercise of the law-making authority which we have elsewhere considered. But the Federal Constitution intends to preserve the same lines of demarkation between the executive, the legislative, and the judicial powers, as those which the States have described; and this separation has given rise to a discussion in regard to the delegation of legislative power by Congress, analogous to that we have already considered. The government of the United States have by various acts, adopted the legislation of the respective States in regard to writs, process, imprisonment for debt, and other matters;* and in so far as this adoption is a mere application of rules already known and in force, to questions arising under the jurisdiction of Congress, it appears to be unobjectionable; but it has been intimated that Congress could not adopt prospectively future acts of State legislation on any given subject, upon the ground that it would be a delegation of legislative power.†

We have already considered the rules which govern the adoption by the Federal tribunals of the decisions of the State courts, in relation to their constitutions and their local law.‡ In deciding, however, on questions which are not questions of mere local municipal law, but arise under the law merchant, the Supreme

* Wayman *vs.* Southard, 10 Wheat. 4; Bank of the U. S. *vs.* Halstead, 10 Wheat. 51; Beers *vs.* Haughton, 9 Peters, 329.

† U. States *vs.* Knight, 3 Sumner, 369; In the Matter of Watson Freeman, 2 Curtis, p. 495; Cooley *vs.* Board of Wardens of Philadelphia, 12 How. 299.

‡ Webster *vs.* Cooper, 14 Howard, 488; Greene *vs.* James, 2 Curtis, 187; *ante*, p. 433.

Court pronounces its own judgment, and does not accept the rules of the State courts as authority.*

Having thus glanced at the general notions of the legislative power of the Union, we proceed to consider the leading rules of interpretation applied to the Constitution of the United States.

The political rules of construction in regard to the Federal Charter, have been stated as follows by Marshall, C. J., who, assisted by a bar and a bench of unsurpassed ability, may fairly claim the title of Expounder of the instrument.

The government, then, of the United States, can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given or by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present time might seem salutary, might in the end prove

* Swift *vs.* Tyson, 16 Peters, 1; Carpenter *vs.* Prov. W. Ins. Co. 16 Peters, 495; Foxcroft *vs.* Mallett, 4 How. 377; The Gloucester Ins. Co. *vs.* Younger, 2 Curtis, 338.

the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers as its own wisdom and the public interest should require.*

And again, the same eminent man has said,—

To say, that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers,—is to repeat what has been already said more at large, and is all that can be necessary.†

I proceed now to state the rules of construction not of a political nature, which are applicable to the instrument.

The Unconstitutionality must be Clear.—It has been repeatedly held, that to warrant the courts in setting aside a law as unconstitutional, the case must be so clear that no reasonable doubt can be said to exist. The Supreme Court has said,—

The question whether a law be void for its repugnancy to the Constitution, is at all times a question of much delicacy, which ought seldom or ever to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law, should be such that the judge feels a clear and strong conviction of their incompatibility with each other. If such be the rule by which the examination of this

* Martin *vs.* Hunter's Lessee, 1 Wheat. 305—326.

† Marshall, C. J., in Ogden *vs.* Saunders, 12 Wheat. 213—332.

case is to be governed and tried (and that it is, no one can doubt), I am certainly not prepared to say that it is not, at least, a doubtful case, or that I feel a clear conviction that the case in question is incompatible with the Constitution of the United States.*

Contemporaneous Exposition.—It is well settled that aid, in regard to the construction of the Constitution of the United States, may be derived from contemporaneous exposition and legislative exposition;† but this cannot be carried so far as to permit usage to override the express terms of the instrument; and Mr. Justice Story has said that contemporary interpretation must be resorted to with much qualification and reserve.‡

Extrinsic facts not admitted to contradict the words of the instrument.—The general principle on which we have heretofore insisted, that the meaning of a written law is to be found in its terms, and that we are not at liberty to resort to extrinsic facts and circumstances to ascertain what the framers might have intended, has

* Fletcher *vs.* Peck, 6 Cranch, 128; see also, to same point, U. S. *vs.* Wonson, 1 Gallison, pp. 4 and 18; U. S. Bank *vs.* Halstead, 10 Wheat. p. 53; Parsons *vs.* Bedford, 8 Peters, 433, 448; Ogden *vs.* Saunders, 12 Wheat. 294. In Green *vs.* Biddle, Mr. Clay, *arguendo*, said, "The Court will exercise its power with the most deliberate caution. This Court is invested with the most important trust that was ever possessed by any tribunal for the benefit of mankind. The political problem is to be solved in America, whether written constitutions of government can exist. They certainly cannot exist without a depositary somewhere of the power to pronounce upon the conformity of the acts of the delegated authority to the fundamental law. This court is that depositary, and I know not of any better. But the success of this experiment, so interesting to all that is dear to the interests of human nature, depends upon the prudence with which this high trust is executed." 8 Wheat. 48.

† Johnson, J., in Ogden *vs.* Saunders, 12 Wheat. p. 290; Stuart *vs.* Laird, 1 Cranch, 299; Martin *vs.* Hunter's Lessee, 1 Wheat. 304; Cohens *vs.* Virginia, 6 Wheat. 264, 418 to 421.

‡ Com. on Con. § 406.

frequently been declared to apply to the Constitution of the United States. "It is well settled that the spirit of a Constitution is to be respected no less than its letter; yet that spirit is to be collected chiefly from its its words, and neither the practice of legislative bodies nor other extrinsic circumstances, can control its clear language." Such was the language of Marshall, C. J., in answer to the objection that the State insolvent laws did not contravene the prohibition upon laws impairing the obligation of contracts, because they were supported by the unbroken practice of the State legislatures for thirty years; and he proceeded to say,—

> It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.*

Words to be taken in their natural sense.—Chief Justice Marshall has said, "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the patriots who framed our Constitution, and the people who adopted it, must be

* Sturges *vs.* Crowninshield, 4 Wheat. 202, 203.

understood to have employed words in their natural sense, and to have intended what they have said."*

Transposition of Clauses.—In regard to the transposition of sentences in order to arrive at the construction of a constitutional provision, Mr. Justice Washington has used this sensible language :—

> In the construction of this clause of the tenth section of the Constitution, one of the counsel for the defendant supposed himself at liberty so to transpose the provisions contained in it as to place the prohibition to pass laws impairing the obligation of contracts, in juxtaposition with the other prohibition to pass laws making any thing but gold and silver coin a tender in payment of debts, inasmuch as the two provisions relate to the subject of contracts. That the derangement of the words and even sentences of a law, may sometimes be tolerated in order to arrive at the apparent meaning of the legislature, to be gathered from other parts or from the entire scope of the law, I shall not deny. But I should deem it a very hazardous rule to adopt in the construction of an instrument so maturely considered as this Constitution was by the enlightened statesmen who framed it, and so severely examined and criticised by its opponents in the numerous State conventions which finally adopted it.†

Reference to clauses struck out.—It has been said by the Supreme Court, that although a clause may have been struck from the Constitution by amendment, it may still be referred to as an aid in the construction of those clauses with which it was originally associated.‡

Acts void in part and valid in part.—It is well settled that an act may be void in part by reason of its violation of a constitutional provision, and good as to the remainder. "If any part of the act be unconstitutional," said the Supreme Court of the United States, "the provisions of that part may be disregarded, while

* Gibbons *vs.* Ogden, 9 Wheat. 188, per Marshall, C. J.
† Ogden *vs.* Saunders, 12 Wheat. p. 267, 268.
‡ Fletcher *vs.* Peck, 6 Cranch, 139.

full effect will be given to such as are not repugnant to the Constitution of the United States, or of the State, or to the ordinance of 1787."*

Effects of Unconstitutionality.—The effect of a judgment or decree declaring a statute void for unconstitutionality, is very stringent. It has been said by the Supreme Court of Massachusetts, that an act of the legislature which it has no constitutional right or power to pass, is a nullity, and all proceedings under it are void. So, where an insolvent debtor is discharged from his debts by virtue of an unconstitutional State bankrupt-law a creditor will not be considered to have assented to, or ratified the discharge, notwithstanding he may have proved his debt under the commission and received a dividend, or have acted as one of the assignees. The dividend received by him will be considered as a payment *pro tanto* of his debt.†

In closing this branch of our subject we may remark, that it is settled that where the limitations on the law-making power contained in the Constitution of the United States, are expressed in general terms, they are naturally and necessarily applicable to the government created by that instrument alone, and have no application to the legislative power of the State governments. So, it has been decided in regard to the fifth amendment, declaring that

* Bank of Hamilton *vs.* Dudley's Lessee, 2 Peters, 526; see also, Ogden *vs.* Saunders, 12 Wheat. 295, per Johnson, J. "It was not denied on the argument, and I presume cannot be, but that a law may be void in part and good in part; or in other words, that it may be void so far as it has a retrospective application to past contracts, and valid as applied prospectively to future contracts."

† Kimberly *vs.* Ely, 6 Pick. 440.

private property shall not be taken without compensation.* So, in regard to the sixth amendment, securing the right of trial by jury in criminal cases.† So, in regard to the seventh amendment, in regard to the right to trial by jury in civil cases.‡ So, in regard to the fourth amendment, protecting individuals against unreasonable seizures.§ So, too, in regard to the prohibition on cruel and unusual punishments.‖ In all these cases the limitations act upon Congress, and not on the State legislatures.

It is also to be observed, that the judiciary of the United States has no general authority to declare acts of the States void simply because they are repugnant to the constitution of the particular State. Such power only belongs to it when it administers the local law of the State, and acts as a State tribunal must act.¶

It is important to notice the rule which has been stated, that where a constitution passes, taking away the power from the legislature to pass laws on a particular subject, this is equivalent to a repeal of existing laws on that subject.**

* Barron *vs.* The Mayor, &c., of Baltimore, 7 Peters, 243.

† Murphy *vs.* The People, 2 Cow. 815; Jackson *vs.* Wood, 2 Cowen, 819.

‡ Livingston *vs.* The Mayor, 8 Wend. 100; Colt *vs.* Eves, 12 Conn. 243.

§ Reed *vs.* Rice, 2 J. J. Marsh. 45.

‖ James *vs.* The Commonwealth, 12 Serg. and Rawle, 220; Barker *vs.* The People, 3 Cowen, 687.

¶ Calder *vs.* Bull, 3 Dall. 386; Satterlee *vs.* Matthewson, 2 Peters, 380. The Supreme Court has no authority on a writ of error from a State court, to declare a State law void on account of its collision with a State constitution, it not being a case embraced in the judiciary act, which alone gives power to issue a writ of error. Jackson *vs.* Lamphire, 3 Peters, 289.

** Ogden *vs.* Saunders, 12 Wheat. 278, per Johnson, J.

I may here notice that it has been said in Illinois, that a proviso in a constitution, as in a statute, cannot enlarge the enacting clause, it can only restrain, qualify, or explain. Sarah *vs.* Borders, 4 Scam. 344; see this

Having thus considered the principal general rules which govern in the interpretation of the Constitution of the United States, I proceed to consider some of the leading decisions made upon the above-cited clauses of the instrument, reserving to the last, the examination of the provision contained in the tenth section of the first article, in regard to the obligation of contracts, which thus far has proved, in regard to private rights, to be practically the most important clause that the instrument contains.

Habeas Corpus. Art. i. sect. 9, § 2.—The writ of of *habeas corpus ad subjiciendum*, was first secured to English liberty by the famous statute 31 Car. II. c. 2; but in England, like all the other guarantees of private right, it is subject to the pleasure of Parliament. Here, we have fixed it in the Constitution, and declared that it can only be forfeited during periods of warfare or rebellion. Practically as yet, Congress has never authorized the suspension of the writ. It is understood that as the unlimited power is vested in Congress, the right to judge of the expediency of its exercise is also absolute in that body.*

Bills of Attainder. Art. i., sect. 9, § 3.—Bills of attainder (the enactment of which is forbidden with us as well by the States as by Congress), as they are strictly called when inflicting capital punishments, and Bills of pains and penalties, or those which award lesser punishment, are believed to be equally within the scope of the constitutional restriction.† They both

case as to the ordinance of 1787, and the constitution of Illinois. On the subject of the ordinance of 1787, see also, 1 Missouri, 472, 725; Walker, Miss. 36; 20 Martin, 699.

* Martin *vs.* Mott, 12 Wheat. 19.

† Fletcher *vs.* Peck, 6 Cranch, 138.

belong in fact, as we have already noticed, to the most vicious class of judicial legislation.* The history of England is filled with instances of the gross abuse of this tremendous engine of political power; but they are now, apparently, as little likely to be resorted to there as here, unless some violent domestic convulsion should disturb the equilibrium of that eminently practical and conservative people.†

Ex-post-facto Laws. Art. i., sect. 9, § 3.—This phrase is now well settled to apply only to acts of a criminal nature. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed, whether by personal or pecuniary penalties.‡ The prohibition, whether in regard to the government of the Union or of the several States, has no application to retrospective laws of a civil character, nor any tendency to protect property or vested rights of a civil description.§

* *Ante*, p. 146.

† See Wooddeson's Law Lectures, lect. 41. Mr. Justice Story in his Commentary, § 1338, says that the power of passing bills of attainder was used during the American Revolution with a most unsparing hand. In Jackson *vs.* Catlin, 2 J. R. 248, it is said, "The act of 22d October, 1779, attainted, among others, Thomas Jones, of the offense of adhering to the enemy of this State. It was a specific offense, and was not declared or understood to amount to treason; because many of the persons attainted had never owed allegiance to this State. The forfeitures arising from the attainder, must be sought for in the act and nowhere else." It is an interesting case as to the effect of an act of attainder.

Mr. Austin, in his valuable work on Jurisprudence, says, "The sovereign Roman people solemnly voted or resolved, that they would never pass, or even take into consideration, what I will venture to denominate a bill of pains or penalties. This solemn resolution or vote was passed with the forms of legislation, and was inserted in the twelve tables in the following imperative terms—*Privilegia ne irriganto.*"

‡ Fletcher *vs.* Peck, 6 Cranch, 138.

§ Watson *vs.* Mercer, 8 Peters, 110; see, also, Dash *vs.* Van Kleeck, 7 J. R. 477. This restricted interpretation of a phrase which, on its face, is

Faith and Credit of Judicial Proceedings. Art. iv., sect. 1.—I have already* called attention to this provision. The act of May 26, 1790, provides the manner of authenticating acts and records, and declares that when so authenticated they shall have such faith and credit given to them in any court within the United States, as they have by law or usage in the courts of the State from whence the records are taken. Under this, it has been decided that if a judgment has the effect of record evidence in the courts of the State from whence it is taken, it has the same effect in the courts of any other State. At common law, a judgment of the courts of one State would have been *prima facie* evidence in the courts of any other State. The Constitution contemplates a power in Congress to give a conclusive power to such judgments, which power it has executed by declaring a judgment conclusive when the courts of the State where it is rendered, would so pronounce it.†

Mutual enjoyment of Privileges and Immunities. Art. iv., sect. 2, § 1.—This clause has not as yet received

susceptible of a much wider construction, has, however, been repeatedly regretted. In Satterlee *vs.* Matthewson, 2 Peters, 380, where a retrospective law was sustained, Mr. J. Johnson, dissenting, says, "The whole difficulty arises out of the unhappy idea that the phrase *ex post facto*, in the Constitution of the United States, was confined to criminal cases exclusively, a decision which leaves a large class of arbitrary legislative acts without the prohibitions of the Constitution."

In Carpenter *vs.* Commonwealth of Pennsylvania, 17 How. 456, the Supreme Court reviewed the cases, and again decided that the phrase *ex post facto* is to be taken as applied to criminal cases only, and that it did not apply to an explanatory act the effect of which was to charge an estate with taxes to which it had not been before subjected.

* *Ante*, p. 77.

† Mills *vs.* Duryee, 7 Cranch, 481; Hampton *vs.* M'Connel, 3 Wheat. 284; Andrews *vs.* Montgomery, 19 J. R. 162; Borden *vs.* Fitch, 15 J. R. 121; Black's Case, 4 Abbott Pr. Rep. 164.

the attention which from its importance it would have been expected to command. It has been considered but in a few instances, and no general authoritative exposition of it has as yet been declared. Some partial interpretations of it have, however, been made.* It has been held, on the third circuit, in applying the clause, that an act of the State of New Jersey limiting the right to take oysters and clams to actual inhabitants and residents of the State, did not conflict with it, upon the ground that it would be going quite too far to construe the guarantee of privileges and immunities of citizens as amounting to a grant of a co-tenancy in the common property of a State to the citizens of all the other States; and Mr. J. Washington said,—

> The inquiry is, What are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental; which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every

* As to the effect of the clause in New York, see Frost *vs.* Brisbin, 19 Wend., 11; Rogers *vs.* Rogers, 1 Paige, 184. An incorporated company is not a citizen within the meaning of the clause in the Constitution by which the citizens of each State are entitled to all privileges and immunities of citizens in the several States. The People *vs.* Imlay, 20 Barb., 68. In connection with this it may be noticed, that the law of a State limiting the remedies of its citizens in its own courts, cannot be applied to prevent the citizens of other States from suing in the courts of the United States in that State, for the recovery of any property or money there to which they may be legally or equitably entitled. The Union Bank of Tennessee *vs.* Jolly's Administrators, 18 How., 504; confirming Suydam *vs.* Broadnax, 14 Peters, 67.

kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State,—may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These and many others which might be mentioned are, strictly speaking, privileges and immunities; and the enjoyment of them by the citizens of each State, in every other State, was manifestly calculated (to use the expression of the preamble of the corresponding provision in the old Articles of Confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union."

But we cannot accede to the proposition which was insisted on by the counsel, that under this provision of the Constitution the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all the other States the same advantages as are secured to their own citizens."*

The Supreme Court of the United States has said, without determining the general interpretation of the phrase "immunities and privileges," that "according to the express words and clear meaning of this clause, no privileges are secured by it except those which belong to *citizenship*. Rights attached by law to contracts by the usage of the place where such contracts

* Corfield *vs.* Coryell, 4 Washington's C. C. Reports, p. 381.

are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed privileges of a citizen." According to the law of Louisiana, a community of *acquets*, or gains, is created between husband and wife when the marriage is contracted within the State, or when the marriage is contracted out of the State and the parties afterwards go into Louisiana to live. But the privilege thus given to the wife does not extend, by virtue of this clause in the Federal Constitution, to a native-born female citizen of Louisiana who was married in Mississippi, and was domiciled with her husband during the marriage. Land acquired by the husband, during the marriage, in Louisiana was held not subject to the Louisiana law in respect to the community of *acquets* or gains, upon the ground that the right was one which attached to the contract of marriage which the State of Louisiana had a right to regulate, and was not the personal right of a citizen.*

In New Jersey, it has been decided that a tax laid upon the agents of foreign insurance companies from other States, doing business within the State, does not conflict with the Federal Constitution in this particular, both for the reason that it was competent for the legislature to impose a tax on citizens of other States as a substitute for other safeguards of the business to which, as non-residents, they could not be made subject; and also, because corporations, though citizens for the purpose of giving jurisdiction to the Federal courts, were not citizens in the ordinary sense of the word.†

* Conner *vs.* Elliott, 18 How., 591.

† Tatem *vs.* Wright, 3 Zabriskie, p. 429.

The most important question, probably, that can arise under this clause, is that which relates to the protection of slave-property while *in transitu* through a free State from one slave State to another slave State, or while the owner is an undomiciled sojourner in a State where slavery is absolutely prohibited, or when carried into a free State from unavoidable necessity, as stress of weather. This grave and perplexing subject I have already considered in regard to the doctrine of comity between the States;* but it presents itself in a more difficult form under this clause of the Constitution. As, however, the question is now under adjudication in our State tribunals, in a way which must bring it directly to the cognizance of the Supreme Court of the United States, where indeed it is understood to have been already incidentally discussed, any examination of it here would be premature.†

Fugitives from Justice. Art. iv., sect. 2, § 3.—The provision in regard to the delivery or extradition of fugitive criminals from other States is very often acted upon, but not many decisions have been made in regard to it. In New Jersey it has been said, that in considering this clause, it is material to observe that it does not contain a grant of power. It confers no

* *Ante*, p. 76.

† The Lemmon Case, as it is commonly called, People *vs.* Lemmon, 5 Sandf. 681, presents the transit question in one aspect distinctly, and is now before the Supreme Court of the State of New York on appeal. The case known as the Dred Scott Case, recently decided by the Supreme Court of the United States, is understood to have incidentally discussed this subject; but we have as yet no authoritative report of the judgment of the court. If the People *vs.* Lemmon shall go up on appeal to the Federal tribunal, the case will, in all probability, call for a settlement of the law of this important question.

right. It is the regulation of a previously-existing right. It only makes obligatory upon every member of the confederacy, the performance of an act which previously was of doubtful obligation.*

It has been decided in New York and New Jersey, that to enable a magistrate to arrest and examine an alleged fugitive from justice from another State, it must be distinctly alleged by a complaint in writing, on oath, that a crime has been committed in the foreign State, that the accused has been charged in such State with the commission of such crime, and that he has fled from such State, and is found here. These facts must not be left to inference.†

In New York, it has been said that when a prisoner is brought up on *habeas corpus*, and it appears that he has been arrested as a fugitive from justice, by a warrant from the executive of one State on the requisition of the executive of another State, under the Constitution and laws of the United States, the court or judge will not inquire into the probable guilt of the accused. The only inquiry is, whether the warrant states that the fugitive has been demanded by the executive of the State from which he is alleged to have fled; and that a copy of the indictment or affidavit charging him with the crime and certified by the executive demanding him, as authentic, have been presented.‡

* In the Matter of William Fetter, 3 Zabriskie, p. 315, where several cases on the subject, are collected. On the subject of this clause, see also, *Ex Parte* Smith, before Mr. Justice M'Lean, cited in 1 Kent *Com.* 8th edit. vol. i. p. 642. Also, *In Re* Kaine, 14 Howard, 103; State *vs.* Buzine, 4 Harrington, 572; State *vs.* Schlemn, 4 Harrington, 577.

† In the Matter of Edward Heyward, 1 Sandford, 701; in the Matter of William Fetter, 3 Zabriskie, p. 315.

‡ In the Matter of Clark, 9 Wend., 212.

It has been decided in New Jersey, that if a fugitive from justice, for whose delivery requisition is made under the Constitution of the United States, be in actual confinement on criminal or civil process in the State to which he has fled, he cannot be given up till the justice of that State be satisfied. The Constitution refers to fugitives at large only.*

Fugitives from Service. Art. iv., sect. 2, § 3.—This clause, which has been twice acted on by Congress,—once in the enactment of the fugitive slave law of 1793, and once in that of the year 1850,—owing to the organization of political parties in this country, has been a fertile source of discussion, of a class into which this work is not intended to enter. I confine myself to stating the most authoritative exposition of the subject which has as yet been made. There can be no serious legal question that it is the duty of all parts of the Union to receive their interpretation of the Federal charter from the Supreme Court of the United States, and to give to the provisions of the instrument, as expounded by that tribunal, in the legitimate exercise of the functions assigned to it by the Constitution, their full and fair effect. It has been decided then, by the Supreme Court, in regard to the fugitive slave law of 1793, 1. That under and in virtue of the Constitution of the United States, the owner of a slave is clothed with entire authority, in every State in the Union, to seize and recapture his fugitive slave, wherever he can do it without illegal violence or a breach of the peace. 2.. That the Federal government is clothed with appropriate authority and functions to enforce the delivery of a fugitive slave on claim of the owner, and has

* In the Matter of Troutman, 4 Zabriskie, 634.

properly exercised its authority in the act of 12th February, 1793. 3. That any State law or regulation which interrupts, impedes, limits, embarrasses, delays, or postpones the right of the owner to the immediate possession of the slave and the immediate command of his service, is void.*

Since this decision was made upon the law of 1793, another law on the subject has been passed in the year 1850, giving the master more stringent remedies for the recapture of his fugitive slave. No question in regard to it has as yet been decided by the Supreme Court of the United States, though its constitutionality has been generally supposed to be disposed of by the judgment above cited.† In the State of Wisconsin, however, its constitutionality has been denied, in an elaborate judgment, on the ground that the article of the Constitution on which the law is based is merely a clause of compact between the States, by which the free States are bound to provide proper legislation for the return of fugitive slaves, but conferring no power on the Federal government.‡

Religious Freedom. Amendments, art. i.—The Constitution contains no more important clause than that prohibiting all laws prescribing religious tests,

* Prigg *vs.* The Commonwealth of Pennsylvania, 16 Pet., 540; Moore *vs.* The People of the State of Illinois, 14 How. U. S., 13.

In New York, on the subject of this clause, see Jack *vs.* Martin, 12 Wend. 311; S. C. 14 Wend. 507; in Massachusetts, Commonwealth *vs.* Tracy, 5 Metcalf, 536; and Kent *Com.* vol. i. p. 641, 8th edition.

† So it was declared by the Supreme Court of Massachusetts, in the Case of Sims, *Law Reporter*, vol. iv., N. S., p. 17, per Shaw, C. J. The constitutionality of the act of 1850 was also assumed in the case of the United States *vs.* Stowell, an indictment for obstructing the marshal in the service of process under the act, 2 Curtis, 153.

‡ Duer, *Cons. Jurisprudence*, p. 271.

establishing religion, or interfering with its free exercise; and fortunately, thus far, the wise spirit of our people has come up to the sagacity and foresight of our ancestors. If in our future history our political toleration shall keep pace with our moderation and forbearance in religious matters, we may hope to escape the evils that have thus far proved so formidable, indeed so fatal, to all free governments. It may be remarked, however, that the recent organization of a distinct territorial government about to claim admission as a State, exclusively occupied by settlers who declare polygamy to be one of their fundamental institutions, presents the problems connected with this matter in a new aspect, and will undoubtedly put our principle of absolute toleration to a very severe test.

Freedom of Speech and of the Press. Amendments, art. i.—The only important questions that have been raised on this clause, grew out of the act of 14th July, 1798, c. 91, commonly called the Sedition Act, making it penal to publish false, scandalous, and malicious writings against the government of the United States. The act was extremely unpopular, and was one of the causes of the downfall of the Federal party. The constitutional question has never been settled; and it may be again agitated, in a different state of the public mind.*

Search-warrants and Seizures. Amendments, Art. iv.—The controversy in regard to general warrants,

* See the Virginia Report and Resolutions of the Virginia Legislature, in December, 1798, and January, 1800; Resolution of the Legislature of Massachusetts and Kentucky in 1799; 2 Tucker's Black. Com., app., note a. p. 11 to 30.

which, in 1763, were pronounced in England to be illegal and void for uncertainty,* was very familiar to the mind of the framers of our government; and their consideration of the subject led to the insertion of this and the analogous clauses in the State and Federal Constitutions. The only serious controversy that has arisen in regard to them, grew out of the Alien Act of 1798, ch. 75, which authorized the President of the United States to order all dangerous aliens out of the republic, and in case of their refusal to comply with the order to depart, to imprison them.† The alien act shared the fate of the sedition act in its unpopularity, but the question of its constitutionality is still open. It has been held under this clause, that a search-warrant to be legal must state the time, place, and nature of the offense charged, with reasonable certainty.‡

Only one Trial for Offenses. Amendments, art. v.—"The jeopardy spoken of in this clause," said Washington, J., "can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon." By this provision a party is absolutely protected from being tried a second time, after he has been once convicted or acquitted. Mr. J. Story has said, on the first circuit, "Upon the most mature deliberation, I am of opinion that the court (the C. C. U. S.) does not possess the power to grant a new trial, in a case of a good indictment, after trial by a competent and regular jury, whether there be a verdict of acquittal or

* Money *vs.* Leach, 3 Burr. 1743; Bell *vs.* Clapp, 10 J. R. 263; Stilly *vs.* Smith, 11 J. R. 500.

† See 1 Tucker's Bl. Com., app. 301 to 304.

‡ *Ex Parte* Burford, 3 Cranch, 448.

conviction."* The rule does not apply, however, to cases where the jury disagree and are discharged, or where judgment is arrested, or a new trial granted in favor of the prisoner. There must be a good trial. So, insanity of one of the jurors is a good cause for discharging the jury without the consent of the prisoner or of his counsel. Such discharge is in the discretion of the court, and cannot form the subject of a plea in bar to the further trial of the prisoner.

Due process of Law. Amendments, art. v.—It seems to be now well settled that these words are equivalent to the phrase "law of the land;" which we have elsewhere examined, and the value of which, under our State constitutions, as one of the most important fundamental guarantees of individual rights, we have already endeavored to state and to explain.† And so it has been expressly determined.

In Rhode Island, on the first circuit, Mr. Justice Curtis has decided under the constitution of that State, that the phrase "law of the land," is equivalent to "due process of law," and that in it is necessarily implied and included the right to answer to and to contest the charge, and the consequent right to be discharged from it, unless it be proved; and where a law of the State of Rhode Island, passed in 1852, designed

* United States *vs.* Gilbert, 2 Sumner, 60; Davis, J., dissented. United States *vs.* Haskell & François, 4 Wash. C. C. R. 402, 410; United States *vs.* Perez, 9 Wheat. 579; Commonwealth *vs.* Cook, 6 S. and Rawle, 577; 1 Dever. 276; United States *vs.* Gilbert, 2 Sumner, 60; United States *vs.* Daniel, 6 Wheat. 542; The People *vs.* Goodwin, 18 J. R. 187; The People *vs.* Comstock, 8 Wend. 549; The People *vs.* Stone, 5 Wend. 39.

In Massachusetts the court has power to grant a new trial on the motion of one convicted of a capital offense, sufficient cause being shown for it. Commonwealth *vs.* Green, 17 Mass. 515.

† Story on Cons. § 1789.

to prevent the sale of intoxicating liquors, required the accused before he could answer to or contest the charge, to give security in the sum of two hundred dollars, with sureties to pay all fees and costs adjudged against him, it was held that this provision conflicted with the constitution and rendered the law void.*

In 1853 the State of Rhode Island passed another act, entitled "An Act for the more effectual suppression of drinking houses and tippling shops," authorizing a seizure of the property; but because it did not provide for notice to the owner, by due legal means, of the nature and cause of the accusation, nor for a trial of the question whether the liquors seized were held for sale in violation of law, the act was declared to violate the constitution of the State; and this decision was adhered to and acted upon in the United States Circuit Court, by Mr. Justice Curtis, on the ground that it belongs to the highest judicial tribunal of a State to interpret its constitution, and to determine how far and in what respects any act of the legislature is in conflict therewith, and therefore inoperative.† A full and careful examination of the decisions of our courts upon the various temperance laws of the different States, would be of extreme interest, as exhibiting the operation of our system of constitutional law, and particularly of this most important clause.

But there are exceptions to the universal application of the rule, giving to persons in all cases the benefit of this construction of the constitutional guarantee of the law of the land. The Supreme Court has

* Greene *vs.* Briggs, 1 Curtis, 311.

† Greene *vs.* James, 2 Curtis, 189; Webster *vs.* Cooper, 14 Howard, 488.

said that though the words *due process of law* generally imply and include *actor*, *reus*, *judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings,—this is not universally true. To ascertain whether any proceeding is due process of law, the Constitution itself is first to be examined to see whether any of its provisions be disregarded, and if not, then we must look to the settled usages and modes of proceeding existing in the common and statute law of England at the time of the emigration of our ancestors; and following this train of reasoning, it has been decided that a distress-warrant against a defaulting collector of the revenue, is not inconsistent with the provision which prohibits a citizen from being deprived of his property without due process of law, upon the ground that the ancient common law of England recognized a summary remedy for the recovery of debts due the government.*

Compensation for Private Property. Amendments, art. v.—In regard to the State constitutions, we have already considered this important subject elsewhere. This clause in the Federal charter, like all the other amendments to the instrument, has been adjudged by the Supreme Court to apply only to the government of the United States, and to have no operation on the State governments.†

Trial by Jury. Amendments, art. vi. and vii.—The

* Murray's Lessee *vs.* Hoboken Land and Improvement Co., where the subject is elaborately examined by Curtis, J., 18 Howard, 272.

† Barron *vs.* Mayor, &c. of Baltimore, 7 Peters, 250. "The amendments," says Marshall, C. J., "contain no expression indicating an intention to apply them to the State government;" see, also, as to this clause, Green *vs.* Biddle, 8 Wheat. 89. Mitchell *vs.* Harmony, 13 Howard, 115, discusses the question as to the extent of the power of a military commander to take private property in time of war.

right of trial by jury under the Constitution of the United States is secured by three provisions, to be found in the second section of the third article, and the sixth and seventh amendments. The two former of these relate to criminal cases; the latter, to civil causes. "One of the strongest objections originally taken to the Constitution of the United States," says the Supreme Court of the United States,* "was the want of an express provision securing the right of trial by jury in civil cases." This gave rise to the seventh amendment.

The provision has been frequently applied. So, where a law of Ohio declared that an occupying claimant of land should not be turned out of possession till he should be paid for lasting and valuable improvements, and directed the court in a suit at law to appoint commissioners to value the improvements, it was held that this came within the provisions of the seventh amendment, and that the law was unconstitutional and void.†

* Parsons *vs.* Bedford, 3 Peters, 446.

† Bank of Hamilton *vs.* Dudley's Lessee, 2 Peters, 493. This case is also of much interest, on the subject of repeal, and vested rights. In 1795 the Territorial government of Ohio created an Orphan's Court, and authorized the administrator of a decedent to sell the real estate, when there was not a sufficient personal estate to pay the debt. In May, 1804, an administrator obtained an order to sell under this statute. In *June*, 1805, the act of 1795 was repealed. In *August*, 1805, an order was entered enlarging the administrator's power to sell, and entered *nunc pro tunc*, as of *May*, and a sale took place; but it was held bad. It was urged that the interest of the administrators in the real estate was a vested interest, and that the repeal of the law could not divest it. But the court said that the repeal divested no vested estate, that it was only "the exercise of a legislative power such as every legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor must always depend upon the wisdom of the legislature." P. 523.

It has been held, too, by the Supreme Court of the United States, that this clause embraces all suits not of equity or admiralty jurisdiction, and that it applies to the proceedings practiced in Louisiana on the trial of causes by a jury, though peculiar and not according to the course of the common law.*

Indeed, as I have had occasion to notice in speaking of the operation of the analogous clause under the State constitutions, the provision has been generally very liberally construed. So, it has been intimated that a court of equity cannot order the complainant and his sureties on an injunction-bond, to pay the damages sustained by reason of the injunction, on the ground that an action on a bond is in its nature a suit at common law.† So, again, it has been decided that to subject the right of trial by jury to any condition, is incompatible with the nature of the constitutional guarantee. Consequently, where a law designed to prevent the sale of intoxicating liquors, required the party accused to give security for the payment of the penalty and costs awarded by the act for its violation, as a condition of having a jury trial, it has been decided by Mr. Justice Curtis, on the Rhode Island Circuit, that this provision conflicted with the consti-

* Parsons *vs.* Bedford, 3 Peters, 447. In the State of Louisiana, the principles of the common law are not recognized; neither do the principles of the civil law of Rome furnish the basis of their jurisprudence. They have a system peculiar to themselves, adopted by their statutes, which embodies much of the civil law, some of the principles of the common law, and in a few instances, the statutory provisions of other States. This system may be called the civil law of Louisiana, and is peculiar to that State. Mr. J. M'Lean's dissenting opinion in Parsons *vs.* Bedford, 3 Peters, 450.

† Merryfield *vs.* Jones, 2 Curtis, p. 306. See on this point, Hiriart *vs.* Ballon, 9 Peters, 156; Gwin *vs.* Breedlove, 2 How., 29; Gwin *vs.* Barton, 6 Howard, 7; Bein *vs.* Heath, 12 Howard, 168.

tution of that State, which declares that the right of trial by jury shall be inviolate, and rendered the whole act unconstitutional and void.*

The general rule of the courts of the United States is, that on the trial of causes the court may give their opinion on the evidence to the jury, being careful to distinguish between matters of law and matters of fact. In regard to the former, the opinion of the court is conclusive; but a mere opinion on the facts has only such influence as the jury may think it entitled to.† But, as has been heretofore observed,‡ there is a diversity of practice in the different States on this subject; and it has been intimated that in those States where the rule is to confine the charge strictly to questions of law, it will be well for the judges of the Federal tribunals to conform to it, for the general reason that it is desirable that the practice in the courts of the United States should resemble as near as practicable that of the States in which they are sitting.§

In criminal cases, it has been earnestly insisted that the jury are the judges of the law, as well as of the fact, and that the opinion of the court on questions of law, how conclusive soever in civil causes, has no binding force on the jury in criminal cases. But this doctrine has been denied on very high authority; and in the first circuit of the United States, as well as in the States of New York, Indiana, New Hampshire,

* Greene *vs.* Briggs, 1 Curtis, 311.

† M'Lanahan *vs.* Universal Ins. Co., 1 Peters, 182; Games *vs.* Stiles, 14 Peters, 322.

‡ *Ante*, p. 550.

§ Mitchell *vs.* Harmony, 13 Howard, 131. See, in this case, in Mr. J. Daniel's dissenting opinion, an ingenious and elaborate defense of the practice, which he says is that of most of the Southern States, of confining the charge to matters of law.

and Massachusetts, it seems settled that juries in criminal trials have not the right to decide any question of law; and that if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given to them by the court.*

Excessive Bail and Cruel Punishments. Amendments, art. viii.—It has been decided in regard to this as the other amendments, that the clause only operates as a limitation on the general government, and does not apply to the States of the Union.†

The Obligation of Contracts.—We have thus far been occupied with considering the effect of those clauses in the Constitution of the United States which act as restrictions on legislative power and as guarantees of private rights. Of these clauses, however, we have still to examine that which in its practical operation has as yet proved far the most important, viz.: The provision in the tenth section of the first article, which declares that *no State shall pass any law impairing the obligation of contracts.**

* United States *vs.* Battiste, 2 Sumner, 240; United States *vs.* Morris, 1 Curtis, 60; People *vs.* Price, 1 Barb. S. C. R., 566; Townsend *vs.* The State, 2 Blackf. 152; Pierce *vs.* The State, 13 N. H. R., 536. Commonwealth *vs.* Porter, 10 Met., 263; and in Ohio, see Montgomery *vs.* The State, 11 Ohio, 427. In England, see Parmiter *vs.* Coupland, 6 M. & W., 105. Levi *vs.* Milne, 4 Bing., 195.

The trial by jury was at one time used in New York as a mode of collecting taxes. The eighty-third letter of the *Federalist* says it is now, "in most cases," out of use for this purpose.

† Barker *vs.* The People, 3 Cowen, 686; James *vs.* Commonwealth, 12 Serg. & R., 220; Barron *vs.* Mayor of Baltimore, 7 Peters' R., 243.

* *Ante*, p. 584.

The importance of this clause certainly does not appear to have been realized at an early period in our history. The subject of the Obligation of Contracts is very summarily disposed of, in connection with bills of attainder and *ex post facto* laws, by the Federalist in the 44th letter. Laws

At the outset of the discussion we may remark, that some of the States have imposed a similar restriction upon themselves;* while in regard to the Federal power there is no express provision protecting the sanctity of contracts. Where it was asserted that an act of Congress granting an exclusive privilege in the shape of a patent was void on the ground that the patentee had had an exclusive privilege granted him by the State, and that on the expiration of the State grant the right to his invention became by an implied contract vested in the people of the State, the Circuit Court in Pennsylvania denied the proposition, saying, "If, even, the premises were true, still there is nothing in the Constitution of the United States which forbids Congress to pass laws violating the obligation of con-

in violation of private contracts are referred to in the 7th letter, and are spoken of somewhat cursorily as among the causes which might lead to wars among the States. Mr. Rawle's work on the Constitution, published in 1825, chap. x. p. 131, contains only a few paragraphs in regard to the matter.

"The tradition is," says Mr. Hunter, *arguendo* in Sturges *vs.* Crowninshield, 4 Wheat. 150, "that Mr. Justice Wilson, who was a member of the Convention and a Scottish lawyer, and learned in the civil law, was the author of the phrase."

* *Louisiana.*—No *ex-post-facto* law, nor any law impairing the obligation of contracts, shall be passed, nor vested rights be divested unless for purposes of public utility and for adequate compensation previously made. —Cons. tit. vi. § 105.

Tennessee.—No retrospective law or law impairing the obligation of contracts shall be made. Cons. art. i. § 20.

Missouri.—No *ex-post-facto* law, nor law impairing the obligation of contracts or retrospective in its operation, can be passed. Cons. art. xi. § 17.

The constitution of New Jersey, art. iv. sec. 7, contains a peculiar and very important provision, to which I shall again call attention when I come to speak of vested rights. "The legislature shall not pass any bill of attainder, *ex-post-facto* law, or law impairing the obligation of contracts, *or depriving a party of any remedy for enforcing a contract which existed when the contract was made.*" Art 4, sec. vii., § 3.

tracts, although such a power is denied to the States individually."*

The consideration of this important clause seems naturally to divide itself into two heads:

First. What are the Contracts to which the Constitutions refers?

Second. What acts of State legislation are considered to impair their obligation?

I shall examine somewhat in detail the leading cases on the subject, and then endeavor to state the general result of the decisions, remarking, however, before the discussion is commenced, that it has been decided by the Supreme Court, under a Virginia act of 1788, that the present Constitution did not commence its operation until the first Wednesday of March, 1789, and that the provision as to the obligation of contracts does not extend to a State law enacted before that time and operating upon rights of property vested before that period.†

What is a Contract within the meaning of the Constitution?—The Supreme Court has said that the contracts designed to be protected by the tenth section of the first article are "contracts by which perfect rights—certain definite, fixed, private rights of property—are vested," as distinguished from rights growing out of measures or engagements adopted or undertaken by the body politic or State government for the benefit of all, and which from the necessity of the case and according to universal understanding are to be varied or discontinued as the public good shall require.‡ And

* Evans *vs.* Eaton, Peters C. C. U. S. R. 337.

† Owings *vs.* Speed, 5 Wheat. 420.

‡ Butler *et al. vs.* Pennsylvania, 10 Howard, p. 416.

the terms of the clause include as well executory as executed contracts.*

The clause in the Constitution referring to all contracts without exception, and it being settled that this includes executory as well as executed contracts, no difficulty seems to have presented itself in relation to the true construction of the clause in regard to agreements of a private character. All private contracts, in the ordinary legal application of that phrase, are understood to be embraced by it. If an agreement is such that if executory it can be enforced in a court of justice, or that if executed a remedy can be sought for its violation or infringement, then it is a contract to be protected within the meaning of the constitutional clause. The precise extent and value of the protection, we shall consider when we consider the next head, as to what impairs the obligation of contracts.

But much more serious embarrassments present themselves in regard to rights or interests created by or under legislation; and many most interesting cases have been decided, as to the rules to be applied in this respect to legal enactments. I shall endeavor to state, as briefly as I can with precision, the results thus far arrived at.

Several years before the point was submitted to the Federal tribunals, it was said by one of the most eminent jurists of the country that "rights legally vested in any corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation."† The question of legislative con-

* Fletcher *vs.* Peck, 6 Cranch, 137.

† Per Parsons, C. J.—Wales *vs.* Stetson, decided in 1806, 2 Mass. 146.

tracts was first distinctly presented to the Supreme Court of the United States in a case involving the power of a State to repeal an act containing a grant of lands, and under which individual titles of *bona-fide* purchasers had become vested.* The legislature of Georgia, on the 7th of January, 1795, passed an act in relation to their unappropriated territory; and on the 13th of January of the same year, letters patent for a portion of this land were issued, under and by virtue of the act, to Gwin and others. From Gwin and others the lands in question passed to one Greenleaf, by deed of the 22d of August, 1795; and from Greenleaf, by sundry mesne conveyances, to the defendant Peck; and he, by conveyance of the 14th of May, 1803, conveyed it to the plaintiff with a covenant, that the State of Georgia was, at the time of the passage of the above act of January, 1795, legally seized in fee of the soil; that the legislature had good right to convey; and further, that the title to the premises so conveyed by the State of Georgia, and finally vested in Peck, had been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the State of Georgia. The declaration in the suit then averred that the passage of the act of the 7th of January, 1795, was obtained by undue influence and corruption, and that the legislature of the State of Georgia afterwards, on the 13th of February, 1796, repealed the act of 1795, by an act declaring the former act, and all grants under it, null and void, and affirmed the whole territory in question to be vested in the State. The plea to this count set up that the grantees under the patent were citizens of

* Fletcher *vs.* Peck, 6 Cranch, 87,—A. D. 1810.

other States than Georgia, and that they had no notice of the corrupt practices charged. On demurrer to this plea, the precise question presented was whether the act of the State of Georgia of 1796, repealing the act of 1795, could have any effect on the title of a purchaser, acquired under the prior act, for a valuable consideration and without notice; and it was decided by the Supreme Court, on very elaborate consideration, that as well upon general principles, common to all free institutions, as on the particular provision which we are considering, no such effect could be given to the act of 1796. They held that the law of 1795 was in the nature of a contract; that absolute rights had vested under that contract; that the repeal of the act impaired the obligation of the contract; and that, consequently, the subsequent statute was unconstitutional and void.*

* Fletcher *vs.* Peck,—A.D. 1810,—6 Cranch, 136 to 138. These grants are familiarly known as the Yazoo grants.

The doubts and difficulties that at first existed as to this clause of the Constitution can be well seen in the opinion of Mr. Justice Johnson in this case, 6 Cranch, 144, 145.

Several interesting questions were discussed in this case. As to the general extent of legislative power, it was said that the validity of the rescinding act of 1796 might well be doubted, even were Georgia a single sovereign power. "To the legislature all legislative power is granted; but the question whether the act of 1796, transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection." On the constitutional question, Johnson, J. dissented. He held that the obligation clause only applied to executory contracts, and put his concurrence with the court on the general doctrine. He said—"I do not hesitate to declare that a State does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things,—a principle which will impose laws even upon the Deity."—*Ibid.* p. 143.

In regard to the question how far fraud could be alleged in an act of legislation, the chief justice said—"It may well be doubted how far the validity of a law depends on the motives of its framers, and how far the

A case was shortly afterwards presented, of much interest in regard to the general question of the sacredness of legislative grants, in connection with the early history of Virginia.* It appears, and indeed is judicially declared in this case, that at an early period the religious establishment of England, together with the general rights and authorities growing out of the common law of the mother country, was adopted in the colony of Virginia; and by various statutes passed from 1776 to 1788 the legislature of the State confirmed and established the rights of the church to all its lands and other property. In 1798 a different public opinion prevailed in the State; and by two statutes passed in that year and in 1801, the legislature repealed the previous legislation on the subject as inconsistent with the principles of religious freedom declared by the Constitution, and asserted the right of the legislature to all the property of the Episcopal church in the State. The Supreme Court, however, held the grants contained in the original acts to be irrevocable, and that the acts of 1798 and 1801 were wholly inoperative.

particular inducements operating on members of the supreme sovereign power of a State to the formation of a contract by that power, are examinable in a court of justice." See also Mr. J. Johnson's Opinion, p. 144. The subject was discussed at length. But it was said that at all events fraud of this kind could not be set up incidentally and collaterally; that it would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State.

I may observe, on this question of fraud, that in Connecticut the following language has been used—"Fraud is not to be presumed; and when this court is called upon, in this collateral manner, to declare void an act of the General Assembly, upon the ground that it was fraudulently obtained, this fact should be clearly proved."—The Derby Turnpike Co. *vs.* Parks, 10 Conn., 540.

* Terrett *vs.* Taylor, 9 Cranch, 43.

It may be remarked, however, that the decision in this case, although obviously correct, is placed by the court as much on the principles of natural justice, as on express provision; nor is the statement of the Constitutional point very clear or well defined. Indeed, it is matter of interesting observation to notice how gradually the legal mind of the country has approached the solution of our great Constitutional questions, and with what sagacious caution the judiciary have generally declared their authority.

The precise question that we are now considering,—*i. e.*, how far a legislative act is to be treated as a contract was soon after presented in a broader shape. In the year 1754, a clergyman of the name of Wheelock established a charity school in Connecticut for the instruction of Indians in Christianity. Desirous to extend the institution, he solicited pecuniary aid in England. Funds were collected by private donations, the founding of a college determined on, and New Hampshire selected for its site. Finally a charter from the crown was obtained, in the year 1769, for a body corporate to be called, "*The Trustees of Dartmouth College*," the whole corporate powers, including that of holding real and personal estate, being vested in twelve trustees, clothed with authority to fill vacancies occurring in their body. The institution went into existence under this charter as *Dartmouth College*, and so continued without interruption or interference till the year 1816; when the legislature of New Hampshire passed several acts "to amend the charter and enlarge and improve the corporation," by which the trustees were increased from twelve to twenty-one, the additional number being appointed by the executive of the State, and a board of twenty-five overseers created of

whom twenty-one were also appointed by the executive.

Upon these acts being brought up before the Supreme Court of the United States, as conflicting with the constitutional guarantee of contracts, it was strenuously contended that the act of incorporation was a mere grant of political power, creating a civil institution to be employed in the administration of a part of the government of New Hampshire, regarding instruction as a subject of public concern, and that as such it was entirely under the control of the State. It was furthermore insisted that the trustees, who complained of the violation of the Constitution, had no vested beneficial or pecuniary interest entitled to protection; and, on both these grounds, that the charter was not a contract within the meaning of the Constitution. But the Supreme Court of the United States held that Dartmouth College was an eleemosynary and not a civil institution participating in the administration of government,—that it was a seminary of education incorporated for the perpetual application of its property to the objects of its creation. They further held that the trustees represented the donors of the original funds, were the assignees of their rights, stood in their place, and were equally entitled to protection; that the charter was a contract made on a valuable consideration for the security and disposition of property, and as such came within not only the letter but the spirit of the Constitution. The judgment of the Supreme Court of New Hampshire which had affirmed the validity of the legislature of the State was reversed, and the statutes in question declared unconstitutional and void.*

* Dartmouth Coll. *vs.* Woodward, 4 Wheat. 519, decided in 1819. See

The case of Fletcher *vs.* Peck was a case of grants of land. The Dartmouth College case was that of the franchises of an eleemosynary corporation. These two decisions, therefore, taken together, determined in the most favorable aspect for rights vested by legislative action, that all private rights of property created by virtue of a statute were protected by the Constitution; and this doctrine has been, ever since the decision of the last-mentioned case, considered the settled law of the Union.*

It has, indeed, been insisted that the legislature has no power to grant, by special act, exclusive rights and privileges; but it is now well settled that the legislature may make exclusive grants of property or privileges, as of bridge, ferry, and railroad franchises. Such grants are not regarded as monopolies, in the odious sense of the phrase, but as contracts within the meaning of the Constitution. It has been urged in argument, that if this right be conceded, a legislature may create gross and outrageous monopolies. But the

Mr. Chancellor Kent's remarks on this case, 1 Com. 418, lec. xix. Its decision undoubtedly forms one of the great epochs in our legal and constitutional annals.

* "Ever since the case of Dartmouth College *vs.* Woodward was decided by the national court, recognizing the charters of private corporations as contracts protected from invasion by the Constitution of the United States, no other court in this country has disregarded the doctrine; and we consider it now as obligatory and settled beyond our reach either to deny or disregard, even if any of us should doubt its original propriety. Therefore, although it may be true that to create a private corporation without a reserved legislative power over its charter is an act of improvident legislation, yet the judiciary has no remedial power to apply." Washington Bridge Co. *vs.* The State, 18 Conn. 65.

That a legislature can no more revoke its grants than a donor his gift when delivered, is now to be considered perfectly well settled. Enfield Toll Bridge Co. *vs.* The Conn. River Co., 7 Conn. 44; The Derby Turnpike Co. *vs.* Park, 10 Conn. 541; The People *vs.* Platt, 17 Johns. R. 215.

Supreme Court of New Hampshire has said, while affirming the general doctrine of the power, that it will be in time to consider whether grants of this character are within the constitutional exercise of the legislative power, when a case is presented in which it is apparent that a fraud has been practiced in obtaining the grant, or the circumstances under which it was made show that it was merely colorable, and intended to effect other purposes than those which appear on the face of it.*

The general principle is thus settled in regard to corporate grants, or to contracts resulting from acts of incorporation; but a very important modification or qualification was attached to the rule by a subsequent decision of the Supreme Court of the United States. They decided that all acts of incorporation, like other public grants, are to be construed strictly, and that no contract or agreement is to be inferred in them, as against the government and in behalf of the corporation, but what they expressly contain. So, where the legislature of Massachusetts, in 1785, granted a charter for seventy years to a bridge company, with the right of taking tolls, across the Charles river, and in 1828 the State incorporated another company with like authority to build a toll bridge, in such close proximity to the first bridge as actually to take away its tolls and destroying the value of its franchises, it was held that this last act was valid, on the ground that the original bridge charter contained no express grant of exclusive privilege, and that the whole matter was within the legiti-

* Piscataqua Bridge *vs.* N. H. Bridge, 7 N. H., 35. This was a case of a bill filed by a bridge company to restrain parties from proceeding to create another bridge, and thus infringing on the exclusive rights of the plaintiffs.

mate control of the legislature. This important doctrine has been repeatedly affirmed, and, I think, has commended itself to the general good sense no less than the sound legal judgment of the country.*

Having thus exhibited the leading rules which declare the definition of contracts within the meaning of the Constitution, it will be well to examine some of the special cases.

A compact was entered into between the States of Virginia and Kentucky, contained in an act of the legislature of the former State, passed the 18th of December, 1789, and ratified by the convention which framed the Constitution of Kentucky, and incorporated into that Constitution, to the effect that all private *rights and interests* of lands within the district of Kentucky derived from the laws of Virginia prior to their separation, should remain *valid and secure* under the laws of the proposed State, and should be determined by the laws then existing in the State of Virginia. Two laws were passed by the State of Kentucky in February, 1797, and January, 1812, concerning occupants and claimants of land, materially affecting private rights and interests to land, by exempting occupants without title from liability for waste, as well as for rents and profits, and compelling the true owner to pay for improvements put on the land by the occupant, even during the pendency of the suit. No acts of a similar character were in existence in Virginia at the time when the compact was made. The Supreme Court held that the compact between the two States

* The Proprietors of the Charles River Bridge *vs.* The Proprietors of the Warren Bridge, 11 Peters, 420. Story, J., dissented. See, to S. P., The Richmond R. R. Co. & Louisa R. R., 13 Howard, 81. Ohio L. I. Co. *vs.* Debolt, 16 Howard, 430.

came within the constitutional clause; that the laws in question rendered the rights and interests of owners less valid and secure, and thus impaired the contract; and that Kentucky being a party to the original compact, which guaranteed those rights, could not constitutionally pass the statutes in question.*

Where the legislature of Arkansas chartered a bank, the whole of the capital of which belonged to the State, and declared that the bills and notes of the institution should be received in payment of debts due to the State, it was held that the undertaking of the State to receive the notes of the bank constituted a contract between the State and the holders of these notes, which the State was not at liberty to break; but that a repeal of the act put an end to the contract as to all notes subsequently issued.†

The provision of an act incorporating a railroad, that no other railroad shall be authorized to be made between the same points for thirty years, constitutes a contract to that effect which no subsequent act can be permitted to impair.‡

In regard to the nature of contracts resulting from acts of legislation, it appears to be settled by the Federal tribunals that it is competent for a State to

* Green *vs.* Biddle, 8 Wheaton, 1. Mr. Justice Johnson dissented.

The doctrine of Green *vs.* Biddle was approved and applied in Tennessee, in 1830, to a case coming up under their State Constitution, which contains a provision similar to that of the Constitution of the United States. Nelson *vs.* Allen *et al.* 1 Yerger, 360.

† Woodruff *vs.* Trappnall, 10 Howard, 191; see also, Paup *vs.* Drew, 10 How. 218, on the subject of this charter.

‡ Boston and Lowell R. R. Corporation *vs.* Salem and Lowell R. R. Co., 2 Gray, 1.

pass laws exempting property from taxation, which shall operate as contracts, and as such be irrepealable.* The Delaware Indians, having large claims to the southern part of New Jersey while yet a colony, surrendered them upon an agreement made between them and the commissioners of the colony, by which in consideration of the cession the colony agreed to purchase a tract of land for them to reside on; and the Assembly, in an act passed on the 12th of August, 1758, to carry this agreement into effect, declared that the lands to be purchased for the Indians should be thereafter *exempted from taxation.* Under the act the agreement was executed and lands purchased for them, which they held till about 1801, when they obtained an act from the legislature of the State of New Jersey authorizing them to sell. This act contained no reference to the exemption from taxation. In 1803, the Indians sold the lands to the plaintiff in this suit. In 1804, the State of New Jersey repealed the section of the act of 1758 exempting the lands from taxation; and the question presented was on the constitutionality of this repeal. The court held, that the proceedings between the colony of New Jersey and the Indians, formed a contract; a privilege, though for the benefit of the Indians, being annexed to the land, not to their persons, that the purchaser had succeeded with the assent of the State to all the rights of the Indians; and they declared the act unconstitutional and void.†

In 1845, the State of Ohio passed a General Banking Law by which it was declared that every banking

* This subject of exemption from taxation we have already partially considered, *ante*, p. 559.

† State of New Jersey *vs.* Wilson, 7 Cranch, 165,—1812.

company organized under the act should semi-annually set off six per cent. on its profits; and that this should be in lieu of all taxes to which the company or the stockholders should be subject. In 1851, an act was passed to tax banks, which provided that bank stock should be taxed at the same rate as other personal property. It was contended for the State, that the act of 1845 was a mere law prescribing a rule of taxation; that the relinquishment of the taxing power could not be made the matter of a binding contract; and that the permanent exemption from taxation was a relinquishment of a portion of the sovereign power of the State, which no legislature could make. But the Supreme Court of the United States held that the act of 1845 created a contract fixing the limit of taxation on the banks in question; that the position that a State in exempting certain property from taxation relinquished a part of its sovereign power, was an unfounded assertion; that it was as competent for a State to make a contract in regard to exemptions from taxation as in regard to any other matter; and the act of 1851 was held unconstitutional and void.*

The same question, or one closely analogous, was presented shortly afterwards in another shape, and it was decided that, where the State of Ohio in 1845 chartered a bank, in the charter of which it was stip-

* State Bank of Ohio *vs.* Knoop, 16 Ohio, 369; Catron, J., Daniel, J., and Campbell, J., dissented. See also the case of the Ohio Life Insurance and Trust Co. *vs.* Dubolt, 16 Howard, 416, on the same banking laws. The opinions in these cases, as well of the court as of the dissenting members, are of great interest in regard to the subject of State contracts, the general nature of legislative power, exemptions from taxation, and the extent to which State decisions control the Supreme Court of the United States.

ulated that the tax which the bank should pay should be computed on a certain principle, and should not exceed a certain sum; and in 1852 the legislature passed an act assessing taxes on the bank to a greater amount and on a different principle,—the law was in conflict with the clause of the Constitution of the United States relating to the obligation of contracts, and void. And the fact that the people of the State had in 1851 adopted a new constitution, in which it was declared that taxes on banks should be imposed in the mode which the act of 1852 purported to carry out, was held not to release the State from the obligations imposed on it by the Constitution of the United States.*

Again, where the legislature of the State of Maryland accepted from a banking corporation a bonus as a consideration for the franchise granted, and pledged the faith of the State not to impose any further tax or burthen upon them during the continuance of their charter, it was held, that this was a pledge against additional taxation; that the exemption operated as well in favor of the stockholders personally as of the capital stocks of the banks; and that a tax upon the stockholders by reason of their stock impaired the obligation of this contract; and the tax was therefore declared illegal.†

* Dodge *vs.* Woolsey, 18 How. 330; Woolsey *vs.* Dodge, 6 M'Lean, 142.

† Gordon *vs.* Appeal Tax Court, 3 Howard, 133.

The same result in regard to contracts for exemption from taxation, has been declared in Connecticut, but doubted in New Hampshire. Osborn *vs.* Humphrey, 7 Conn. 335; Brewster *vs.* Hough, 10 N. H. 138; *ante*, p. 559.

In New Jersey also it has been decided that when an incorporated company is by its charter exempt from taxation, the stock in the hands of the stockholders cannot be taxed: it represents and is the title to the

But, in analogy to the rules requiring a strict interpretation to be applied to all corporate grants, it is held, that although a contract may be made exempting a party from taxation it must be very clear and express. The taxing power of a State is never presumed to be relinquished unless the intention to relinquish is declared in clear and unequivocal terms.* So, when a State enacted that the real property belonging to a hospital "should be, and remain free from taxes," it was held, that there being nothing in the exempting statute in the nature of a contract, it was liable to repeal. "No duty," said the Supreme Court of Pennsylvania, "is imposed on the institution as the consideration of the grant: it is required to do nothing; it is left to pursue its own course as freely as before."†

property of the company, and therefore is included in the exemption of the charter. The State *vs.* Branin, 3 Zabriskie, p. 485. In this case the absolute power of the legislature over the subject of taxation, is strongly declared.

See also on the subject of exemption from taxation of stockholders of institutions themselves exempt, Johnsen *vs.* The Commonwealth, 7 Dana, 342; Tax Cases, 12 Gill & J. 117; Gordon's Exors. *vs.* The Mayor of Balt. 5 Gill, 236; Smith *vs.* Burley, 9 New Hampshire, 423. See the subject of statutory exemptions from taxation elaborately considered also in Landon *vs.* Litchfield, 11 Conn. 251.

* Philadelphia & Wilmington R. R. Co. *vs.* Maryland, 10 Howard, 393; Providence Bank *vs.* Billings & Pittman, 4 Peters, 514.

† Hospital *vs.* Philadelphia Co., 24 Penn. 229.

An interesting question of a somewhat analogous nature, has been raised in Massachusetts in regard to the application of the constitutional provision to the grants of lands made in that State to towns for the support of the ministry. In 1797 the legislature passed a resolve authorizing the sale of certain ministry lands in the town of Lanesborough, and the distribution of the income between the Congregational and Episcopal societies, and providing for the appointment of trustees, but with a proviso that it should be in the power of the legislature, on the future application of any new denomination of Christians in the town, to make a new appropria-

In the cases just examined, we have seen that legislative acts are sometimes held to create a contract, and treated accordingly. But we have already* stated that in the term contracts are not included rights, or rather interests, growing out of measures of public policy. So, no contract is created by a statute fixing the emoluments of a public office; and where a Pennsylvania act reduced the *per-diem* compensation of a public officer during the term for which the office, with its remuneration, had been fixed by a previous statute, it was held that the original law created no contract.† So, a grant by a legislature to a county, of a sum forfeited, may be refunded. Such a grant creates no contract, on the ground that it is made to a public body, and for public not private purposes.‡ So, the grant of a ferry franchise to a town, creates no contract by which the town can claim a permanent

tion. In 1814, the proviso reserving power to the legislature was repealed, and the actual appropriation confirmed. In 1837, the legislature on the application of the Baptists passed a resolve, that a portion of the income should be paid to that society. It was held, that under the special circumstances of the case, the repeal of the proviso was neither a renunciation nor a final execution of the power reserved to the legislature, and did not preclude them from exercising the power reserved; and that the resolve of 1837 was valid. But the court said, "Whether this power, reserved as a perpetual benefit in favor of denominations of Christians who should afterwards spring up in that town, could be renounced by one legislature so as to bind their successors, if done after notice to all parties then existing; or whether the court would be bound to presume that an act done by the legislature was done after due notice,—are questions of difficulty, on which we give no opinion." Per Shaw, C. J., in Congr. Soc. in Lanesboro' *vs.* Curtis, 22 Pick. 332; See also Humphrey *vs.* Whitney, 3 Pick. 158.

* *Ante*, p. 618.

† Butler *et al. vs.* Pennsylvania, 10 Howard, 416.

‡ The State of Maryland *vs.* Balt. & Ohio R. R., 3 Howard, 551. See also, The People *vs.* Morris, 13 Wend., 325; The Commonwealth *vs.* Bacon, 6 Serg. & Rawle, 322; The Commonwealth *vs.* Mann, 5 Watts & Sergeant, 418; Barker *vs.* The City of Pittsburgh, 4 Barr, Penn. R. 51.

right to the ferry; and the legislature may, in its pleasure, discontinue the ferry; and this, both on the ground that the ferry franchise related only to public interests, and also that the town was a mere organization for public purposes, and that the grant was rather in the nature of legislation than of compact.*

The same doctrine has been applied to municipal ordinances; and it has been decided that the corporations of cities cannot make permanent and irrepealable contracts in regard to matters of public interest; or, as the proposition is sometimes put in other words, that they cannot strip themselves of any portion of their legislative power. So, it has been held by the Supreme Court of the United States, in regard to an ordinance for grading streets;† and so in New York, in regard to ordinances regulating the interment of the dead.‡ In the latter case, it was determined that ordinances declaring it unlawful to inter in cities, and which by their necessary operation annulled or revoked the covenants and permissions contained in prior grants of land ceded for cemetery purposes, were valid. It was held that this was so, although the contract was thus annulled by the very body that made it. It was said, "There is, indeed, a seeming inconsistency; but the defendants, the city, had no power to limit the legisla-

* East Hartford *vs.* Hartford Bridge Co., 10 Howard, 534. See also, Mills *vs.* St. Clare Company, 8 Howard, 569, 581.

† Goszler *vs.* The Corporation of Georgetown, 6 Wheat., 593.

‡ Presb. Church *vs.* City of N. Y., 5 Cowen, 542; Coates & Stuyvisant *vs.* The Mayor of N. Y., 7 Cow., 58. So decided, also, by Nelson, J., in The Mayor *vs.* Brittain (not reported), in regard to a street-cleaning contract. I am indebted for this last case to the kindness of M. V. B. Wilroyson, Esq., assistant counsel to the corporation.

tive discretion by covenant, and they are not estopped from giving this answer."*

The most serious question that yet exists in regard to the true meaning of the phrase contract under this clause, relates to the subject of marriage. It has been insisted that the constitutional clause only related to pecuniary contracts; and in regard to marriage, it has been urged that the agreement is not strictly a contract, but a civil relation, entirely subject to the control of municipal law. On this point, different and conflicting decisions have been made. In Missouri, adhering to an intimation very early made *obiter* by the Supreme Court of the United States,† it has been decided that marriage is a contract within the mean-

* Presb. Church *vs.* City of N. Y., 5 Cowen, p. 542.

In England, it has been said that a deed, or covenant, cannot operate in direct opposition to an act of Parliament; which negatives the ideas of the party being prevented by estoppel from setting up the act.—Fair Title *vs.* Gilbert, 2 T. R., 171.

In connection with this, I may here notice the question whether an agreement to do a thing lawful at the time is annulled by a statute declaring the act unlawful. In an early case, 1683, it was held, that if the thing to be done was lawful at the time when the defendant entered into the covenant, though afterwards prohibited by act of Parliament, yet the covenant was binding.—Brason *vs.* Dean, 3 Mod. 39.

But a different and more rational doctrine was soon after laid down; and it was declared that the distinction between the cases when a statute repeals a covenant and when it does not, is this:—when a man covenants not to do a thing which was lawful for him to do, and an act of Parliament comes after and compels him to do it,—then the act repeals the covenant; so, if a man covenant to do a thing which is lawful, and an act of Parliament comes and hinders him from doing it, the covenant is repealed; but if a man covenants not to do a thing which then was unlawful, and an act comes and makes it lawful to do it,—such act of Parliament does not repeal the covenant.—Brewster *vs.* Kitchin, 1 Ld. Ray. 317; S. C. 1 Salk., 198. The same rule has been declared in New York, and applied to municipal corporations, as above.—Presb. Church *vs.* City of N. Y., 5 Cowen, 542.

‖ Dartmouth College *vs.* Woodward, 4 Wheaton, 518.

ing of the Constitution, and protected by the clause in question; and an act of the General Assembly granting a divorce, was held unconstitutional and void.*

On the other hand, in Maine, the Supreme Court has held that the clause in regard to the obligation of contracts, does not relate or apply to marriages.† They said, however, at the same time, that under the clause in regard to the division of power into executive, legislative, and judicial, the legislature had no power to grant divorces in cases where the Supreme Court

* The State, to the use of Gentry, *vs.* Fry, 4 Miss., 120. The divorce was also pronounced unconstitutional on the ground, that the grant of a divorce was a judicial and not a legislative act. See this case, also, for an elaborate discussion of the subject of the distribution of powers between the legislature and the judiciary and the executive. The case of Bryson *vs.* Campbell, 12 Miss., 498, was decided in 1849, on the authority of Gentry's case, which was said to be the settled law of the State.

Several other points decided in this case may be noticed here. Retrospective laws are said neither to accord with sound legislation, nor with the fundamental principles of the social compact. Yet the Constitution of the United States has not made any provision against their passage, and many of the State Constitutions contain no guard against them. All such retrospective laws may be passed, and when passed are binding and obligatory on the judiciary. The Constitution, however, of this State has provided against these laws in express terms; and, therefore, all such as have a retrospective action, either upon contracts or other acts, are by this provision void.—p. 135.

It is conceded that the legislature is not bound to assign a cause for the passage of any law.—p. 156.

The right of the judiciary to decide a law to be unconstitutional, follows inevitably from its duty to declare what the law is.—p. 178.

In New York, in the following cases, it has been intimated that the contract of marriage, and its incidents, as the wife's right of dower, are within the provisions of the Constitution as to the obligation of contracts.—Kelly *vs.* Harrison, 2 J. Cases, 29; Jackson *vs.* Edwards, 22 Wend., 498; Lawrence *vs.* Miller, 2 Coms., 245. See, also, Moore *vs.* The Mayor, 4 Seld., 110, as to dower, and Westervelt *vs.* Gregg, 2 Kernan, 202, as to the husband's right to the wife's choses in action. *Ante*, p. 541.

† Opinion of Justices, 16 Maine, 479.

had jurisdiction; but that the power to grant divorces existed where that tribunal had no jurisdiction.

In Connecticut, too, legislative divorces have been sustained; and it has been said that they were neither invalid as within the constitutional clause, nor repugnant to the State Constitution as an assumption of judicial power by the legislature; but much stress was laid on the appalling consequences of declaring all the legislative divorces of the State void; and the result appears to have been arrived at more on that ground than on any other.* It has also been said, in New York, that marriage was not a contract, in the strict common-law sense of that term.†

In Florida, the marriage contract is considered within the protection of the constitution.‡ But in Kentucky it is treated as an institution created by the public law, and subject to the public will.§ And this, according to Mr. Chancellor Kent, is the true construction.‖

The act of New York, of 1848, entitled, "An Act for the more effectual protection of the property of

* Starr *vs.* Pease, 8 Conn., 548. See the opinion of Peters, J., in part dissenting.

† White *vs.* White, 5 Barb., 474.

‡ Ponder *vs.* Graham, 4 Florida, 23.

§ Maguire *vs.* Maguire, 7 Dana, 184.

‖ Kent Comm., vol. i. p. 417, note. I cite the 8th edition.

In New Hampshire, it has been decided that a grant of a divorce is a judicial proceeding; that the legislature may provide by general laws, having no retrospective effect, for the dissolution of existing marriages; but that an act altering the law of the contract, and empowering the courts to grant divorces for causes which, when they occurred, furnished no ground for the dissolution of the marriage, is a retrospective law, within the provision of the constitution of that State, and as such void.—Clark *vs.* Clark, 10 N. H., 381. See, in this case, the comments of Parker, C. J., on the Dartmouth College Case.

married women," of which the object was to make a complete change of the relations of husband and wife as regards property, declares that the real and personal property, and the rents, issues, and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, except so far as the same may be liable for the debts of the husband heretofore contracted. It has been held that this law, so far as it was intended to affect existing rights of property in married persons, was, in regard to marriages celebrated before its passage, unconstitutional and void; on the ground that, as regards property, the contract of marriage must stand on the same footing as other contracts; that the law, as it existed at the time of the making of the contract, formed part of the contract.*

In the same State, however, it has been held that dower is not the result of a contract, but a positive institution of the State; and a law extinguishing the wife's right to dower during the husband's lifetime, does not infringe the provision of the Federal Constitution in regard to contracts.†

I may close this branch of my subject by stating that it has been intimated that the constitutional provision applies to cases of contract strictly; and that where the obligation, though of a pecuniary nature, results from a duty imposed on the party by statute, it is wholly under legislative control.‡

We proceed to the second head of inquiry in regard

* Holmes *vs.* Holmes, 4 Barbour, 296, *per* Barculo, J.

† Moore *vs.* The Mayor, &c., 4 Selden, 110.

‡ *Per* Gridley, J., 17 Barb., 116, in regard to the laws regulating manufacturing corporations in New York.

to the clause of the Constitution now under discussion. *What acts of State legislation are considered to impair the obligation of a contract?* In reference to this, at the outset, we may remark that, so far as regards the legislation of the several States, the courts of the United States have no right to interfere by virtue of the restraining power of the Federal Constitution, except in the two cases of *ex post facto* laws, and laws impairing the obligation of contracts. The States may pass retrospective laws, however unjust; pass acts of a judicial nature, however clearly overstepping the line of legislative power; they may pass acts divesting vested rights; they may violate express provisions of their own Constitutions;—acts of these classes, however objectionable, are not within the scope of the restrictions of the Federal Constitution, and give no right of appeal from the decisions of the State tribunals.§

§ Calder *vs.* Bull, 3 Dall., 380; Satterlee *vs.* Matthewson, 2 Peters, 413; the Charles River Bridge Case, 11 Peters, 538. See comments of Mr Senator Verplank, in Cochran *vs.* Surlay, 20 Wend., 379, on Fletcher *vs.* Peck and Satterlee *vs.* Matthewson. Watson *vs.* Mercer, 8 Peters, 110; Balt. and S. R. R. *vs.* Nesbit, 10 Howard, 401; East Hartford *vs.* Hartford Bridge Co., 10 Howard, 539.

It may be well to give somewhat at length one of these cases. In 1785, a deed was executed of lands in Pennsylvania, which, by reason of a defective acknowledgment under the then law, was insufficient to pass the title. In 1826, a statute of the State was passed to cure the defect, so as to make the deed as effectual as if properly acknowledged; and ejectment was then brought by parties claiming under it. It was objected, that the act of 1826 violated the obligation of a contract; but the Supreme Court said that it did not, either in its terms or in its principles; and they held the plaintiff's recovery below final and conclusive,—declaring, also, that the court had no right to pronounce an act of a State legislature void as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property; and that the Constitution prohibited no retrospective legislation, excepting the passage of *ex post facto* laws—which term is only applied to penal and criminal laws,—and laws violating the obligation of contracts.—Watson *vs.* Mercer, 8 Peters, 88.

Questions of this nature can only be presented in the Supreme Court of the United States in cases arising in the circuit courts, within the jurisdiction given to them under the Constitution of the United States, and where, consequently, the circuit courts exercise all the powers of the State tribunals. In regard to the present subject of investigation, therefore, the inquiry is, What legislation is held *to impair contracts?* And in regard to this, it is well here to remark that it has been said, by a very eminent judge of the Supreme Court of the United States, that "after a careful examination of the questions adjudged by this court, they seem not to have decided in any case that the contract is impaired, within the meaning of the Constitution, where the action of the State has not been on the contract."*

The clause of the Constitution embraces, as we have seen, private agreements, or agreements *inter partes;* and public agreements, as they may be called, resulting from acts of legislation. In regard to public agreements growing out of statutes creating charters, and similar enactments, the questions arising in regard to what acts impair them have not been numerous, as the case generally turns on the true construction of the act containing the alleged contract. But in regard to private agreements, the subject of our present inquiry has presented many very perplexing subjects of investigation.

Of these, one of the most important relates to the control which may be exercised over private contracts, in the shape of State insolvent or bankrupt laws,

* In Charles River Bridge *vs.* Warren Bridge, 11 Peters, 581, *per* Mr. Justice M'Lean.

whether acting on the person or property of the debtor; whether applying to subsequent or pre-existing engagements; whether affecting only citizens of the State passing the law, or having an extra-territorial operation. These topics, partly growing out of the clause which we are now considering, partly out of the 8th section of the 4th Article, giving Congress power to pass bankrupt laws, have been repeatedly and elaborately considered. Nor are they yet exhausted; for the division of judicial opinion in the Federal tribunal in some of the cases, has left the precise point decided a matter of controversy; and I think, therefore, that I shall best attain the objects of this treatise by a reference to the decisions, and a brief statement of the points generally understood to have been adjudged.*

It appears, then, to have been decided by the Supreme Court of the United States, that the power of Congress to pass a bankrupt law is not exclusive; that the exercise of that power by the States, as to future contracts, does not impair their obligation; that a contract made and to be performed in one State is not, as against a citizen of that State, discharged by a certificate obtained under the laws of another State, though such laws were passed before the inception of the contract; that a discharge under the laws of the State where the contract was made, but not to be performed, could not be pleaded in bar in the Circuit Court of the United States against a creditor, a citizen of another State at the time of the origin of the contract and of

* The cases in the Supreme Court of the United States are—Sturges *vs.* Crowninshield, 4 Wheat., 200; M'Millen *vs.* M'Neill, 4 Wheat., 209; Farmers & Mechanics' Bank of Penn. *vs.* Smith, 6 Wheat. 131; Ogden *vs.* Saunders, 12 Wheat., 213; Boyle *vs.* Zacharie, 6 Peters, 635; Cook *vs.* Moffat, 5 Howard, 295; Bronson *vs.* Kinzie, 1 Howard, 311.

the discharge; that the same is true when the action is brought in the courts of a State other than that of the origin of the contract; that a creditor of one State, who voluntarily makes himself a party to insolvent proceedings in another State, is bound by the result.

The Supreme Court has not decided that a contract which is in terms to be performed within the State where the discharge is granted, may not be barred by such discharge, as against a citizen of another State seeking to enforce the contract in the State where the contract was to be performed and where the discharge was obtained. Nor has it decided the question where the contract was made with a citizen of the State where the discharge is granted, and of which both creditor and debtor were citizens at the time of the proceedings in insolvency, though the contract itself was entered into in another State.*

* I take this clear and succinct statement from a recent case in Massachusetts where the whole subject has been considered. Marsh *vs.* Putnam, 3 Gray, 563, per Thomas, J. The other cases in Massachusetts are: Braynard *vs.* Marshall, 8 Pick. 194; Betts *vs.* Bagley, 12 Pick. 572; Agew *vs.* Platt, 15 Pick. 417; Savoye *vs.* Marsh, 10 Met. 594; Fiske *vs.* Foster, 10 Met. 597; Woodbridge *vs.* Allen, 12 Met. 470; Ilsley *vs.* Meriam, 7 Cush. 242; Clark *vs.* Hatch, 7 Cush. 455; Scribner *vs.* Fisher, 2 Gray, 43. These cases are all reviewed by the Supreme Court in Marsh *vs.* Putnam, 3 Gray, 551; where held, that a certificate of discharge under the insolvent laws of the State of Massachusetts is a bar to an action on a contract between two citizens of the same State, though made and to be performed in another State.

In Betts *vs.* Bagley, 12 Pick. 579, the Supreme Court of Massachusetts said, "We consider the case of Ogden *vs.* Saunders as authority for the proposition that a State insolvent law, when no general law, passed by the Congress of the United States establishing a uniform system of bankruptcy is in force, is not *per se* and by force of the clause in the Constitution of the United States vesting in Congress the power of passing such law, unconstitutional and invalid; but that the law of a State providing for the

The most embarrassing cases that have arisen, however, under this branch of our inquiry, are those growing out of a nice distinction taken early by very high authority between the *obligation* of a contract, and the *remedy* for its infringement or non-performance. Out of this has grown much discussion as to the extent to which the legislative action of the States may alter the remedy without impairing the obligation of a contract. In a case already cited,* Mr. Chief Justice Marshall used this language, "The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation."† This very general

discharge of an insolvent debtor upon the surrender of his property, so far as it operates upon contracts made after such law within such State by citizens thereof then resident therein, and which by their terms are to be performed and executed within the limits of such State, is valid and binding upon such citizens, and that a discharge obtained by a citizen of such State under such a law is a valid discharge."

* Sturges *vs.* Crowninshield, 4 Wheat. 200.

† About the same time the Supreme Court of the United States held, that an act incorporating a bank and giving to the corporation a summary process, in the nature of an attachment against its debtors who by express written consent made their notes negotiable at the bank, did not conflict with the provisions relating to trial by jury on the law of the land; but they also held, that the provision did not create a chartered right in the

language has been repeatedly regretted, and often criticised. And certainly it does not appear to have been necessary for the decision of the cause.*

The subject was again considered by the same tribunal. In a case already cited, where certain laws of Kentucky were complained of as infringing the constitutional provision because, contrary to a compact with the State of Virginia, they rendered the rights of claimants to lands less secure by depriving them of the fruits of their property, and charging them with the value of improvements, it was said, "The objection to a law on the ground of its impairing the obligation of a contract can never depend on the extent of the change which the law effects in it. The court proceeded to declare, that "legislation which should deny to the owner of land a remedy to recover the possession of it, or to recover the profits, or clogging his recovery of the possession or profits by conditions and restrictions tending to diminish their value, impaired his right to and interest in the property;" and in the principal case they held the statutes in question unconstitutional and void.†

The subject of the extent to which the remedy can be altered without impairing the obligation, soon came up more distinctly for consideration.

bank,—that it related to the remedy and not the right, and as such was subject to legislative control. Bank of Columbia *vs.* Okely, 4 Wheaton, 245; See also Young *vs.* The Bank of Alexandria, 4 Cranch, 384.

* Kent terms this language of Marshall, C. J. general, latitudinary, and hazardous, and says, "It seems to me that to lessen or take away from the extent and efficiency of the remedy to enforce the contract legally existing when the contract was made, impairs its value and obligation." Com. vol. i. p. 456; Vide also *ante*, pp. 133, 192, 200.

† Green *vs.* Biddle, 8 Wheat., p. 84 and 76.

"I say with great confidence, that a law taking away all remedy from existing contracts would be manifestly a law impairing the obligation of contracts." Per Trimble, J., 12 Wheat. p. 327.

In March 1814, Haile being a prisoner in Rhode Island for debt, gave bond to the jail limits to continue a true prisoner until lawfully discharged. In June 1814, he presented a petition to the legislature of Rhode Island for relief, and for the benefit of an act passed in Rhode Island in June, 1756, but then no longer in force, for the relief of insolvent debtors. In 1816 the prayer of his petition was granted, and thereafter a discharge from his debts and from imprisonment was granted him by the proper court. Suit being brought on the bond, the legislative proceedings and the discharge were pleaded, and a demurrer interposed, on which the question went up to the Supreme Court of the United States. The court premised by saying, that the legislature of Rhode Island had been in the constant habit of entertaining petitions of a similar character to that of Haile; and held the discharge valid, saying, "The discharge so far as it related to the imprisonment of the defendant affected the *remedy in part only*, and was in the due and ordinary exercise of the powers vested in the legislature of Rhode Island, and was a lawful discharge and no escape, and of course no breach of the condition of the bond in question."* The court also cited the language above used, in Sturges *vs.* Crowninshield, and said, "Can it be doubted that the legislatures of the States, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such law might extend to present as well as to future imprisonment?"†

* Washington, J., dissented, in a clear and able opinion. Mason *vs.* Haile, 12 Wheat. 379.

† It may be observed of this case, as of the interesting one of Wilkinson *vs.* Leland, 2 Peters, 627, that they were both decided under the very curi-

The general and sweeping character of the language of these cases, and the singular omission to state any restrictions or to fix any general, practical line of demarkation in regard to the power of the State legislatures, was perhaps the cause, among others, that many laws were passed by the States striking at the remedy of contracts in a very serious way; and that the State Courts have frequently showed a disposition to sustain legislation of this character.

Previous to 1838, in the State of Massachusetts, creditors had by law a right to secure their claims by attachments. An act was passed on the 23d of April, 1838, to go into effect on the 1st of August of that year, organizing what was, in fact, a State bankrupt system providing for the appointment of an assignee, an equal distribution of assets, and a discharge of the debtor. The act declared that all the property of the debtor should be vested in the assignees, although then attached on mesne-process, but saved all rights which had accrued to any person by virtue of the prior system. Where a debt was due before the passage of this act, of 23d April, 1838, and an attachment issued at the suit of an individual creditor on the 7th of August, 1838, or after it went into effect, it was held that the attachment and lien of the attaching creditor could not be sustained as against the assignees under the act of 1838, on the ground that the act only impaired the remedy, and did not affect the contract. And the court said, "A creditor cannot be said to be deprived of all remedy, which, if true, would be tan-

ous, original charter of Rhode Island, by which no division of the powers of government were created, and under which the legislature seems to have exercised a despotic sort of authority.

tamount to the discharge of his claim; but his contract remains in full force, and the limited remedy which is left to enforce the payment would be more or less valuable according to circumstances."*

The laxity of legislative practice and of judicial decisions, finally brought up the whole subject again before the Supreme Court of the United States; and their original language was very seriously modified. Certain laws of Illinois passed in 1841, declared that the equitable estate of the mortgagor in premises mortgaged before the passage of the act, should not be extinguished for twelve months after a sale and a decree in chancery, and prohibited any sale unless two thirds of the amount at which the property had been

* Bigelow *vs.* Pritchard, 21 Pick., 174, decided in 1838. This language declares that a *substantial limitation or diminution* of the remedy, does not *impair* the obligation of the contract; and it appears very difficult to sustain its reasoning, either on any construction of the phraseology of the constitutional clause, or on principle; nor does it seem in accordance with the later decisions. I may remark that the court in this case added, "A creditor has no vested right in the mere remedy, *unless he may have exercised that right, by the commencement of legal process* under it before the law making an alteration concerning it shall have gone into operation." I shall call attention elsewhere, to this important qualification.

We have elsewhere seen that in the same State, an act of the legislature enlarging the limits of a prison-yard, was held a good defence to an action on a prison-bond executed before the passage of the statute. Walter *vs.* Bacon, 8 Mass., 468.

I may here notice some other cases belonging to the lax school of interpretation. In Woodfin *vs.* Hooper, 4 Humph. Tenn. R., 13, it was held that the right to imprison the debtor as part of the remedy formed no portion of the contract. In Chadwick *vs.* Moore, 8 Watts & Serg., 49, a State statute suspending sales on executions for a year unless two thirds of the appraised value was realized, was held not unconstitutional. See also, on the same side, Evans *vs.* Montgomery, 4 Watts & Serg., 218, and Patin *vs.* Prejean, 7 Louis. Rep., 301; Newton *vs.* Tibbats, 2 Eng. R., 150; Bronson *vs.* Newberry, 2 Doug. Michigan, 38; Rockwell *vs.* Hubbell, 2 Doug. Michigan, 197.

valued by appraisers should be bid therefor. These acts being brought up for adjudication before the Supreme Court of the United States, were declared to be void within this clause of the Constitution of the United States. The court held the twelve months delay and the restriction on the sale both clearly to impair the contract, as far as regarded mortgages executed previous to the passage of the law.* I give an extract from the able opinion of Mr. Chief Justice Taney, on account of the importance of the subject; but I cannot refrain from saying that, it appears to me, if the reasoning were pushed to its legitimate and logical results, contracts would have a much more efficient protection than they have yet received.

If the laws of the State passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a State may regulate at pleasure the modes of proceeding in its courts in relation to its past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every State, to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional.

* Mr. Justice M'Lean dissented.

Whatever belongs merely to the remedy, may be altered according to the will of the State; provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case, it is prohibited by the Constitution.

It is difficult, perhaps, to draw a line that would be applicable, in all cases, between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may in effect be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it.

This brings us to examine the statutes of Illinois which have given rise to this controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly upon the contract itself, and to engraft upon it new conditions injurious and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the Court of Chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment-creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security, by rendering the property unsalable for anything like its value. This law gives the mortgagor and the judgment-creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution.

The second point certified arises under the law of February 27,

1841. The observations already made in relation to the other act apply with equal force to this. It is true, that this law apparently acts upon the remedy and not directly upon the contract. Yet its effect is to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible. And this law is still more objectionable, because it is not a general one, prescribing the mode of selling mortgaged premises in all cases, but is confined to judgments rendered and contracts made prior to the 1st of May, 1841. The act was passed on the 27th of February, in that year; and it operates mainly on past contracts, and not on the future. If the contracts intended to be affected by it had been specifically enumerated in the law, and these conditions applied to them, while other contracts of the same description were to be enforced in the ordinary course of legal proceedings, no one would doubt that such a law was unconstitutional. Here a particular class of contracts is selected, and encumbered with these new conditions; and it can make no difference in principle, whether they are described by the names of the parties, or by the time at which they were made.

In the case before us, the conflict of these laws with the obligations of the contract is made the more evident by an express covenant contained in the instrument itself, whereby the mortgagee, in default of payment, was authorized to enter on the premises and sell them at public auction; and to retain out of the money thus raised the amount due, and to pay the overplus, if any, to the mortgagor. It is impossible to read this covenant and compare it with the laws now under consideration, without seeing that both of these acts materially interfere with the express agreement of the parties contained in this covenant. Yet the right here secured to the mortgagee is substantially nothing more than the right to sell, free and discharged of the equitable interest of Kinzie and wife, in order to obtain his money. Now, at the time this deed was executed, the right to sell free and discharged of the equitable estate of mortgagor in the State, existed without the aid of this express covenant, and the only difference between the right annexed by law and that given by the covenant, consists in this—that in the former case the right of sale must be exercised under the direction of the Court of Chancery, upon such terms as it shall prescribe, and the sale made by an agent of the court; in the latter, the sale is made by the party himself. But, even under this covenant, the sale made by the party is so far subject to the supervision of the court, that it will be set aside and a new one ordered, if reasonable notice is not given,

or the proceedings be regarded, in any respect, as contrary to equity and justice. There is, therefore, in truth, but little material difference between the rights of the mortgagee, with or without this covenant. The distinction consists rather in the form of the remedy than in the substantial right; and as it is evident that the laws in question invade the right secured by this covenant, there can be no sound reason for a different conclusion where similar rights are incorporated by law into the contract, and form a part of it at the time it is made.

Mortgages made since the passage of these laws must undoubtedly be governed by them; for every State has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale, for the payment of a debt; and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions, and they would be obligatory upon the parties in the courts of the United States as well as those of the State. We speak, of course, of contracts made and to be executed in the State. It is a case of that description that is now before us, and we do not think it proper to go beyond it.*

And again,† the same principle was applied to the same laws, and they were declared unconstitutional so far as they affected mortgages given before their passage.‡

But this rule is only understood to protect contracts made before the passage of the law. Contracts made after the passage of the statute are controlled by it, on the ground that the laws in existence when

* Bronson *vs.* Kinzie, 1 Howard, 315, decided in 1843.

I may be permitted to express my regret that in this case, as in Sturges *vs.* Crowninshield, and the Dartmouth College Case, the Supreme Court felt themselves at liberty to go beyond the case before them, and to express an opinion in regard to other questions, of great moment but not necessarily in judgment. The rule which confines judicial decisions to the very matter before the tribunal is important in all cases; but in regard to constitutional questions, its magnitude cannot easily be overstated.

† M'Cracken *vs.* Hayward, 2 Howard, 608.

‡ Mr. Justice Catron dissented; see also, Curran *vs.* State of Arkansas, 15 Howard, 304, 318, where the same doctrine is laid down in an able opinion by Mr. Justice Curtis.

the contract is made, are necessarily referred to, and form part of the contract, and fix the rights and obligations growing out of it.*

These decisions exercised a marked and immediate influence on the legislation of the country and on the action of the State tribunals; and it may perhaps be said, with, however, many serious exceptions, that the tendency of the later decisions is to treat the substantial remedy provided by the laws in existence at the time of the formation of the contract, as a material part of the contract; and that any legislation which materially impairs the vigor or efficiency of that remedy, in just so far impairs the contract.

Notwithstanding the great weight of authority on the other side of the question, I am free to confess my entire inability to distinguish between the *obligation* and the *remedy* of a contract. Obligation, I suppose, means binding force, the force or constraint which binds the party to perform his agreement. What, then, is in legal acceptation, the binding force of a contract? It certainly is not the mere, naked promise. It is not the moral duty. It is not honor, nor fashion, that binds the contracting party to keep his engagement. What is it then, but the remedy—the coercive remedy—which the law gives against the person or property of the defaulting party. It seems to me, that looking at a contract legally and practically as an instrument by which rights of property are created, and on which they repose, obligation and remedy are strictly convertible terms. Take away the whole remedy, and

* Moore *vs.* Fowler, Hempstead's Arkansas C. C. Reports, 537. The law had been before held valid, even as to contracts made before it. U. S. *vs.* Conway, *ibid*, 313.

and it is admitted the contract is gone. How, then, if a material part of the remedy be taken away, can it be said that the obligation is not *impaired?* A confusion would seem to have arisen from not sufficiently taking into consideration the full sense of the term *impaired.* It is said that the remedy forms no part of the contract, and that the creditor makes his bargain, knowing that he is at the mercy of future legislation; but as I understand it, all the cases distinguishing between the operation of State insolvent laws and State stop laws, passed before the making of the contract, and those made after, proceed on the very ground that the legislation in force at the time of the contract enters into and forms part of it. It is said again, that in all countries, and at all times, the remedy has been under the control of the sovereign authority. This is merely begging the question, or rather arguing from false analogies. The very question with us, is whether, under our system, we have not declared a different rule. No one seeks to deny that the remedy should be to a certain extent under legislative control. Tribunals may be changed, procedure altered: these modifications do in nowise impair the remedy or prejudice the holder of a contract. But it seems to me the only logical rule to hold, that any legislation which materially diminishes the remedy given by the law to the creditor at the time his contract is made, just so far *impairs* the obligation of the contract. We must, however, take our law from the adjudged cases.

In Pennsylvania and Missouri, the doctrine of Bronson *vs.* Kinzie have been followed, and State stop laws of the same kind have been declared invalid;* and in

* Lancaster Savings Institution *vs.* Peigart, cited 4 Kent Com. 434, note a.; Baumgardner *vs.* Circuit Court, 4 Missouri R. 50.

Indiana it has been generally decided that the sale of property on execution under a judgment on a contract, is governed by the laws in force when the contract was made.*

In 1830 the legislature of Mississippi passed an act entitled, An act to establish a planter's bank in the State of Mississippi, by which, among other things, the bank was authorized to receive, retain, and enjoy its property of every kind, and to grant, demise, alien, and dispose of the same. In 1840 the State of Mississippi passed a law declaring that it should not be lawful for any bank in the State to transfer by endorsement or otherwise, any note or bill receivable, and if an action was brought on any note or bill so transferred, the same should be abated The Supreme Court of the United States held that the obligation in the contract between the State and the bank was, that the bank should have power to assign and transfer its property; that the contract between the bank and the signers of its notes, was that they should be paid in the hands of an assignee; that the law of 1840, by abating the suit, and thus destroying all remedy on the note in suit, impaired the obligation of both contracts; and it was held void.†

* Harrison *vs.* Stipp, 8 Blackf. R. 455.

† Planters' Bank *vs.* Sharp, 6 How. 301. This case contains the following brief and comprehensive summary of the decisions of the courts on this clause, by Mr. Justice Woodbury:—

"Where a new law has taken the property of a corporation for highways, under the right of eminent domain, which reaches all property, private or corporate, on a public necessity, and on making full compensation for it, and under an implied stipulation to be allowed to do it in all public grants and charters, no injury is committed not atoned for; nothing is done not allowed by pre-existing laws or rights, and consequently no part of the obligation of the contract is impaired. See case of the West River Bridge, and authorities there cited, in 6 Howard, 507.

Where a railroad charter passed in 1828, provided for a mode of determining the value of land wanted for the road, by the inquisition of a jury, the fee to vest in the company on payment or tender of the sum assessed, in 1836 an inquisition was had and the damages assessed; but in 1841, before payment or tender made, the legislature interposed and ordered a new

"So, where the legislature afterward taxthe property of such corporations, in common with other property of like kind in the State, it is under an implied stipulation to that effect, and violates no part of the contract contained in the charter. Armstrong *vs.* Treasurer of Athens County, 16 Peters, 281. See Providence Bank *vs.* Billings, 4 Peters, 514; 11 Peters, 567; 4 Wheat. 699; 12 Mass. Rep. 252; 4 Gill and Johns. 132; 4 Durn. and East, 2; 5 Barn. and Ald. 157; 2 Railway Cases, 23.

"So, where no clause existed in the charter for a bridge against authorizing other bridges near at suitable places, it is no violation of the terms or obligation of the contract to authorize another. Charles River Bridge *vs.* The Warren Bridge *et al.*, 11 Peters, 420.

"Nor is it, if a law make deeds by *femes covert* good when *bona fide*, though not acknowledged in a particular form; because it confirms rather than impairs their deeds, and carries out the original intent of the parties. Watson *vs.* Mercer, 8 Peters, 88.

"Or if a State grant lands, but makes no stipulation not to legislate further upon the subject, and proceeds to prescribe a mode or form of settling titles, this does not impair the force of the grant, or take away any right under it. Jackson *vs.* Lamphire, 3 Peters, 280.

"Nor does it, if a State merely changes the remedies in form but does not abolish them entirely, or merely changes the mode of recording deeds, or shortens the statute of limitations. 3 Peters, 280; Hawkins *vs.* Barney's Lessee, 5 *ib.* 457.

"It has been held also, not only that the legislature may regulate anew what is merely the remedy, but some State courts have decided that it may make banking corporations subject to certain penalties for not performing their duties, such as paying their notes on demand in specie, and that does not violate any contract. Brown *vs.* Penobscot Bank, 8 Mass. Rep. 445; 2 Hill, 242; 5 Howard, 342. It is supposed to help enforce, and not impair, what the charter requires. But on this, being a very different question, we give no opinion.

"But look a moment at the other class of decisions. Let a charter or grant be entirely expunged, as in the case of the Yazoo claims in Georgia,

inquisition to be taken,—it was held that this did not impair the contract contained in the original charter, that the company had acquired no vested right by contract with the State, and that consequently none was impaired.*

An interesting question has been recently presented in New Jersey, in which a sound and vigorous interpretation has been given to the clause. The Somerville Water-Power Company, incorporated by the State of New Jersey, borrowed money on an issue of their negotiable bonds secured by a mortgage of the

and no one can doubt that the obligation of the contract is impaired. Fletcher *vs.* Peck, 6 Cranch, 87.

"So, if the State expressly engage in a grant that certain lands shall never be taxed, and a law afterwards passes to tax them. State of New Jersey *vs.* Wilson, 7 Cranch, 164. Or that corporate property and franchises shall be exempt, and they are taxed. Gordon *vs.* Appeal Tax Court, 3 Howard, 133.

"So, if lands have been granted for one purpose, and an attempt is made by law to appropriate them to another, or to revoke the grant. Terrett *vs.* Taylor, 9 Cranch, 43; Town of Pawlett *vs.* Clark, 9 Cranch, 292.

"Or if a charter, deemed private rather than public, has been altered as to its government and control. Dartmouth College *vs.* Woodward, 4 Wheat. 518.

"Or if owners of land granted without conditions or restrictions, have been by the legislature deprived of their usual remedy for mesne profits, or compelled to pay for certain kinds of improvements for which they were not otherwise liable. Green *vs.* Biddle, 8 Wheat. 1.

"Or if after a mortgage, new laws are passed prohibiting a sale to foreclose it unless two thirds of its appraised value is offered, and enacting further that the equitable title shall not be extinguished until twelve months after the sale. Bronson *vs.* Kinzie, 1 Howard, 311; M'Cracken *vs.* Hayward, 2 *ib.* 608;" Planters' Bank *vs.* Sharp *et al.* 6 *ib.* 331.

* Baltimore and Susquehanna Railroad Co. *vs.* Nesbit, 10 Howard, 395.

See, in Pennsylvania, the Erie and North East R. R. *vs.* Casey, 26 Penn. 287, a case of great interest, growing out of the repeal of a railroad charter. The repealing act was held constitutional, and various points in regard to the true construction of the clause in regard to the obligation of contracts, the repeal of charters, and the nature and effect of a preamble, will be found discussed.

real estate of the company, conditioned that on default of payment the lenders should have the right to re-enter and sell. A bill in equity having been filed against the company, and receivers appointed, a statute was passed by the State of New Jersey, in the year 1856, authorizing the receivers to sell the real estate of the company *free and clear from all incumbrances*, including the mortgages in question; and under the act a sale took place. A bill was thereupon filed by one of the mortgage creditors, to set aside this receiver's sale, to foreclose in his own behalf, and praying that the act of 1856 might be decreed unconstitutional and void. Mr. Justice Grier, on the New Jersey Circuit, has declared that the act authorizing the sale impairs the obligation of the contract in so far as it alters the estate of the mortgagee in the premises, and moreover violates the State constitution of New Jersey, which, as we have elsewhere seen,* prohibits any change of remedy existing at the time of the making of the contract.†

* *Ante*, p. 617.

† John M. Martin *vs.* The Somerville Water-Power Company and others. I find the case reported in the New York Evening Post for April 4th, 1857. In his opinion in this case, Mr. Justice Grier says, "Previous to the 29th of June, 1844, the State of New Jersey was governed by the old colonial constitution, adopted on the 2d of July, 1776. This contained no bill of rights, nor any clear limitation of the powers of the legislature. The history of New Jersey legislation exhibits a long list of private acts and anomalous legislation on the affairs of individuals, assuming control over wills, deeds, partitions, trusts, and other subjects usually coming under the jurisdiction of courts of law or equity; consequently, the decisions of the courts of New Jersey of questions arising under the old constitution, cannot be cited as precedents applicable to the present one, which carefully defines and limits the powers entrusted to the legislature, the executive, and the judiciary." The remark is important, and tends to throw light upon the

Some of the recent State decisions, however, exhibit a tendency again to relax the rule. It has been held in New York, that where the law has conferred an extraordinary remedy upon a particular class of creditors, a statute taking away such remedy, but leaving the ordinary means for the collection of the debt in full force, is not, though operating upon existing contracts, within the constitutional provision; and it was accordingly decided, that an act (1836, c. 369, § 2), repealing the provisions of a prior statute allowing a landlord to claim rent out of the proceeds of property seized in execution on the demised premises, was valid in its application to cases existing when the act was passed.* So, it has been held in the same State, following the intimation made *obiter* in Bronson *vs.* Kinzie, that a law exempting certain property from sale and execution, applies to judgments and executions on debts contracted before as well as after its passage.† These decisions present questions which are, however, still to be distinctly passed on by the Federal tribunal.

We have thus far considered cases where the effect of the act in question was directly upon the final remedy. But the preliminary procedure also forms part, and a very important part, of the remedy; and it seems to be settled that statutes of limitation pertain to the remedy, and not to the essence of the contract; and, in regard to this also, that it is within the power

cases of Mason *vs.* Haile, 12 Wheat. p. 376; *Ante*, p. 645; and Wilkinson *vs.* Leland, 2 Peters, *ante*, p. 645, decided under the old constitution or charter of Rhode Island, which was equally lax in its definition and distribution of the powers of government.

* Stocking *vs.* Hunt, 3 Denio, 274.

† In Quackenbush *vs.* Danks, 1 Denio, 128, affirmed by a divided court, 1 Coms., 129, a contrary result was arrived at; but the point has been finally decided in Morse *vs.* Goold, 1 Kernan, 281.

of the State legislatures to regulate the remedy and modes of proceeding, in relation to past as well as to future contracts. This power is subject only to the restriction that it cannot be exercised so as to take away all remedy upon the contract, or to impose upon it new burdens and restrictions which materially impair the value and benefit of the contract. And, accordingly, it has been held to be within the undoubted competency of the State legislatures to shorten the period of limitation of actions, to change existing rules of evidence, and to prescribe new rules of evidence and judicial procedure,—all to affect both past and future rights of action. Such acts are held to be invalid only when they deprive the party of all remedy, by changing the period of limitation, or destroying the validity of the proof on which his claim rested, so as to render it impossible to establish his right.*

The Supreme Court of Massachusetts has said,—

> If the legislature of any State were to undertake to make a law preventing the legal remedy upon a contract lawfully made, and binding on the party to it, there is no question that such legislature would, by such act, exceed its legitimate powers. Such an act must necessarily impair the obligation of the contract within the meaning of the Constitution; and the courts of law would be found, therefore, to consider it as a void act of legislation, and as having no force or authority. But to extend this principle to acts for the limitation of suits at law which, when enacted with a due discretion, and a reasonable time allowed for the commencement of suits on existing demands, are wholesome and useful regulations, would be extravagant. It must be left to the discretion of the legislature to fix the proper limitations. In the

* Bronson *vs.* Kinzie, 1 How. 311; M'Cracken *vs.* Hayward, 2 How. 608; Jackson *vs.* Lamphire, 3 Peters, 290; Briscoe *vs.* Anketell, 28 Miss., 361. See, also, to what is said as to statutes of limitation and usury in Sturges *vs.* Crowninshield, 4 Wheat., 206.

case under consideration, the term of a year is not, in our opinion, unreasonably short. But a true construction of the statute in question will not extend it to passing actions on bonds where, the escape having taken place before the passing of the act, a right of action had vested in the creditor.*

The following case exhibits, in a strong light, the power which our legislatures wield by this concession to them of an almost unlimited authority over statutes of limitation. Where the State of Mississippi passed a law, declaring that all judgments which had been obtained in any other State, prior to the passage of the law, should be barred, unless suit was brought upon the judgment within two years after the passage of the statute,—the act was held within the power of the State, even in a case where the person against whom the judgment was given became a citizen of the State upon the day on which he was sued; and although the Supreme Court, in deciding the case, admitted that the statute of Mississippi invited to the State and protected absconding debtors from other States, by refusing the creditor a remedy in his judgment, which was in full force in the State when the debtor absconded.†

In regard to recording acts, an interesting question has arisen. By a law passed in 1813 (April 12, 1813, 1 R. L. 369), the State of New York enacted that all deeds made after February, 1799, of lands in certain counties specified, should be recorded, and that every such deed should be adjudged fraudulent and void as

* Call *vs.* Hagger *et al.*, 8 Mass. 429. See, also, Holyoke *vs.* Haskins, 5 Pick. 26; Smith *vs.* Morrison, 22 Pick. 431.

† Bank of State of Alabama *vs.* Dalton, 9 Howard, 527. It is worthy of observation, however, that the clause in regard to obligation of contracts does not appear to have been discussed.

against any subsequent *bona-fide* purchaser or mortgagee, unless it should be recorded before the recording of the deed or conveyance under which such subsequent purchaser or mortgagee should claim. In a case arising under this act, Mr. Chancellor Walworth held that it could not be construed retrospectively; that if it were, it would destroy or materially impair a vested right under a previous contract, and be inoperative and void. On appeal, the decree was affirmed. Mr. Senator Verplanck, in delivering the decision of the Court of Errors, went further, and said that, even if prospective, the act was void as to all previously executed deeds, as impairing the obligation of contracts; that the effect of the statute would be to enact that valid contracts should be held invalid, unless a further legal sanction were added; and that thus the contract was impaired.*

But this does not seem to be the opinion of the Supreme Court of the United States. In March, 1797, the legislature of New York passed an act to settle disputes concerning titles to land in the county of Onondaga, in that State, by which it was enacted that commissioners should be appointed to hear and determine all disputes in regard to land titles in that county; that their decision or award should be final and conclusive, unless the parties deeming themselves aggrieved should file a dissent within two years, and within three years bring suit in the ordinary courts of the State. A controversy arose as to lands in this county, granted under letters patent by the State of New York, in 1790, to John Cornelius,—one party claim-

* Varick *vs.* Briggs, 6 Paige, 332; Varick's Exrs. *vs.* Briggs, 22 Wend. 546.

ing under a deed from the original patentee, dated the 17th of January, 1784, and recorded on the 25th of April, 1795; the other party claiming under a deed dated the 23d June, 1784, and recorded the 3d of April, 1795. The commissioners, in December, 1799, decided in favor of the second deed, which, as it appears, was subsequent in point of date, but prior in point of record. No dissent was filed; and suit was brought by the heir of the grantee in the first deed, in May, 1825. It was contended for the plaintiff, that the patent from the State created a contract with the grantee, his heirs and assigns, that they should enjoy the land therein granted free from any legislative regulations to be made in violation of the State constitution; that the act in question did violate some of the provisions of that constitution; that it consequently violated the obligation of a contract; and that the award of the commissioners was a nullity. But the Supreme Court of the United States held otherwise. They said that the patent contained no covenant to do, or not to do, any further act in relation to the land, and they could not create one by implication; they said that the State had not, by the act, impaired the force of the grant; that it did not attempt to take the land from the assigns of the original patentee and give it to one not claiming under him, nor did the award produce that effect; and they proceeded to hold this language,—

Presuming that the laws of New York authorized a soldier to convey his bounty land before recovering a patent, and that, at the date of the deeds, there was no law compelling the grantors to record them, they would take priority from their date. This is the legal result of the deeds; but there is no contract on the part of the State that the priority of title shall depend solely on

the principles of the common law, or that the State shall pass no law imposing on a grantee the performance of acts which were not necessary to the legal operation of his deed at the time it was delivered. It is within the undoubted power of State legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger if the prior deed is not recorded within the limited time; and the power is the same, whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts. Such, too, is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the title, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right and call for the interposition of the court; but the present is not one.*

It results from the general nature of the Federal government, and its supremacy over the States within its legitimate sphere, that a contract can no more be impaired by the change of a State constitution than by a State law. In 1845, the State of Ohio had chartered a bank, and stipulated the amount of taxes payable. In 1851, the people of that State adopted a new constitution, declaring a new mode by which taxes therein be levied on banks; and, in 1852, the legislature passed an act, in conformity to that constitution, levying taxes on the bank to a greater amount than as stipulated in the act of 1845, and on a different principle. It was held, that the act of 1852 was void as impairing the obligation of contracts; that it derived no validity

* Jackson *vs.* Lamphire, 3 Peters' R., p. 289.

from the fact of being in conformity with the State constitution of 1851.*

We are still to consider the effect of the constitutional clause with reference to the right of eminent domain. The important question, whether the clause in regard to the inviolability of contracts places State charters beyond the reach of the exercise of the sovereign control over all property with reference to public convenience and necessity, first came before the Supreme Court in a case where a bridge, held by an incorporated company under a charter from the State of Vermont, was occupied and taken as part of a public road, under a law of that State: the court held that the act was not unconstitutional; that the charter was a contract, but, like all other property, held by tenure from the State, and, also like all other property, held subject to the right of eminent domain; and that no distinction could be drawn between the franchises of a corporation and property held by an individual.† The doctrine has been since affirmed;

* Dodge *vs.* Woolsey, 18 Howard, 331; and, also, State Bank of Ohio *vs.* Knoop, 16 Howard, 369. See the former case, also, for one of the most recent cases expounding the rights and duties of the Supreme Court of the United States, as an ultimate tribunal to determine whether laws enacted by Congress, or by State legislatures, and the decisions of State courts, are in conflict with the Constitution of the United States.

† West River Bridge Co. *vs.* Dix *et al.*, 6 How. p. 507, by Daniels, J. See, in this case, Mr. Justice Woodbury's opinion. It contains the suggestion of some important—if practicable—qualifications in regard to the exercise of the power of eminent domain. He says, p. 541, in regard to the comparative protection of private rights here and in England, "Notwithstanding the theoretical omnipotence of Parliament, private rights and contracts have been, in these particulars about compensation and necessity for public use, as much respected in England as here." *Vide ante*, p. 524, in note.

The definition of the power of eminent domain given by the court, substantially agrees with that which I have suggested *ante*, pp. 500 and 504. "In every political sovereign community there inheres necessarily the

and, in a recent case, it was again decided that the grant of a franchise is of no higher order, and confers no more sacred title, than a grant of land to an individual; and, when the public necessities require it, the one as well as the other may be taken for public purposes on making suitable compensation; nor does such an exercise of the right of general domain interfere with the inviolability of contracts.*

This important rule has been repeatedly laid down also in the State courts. From the fact that a franchise is property, it necessarily results that any contract in a charter may be impaired provided compensation is secured.† In Massachusetts, it has been decided that an act of the legislature, in the exercise of the right of

right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power, and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend, likewise, the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the *eminent domain* of the State, is, as its name imports, paramount to all private rights vested under the government; and these last are, by necessary implication, held in subordination to this power, and must yield, in every instance, to its proper exercise."—Page 532.

The three cases—of the Dartmouth College, declaring State charters to be contracts within the protection of the Constitution; of the Charles River Bridge, declaring the principles of interpretation applicable to such acts; and, finally, of the West River Bridge, declaring corporate franchises to be subject to the power of eminent domain—are all cases of extreme interest, and cannot be too often consulted as fixing some of the most important landmarks of legislative power and providing some of the most valuable guarantees of private right.

* The Richmond R. R. Co. *vs.* The Louisa R. R. Co., 13 Howard, 82.

† Piscataqua Bridge *vs.* N. H. Bridge, 7 N. H. 65. The principle of the Piscataqua Bridge Case is affirmed in Barber *vs.* Andover, 8 N. H. 398; and in Backus *vs.* Lebanon, 11 N. H. 19, the power of the State, by virtue of its eminent domain, over corporations, even to the extent of taking their franchises, was declared. The Enfield Toll Bridge Co. *vs.* The Hartford and N. H. R. R. Co. 17 Conn. 40.

eminent domain, appropriating to public use, on payment of a full equivalent, property or rights in the nature of property granted by the State to individuals, is not a law impairing the obligation of contracts within the Constitution of the United States. And it was intimated that the power would extend to take the entire franchises of a corporation.*

Before quitting this branch of our subject, it may be well to notice some cases of alleged infringement of vested rights, where the constitutional objection has been taken, but where it has not been sustained.

By the original statute law of Connecticut, to render a marriage valid it was necessary that it should be solemnized by a clergyman "ordained and settled in the work of the ministry;" and all marriages not so solemnized were void. Difficulties arising under the act, another statute was passed, in 1820, declaring that all marriages which had theretofore been performed and celebrated by a minister authorized to celebrate marriages according to the forms and usages of any religious society or denomination, should be deemed good and valid to all intents and purposes whatever. A marriage having been solemnized, in 1805, by a clergyman ordained but not settled within the prior law, its validity came up, on a question of pauper settlement, in 1821; and it was held that the act of 1820 was valid, and that, though the marriage was void when solemnized, the subsequent statute rendered it

* The Boston Water-Power Co. *vs.* The Boston and Worcester R. R. Co., 23 Pick. 361. The general doctrine of the Charles River Bridge Case, that any ambiguity in the terms of the contract must operate against the corporation and in favor of the public, and that the corporation can claim nothing but what is clearly given by the act, is affirmed and applied in the Richmond, &c., R. R. Co. *vs.* The Louisa R. R. Co., 13 How. 81.

good; Hosmer, J., said there was no pretense that it was a law which impaired the obligation of contracts, and that the legislature had the power to pass retrospective laws to accomplish just and proper ends.*

* He said, "The interposition of the legislature to pass retrospective laws promotive of justice and the general good, is familiar. The judgments of courts, when by accident a term has fallen through, have been established; the doings of a committee and conservator, not strictly legal, have been confirmed; and other laws have been passed, all affecting vested rights; but, being incontrovertibly just, no disapprobation has ever been expressed.

"In result, I feel myself authorized to assert that the question, where no constitutional objection exists, whether the judiciary may declare a retrospective law operating on vested rights to be void, is undetermined; that men of profound learning and exalted talents have greatly differed on the subject; and that it is an inquiry beset with difficulty.

"With those judges who assert the omnipotence of the legislature in all cases where the constitution has not interposed an explicit restraint, I cannot agree. Should there exist—what I know is not only an incredible supposition, but a most remote improbability—a case of the direct infraction of vested rights too palpable to be questioned and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact and within the control of the judiciary. If, for example, a law were made, without any cause, to deprive a person of his property, or to subject him to imprisonment, who would not question its legality, and who would aid in carrying it into effect?

"On the other hand, I cannot harmonize with those who deny the power of the legislature to make laws, in any case, which, with entire justice, operate on antecedent legal rights. A retrospective law may be just and reasonable; and the right of the legislature to enact one of this description I am not speculatist enough to question. I believe no person will deny that the exercise of legislative authority, merely, and without further consequences, to confirm marriages not duly celebrated, is valid, although clearly retrospective and manifestly operating on the rights of individuals. And as every law intrinsically implies an opinion of the legislature that they had authority to pass it, and that it is just and reasonable on all occasions that may arise, it is proper to demand that the supposed unjust violation of legal rights by statute should be established with great clearness and certainty. If a judge of the Supreme Court of the United States was authorized in the assertion (Calder *et ux. vs.* Bull *et ux.* 3 Dallas, 386, 395) that he would not decide any law to be void except in a very clear case, with equal propriety may other judges adopt the same resolution in respect of laws

An execution was levied on land in the State of Connecticut, in December, 1823. The law, as it then stood, required land taken on execution to be appraised by three freeholders of the town; and if the parties neglected, or could not agree, the appraisers were to be appointed by any justice of the town. In the case in question, the sheriff omitted to certify, in his return, the fact that the justice who made the appointment resided in the town; and, as the return to the levy was the only evidence of title, the levy was fatally defective and void, and the plaintiff acquired no title. These facts appearing in the inferior court, pending the

which cannot be brought to the definite test of a written constitution, but which, as violations of the social compact, are claimed to be unwarrantable.

"The act of May, 1820, was intended to quiet controversy and promote the public tranquillity. Many marriages had been celebrated, as was believed, according to the prescriptions of the statute. On a close investigation of the subject, under the prompting scrutiny of interest, it was made to appear that there had been an honest misconstruction of the law; that many unions which were considered as matrimonial were really meretricious; and that the settlement of children in great numbers was not in the towns of which their fathers were inhabitants, but in different places. To furnish a remedy co-extensive with the mischief, the legislature have passed an act confirming the matrimonial engagements supposed to have been formed, and giving to them validity, as if the existing law had precisely been observed. The act intrinsically imports, that the legislature considered the law of May, 1820, to be conformable to justice and within the sphere of their authority. It was no violation of the constitution; it was not a novelty; such exercises of power having been frequent and the subject of universal acquiescence, and no injustice can arise from having given legal efficacy to voluntary engagements and from accompanying them with the consequences which they always impart. The judiciary, to declare the law in question void, must first recognize the principle that every retrospective act, however just and wise, is of no validity; and that, for the correction of every deviation of the legislature from absolute right, theirs is the supremacy. Impressed with the opinion that this is beyond the confines of judicial authority, I am satisfied with the decision at the circuit, and would not advise a new trial."—Goshen *vs.* Stonington, 4 Conn. R. p. 226.

application to the court above for a new trial a law was passed, in 1825, to ratify and establish executions thus defectively executed or returned. It was objected that the act was unconstitutional, because it impaired the obligation of contracts; but it was said that, between the parties, there never was any contract relative to the land; that the levy of the execution was altogether *in invitum*, and that the objection pointed at an object which had no existence; and the statute was held valid on the ground that, although retrospective, it was a just and reasonable law.*

Another case has presented itself, in the same State, in relation to an act, passed in 1826, declaring that no levy of an execution theretofore made should be

* The court said, "In Goshen *vs.* Stonington, 4 Conn. Rep. 209, it was adjudged by this court that a retrospective law impairing vested rights, if it be not *clearly unjust*, is entitled to obedience; and that to disregard an act of the legislature, unless it be inequitable, oppressive, and in violation of the social compact, is not within the confines of judicial authority. I discern nothing of this character in the law under consideration. It is the ordinary exercise of legislative authority, in similar cases sometimes requisite to prevent great injustice and public inconvenience. In the case before us, the error arose from slight and unobserved alterations at the late revision of the law relative to the levy of executions. The wide-spread mischief to officers who had faithfully performed their duty according to their best knowledge, and the rights of numerous creditors whose debts were in jeopardy, furnished strong political and equitable reasons for the interposition of the legislature. On the other hand, to the mistaken levy of the execution the debtors had no reasonable objection; and creditors and purchasers, always acting with full information derived from the records of land titles, could not justly complain that they were not permitted to wrench from those who had levied their executions defectively the property to which they had, at least, an equitable title. The real question to be determined is merely this: Whether every retrospective law acting on vested rights is invalid. If it is not, there are few cases the equity of which more imperiously demands legislative interposition than those within the purview of the late law." Mather *vs.* Chapman, 6 Conn. Rep. 58; S. P. Norton *vs.* Pettibone, 7 Conn. 319; and Booth *vs.* Booth, 7 Conn. 351.

deemed void by reason of defects which, in the then state of the laws, were fatal. In a case where a levy had been made, an action brought by the execution creditor, trial had, and the levy held bad at the circuit before the confirmatory act passed, the Supreme Court held that the act was valid and that it made the levy good,—that though retrospective, it was valid because just.*

We have thus terminated our consideration of this important clause of the Constitution. Its value has certainly been very great; but if we observe its practical operation in connection with that other fundamental guarantee of our rights, that private property shall not be taken without compensation, some deductions will perhaps have to be made from the commendations

* Hosmer, C. J., said, "Every act of the legislature intrinsically implies an opinion that the legislative body had a right to enact it. And the judiciary will discover sufficient promptitude if it determine a law to be invalid that operates by retrospection unjustly on person or property. This principle steers a correct medium, admitting the sovereignty of the legislature to do justice by an act unquestioned by the court of law, while it equally repels the supposed uncontrollable omnipotence of the same body to require the observance of an unjust law in subversion of fundamental rights and in opposition to the social compact. The question is not free from difficulty; but unless the doctrine sanctioned by the court be embraced, this extreme would be resorted to, that every retrospective law, however just or wise, affecting the property of an individual, must be considered as of no validity. And thus, in cases the most equitable and salutary, the judiciary must deny the legislative right to pass a law oppressive to no one and promotive of entire justice, and this upon the authority of general principles. I am not speculatist enough to yield my sanction to this course of proceeding. Beach *vs.* Walker, 6 Conn. 198.

"Under the power to maintain an army and navy, Congress may authorize infants to make a valid contract of enlistment; and an indentured infant, bound out by the managers of an alms-house as an apprentice, may enlist with the consent of the master, even although the consent of the manager is not obtained." Commonwealth *vs.* Murray, 4 Binn. 487; Commonwealth *vs.* Barker, 5 Binn. 423.

which we bestow on our system of constitutional law. In the one case, by a very rigid and technical interpretation of the word *to take*, and in the other by a most subtle and refined distinction between the *contract* and its *remedy*, it is difficult to deny that the protection intended to be given by both these provisions has been seriously diminished.

In truth, the very protection sought to be afforded to private rights by our system of constitutional limitations in some sense diminishes their security; the interests that elsewhere are guarded by a general sense of the importance of refraining from all interference with individual rights, here seek the protection of precise texts of written law. It is not a protection of principle, so much as of authority; and the exercise of authority always, and eminently with us, excites jealousy and provokes resistance. But this aspect of the case opens a wide field for discussion, involving the peculiar character of our complex system of government, and the wants and necessities of a new country.

*Vested Rights.**—Having thus surveyed the great field of constitutional law, and considered the operation and effect of the most prominent clauses in the fundamental law of the Federal and State governments, devised to operate as checks on legislative

* This phrase is one of most frequent occurrence. In a case in Maine, it was said, "The act is unconstitutional and cannot be carried into effect, because such operation would impair and destroy *vested rights*, and deprive the owners of real estate and of their titles thereto, by changing the principles and the nature of those facts by means of which those titles had existed and been preserved to them in safety." Proprietors Ken Purchase *vs.* Laboree, 2 Greenleaf, 295.

"It cannot be denied that the legislature possesses the power to take away by statute what was given by statute, except *vested rights*." The People *vs.* Livingston, per Savage, C. J., 6 Wend., 531.

power, and to act as guarantees of private property, we are better prepared, before taking final leave of our subject, to approach this branch of it in detail, and to form some general conclusions as to the rules by which and the extent to which private rights are secured under our form of government from governmental invasion—in other words, to what extent *vested rights* are protected. This subject, *i. e.* the protection of vested rights, as they are called, has been repeatedly referred to in the progress of this work,* and the difficulty of laying down any precise rule in regard to them pointed out.† Its importance, too, has

* *Ante*, pp. 177 and 193.

† In England, as a matter of practice, vested rights are very sedulously protected; as a matter of theory, their doctrine of Parliamentary supremacy leaves little room for the judicial discussion of them. The most prominent case, perhaps, of Parliamentary examination of the question, occurs in the great debate on Fox's East India Bill. Mr. Burke said,—

"The rights of *men*, that is to say, the natural rights of mankind, are indeed sacred things; and if any public measure is proved mischievously to affect them, the objection ought to be fatal to that measure, even if no charter at all could be set up against it. If these natural rights are further affirmed and declared by express covenants; if they are clearly defined and secured against chicane, against power and authority, by written instruments and positive engagements, they are in a still better condition: they partake not only of the sanctity of the object so secured, but of that solemn public faith itself which secures an object of such importance.

"Indeed, this formal recognition by the sovereign power, of an original right in the subject, can never be subverted but by rooting up the radical principles of government, and even of society itself. The charters which we call by distinction *great*, are public instruments of this nature: I mean the charters of King John and King Henry the Third. The things secured by these instruments may, without any deceitful ambiguity, be very fitly called the *chartered rights of men*.

"These charters have made the very name of a charter dear to the heart of every Englishman. But, Sir, there may be, and there are, charters not only different in nature, but formed on principles the *very reverse* of those of the great charter. Of this kind is the charter of the East India Company. *Magna charta* is a charter to restrain power, and to destroy monopoly. The East India charter is a charter to establish monopoly and to create power. Political power and commercial monopoly are *not* the rights

been already repeatedly insisted on. Indeed, it is manifest that in both the framework and the daily operation of our government, this is the great practical object sought to be obtained. Some governments may chiefly seek to guard against the turbulence of the poorer classes; some to repress the oligarchical insolence of a privileged class; some to prevent the union of the powers of the Church and of the State; some to check the authority of the sovereign. These points were certainly not overlooked by the founders of our government,—the heroes and leaders of a popular revolution; but it will hardly be denied that with us as a practical question, the legislative power is the most formidable, nor that our system chiefly aims to guard the citizen against the legislature,—to protect him against the power of a majority taking the shape of unjust law. And it is to be observed, also, that the unjust action of government with us is most likely to take the shape of attacks upon rights of property. All government, indeed, resolves itself into the protection of life, liberty, and property. Life and liberty in our fortunate condition are, however, little likely to be injuriously affected by the action of the body politic. Property is very differently situated. It is therefore of the highest moment, if possible, to obtain a clear idea as to the nature and extent of the protections which guard our rights of property

of men; and the rights of them derived from charters, it is fallacious and sophistical to call 'the chartered rights of men.'

"These chartered rights (to speak of such charters and of their effects in terms of the greatest possible moderation) do at least suspend the natural rights of mankind at large, and in their very frame and constitution are liable to fall into a direct violation of them."—*Burke's Speech on Fox's East India Bill.*

from attack under color of law,—to determine, in other words, what is a *vested right.*

The fundamental guards and guarantees of this class are to be found first in the great constitutional restrictions, whether of the Federal or State charters.

Private property is not to be taken without compensation.

No law is to be passed impairing the obligation of contracts.

Property is not to be taken without due process of law; and every individual right is placed under the protection of the law of the land.

In those States where they exist, the clauses intended to secure uniformity of taxation should be added. The questions connected with taxation are, indeed, every day becoming of more and more pressing importance. The taxing authority is after all but one arm of that tremendous power of eminent domain, at the foot of which, so far as uncontrolled, every citizen lies prostrate; and the consequences of the earlier decisions leaving this engine in the hands of unrestrained legislative authority, seem to have awakened that conservative jealousy of power which never lies long dormant in the breast of our people. Certain it is, that the more recent constitutions and the more recent judicial decisions, show a disposition not to abandon the taxing power to the often ill-regulated and despotic will of our fluctuating and hasty legislation.*

* In Missouri, while conceding the uncontrolled power of taxation to the legislature, subject only to the restriction contained in the constitution of that State, that "all property subject to taxation shall be taxed in proportion to its value," and conceding also the right to delegate the power to subordinate agencies, such as municipal corporations, they have denied the power arbitrarily to tax the property of one citizen and give it to another; and on this ground have held that the legislature cannot authorize a

With this qualification, the great provisions referred to, *i. e.* compensation for private property taken for public uses, sanctity of contracts, and law of the land, seem to furnish the principal guarantees of our liberty and rights. The other provisions as to trial by jury, titles of bills, searches and seizures, constitutional majorities, and the like, which we have considered, relate rather to modes and details than to principles. The above provisions are those which are to be found everywhere, and on which chiefly, so far as written law goes, our rights depend.

These three constitutional checks, then, guard private property from the invasions of the State, protect contracts from violation under guise of law, and finally, insure to every person impleaded, attacked, or charged, the invaluable right of systematic procedure, evidence, and judicial trial.

All these clauses have been expounded, and in some cases, restricted by construction and explanation; and the nature of those restrictions we have considered and discussed. In addition to these, our attention has also

municipal corporation to tax for its own local purposes land lying beyond the corporation limits. Wells *vs.* City of Weston, 22 Miss., p. 385.

As to the difficulty of drawing a line between a legitimate exercise of the taxing power, and the arbitrary seizure of the property of an individual under the mask of this power, see Cheany *vs.* Hooser, 9 Ben Monroe, 389.

See also on this point, City of Covington *vs.* Southgate, 15 Ben Monroe Law and Equity R., 491, where held that though the legislature has the power constitutionally to extend the limits of towns and cities, and include adjacent agricultural lands without the consent of the owner, yet the town or city cannot tax such property as town property and subject it to the city burthens without the consent of the owner, until it shall be laid off into lots and used as town property. This decision was made distinctly on the ground that the act in question was an invasion of private property contrary to the principles of our constitutional law, under color of the power of taxation.

been called to one other check on the vicious action of legislative bodies, not derived from express provision but from the division of political power growing out of the general structure of our system; this is, that the legislature can do no act which is not a law.

This idea is sometimes conveyed in the phrase (the meaning of which we have elsewhere considered),* that the legislature can do no judicial act; and it is almost identical with the constitutional declaration which insures to all persons attached or charged, the protection of the law of the land.

If, as we have seen, by the right to the law of the land is meant the right to judicial procedure, investigation, and determination, whenever life, liberty, or property is attacked; and if it be conceded, as it must be, that our legislatures are by our fundamental law prohibited from doing any judicial acts,—then it would seem, as far as the present question is concerned, that the rights of the citizen are as perfectly protected by the guarantee of the law of the land, as they can be by a peremptory distribution of power. In fact, the special clause works a division of power. But these are rather speculative questions; and the great idea of the protection intended to be conferred by our division of powers into executive, legislative, and judicial, is perhaps best expressed by the proposition just stated, that the work of the legislature is to be confined to the passage of laws, as distinguished from judicial and executive acts. And this brings us to the precise question of vested rights; for the prohibition, so far as it exists, of retrospective acts, whether direct† or in the shape of repealing statutes,‡ and the non-interference,

* *Ante*, pp. 163 and 167. † Page 193. ‡ Page 135.

so far as it is enforced, with vested rights, in cases which do not come within the prohibition of the positive clauses in our constitutions, State or Federal, in regard to private property and contracts, will be found to be summed up in the idea that the legislature can *only make laws*, or legislative enactments, as contradistinguished from judicial sentences and decrees.

If we renounce, as I think we must,* the idea that the validity of a law can be determined by the judiciary on abstract notions of justice and right; if we admit, as we must, that the denial of the right to make retrospective laws cannot, as a universal proposition, be maintained,—then outside of the cases depending on positive constitutional inhibitions, no other restriction can be imposed on legislative action except such as is derived from the idea, perhaps, as we have said, expressed with equal clearness in the guarantee of the law of the land, that *legislative* power only is granted to it, and that vested rights of property can only be interfered with by it so far as is competent to be done by the enactment of *laws*.†

This, however, is merely a circuitous statement of the proposition that vested rights are sacred. Let us, therefore, sum up the result of our researches, and

* *Ante*, ch. v., p. 180, and p. 187.

† The 47th letter of the Federalist discusses the subject of the division of power between legislative, executive, and judicial, and shows that it has never been strictly carried out in England, or in any of the States of the Union, any more than in the Federal government itself.

The Supreme Court of New York has denied the right of the legislature to determine the rights of parties to land, either by themselves or commissioners. "If they attempted this, they clearly were assuming powers which belonged to another branch of the government. If they converted themselves into a court of law, their acts in that capacity were unauthorized by the Constitution, and of course not binding on the parties." Jackson *vs.* Frost, 5 Cowen, 346.

state as accurately as we can what direct interference with private rights and interests of property can and cannot be accomplished by laws.

The difficulty of this subject fully equals its importance: on the one hand, any interference with rights acquired under existing laws is a positive evil and injury; while on the other, to deny to the legislature power to make such changes as the social or political condition requires, would reduce us to a state of Chinese stagnation and immobility, and would be absurdly inconsistent with the condition of our country and the character of our people. These inherent difficulties have led to frequent contradiction; and there is perhaps no subject of equal importance on which there are greater incongruities than on the point, what rights are vested so as to be beyond the reach of legislative action, and what are within its proper and regular control.

It will be well to recall the attention of the reader more particularly to the branches of this subject which we have already incidentally discussed.

At the outset we are to keep in mind the distinction between private acts and public acts, and the general rule,* that in regard to the former, they only affect those expressly named, and that they do not conclude third parties or strangers. But our observations now relate to public acts.†

* *Ante*, p. 34.

† In 1774, the interest of George Croghan in certain lands in the State of New York was sold, under sheriff's sale, to Thomas Jones. In 1779 Thomas Jones was attainted. In 1788, a private act was passed authorizing the surveyor general to sell the lands so purchased by Jones, and to pay the money upon the sheriff's sales which had been arrested by the war. The Supreme Court decided that nothing passed by the sheriff's sale to Jones, on the ground that the provisions of the statute of frauds had not been com-

Before proceeding, however, we may also notice the often-declared principle of the common law, that the division of an empire creates no forfeiture of previously vested rights of property.*

With these preliminary suggestions, we may remind the reader that we have already considered a large class of cases in which it has been decided that the legislature has no power to perform a judicial act.† So, acts granting appeals after the time allowed by law, and, in many other cases, deciding on questions of private contested rights, have been held void.

We have, also, already seen that in some cases the legislature is competent, by the operation of a repeal-

plied with. It further decided, that the act of 1788, and sales under it, had no effect upon the rights of the heirs of Croghan. They said "It is a private act, and liable to the rules of construction applicable to such statutes. In England a general saving clause is now always added, at the close of every private act, of the rights and interests of all persons except those whose consent is obtained; and before this practice of inserting the saving clause, it was held that a private act did not bind strangers. 2 Black. *Com.* 345; 4 Cruise *Dig.* 518. In Boswell's Case, 25 and 26 Eliz., cited in Barrington's Case, 8 Co. 138 a, it was resolved in the Court of Wards, that when an act of Parliament maketh any conveyance good against the king or other person certain, it should not take away the right of any other." Although there be not any saving in the act and although the constitution of New York then had no clause as to private property, it was said that if this act had declared the sale to be a bar to the claim of Croghan, a very serious question would have arisen on the validity of a statute taking away private property without the consent of the owner, and without any public object or any just compensation. Jackson *vs.* Catlin, 2 J. R. 248; affirmed in error, 3 J. R. 520.

In Jackson *vs.* Cory, 8 J. R. 388, it is said, "that to take away private property, even for public uses, without making just compensation, is against the fundamental principles of free government. And this limitation is to be found, as an express provision, in the Constitution of the United States."

* Hilour's Case, 7 Rep. 27; Kelly *vs.* Harrison, 2 Johns. Cases, 29; Jackson *vs.* Lunn, 3 Johns. Cases, 109; Terrett *vs.* Taylor, 9 Cranch, 50.

† *Ante*, p. 169.

ing act, to put an end to pending proceedings, and to take away rights under existing laws, as that of a mortgage debtor to redeem, and to put an end to pending suits where a good right of action or a valid demand existed;* but that in others, both in England and in this country, a disposition has been shown to prevent this arbitrary interference with the rights of parties, so far as existing rights of action were concerned.†

We have also considered,‡ under the head of retrospective laws and the retroactive effect of laws,§ a great class of decisions where, in some cases, it has been held competent for the legislature to interfere with vested rights of property, and where, in others, it has been denied‖.

* *Ante*, p. 131.

When the revised statutes of New York, of 1828, went into operation, the fifth section of the act repealing previous statutory provisions conflicting with them, used this language: "The repeal of any statutory provision by this act shall not affect any act done, or right accrued or established," &c.; and it was held that, where a junior creditor's right to redeem was acquired after the revised statutes, that right must be presented and prosecuted under the provisions of the revised statutes, and not according to the antecedent legislation,—on the ground that it related merely to the remedy, over which the legislature had power. The People *vs.* Livingston, 6 Wend. 527. See, in this case, the different phraseology of various repealing acts commented on. "It will not be denied, I presume," says Savage, J., "that it is competent for the legislature to repeal any act upon which a suit has been brought; and, if the repeal is absolute, such suit is at an end." The People *vs.* Livingston, 6 Wend. 530.

† *Ante*, p. 135.

‡ *Ante*, p. 193 and p. 406.

§ *Ante*, pp. 667 *et seq.*

‖ At common law, improvements made and annexed to the freehold, by a tenant for life or years, became a part of the estate of inheritance and went to the reversioner. In 1843, an act was passed in Maine declaring that, in all actions then pending or thereafter brought by reversioners against assignees or grantees of tenants for life, such grantees or assignees could obtain com-

We have, also,* considered the effect of treaties on rights of property and of action, and considered how far they may have a retrospective effect.

I merely here refer to these cases, and proceed to cite some others on the same general subject.

It has been repeatedly decided, that it is not competent, by any act of legislation, to divest a vested interest in real estate. Such acts are undoubtedly void, for several reasons: they take away private property without compensation; they take away property without any process of law; and they are not acts of a legislative character. Thus, in New York, it has been held,—where military bounty lands were vested, under a particular act, in an officer or soldier, constituting him a stock of descent, and passing the lands to his heirs *ex parte paterna*, and, for default of them, then *ex parte materna*, that the legislature could not, by a subsequent act, divest the title thus vested in one set of heirs and pass it to another, as from the heirs *ex parte materna* to those who were heirs *ex parte paterna* but aliens, and as such incapable to take independently of the second act.† So, where land was vested in four heirs of a decedent, by virtue of the treaty with Great Britain of 1794, and, an act subse-

pensation for improvements put by the tenants for life upon the premises. In a case where the tenant for life died in 1841, the Supreme Court held that the rights of the reversioners was clearly vested; that the improvements made by the person in possession for life became incorporated into the reversioner's estate on the decease of the tenant; and that the act could not have any retrospective operation, as such interpretation would bring it in direct conflict with the provisions of the State constitution in regard to the enjoyment of property. Cons. art. iii. § 1, 2, art. vi. § 1, art. iv. § 1, art. i. § 21; Austin *vs.* Stevens, 24 Maine, 525.

* *Ante*, p. 449.

† Jackson *ex dem.* M'Cloughry *vs.* Lyon, 9 Cowen, 664.

quently passed giving it to one of such heirs, it was treated as inoperative and void.* So, an act vesting the title of the State in escheated lands in an alien next of kin, after the widow of the decedent had acquired a good title to the land by release from the commissioners of the land-office under a general act, is wholly inoperative and void.†

But even vested interests in real estate have been deemed subject to legislative control, where the power has been considered by the court as used for the benefit of the parties interested. A retrospective statute, turning estates in joint tenancy into tenancies in common, has been held, in Massachusetts, unobjectionable. There seemed to the court no constitutional objection to the power of the legislature to alter a tenure by substituting another tenure more beneficial to all the tenants;—an absolute interest in one half being considered better than an uncertain interest in the whole.‡

And what the legislature cannot do directly it cannot effect indirectly, as by the operation of a statute of limitations. By a Massachusetts statute, passed in 1817, no action by an heir, to recover real estate sold by an administrator under a license from the Probate Court, shall be sustained unless brought within five years after the delivery of the deed. An action was brought, in or about 1825, by an heir, to set aside a sale made, previous to the passage of the act, under a license, by an administrator; and it appeared that the letters were void for want of jurisdiction, and that,

* Jackson *vs.* Wright, 4 John. R. 79.

† Englishbee *vs.* Helmuth, 3 Conn. 295.

‡ Holbrook *vs.* Finney, 4 Mass. 566; Miller *vs.* Miller, 16 Mass. 59; Burghardt *vs.* Turner, 12 Pick. 539. But the equity of this conversion might depend entirely on the relative ages and constitutions of the parties.

consequently, the sale conveyed no title. The act was relied on to bar the action; but the court said that it could only apply to sales made subsequently to its passage; "it could not be construed to extend to sales made more than six years previous, without a violation of vested rights."* And we have seen the same point substantially decided in Pennsylvania.† So, too, we have seen the same point determined by the courts of Mississippi.‡

So, it has been declared, that it is not in the power of the legislature to create a debt from one person to another, or from one corporation to another, without the consent expressed or implied of the party to be charged. Thus, where a statute was passed requiring one county of the State of Massachusetts to pay out of its treasury money belonging to it, to another county, the latter county having before the passage of the statute in question, no legal right to the money,—it was held to have no operation as law.§

Thus far it seems sufficiently clear, as a general rule, that the legislature cannot interfere with existing rights of property; but when we leave the subject of vested interests in real estate or actual property in possession, we find the subject surrounded with difficulty.

We have seen‖ that there is no such thing as a vested right to exemption from militia duty; and exemptions from taxation depend on the question whether

* Holyoke *vs.* Haskins, 5 Pick. 20; Same *vs.* Same, 9 Pick. 259.

† Eakin *vs.* Raub, 12 S. and Rawle, p. 339; *ante*, p. 479.

‡ Boyd *vs.* Barrenger, 23 Miss. 270; *ante*, p. 196.

§ Hampshire *vs.* Franklin, 16 Mass. 86.

‖ *Ante*, p. 559.

the act creating them is to be treated as a contract;* and rights of action of all descriptions, seem to a large extent under the control of the legislature.

We have seen that acts have been held valid confirming invalid marriages,† and declaring valid invalid ministerial proceedings, such as sheriffs' levies,‡ although they directly destroyed rights previously existing, and even in litigation at the time of the passage of the act.

The same principle has been applied in Massachusetts, and the general power of the legislature asserted over all matters of general policy, without reference to the rights of individuals.§

* *Ante*, pp. 558 and 630.

† *Ante*, p. 667. In this respect, we have English precedent on the same side, though apparently not sustained by positive judicial decision. The 26 Geo. II. c. xxxiii., provided that the banns of matrimony should be published in certain chapels, and that unless so published, the marriage should be void, and the parties solemnizing it held guilty of felony. In The King against The Inhabitants of Northfield, Douglas, 661, the King's Bench applied this act, and declared that marriages of which the banns were published in other chapels than those directed, were absolutely void. But Lord Mansfield intimated that time "or the interposition of the legislature" might cure the marriages already solemnized in unauthorized chapels. Thereupon, an act was passed, 21 Geo. III. c. xxxiii., declaring all such marriages valid in law, and exempting the clergymen who had celebrated them from the penalties of the 26 Geo. II. c. xxxiii.

‡ *Ante*, p. 668.

§ By a Massachusetts act of 1784, in adherence to a policy pursued by several provincial statutes, the courts of sessions were authorized "to fix and determine the boundaries of the jail-yards to the several jails appertaining." Under this act, the Court of Sessions for the county of Cumberland, fixed and determined the limits or bounds of the town of Portland, exclusive of the islands, as the limits and boundaries of the jail-yard." But the Supreme Court held, that this was an abuse of the power given by the act; that the practice under the former laws for half a century, was irresistible evidence of the ture construction of the power of the Sessions; that they had no authority so to appropriate private property to public uses without compensation; and that they could not extend the limits of the jail-yard

If the power of the legislature be conceded over ministerial and administrative proceedings, the question still remains how far they can act upon judicial proceedings which have already taken place; how far

beyond the land of the county, with the highways adjoining or leading to the prison. Baxter *vs.* Taber, 4 Mass. 360.

Thereupon, in 1808, the legislature passed a law, and in 1809 one supplementary to it, the two in substance declaring that the boundaries of jail-yards theretofore fixed and determined hy the Courts of Sessions, should be valid and legal so far forth that no person found anywhere within them, should be considered as having committed an escape. And this act was held a valid exercise of the legislative power. The court said, The statute is like the laws frequently made to confirm the acts and doings of towns and other corporations which have been void for some informality, and in reviving terms of courts which have failed from accident. Such acts have never been questioned on constitutional ground. And the acts of 1808 and 1809, were held to defeat actions brought for escapes before they were passed. Waller *vs.* Bacon, 8 Mass. 471. Patterson *vs.* Philbrook, 9 Mass. 151; Locke *vs.* Dane, 9 Mass. 360. The first of these cases is a short, *per-curiam* opinion. The second was decided on the authority of the first, and the third on the authority of the other two. The subject does not seem to have received the attention that its importance merited.

A statute passed in Massachusetts, narrowing the gaol liberties after a day named in the act, has been held not to be unconstitutional, as applied to a bond given before the passage of the statute; and the debtor having, after the day fixed by the statute, made use of the liberties in their previous extent, was held guilty of an escape. Reed *vs.* Fullum, 2 Pick. 158.

In Maine, under the acts of that State of 1835 and 1836, in actions on jail bonds, given as security against the escape or discharge of debtors charged in execution, the plaintiff was entitled to recover as damages the amount of the execution costs, fees, and costs of commitment, with twenty-five per cent. interest. And in 1838, while these acts were in force, such a bond was taken. In 1839 the legislature passed a law declaring that in cases of this kind the plaintiff should only recover his actual damages sustained. In a case in which the plaintiff relied on the prior legislation, it was insisted that the act of 1839 was unconstitutional and void; but the court held that it merely controlled the remedy, as such was valid, and the plaintiff was nonsuited. Mr. J. Shipley said, "The constitutional provision in regard to the right of private property, does not prohibit the legislature from passing such laws as act retrospectively not on the right of property or obligation of the contract, but only upon the remedy which the laws

they can interfere with the regular operation of justice; how far particular laws can be passed where general rules exist; how far defective proceedings can be cured. On all these subjects many and conflicting decisions, as we have seen, have been made. In some cases, as we have seen, the supremacy of the legislature has been asserted; in others, the strict division of powers has been enforced. Great contrariety is to be observed; but I think that on a careful observation of the cases, and especially the later decisions turning on the interpretation and application of the phrase, "the law of the land," among which may be specially noticed the determinations on the temperance laws, it is obvious that there is a strong and increasing disposition on the part of the judiciary, strictly to enforce the constitutional prohibitions, and to restrain the legislatures from those invasions of private rights to which the haste of our law-making operations frequently tends.*

afford to protect or enforce them. The legislature must necessarily possess the power to determine in what manner the person or property of a debtor shall be subjected to the demands of a creditor, and of making alterations in such laws, as a change of circumstances or the public good may require; and in doing this, one may be deprived of a right, which he has by existing laws, to arrest the body or to attach or seize a certain description of property, without infringing any constitutional provision. When a person, by the existing laws, becomes entitled to recover a judgment, or to have certain real or personal estate applied to pay his debt, he is apt to regard the privilege which the law affords him, as a vested right, not considering that it has its foundation only in the remedy, which may be changed, and the privilege thereby destroyed." Oriental Bank *vs.* Freese, 18 Maine, 112; see also, Potter *vs.* Sturdivant, 4 Greenleaf, 154.

* I may be permitted, in this note, to notice some of these cases. Some of them have been already more briefly referred to:—

Jonathan Jenckes, a citizen of New Hampshire, died, seized of lands in Rhode Island. The estate was insolvent. Letters were taken out in New Hampshire, and a license granted by the judge of probate of that State, to sell the land of the testator for the payment of debts. Under that order,

In some cases the legislature acts directly on the subject-matter. But the question of the extent of legislative power often arises in regard to statutes which affect a right of property indirectly, by acting

the land in Rhode Island was sold in 1791. In 1792 an act was passed by the legislature of Rhode Island, ratifying and confirming the title acquired under the sale. In an action of ejectment brought by the heirs-at-law of Jonathan Jenckes, against parties claiming under the sale and legislative ratification, it appeared that the sale of lands in Rhode Island by virtue of an order made by a New Hampshire judge of probate, was absolutely void, and the title of the defendant depended on the validity of the confirming statute of Rhode Island. The Supreme Court of the United States held the act good, and that the title passed by it, on the ground that the estate of the heirs of Jenckes was a vested estate in fee, but that it was subject to the payment of the debts of the decedent, and that the act divested no vested rights except in favor of existing liens of paramount obligation; that the act was to be considered not as a judicial act, but as an exercise of legislation; that no attempt was made to impeach the sale for fraud; and that as to want of notice, it might well be presumed after the lapse of more than thirty years. Wilkinson *vs.* Leland, 2 Peters, 627; see the case again, 10 Peters, 294. The court disposes of the question of judicial power very summarily, saying that the act *purports* to be a legislative resolution, and not a decree. It could hardly purport to be any thing but what it was. The question was whether it operated like a decree. And in examining the case, it is obvious that in arriving at its decision, the court was largely influenced by the peculiar character of the then government of Rhode Island, which had had no written constitution of government, but was governed under the Charter of Charles II., which did not attempt to divide the powers of government, but gave to the General Assembly a very sweeping power of making laws, under which a long series of acts was proved, showing a frequent exercise of the same kind of authority.

In a case in Pennsylvania, it has been held that a judgment erroneously entered on the first day of term in 1817, was cured by an act passed in 1822. The court said, this law had impaired no contract, disturbed no vested right. Every confirming act is in its very nature retrospective. Retrospective acts which only vary the remedies, divest no right, but merely cure a defect in proceedings otherwise fair. The omission of formalities which do not diminish existing obligations contrary to the situation when entered into and when prosecuted, is consistent with every principle of natural justice. Underwood *vs.* Lilly, 10 S. & R. 97.

In Massachusetts, the constitution in force in 1820, gave the legislature full power and authority to make, ordain, and establish all manner of

on the proceedings in courts of justice, or as it is said by acts affecting the remedy. In regard to this, the legislature may affect existing rights in the first place, by statutes of limitation restricting the time within

wholesome and reasonable orders, laws, statutes, directions, and instructions (so as the same be not repugnant or contrary to the constitution) as they shall judge to be for the good and welfare of the commonwealth, and of the subjects thereof; and it was also declared that each individual of the society has a right to be protected by it, in the enjoyment of his life, liberty, and property, according to standing laws; and by an act of 1783, the courts of probate were empowered to sell the real estates of minor children. In 1790 certain real estate was vested in the minor children of Asaph Rice, in right of their deceased mother; and in 1792, a resolve was passed by the General Court, or legislature, of the State, authorizing the father to sell and convey the premises for the best price that could be got, and invest the proceeds for the benefit of the children. Under this resolve the property was sold, and the validity of the sale coming up for adjudication, it was contended that the resolution was void as an act of judicial power. But it was held valid as not being a judicial act; and while it was conceded that under the general grant of legislative authority, the legislature could not deprive a citizen of his estate, or impair a valuable contract, it was held that the resolve in question, being for the benefit of the minors, was good. Rice *vs.* Parkman, 16 Mass. 326. The opinion in this case is delivered by a very able judge, Parker, C. J., but it appears open to criticism. It is said, "that this was not a judicial act, that it was not a case of controversy between party and party, nor is there any decree or judgment affecting the title to property." That there was no controversy nor any opportunity for controversy, as there would have been in a regular judicial proceeding, is the very ground of complaint; and the precise allegation is, that the resolve is in its *operation and effect* a decree or judgment affecting the title to property. It is admitted in the defence, that the legislature could not deprive a citizen of his estate; but that is exactly what is done in this case. The property belongs to minor heirs, the legislature directs it to be sold, or in other words, divests them of their estates. It is alleged to be for their benefit. That may or may not be. It may have been a fraud, and the proceeds embezzled. The true question is whether a party can be deprived of his property without having the benefit of pleading, evidence, hearing, and trial. If the legislature takes away property without any of these proceedings, it does what the judiciary only can do after going through them, and in this sense must be said to perform a judicial act.

In Massachusetts, by the constitution in force in 1814, it was declared

which actions may be brought. Secondly, by acts in regard to the evidence or procedure, by altering the

that "the power of suspending the laws or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for." This provision seems to have been suggested by the English Bill of Rights and its provisions, in regard to the dispensing power. In 1813, on the petition of Holden, a resolution was passed by the legislature, authorizing him to prosecute certain claims against the estate of Hannah Ranger, as if the same had been commenced within the time prescribed by law, and declaring that the operation of any statutes of limitation of the State, that might bar the claims of Holden, should be by this resolution suspended. An action being brought by Holden against the administrator of the estate, it appeared that the claims were in fact barred by the general statute of limitations; but the resolution was relied on. The court, however, held that though the general power of suspending laws resided in the legislature, they had not the power to suspend a general law in favor of an individual, nor in an individual case; and the plaintiff was accordingly nonsuited. Holden *vs.* James, 11 Mass. 396.

A mortgage executed to Eames and Ryder, loan commissioners for the county of Kings, in New York, having become due in 1842, notice was published that the premises would be sold. The term of office of one of the commissioners (Ryder) expired in 1843, and the remaining commissioner (Eames) proceeded to sell the premises. The law of the State was well settled on grounds which we have elsewhere considered, under the head of "summary administrative proceedings" (*ante*, p. 351), that a sale by one of several loan commissioners was wholly void, and that no title could be thus acquired. Olmsted *vs.* Elder, 1 Seld. 144. On the 12th of May, 1844, an act was passed entitled an "Act to confirm certain official acts of the commissioners for loaning the moneys of the United States of the county of Kings," which declared that all the official acts of the commissioners for loaning money in Kings Co., and all proceedings by the same, performed or transacted solely by Eames, he being one of the said commissioners, or by any other person being one of said commissioners, at any time after the expiration of the term of office of any associate commissioner, and before a successor to such associate commissioner had been duly qualified, should be, and be held to be, of the same force as if such acts or proceedings had been performed by such commissioners jointly; and all deeds and other papers executed by the said Eames, or by any one of such commissioners, should be, and be held to be, of the same force and validity as if such deed and other papers had been sealed and subscribed by both of said commissioners. In an action brought by a party claiming against the foreclosure and sale by Eames, the invalidity of the proceeding being established, it was

remedy or prohibiting a defence. Of these in their order.

As to statutes of limitation, the rule appears to be

insisted by the defendant, that it was confirmed and rendered valid by the act of 1846; but all retrospective effect was denied to it. The court said, "The act could not, and did not, act retrospectively, so as to take away any existing rights. We hold our right of property under a higher power, which cannot be overturned by the legislature." And the plaintiff had judgment. Pell *vs.* Ulman, per S. B. Strong, J. (not reported.) I take the decision from the printed case, obligingly furnished me by J. Townsend, Esq., counsel for the plaintiff. A question very analogous has arisen under the act of 1850, to confirm proceedings in surrogates' courts, by which an attempt has been made to confirm proceedings entirely void, because not taken in conformity to the statutes conferring jurisdiction on the surrogate.

Dean *vs.* Dean, 2 Mass. 150, is a case turning on a legislative resolve authorizing an appeal from a probate-court decree, after the time to appeal had expired. The appeal was dismissed, but the power of the legislature to pass the act was not denied nor, indeed, discussed.

Where a statute of Massachusetts provided that bank commissioners should be authorized to examine the State banks, and if on examination they appeared to the commissioners insolvent or in a hazardous condition, then that on their report a justice of the Supreme Court should, without further investigation, be required to issue an injunction restraining their operations, it was held that this was not an exercise by the legislature of judicial power, on the ground that it made the report *prima facie* evidence of the facts. Commonwealth *vs.* Farmers and Mechanics' Bank, 21 Pick. 543.

An act authorizing the guardian of an infant to sell and convey at public or private sale, under the direction and sanction of the judge of probate, is a valid act, and not unconstitutional as an exercise of judicial power. Mason *vs.* Wait, 4 Scammon, 134.

A provision that a municipal charter shall not take effect until approved of by a majority of the inhabitants of the district incorporated, is not the delegation of legislative power, it is the mere question of the acceptance of a charter. City of Paterson *vs.* The Society, &c., 4 Zabriskie, p. 385.

A statute in Indiana, after enumerating certain specific causes for which divorces may be granted by the courts, declares that they may be granted for "any other cause for which the court shall deem it proper that a divorce should be granted." (2 Rev. Stat. of Indiana, p. 235.) In a case arising under this act, it was insisted that this provision was unconstitutional, because it conferred legislative power on the courts; but the objection was held void on the ground that it only authorized the exercise of the discretionary power of the court. Ritter *vs.* Ritter, 5 Blackf. 81.

that they cannot be made so to retrospect as absolutely to cut off an existing right of action; but within these bounds, it is said that the legislature has full power over the subject. By the Revised Statutes of Massachusetts, it was provided that all actions upon judgments should be commenced within six years next after the cause of action shall accrue. The Revised Statutes were passed on the 4th of November, 1835, and went into operation on the 1st of May, 1836. After the 1st of May, 1836, suit was brought on a judgment recovered in 1817. The law was held not to be unconstitutional as impairing the obligation of contracts, since, as it was enacted on the 1st of November, 1835, and did not go into operation till the 1st of May, 1836, the creditor had an opportunity in the interval to bring his action on any such judgment recovered more than six years before the 1st of May, 1836; and it was said "Whether the time allowed for creditors to commence their actions was a reasonable time or not, was a question within the exclusive power of the legislature to determine."*

The same rule seems to hold good in regard to evidence; the legislature may alter the rules of testimony in regard even to suits pending, however seriously the change may affect the rights of parties; but the power must not be so exercised as to cut off a clear valid right. The Supreme Court of Massachusetts has said, "The legislature may prescribe rules of evidence by which parties must support their acknowledged rights. If at any time evidence was required by law which would defeat a constitutional right, the same would not be binding on the courts."†

* Smith *vs.* Morrison, 22 Pick. 430.

† Kendall *vs.* Kingston, 5 Mass. 533.

In regard to remedies generally, the right of the legislature has been repeatedly asserted, and in very sweeping terms. So, in Massachusetts it has been said, "There is no such thing as a vested right to a particular remedy. The legislature may always alter the form of administering right and justice, and may transfer jurisdiction from one tribunal to another."* It has been said in the same State, to be very clear that a statute authorizing representatives in a suit to come in and to prosecute to judgment, is a valid act and may well apply to cases pending at the time it passed."† A statutory provision allowing an executor to maintain trespass *quare clausum* for an injury done to the land in the lifetime of the testator, is not unconstitutional as applied to a trespass committed before this provision went into operation, as it affects the remedy only.‡ So, we have seen that there is no vested right to the defence of usury.§

So, again, a Massachusetts statute, of 1838, regulated proceedings by insolvents to obtain their discharge. On the 6th of April, 1841, a party applied for the benefit of the statute. An act was passed in 1841, going into effect on the 17th of April, declaring that no certificate of discharge should be granted if the debtor, within six months before his application, should have made an assignment with preferences. On the 3d of April the debtor had made such an assignment. It was insisted that the insolvent was still entitled to his discharge under

* Springfield *vs.* Hampden Commissioners of Highway, 6 Pick. 501,—a mandamus to Commissioners of Highways.

† Holyoke *vs.* Haskins, 9 Pick. 263.

‡ Wilbur *vs.* Gilmore, 21 Pick. 250.

§ Baugher *vs.* Nelson, 9 Gill, 299; *ante*, p. 412.

the act of 1838; but the court held otherwise, saying, "It is clear that the appellant had no vested right to a discharge at the time of filing his petition."*

So, even when a suit is definitively decided, it has been held that a right of appeal can be given by a statute passed for that purpose. Suit was brought by Sampeyrac, in the Circuit Court of Arkansas, to establish his title to certain lands. An answer was put in, on behalf of the United States, denying the claim, and setting up that the plaintiff's grants were forged. In 1827, however, a decree was made in favor of the title. No appeal was taken, and the time for appealing expired. In 1830, Congress passed an act authorizing the courts of Arkansas to proceed, by bills filed or to be filed by the United States, to review any decrees of the court alleged to have been made on forged warrants or grants. Under this act, a bill of review was filed by the United States to set aside the decree in question; the case was brought before the Supreme Court of the United States, and it was insisted that the act of 1830 deprived the claimant of a vested right; but the court held that, considering the act of 1830 as providing a remedy only, it was entirely unexceptionable; that it only organized a tribunal with judicial powers; that the retrospective operation of a law providing a remedy formed no objection to it; and it was said that, "almost every law providing a new remedy affects and operates upon causes of action existing at the time the law is passed." And, it appearing that the plaintiff was a fictitious person and the alleged grant a forgery, the original decree was reversed.†

* *Ex parte* Lane, 3 Met. 213.

† United States *vs.* Sampeyrac, 7 Peters, 222; S. C., Hempstead's Arkansas C. C. R. 119. We have seen (*ante*, p. 196) that, in Pennsylvania,

It has been said by the chancellor of the State of New York, that where naked trustees might be compelled to transfer the legal title to *cestui que* trusts under the decree of a court of equity, there could be no doubt that the legislature had the power to transfer the title.*

In regard to this matter of remedies, it has been in several cases held, that the right of the legislature to interfere depended on the point whether the end sought to be attained by the legislature was a good one. So, an act cutting off the defence of usury was held valid, because usury was considered as an immoral defence.† So, the Supreme Court of Massachusetts has said, there could be no vested right to do wrong.‡ So, the act confirming invalid marriages was held to be good, because the object aimed at by the legislature was commendable.§ But this is a formidable if not a fallacious line of reasoning. It assumes that a power exists in the judiciary to decide on the morality, wisdom, or justice of acts of legislation, and to treat them accordingly. This authority I have already had occasion to deny.

If the cases which I have here grouped and to which I have referred, be carefully considered, I think it must be admitted that I have not at all exaggerated the difficulty of defining vested rights; that no general rule can be laid down which will describe with

the power of the legislature to pass a statute giving a writ of error in a case where none lay before the passage of the act, has been denied.

* Dutch Church in Garden Street *vs.* Mott, 7 Paige, 82; Morgan *et al. vs.* Lesler, Wright's Ohio R. 144.

† Baugher *vs.* Nelson, 9 Gill, 299; *ante*, p. 412.

‡ Foster *vs.* The Essex Bank, 16 Mass. 245; *ante*, p. 484.

§ Goshen *vs.* Stonington, 4 Conn. 226; *ante*, p. 668.

precision the extent to which legislative interference with rights or interests in property, under our system, is permitted or prohibited.

The construction of the great constitutional clauses in regard to private property, the obligation of contracts, and the right to process of law, is settled with considerable accuracy; but beyond this the subject is infested with plain and painful contradiction. On the one hand, we have the propositions,—that the legislature can only make laws; that a judicial act, not being a law, is beyond its competency; and that private rights are entitled to the protection of the law of the land. Taking, on the other hand, the conceded power of the legislature over the procedure and remedy,—their right to pass repealing acts, and in many cases retrospective acts, and I think the result of the investigation is, that in no branch of our subject clear lines of demarkation are more imperatively required, nor in any more difficult to establish. At present, all that can be done is to bring each case to the test of previous decisions, and of principle, and as far as possible, to endeavor to restrict the operation of laws to future cases. Every sudden alteration of existing rights, duties, or relations, by the operation of law, as a general rule tends to insecurity and danger.

This idea is expressed to a certain extent, in Massachusetts, in a case already cited, where the court said, "A creditor has no vested right in the mere remedy, unless he may have exercised that right by the commencement of legal process under it before the law making an alteration concerning it shall have gone into operation."* So, too, in Penn-

* Bigelow *vs.* Pritchard, 21 Pick., 174.

sylvania, under an act for the sale of vacant lands, passed April, 1792, it was held sufficient for a person holding a land warrant, in a suit against an intruder without title, to show that he, the warrantee, had been prevented by reasonable apprehension of the Indians from making a settlement on the warranted lands. Thereupon the legislature, in 1814, passed a law requiring the warrantee in such suits to prove that he had personally gone on to the land. The Supreme Court of Pennsylvania held, that this explanatory act could not apply to suits before its passage; that nothing less than positive expressions would warrant the court in giving a construction which would work manifest injustice. "It must not be supposed that the legislature meant to do injustice; and what but injustice would it be to subject a man to the loss of his action and the costs of suit by a retrospective law, although at the time when he commenced his suit, he was entitled by the established law to recover?"*

The same idea has been expressed still more clearly and emphatically in the fundamental law of New Jersey. The constitution of that State declares that, "The legislature shall not pass any bill of attainder, ex-post-facto law, or law impairing the obligation of contracts, *or depriving a party of any remedy for enforcing a contract which existed when the contract was made.*"† This provision is evidently drawn to obviate the difficulties and answer the objections growing out of the subtle distinction taken between the obligation and the remedy. It very clearly declares that the substantial remedial legislation existing at the

* Bedford *vs.* Shiling, 4 S. & R., 401.

† Cons. of New Jersey, art. iv., sec. vii., § 3.

time a contract is made, enters into and forms part of the agreement; it is the assertion, by a populous and flourishing community, that vested rights may be safely protected to this extent; and it seems to me every way worthy of commendation for its vigorous justice and sound sense.

I here bring to a close this attempt to state the rules which govern the interpretation and application of written law. On a careful consideration of the whole subject, its importance cannot fail to impress the mind. "Absolute liberty, just and true liberty, equal and impartial liberty, is the thing we stand in need of!"* This is the fervid language of the great apostle of toleration; and the longing should be as earnest and the prayer as devout now as when the emphatic words were uttered. But in our time, liberty will not be secured by violent effort or convulsive action. Liberty will only be preserved by steady determination and systematic habit, by the practice of those virtues of fortitude and self-command, most difficult, whether for nations or individuals.

Most eminently is this true of this country. Liberty, here, can only exist in fellowship with Law. Whatever the glories of our past history, however grand our present, however brilliant our future, it is vain to suppose that American freedom can be maintained except just so long as our people shall exhibit the capacity justly and intelligently to administer, and the disposition steadily and loyally to obey, the government of WRITTEN LAW.

* Locke, Pref. to Letter on Toleration.

While this last sheet is going through the press, I have for the first time seen "The Principles and Maxims of Jurisprudence," by John George Phillimore, Q. C., M. P., London, 1856; and I can only wish that I had been able to avail myself of it at an earlier stage of my work. Mr. Phillimore's thorough knowledge and enlightened appreciation of the scientific order of the Roman law, and his liberal and courageous recognition of the defects of English jurisprudence, have already been made well known by his "Introduction to the Study and History of the Roman Law," London, 1848; but the present work is calculated still more strongly to turn the professional mind of the present age to the comparative merits of the two systems. The work is a skillful selection of some of the most terse and profound maxims of the Roman law, with comments on them by the author, showing by the light of the decided cases of English and American law, the extent to which the principles of the civil jurisprudence are recognized or disregarded by the Anglo-American tribunals. Mr. Phillimore's work is one eminently of a character to arouse the minds of the legal students and practitioners of our time to the true dignity of the science to which their lives are devoted. In the present chaotic state of our own law, particularly, nothing can be more desirable than to keep in as frequent recollection as possible the simplicity, order, and equal justice of the great system of jurisprudence by which the Roman world was governed.

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