

STATUTES
AND
STATUTORY CONSTRUCTION

INCLUDING

A DISCUSSION OF LEGISLATIVE POWERS, CONSTITUTIONAL
REGULATIONS RELATIVE TO THE FORMS OF LEGIS-
LATION AND TO LEGISLATIVE PROCEDURE

TOGETHER WITH

AN EXPOSITION AT LENGTH OF THE PRINCIPLES OF
INTERPRETATION AND COGNATE TOPICS

BY

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PREFACE.

No apology to the profession is necessary from the author for offering a new book on Statutory Construction, although it is a subject which his predecessors in the same work have treated in a masterly manner. It is a field in no danger of being over-cultivated.

The law for the construction of written contracts and other private documents is as certain and well defined as upon any other branch of legal science. This is not equally true of the law for the construction of *Written Laws*. They deal with subjects of greater complexity; they are the product of so many minds, not having common views, that incongruities cannot be wholly excluded, and threads of diverse ideas are often interwoven; and, moreover, opposing considerations of broader range press for recognition in their construction. In many ways converse rules overlap, and the lines of distinction are faint and shifting.

The natural tendency and growth of the law is towards system and towards certainty, towards modes of operation at once practical and just, by the process of its intelligent judicial administration; but this process is impaired by over-work and legislative interference.

When it is considered how many legislative bodies there are, and how many independent courts administer their laws, the diversities of construction which have occurred are not surprising; these divergencies lead to permanent contrarieties bounded by state lines. Under such circumstances it is important that cognate cases be often collated and their princi-

ples generalized, with a view to maintaining the domain of the law as a science by remarking the true lines.

The frequent assertion of sound doctrine with copious illustrations is promotive of harmony. The author has embodied in this work the result of thorough reading of the cases, and a thoughtful and earnest endeavor to extract and put in elementary form their best teaching. And he submits it in the modest hope that his fellow-practitioners and the courts may find it useful and contributory to that end.

J. G. S.

SALT LAKE CITY,
December, 1890.

TABLE OF CONTENTS.

PART FIRST.

THE ENACTMENT, DURATION AND PROOF OF STATUTORY LAWS.

CHAPTER I.

THE LEGISLATIVE POWER AS DISTINGUISHED FROM OTHER SOVEREIGN POWERS, AND THE GENERAL NATURE OF STATUTORY LAW.

	<i>Sec.</i>
Order of subjects	1
The legislative a distinct power	2
The nature of legislative power	6
Statutory laws, in general	7
Rules of action	9
Legislative rules of action — Essential limitations	10
Statutes have no extraterritorial effect	12
Extraterritorial operation of laws in colonization of a new country	14
English statutes passed after the establishment of the colonies	17
Continuance of laws on change of sovereignty	19
Laws of states in rebellion	20
Federal and state statutes	21
Territorial statutes	23

CHAPTER II.

THE LEGISLATURE, AND THE ESSENTIAL PARLIAMENTARY PROCEDURE.

The legislature	26
Common-law record of legislation conclusive	27
Our legislative record	28
Effect of constitutional regulations of legislative procedure	30
States holding statutes conclusive in Missouri and Mississippi	33
Same in Louisiana, etc.	35
Evidence of statutes in New York; Indiana	36
Constitutional regulations of procedure, where mandatory	41
Legislative journals and files are evidence	42
Presumption in favor of validity of statutes	46
Required reading of bills	4
Necessity of signatures of presiding officers	51
How validity of statutes tried	52
When acts should be approved	52

CHAPTER III.

FORMS OF LEGISLATION — REFERENCE TO THE ENACTING POWER, AND THE DELEGATION OF IT.		Sec.
Forms of legislation		60
Constitutional regulations of, directory in certain states		62
Mandatory in others		64
As to enacting style		65
Legislative power cannot be delegated		67
What is a delegation of legislative power		69
Exceptions which have been established		70
Effect of submitting laws, etc., to popular vote		71
Local laws may be submitted		75

CHAPTER IV.

CONSTITUTIONAL REQUIREMENT THAT NO ACT EMBRACE MORE THAN ONE SUBJECT AND THAT IT BE EXPRESSED IN THE TITLE.		
Substantial agreement of constitutional provisions		76
Regarded as mandatory		79
Liberal construed to sustain legislation		82
Provisions must be germane		85
Requirement to state subject in title		86
Provisions can have no greater scope than subject in the bill		87
Title need not index details of act		88
"Etc." may increase scope of title		89
Title too general		90
Title should accompany bill in process of passage		91
What general title includes		93
Acts which relate to plurality of similar subjects		98
Title and subject of amendatory and supplementary acts		101
Provisions not within subject in the title		102
Effect of act containing more than one subject		103

CHAPTER V.

TIME OF TAKING EFFECT.

When silent as to commencement	104
Acts of parliament formerly took effect from first day of session	105
Actual date of passage adopted in this country	106
Legislature may fix the time for act to take effect	107
Constitutional regulations	108, 109
Precise time of taking immediate effect	110
Computation of time when to take effect in specific number of days	111-115

CHAPTER VI.

REQUIREMENT OF GENERAL LAWS AND THAT THEY BE OF UNIFORM OPERATION.

Constitutional requirements	116
They are mandatory	117
General laws, or laws of general nature	120-123
Required uniform operation	124-126
Special and local laws	127-129
Amendatory and curative acts may not interrupt uniform operation	130

CHAPTER VII.

AMENDATORY ACTS.

	<i>Sec.</i>
Constitutional requirement and its purpose	131
Acts expressly amendatory	132
Amendment "to read as follows"	133
Repeal and re-enactment	134
Amendments by implication not within constitutional regulation	135

CHAPTER VIII.

REPEALING ACTS.

Duration of statutes and power of repeal	136
Express and implied repeal	137
Repeals by implication not favored	138
Implication from negative or affirmative statutes	139
Repealing effect of affirmative statutes conferring power	140
Where there is grant of part of power already possessed	141
Repealing effect of acts changing criminal laws	142
Grant of greater or different power or right	145
Repeal by radical change of leading part	146
Repeal of inconsistent legislation	147
Reconciliation of affirmative statutes	148
Repeal by revision	154
General laws will not repeal those which are special	157
The later law which causes repeal	160
Effect of repeal as to civil rights	162
Effect of repealing penal laws	166
Saving clauses	167
Revival by repeal of repealing statute	168

CHAPTER IX.

STATUTES VOID IN PART.

Statutes may be void in part and valid in part	169
Requisite separableness of void part	171
Main purpose being unconstitutional, whole act void	174
Where void part inducement to residue	176
Valid part must be complete and accord with legislative intent	178

CHAPTER X.

JUDICIAL NOTICE AND PROOF OF STATUTES, AND THEIR AUTHORITATIVE EXPOSITION.

Judicial notice of statutes	181
State statutes in federal courts	185
Foreign statutes, how proved	188
Functions of court and jury in respect of foreign laws proved	192
Private statutes	193

PART SECOND.

STATUTORY CONSTRUCTION.

CHAPTER XI.

CLASSIFICATION AND DESCRIPTION OF STATUTES.

	<i>Sec.</i>
The names applied to statutes	195
Ancient statutes of England	196
Federal, state, territorial and colonial statutes	197
Public and private statutes	198
Declaratory statutes	200
Affirmative and negative statutes	202
Preceptive, prohibitive and permissive statutes	205
Prospective and retroactive statutes	206
Remedial statutes	207
Penal statutes	208

CHAPTER XII.

PARTS OF A STATUTE AND THEIR RELATIONS.

The title	210
The preamble	212
The enacting style	214
The purview	215
Exceptions, provisos, interpretation, repealing and saving clauses	216
Partial conflict resolved into an exception	217
Words expounded to accord with intent	218
Effect of total conflict	220
Punctuation	232
Headings and marginal notes	234

CHAPTER XIII.

INTERPRETATION AND CONSTRUCTION.

The intent of a statute is the law	234
Its ascertainment the object of interpretation	235
Interpretation and construction compared	236
Intent first to be sought in language of statute itself	237
If intent plainly expressed it is to be followed without further inquiry	238
The intention to be ascertained from entire statute	239
General intent of statute key to meaning of the parts	240
The flexibility of words and clauses to harmonize with the general intent	245
Literal sense of words not controlling	246
Interpretation of words and phrases	247
They should be construed as they are generally understood	248

	<i>See</i>
How general words construed	249
Words having popular and technical meaning	250
Common-law words	253
Statutory uses of words	255
Change of phraseology of statute	256
Statutes adopted by general reference	257
Interpretation with reference to grammatical sense	258
Correction of mistakes	260
Context and associated words	262
Relative and qualifying words	267
General words following particular	268
<i>Reddendo singula singulis</i>	282
Interpretation affected by other statutes	283
Construction of statutes <i>in pari materia</i>	286
Interpretation with reference to common law	289
Extraneous aids to construction	292
Judicial knowledge	293
Contemporaneous construction	307
General usage	308
<i>Stare decisis</i>	313
Effects and consequences	321
<i>Expressio unius est exclusio alterius</i>	325
Presumptions	330
Implications and incidents	334

CHAPTER XIV.

STRICT CONSTRUCTION.

Literal and strict construction compared	346
Strict construction of penal statutes	349
Not construed so strictly as to defeat intention	356
What statutes are penal	358
Revenue laws	361
Statutes which impose burden of taxation	362
Statutes delegating the taxing power	365
Statutes against common right	366
Statutes of limitations	368
Limitations as to new trials and appeals	369
Statutes interfering with legitimate industries, etc.	370
Statutes creating liability for death by negligence	371
Civil damage acts	373
Statutes for exercise of eminent domain	378
Statutes granting power	381
Jurisdiction of courts	386
Grants of titles and franchises	389
Statutory rights	398
Statutes in derogation of the common law	400
Interpretation clauses	402
Statutes affecting statutory policy	407

CHAPTER XV.

LIBERAL CONSTRUCTION.

	<i>Sec.</i>
General explanation of subject	404
Remedial statutes in sense of rule that they are liberally construed	409-413
Equitable construction	413
Liberal construction	416
<i>Causa omisus</i>	431

CHAPTER XVI.

DIRECTORY AND MANDATORY STATUTES.

Preliminary explanation	446
Provisions as to time generally directory	448
Also formal and incidental provisions	451
Statutory bonds differing from statute	453
Mandatory statutes	454
Statutes which confer new rights, privileges, etc.	458
Statutes which are in form permissive	460

CHAPTER XVII.

RETROACTIVE STATUTES.

Generally regarded with disfavor	463
<i>Ex post facto</i> laws	465
Retrospective laws relating to criminal procedure	467
Change of punishment by subsequent legislation	470
Laws impairing obligation of contracts	471
Change of remedy	476
Vested rights inviolable	480
Curative statutes	483

TABLE OF CASES CITED.

- Aaron v. State**, 40 Ala. 307. §§ 166, 167, 227.
- Abbott v. Middleton**, 7 H. of L. 68. §§ 236, 247.
- v. Wood**, 22 Me. 541. § 360.
- Abbottsford, The**, 98 U. S. 440. §§ 255, 333.
- Abel v. Douglass**, 4 Denio, 305. § 184.
- v. Lee**, L. R. 6 C. P. 371. § 258.
- Aberdare Local Board v. Hammett**, L. R. 10 Q. B. 162. § 429.
- Abernathy v. State**, 78 Ala. 411. § 138.
- Abington v. Cabeen**, 106 Ill. 200. §§ 93, 96.
- v. Duxbury**, 105 Mass. 287. § 206.
- Ableman v. Booth**, 21 How. 506. § 21.
- Abley v. Dale**, 11 C. B. 378. §§ 237, 238.
- Acker v. Acker**, 81 N. Y. 143. § 146.
- Ackley School Dist. v. Hall**, 103 U. S. 135. §§ 93, 95.
- Adams v. Abram**, 38 Mich. 302. § 371.
- v. Field**, 21 Vt. 266. § 333.
- v. Foster**, 20 John. 452. § 339.
- v. Lockwood**, 30 Kan. 773. § 393.
- v. Nashville**, 95 U. S. 19. § 185.
- v. Oaks**, 20 John. 282. § 339.
- v. Saratoga, etc.** R. R. Co. 10 N. Y. 328. § 387.
- v. Turrentine**, 8 Ired. L. 147. §§ 247, 253, 291.
- v. Tyler**, 121 Mass. 380. § 428.
- v. Webster**, 26 La. Ann. 142. §§ 93, 103.
- Adams Exp. Co. v. Owensboro**, 85 Ky. 265. § 157.
- Adamson v. Davis**, 47 Mo. 268. § 10.
- Adj.-Gen. v. Ranee Surnomoye Dossee**, 9 Moore's Ind. App. 387. § 15.
- Aechternacht v. Watmouth**, 8 Watts & S. 162. § 358.
- Aerated Bread Co. v. Gregg**, L. R. 8 Q. B. 355. §§ 247, 254.
- Ætna Ins. Co. v. Harvey**, 11 Wis. 394. § 336.
- Ahl v. Rhoads**, 84 Pa. St. 319. § 206.
- Aicard v. Daly**, 7 La. Ann. 612. § 314.
- Aikin v. Western R. R. Co.** 20 N. Y. 370. § 229.
- Alabama Ins. Co. v. Boykin**, 38 Ala. 510. § 483.
- Alabama Med. College v. Muddon**, 46 Ala. 603. § 162.
- Alberson v. Mayor**, 82 Ga. 30. § 101.
- Albertson v. Robeson**, 1 Dall. 9. § 104.
- v. State**, 9 Neb. 422. §§ 160, 220.
- Albon v. Pyke**, 4 M. & Gr. 424. § 396.
- Albright v. Lapp**, 26 Pa. St. 99. § 342.
- v. Payne**, 43 Ohio St. 8. § 232.
- Alcorn v. Hamer**, 38 Miss. 652. §§ 67, 72, 75.
- Alderman v. Phelps**, 15 Mass. 225. § 115.
- Aldrich v. Parnell**, 147 Mass. 409. § 377.
- Aldridge v. Mardoff**, 32 Tex. 204. § 240.
- v. Tuscumbia, etc.** R. R. Co. 2 St. & P. 199. § 480.
- v. Williams**, 3 How. 9. § 300.
- Alexander v. Bennett**, 60 N. Y. 204. § 385.
- v. Burnham**, 18 Wis. 199. § 298.
- v. State**, 56 Ga. 478. § 333.
- v. State**, 9 Ind. 337. § 133.
- v. Saulsbury**, 37 Ala. 375. § 400.
- v. Worthington**, 5 Md. 471. §§ 215, 236, 237.

- Alina, The, 5 Ex. Div. 227; 5 Prob. Div. 138. § 268.
- Alkins v. Jupe, 2 C. P. Div. 373. § 210.
- Allaire v. Howell Works Co. 14 N. J. L. 21. § 358.
- Allegheny Co. Home's Case, 77 Pa. St. 77. §§ 103, 170.
- Allen's Appeal, 81* Pa. St. 302. § 272.
- Allen's Appeal, 99 Pa. St. 196. §§ 247, 253, 291.
- Allen v. Hall, 14 Bush, 85. § 100.
- v. Hirsch, 8 Ore. 412. § 193.
- v. Louisiana, 103 U. S. 80. §§ 169, 174.
- v. Manasse, 4 Ala. 454. § 422.
- v. Massey, 17 Wall. 354. § 185.
- v. Parish, 3 Ohio, 198. § 246.
- v. Pioneer Press, 40 Minn. 117. §§ 122, 128.
- v. Ramsey, 1 Metc. (Ky.) 635. § 253.
- v. Roundtree, 1 Spears. 80. § 424.
- v. Russell, 39 Ohio St. 336. § 232.
- v. Savannah, 9 Ga. 286. § 322.
- v. Scharinghausen, 8 Mo. App. 229. § 306.
- v. Stevens, 29 N. J. L. 509. § 358.
- v. Tison, 50 Ga. 374. §§ 93, 96, 98.
- v. Young, 76 Me. 80. § 243.
- v. Watson, 2 Hill (S. C.), 319. §§ 184, 190.
- Allen, Ball & Co. v. Mayor, 9 Ga. 286. § 257.
- Allentown v. Hower, 93 Pa. St. 332. § 198.
- Alley in Kritztown, In re, 2 Woodw. Dec. (Pa.) 373. § 204.
- Allhusen v. Brooking, L. R. 26 Ch. Div. 564. §§ 463, 484.
- Allman v. Owen, 31 Ala. 167. § 302.
- Allor v. Wayne Co. Auditors, 43 Mich. 76. §§ 92, 211.
- Allsop v. Day, 7 H. & N. 463. § 402.
- Alma Spinning Co., In re, L. R. 16 Ch. Div. 687. §§ 322, 324.
- Almy v. Harris, 5 John. 175. §§ 202, 204, 325, 399.
- Alsath v. Philbrick, 50 N. J. L. 581. § 128.
- Alter v. Shepherd, 27 La. Ann. 207. §§ 363, 420.
- Altrincham Union v. Cheshire Lines Committee, L. R. 15 Q. B. Div. 597. § 199.
- Alvord v. Lent, 23 Mich. 372. §§ 238, 372.
- v. Little, 16 Fla. 158. § 10.
- American Fur Co. v. United States, 2 Pet. 367. § 349.
- American Ins. Co. v. Canter, 1 Pet. 541. §§ 19, 24, 25, 184.
- American Printing House v. Dupuy, 37 La. Ann. 188. § 88.
- American Print Works v. Lawrence, 23 N. J. L. 590. §§ 169, 191.
- American Transportation Co. v. Moore, 5 Mich. 368. § 271.
- Ames v. McCamper, 124 Mass. 85. § 192.
- v. Martin, 6 Wis. 361. § 420.
- Amsbry v. Hinds, 48 N. Y. 57. § 206.
- Amy v. Watertown, 130 U. S. 301. § 187.
- Anderson v. Anderson, 23 Tex. 639. § 297.
- v. Commonwealth, 18 Gratt. 295. § 135.
- v. Dunn, 6 Wheat. 204. § 8.
- v. Folger, 11 La. Ann. 269. § 297.
- v. Herriott, 4 Cow. 508. § 12.
- v. Hill, 42 N. J. L. 351. § 157.
- v. Hill, 54 Mich. 477. § 90.
- v. Levely, 58 Md. 192. §§ 68, 342.
- v. Trenton, 42 N. J. L. 486. § 128.
- Andrews v. Hoxie, 5 Tex. 117. §§ 184, 192.
- v. King, 77 Me. 224. § 333.
- v. Knox Co. 70 Ill. 65. § 298.
- v. People, 75 Ill. 605. § 154.
- v. Russell, 7 Blackf. 474. § 164.
- v. Schott, 10 Pa. St. 47. § 364.
- v. Shaffer, 12 How. Pr. 441. § 338.
- v. United States, 2 Story, 202. §§ 208, 347, 350.
- Angele de Sentamanat v. Soule, 33 La. Ann. 609. §§ 260, 261.
- Anglo-Greek Steam Co., In re, L. R. 2 Eq. 1. § 268.

- Anna, The**, L. R. 1 P. Div. 259. §§ 309, 310.
- Annable v. Patch**, 3 Pick. 360. § 206.
- Annan v. Houck**, 4 Gill, 332. § 414.
- Anness v. Providence**, 13 R. L. 17. § 392.
- Anonymous**, 2 Stew. 228. § 482.
- Anonymous**, 1 Strange, 86. § 115.
- Anonymous**, 2 Hill, 375. § 115.
- Ansley v. Meikle**, 81 Ind. 260. § 190.
- Antelope, The**, 10 Wheat. 66. § 12.
- Anthony v. State**, 29 Ala. 27. § 256.
- Appeal Tax Court v. Western, etc.**
R. R. Co. 50 Md. 274. §§ 138, 463, 480.
- Apple v. Apple**, 1 Head, 348. §§ 247, 253, 291.
- Archbishop Canterbury's Case**, 2 Rep. 46a. § 277.
- Arding v. Bonner**, 2 Jur. (N. S.) 763. § 300.
- Argenti v. San Francisco**, 16 Cal. 282. § 380.
- Arguello v. United States**, 18 How. 550. § 181.
- Aritt v. Elmore**, 2 Bailey, 595. § 425.
- Armstrong v. Berreman**, 13 Ind. 423. § 132.
- v. Ross**, 20 N. J. Eq. 109. § 458.
- v. Toler**, 11 Wheat. 258. § 336.
- v. United States**, 1 Pet. C. C. 46. § 453.
- Arnold v. Kelley**, 5 W. Va. 446. §§ 10, 119.
- v. United States**, 9 Cranch, 104. §§ 110, 112.
- Arnoult v. New Orleans**, 11 La. Ann. 54. § 132.
- Arthur v. Adam**, 49 Miss. 404. § 451.
- v. Bokenham**, 11 Mod. 150. § 291.
- v. Dodge**, 101 U. S. 34. § 156.
- v. Homer**, 96 U. S. 137. § 138.
- v. Morrison**, 96 U. S. 102. §§ 238, 254.
- Arundel v. McCulloch**, 10 Mass. 70. §§ 386, 388.
- Ashbury Co. v. Riche**, L. R. 7 H. of L. 653. § 269.
- Ashford v. Walkins**, 70 Ala. 156. § 194.
- Ashley, Appellant**, 4 Pick. 21. §§ 154, 201, 229.
- Ashley v. Harrington**, 1 D. Chip. 348. § 133.
- v. Martin**, 50 Ala. 537. § 298.
- Asmale v. Goodwin**, 2 Salk. 624. § 115.
- Aspinwall v. Daviess Co.** 22 How. 364. § 164.
- Asplin v. Blackman**, 7 Ex. 386. § 462.
- Assessor v. Osbornes**, 9 Wall. 567. §§ 165, 464.
- Atcheson v. Everitt**, 1 Cowp. 391. §§ 410, 416, 430.
- Atkins v. Disintegrating Co.** 18 Wall. 272. §§ 215, 234, 246.
- v. Kinnan**, 20 Wend. 249. §§ 390, 454.
- Atkinson v. Atkinson**, 15 La. Ann. 491. § 184.
- v. Duffy**, 16 Minn. 49. §§ 82, 88, 92, 93.
- v. Dunlap**, 50 Me. 111. §§ 10, 206.
- v. Rhea**, 7 Humph. 59. § 447.
- Atlantic City Water-works Co. v. Consumers' Water Co.** 44 N. J. Eq. 427. § 128.
- Attorney-General v. Amos**, 60 Mich. 372. § 94.
- v. Baker**, 9 Rich. Eq. 521. § 447.
- v. Bank**, 5 Ired. Eq. 71. §§ 308, 310.
- v. Brown**, 1 Wis. 513. §§ 136, 202.
- v. Brunst**, 3 Wis. 787. § 256.
- v. Chelsea Water-works Co.**, Fitzgib. 195. §§ 160, 221, 228.
- v. Day**, 1 Ves. Sr. 221. § 427.
- v. Detroit, etc. Co.** 2 Mich. 138. §§ 239, 240.
- v. Donaldson**, 10 M. & W. 117. § 333.
- v. Edison Telephone Co. of London**, L. R. 6 Q. B. Div. 244. § 383.
- v. Erie, etc. R. R. Co.** 55 Mich. 21. § 193.
- v. Forster**, 10 Ves. 338. § 312.
- v. Joy**, 55 Mich. 94. §§ 40, 41, 92.

- Attorney-General v. Knock-A-Sing**,
 L. R. 5 P. C. 179. §§ 218, 246.
v. Lamplough, L. R. 3 Ex. Div.
 223. § 162.
v. Lockwood, 9 M. & W. 391.
 §§ 143, 246, 258.
v. Middleton, 3 H. & N. 138.
 § 362.
v. Powis, Kay, 186. § 247.
v. Preston, 56 Mich. 181. § 311.
v. Primate, 1 Jebb & Symes, 317.
 § 307.
v. Rice, 64 Mich. 385. § 91.
v. Sillem, 2 H. & C. 508. §§ 237,
 238, 239, 300.
v. Smth, 31 Mich. 359. §§ 321,
 407.
v. Stewart, 2 Meriv. 162. § 184.
v. Weymouth, 1 Amb. 22. §§ 196,
 210.
Atwater v. Schenck, 8 Wis. 160.
 § 298.
Atwell v. Grant, 11 Md. 104. §§ 164,
 483.
Aubert v. Maze, 2 B. & P. 371. § 336.
Auditor v. Atchison, etc. R. R. Co. 6
 Kans. 500. §§ 3, 10, 68.
v. Haycraft, 14 Bush, 284. § 300.
Augusta v. Sweeney, 44 Ga. 463.
 § 473.
Aurora, Cargo of Brig, v. United
States, 7 Cr. 382. §§ 168, 182.
Aurora, etc. Turnpike v. Holthouse, 7
 Ind. 59. § 206.
Ausman v. Veal, 10 Ind. 355. § 305.
Austin v. Bunyard, 6 B. & S. 687.
 § 324.
v. Carter, 1 Mass. 230. §§ 386,
 388.
v. Gulf, etc. R. R. Co. 45 Tex. 234.
 § 287.
v. Murray, 16 Pick. 121. § 370.
v. State, 71 Ga. 595. § 347.
v. Stevens, 24 Mo. 520. § 206.
v. The Aldermen, 7 Wall. 694.
 § 171.
Avanzo v. Mudie, 10 Ex. 203. § 458.
Averil v. Perrott, 74 Mich. 296; 41
 N. W. Rep. 929. § 397.
- Avery v. Groton**, 36 Conn. 304.
 §§ 387, 416.
v. Pixley, 4 Mass. 460. §§ 251,
 253.
v. Stewart, 2 Conn. 69. § 115.
Aycock v. Martin, 37 Ga. 124. § 478.
Ayeridge v. Town Commissioners, 60
 Ga. 405. §§ 94, 102.
Ayers v. Knox, 7 Mass. 306. §§ 218,
 223, 246, 428.
Ayres v. Methodist Church, etc. 3
 Sandf. 368. § 184.
Babcock v. Goodrich, 47 Cal. 488.
 § 336.
v. New J. Stockyard Co. 20 N. J.
 Eq. 296. § 381.
Bach v. Smith, 2 Wash. T'y, 145.
 § 336.
Bachman v. Chrisman, 23 Pa. St. 162.
 § 206.
Backes v. Dant, 55 Ind. 181. §§ 164,
 376.
Backus v. Lebanon, 11 N. H. 19. § 473.
Backwell's Case, 1 Vern. 152. § 460.
Bacon v. Kennedy, 56 Mich. 329.
 §§ 113, 114.
Bagg's Appeal, 43 Pa. St. 512. §§ 10,
 484.
Bagley v. Emberson, 79 Mo. 139.
 § 458.
Bailey v. Bailey, 21 Gratt. 43. § 482.
v. Bailey, L. R. 13 Q. B. Div. 859.
 § 204.
v. Bryan, 3 Jones' L. (N. C.) 357.
 §§ 139, 207, 290, 325, 392, 393.
v. Commonwealth, 11 Bush, 688.
 §§ 218, 240, 251, 331.
v. Harris, 12 Q. B. 905. § 336.
v. Kalamazoo Pub. Co. 40 Mich.
 251. § 304.
v. McDowell, 2 Harr. 34. § 190.
v. Maguire, 22 Wall. 226. § 364.
v. Mason, 4 Minn. 546. § 163.
v. R. R. Co. 4 Harr. 389. § 482.
v. Rolfe, 16 N. H. 247. §§ 308,
 310, 312.
Baile's Case, 1 Leach's Cas. 396.
 § 210.

- Baines v. Williams**, 8 Ired. L. 481. § 368.
- Baird v. Bank of Washington**, 11 Serg. & R. 418. § 385.
- Baker**, In re, 2 H. & N. 210. § 143.
- Baker v. Baker**, 13 Cal. 87. §§ 200, 291.
- v. Compton**, 52 Tex. 252. § 104.
- v. Lorillard**, 4 N. Y. 261. § 314.
- v. Taylor**, 2 Blatch. 82. § 458.
- v. Terrell**, 8 Minn. 195. § 400.
- v. Wright**, 1 Bush, 500. § 20.
- Baldro v. Tolmie**, 1 Ore. 176. § 426.
- Baldwin v. Franks**, 120 U. S. 678. § 173.
- v. Newark**, 38 N. J. L. 158. § 206.
- Balfour v. Malcolm**, 8 Cl. & Fin. 500. § 396.
- Ball v. Bullard**, 52 Barb. 141. § 146.
- v. Lastinger**, 71 Ga. 678. §§ 392, 393.
- Ballard v. Ward**, 89 Pa. St. 358. § 206.
- Ballin v. Ferst**, 55 Ga. 546. § 167.
- Ballou v. Black**, 17 Neb. 389. § 54.
- Ballston Spa Bank v. Marine Bank**, 16 Wis. 120. § 139.
- Baltimore, etc. R. R. Co. v. Glenn**, 28 Md. 287. §§ 190, 192.
- v. Grant**, 98 U. S. 398. §§ 165, 464.
- v. Haiver**, 12 Am. & Eng. R. R. Cas. 149. § 371.
- v. Kelly**, 24 Md. 271. § 371.
- v. Trainor**, 38 Md. 542. § 371.
- v. Wilson**, 2 W. Va. 528. § 341.
- Baltimore, etc. Turnpike Co. v. Union R. R. Co.** 35 Md. 224. § 388.
- Bancroft v. Dumas**, 21 Vt. 456. § 336.
- Bane v. Wick**, 6 Ohio St. 13. §§ 315, 320.
- Bangs v. Snow**, 1 Mass. 181. § 380.
- Bank v. Dalton**, 9 How. 522. § 427.
- v. Ibbotson**, 5 Hill, 461. § 207.
- Bank for Savings v. The Collector**, 3 Wall. 495. §§ 162, 222.
- Bank of Alexandria v. Dyer**, 14 Pet. 141. § 424.
- Bank of Augusta v. Earle**, 13 Pet. 519. §§ 12, 13, 385.
- Bank of Columbia v. Fitzhugh**, 1 H. & G. 239. § 295.
- Bank of Commonwealth v. Spilman**, 3 Dana, 150. § 193.
- Bank of the Dominion v. McVeigh**, 20 Gratt. 457. § 473.
- Bank of England v. Anderson**, 3 Bing. N. C. 666. § 207.
- Bank of Gallipolis v. Domigan**, 13 Ohio St. 220. § 398.
- Bank of Hamilton v. Dudley**, 2 Pet. 492. §§ 165, 169.
- Bank of Indiana v. New Albany**, 11 Ind. 139. § 102.
- Bank of Ireland v. Evans' Charities**, 5 H. of L. Cas. 405. § 308.
- Bank of Louisiana v. Williams**, 46 Miss. 618. § 378.
- Bank of Mobile v. Meagher**, 33 Ala. 622. § 333.
- Bank of Monroe v. Widner**, 11 Paige, 529. § 304.
- Bank of Natchez v. State**, 6 Sm. & M. 599. § 473.
- Bank of Newberry v. Railroad Co.**, 9 Rich. 495. § 193.
- Bank of Pennsylvania v. Commonwealth**, 19 Pa. St. 144. § 500.
- Bank of Rome v. Village of Rome**, 18 N. Y. 38. § 75.
- Bank of St. Marys v. State**, 12 Ga. 475. §§ 163, 166.
- Bank of the State v. Bank of Cape Fear**, 13 Ired. 75. § 473.
- Bank of Toledo v. Bond**, 1 Ohio St. 622. § 206.
- Bank of United States v. Halstead**, 1 Wheat. 51. § 68.
- v. Lee**, 13 Pet. 107. § 444.
- v. McKenzie**, 2 Brock. 393. § 222.
- v. Merchants' Bank**, 7 Gill, 415. § 294.
- Bank of Utica v. Smedes**, 3 Cow. 684. § 193.
- Banks, Ex parte**, 28 Ala. 28. §§ 333, 462.

- Banks v. Cage*, 1 How. (Miss.) 293. § 392.
v. Darden, 18 Ga. 818. §§ 207, 892, 393.
Bannon v. State, 49 Ark. 167. § 125.
Baptiste v. De Volunbran, 5 H. & J. 86. § 294.
Barber, Cont. Election of, In re, 86 Pa. St. 392. § 202.
Barber v. Gamson, 4 B. & Ald. 281. § 462.
v. Waite, 1 Ad. & E. 514. § 240.
Bard v. Yohn, 26 Pa. St. 482. § 377.
Barden v. Crocker, 10 Pick. 383. § 202.
Barker v. Bell, 46 Ala. 216. § 138.
v. Esty, 19 Vt. 131. §§ 234, 246, 252.
v. Jackson, 1 Paine, 559. § 187.
v. Millard, 16 Wend. 572. § 426.
v. Palmer, L. R. 8 Q. B. Div. 9. § 455.
Barkman v. Hopkins, 6 Eng. (Ark.) 157. § 192.
Barks v. Woodruff, 12 Ill. App. 96. § 374.
Barnard v. Viele, 21 Wend. 89. § 454.
Barnawell v. Threadgill, 5 Ired. Eq. 86. § 396.
Barnes v. Doe, 4 Ind. 132. § 863.
v. Mayor, 19 Ala. 707. § 463.
v. Supervisors, 51 Miss. 305. § 75.
v. Thompson, 2 Swan, 317. § 462.
v. Williams, 3 Ired. L. 481. § 426.
Barnet v. Barnet, 15 S. & R. 72. § 483.
Barnett, Ex parte, L. R. 4 Ch. 351. § 333.
Barnett v. Scully, 56 Mich. 374. § 457.
Barret v. Chitwood, 2 Bibb, 431. § 435.
Barrett v. Dolan, 130 Mass. 366. §§ 371, 376.
Barrows v. Downs, 9 R. I. 447. § 190.
Barry v. Merchants' Exchange Co. 1 Sandf. Ch. 289. § 385.
v. Randolph, 3 Binn. 277. § 342.
v. Viall, 12 R. I. 18. § 64.
Bartemeyer v. Iowa, 18 Wall. 129. § 370.
Bartlet v. King, 12 Mass. 545. § 154.
v. Viner, Skinner, 322. § 335.
Bartlett v. Board, 59 Ill. 364. § 458.
v. Morris, 9 Port. 266. §§ 199, 210, 238.
v. O'Donoghue, 72 Mo. 563. § 458.
Barto v. Himrod, 8 N. Y. 483. §§ 67, 72, 180.
Barton v. Gadsden, 79 Ala. 495. § 187.
v. Hannant, 3 B. & S. 16. § 218.
v. McWhinney, 85 Ind. 481. § 64.
v. Morris, 15 Ohio, 408. § 206.
v. Port J. etc. Plk. R. Co. 17 Barb. 897. § 336.
Bartruff v. Remey, 15 Iowa, 257. §§ 167, 206.
Basnett v. Jacksonville, 19 Fla. 664. §§ 132, 183.
Bass v. Mayor, etc. 30 Ga. 845. § 483.
Bassett v. United States, 2 Ct. of Cl. 448. §§ 104, 201.
Batchelder v. Shapleigh, 10 Me. 135. § 422.
Bates v. Clark, 95 U. S. 204. § 162.
v. Davis, 76 Ill. 222. § 374.
v. Kimball, 2 D. Chip. 77. § 10.
v. Nelson, 49 Mich. 459. § 87.
v. Relyea, 23 Wend. 340. § 313.
v. Stearns, 23 Wend. 482. § 482.
Battle v. Shivers, 39 Ga. 405. § 211.
Baugh v. Nelson, 9 Gill, 299. §§ 474, 480, 484.
Baum v. Mullen, 47 N. Y. 577. § 400.
Baumgartner v. Hasty, 100 Ind. 575. § 81.
Bay v. Gage, 36 Barb. 447. §§ 133, 206, 406.
Bayard v. Smith, 17 Wend. 88. §§ 208, 358.
Bay City, etc. R. R. Co. v. Austin, 21 Mich. 390. §§ 163, 166, 208, 358.
Bay Co. v. Brock, 44 Mich. 45. § 453.
Bayley v. Hazard, 8 Yerg. 487. § 454.
Bayly v. Chubb, 16 Gratt. 284. §§ 181, 293.
Baxter v. Tripp, 12 R. I. 310. §§ 321, 407.
Beach v. Botsford, 1 Doug. (Mich.) 199. §§ 327, 391.

- Beach v. Reynolds, 64 Barb. 506.
 § 462.
 v. Viles, 2 Pet. 678. § 186.
 Beall v. Beall, 8 Ga. 210. §§ 400, 442.
 v. Harwood, 2 Har. & J. 167.
 §§ 219, 234.
 Beals v. Hale, 4 How. 37. §§ 138, 153.
 Beams, Matter of, 17 How. Pr. 459.
 § 482.
 Bean v. Briggs, 4 Iowa, 464. § 184.
 Bear Brothers v. Marx, 63 Tex. 208.
 §§ 240, 262.
 Bearcamp River Co. v. Woodman, 2
 Greenlf. 404. § 202.
 Beard v. Basye, 7 B. Mon. 144. §§ 12,
 13, 188.
 v. Rowan, 9 Pet. 301. § 212.
 Bearpark v. Hutchinson, 7 Bing. 186.
 § 434.
 Beatty v. Burnes, 8 Cranch, 98. § 426.
 v. People, 6 Colo. 538. §§ 167,
 225.
 Beaty v. Knowler, 4 Pet. 152. §§ 193,
 365, 387.
 Beaumont v. Irwin, 2 Sneed, 291.
 § 223.
 Beaver County Indexes, 6 Pa. County
 Ct. 525. § 128.
 Beawfage's Case, 10 Coke, 99b. §§ 246,
 436.
 Bechtol v. Cobaugh, 10 S. & R. 121.
 § 163.
 De. ke v. Smith, 2 M. & W. 195.
 §§ 246, 258, 419.
 Beckett v. Uniontown Building Asso.
 88 Pa. St. 211. § 456.
 Beckford v. Hood, 7 T. R. 620. § 399.
 Beckman v. Stanley, 8 Nev. 257.
 § 458.
 Beckwith v. Racine, 7 Biss. 142.
 § 473.
 Bedell v. Janney, 9 Ill. 193. § 367.
 Bedford v. Shilling, 4 S. & R. 411.
 §§ 11, 206, 482.
 Beebe v. Scheidt, 13 Ohio St. 406.
 § 395.
 Beecher v. Baldy, 7 Mich. 483. § 398.
 Beekman Street, Matter of, 20 John.
 269. § 391.
- Beer Co. v. Massachusetts, 97 U. S. 25.
 § 473.
 Beers v. Haughton, 9 Pet. 359. § 478.
 v. Phoenix Glass Co. 14 Barb. 358.
 § 385.
 v. Walhizer, 43 Hun. 254. § 375.
 Beeson v. Green Mountain G. M. Co.
 57 Cal. 20. § 371.
 Belfast v. Fogler, 71 Ma. 403. §§ 167,
 254.
 Bell v. Barnet, 2 J. J. Marsh. 51C.
 § 306.
 v. Holtby, L. R. 15 Eq. 178. § 234.
 v. Jones, 10 Md. 322. § 322.
 v. Morrison, 1 Pet. 315. §§ 186,
 368.
 v. New York, 105 N. Y. 139.
 § 246.
 v. Zelmer, 75 Mich. 66. § 376.
 Bellmeyer v. Independent Dist. etc.
 44 Iowa, 564. § 381.
 Bellville R. R. Co. v. Gregory, 15 Ill.
 20. §§ 96, 215.
 Bellville S. Bank v. Richardi, 56 Mich.
 453. § 190.
 Beltzhoover v. Gollings, 101 Pa. St.
 293. § 454.
 Belvidere v. Warren R. R. Co. 34
 N. J. L. 193; 35 id. 587. §§ 163,
 166.
 Bemis v. Becker, 1 Kan. 226. § 336.
 v. Leonard, 118 Mass. 502. §§ 111,
 112, 113.
 v. McKenzie, 13 Fla. 553. § 184.
 Bender v. State, 53 Ind. 254. § 39.
 Benkert v. Benkert, 32 Cal. 467.
 § 482.
 Benner v. Porter, 9 How. 242. §§ 24,
 25.
 Bennet v. Hargus, 1 Neb. 419. §§ 163,
 164.
 Bennett v. Bennett, Deady, 309. §§ 22,
 185.
 v. Birmingham, 81 Pa. St. 15.
 § 365.
 v. Drain Commissioner, 56 Mich.
 634. §§ 456, 457.
 v. McWhorter, 2 W. Va. 441.
 § 386.

- Bennett v. North British Ins. Co. 8
 Daly, 417. § 306.
 v. State, 2 Yerg. 472. §§ 143, 166.
 v. The Auditor, 2 W. Va. 441.
 § 333.
 v. Worthington, 24 Ark. 487.
 §§ 236, 332.
 Bensley v. Bignold, 5 B. & Ald. 335.
 § 335.
 v. Ellis, 39 Cal. 309. § 206.
 v. Mountain Lake Water Co. 13
 Cal. 306. §§ 363, 387.
 Bentley v. Rotherham L. Board, L. R.
 4 Ch. Div. 588. §§ 210, 212.
 Benton v. Wickwire, 54 N. Y. 226.
 §§ 133, 237.
 Berg v. Baldwin, 31 Minn. 541. § 420.
 Berger v. Duff, 4 John. Ch. 368. § 67.
 Berkowitz v. Lester, 121 Ill. 999. § 396.
 Berkshire v. Miss. etc. R'y Co. 28 Mo.
 App. 225. § 154.
 Berley v. Rampacher, 5 Duer, 183.
 § 206.
 Berliner v. Waterloo, 14 Wis. 378.
 §§ 42, 109, 294.
 Berluchaux v. Berluchaux, 7 La. 539.
 § 181.
 Bernier v. Becker, 37 Ohio St. 72.
 § 201.
 Berne v. Bank of England, 9 Ves. 347.
 § 297.
 Berry v. Baltimore, etc. R. R. Co. 41
 Md. 446. §§ 40, 42, 43, 45, 110,
 169, 181, 294.
 v. Bellows, 30 Ark. 198. § 20.
 v. Clary, 77 Me. 482. §§ 215, 240,
 482.
 v. Clements, 9 Humph. 312; 11
 How. 398. § 111.
 Bertholf v. O'Reilly, 74 N. Y. 509.
 § 373.
 Best v. Gholson, 89 Ill. 465. §§ 207,
 454, 455.
 Bestor v. Powell, 7 Ill. 119. § 247.
 Bethlehem v. Watertown, 51 Conn.
 490. § 202.
 Bettis v. Taylor, 8 Port. 564. § 347.
 Bevens v. Baxter, 23 Ark. 387. §§ 193,
 198.
 Biagi v. Howes, 66 Cal. 409. § 869.
 Bibb County Loan Asso. v. Richards,
 21 Ga. 592. § 49.
 Biddis v. James, 6 Binn. 321. § 190.
 Bidwell v. Whitaker, 1 Mich. 469.
 § 324.
 Biffin v. Yorke, 5 Man. & Gr. 437.
 § 238.
 Big Black Creek, etc. Co. v. Common-
 wealth, 94 Pa. St. 450. §§ 240,
 246, 292, 300.
 Bigelow v. Forrest, 9 Wall. 339. § 311.
 v. Gregory, 73 Ill. 197. § 456.
 v. Willson, 1 Pick. 485. §§ 110,
 111, 114.
 Biggs v. McBride, 17 Oregon, 640.
 § 198.
 Billerica v. Chelmsford, 10 Mass. 394.
 § 366.
 Billings v. Baker, 28 Barb. 343. §§ 146,
 400, 442.
 Billingslea v. Baldwin, 23 Md. 85.
 § 286.
 Billingsley v. Dean, 11 Ind. 331.
 § 297.
 Bingham v. Camden, 40 N. J. L. 156.
 § 127.
 v. Supervisors, 8 Minn. 441. § 229.
 Bingham's Trustees v. Guthrie, 19
 Pa. St. 418. § 439.
 Binghamton Bridge, 3 Wall. 51.
 § 378.
 Binney v. Canal Co. 8 Pet. 201.
 § 246.
 Binz v. Weber, 81 Ill. 288. §§ 91, 96.
 Binzel v. Grogan, 67 Wis. 147. § 422.
 Birchard v. Booth, 4 Wis. 67. § 449.
 Bird v. Commonwealth, 21 Gratt. 800.
 §§ 185, 293.
 v. County of Wasco, 3 Ore. 282.
 §§ 135, 138.
 v. Jones, 37 Ark. 195. § 224.
 Birdsall v. Carrick, 3 Nev. 154. §§ 56,
 57.
 Birmingham, etc. St. R'y Co. v. Bir-
 mingham St. R'y Co. 79 Ala. 465.
 § 378.
 Bishop v. Barton, 2 Hun, 436. §§ 211,
 218, 239, 284.

- Bishop v. Globe Co.** 135 Mass. 132. § 14.
 v. Jones, 28 Tex. 294. § 306.
Bissell v. Bissell, 11 Barb. 96. § 115.
Bitters v. Board, 81 Ind. 125. § 92.
Bittle v. Stuart, 34 Ark. 224. §§ 169, 173.
Black v. Cohen, 52 Ga. 626. §§ 77, 93.
 v. Johns, 68 Pa. St. 83. § 111.
 v. Tricker, 59 Pa. St. 13. § 283.
 v. Trower, 79 Va. 123. §§ 173, 174.
Blackford v. Hurst, 26 Gratt. 206. §§ 156, 161.
Blackman v. Gordon, 2 Rich. Eq. 43. § 480.
 v. Nearing, 43 Conn. 56. § 114.
Blackwell v. State, 45 Ark. 90. §§ 142, 149.
Blackwood v. Queen, L. R. 8 App. Cas. 96. § 246.
 v. Van Vliet, 30 Mich. 118. §§ 321, 407, 478.
Bladen v. Philadelphia, 60 Pa. St. 464. §§ 139, 203, 447, 454, 459.
Blain v. Bailey, 25 Ind. 165. §§ 153, 202.
Blair v. Cary, 9 Wis. 543. §§ 206, 482.
 v. Ridgely, 41 Mo. 63. § 21.
Blake v. Brackett, 47 Me. 28. § 260.
 v. Crowningshield, 9 N. H. 304. § 111.
 v. Heyward, Bailey's Eq. 208. § 324.
 v. Midland R'y Co. 10 L. & Eq. 437. § 371.
 v. National Banks, 23 Wall. 307. § 300.
Blakemore v. Dolan, 50 Ind. 194. §§ 131, 132.
Blakeney v. Blakeney, 6 Port. 109. §§ 410, 416.
Blanchard v. Russell, 13 Mass. 1. § 191.
 v. Sprague, 2 Story, 164. § 380.
 v. Sprague, 3 Sumn. 279. §§ 218, 261, 442, 463.
- Blanding v. Burr**, 13 Cal. 357. §§ 71, 75.
Blankard v. Galdy, 2 Salk. 411. §§ 15, 19, 184.
Blasdell v. State, 5 Tex. App. 263. § 222.
Blatz v. Rohrbach, 43 Hun, 402. § 375.
Blemer v. People, 76 Ill. 265. §§ 253, 260.
Blessing v. Galveston, 43 Tex. 641. §§ 41, 46.
Block v. State, 66 Ala. 493. § 85.
Blodgett, In re, 27 Hun, 12. § 92.
Blodgett, Matter of, 89 N. Y. 392. § 87.
Blood v. Fairbanks, 50 Cal. 420. §§ 223, 224.
 v. Humphrey, 17 Barb. 660. § 338.
Bloodgood v. Grasey, 31 Ala. 575. §§ 191, 320, 333.
Bloom v. Burdick, 1 Hill, 130. §§ 393, 454.
 v. Richards, 2 Ohio St. 387. § 336.
Bloomer v. Stolley, 5 McLean, 158. § 136.
Blue v. McDuffie, Busbee, L. (N. C.) 131. § 212.
Bly v. National Bank, 79 Pa. St. 453. § 336.
Board of Assessors v. Central R. R. Co. 48 N. J. L. 146. § 127.
Board of Commissioners v. Baker, 80 Ind. 374. §§ 86, 87, 102.
 v. Potts, 10 Ind. 286. §§ 145, 154.
 v. Silver, 22 Ind. 491. § 170.
 v. Spitler, 13 Ind. 235. § 298.
 v. State, 9 Gill, 379. § 213.
Board of Education v. Barlow, 49 Ga. 241. § 77.
Board of Health v. Hill, 13 C. B. (N. S.) 483. § 301.
Board of Supervisors v. Auditor-General, 65 Mich. 408. § 95.
Boas v. Nagle, 3 S. & R. 253. § 342.
Boatwright v. Faust, 4 McCord, 439. § 480.

- Bock v. Lauman, 24 Pa. St. 435. §§ 184, 190, 192.
 Bode v. State, 7 Gill, 328. § 246.
 Bodge v. Hughes, 53 N. H. 614. § 373.
 Boehm v. Engle, 1 Dall. 15. §§ 15, 184.
 Bogardus v. Trinity Church, 4 Paige, 198. § 15.
 Boggs v. Reed, 5 Mart. 673. § 297.
 Boice v. Boice, 27 Minn. 371. § 478.
 Boismare v. His Creditors, 8 La. 315. § 168.
 Bollin v. Shiner, 12 Pa. St. 205. § 252.
 Bolton v. King, 105 Pa. St. 78. §§ 207, 440.
 Bolton School, Ex parte, 2 Bro. C. C. 662; Madd. Ch. 719. § 194.
 Bond Debt Cases, 12 S. C. 200. §§ 41, 48.
 Bond v. Hopkins, 1 Sch. & Lef. 433. § 427.
 v. Munro, 28 Ga. 597. §§ 206, 463, 481.
 Bonds v. Greer, 56 Miss. 710. § 237.
 Bonham v. Board of Education, 4 Dill. 156. § 204.
 Booker v. McRoberts, 1 Call, 243. §§ 202, 399.
 Boon v. Bowers, 30 Miss. 246. §§ 194, 315.
 v. Juliet, 2 Ill. 258. § 222.
 Boone v. State, 12 Tex. App. 184. § 75.
 Boone Co. v. Keck, 31 Ark. 387. § 428.
 Booth v. Ibbotson, 1 Y. & J. 360. § 307.
 v. Kitchen, 7 Hun, 260. §§ 333, 337.
 v. State, 4 Conn. 65. § 367.
 v. Williams, 2 Ga. 252. § 411.
 Boothroyd, In re, 15 M. & W. 1. § 210.
 Borden v. State, 11 Ark. 519. § 314.
 Borrowdale, The, 39 Fed. Rep. 376. § 133.
 Borst v. Griffin, 5 Wend. 84. § 115.
 Bosanquet v. Woodford, 5 Q. B. 310. § 448.
 Bosley v. Davies, 1 Q. B. Div. 84. § 256.
 Bosley v. Mattingly, 4 B. Mon. 89. §§ 238, 407.
 Boston v. Cummins, 16 Ga. 102. §§ 105, 107.
 Boston, etc. Co. v. Gardner, 2 Pick. 33. § 441.
 Boston, etc. R. R. Co., Matter of, 53 N. Y. 574. § 388.
 Boston, etc. R. R. Co. v. Cilley, 44 N. H. 578. § 206.
 Boston Min. Co., In re, 51 Cal. 624. §§ 210, 211.
 Boston Water Power Co. v. Boston, etc. R. R. Co. 23 Pick. 360. § 388.
 Botanic Med. College v. Atchinson, 41 Miss. 188. §§ 191, 256.
 Bouknight v. Epting, 11 S. C. 71. § 480.
 Bouldin v. Lockhart, 1 Lea, 195. § 48.
 v. Phelps, 30 Fed. Rep. 547. § 295.
 Boulton v. Bull, 2 H. Bl. 499. § 194.
 v. Royce, 10 Phila. 559. § 168.
 Bound v. R. R. Co. 45 Wis. 543. §§ 42, 45, 46.
 Bourgignon Building Asso. v. Commonwealth, 98 Pa. St. 54. §§ 136, 266.
 Boutwell v. Foster, 24 Vt. 485. § 336.
 Bovard v. Kettering, 101 Pa. St. 181. § 338.
 Bowen, Matter of Will of, 34 Cal. 682. § 395.
 Bowen v. Lease, 5 Hill, 221. §§ 137, 138, 140, 152.
 Bower v. Hope Life Ins. Co. 11 H. of L. Cas. 389. § 462.
 Bowers v. Green, 1 Scam. 42. § 316.
 Bowles v. Cochran, 93 N. C. 398. § 283.
 Bowman v. Blyth, 7 El. & Bl. 47. §§ 139, 355.
 v. Cockrill, 6 Kan. 311. §§ 84, 93, 96.
 v. Wood, 41 Ill. 203. §§ 111, 113, 114.
 Bows v. Fenwick, L. R. 9 C. P. 339. § 280.
 Bowyer v. Camden, 50 N. J. L. 87. § 159.

- Boyce v. Holmes, 2 Ala. 54. § 206.
 v. Tabb, 18 Wall. 546. § 429.
 v. Wabash R'y Co. 63 Iowa, 70.
 § 14.
- Boyd v. Alabama, 94 U. S. 645. § 318.
 v. Bryant, 35 Ark. 69. § 75.
 v. Hood, 57 Pa. St. 98. § 363.
 v. Lowry, 53 Miss. 352. § 392.
 v. Watt, 27 Ohio St. 259. § 377.
- Boyen v. Crane, 1 W. Va. 176. § 64.
- Boykin v. State, 50 Miss. 375. § 448.
- Boyle, In re, 9 Wis. 264. §§ 109, 120,
 193.
- Bracken v. Smith, 39 N. J. Eq. 169.
 §§ 154, 156.
- Brackett v. Brackett, 61 Mo. 223.
 § 111.
 v. Norton, 4 Conn. 517. §§ 189,
 190.
- Bradburn v. Great W. R'y Co., L. R.
 10 Ex. 1. § 371.
- Bradbury v. Wagenhorst, 54 Pa. St.
 182. §§ 237, 238, 260, 332, 333.
- Bradford v. Barclay, 42 Ala. 375.
 §§ 206, 482.
 v. Floyd, 80 Mo. 207. § 306.
 v. Jones, 1 Md. 351. §§ 210, 211.
 v. Treasurer, Peck, 425. §§ 196,
 236.
- Bradley v. Baxter, 15 Barb. 122. § 67.
 v. Clark, 5 T. R. 201. § 196.
 v. Commissioners, . Humph. 428.
 § 183.
 v. Ina. Co. 3 Lans. 341. § 184.
 v. Jamison, 46 Iowa, 68. § 394.
 v. McAtee, 7 Bush, 667. § 473.
 v. New York, etc. R. R. Co. 21
 Conn. 305. § 388.
 v. Richmond, 6 Vt. 121. § 428.
 v. State, 69 Ala. 318. § 256.
- Bradshaw v. Mayfield, 18 Tex. 21.
 § 297.
- Bradwell's Case, 55 Ill. 535. § 321.
- Bradwell v. State, 16 Wall. 130.
 § 321.
- Brady v. Mayor, etc. 20 N. Y. 312.
 § 381.
 v. Northwestern Ina. Co. 11 Mich.
 425. § 367.
- Brady v. Page, 59 Cal. 52. § 298.
 v. West, 50 Miss. 68. § 182.
- Brady Street, In re, 99 Pa. St. 591.
 § 273.
- Bragg v. Clark, 50 Ala. 363. §§ 223,
 224.
- Brain v. Thomas, 50 L. J. Q. B. Div.
 663. § 204.
- Brainard v. Bushnell, 11 Conn. 17.
 § 10.
- Bramwell v. Penneck, 7 B. & C. 536.
 § 270.
- Branagan v. Dulaney, 8 Colo. 408.
 §§ 160, 220.
- Branch v. Burnley, 1 Call, 147. § 295.
- Branch Bank v. Murphy, 8 Ala. 119.
 § 104.
 v. Tillman, 12 Ala. 214. § 399.
- Brandling v. Barrington, 6 B. & C.
 475. §§ 410, 414.
- Brandon v. Pate, 2 H. Black. 308.
 § 360.
 v. Sands, 2 Ves. Jr. 514. § 360.
 v. State, 16 Ind. 197. § 101.
- Branham v. Lange, 16 Ind. 497. § 135.
 v. Long, 78 Va. 352. § 217.
- Bramston v. Colchester, 6 E. & B.
 246. § 159.
- Bratton v. Grey, 12 S. C. 42. § 133.
- Braun v. Sauerstein, 10 Wall. 218.
 § 136.
- Bray v. Hudson, 50 N. J. L. 82. § 128.
 v. Wallingford, 20 Conn. 416.
 § 428.
- Breitenbach v. Bush, 44 Pa. St. 313.
 §§ 364, 478.
- Breitung v. Lindauer, 37 Mich. 217.
 §§ 137, 138, 358, 476.
- Bremer v. Freeman, 10 Moore P. C.
 306. § 192.
- Brenham v. Brenham Water Co. 67
 Tex. 542. §§ 378, 384.
- Brennan v. Bradshaw, 53 Tex. 330.
 § 378.
- Brent v. Chapman, 5 Cr. 358. § 479.
- Brett v. Brett, 3 Addams, 219.
 §§ 210, 212.
- Bretz v. Mayor, etc. 6 Rob. 325.
 § 193.

- Bretz v. Mayor, etc.** 3 Abb. Pr. (N. S.) 478. § 194.
 v. New York, 6 Robt. 325. § 198.
 v. New York, 4 Abb. Pr. (N. S.) 258. § 198.
Brevoort v. Grace, 53 N. Y. 245. § 194.
Brewer v. Blougher, 14 Pet. 198. §§ 240, 246, 330.
 v. Brewer, 62 Me. 62. § 67.
Brewster v. Syracuse, 19 N. Y. 116. § 88.
Brice v. State, 2 Overt. 254. §§ 17, 184, 189.
Bridge v. Branch, L. R. 1 C. P. Div. 633. § 322.
Bridge Co. v. Hoboken, etc. Co. 18 N. J. Eq. 94. §§ 378, 380, 473.
Bridgeport v. R. R. Co. 15 Conn. 475. § 380.
Bridges v. Shallcross, 6 W. Va. 574. § 332.
Bridgman, In re, 1 Drew. & S. 169. § 462.
Brieswick v. Mayor, etc. 51 Ga. 639. § 102.
Briffitt v. State, 58 Wis. 39. § 303.
Brig Ann, The, 1 Gall. 61. § 104.
Brig William Gray, The, 1 Paine, 16. § 355.
Briggs v. Allen, 4 Hill, 538. § 371.
 v. Cottrell, 4 Strob. 86. § 464.
 v. Hubbard, 19 Vt. 86. § 206.
 v. Smith, 83 N. C. 306. § 146.
Brigham v. Edmunds, 7 Gray, 359. § 370.
Bright v. McCulloch, 27 Ind. 223. §§ 88, 122.
Brimhall v. Van Campen, 8 Minn. 13. § 184.
Brinkley v. Swicegood, 65 N. C. 626. §§ 162, 168.
Brinsfield v. Carter, 2 Ga. 150. §§ 218, 219, 246.
Brisbane v. Peabody, 3 How. Pr. 109. § 454.
Brisbin v. Farmer, 16 Minn. 215. § 226.
Briscoe v. Bank of Kentucky, 11 Pet. 257. § 197.
Bristol v. Sequeville, 5 Exch. 275. §§ 12, 184, 190, 192.
British Farmers', etc. Co., Re, 48 L. J. Ch. 56. § 238.
Britt v. Robinson, L. R. 5 C. P. 513. §§ 348, 350.
Broadbent v. State, 7 Md. 416. § 400.
Broaddus v. Broaddus, 10 Bush, 299. §§ 154, 155, 156, 255.
Broad Street Hotel Co. v. Weaver, 57 Ala. 26. § 296.
Broadway Bap. Church v. McAtee, 8 Bush, 508. § 365.
Brocaw v. Board, etc. 73 Ind. 543. § 132.
Brock v. Parker, 5 Ind. 538. § 206.
Brockbank v. Whitehaven R. Co. 7 H. & N. 834. § 205.
Brocket v. Ohio & P. R. Co. 14 Pa. St. 241. §§ 247, 253, 291, 328, 378.
Brodnax v. Groom, 64 N. C. 244. § 47.
Bronson v. Kinzie, 1 How. 319. §§ 206, 471, 476, 477, 478.
 v. Newberry, 2 Doug. (Mich.) 38. § 206.
Brooklyn Gravel R. Co. v. Slaughter, 33 Ind. 185. § 381.
Brooklyn L. Ins. Co. v. Bledsoe, 53 Ala. 538. § 336.
Brooks v. Boswell, 34 Mo. 474. § 342.
 v. Cock, 3 Ad. & E. 141. § 458.
 v. Cook, 44 Mich. 617. §§ 271, 373.
 v. Hicks, 20 Tex. 666. § 241.
 v. Hyde, 37 Cal. 375. §§ 121, 198.
 v. Hydorn, 76 Mich. 273. §§ 90, 91.
 v. Mobile School Commissioners, 31 Ala. 227. §§ 215, 240.
Brookville Ins. Co. v. Records, 5 Blackf. 170. § 193.
Broome v. Wellington, 1 Sandf. 660. § 115.
Brothers v. Mundell, 60 Tex. 240. § 256.
 v. State, 2 Cold. 201. § 166.
Brotherton v. Brotherton, 41 Iowa, 112. § 226.
Broughton v. Branch Bank, 17 Ala. 828. § 166.

- Broughton v. Manchester Water-works Co. 3 B. & Ald. 1. § 345.
- Brower v. Bowers, 1 Abb. App. Dec. 214. § 322.
- Brown, In re, 21 Wend. 316. § 256.
- Brown. In re, 21 L. J. N. C. 118. § 262.
- Brown v. Barry, 3 Dall. 365. §§ 136, 137, 168, 246, 290.
- v. Buzan, 24 Ind. 194. §§ 111, 329, 331, 332.
- v. Chancellor, 61 Tex. 437. § 138.
- v. County Commissioners, 21 Pa. St. 37. §§ 138, 157, 220.
- v. Cousens, 51 Me. 301. § 146.
- v. Denver, 7 Colo. 305. §§ 117, 130.
- v. Duncan, 10 B. & C. 93. § 336.
- v. Elms, 10 Humph. 135. § 298.
- v. Fifield, 4 Mich. 322. §§ 207, 401.
- v. Fleischner, 4 Oregon. 132. § 64.
- v. Fowzer, 114 Pa. St. 446. § 390.
- v. Gates, 15 W. Va. 131. §§ 411, 428.
- v. Graham, 58 Tex. 254. § 344.
- v. Great W. Ry Co., L. R. 9 Q. B. Div. 753. §§ 133, 240.
- v. Hamlett, 8 Lea, 732. § 240.
- v. Haywood, 4 Heisk. 357. § 124.
- v. McCormick, 28 Mich. 215. §§ 138, 148, 405.
- v. Maryland, 12 Wheat. 438. § 222.
- v. Mayor, etc. 63 N. Y. 239. § 483.
- v. Miller, 4 J. J. Marsh. 474. § 202.
- v. Nash, 1 Wyoming, 85. § 41.
- v. Pendergast, 7 Allen. 427. § 436.
- v. Piper, 91 U. S. 37. §§ 301, 304.
- v. Ry Co. 83 Mo. 478. § 454.
- v. State, 73 Ga. 38. §§ 88, 93, 95, 96.
- v. State, 23 Md. 503. § 117.
- v. State, 5 Colo. 496. § 311.
- v. Thompson, 14 Bush, 538. § 429.
- v. Tucker, 7 Colo. 30. § 394.
- v. United States, 113 U. S. 568. § 309.
- Brown v. Wilcox, 14 S. & M. 127. §§ 206, 479.
- Browning v. Jones, 4 Humph. 69. § 138.
- v. Wheeler, 24 Wend. 258. § 439.
- Bruce v. County of Dodge, 20 Minn. 388. § 119.
- v. Schuyler, 9 Ill. 221. § 202.
- v. Wood, 1 Met. 542. § 184.
- Brucker v. State, 19 Wis. 539. § 299.
- Bruffett v. G. W. R. R. Co. 25 Ill. 353. § 473.
- Brush v. Scribner, 11 Conn. 407. § 190.
- v. Wilkins, 4 Johns. Ch. 506. § 190.
- Brunswick v. Litchfield, 2 Greenl. 28. § 206.
- Bryan v. Dennis, 4 Fla. 445. § 283.
- v. Sundberg, 5 Tex. 418. §§ 154, 204.
- Bryant, In re, Deady, 118. § 240.
- Bryant v. Kelton, 1 Tex. 434. § 190.
- v. Lefever, 4 C. P. Div. 172. § 265.
- v. Tidgewill, 133 Mass. 86. § 377.
- Buchanan v. Robinson, 3 Baxt. 147. § 138.
- Bucher v. Commonwealth, 103 Pa. St. 528. § 273.
- v. Henderson, L. R. 3 Q. B. 335. § 165.
- Buck v. Dowley, 16 Gray, 555. § 391.
- v. Spofford, 31 Me. 34. § 255.
- Buckallew v. Ackerman, 8 N. J. L. 48. §§ 138, 142.
- Buckingham v. Billings, 13 Mass. 82. §§ 372, 422.
- v. Gregg, 19 Ind. 401. §§ 298, 306.
- Bucklew v. R. R. Co. 64 Iowa, 603. § 127.
- Buckley, Ex parte, 53 Ala. 42. §§ 463, 482.
- Buckley v. Lowry, 2 Mich. 419. § 454.
- Bucklin v. Ford, 5 Barb. 393. § 426.
- Buckmaster v. McElroy, 20 Neb. 557. §§ 373, 375.
- Buckner v. Real Estate Bank, 5 Ark. 536. §§ 253, 322, 346.

- Bucky v. Willard, 16 Fla. 330. § 170.
 Budd v. State, 3 Humph. 483. §§ 119, 124.
 Buell v. State, 72 Ind. 523. § 299.
 Buffalo, Matter of the City of, 68 N. Y. 167. §§ 344, 388, 389.
 Buffalo City Cemetery Co. v. Buffalo, 46 N. Y. 506. § 364.
 Buffalo, etc. Co. v. N. Y. etc. R. R. Co. 10 Abb. N. C. 107. § 305.
 Buffham v. Racine, 26 Wis. 449. § 428.
 Buford v. Bostick, 58 Tex. 63. § 394.
 v. Tucker, 44 Ala. 89. § 298.
 Bugher v. Prescott, 23 Fed. Rep. 20. §§ 102, 103.
 Bulkley v. Eckert, 3 Pa. St. 268. §§ 324, 428.
 Bull v. Conroe, 13 Wis. 238. § 119.
 v. Read, 13 Gratt. 88. §§ 72, 75.
 v. Rowe, 13 S. C. 355. §§ 171, 322.
 Bulla. v. Bell, 1 Mason, 290. § 340.
 Bullock v. Fladgate, 1 Ves. & Bea. 471. § 194.
 v. Lincoln, 2 Strange, 914. § 115.
 Bumsted v. Govern, 47 N. J. L. 368: 48 id. 612. §§ 125, 127.
 Bunce v. Reed, 16 Barb. 127. § 112.
 Bunn v. Gorgas, 41 Pa. St. 441. § 478.
 Burch v. Newbury, 10 N. Y. 374. §§ 10, 206, 480.
 v. Watts, 37 Tex. 135. § 393.
 Burden v. Stein, 25 Ala. 455. § 322.
 Burder v. Veley, 12 Ad. & E. 246. § 362.
 Burdine v. Grand Lodge, 37 Ala. 478. § 306.
 Burgess v. Hargrove, 64 Tex. 110. §§ 253, 255.
 v. Pue, 2 Gill, 11. § 72.
 v. Salmon, 97 U. S. 381. §§ 110, 182.
 Burgett v. Burgett, 1 Ohio, 219. §§ 207, 410.
 Burgoyne v. Supervisors, 5 Cal. 9. §§ 10, 204.
 Burhof v. Milwaukee, 21 Wis. 257. §§ 193, 194.
 Burke v. Monroe Co. 77 Ill. 610. §§ 97, 215, 240, 245.
 Burkholtz v. State, 16 Lea, 71. §§ 119, 123, 124, 169, 180.
 Burlander v. Railway Co. 26 Wis. 76. § 154.
 Burlington v. Burlington, etc. R'y Co. 41 Iowa, 134. § 167.
 Burlington, etc. R. R. Co. v. Thompson, 31 Kan. 108. § 14.
 Burn v. Carvalho, 4 Nev. & M. 893. § 107.
 Burnet, Ex parte, 30 Ala. 461. § 380.
 Burnett v. Henderson, 21 Tex. 588. § 298.
 v. Turner, 87 Tenn. 124. § 132.
 Burnham v. Acton, 4 Abb. Pr. (N. S.) 1. § 198.
 v. Acton, 35 How. Pr. 48. § 193.
 v. Fond du Lac, 15 Wis. 193. § 428.
 v. Onderdonk, 41 N. Y. 425. §§ 147, 321, 327, 399.
 v. Stevens, 33 N. H. 249. § 256.
 v. Summer, 50 Miss. 517. § 400.
 v. Webster, 5 Mass. 266. § 193.
 Burnside v. Lincoln Co. Court, 86 Ky. 423. § 92.
 v. Whitney, 21 N. Y. 148. §§ 139, 207, 290, 439.
 Burr v. Dana, 22 Cal. 11. §§ 218, 240, 246, 429.
 v. Ross, 19 Ark. 250. § 41.
 Burt v. Williams, 24 Ark. 91. § 478.
 v. Winona, etc. R. R. Co. 31 Minn. 472. §§ 41, 54.
 Burton v. Anderson, 1 Tex. 93. § 190.
 v. School Commissioners, Meigs, 589. § 124.
 Burwell v. Tullis, 12 Minn. 572. § 133.
 Bush v. Brainard, 1 Cow. 78. § 290.
 v. Republic, 1 Tex. 455. § 144.
 Bussing v. Bushnell, 6 Hill, 382. § 290.
 Butcher v. Bank of Brownsville, 2 Kan. 70. § 294.
 v. Henderson, L. R. 3 Q. B. 335. § 163.

- Butler v. Palmer**, 1 Hill, 324. §§ 162, 464, 482.
 v. Pennsylvania, 10 How. 402. § 473.
 v. Robinson, 75 Mo. 192. § 194.
 v. Rochester, 4 Hun, 321. § 322.
 v. Russell, 3 Cliff. 251. § 168.
Butts v. Vicksburg, etc. R. R. Co. 63 Miss. 462. §§ 218, 223.
Butz v. Muscatine, 8 Wall. 575. § 478.
Byard v. State, 57 Miss. 243. § 231.
Byrd v. Brown, 5 Ark. 709. §§ 395, 397.
 v. State, 57 Miss. 243. § 402.
Bywater v. Brandling, 7 B. & C. 643. § 212.

Cadogan v. Kennett, 2 Cowp. 434. § 444.
Cahall v. Citizens' Mut. B. Asso. 61 Ala. 232. § 156.
Cain v. Goda, 84 Ind. 209. §§ 108, 109.
Calder v. Bull, 3 Dall. 386. §§ 143, 196, 206, 465.
 v. Kurby, 5 Gray, 597. § 473.
Calderwood v. Calderwood, 38 Vt. 171. § 254.
Caldwell v. Alton, 33 Ill. 416. § 380.
 v. Barrett, 73 Ga. 604. §§ 75, 96.
 v. State, 34 Ga. 18. § 342.
 v. Vanvlissingen, 9 Hare, 425. § 12.
Caledonian R'y Co. v. North British R'y Co., L. R. 6 App. Cas. 122. §§ 238, 241, 246.
Calhoun v. Delhi, etc. R. R. Co. 28 Hun, 379. § 133.
 v. Kellogg, 41 Ga. 231. § 479.
 v. McLendon, 42 Ga. 405. §§ 10, 11, 422.
Calkin v. Cocke, 14 How. 227. § 189.
Calking v. Baldwin, 4 Wend. 667. §§ 193, 325.
Calkins v. State, 14 Ohio St. 222. § 166.
Call v. Hagger, 8 Mass. 430. § 478.
Calladay v. Pilkington, 12 Mod. 513. § 372.
Callaghan v. Chipman, 59 Mich. 610. § 170.

Callanan v. Judd, 23 Wis. 343. § 397.
Callaway v. Harding, 23 Gratt. 547. § 223.
Callis v. Waddy, 2 Munf. 511. § 427.
Calloway v. Laydon, 47 Iowa, 456. § 374.
 v. Willie's Lessee, 2 Yerg. 1. § 184.
Callum v. Pettigrew, 10 Heisk. 394. § 458.
Cally v. Anson, 4 Wis. 223. § 440.
Calvert v. Williams, 34 Md. 672. § 112.
Cambria Iron Co. v. Ashburn, 118 U. S. 54. § 156.
Cambrian R'y Co.'s Scheme, In re, L. R. 3 Ch. 278. §§ 257, 267.
Cambridge v. Boston, 130 Mass. 357. § 206.
Camden v. Allen, 26 N. J. L. 398. §§ 204, 325.
Camden, etc. R. R. Co. v. Briggs, 22 N. J. L. 623. § 358.
Cameron v. Blackman, 39 Mich. 108. § 296.
 v. Merchants', etc. Bank, 37 Mich. 240. § 309.
 v. Smith, 50 Cal. 303. § 146.
Campau v. Detroit, 14 Mich. 276. §§ 135, 137.
Campbell's Case, 2 Bland's Ch. 209. § 194.
Campbell, Ex parte, L. R. 5 Ch. 703. § 255.
Campbell v. Allison, 63 N. C. 568. § 454.
 v. Board of Pharmacy, 45 N. J. L. 241. § 93.
 v. Hall, 1 Cowp. 208. §§ 13, 19.
 v. International Life, 4 Bosw. 317. § 115.
 v. Schlesinger, 48 Hun, 428. § 375.
Campbell, etc. Co. v. Nonpareil, etc. Co. 75 Va. 291. § 464.
Canady v. George, 6 Rich. Eq. 103. § 137.
Canal and Walker Sts., Matter of, 13 N. Y. 406. § 342.

- Canal Commissioners v. People, 15 Wend. 445. § 184.
- Canal Co. v. Railroad Co. 4 Gill & J. 152. §§ 210, 215, 411.
- Candee, Ex parte, 48 Ala. 386. § 397.
- Cannan v. Bryce, 3 B. & Ald. 179. § 336.
- Cannon v. Hemphill, 7 Tex. 184. § 80.
- v. Mathes, 8 Heisk. 504. §§ 66, 80.
- Cantrell v. Conner, 51 How. Pr. 45. § 422.
- Canty v. Sanderford, 37 Ala. 91. § 400.
- Cape Girardeau v. Riley, 52 Mo. 428. § 161.
- Caperon v. Strout, 11 Nev. 304. §§ 134, 167.
- Carey v. Cincinnati, etc. R. R. Co. 5 Iowa, 357. §§ 12, 297.
- v. Giles, 9 Ga. 253. § 444.
- Cargo of Brig Aurora v. United States, 7 Cr. 382. §§ 72, 168, 182.
- Carleton v. Goodwin, 41 Ala. 153. § 10.
- Carlisle v. Carlisle's Adm'r, 2 Harr. 318. § 67.
- v. State, 42 Ala. 523. § 166.
- v. Stitler, 1 Pen. & W. 6. § 364.
- Carmichael v. Hays, 66 Ala. 543. § 154.
- Carmon v. State, 18 Ind. 450. § 303.
- Carnes v. Parish of Red River, 29 La. Ann. 608. § 482.
- Carothers v. Wheeler, 1 Oregon, 194. §§ 111, 114.
- Carpenter's Case, 14 Pa. St. 486. § 342.
- Carpenter v. Dexter, 8 Wall. 513. § 293.
- v. Herrington, 25 Wend. 370. § 364.
- v. Montgomery, 7 Blackf. 415. §§ 107, 108.
- v. Pennsylvania, 17 How. 456. §§ 164, 197.
- v. People, 8 Barb. 603. § 208.
- Carr v. Thomas, 18 Fla. 736. §§ 86, 102.
- Carrier, Matter of, 13 Bankr. Reg. 208. § 104.
- Carroll v. Carroll, 16 How. 275. § 320.
- v. Lessee of Olmsted, 16 Ohio, 251. § 194.
- v. Mo. Pac. R. R. Co. 26 Am. & Eng. R. R. Cas. 268. § 371.
- v. State, 58 Ala. 396. § 223.
- Carrow v. Bridge Co., Phill. L. (N. C.) 118. § 194.
- Carson v. Dalton, 59 Tex. 500. § 298.
- v. Love, 8 Yerg. 215. § 111.
- v. State, 69 Ala. 235. §§ 95, 354.
- Carter v. Balfour, 19 Ala. 814. §§ 17, 184.
- v. Burt, 12 Allen, 424. §§ 144, 470.
- v. Hawley, Wright (Ohio), 74. § 142.
- v. Peak, 138 Mass. 439. § 264.
- v. State, 6 Cold. 537. § 397.
- Caruthers v. Andrews, 2 Cold. 878. § 124.
- Carver v. Smith, 90 Ind. 222. § 150.
- Carville v. Additon, 62 Me. 459. § 115.
- Case of the Marshalsea, 10 Coke, 73a. § 300.
- Case of Swans, 7 Coke, 82. § 305.
- Case v. Kelly, 133 U. S. 21. § 185.
- v. Mayor, etc. 30 Ala. 538. § 296.
- v. Serew, 46 Hun, 57. § 302.
- v. Storey, L. R. 4 Ex. 319. § 262.
- v. Wildridge, 4 Ind. 51. § 237.
- Casement v. Fulton, 5 Moore's P. C. 141. § 256.
- Casey v. Harned, 5 Iowa, 1. § 137.
- Cash v. State, 10 Humph. 111. §§ 293, 299.
- Casher v. Holmes, 2 B. & Ad. 592. §§ 276, 277.
- Cass v. Dillon, 2 Ohio St. 607. §§ 120, 121, 122, 137, 151, 152.
- Cass County v. Gillett, 100 U. S. 585. § 157.
- Cassity v. Storms, 1 Bush, 452. § 164.
- Castelli v. Groom, 18 Q. B. 490. § 462.
- Castle's Case, Cro. Jac. 644. § 325.
- Castle v. Burditt, 3 T. R. 623. §§ 112, 253.

- Castner v. Walrod*, 83 Ill. 171. §§ 146, 223.
- Caston v. Brock*, 14 S. C. 104. § 232.
- Caswell v. Cook*, 11 C. B. (N. S.) 637. § 362.
- v. Worth*, 5 E. & B. 849. § 202.
- Catawissa R. R. Co. v. Armstrong*, 52 Pa. St. 282. § 371.
- Cate v. State*, 3 Sneed, 120. §§ 138, 143.
- Cates v. Knight*, 3 T. R. 442. §§ 165, 256, 396.
- Catesby's Case*, 6 Coke, 62. § 253.
- Cathcart v. Robinson*, 5 Pet. 280. §§ 184, 191.
- Catlin v. Hull*, 21 Vt. 152. §§ 215, 240.
- v. Wheeler*, 49 Wis. 507. § 396.
- Caulfield v. Hudson*, 3 Cal. 389. § 397.
- v. Stevens*, 28 Cal. 118. § 395.
- Cavanagh v. Boston*, 139 Mass. 426. § 347.
- C., B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155. § 126.
- Cearfoss v. State*, 42 Md. 406. §§ 219, 234, 236, 239, 240, 241, 246.
- Cecil Bank v. Barry*, 20 Md. 287. §§ 190, 192.
- Cedar Rapids, etc. R'y Co. v. Carroll Co.* 41 Iowa, 153. § 167.
- Central Branch Union P. R. Co. v. Atchison, etc. R. R. Co.* 28 Kan. 453. §§ 176, 180.
- Central Bridge v. Lowell*, 15 Gray, 106. § 473.
- Central City Horse R'y Co. v. Fort Clark Horse R'y Co.* 81 Ill. 523. § 388.
- Central & G. R. Co. v. People*, 5 Colo. 39. §§ 80, 103.
- Central Iowa R. R. Co. v. Board of Supervisors*, 67 Iowa, 199. §§ 122, 129, 138.
- Central Plk. R. Co. v. Hannaman*, 22 Ind. 484. §§ 93, 95.
- Central R. R. Co. v. Gamble*, 77 Ga. 584. § 298.
- v. Hamilton*, 71 Ga. 461. §§ 135, 138, 286.
- Central R. R. Co. v. Swint*, 73 Ca. 651. § 14.
- Central Trust Co. v. Sheffield & B. Coal, etc. Co.* 42 Fed. Rep. 106. § 263.
- v. Sloan*, 65 Iowa, 655. §§ 125, 127.
- Chadwick v. Moore*, 8 W. & S. 44. § 478.
- Chaffee's Appeal*, 56 Mich. 244. §§ 390, 432.
- Chaffe v. Aaron*, 62 Miss. 29. § 482.
- Chamberlain v. Chamberlain*, 43 N. Y. 424. §§ 145, 152.
- v. Evansville*, 77 Ind. 542. §§ 165, 166.
- v. Western Transp. Co.* 44 N. Y. 305. § 442.
- Chambers v. Carson*, 2 Whart. 2. § 256.
- v. Dickson*, 2 Serg. & R. 475. § 322.
- v. State*, 25 Tex. 307. § 136.
- Champion v. Kille*, 15 N. J. Eq. 476. § 297.
- Chance v. Adams*, 1 Lord Raym. 77. §§ 196, 210.
- Chancellor of Oxford's Case*, 10 Coke, 57. § 194.
- Chandler v. Hanna*, 73 Ala. 390. §§ 140, 399.
- v. Nash*, 5 Mich. 409. § 395.
- v. Vilett*, 2 Saund. 120. §§ 424, 426.
- Chaney v. State*, 31 Ala. 342. §§ 206, 482.
- Chapin v. Crusen*, 31 Wis. 209. § 223.
- v. Curtenius*, 15 Ill. 427. § 420.
- v. Persse & Brooks Paper Works*, 30 Conn. 461. §§ 347, 461.
- Chapman v. Foster*, 6 Allen, 136. § 338.
- v. Miller*, 128 Mass. 269. § 240.
- v. Milvain*, 5 Ex. 61. § 145.
- v. State*, 16 Tex. App. 76. § 260.
- v. Woodruff*, 34 Ga. 98. § 277.
- Chapoton v. Detroit*, 38, Mich. 636. § 138.
- Chapron v. Cassaday*, 3 Humph. 661. § 184.

- Charles River Bridge v. Warren Bridge, 11 Pet. 420. §§ 164, 206, 289, 378.
- Charles St. Ave. Co. v. Merryman, 10 Md. 536. § 242.
- Charless v. Lamberson, 1 Iowa, 435. §§ 107, 422.
- Charleston v. County Com'rs, 3 Met. 202. § 388.
- Charlotte v. Chouteau, 33 Mo. 194. §§ 190, 192.
- Charter v. Greame, 13 Q. B. 216. § 448.
- Chartered Mercantile Bank, etc. v. Wilson, L. R. 3 Ex. Div. 108. § 265.
- Chase v. Ins. Co. 9 Allen, 311. § 184.
- Cheatham v. Briens, 3 Head, 552. § 447.
- Chealy v. Brewer, 7 Mass. 259. § 411.
- Cheever v. Wilson, 9 Wall. 108. §§ 22, 185, 293.
- Chegaray v. Mayor, 13 N. Y. 220. §§ 271, 272.
- Chenango Bridge Co. v. Binghamton Bridge Co. 27 N. Y. 87. § 164.
- Cherry Overseers v. Marion Overseers, 96 Pa. St. 528. § 454.
- Chesapeake & O. Canal Co. v. Railroad Co. 4 Gill & J. 1. §§ 234, 239.
- Chesapeake & Ohio R. R. Co. v. Hoard, 16 W. Va. 276. § 157.
- Chesnut v. Shane, 16 Ohio, 599. §§ 308, 309, 316, 452, 483.
- Chester Glass Co. v. Dewey, 16 Mass. 102. § 385.
- Chew v. Calvert, 1 Walk. (Miss.) 54. § 19.
- Chew Heong v. United States, 112 U. S. 536. §§ 138, 407.
- Chicago v. Hasley, 25 Ill. 595. § 429.
- v. Vulcan Iron Works, 93 Ill. 222. § 115.
- Chicago, etc. R'y Co. v. Chicago, etc. R. R. Co. 112 Ill. 389. § 388.
- v. Chicago, 121 Ill. 176. § 387.
- v. Doyle, 60 Miss. 977. § 13.
- v. Dunn, 52 Ill. 260. § 207.
- Chicago, etc. R'y Co. v. Hartshorn, 30 Fed. Rep. 541. § 167.
- v. McGlinn, 114 U. S. 542. § 19.
- v. People, 67 Ill. 11. § 349.
- v. Smith, 78 Ill. 96. § 207.
- v. Sturges, 74 Mich. 538. § 371.
- v. Wiltse, 116 Ill. 449. § 387.
- Chicago Packing Co. v. Chicago, 88 Ill. 221. § 473.
- Chicot Co. v. Davies, 40 Ark. 200. § 49.
- Childs v. Shower, 18 Iowa, 261. §§ 137, 175, 180.
- v. Smith, 55 Barb. 45. §§ 326, 456.
- Chiles v. Drake, 2 Met. (Ky.) 150. § 85.
- v. Smith's Heirs, 13 B. Mon. 460. §§ 112, 114.
- v. State, 2 Tex. App. 37. § 325.
- Chisholm v. Northern Transportation Co. 61 Barb. 363. § 399.
- Chollar Mining Co. v. Wilson, 66 Cal. 374. § 456.
- Chouteau v. Allen, 70 Mo. 290. § 336.
- v. Pierre, 9 Mo. 3. §§ 181, 295.
- Christie v. Unwin, 3 Perry & Davison, 208. § 391.
- Christopherson v. Lotinga, 33 L. J. C. P. 123; 15 C. B. (N. S.) 809. §§ 258, 420.
- Christy v. Board of Supervisors, 39 Cal. 3. § 170.
- v. Pridgeon, 4 Wall. 196. § 185.
- Church, Matter of, 28 Hun, 476. § 183.
- Church v. Crocker, 3 Mass. 21. §§ 288, 322.
- v. Detroit, 64 Mich. 571. § 102.
- v. Hubbard, 2 Cranch, 237. §§ 190, 192, 247.
- v. Rhodes, 6 How. Pr. 281. §§ 138, 165.
- v. Stadler, 16 Ind. 463. § 222.
- Churchill v. Crease, 5 Bing. 177. §§ 159, 216.
- v. Merchants' Bank, 19 Pick. 532. § 253.
- Cicero, etc. Co. v. Craighead, 28 Ind. 274. § 306.

- Cincinnati College v. State, 19 Ohio, 110. § 364.
- Cincinnati, etc. R. R. Co. v. Carthage, 36 Ohio St. 631. § 472.
- v. Commissioners, 1 Ohio St. 77. §§ 67, 68, 75.
- Citizens' Gas, etc. Co. v. Elwood, 114 Ind. 332. § 384.
- Citizens' Gas Light Co. v. Alden, 44 N. J. L. 648. § 201.
- City v. R. R. Co. 35 La. Ann. 679. § 482.
- v. Schellinger, 15 Phila. 50. §§ 239, 241.
- City Bank v. Huie, 1 Rob. (La.) 236. §§ 215, 240.
- City Council v. Adams, 51 Ala. 449. § 113.
- v. Baptist Church, 4 Strob. 306. § 136.
- v. Plank R. Co. 31 Ala. 76. § 380.
- v. Port Royal, 74 Ga. 658. §§ 94, 102.
- City Council of Montgomery v. Wright, 72 Ala. 411. § 120.
- City of Berne v. Bank of England, 9 Ves. 347. § 297.
- City of Buffalo, Matter of, 68 N. Y. 167. §§ 344, 388, 389.
- Clanton v. Barnes, 50 Ala. 260. § 190.
- Clare v. State, 5 Iowa, 510. §§ 35, 109, 300.
- v. State, 68 Ind. 17. § 132.
- Clarence R'y Co. v. Great North of Eng. etc. R'y Co. 13 M. & W. 706. § 344.
- Clarion Bank v. Gruber, 87 Pa. St. 468. § 194.
- Clark's Succession, 11 La. Ann. 124. § 218.
- Clark v. Brown, 18 Wend. 213. § 399.
- v. Bynum, 3 McCord, 298. § 212.
- v. Clark, 10 N. H. 391. § 482.
- v. Crane, 5 Mich. 151. § 455.
- v. Davenport, 14 Iowa, 495. §§ 365, 380.
- v. Dewey, 5 Johns. 251. § 371.
- v. Dolter, 54 Pa. St. 215. § 312.
- v. Ellis, 2 Blackf. 8. § 172.
- Clark v. Ewing, 87 Ill. 344. § 112.
- v. Farrington, 11 Wis. 306. § 385.
- v. Gaskarth, 8 Taunt. 431. § 269.
- v. Hague, 2 E. & E. 281. § 280.
- v. Hardiman, 2 Leigh, 347. § 425.
- v. Holms, 1 Doug. (Mich.) 390. §§ 327, 391.
- v. Janesville, 10 Wis. 136. §§ 110, 120, 193, 198, 292.
- v. Lamoreux, 70 Wis. 508. § 459.
- v. McCann, 18 Hun, 13. § 146.
- v. Martin, 3 Grant's Cas. 393. § 478.
- v. Mayor, etc. 29 Md. 283. § 237.
- v. Middleton, 19 Mo. 53. § 336.
- v. Mowyer, 5 Mich. 462. § 309.
- v. Railroad Co. 81 Me. 477. § 238.
- v. Richardson, 15 N. J. L. 347. § 426.
- v. Robinson, 88 Ill. 498. § 459.
- v. Smith, 13 Pet. 195. § 185.
- v. Utica, 18 Barb. 451. § 247.
- v. Washington, 12 Wheat. 40. § 365.
- v. Wilkie, 4 Strob. 259. § 379.
- Clarke v. Bradlaugh, L. R. 8 Q. B. Div. 69. § 257.
- v. Brookfield, 81 Mo. 503. § 345.
- v. Gibbons, 83 N. Y. 107. § 146.
- v. Irwin, 5 Nev. 124. § 117.
- v. Pratt, 20 Ala. 470. § 12.
- v. Rochester, 28 N. Y. 605. §§ 70, 75.
- v. State, 23 Miss. 261. §§ 139, 470.
- Clarkson v. R. R. Co. 12 N. Y. 304. § 207.
- Clawson v. Eichbaum, 2 Grant's Cas. 130. § 110.
- v. Primrose, 4 Del. Ch. 643. §§ 15, 184.
- v. United States, 114 U. S. 477. § 396.
- Clay County v. Society for Savings, 104 U. S. 579. § 138.
- Clay Co. Sup'rs v. Chickasaw Co. Sup'rs, 64 Miss. 534. § 155.
- Claydon v. Green, L. R. 3 C. P. 521. § 233.
- Clayton's Case, 5 Coke, 1. § 112.

- Clem v. State, 33 Ind. 418. § 124.
 Clements v. Smith, 3 E. & E. 238. § 420.
 Clementson v. Mason, L. R. 10 C. P. 209. §§ 239, 246.
 v. Williams, 8 Cranch, 72. § 368.
 Cleveland, etc. R. R. Co. v. Erie, 27 Pa. St. 380. § 380.
 v. Rowan, 66 Pa. St. 393. § 371.
 Cleveland & P. R. Co. v. Speer, 56 Pa. St. 325. § 378.
 Cline v. Greenwood, 10 Ore. 230. § 331.
 Clinton v. Draper, 14 Ind. 295. § 87.
 v. Englebrecht, 13 Wall. 434. § 312.
 v. Phillips, 7 T. B. Mon. 117. § 454.
 Clinton Water Com'rs v. Dwight, 101 N. Y. 9. § 88.
 Cliquot's Champagne, 3 Wall. 114. § 361.
 Closson v. Trenton, 48 N. J. L. 438. § 128.
 Clow v. Harper, L. R. 3 Ex. Div. 198. § 310.
 Cluff v. Ina Co. 13 Allen, 308. § 184.
 Coalheavers' Case, 1 Leach C. C. 64. § 334.
 Coates v. Mackey, 56 Md. 416. § 294.
 Coats v. Hill, 41 Ark. 149. §§ 138, 143, 151, 152.
 Coatsworth v. Barr, 11 Mich. 199. § 254.
 Cobb v. Bord, 40 Minn. 479. §§ 122, 128.
 Coburn v. Dodd, 14 Ind. 347. §§ 181, 294.
 v. Harvey, 18 Wis. 147. § 184.
 Cochran v. Baker, 60 Miss. 282. § 483.
 v. Library Co. 6 Phila. 492. § 210.
 v. Taylor, 13 Ohio St. 382. §§ 167, 225.
 Cock v. Bunn, 6 John. 326. §§ 111, 113, 115.
 Cockrell v. Gurley, 26 Ala. 405. § 12.
 Coe v. Lawrence, 1 E. & B. 516. § 351.
 v. Schultz, 47 Barb. 64. § 68.
 Coffin v. Rich, 45 Me. 507. §§ 163, 167, 234, 236, 246, 407.
 v. State, 7 Ind. 157. § 206.
 Coffman v. Daveny, 2 How. (Miss.) 854. § 454.
 Coghill v. State, 37 Ind. 111. §§ 142, 143.
 Cohen v. Barrett, 5 Cal. 195. § 210.
 Cohens v. Virginia, 6 Wheat. 380. §§ 21, 307.
 Cohn v. Neeves, 40 Wis. 393. §§ 208, 355, 371.
 Cohoes Co. v. Goss, 13 Barb. 187. § 454.
 Coke v. Robbins, 4 Halst. 384. § 202.
 Colbran v. Barness, 11 C. B. (N. S.) 244. § 240.
 Colburn v. Swett, 1 Met. 232. § 333.
 Colby v. Dennis, 36 Me. 9. §§ 164, 167.
 v. Knapp, 13 N. H. 175. § 59.
 Colden v. Eldred, 15 John. 220. § 399.
 Cole v. Aune, 40 Minn. 80. § 393.
 v. Commissioners, 78 Me. 532. § 169.
 v. Coulton, 2 E. & E. 695. § 143.
 v. Groves, 134 Mass. 471. § 358.
 v. Hall, 103 Ill. 30. § 92.
 v. Perry, 8 Cow. 214. § 207.
 v. Supervisors, 11 Iowa, 552. § 147.
 v. Thayer, 8 Cow. 249. § 204.
 v. White, 32 Ark. 45. § 333.
 Colehan v. Cooke, Willes, 395. §§ 212, 213.
 Coleman v. Ballandi, 22 Minn. 144. § 476.
 v. Davidson's Academy, Cooke (Tenn.), 258. § 288.
 v. Dobbins, 8 Ind. 156. §§ 183, 300.
 v. Holmes, 44 Ala. 124. § 368.
 v. Newby, 7 Kan. 88. § 68.
 Colgate v. Penn. Co. 102 N. Y. 127. § 207.
 Colley v. London, etc. Co., L. R. 5 Ex. Div. 277. § 204.
 Collin v. Knoblock, 25 La. Ann. 263. § 237.

- Collins v. Carman**, 5 Md. 503. §§ 322, 324, 407.
- v. Chase**, 71 Me. 434. § 138.
- v. East Tenn. etc. R. R. Co.** 9 Heisk. 841. §§ 476, 480.
- v. Henderson**, 11 Bush, 74. § 88.
- v. Warren**, 63 Tex. 311. § 167.
- v. Welch**, L. R. 5 C. P. Div. 27. §§ 219, 248.
- Collier v. Early**, 54 Ind. 559. §§ 375, 376.
- Colt v. Eves**, 12 Conn. 243. § 448.
- Columbia T. Co. v. Haywood**, 10 Wend. 422. §§ 111, 112, 113.
- Columbus Ins. Co. v. Walsh**, 18 Mo. 229. § 336.
- Colwell v. Chamberlin**, 43 N. J. L. 387. §§ 131, 132, 170.
- Combe v. Pitt**, 3 Burr. 1423. § 110.
- Comer v. Folsom**, 13 Minn. 219. § 206.
- Commercial Bank v. Chambers**, 8 Sm. & M. 9. § 220.
- v. Foster**, 5 La. Ann. 516. §§ 218, 240, 241, 246, 428.
- v. Ives**, 2 Hill, 355. § 114.
- v. Markham**, 3 La. Ann. 698. § 482.
- v. Sparrow**, 2 Denio, 97. §§ 181, 294.
- Commercial Bank of Natchez v. Chambers**, 8 Sm. & M. 9. §§ 138, 140, 152.
- Commissioners, In re**, 49 N. J. L. 488. § 103.
- Commissioners v. Andrews**, 18 Ohio St. 64. § 379.
- v. Baker**, 80 Ind. 374. §§ 86, 87, 102.
- v. Ballard**, 69 N. C. 18. § 331.
- v. Harrison**, L. R. 7 H. of L. 9. § 310.
- v. Higginbotham**, 17 Kan. 75. § 51.
- v. Keith**, 2 Pa. St. 218. § 223.
- v. Mighels**, 7 Ohio St. 109. § 380.
- v. Northern Bank**, 1 Met. (Ky.) 174. § 164.
- v. Silvers**, 22 Ind. 491. § 331.
- Commissioners v. Spitler**, 13 Ind. 235. § 298.
- Commissioners of Central Park, Matter of**, 50 N. Y. 493. § 155.
- Commissioners of Knox Co. v. Macomb**, 19 Ohio St. 320. § 145.
- Commissioners of Lunatic Asylums, In re**, 8 Irish Eq. Rep. 366. § 257.
- Commissioners of Public Schools v. County Commissioners**, 20 Md. 449. § 462.
- Commissioners of Sedgwick Co. v. Bailey**, 13 Kan. 607. §§ 79, 80.
- Common Council of Albany, Ex parte**, 3 Cow. 358. § 454.
- Commonwealth v. Alger**, 7 Cush. 53. §§ 215, 239.
- v. Bailey**, 13 Allen, 541. §§ 162, 322.
- v. Beatty**, 1 Watts, 382. § 165.
- v. Bennett**, 108 Mass. 27. §§ 75, 225.
- v. Bradley**, 16 Gray, 241. §§ 206, 482.
- v. Breed**, 4 Pick. 460. § 194.
- v. Cain**, 14 Bush, 525. §§ 157, 166.
- v. Cambridge**, 20 Pick. 267. §§ 215, 322.
- v. Chambre**, 4 Dall. 143. § 253.
- v. Churchill**, 2 Met. 118. §§ 147, 168, 184.
- v. Commissioners, etc.** 37 Pa. St. 237. § 397.
- v. Commissioners of Allegheny Co.** 40 Pa. St. 348. § 145.
- v. Conyngham**, 66 Pa. St. 99. §§ 215, 241, 245, 341.
- v. Cooley**, 10 Pick. 37. §§ 142, 154.
- v. Coombs**, 2 Mass. 489. §§ 386, 388.
- v. Costley**, 118 Mass. 1. § 307.
- v. Cotton**, 14 Phila. 667. § 157.
- v. Council of Montrose**, 52 Pa. St. 391. § 240.
- v. Cromley**, 1 Ashm. 179. § 154.
- v. Cullen**, 13 Pa. St. 133. § 473.
- v. Dorsey**, 103 Mass. 412. § 469.

Commonwealth v. Duane, 1 Binn.

601. §§ 11, 215, 239.
 v. Edwards, 4 Gray, 1. § 225.
 v. Erie, etc. R. R. Co. 27 Pa. St. 339. § 378.
 v. Fisher, 17 Mass. 46. §§ 347, 349.
 v. Gaines, 2 Va. Cas. 172. §§ 210, 332.
 v. Gardner, 11 Gray, 438. §§ 142, 143.
 v. Getchell, 16 Pick. 452. § 166.
 v. Giltinan, 64 Pa. St. 100. §§ 254, 351.
 v. Green, 17 Mass. 515. § 12.
 v. Green, 58 Pa. St. 226. §§ 88, 89, 95.
 v. Griffin, 105 Mass. 185. §§ 252, 285.
 v. Hall, 97 Mass. 570. §§ 468, 482.
 v. Hall, 128 Mass. 410. § 243.
 v. Harris, 13 Allen, 534. § 260.
 v. Hartnett, 3 Gray, 450. § 333.
 v. Hewitt, 2 H. & M. 181. § 463.
 v. Hitchings, 5 Gray, 482. §§ 169, 176, 331.
 v. Hudson, 11 Gray, 64. § 396.
 v. Humphries, 7 Mass. 242. § 200.
 v. Intoxicating Liquors, 108 Mass. 19. § 240.
 v. Johnson, 42 Pa. St. 448. § 10.
 v. Kelliher, 12 Allen, 480. §§ 143, 154.
 v. Keniston, 5 Pick. 420. §§ 208, 349, 353.
 v. Kimball, 21 Pick. 373. §§ 142, 165, 166, 225, 332.
 v. Knapp, 9 Pick. 496. §§ 139, 290.
 v. Knowlton, 2 Mass. 534. §§ 15, 16, 17, 184.
 v. Leach, 1 Mass. 60. § 15.
 v. Leech, 24 Pa. St. 55. § 168.
 v. Leech, 44 Pa. St. 332. § 384.
 v. Lockwood, 109 Mass. 322. § 307.
 v. Logan, 12 Gray, 136. § 206.

Commonwealth v. Loring, 8 Pick.

370. §§ 218, 350.
 v. McDonough, 13 Allen, 581. § 142.
 v. McKenney, 14 Gray, 1. § 143.
 v. McWilliams, 11 Pa. St. 61. § 67.
 v. Marshall, 11 Pick. 350. §§ 142, 165, 166, 225.
 v. Marshall, 69 Pa. St. 332. § 260.
 v. Martin, 17 Mass. 362. §§ 208, 288, 357.
 v. Martin, 107 Pa. St. 185. §§ 35, 86, 91, 102, 103.
 v. Mason, 82 Ky. 256. §§ 154, 155, 156.
 v. Miller, 5 Dana, 320. §§ 311, 314.
 v. Monongahela Nav. Co. 66 Pa. St. 81. § 263.
 v. Mott, 21 Pick. 492. § 166.
 v. Munson, 127 Mass. 459. § 322.
 v. Meiser, 44 Pa. St. 341. § 384.
 v. Painter, 10 Pa. St. 214. § 75.
 v. Parker, 2 Pick. 550. § 307.
 v. Pattee, 12 Cush. 501. § 166.
 v. Patten, 88 Pa. St. 258. § 129.
 v. Peckham, 2 Gray, 514. § 303.
 v. Peyram, 1 Leigh, 569. § 143.
 v. Perryman, 2 Leigh, 717. § 357.
 v. Phillips, 11 Pick. 28. § 469.
 v. Pointer, 5 Bush, 301. § 225.
 v. Rainey, 4 W. & S. 186. § 256.
 v. Reiter, 78 Pa. St. 161. § 333.
 v. Roxbury, 9 Gray, 451. §§ 378, 386, 390.
 v. Sherman, 85 Ky. 686. § 166.
 v. Shopp, 1 Woodw. Dec. 123. § 232.
 v. Shortridge, 3 J. J. Marsh. 638. § 253.
 v. Slack, 19 Pick. 304. § 218.
 v. Slifer, 53 Pa. St. 71. §§ 210, 211.
 v. Snelling, 4 Binn. 379. § 349.
 v. Snowden, 1 Brewst. 218. § 297.
 v. Springfield, 7 Mass. 12. § 193.
 v. Standard Oil Co. 101 Pa. St. 119. §§ 165, 227.

- Commonwealth v. Stevens, 10 Pick. 247. § 388.
 v. Sylvester, 13 Allen, 247. § 370.
 v. Tewksbury, 11 Met. 55. § 36.
 v. Turner, 1 Cush. 493. § 380.
 v. Watts, 84 Ky. 537. §§ 187, 154.
 v. Welch, 2 Dana, 330. §§ 166, 480.
 v. Weller, 14 Bush, 218. § 75.
 v. Wolbert, 6 Binn. 292. § 453.
 v. Worcester, 3 Pick. 473. § 193.
 v. Wyatt, 6 Rand. 694. § 143.
 v. Wyman, 12 Cush. 237. § 148.
 Company of Cutlers v. Ruslin, Skinner, 363. § 166.
 Compton v. Pierson, 28 N. J. Eq. 229. § 400.
 Comstock v. Bechtel, 63 Wis. 656. § 422.
 v. Judge, etc. 39 Mich. 195. § 132.
 Cone v. Bowles, 1 Salk. 205. § 371.
 Conger v. Barker, 11 Ohio St. 1. § 256.
 v. Weaver, 6 Cal. 548. § 298.
 Conkey v. Hart, 14 N. Y. 22. § 478.
 Conkling v. Parker, 10 Ohio St. 28. § 398.
 Conley v. Columbus, etc. R. R. Co. 44 Tex. 579. § 194.
 v. Sims, 71 Ga. 161. § 336.
 v. Supervisors, 2 W. Va. 416. § 157.
 Connecting Ry. Co. v. Union Ry. Co. 108 Ill. 265. § 388.
 Connecticut, etc. Ins. Co. v. Albert, 39 Mo. 181. § 211.
 Conner, Ex parte, 51 Ga. 571. §§ 94, 98.
 Conner v. Mayor, etc. 5 N. Y. 285. §§ 88, 120.
 Connor v. Green Pond, etc. R. R. Co. 23 S. C. 427. § 96.
 v. Carp River Iron Co. 54 Mich. 163. §§ 138, 152.
 Connors v. Gorey, 22 Wis. 518. § 397.
 Conolly v. Riley, 25 Md. 402. § 184.
 Conover v. Wright, 6 N. J. Eq. 613. § 423.
 Conrad v. Nall, 24 Mich. 275. § 133.
 Consequa v. Willings, 1 Pet. C. C. 225. §§ 190, 295.
 Conservators of River Thames v. Hall, L. R. 3 C. P. 415. § 157.
 Consolidated, etc. Co. v. Cashow, 49 Md. 59. §§ 190, 192.
 Constantine v. Constantine, 6 Ves. 100. § 138.
 v. Van Winkle, 6 Hill, 177. §§ 202, 212, 399, 483.
 Continental Imp. Co. v. Phelps, 47 Mich. 299. §§ 94, 309.
 Converse v. Burrows, 2 Minn. 229. §§ 207, 440.
 v. United States, 21 How. 463. §§ 240, 283.
 Conwell v. Hagerstown Canal Co. 2 Ind. 588. §§ 204, 325.
 Cook v. Clark, 10 Bing. 21. § 442.
 v. Com'rs, 6 McLean, 112. § 331.
 v. Gray, 6 Ind. 335. § 112.
 v. Meyer, 73 Ala. 580. §§ 138, 400.
 v. Moffat, 5 How. 295. § 197.
 v. Moore, 95 N. C. 1. § 111.
 v. Mutual Ins. Co. 53 Ala. 37. § 206.
 v. Oliver, 1 Woods, 437. § 20.
 v. Sexton, 79 N. C. 305. § 206.
 v. Tower, 1 Taunt. 372. § 462.
 Cook County Nat. Bank v. United States, 107 U. S. 445. § 154.
 Cooley v. Granville, 10 Cush. 56. § 380.
 Coolidge v. Williams, 4 Mass. 140. §§ 366, 398.
 Coomber v. Berks, L. R. 9 Q. B. Div. 33. § 210.
 Cooper, Matter of, 15 John. 532. § 440.
 Cooper v. Curtis, 30 Me. 488. § 107.
 v. Reaney, 4 Minn. 528. § 184.
 Coosa R. R. Co. v. Barclay, 30 Ala. 120. §§ 10, 480, 481, 482.
 Cope v. Doherty, 2 De G. & J. 614. §§ 218, 219, 239.
 v. Rowlands, 2 M. & W. 149. §§ 335, 336.
 v. Thames Haven, etc. Co. 3 Ex. 841. § 456.

- Copeland, *Ex parte*, De G. M. & G. 914. § 288.
 Copeman v. Gallant, 1 P. Wms. 314. § 212.
 Copland v. Davies, L. R. 5 H. L. Cas. 358. §§ 212, 213.
 v. Powell, 1 Bing. 369. § 277.
 Copley v. Sanford, 2 La. Ann. 335. § 297.
 Corbett v. Bradley, 7 Nev. 106. § 449.
 v. Nutt, 10 Wall. 464. § 420.
 Cordell v. State, 22 Ind. 1. §§ 133, 150.
 Core v. James, L. R. 7 Q. B. 135. §§ 355, 429.
 Corliss v. Corliss, 8 Vt. 373. § 451.
 Cornell v. Moulton, 3 Denio, 12. § 111.
 v. Moulton, 5 Denio, 12. § 114.
 Corning v. Greene, 23 Barb. 33. § 75.
 v. McCullough, 1 N. Y. 47. § 474.
 Cornwall v. Todd, 38 Conn. 443. § 363.
 Corporation v. Scott, 1 Cai. 544. § 378.
 Cortis v. Kent Water-works, 7 B. & C. 314. §§ 219, 421.
 Corwin v. Merritt, 3 Barb. 341. §§ 400, 454.
 Corg v. Carter, 48 Ind. 227. § 119.
 Costa Rica v. Erlanger, L. R. 3 Ch. Div. 69. § 482.
 Cota v. Ross, 66 Me. 161. § 333.
 Cotton v. Brien, 6 Rob. (La.) 115. § 229.
 v. James, Mood. & Mal. 278. § 265.
 v. Leon County, 6 Fla. 610. § 75.
 Cotton Planter, The, 1 Paine, 23. § 104.
 Cottrell v. State, 9 Neb. 128. § 51.
 Couch v. Jeffries, 4 Burr. 2460. § 464.
 v. McKee, 6 Ark. 484. § 463.
 Countess of Rothes v. Kirkcaldy Water-works, L. R. 7 App. Cas. 702. §§ 236, 270, 325, 328.
 County Commissioners v. Commissioners, 51 Md. 465. § 120.
 v. Franklin R. R. Co. 34 Md. 163. § 78.
 v. Meekins, 50 Md. 39. § 78.
 County of Hardin v. McFarlan, 83 Ill. 138. § 390.
 County of York v. Crafton, 100 Pa. St. 619. § 212.
 County Seat Linn Co. 15 Kan. 500. § 255.
 Course v. Stead, 4 Dall. 27, n. §§ 185, 293.
 Courtauld v. Legh, L. R. 4 Ex. 126. § 255.
 Coutieri v. Mayor, etc. 44 N. J. L. 58. §§ 87, 123.
 v. New Brunswick, 44 N. J. L. 363. §§ 87, 90, 128.
 Covington v. East St. Louis, 78 Ill. 548. § 157.
 v. McMickle, 18 B. Mon. 269. §§ 212, 215, 219, 246, 428.
 v. Voskotter, 80 Ky. 219. §§ 94, 120, 193.
 Covington Drawbridge v. Shepherd, 20 How. 227. §§ 185, 193, 293.
 Cowley v. Rushville, 60 Ind. 327. § 132.
 Cox v. Robinson, 2 Stew. & Port. 96. § 190.
 v. State, 8 Tex. App. 254. § 198.
 Coxe v. Martin, 44 Pa. St. 332. § 478.
 Coxson v. Doland, 2 Daly, 66. §§ 255, 256, 259, 267.
 Coy v. Coy, 15 Minn. 119. § 324.
 Crafts v. Clark, 38 Iowa, 237. § 184.
 Cragin v. Lamkin, 7 Allen, 395. §§ 191, 192.
 Craig v. First Presb. Church, 88 Pa. St. 42. § 101.
 Crane v. Crane, 18 Ind. 156. § 184.
 v. Powell, 2 E. & B. 210. § 462.
 Crane v. Alling, 2 Green (N. J.), 593. § 436.
 v. Hardy, 1 Mich. 56. § 184.
 v. McGinnis, 1 Gill & J. 463. § 10.
 v. Reeder, 22 Mich. 322. §§ 157, 158, 217.
 Crawford v. Spooner, 6 Moore's P. C. 9. § 431.
 v. Tyson, 46 Ala. 299. § 233.
 Crawfordsville, etc. T. Co. v. Fletcher, 104 Ind. 97. §§ 93, 95, 240, 300.

- Crawhall's Trust, In re*, 8 De G. Macn. & Gord. 480. § 253.
- Cresighton, In re*, 12 Neb. 280. § 396.
v. Pragg, 21 Cal. 115. § 164.
- Cresoe v. Laidley*, 2 Binn. 279. § 432.
- Crespigny v. Wittenoom*, 4 T. R. 790.
§§ 210, 212, 246.
- Cressey v. Parks*, 57 Me. 387. §§ 113, 115.
- Cressy v. Tatom*, 9 Ore. 542. § 184.
- Creswell v. Green*, 14 East. 537. § 115.
- Crigler v. Alexander*, 33 Gratt. 674.
§§ 463, 464.
- Crisp v. Bunbury*, 8 Bing. 394. §§ 165, 396.
- Crispin v. Doglioni*, 3 S. & T. 96.
§ 13.
- Crittenden v. Wilson*, 2 Cow. 165.
§§ 194, 202.
- Crocker v. Crane*, 21 Wend. 211.
§§ 234, 246.
- Cromelien v. Brink*, 29 Pa. St. 522.
§§ 111, 114.
- Crone v. State*, 49 Ind. 538. § 215.
- Crooke v. Brookling*, 2 Vern. 107.
§ 253.
- Crosby v. Bennett*, 7 Met. 17. § 325.
v. Brown, 60 Barb. 548. § 363.
v. Hawthorn, 25 Ala. 221. §§ 349, 356.
v. Huston, 1 Tex. 237. § 429.
v. Patch, 18 Cal. 438. §§ 147, 327.
- Crosier v. Tomlinson*, 2 Mod. 71.
§§ 424, 426.
- Cross v. Harrison*, 16 How. 196. § 104.
v. McMacken, 17 Mich. 511.
§ 393.
v. Pinckneyville Mill Co. 17 Ill. 54. § 456.
- Crossman v. Crossman*, 33 Ala. 486.
§ 482.
- Croswell v. Crane*, 7 Barb. 191. § 256.
- Crow Dog, Ex parte*, 109 U. S. 556.
§§ 138, 157, 162.
- Crowder v. Stewart*, L. R. 16 Ch. Div. 370. § 212.
- Croxall v. Shererd*, 5 Wall. 268.
§§ 194, 390.
- Crozier v. Hodges*, 3 La. 357. § 184.
- Cruger v. Cruger*, 5 Barb. 225. § 247.
v. Dougherty, 43 N. Y. 107.
§§ 365, 457.
- Cucullu v. Louisiana Ins. Co.* 5 Mart. (N. S.) (La.) 613. § 189.
- Cull v. Austin*, L. R. 7 C. P. 234.
§§ 247, 258.
- Cullerton v. Mead*, 22 Cal. 95. §§ 207, 436.
- Culver v. Third Nat. Bank*, 64 Ill. 528. § 154.
v. Woodruff Co. 5 Dill. 392. § 482.
- Cumberland Co. v. Boyd*, 113 Pa. St. 52. § 300.
- Cumberland, etc. Canal v. Hitchings*, 57 Me. 146. § 358.
- Cumming v. Fryer, Dudley (Ga.)*, 182. §§ 360, 444.
- Cummings v. Akron Cement Co.* 6 Blatchf. 509. § 232.
v. Chandler, 26 Me. 453. § 165.
v. Coleman, 7 Rich. Eq. 509.
§ 254.
v. Missouri, 4 Wall. 326. §§ 465, 467.
- Cummins v. Garretson*, 15 Ark. 135.
§ 400.
v. State, 12 Tex. App. 121. §§ 12, 190.
- Cundell v. Dawson*, 4 C. B. 376.
§ 336.
- Cunningham v. Hanney*, 12 Ill. App. 437. § 400.
v. Mahan, 112 Mass. 58. § 115.
v. State, 2 Speers, 246. § 246.
- Curlewis v. Mornington*, 7 El. & B. 283. § 424.
- Curran v. Owens*, 15 W. Va. 208.
§ 162.
v. Shattuck, 24 Cal. 427. § 387.
- Currier v. Marietta, etc. R. R. Co.* 11 Ohio St. 228. § 378.
- Curtis v. Embery*, L. R. 7 Ex. 369.
§ 256.
v. Gill, 34 Conn. 49. §§ 141, 204.
v. Leavitt, 17 Barb. 309. § 325.
v. Leavitt, 15 N. Y. 1. §§ 139, 163, 169.

- Curtis v. McCullough, 3 Nev. 202. § 329.
 v. March, 4 Jur. (N. S.) 1112. § 302.
 v. Martin, 3 How. 106. § 254.
 Cushing v. Worrick, 9 Gray, 382. §§ 223, 232.
 Cusic v. Douglas, 3 Kan. 123. § 476.
 Custer v. Yellowstone Co. 6 Mont. 39. § 333.
 Custin v. City of Viroqua, 67 Wis. 314. §§ 240, 260.
 Cutler v. Supervisors, 56 Miss. 115. § 483.
 Cutlip v. Sheriff, 3 W. Va. 588. § 97.
 Cutter v. Caruthers, 48 Cal. 178. § 306.
 Cutts v. Hardee, 38 Ga. 350. §§ 10, 331, 476, 478.

 Daggett v. State, 4 Conn. 60. § 271.
 Daines v. Heath, 3 C. B. 941. § 362.
 Dakins v. Wagner, 3 Dowl. P. C. 535. § 112.
 Dalby v. Wolf, 14 Iowa, 228. § 75.
 Dale v. Irwin, 78 Ill. 170. § 459.
 D'Allex v. Jones, 2 Jur. (N. S.) 979. § 335.
 Dalrymple v. Dalrymple, 2 Hagg. Consist. 81. § 190.
 Dalton v. Murphy, 30 Miss. 59. § 454.
 Daly v. James, 8 Wheat. 535. § 187.
 v. State, 13 Lea. 228. §§ 119, 124.
 Dame's Appeal, 62 Pa. St. 417. § 258.
 Dane v. McArthur, 57 Ala. 454. §§ 41, 49.
 Danforth v. Smith, 23 Vt. 247. § 164.
 v. Woodward, 10 Pick. 423. §§ 372, 422.
 Daniels v. Moses, 12 S. C. 130. § 488.
 Danks v. Quackenbush, 3 Denio, 594. § 476.
 v. Quackenbush, 1 N. Y. 129. § 207.
 Dano v. Railroad Co. 27 Ark. 564. § 246.
 Danvers v. Boston, 10 Pick. 513. § 366.
 Danville v. Pace, 25 Gratt. 1. § 480.

 Darby v. Wilmington, 76 N. C. 133. § 174.
 Darling, Ex parte, 16 Nev. 98. § 10.
 Darling v. Boesch, 67 Iowa, 702. § 58.
 v. Rodgers, 7 Kan. 592. § 122.
 Darmstaetter v. Moloney, 45 Mich. 621. §§ 257, 390.
 Darragh v. McKim, 2 Hun, 337. § 169.
 Darrow v. People, 8 Colo. 417. § 127.
 Dartmouth College v. Woodward, 4 Wheat. 518. §§ 381, 472, 473.
 Dash v. Van Kleeck, 7 John. 508. §§ 2, 10, 201, 206, 406, 463, 464, 480.
 Dashiell v. Mayor, etc. of Baltimore, 45 Md. 615. §§ 165, 167.
 Daubman v. Smith, 47 N. J. L. 200. §§ 88, 93, 98, 103.
 Davenport v. Barnes, 2 N. J. L. 211. §§ 207, 410.
 v. Kleinschmidt, 6 Mont. 502. §§ 378, 384.
 v. Railroad Co. 37 Iowa, 624. § 107.
 Davey v. Burlington, etc. R. R. Co. 31 Iowa, 553. § 215.
 David v. Aetna Ins. Co. 9 Iowa, 45. § 342.
 v. Southwestern R. R. Co. 41 Ga. 223. § 371.
 Davidson v. Allen, 36 Miss. 419. §§ 314, 318.
 v. Carson, 1 Wash. T'y, 307. § 283.
 v. Clayland, 1 Har. & J. 546. § 210.
 v. Kuhn, 1 Disney, 405. § 452.
 v. Moorman, 2 Heisk. 575. § 26.
 v. New Orleans, 96 U. S. 97. § 480.
 v. Sharpe, 6 Ind. 14. § 191.
 Davies v. Creighton, 33 Gratt. 696. § 138.
 v. Harvey, L. R. 9 Q. B. 433. § 143.
 Daviess v. Fairbairn, 3 How. 636. §§ 141, 154, 157, 204.
 Davis, Ex parte, 21 Fed. Rep. 396. §§ 135, 147.

- Davis v. Bank of Fulton, 31 Ga. 69. § 96.
 v. Bowling, 19 Mo. 651. § 297.
 v. Branch Bank, 12 Ala. 463. § 482.
 v. Carew, 1 Rich. 275. § 154.
 v. Clark, 106 Pa. St. 377. § 129.
 v. Commonwealth, 17 Gratt. 617. § 290.
 v. Curling, 8 Q. B. 286. § 243.
 v. Delpit, 25 Miss. 445. §§ 231, 402.
 v. Farnes, 26 Tex. 296. § 390.
 v. Gaines, 48 Ark. 370. § 365.
 v. Gray, 16 Wall. 203. § 472.
 v. Humphrey, 22 Iowa, 137. § 422.
 v. Jacquin, 5 Harr. & J. 100. § 13.
 v. Justice, 31 Ohio St. 29. § 376.
 v. Lumpkin, 57 Miss. 506. § 464.
 v. Mason, 1 Pet. 503. § 187.
 v. Minor, 1 How. (Miss.) 183. §§ 163, 479, 480.
 v. Rogers, 14 Ind. 424. § 184.
 v. Standish, 26 Hun, 608. §§ 374, 375.
 v. State, 7 Md. 160. §§ 78, 81, 84, 102, 103, 131, 170.
 v. State, 3 Lea, 376. § 124.
 v. State Bank, 7 Ind. 316. § 483.
 v. Van Arsdale, 59 Miss. 367. § 483.
 v. Village of Menasha, 21 Wis. 491. § 10.
 v. Woolnough, 9 Iowa, 104. §§ 129, 130.
 v. Wood, 7 Mo. 165. § 63.
 Davison v. Farmer, 6 Ex. 242. §§ 145, 152.
 v. Gill, 1 East, 64. § 204.
 v. Johonnot, 7 Met. 388. § 194.
 Davys v. Douglas, 4 H. & N. 180. § 262.
 Daw v. Metropolitan Board, 12 C. B. (N. S.) 161. §§ 140, 204.
 Dawson's Appeal, 15 Pa. St. 480. § 434.
 Dawson v. Dawson, 23 Mo. App. 169. §§ 247, 255.
 v. Horan, 51 Barb. 459. § 153.
 Day v. McGinnis, 1 Heisk. 310. §§ 104, 108.
 v. Munson, 14 Ohio St. 488. § 314.
 Dayton v. McIntyre, 5 How. Pr. 117. § 111.
 Dean, Ex parte, 2 Cow. 605. § 114.
 Dean v. Borchsenius, 30 Wis. 236. §§ 229, 307.
 v. Charlton, 27 Wis. 522. § 363.
 v. King, 13 Ired. L. 20. § 107.
 v. Mellard, 15 C. B. (N. S.) 19. § 164.
 Dean and Chapter of York v. Middleburgh, 2 Y. & J. 196. §§ 373, 416.
 Dean of Ely v. Bliss, 2 De G. M. & G. 471. § 403.
 Dean of York, Matter of, 2 Q. B. 34. § 300.
 Dearborn v. Brookline, 97 Mass. 466. § 267.
 v. Patton, 3 Ore. 420. § 167.
 De Begnis v. Armstead, 10 Bing. 107. § 336.
 Debevoise v. N. Y. etc. R. R. Co. 98 N. Y. 377. §§ 12, 13.
 De Bow v. People, 1 Denio, 14. §§ 36, 40, 181, 182, 294.
 De Camp v. Eveland, 19 Barb. 81. §§ 183, 331.
 v. Hibernia R. R. Co. 47 N. J. L. 43. § 387.
 De Celis v. United States, 13 Ct. of Cl. 117. §§ 297, 300.
 De Chastellux v. Fairchild, 15 Pa. St. 18. §§ 10, 480, 484.
 Deck v. Gherke, 6 Cal. 666. § 397.
 De Cordova v. Galveston, 4 Tex. 470. § 206.
 Deddrick v. Wood, 15 Pa. St. 9. §§ 210, 212.
 Deerfield v. Arms, 20 Pick. 483. § 439.
 Deering v. York, etc. R. R. Co. 31 Me. 172. § 331.
 De Giacomo, In re, 12 Blatch. 391. § 469.
 De Graff v. St. Paul, etc. R. R. Co. 23 Minn. 174. § 472.

- De Groot v. United States, 5 Wall. 419. § 186.
- De Kay v. Darrah, 14 N. J. L. 288. § 426.
- Delano v. Jopling, 1 Litt. 117. §§ 181, 295.
- Delaplane v. Cranshaw, 15 Gratt. 479. §§ 298, 300.
- Delaware, etc. R. R. Co. v. Burson, 61 Pa. St. 369. § 367.
- Dells v. Kennedy, 49 Wis. 555. § 174.
- Delmas v. Ins. Co. 14 Wall. 665. § 429.
- De Lorme v. Pease, 19 Ga. 220. § 342.
- Den v. Diamond, 4 B. & C. 243. § 362.
- v. Robinson, 5 N. J. L. 689. § 164.
- Dendy v. Gamble, 64 Ga. 528. § 422.
- Denham v. Holeman, 26 Ga. 182. § 424.
- Denn v. Reid, 10 Pet. 524. §§ 236, 237, 410.
- Dennick v. Central R. R. Co. 103 U. S. 11. §§ 14, 189.
- Denning v. Corwin, 11 Wend. 647. § 391.
- v. Foster, 42 N. H. 165. § 342.
- v. Smith, 3 John. Ch. 331. § 454.
- Denny v. Mattoon, 2 Allen. 361. § 10.
- Dent v. Ross, 52 Miss. 188. §§ 392, 398.
- Denton v. Reading, 22 La. Ann. 607. §§ 234, 236.
- Dentzel v. Waldie, 30 Cal. 138. §§ 164, 483.
- Denver Circle R. R. Co. v. Nestor, 10 Colo. 403. § 135.
- Department Pub. Works, In re, 86 N. Y. 347. §§ 92, 93.
- Depas v. Riez, 2 La. Ann. 30. § 246.
- De Pauw v. New Albany, 22 Ind. 204. § 202.
- Deposit, Village of, v. Vail, 5 Hun, 310. § 169.
- Dequasei v. Harris, 16 W. Va. 345. §§ 394, 400.
- Dequindre v. Williams, 31 Ind. 444. § 206.
- Derr v. Lubey, 1 MacArthur, 187. § 428.
- De Russey v. Davis, 13 La. Ann. 468. § 380.
- Desban v. Pickett, 16 La. Ann. 350. § 138.
- De Sentamanat v. Sole, 33 La. Ann. 609. §§ 260, 261.
- Des Moines v. Gilchrist, 67 Iowa, 210. §§ 390, 456.
- Desmond v. Dunn, 55 Cal. 242. § 129.
- Desnoyer v. McDonald, 4 Minn. 515. § 184.
- De Sobry v. De Laistre, 2 Har. & J. 191. §§ 192, 297.
- Deters v. Renick, 37 Mo. 597. § 157.
- Detroit v. Chaffee, 70 Mich. 80. § 371.
- v. Plank Road Co. 43 Mich. 140. § 473.
- v. Putnam, 45 Mich. 263. § 371.
- De Vaucene, In re, 31 How. Pr. 337. §§ 87, 93, 120, 124, 170.
- De Veaux v. De Veaux, 1 Strob. Eq. 283. §§ 247, 346.
- Devine v. Board of Commissioners, 84 Ill. 590. § 129.
- Devoy v. Mayor, 35 Barb. 264. § 137.
- De Vries v. Conkling, 22 Mich. 255. § 400.
- Dew v. Cunningham, 28 Ala. 471. § 49.
- Dewart v. Purdy, 29 Pa. St. 113. § 206.
- Deweese v. Colorado, 32 Tex. 570. § 298.
- Dewey v. Goodenough, 56 Barb. 54. §§ 350, 400.
- v. Gray, 2 Cal. 374. § 320.
- Dewhurst v. Alleghany, 95 Pa. St. 437. § 170.
- v. Fielden, 7 M. & G. 182. §§ 266, 327.
- De Winton v. Mayor, 26 Beav. 533. § 153.
- v. Mayor of Brecon, 28 L. J. Ch. 600. § 217.
- De Wolf v. Rabaud, 1 Pet. 479. §§ 185, 186.
- Dexter v. Cranston, 41 Mich. 448. §§ 113, 114.

- Dexter v. Limerick P. R. Co. v. Allen*,
16 Barb. 15. § 154.
v. Shepard, 117 Mass. 480. § 114.
Deyraud, Succession of, 9 Rob. (La.)
357. § 463.
Diana, The, 4 Moore, P. C. 11. § 364.
Dibrell v. Dandridge, 51 Miss. 55.
§§ 392, 398.
Dick's Appeal, 106 Pa. St. 589. §§ 157,
266, 396, 440.
Dickenson v. Breeden, 30 Ill. 279.
§ 181.
v. Fletcher, L. R. 9 C. P. 8. §§ 256,
352.
Dickey v. Hurlburt, 5 Cal. 343. § 10.
Dickins v. N. Y. Cent. R. R. Co. 23
N. Y. 159. § 371.
Dickinson v. Northeastern R'y Co. 2
H. & C. 735. § 371.
v. Van Wormer, 39 Mich. 141.
§ 399.
Diedrick v. Richley, 2 Hill, 271.
§ 439.
Diez, In re, 56 Barb. 391. §§ 184,
190.
Diggle v. London, etc. R. R. Co. 5 Ex.
442. § 456.
Dikeman v. Dikeman, 11 Paige, 484.
§ 478.
Dillard, Ex parte, 68 Ala. 594. § 111.
Dillard v. Alexander, 9 Heisk. 719.
§ 20.
v. Noel, 2 Ark. 449. § 397.
Dillon v. Dougherty, 2 Grant's Cas.
299. § 480.
v. Linder, 36 Wis. 344. § 167.
Dingley v. Moore, Cro. Eliz. 750.
§ 136.
Dismukes v. Stokes, 41 Miss. 431.
§ 164.
Di Sora v. Phillips, 10 H. of L. Cas.
624. § 192.
Distilled Spirits, The, 11 Wall. 356.
§ 138.
District of Columbia v. Washington
Market, 108 U. S. 243. § 300.
District Township of Dubuque v.
Dubuque, 7 Iowa, 262. §§ 204,
325, 326.
Divine v. Harvie, 7 T. B. Mon. 443.
§ 335.
Division of Howard Co. 15 Kan. 194.
§ 300.
Dixon v. Caledonian R'y Co., L. R. 5
App. Cas. 827. § 322.
v. Nicolls, 39 Ill. 372. § 302.
v. Thatcher, 14 Ark. 141. § 190.
Doan v. Boley, 38 Mo. 449. § 63.
Dobbins v. First Nat. Bank, 112 Ill.
553. §§ 225, 482.
v. Northampton, 50 N. J. L. 496.
§ 128.
Dobbs v. Grand Junction Water-
Works, L. R. 9 Q. B. Div. 158.
§ 138.
Dockstader v. Sammons, 4 Hill, 546.
§ 371.
Dodd v. State, 18 Ind. 56. § 211.
Dodge, Ex parte, 7 Cow. 147. § 115.
Dodge v. County of Platte, 16 Hun,
285. § 480.
v. Gardiner, 31 N. Y. 239. § 292.
v. Gridley, 10 Ohio, 173. § 287.
v. Williams, 46 Wis. 92. §§ 15,
184.
v. Woolsey, 18 How. 331. §§ 197,
480.
Doe v. Avaline, 8 Ind. 6. § 367.
v. Chunn, 1 Blackf. 336. § 390.
v. Considine, 6 Wall. 458. §§ 246,
260.
v. Eslava, 11 Ala. 1028. §§ 181,
189.
v. Harvey, 4 B. & C. 610. § 247.
v. Naylor, 2 Blackf. 32. § 168.
v. Snaith, 8 Bing. 146. § 362.
v. Waterton, 3 B. & Ald. 149.
§ 423.
Doggett v. Catterns, 17 C. B. (N. S.)
669; 19 C. B. (N. S.) 765.
§ 280.
v. Walter, 15 Fla. 355. § 311.
Doherty v. Allman, L. R. 3 App. Cas.
709. § 333.
Dolan v. Thomas, 12 Allen, 421.
§ 143.
Dolder v. Huntingfield, 11 Ves. 283.
§ 297.

- Dole v. Wilson, 16 Minn. 525. § 294.
Dolese v. Pierce, 120 Ill. 140. § 101.
Domick v. Michael, 4 Sandf. 374. § 256.
Don v. Lippmann, 5 Cl. & Fin. 1. § 479.
Donaldson v. Beckett, 2 Bro. P. C. 129. § 399.
Donnell v. State, 48 Miss. 679. §§ 4, 21.
Donner v. Palmer, 23 Cal. 40. § 206.
Donohue v. Ladd, 31 Minn. 244. § 260.
Dooling v. Moore, 20 Cal. 14. § 454.
Doolblass v. Ramloll, 7 Moore P. C. 239. § 206.
Dorr v. Gibboney, 3 Hughes, 382. § 20.
Dorris v. Erwin, 101 Pa. St. 239. § 400.
Dorsey's Appeal, 73 Pa. St. 192. §§ 78, 83, 86, 87, 88, 102, 103, 170.
Dorsey v. Dorsey, 31 Md. 64. § 119.
Dougherty v. Bethune, 7 Ga. 90. § 213.
Doughty v. Hope, 3 Denio, 594. §§ 400, 457.
v. Hope, 1 N. Y. 79. §§ 207, 390, 457.
Douglas v. Douglas, 5 Hun, 140. §§ 156, 256.
Douglass, In re Petition of, 58 Barb. 174. §§ 447, 457.
Douglass v. Chosen Freeholders, 38 N. J. L. 212. §§ 235, 237, 238.
v. Eyre, Gilpin, 148. §§ 252, 261.
v. Mayor, etc. 18 Cal. 643. § 365.
v. Pike Co. 101 U. S. 677. §§ 206, 319, 474.
v. Placerville, 18 Cal. 643. § 380.
Dousman v. O'Malley, 1 Doug. (Mich.) 450. §§ 111, 112.
Dover Gas L. Co. v. Dover, 7 De G. M. & G. 515. § 443.
Dow v. Beidelman, 49 Ark. 325. § 125.
v. Johnson, 100 U. S. 158. § 20.
Dowdell v. State, 58 Ind. 333. §§ 142, 143.
Dowling v. Smith, 9 Md. 242. § 104.
v. State, 5 Sm. & M. 664. § 469.
Downer v. Rugar, 21 Wend. 178. § 390.
Downie v. Hendrie, 46 Mich. 498. § 306.
Downing v. Baldwin, 1 S. & R. 298. § 437.
v. Lindsay, 2 Pa. St. 382. § 424.
v. Miltonvale, 36 Kan. 740. § 296.
Downs v. Town of Huntington, 35 Conn. 588. §§ 165, 167, 225.
Doyle v. Continental Ins. Co. 94 U. S. 535. § 330.
v. Howard, 16 Mich. 261. § 390.
v. Mizner, 41 Mich. 549. §§ 111, 113.
Dozier v. Ellis, 28 Miss. 730. §§ 368, 426.
Drain Com'r v. Baxter, 52 Mich. 127. § 311.
Drake v. Andrews, 2 Mich. 203. § 115.
v. Drake, 4 Dev. 110. § 261.
v. Flewellen, 33 Ala. 106. § 194.
v. Jordan, 73 Iowa, 653. § 469.
v. State, 5 Tex. App. 649. § 325.
v. Wilkie, 30 Hun, 537. § 479.
Drennan v. People, 10 Mich. 169. § 403.
Draper v. Falley, 33 Ind. 165. §§ 131, 132.
Drayton v. Grimke, 1 Bailey's Eq. 239. § 437.
Dred Scott v. Sanford, 19 How. 445. §§ 24, 25, 70.
Drew County v. Bennett, 43 Ark. 364. § 142.
Drew v. Dequindre, 2 Dougl. (Mich.) 93. § 893.
v. Wakefield, 54 Me. 291. § 184.
Drummond v. Drummond, L. R. 2 Ch. 45. § 300.
Duane's Case, 1 Binn. 601. § 166.
Duaneburgh v. Jenkins, 46 Barb. 294. § 456.
v. Jenkins, 57 N. Y. 191. §§ 482, 483.
Dubos v. McLean, 4 McLean, 486. § 206.

- Dubuque v. Dubuque, 7 Iowa, 262. §§ 204, 325, 326.
- Dubuque R. R. Co. v. Des Moines R. R. Co. 109 U. S. 329. § 379.
- v. Litchfield, 23 How. 66. § 379.
- Dudley, In re Corporation of, L. R. 8 Q. B. Div. 93. § 344.
- Dudley v. Mayhew, 3 N. Y. 9. §§ 204, 207, 325, 399.
- v. Reynolds, 1 Kan. 285. § 324.
- v. Steele, 71 Ala. 423. § 256.
- Duff v. Fisher, 15 Cal. 325. § 314.
- Duffy v. Ogden, 64 Pa. St. 240. § 111.
- Dugan v. Bridge Co. 27 Pa. St. 303. §§ 221, 380.
- v. Gittings, 3 Gill, 138. §§ 138, 154, 283.
- Dulany v. Tilghman, 6 G. & J. 461. §§ 164, 194.
- Dull v. People, 4 Denio, 94. §§ 227, 349.
- Dunbar v. Roxburghe, 3 Cl. & Fin. 335. §§ 308, 312.
- Duncan v. Drakeley, 10 Ohio, 47. § 398.
- v. State, 7 Humph. 148. § 229.
- Duncombe v. Prindle, 12 Iowa, 1. §§ 35, 183, 213, 294.
- Dunelm. The, L. R. 9 P. Div. 171. § 254.
- Dunham v. Sage, 52 N. Y. 229. § 146.
- v. Wright, 53 Pa. St. 167. § 458.
- Dunlap, Ex parte, 71 Ala. 93. § 240.
- Dunlap v. Crawford, 2 McCord Eq. 171. § 229.
- v. Wagner, 85 Ind. 529. §§ 375, 376.
- Dunmore, Appeal of Borough of, 52 Pa. St. 374. § 473.
- Dunnebaum v. Schram, 59 Tex. 281. § 445.
- Du Page County v. Jenks, 65 Ill. 275. § 390.
- Duquesne Savings Bank's Appeal, 96 Pa. St. 298. § 324.
- Duramus v. Harrison, 26 Ala. 326. § 256.
- Durham, Inhabitants of, v. Inhabitants of L. 4 Greenl. 140. § 10.
- Durham v. Lewiston, 4 Me. 140. § 119.
- Durkee v. Janesville, 26 Wis. 697. §§ 78, 90.
- Duryee v. Mayor, etc. 96 N. Y. 477. § 169.
- Dutton v. Howell, Show. P. C. 83. § 15.
- Duval v. Malone, 14 Gratt. 28. § 463.
- Dwelly v. Dwelly, 46 Me. 377. §§ 139, 207, 290.
- Dwight v. Richardson, 12 Sm. & M. 325. §§ 184, 191.
- Dyer v. Best, L. R. 1 Ex. 152. § 308.
- v. Covington Township, 28 Pa. St. 186. § 157.
- v. Smith, 12 Conn. 384. §§ 190, 192.
- v. State, Meigs, 237. §§ 104, 168.
- Dyson v. Sheley, 11 Mich. 527. § 398.
- v. West, 1 Har. & J. 567. §§ 394, 400.
- Eagan v. State, 53 Ind. 162. § 303.
- Eager, In re Petition of, 58 Barb. 557. § 464.
- Eakin v. Raub, 12 S. & R. 363. § 206.
- Earl of Ailesbury v. Pattison, 1 Doug. 28. §§ 283, 288.
- Earl of Shrewsbury v. Scott, 6 C. B. (N. S.) 1. § 194.
- Earl of Waterford's Peerage, 6 Cl. & Fin. 173. § 308.
- Earle v. Board of Education, 55 Cal. 489. §§ 129, 132.
- Early v. Doe ex dem. Homans, 16 How. 615. § 114.
- Earthman v. Jones, 2 Yerg. 484. § 391.
- Easley v. Whipple, 57 Wis. 485. § 322.
- East Haven v. Hemingway, 7 Conn. 186. § 386.
- East India Interest, 3 Bing. 196. §§ 348, 350.
- Eastman v. McAlpin, 1 Ga. 157. § 210.
- East Union Township v. Ryan, 86 Pa. St. 459. § 390.
- Eastwood v. Miller, L. R. 9 Q. B. 440. § 280.
- Eaton v. Green, 22 Pick. 526. § 322.

- Eaton v. Walker**, 76 Mich. 579. § 102.
Ebbs v. Poulnois, L. R. 10 Ch. 479. § 243.
Eby's Appeal, 70 Pa. St. 311. § 267.
Eckhart v. State, 5 W. Va. 515. §§ 174, 180.
Eckloff v. Dist. of Columbia, 2 Mackay, 572. § 153.
Edinburgh R. R. v. Wauchope, 8 Cl. & F. 710. § 193.
Edge v. Commonwealth, 7 Pa. St. 275. § 333.
Edger v. County Commissioners, 70 Ind. 331. § 30.
Edgerly v. Bush, 81 N. Y. 199. § 188.
Edinburgh, etc. R. R. Co. v. Linlithgow, 3 Macq. H. L. Cas. 704. § 213.
Edmonds v. Lawley, 6 M. & W. 285. §§ 206, 464, 482.
Edmundson v. Wragg, 104 Pa. St. 500. §§ 114, 115.
Edson v. Hayden, 20 Wis. 682. § 273.
Edward v. Trevellick, 4 E. & B. 59. §§ 356, 429.
Edwards v. Darby, 12 Wheat. 206. § 309.
 v. Davis, 16 John. 281. § 207.
 v. Dick, 4 B. & Ald. 212. § 240.
 v. Goulding, 38 Miss. 118. §§ 289, 290, 400.
 v. Grand Junction R. R. Co. 10 Eng. Ch. 85. § 194.
 v. Hall, 30 Ark. 31. § 448.
 v. Jagers, 19 Ind. 407. § 473.
 v. Kearzey, 96 U. S. 595. §§ 471, 477, 479.
 v. Williamson, 70 Ala. 145. §§ 206, 331.
Egerton v. Third Municipality, 1 La. Ann. 435. §§ 231, 246, 429.
Egnew v. Cochrane, 2 Head, 829. §§ 17, 184, 189, 301, 307.
Egypt Street, 2 Grant's Cas. 455. § 138.
Eilers v. Wood, 64 Wis. 422. § 290.
Eld v. Gorham, 20 Conn. 8. §§ 27, 52.
Elder v. Bemis, 2 Met. 509. § 333.
Elder v. Bradley, Adm'r, 2 Sneed, 252. § 112.
 v. State, 96 Ind. 162. § 124.
Eldridge v. Pierce, 90 Ill. 474. § 364.
Electric M. etc. v. Van Auker, 9 Colo. 204. §§ 219, 428.
Eliot v. Himrod, 108 Pa. St. 569. §§ 255, 256.
Elliot v. Lyell, 3 Call, 268. § 463.
Elizabethtown, etc. R. R. Co. v. Elizabethtown, 12 Bush, 233. §§ 138, 151, 152.
Ellingham v. Mount, 43 N. J. L. 470. § 342.
Elliott v. Chapman, 15 Cal. 383. § 454.
 v. Lochnane, 1 Kan. 135. § 160.
 v. Swartwout, 10 Pet. 137. §§ 254, 346.
Ellis, Ex parte, 11 Cal. 222. §§ 218, 238, 246.
 v. Hutchinson, 70 Mich. 154. § 102.
 v. Maxson, 19 Mich. 186. § 184.
 v. Murray, 28 Miss. 129. §§ 267, 278.
 v. Owens, 10 M. & W. 521. § 310.
 v. Paige, 1 Pick. 45. §§ 154, 155.
 v. Park, 8 Tex. 205. § 306.
 v. Whitlock, 10 Mo. 781. §§ 360, 444.
 v. Wiley, 17 Tex. 134. § 190.
Ellison v. Mobile, etc. R. R. Co. 36 Miss. 572. §§ 215, 239.
Elmendorf v. Carmichael, 3 Litt. 472. § 194.
 v. Taylor, 10 Wheat. 152. §§ 186, 191, 293.
Elmwood v. Marcy, 92 U. S. 289. § 185.
Elrod v. Gilliland, 27 Ga. 467. § 138.
Elsworth v. Cole, 2 M. & W. 81. § 212.
Elton v. Geissert, 10 Phila. 330. § 217.
Elwood v. Flannigan, 104 U. S. 568. § 185.
Ely v. Holton, 15 N. Y. 595. §§ 133, 137, 206.
 v. James, 123 Mass. 36. §§ 190, 192-

- Ely v. Thompson, 3 A. K. Marsh. 70. §§ 136, 138.
 Emanuel v. Constable, 3 Russ. 436. § 212.
 Emerick v. Harris, 1 Binn. 416. § 169.
 Emerson v. Atwater, 7 Mich. 23. § 313.
 v. Clayton, 32 Ill. 493. § 146.
 v. Commonwealth, 108 Pa. St. 111. § 433.
 Emery v. Berry, 28 N. H. 486. § 190.
 Emigrant Industrial Savings Bank, In re, 75 N. Y. 388. § 457.
 Emory v. Addis, 71 Ill. 273. §§ 374, 375.
 Employers' L. Co. v. Commissioner of Ins. 64 Mich. 514. § 309.
 Emporia v. Norton, 13 Kan. 569. §§ 130, 134.
 Enfield Toll Br. Co. v. Hartford, etc. R. R. Co. 17 Conn. 40 and 454. § 473.
 Engelking v. Von Wamel, 26 Tex. 469. § 247.
 Engleken v. Hilger, 43 Iowa, 563. § 375.
 v. Webber, 47 Iowa, 558. § 377.
 English v. Beard, 51 Ind. 489. § 373.
 v. Oliver, 28 Ark. 317. §§ 46, 183.
 v. State, 7 Tex. App. 171. §§ 93, 95.
 Enloe v. Reike, 56 Ala. 500. § 151.
 Ennis v. Crump, 6 Tex. 84. § 256.
 v. Smith, 14 How. 400. §§ 186, 190, 192.
 Enos v. Buckley, 94 Ill. 458. § 146.
 Ensign v. Barse, 107 N. Y. 329. § 95.
 Enterprise, Schooner, The, 1 Paine, 32. §§ 347, 349, 353.
 Entick v. Carrington, 19 How. St. Tr. 1029. § 414.
 Epps v. Epps, 17 Ill. App. 196. § 223.
 Equitable L. Ins. Co. v. Gleason, 56 Iowa, 48. § 469.
 Erie v. Knapp, 29 Pa. St. 173. § 428.
 Erie, etc. R. R. Co. v. Casey, 1 Grant's Cas. 274. § 10.
 Erlinger v. Boneau, 51 Ill. 94. § 76.
 Ernst v. Morgan, 39 N. J. Eq. 391. § 128.
 Eshleman's Appeal, 74 Pa. St. 42. §§ 240, 253.
 Eskridge v. Ditmars, 51 Ala. 245. § 482.
 v. McGruder, 45 Miss. 294. § 283.
 Estep v. Hutchman, 14 S. & R. 435. § 194.
 Esterbrook Mfg. Co. v. Ahern, 30 N. J. Eq. 341. § 306.
 Esterley's Appeal, 54 Pa. St. 192. § 290.
 Eureka Case, 4 Sawyer, 302. § 218.
 Eureka v. Davis, 21 Kan. 580. §§ 88, 92.
 Eustis v. Kidder, 26 Me. 97. § 448.
 Evans v. Browne, 30 Ind. 514. § 38.
 v. Jones, 9 Bing. 311. § 419.
 v. Memphis, etc. R. R. Co. 56 Ala. 246. §§ 86, 102.
 v. Montgomery, 4 Watts & S. 218. §§ 10, 476.
 v. Myers, 25 Pa. St. 114. § 308.
 v. Pratt, 3 M. & G. 767. § 441.
 v. Stevens, 4 T. R. 462. §§ 247, 270.
 v. Williams, 2 Drew. & Sm. 324. §§ 463, 481.
 Evansville v. Bayard, 39 Ind. 450. §§ 140, 159.
 Evansville, etc. R. R. Co. v. Barbee, 74 Ind. 169. § 107.
 Evanturel v. Evanturel, L. R. 2 P. C. 462. § 310.
 Everett v. Wells, 2 Man. & Gr. 269. § 258.
 v. Wells, 2 Scott N. R. 531. § 324.
 Evergreens, Matter of, 47 N. Y. 216. § 152.
 Evernham v. Hulit, 45 N. J. L. 53. § 135.
 Ewart v. Williams, 3 Drew. 21. § 300.
 Ewell v. Daggs, 108 U. S. 143. § 164.
 Ewer v. Jones, 2 Salk. 415. § 399.
 Ewing's Case, 5 Gratt. 701. §§ 206, 469.
 Ewing v. Burnet, 11 Pet. 41. § 231.
 v. Ewing, 24 Ind. 470. § 315.

- Ewing v. Hoblitzelle, 85 Mo. 64. § 93.
 Excelsior Manuf'g Co. v. Keyser, 62 Miss. 155. § 482.
 Excelsior Petroleum Co. v. Embury, 67 Barb. 261. §§ 140, 154.
 Eyre v. Jacob, 14 Gratt. 422. § 332.
 Eyston v. Studd, 2 Plowd. 464. §§ 234, 258, 411, 413.
 Ezeikel v. Dixon, 3 Ga. 151. §§ 234, 236, 241.
 Fackler v. Fackler, 14 Mo. 431. § 424.
 Fairchild v. Gwynne, 14 Abb. Pr. 121. §§ 104, 107, 110, 300, 434.
 v. Masonic Hall Asso. 71 Mo. 526. § 261.
 Fairfield v. County of Gallatin, 100 U. S. 47. § 319.
 v. Ratcliff, 20 Iowa, 396. § 365.
 Falconer v. Campbell, 2 McLean, 195. § 54.
 v. Robinson, 46 Ala. 340. §§ 88, 135.
 Falk, Ex parte, 42 Ohio St. 683. §§ 117, 120, 123.
 Fall Brook Coal Co. v. Lynch, 47 How. Pr. 530. § 193.
 Fallon, Ex parte, 5 T. R. 283. §§ 111, 112.
 Fant v. Gibbs, 54 Miss. 396. § 174.
 Faqua v. Mullen, 13 Bush, 467. §§ 102, 103, 170.
 Farley v. Bonham, 2 J. & H. 177. § 300.
 v. De Waters, 2 Daly, 192. §§ 138, 145.
 v. Dowe, 45 Ala. 324. § 476.
 Farmer v. People, 77 Ill. 322. §§ 164, 226.
 Farmers' Bank v. Hale, 59 N. Y. 53. §§ 160, 220, 223, 246.
 Farmers', etc. Co. v. Chicago, etc. R. R. Co. 39 Fed. Rep. 143. § 331.
 Farmers' Ins. Co. v. Highsmith, 44 Iowa, 330. §§ 93, 96.
 Farmers', etc. Nat. Bank v. Dearing, 91 U. S. 29. § 351.
 Farmer's Heirs v. Fletcher, 11 La. Ann. 142. § 314.
 Farmers' L. & T. Co. v. Oregon, etc. R. R. Co. 24 Fed. Rep. 407. §§ 98, 96.
 Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29. §§ 359, 360.
 Farmers' Turnpike v. Coventry, 10 John. 389. § 202.
 Farnsworth v. Lisbon, 62 Me. 451. § 67.
 Farnum v. Blackstone Canal Corp. 1 Sumn. 46. § 324.
 Farr v. Brackett, 30 Vt. 344. § 154.
 Farrar v. Bates, 55 Tex. 193. § 299.
 Farrell Foundry v. Dart, 26 Conn. 376. §§ 237, 238, 431.
 Farrington v. Rennie, 2 Cai. 220. § 371.
 Farris v. Houston, 78 Ala. 250. § 464.
 Favers v. Glass, 22 Ala. 621. § 248.
 Favorite v. Booher, 17 Ohio St. 548. §§ 368, 426.
 Fayette Co. v. Faires, 44 Tex. 514. §§ 138, 154.
 Featherstonh v. Compton, 8 La. Ann. 285. § 482.
 Feemster v. Ringo, 5 T. B. Mon. 336. § 306.
 Feibleman v. State, 98 Ind. 521. § 132.
 Feldman v. Morrison, 1 Ill. App. 460. § 325.
 Fell v. State, 42 Md. 71. §§ 72, 75.
 Fellowes v. Clay, 4 Q. B. 356. § 300.
 Fellows v. Walker, 39 Fed. Rep. 651. § 123.
 Felt v. Felt, 19 Wis. 193. §§ 158, 217, 325.
 Fenlon, Petition of, 7 Pa. St. 173. §§ 165, 464.
 Fenton v. Livingstone, 3 Macq. H. L. Cas. 497. § 12.
 v. State, 100 Ind. 598. § 303.
 Fenwick v. Schmalz, L. R. 3 C. P. 315. §§ 270, 276, 278.
 Ferguson, Ex parte, L. R. 6 Q. B. 291. § 404.
 Fergusson v. Norman, 5 Bing. N. C. 76. § 336.
 Fermoy Peerage Claim, 5 H. of L. Cas. 747. §§ 307, 312.

- Ferris v. Higley**, 20 Wall. 375. §§ 312, 395.
- Fertilizing Co. v. Hyde Park**, 97 U. S. 659. §§ 381, 473.
- Fessenden v. Hill**, 6 Mich. 242. §§ 207, 393, 401.
- Fidelity Ins. Co. v. Shenandoah V. R. R. Co.** 9 S. E. Rep. 759. § 102.
- Fidelity Trust Co. v. Gill Car Co.** 25 Fed. Rep. 737. § 396.
- Fidler v. Hershey**, 90 Pa. St. 363. § 440.
- Field v. Gooding**, 106 Mass. 810. § 210.
- Field's Heirs v. Goldsby**, 28 Ala. 218. § 315.
- Field v. People**, 2 Scam. 79. § 229.
- v. Silo**, 44 N. J. L. 355. § 127.
- Fifield v. Marinette Co.** 62 Wis. 532. § 452.
- Files v. Fuller**, 44 Ark. 273. §§ 136, 225.
- Finch v. Birmingham Canal Co.** 5 B. & C. 820. § 441.
- Finn v. Haynes**, 37 Mich. 63. § 206.
- Finney v. Ackerman**, 21 Wis. 268. § 206.
- Fire Department of Troy v. Bacon**, 2 Abb. App. 127. § 198.
- Firemen's Benefit Asso. v. Lounsbury**, 21 Ill. 511. § 96.
- First National Bank v. Yankton**, 101 U. S. 129. §§ 23, 24.
- First Nat. Bank of Whitehall v. Lamb**, 50 N. Y. 95. § 220.
- First School Dist. v. Ufford**, 52 Conn. 44. § 207.
- Fisher v. Bidwell**, 27 Conn. 363. § 400.
- v. Connard**, 100 Pa. St. 63. §§ 258, 259, 267.
- v. Harnden**, 1 Paine, 55. § 138.
- v. Horicon L. Co.** 10 Wis. 355. § 314.
- v. McGirr**, 1 Gray, 1. § 170.
- v. New York, etc. R. R. Co.** 46 N. Y. 614. § 166.
- Fishkill v. F. & B. Co.** 22 Barb. 634. §§ 78, 87, 88, 93, 170.
- Fishwick v. Sewell**, 4 H. & J. 399. § 425.
- Fisk v. Varnell**, 39 Tex. 73. § 390.
- Fitzgerald, Matter of**, 2 Cai. 318. § 400.
- Fitzgerald v. Champneys**, 30 L. J. (Ch.) 782; 2 Johns. & H. 81. § 157.
- v. Quan**, 109 N. Y. 441. § 139.
- Fitzpatrick v. Gebhart**, 7 Kan. 35. §§ 234, 237, 238.
- Flaherty v. Thomas**, 12 Allen, 428. § 142.
- Flanders v. Merrimack**, 48 Wis. 567. § 162.
- Flanagan v. Plainfield**, 44 N. J. L. 118. § 180.
- Flanigan v. Washington Ins. Co.** 7 Pa. St. 306. §§ 181, 190.
- Flaton v. State**, 56 Tex. 94. § 448.
- Fleischner v. Chadwick**, 5 Ore. 152. §§ 135, 169, 170.
- Fletcher v. Lord Sondes**, 3 Bing. 580. § 349.
- v. Peck**, 6 Cranch, 138. §§ 465, 472.
- v. State**, 54 Ind. 462. § 96.
- Flint v. Gawer**, 66 Iowa, 696. § 377.
- Flint, etc. Co. v. Woodhull**, 25 Mich. 99. §§ 3, 237, 330.
- Flint River Steamboat Co. v. Foster**, 5 Ga. 194. §§ 322, 366.
- Flory v. Wilson**, 83 Ind. 391. § 454.
- Flower v. Witkovsky**, 69 Mich. 371. §§ 373, 374.
- Floyd v. Johnson**, 2 Litt. 109. § 302.
- v. Perrin**, 30 S. C. 1. § 96.
- v. Ricks**, 14 Ark. 286. § 302.
- Flynn v. Abbott**, 16 Cal. 358. § 211.
- Fogg v. Holcomb**, 64 Iowa, 621. §§ 164, 298.
- Foley v. Bourg**, 10 La. Ann. 129. § 332.
- v. Fletcher**, 28 L. J. Ex. 106. § 348.
- Foliamb's Case**, 5 Coke, 116. § 341.
- Folkers v. Powers**, 42 Mich. 283. § 365.
- Folliott v. Ogden**, 1 H. Black. 135. § 12.

- Folmer's Appeal, 87 Pa. St. 133. § 221.
 Folsom, In re Petition of, 2 T. & C. 55. § 456.
 Foltz v. Hoge, 54 Cal. 28. § 402.
 Fontaine v. Houston, 58 Ind. 316. § 394.
 Foot v. Stevens, 17 Wend. 488. § 391.
 Foote v. Vanzandt, 34 Miss. 40. §§ 208, 350.
 Forbe v. Foot, 2 McCord, 331. § 424.
 Forbes v. Smith, 11 Ex. 161. §§ 424, 425.
 Ford, In re Petition of, 6 Lans. 92. § 456.
 Ford v. Booker, 53 Ind. 395. § 132.
 v. Farmer, 9 Humph. 152. § 183.
 v. Ford, 143 Mass. 577. § 261.
 v. Johnson, 34 Barb. 364. § 422.
 Fordyce v. Bridges, 1 H. of L. Cas. 1. §§ 235, 237.
 v. Godman, 20 Ohio St. 1. §§ 42, 253.
 Fore v. Williams, 35 Miss. 533. § 221.
 Fork Ridge Baptist Cemetery Asso. v. Redd, 10 S. E. Rep. 405. § 387.
 Forqueran v. Donnally, 7 W. Va. 114. §§ 138, 288.
 Forshey v. Railroad Co. 16 Tex. 516. §§ 401, 439.
 Forsyth v. Marbury, P. M. Charlt. 333. § 206.
 v. Warren, 62 Ill. 68. §§ 113, 114.
 Fort v. Burch, 6 Barb. 60. §§ 288, 321, 407.
 Fort Plain Bridge Co. v. Smith, 30 N. Y. 44. § 164.
 Fosdick v. Perrysburg, 14 Ohio St. 472. §§ 107, 157, 158, 256, 300.
 Fortune v. St. Louis, 23 Mo. 239. § 428.
 Foster's Case, 11 Rep. 586. §§ 217, 222, 325.
 Foster v. Blount, 18 Ala. 682. §§ 219, 268, 279, 280, 365.
 v. Collner, 107 Pa. St. 305. § 240.
 v. Commonwealth, 8 W. & S. 77. §§ 252, 260.
 v. Illinski, 3 Ill. App. 345. § 393.
 v. Neilson, 2 Pet. 253. § 197.
 Foster v. Oxford, etc. R. R. Co. 18 C. B. 200. § 336.
 v. Pritchard, 2 H. & N. 151. § 223.
 v. Rhoads, 19 John. 191. §§ 350, 390.
 v. Taylor, 2 Overt. 190. § 190.
 Fouke v. Fleming, 13 Md. 392. § 184.
 Fourth Nat. Bank v. Francklyn, 100 U. S. 747. § 293.
 Fowle v. Alexandria, 3 Pet. 398. § 365.
 v. Kirkland, 18 Pick. 209. § 167.
 Fowler v. Padget, 7 T. R. 509. §§ 252, 260, 355.
 v. Peirce, 2 Cal. 165. § 41.
 v. Pirkins, 77 Ill. 271. § 138.
 v. Scully, 72 Pa. St. 456. §§ 327, 336.
 v. Smith, 2 Cal. 39, 568. § 19.
 v. Stoneum, 11 Tex. 478. § 184.
 v. Tuttle, 24 N. H. 9. § 267.
 Fox's Appeal, 112 Pa. St. 337. § 363.
 Fox v. Allensville, 46 Ind. 31. § 114.
 v. New Orleans, 12 La. Ann. 154. § 207, 410.
 v. Sloo, 10 La. Ann. 11. §§ 207, 410.
 Fox, Town of, v. Kendall, Town of, 97 Ill. 72. §§ 75, 107.
 Francklyn v. Long Island City, 32 Hun, 451. § 483.
 Frank v. San Francisco, 21 Cal. 668. § 206.
 Franklin v. Franklin, 1 Md. Ch. 342. §§ 207, 410.
 v. Westfall, 27 Kan. 614. § 171.
 Franklin Glass Co. v. White, 14 Mass. 286. § 454.
 Fraser v. Willey, 2 Fla. 116. § 449.
 Frazer, Ex parte, 54 Cal. 94. § 169.
 Frazier v. Town of Tompkins, 30 Hun, 168. § 481.
 v. Warfield, 13 Md. 279. § 308.
 Frecking v. Rolland, 53 N. Y. 422. § 338.
 Fredericks v. Howie, 1 H. & C. 381. § 219.
 Free v. Burgoyne, 5 B. & C. 400. § 210.

- Freeholders v. Stevenson**, 46 N. J. L. 173. § 128.
- Freeman v. People**, 4 Denio, 9. § 200.
- Freestone, Ex parte**, 25 L. J. M. C. 121. § 262.
- Freight Tax Case**, 15 Wall. 232. § 171.
- Freme v. Clement**, 44 L. T. (N. S.) 399; L. R. 18 Ch. Div. 499. §§ 241, 246.
- Fremont v. United States**, 17 How. 542. §§ 181, 189.
- French v. Commonwealth**, 78 Pa. St. 339. § 473.
- v. Cowen**, 79 Me. 426. § 311.
- v. Teschemaker**, 24 Cal. 544. § 121.
- Freud v. Dennett**, 4 C. B. (N. S.) 576. § 456.
- Friedman v. Sullivan**, 48 Ark. 213. § 223.
- Friend v. Dunks**, 87 Mich. 25. § 373.
- Frink v. Pond**, 46 N. H. 125. § 333.
- Frohook v. Pattee**, 38 Me. 103. §§ 208, 360.
- Frost v. Cherry**, 122 Pa. St. 417. § 122.
- Frothingham v. March**, 1 Mass. 247. § 114.
- Fry v. Bennett**, 16 How. Pr. 402. § 369.
- v. Booth**, 19 Ohio St. 25. § 450.
- Frye v. Partridge**, 82 Ill. 267. § 129.
- Fryeburg Canal v. Frye**, 5 Me. 38. §§ 193, 202.
- Fuhrman v. Jones**, 68 Wis. 497. § 459.
- Fuller v. Rood**, 3 Hill, 258. § 207.
- Fullerton v. Bank of United States**, 1 Pet. 604. § 342.
- v. Spring**, 3 Wis. 667. §§ 133, 134.
- Fultz v. Fox**, 9 B. Mon. 499. § 463.
- Furman v. Nichol**, 3 Cold. 432. §§ 138, 154.
- v. Nichol**, 8 Wall. 44. § 138.
- Furnivall v. Coombes**, 5 M. & G. 736. § 221.
- Gabbert v. Jefferson R. R. Co.** 11 Ind. 365. §§ 88, 97.
- Gaines v. Coates**, 51 Miss. 335. § 378.
- Gaines v. Faris**, 39 Miss. 403. §§ 343, 452.
- v. Horrigan**, 4 Lea, 608. §§ 41, 43.
- Gale v. Laurie**, 5 B. & C. 156. § 364.
- v. Mead**, 4 Hill, 109. § 168.
- v. Mead**, 2 Denio, 160. § 449.
- Galena v. Amy**, 5 Wall. 705. § 188.
- Gallagher v. Neal**, 3 P. & W. 183. § 351.
- Gallatain v. Cunningham**, 8 Cow. 361. §§ 204, 339, 391.
- Gallaway v. Maries**, L. R. 8 Q. B. Div. 275. § 280.
- Gallia Co. v. Holcomb**, 7 Ohio, 232. § 380.
- Galpin v. Abbott**, 6 Mich. 17. §§ 207, 401, 456.
- Galusha v. Cobleigh**, 13 N. H. 79. § 424.
- Galveston v. Menard**, 23 Tex. 349. § 386.
- Galveston, etc. R'y Co. v. Dunlavy**, 56 Tex. 256. § 452.
- v. Gross**, 47 Tex. 428. §§ 331, 332.
- v. Kutac**, 37 Am. & Eng. R. R. Cas. 470; 72 Tex. 643. § 371.
- v. Le Gierse**, 51 Tex. 189. § 371.
- Galway Presentments, Ex parte**, 9 W. R. C. L. 114. § 158.
- Gamble v. Beattie**, 4 How. Pr. 41. § 133.
- Ganssby v. Perkins**, 30 Mich. 492. §§ 373, 374.
- Gantz v. Toles**, 40 Mich. 725. § 114.
- Garaty v. Du Bose**, 5 S. C. 493. § 422.
- Garby v. Harris**, 7 Ex. 591. § 242.
- Gardenhire v. McCombs**, 1 Sneed, 83. § 482.
- Gardner v. Cole**, 21 Iowa, 205. § 184.
- v. Collector**, 6 Wall. 499. §§ 41, 44, 54, 104, 110, 160, 182, 183, 294, 300.
- v. Collins**, 2 Pet. 93. §§ 191, 236.
- v. Eberhart**, 82 Ill. 316. § 298.
- v. Heyer**, 2 Paige, 11. § 371.
- v. Johnson**, 22 Ala. 494. § 111.
- v. Lewis**, 7 Gill, 377. §§ 12, 192.

- Gardner v. Lucas**, L. R. 3 App. Cas. 582. §§ 206, 482.
Garforth v. Fearon, 1 H. Bl. 327. § 429.
Gargrave v. Every, 1 Lutw. C. P. 260. § 424.
Garland, Ex parte, 4 Wall. 390. §§ 465, 467.
Garland v. Carlisle, 2 Cr. & M. 30. § 307.
 v. Hickey, 75 Wis. 178. § 167.
Garrigus v. Board of Com'rs, 69 Ind. 66. § 211.
Garrison v. Cheeney, 1 Wash. T'y, 489. § 482.
Garvey v. People, 6 Cal. 554. § 470.
Garvin v. State, 13 Lea, 162. §§ 87, 89, 92, 211.
 v. Wells, 8 Iowa, 286. § 296.
Gas Co. v. Parkersburg, 30 W. Va. 435. § 384.
 v. Wheeling, 8 W. Va. 320. § 215.
Gaskin v. Anderson, 55 Barb. 259. § 102.
 v. Meek, 42 N. Y. 186. §§ 80, 95, 198.
Gaston v. Merriam, 33 Minn. 271. §§ 155, 256.
 v. Stott, 5 Ore. 48. § 450.
Gates v. Johnson Co. 36 Tex. 144. § 298.
 v. McDaniel, 3 Port. 356. § 342.
 v. Salmon, 35 Cal. 576. §§ 215, 239, 240.
 v. Shugrue, 35 Minn. 392. § 138.
Gatty v. Fry, L. R. 2 Ex. Div. 265. § 324.
Gaul v. Brown, 53 Me. 496. §§ 163, 166.
Gauntlet, The, L. R. 3 Adm. 381. §§ 352, 404.
Gayles' Heirs v. Williams, 7 La. 162. §§ 138, 283.
Gearhart v. Dixon, 1 Pa. St. 224. § 333.
Geddes v. Brown, 5 Phila. 180. § 319.
Gedney v. Tewksbury, 3 Mass. 307. § 325.
Gee v. Thompson, 11 La. Ann. 657. § 220.
Geebrick v. State, 5 Iowa, 491. §§ 67, 72.
Geiger v. Brown, 4 McCord, 423. § 425.
Geisen v. Heiderich, 104 Ill. 537. § 146.
Gelpcke v. Dubuque, 1 Wall. 175. §§ 185, 186.
Genkinger v. Commonwealth, 32 Pa. St. 99. § 166.
Gentile v. State, 29 Ind. 409; 11 id. 224. §§ 108, 117, 345.
George v. Board of Education, 33 Ga. 344. §§ 254, 258.
Georgia v. Atkins, 1 Abb. (U. S.) 22. §§ 239, 247.
Gerry v. Stoneham, 1 Allen, 319. § 206.
Geter v. Commissioners, 1 Bay, 354. § 391.
Gholston v. Gholston, 54 Ga. 285. § 464.
Gibbons v. Brittenum, 56 Miss. 232. §§ 141, 145, 153, 154, 160, 215, 220.
 v. Ogden, 9 Wheat. 191. §§ 222, 223.
Gibbs v. Morgan, 39 N. J. Eq. 126. § 128.
Giblin v. Jordan, 6 Cal. 416. § 317.
Gibson v. Belcher, 1 Bush, 145. §§ 103, 170.
 v. Commonwealth, 87 Pa. St. 253. § 207.
 v. Hibbard, 13 Mich. 215. §§ 164, 474.
 v. Jenny, 15 Mass. 205. §§ 139, 290, 324.
 v. Marquis, 29 Ala. 668. § 400.
 v. Midland R'y Co. 15 Am. & Eng. R. R. Cas. 507. § 371.
 v. Preston, L. R. 5 Q. B. 219. § 202.
 v. State, 16 Fla. 291. §§ 101, 132.
 v. State, 38 Ga. 571. §§ 208, 351.
Giddings v. Cox, 31 Vt. 607. § 154.
Gifford v. New Jersey R. R. Co. 2 Stockt. 172. § 78.

- Gilbank v. Stephenson, 30 Wis. 157. § 154.
- Gilbert v. Columbia T. Co. 3 Johns. Cas. 107. § 440.
- v. Flint, etc. R. R. Co. 51 Mich. 488. § 301.
- v. Moline Water Power Co. 19 Iowa, 319. § 298.
- Gilfillan v. Hobart, 35 Minn. 185. § 462.
- Gilkey v. Cook, 60 Wis. 133. §§ 107, 332, 410.
- Gilleland v. Schuyler, 9 Kan. 569. §§ 136, 165, 225, 226.
- Gillespie v. White, 16 John. 117. §§ 111, 113.
- Gilliland v. Sellers, 2 Ohio St. 223. § 298.
- Gillitt v. McCarthy, 34 Minn. 318. §§ 92, 93.
- Gilman v. Philadelphia, 3 Wall. 713. § 197.
- Gilmer v. Lime Point, 19 Cal. 47. §§ 207, 387.
- Gilmore v. Shuter, 2 Lev. 227. § 463.
- "Gin" Webb v. Knight, 2 Q. B. Div. 530. § 254.
- Girard, etc. Co. v. Philadelphia, 88 Pa. St. 393. § 240.
- Girardeau v. Riley, 52 Mo. 424. § 63.
- Girdlestone v. Allan, 1 B. & C. 61. § 462.
- Girdner v. Stephens, 1 Heisk. 280. § 10.
- Gist v. Drakely, 2 Gill, 330. § 342.
- Gittings v. Crawford, Taney's Dec. 1. § 399.
- Given v. Simpson, 5 Me. 303. §§ 391, 395.
- Gladney v. Deavors, 11 Ga. 79. § 335.
- Glass v. State, 30 Ala. 529. § 256.
- Glassington v. Rawlins, 3 East, 407. § 112.
- Glenn v. Lopez, 1 Harper, 105. § 322.
- Glentz v. State, 38 Wis. 549. §§ 133, 134.
- Glidden v. Strupler, 52 Pa. St. 400. § 458.
- Glidewell v. Martin, 51 Ark. 559. § 330.
- Glover v. Alcott, 11 Mich. 470. §§ 290, 400.
- Goddard v. Boston, 20 Pick. 407. § 322.
- v. Gloninger, 5 Watts, 209. § 309.
- Goenen v. Schraeder, 8 Minn. 387. § 478.
- Gohen v. Texas Pac. R. R. Co. 2 Woods, 346. §§ 145, 202.
- Goillotel v. Mayor, etc. 87 N. Y. 441. § 133.
- Golden v. Prince, 3 Wash. 313. § 474.
- Golden Canal Co. v. Bright, 8 Colo. 144. §§ 93, 95.
- Goldsborough v. United States, Taney's Dec. 83. § 308.
- Goldsmid v. Hampton, 5 C. B. (N. S.) 94. § 212.
- Goldsmith v. Georgia R. R. Co. 62 Ga. 485. § 93.
- v. Rome R. R. Co. 62 Ga. 473. § 88.
- v. Sawyer, 46 Cal. 209. §§ 295, 296.
- Gonder v. Estabrook, 33 Pa. St. 374. § 424.
- Goode v. Webb, 52 Ala. 452. § 111.
- Goodell's Case, 39 Wis. 232. § 321.
- Goodell v. Jackson, 20 John. 706. § 337.
- Goodenow v. Buttrick, 7 Mass. 140. § 154.
- Gooding v. Morgan, 70 Ill. 275. § 181.
- Goodno v. Oshkosh, 31 Wis. 127. §§ 133, 137, 154, 162, 168.
- Goodon v. Tweedy, 74 Ala. 232. § 302.
- Goodrich v. Russell, 42 N. Y. 177. § 286.
- Goodsell v. Boynton, 2 Ill. 555. § 104.
- Goodwin v. Appleton, 22 Me. 453. §§ 298, 306.
- v. Morris, 9 Ore. 322. § 184.
- Gordon v. Cornes, 47 N. Y. 617. §§ 170, 177.
- v. Hobart, 2 Sumn. 401. § 185.
- v. Inghram, 1 Grant's Cas. 152. § 10.
- v. People, 44 Mich. 485. § 133.

- Gordon v. State, 4 Kan. 489. § 225.
 v. Wansey, 19 Cal. 82. § 454.
 v. Winchester Building Assn. 12 Bush, 110. § 456.
- Gordon's Ex'r v. Mayor, etc. 5 Gill, 281. § 364.
- Gore v. Brazier, 3 Mass. 523. § 324.
- Gorham v. Bishop of Exeter, 15 Q. B. 69. §§ 307, 312.
 v. Bishop of Exeter, Moore's Case of, 462. §§ 292, 300.
 v. Luckett, 6 B. Mon. 146. §§ 137, 141, 154, 204.
 v. Springfield, 21 Me. 58. §§ 107, 108, 193.
 v. Wing, 10 Mich. 486. §§ 111, 114.
- Gorman v. Hammond, 28 Ga. 85. §§ 142, 143.
 v. Pacific R. R. 26 Mo. 441. § 206.
- Gormley v. Clark, 134 U. S. 338. §§ 185, 187.
 v. Taylor, 44 Ga. 76. § 26.
- Gorton v. Champneys, 1 Bing. 301. §§ 360, 445.
- Goshen v. Stonington, 4 Conn. 225. §§ 169, 463.
- Goshorn v. Purcell, 11 Ohio St. 641. §§ 206, 483.
- Gosling v. Veley, 12 Q. B. 407. § 362.
- Goss v. Cahill, 42 Barb. 310. §§ 400, 442.
 v. Goss, 29 Ga. 109. § 341.
- Gossler v. Goodrich, 3 Cliff. 71. § 137.
- Gough v. Dorsey, 27 Wis. 119. §§ 229, 395.
 v. Pratt, 9 Md. 526. §§ 184, 229.
- Gould v. Wise, 18 Nev. 253. § 333.
- Gover's Case, L. R. 1 Ch. Div. 198. § 238.
- Governor v. Howard, 1 Murphy, 465. §§ 166, 225.
 v. McEwen, 5 Humph. 241. § 4.
 v. Porter, 5 Humph. 165. §§ 200, 201, 206, 229.
 v. Roby, 34 Ga. 176. § 334.
- Grace v. Donovan, 12 Minn. 580. §§ 167, 226.
- Graff v. Evans, L. R. 8 Q. B. Div. 377. § 350.
- Graffins v. Commonwealth, 3 Pen. & W. 502. § 333.
- Graham, Ex parte, 13 Rich. 277. §§ 164, 463.
- Graham v. Bradbury, 7 Mo. 281. § 393.
 v. Charlotte, etc. R. R. Co. 64 N. C. 631. § 260.
 v. Chicago, etc. R. R. Co. 53 Wis. 473. §§ 164, 166.
 v. Long, 65 Pa. St. 383. § 458.
 v. Van Wyck, 14 Barb. 531. §§ 290, 333.
- Grammar School v. Burt, 11 Vt. 632. § 473.
- Grand Rapids Electric Light, etc. Co. v. Grand Rapids, etc. Co. 33 Fed. Rep. 659. §§ 378, 384.
- Grand River B. Co. v. Jarvis, 30 Mich. 308. § 332.
- Grant v. Courter, 24 Barb. 242. § 75.
 v. Grant, 12 S. C. 29. § 165.
- Grant County v. Sels, 5 Ore. 243. § 138.
- Graves v. Keaton, 3 Cold. 8. §§ 181, 295.
 v. McWilliams, 1 Pin. 491. § 120.
 v. Otis, 2 Hill, 460. § 400.
- Gravett v. State, 74 Ga. 191. § 246.
- Gray v. Bennett, 3 Metc. 522. § 360.
 v. Gray, 34 Ga. 499. § 320.
 v. Hook, 4 N. Y. 449. § 336.
 v. La Fayette Co. 65 Wis. 567. § 364.
 v. Larrimore, 2 Abb. (U. S.) 542. § 394.
 v. Nations, 1 Ark. 557. § 400.
 v. Obear, 54 Ga. 231. § 168.
 v. Regina, 11 Cl. & Fin. 427. § 334.
- Great Central Gas. Cons. Co. v. Clarke, 13 Com. B. (N. S.) 838. § 159.
 v. Clarke, 11 C. B. (N. S.) 814. § 139.

- Great Western R'y Co. v. Swindon**,
L. R. 9 App. Cas. 808. §§ 267, 269.
- Greaton v. Griffin**, 4 Abb. Pr. (N. S.)
310. §§ 87, 88.
- Green's Estate**, 4 Md. Ch. 349. §§ 378,
398.
- Green v. Abraham**, 43 Ark. 420.
§§ 483, 484.
- v. Anderson**, 39 Miss. 359. §§ 463,
464, 481.
- v. Biddle**, 8 Wheat. 92. §§ 206,
471, 472, 474, 476.
- v. Cheek**, 5 Ind. 105. §§ 215, 237,
240.
- v. Commonwealth**, 12 Allen, 155.
§§ 283, 428.
- v. Dikeman**, 18 Barb. 535. § 464.
- v. Goodall**, 1 Cold. 404. § 295.
- v. Graves**, 1 Doug. 351. §§ 40,
322.
- v. Hudson R. R. Co.** 32 Barb.
25. § 371.
- v. Lord Penzance**, L. R. 6 App.
Cas. 675. § 399.
- v. Mayor, etc.** 2 Hilt. 203. § 343.
- v. Mayor, etc., R. M. Charlt.** 368.
§ 88.
- v. Neal**, 6 Pet. 291. §§ 187, 191,
314, 316.
- v. Rugely**, 23 Tex. 539. § 184.
- v. Shumway**, 39 N. Y. 418. § 470.
- v. State**, 59 Md. 123. §§ 218, 234,
239.
- v. United States**, 9 Wall. 655.
§ 333.
- v. Van Buskirk**, 7 Wall. 139.
§ 294.
- v. Weller**, 32 Miss. 704. §§ 28, 34,
183, 218, 219, 237, 247, 254,
294.
- v. Wood**, 7 Q. B. 178. §§ 252, 431.
- Greencastle Southern T. Co. v. State**,
28 Ind. 382. §§ 132, 314.
- Greencastle Township v. Black**, 5 Ind.
566. § 66.
- Greene, Ex parte**, 29 Ala. 52. § 390.
- Greene v. Briggs**, 1 Curtis, 311. § 5.
- Greenfield v. Dorris**, 1 Sneed, 550.
§ 478. d
- Greenhow v. James**, 80 Va. 636.
§ 407.
- Greenlaw v. Greenlaw**, 12 N. H. 200.
§ 482.
- Greenough v. Greenough**, 11 Pa. St.
489. §§ 6, 10, 201, 395, 480, 484.
- Greenville, etc. R. R. Co. v. Cathcart**,
4 Rich. 89. § 399.
- Greenwade v. Greenwade**, 3 Dana,
495. § 184.
- Greenwood v. Greenwood**, 28 Md.
370. § 291.
- Greer v. Rowley**, 1 Pittsburgh, 1.
§ 428.
- v. State**, 22 Tex. 588. §§ 144,
166.
- v. State**, 54 Miss. 378. § 40.
- Gregory's Case**, 6 Rep. 19b. §§ 217,
222.
- Gregory v. German Bank**, 3 Colo.
323. § 163.
- Greig v. Bendeno**, El. Bl. & El. 133.
§ 213.
- Greiner v. Klein**, 28 Mich. 17. § 256.
- Grenada Co. Supervisors v. Brogden**,
112 U. S. 261. §§ 321, 407.
- Grey v. Mobile Trade Co.** 55 Ala. 387.
§§ 164, 166.
- Grider v. Tally**, 77 Ala. 422. § 306.
- Griffin's Case**, Chase's Dec. 364.
§ 323.
- Griffin, In re**, 25 Tex. (Supl't) 623.
§ 331.
- Griffin v. Cunningham**, 20 Gratt. 31.
§§ 10, 119.
- v. Forrest**, 49 Mich. 309. § 111.
- v. Leslie**, 20 Md. 15. §§ 434, 437.
- v. State**, 39 Ala. 541. § 166.
- Griffing v. Gibb**, 2 Black, 519. § 185.
- Griffith v. Beasley**, 10 Yerg. 434.
§ 184.
- v. Carter**, 8 Kan. 565. § 283.
- v. Wells**, 3 Denio, 226. § 336.
- Grigsby v. Barr**, 14 Bush, 330. § 137.
- v. Peak**, 57 Tex. 142. § 10.
- Grinad v. State**, 34 Ga. 270. § 107.
- Griner, In re**, 16 Wis. 423. § 68.
- Griswold v. Pitcairn**, 2 Conn. 85.
§ 297.

- Grob v. Cushman, 45 Ill. 124. §§ 52, 183, 300.
- Grosch v. State, 42 Ind. 547. §§ 75, 124.
- Groff, Re, 21 Neb. 647. § 169.
- Grogan v. San Francisco, 18 Cal. 590. § 472.
- Grooms v. Hannon, 59 Ala. 510. §§ 350, 351, 358.
- Gross v. Fowler, 21 Cal. 392. §§ 247, 253.
- Grosvenor v. Magill, 37 Ill. 239. § 110.
- Grover v. Fox, 36 Mich. 453. § 390.
- v. Trustees, etc. 45 N. J. L. 399. §§ 84, 85, 87, 88.
- Grubbs v. State, 24 Ind. 295. §§ 78, 103, 316.
- Grumley v. Webb, 44 Mo. 444. §§ 275, 365.
- Guerard v. Polhill, R. M. Charlt. 237. § 325.
- Guidry v. Rees, 7 La. 278. § 463.
- Guild v. Chicago, 82 Ill. 472. § 72.
- v. Rogers, 8 Barb. 502. § 478.
- Guilford v. Cornell, 18 Barb. 615. § 473.
- v. Supervisors, 13 N. Y. 143. §§ 11, 473.
- Gulick v. Loder, 13 N. J. L. 68. § 479.
- Gulf, etc. R'y Co. v. Levy, 12 Am. & Eng. R. R. Cas. 90. § 371.
- Guillaume v. Miller, 14 Rich. 118. § 393.
- Gunn v. Barry, 15 Wall. 610. §§ 206, 477.
- Gunnestad v. Price, L. R. 10 Ex. 69. § 268.
- Gunnison Co. Com. v. Owen, 7 Colo. 467. § 169.
- Gunter v. Lecky, 30 Ala. 591. §§ 208, 200, 366.
- Gut v. State, 9 Wall. 35. §§ 185, 468.
- Guthrie v. Fisk, 3 B. & C. 182. §§ 410, 414.
- Gwinner v. Lehigh, etc. R. R. Co. 55 Pa. St. 126. § 145.
- Gwyn v. Hardwicke, 1 H. & N. 53. § 308.
- Gwynne v. Burnell, 6 Bing. N. C. 559. §§ 196, 238.
- v. Burnell, 7 Cl. & F. 696. §§ 430, 431.
- Gyger's Estate, 65 Pa. St. 311. §§ 232, 259, 267.
- Hackett v. Smelsley, 77 Ill. 109. §§ 374, 375.
- Hackley v. Sprague, 10 Wend. 114. § 464.
- Hadden v. Collector, 5 Wall. 110. §§ 196, 210, 211, 235, 407.
- Hadley v. Peabody, 13 Gray, 200. § 428.
- v. Perks, L. R. 1 Q. B. 457. §§ 256, 262.
- Haentze v. Howe, 23 Wis. 293. § 240.
- Hagerman v. Ohio Building, etc. Co. 25 Ohio St. 186. § 114.
- Hagerstown v. Sehner, 37 Md. 180. § 206.
- Hahn v. Salmon, 20 Fed. Rep. 801. § 360.
- v. United States, 107 U. S. 402. § 307.
- v. United States, 14 Ct. of Cl. 305. § 309.
- Haigh v. Corporation of Sheffield, L. R. 10 Q. B. 102. § 280.
- Haight v. Gay, 8 Cal. 297. § 397.
- v. Holley, 3 Wend. 258. § 334.
- Hakes v. Peck, 30 How. Pr. 104. § 333.
- Halbert v. Skyles, 1 A. K. Marsh. 369. § 193.
- Haldane v. Beauclerk, 3 Ex. 658. § 256.
- Halderman v. Young, 107 Pa. St. 324. § 322.
- Hale v. Angel, 20 John. 342. § 207.
- v. N. J. St. Nav. Co. 15 Conn. 539. §§ 190, 192.
- Hales v. Owen, 2 Salk. 625. § 115.
- Haley v. Petty, 42 Ark. 392. § 454.
- v. Philadelphia, 68 Pa. St. 45. § 206.
- v. Young, 134 Mass. 364. § 115.
- Hall, Ex parte, 1 Pick. 261. § 247.

- Hall v. Bray**, 51 Mo. 288. § 117.
v. Byrne, 1 Scam. 140. § 278.
v. Cassidy, 25 Miss. 48. §§ 111, 113.
v. Goodwyn, 4 McCord, 476. § 10.
v. Newcomb, 3 Hill, 233; 7 id. 416. § 316.
v. Pillow, 31 Ark. 32. § 184.
v. State, 20 Ohio, 7. §§ 208, 271, 350.
v. Wisconsin, 103 U. S. 5. § 472.
v. Woodson, 13 Mo. 462. § 184.
Halleman v. Halleman, 65 Ga. 476. § 93.
Hallett v. Novion, 14 John. 273. § 336.
Hallock v. Hollingshead, 49 N. J. L. 64. § 129.
Halloran v. T. etc. R. R. Co. 40 Tex. 465. § 480.
Ham v. Board of Police, 142 Mass. 90. § 333.
v. Ham, 39 Me. 263. § 298.
v. McClaws, 1 Bay, 92. § 322.
v. Sawyer, 38 Me. 37. § 308.
v. State, 7 Blackf. 314. § 136.
v. Steamboat Hamburg, 2 Iowa, 460. §§ 204, 327.
Hamilton v. Buxton, 6 Ark. 24. § 220.
v. McNeil, 13 Gratt. 394. § 307.
v. Smith, 3 Murphy, 115. § 427.
v. Steamer R. B. Hamilton, 16 Ohio St. 428. § 232.
Hamlet v. State, 5 Jones' L. 36. § 106.
Hamlyn v. Nesbit, 37 Ind. 284. § 138.
Hammer v. State, 44 N. J. L. 667. §§ 122, 127, 129.
Hammersmith, etc. R'y Co. v. Brand, L. R. 4 H. L. Cas. 171. § 233.
Hammock v. Loan & Trust Co. 105 U. S. 77. § 282.
Hammond v. American Ins. Co. 10 Gray, 306. § 115.
v. Haines, 25 Md. 541. § 75.
v. Lesseps, 31 La. Ann. 337. § 88.
v. Webb, 10 Mod. 281. § 400.
Hampton v. Commonwealth, 19 Pa. St. 329. §§ 11, 163, 165, 464.
Hanchett v. Weber, 17 Ill. App. 114. § 334.
Handley v. Cunningham, 12 Bush, 402. § 112.
Handy v. Hopkins, 59 Md. 157. § 342.
Haney v. State, 34 Ark. 263. §§ 238, 260.
Hankins v. People, 106 Ill. 628. §§ 231, 325, 356.
Hanley v. Donoghue, 116 U. S. 1. §§ 185, 293, 294.
Hanlon v. Board of Commissioners, 53 Ind. 123. §§ 124, 127.
Hannmann v. Mink, 99 Ind. 279. § 299.
Hannibal, etc. R. R. Co. v. Packet Co. 125 U. S. 260. § 378.
Hannum v. Bank of Tennessee, 1 Cold. 398. § 206.
v. Tourtellott, 10 Allen, 494. § 115.
Hanrick v. Andrews, 9 Port. 9. §§ 190, 191.
Hanson v. Dunn, 76 Wis. 455. § 459.
Happel v. Brethauer, 70 Ill. 166. §§ 43, 45, 183.
Harbeck v. Mayor, 10 Bosw. 366. § 137.
Harbord v. Perigal, 5 T. R. 210. § 115.
Hardeman v. Downer, 39 Ga. 425. § 476.
Hardenburgh v. Lakin, 47 N. Y. 109. § 483.
Harding v. Bader, 75 Mich. 316. § 365.
v. Strong, 42 Ill. 148. § 295.
Hardmann v. Bowen, 39 N. Y. 196. § 459.
Hardy, Ex parte, 68 Ala. 303. § 311.
Hardy v. Bern, 5 T. R. 636. § 462.
v. Heard, 15 Ark. 184. § 453.
v. Ryle, 9 Barn. & Cr. 603. § 112.
Hare v. Hare, 10 Tex. 355. § 482.
Harford v. United States, 8 Cranch, 109. § 138.
Hargrave v. Weber, 66 Mich. 59. § 88.
Harker v. Addis, 4 Pa. St. 515. § 115.
v. Harker, 3 Har. 57. § 400.
Harlan v. Sigler, Morris, 39. § 169.
v. State, 41 Miss. 566. § 20.

- Harold v. State**, 16 Tex. App. 157. § 154.
- Harpending v. Dutch Church**, 16 Pet. 493. §§ 185, 186.
- v. Haight**, 39 Cal. 189. § 330.
- Harrell v. Harrell**, 8 Fla. 46. §§ 133, 215, 288.
- Harriet, The Schooner**, 1 Story, 251. §§ 349, 350, 356.
- Harrington v. Du Chatel**, 1 Bro. C. C. 124. § 429.
- v. Harrington's Estate**, 53 Vt. 649. § 160.
- v. People**, 6 Barb. 607. § 454.
- v. Rochester**, 10 Wend. 547. §§ 137, 160, 220.
- v. Smith**, 28 Wis. 43. §§ 229, 256.
- v. Wands**, 23 Mich. 385. § 135.
- Harris v. Allnutt**, 12 La. 465. § 184.
- v. Gest**, 4 Ohio St. 469. § 454.
- v. Glenn**, 56 Ga. 94. § 206.
- v. Jenns**, 9 C. B. (N. S.) 152. § 152.
- v. People**, 59 N. Y. 602. §§ 78, 84, 88, 94.
- v. Runnells**, 12 How. 79. § 336.
- v. Rutledge**, 19 Iowa, 388. § 164.
- v. Saunders**, 4 B. & C. 411. § 426.
- v. Supervisors**, 33 Hun, 279. §§ 168, 170.
- v. Townshend**, 56 Vt. 716. §§ 164, 166, 167, 225.
- v. Vanderveer**, 21 N. J. Eq. 424. § 397.
- v. White**, 81 N. Y. 532. § 190.
- Harrisburg v. Sheck**, 104 Pa. St. 53. § 157.
- Harrison, Ex parte**, 4 Cow. 63. §§ 215, 239, 241.
- Harrison v. Allen, Wythe (Va.)**, 291. § 166.
- v. Gordy**, 57 Ala. 49. §§ 46, 47.
- v. Harrison**, 39 Ala. 489. § 426.
- v. Harrison**, 20 Ala. 629. § 12.
- v. James**, 2 Chitty, 547. § 420.
- v. Leach**, 4 W. Va. 383. §§ 207, 367.
- v. Sayer**, 28 Mich. 32. § 256.
- Harrison v. Sayer**, 27 Mich. 476. § 115.
- v. Walker**, 1 Ga. 32. §§ 138, 168, 288.
- v. Willis**, 7 Heisk. 35. § 307.
- v. Young**, 9 Ga. 359. §§ 333, 378, 379, 386.
- Hart v. Bodley, Hardin**, 98. § 298.
- v. Kennedy**, 14 Abb. Pr. 432; 15 id. 290. §§ 259, 267.
- v. Reynolds**, 3 Cow. 42, note. § 451.
- v. Reynolds**, 1 Heisk. 208. § 229.
- v. State**, 40 Ala. 32, 206. § 468.
- v. State**, 55 Ind. 591. §§ 298, 306.
- v. Walker**, 31 Mo. 26. §§ 111, 113.
- Hartford Bridge Co. v. Union Ferry Co.** 29 Conn. 210. §§ 331, 380.
- Hartford, etc. R. R. Co., Re**, 65 How. Pr. 133. § 387.
- Hartford Fire Ins. Co. v. Owen**, 30 Mich. 441. § 394.
- v. Raymond**, 70 Mich. 485. § 95.
- Hartley v. Hooker**, 2 Cowp. 523. § 396.
- Hartman v. Greenhow**, 102 U. S. 672. § 472.
- Hartung v. People**, 22 N. Y. 95. §§ 164, 166.
- v. People**, 26 N. Y. 167. §§ 467, 470.
- Harvey v. Tyler**, 2 Wall. 328. § 206.
- Harwell v. Steel**, 17 Ala. 372. § 427.
- Hasbrouck v. Shipman**, 16 Wis. 296. § 478.
- Hascall v. Madison University**, 8 Barb. 174. § 456.
- Haseltine v. Hewitt**, 61 Wis. 121. § 322.
- Haskel v. Burlington**, 30 Iowa, 232. § 125.
- Hasketh v. Lee**, 2 Saund. 84. § 194.
- Hassenplug's Appeal**, 106 Pa. St. 527. §§ 207, 437.
- Hastings v. Aiken**, 1 Gray, 163. § 168.
- Hathaway v. Johnson**, 55 N. Y. 93. § 208.
- Hatch v. Burrows**, 1 Woods, 439. § 20.
- Hatchett v. Billingslea**, 65 Ala. 16. § 154.

- Hatfield v. Commonwealth**, 120 Pa. St. 395. § 102.
- Hatton v. Wier**, 19 Ala. 127. § 400.
- Haven v. Foster**, 9 Pick. 112. § 426.
- Hawes v. Clement**, 64 Wis. 152. § 393.
- Hawkins v. Barney's Lessee**, 5 Pet. 457. § 472.
- v. Filkins**, 24 Ark. 286. § 20.
- v. Gathercole**, 6 De G. M. & G. 1. § 292.
- v. Great W. R'y Co.** 17 Mich. 57. §§ 271, 373.
- Hawthorne v. Calef**, 2 Wall. 10. § 474.
- Hay v. Lord Provost of Perth**, 4 Macq. Sc. App. 544. § 414.
- Hayburn's Case**, 2 Dall. 409. § 10.
- Hayden's Case**, 3 Rep. 7. § 418.
- Hayes v. Hanson**, 13 N. H. 284. §§ 283, 288.
- v. Phelan**, 4 Hun. 733. § 371.
- v. State**, 55 Ind. 99. § 143.
- Haynie v. State**, 32 Miss. 400. § 350.
- Hays v. Hays**, 5 Rich. 31. § 400.
- v. Hunt**, 85 N. C. 303. § 390.
- v. Miller**, 1 Wash. T'y, 143. § 401.
- v. Richardson**, 1 Gill & J. 366. § 284.
- Hayward v. Gunn**, 82 Ill. 385. § 146.
- v. Pilgrim Society**, 21 Pick. 270. § 385.
- Haywood v. Mayor**, 12 Ga. 404. § 157.
- Hazelton v. Valentine**, 113 Mass. 472. § 190.
- Hazen v. Union Bank**, 1 Sneed, 115. § 124.
- Head v. Providence Ins. Co.** 2 Cr. 127. §§ 381, 454.
- v. Ward**, 1 J. J. Marsh. 280. § 206.
- Heald v. State**, 36 Me. 62. § 166.
- Healey v. Dudley**, 5 Lans. 115. §§ 120, 129, 198.
- Heanley v. State**, 74 Ind. 99. § 124.
- Heard v. Baskerville**, Hob. 232. § 210.
- v. Heard**, 8 Ga. 380. § 104.
- Hearn v. Brogan**, 64 Miss. 334. § 138.
- v. Ewin**, 3 Cold. 399. §§ 207, 290, 393.
- Hearne v. Garton**, 2 E. & E. 66. §§ 355, 429.
- Heath, Ex parte**, 3 Hill. 42. §§ 202, 448, 450.
- Heath v. Kent Circuit Judge**, 37 Mich. 372. § 397.
- Hebbert v. Purchas**, L. R. 3 P. C. 650. §§ 137, 300.
- Heckmann v. Pinkney**, 81 N. Y. 211. §§ 154, 156.
- Hedger v. Rennaker**, 3 Met. (Ky.) 255. §§ 107, 464.
- Hedley, Ex parte**, 31 Cal. 108. § 260.
- Hedworth v. Primate**, Hard. 318. § 300.
- Hegarty's Appeal**, 75 Pa. St. 503. § 484.
- Heirn v. Bridault**, 37 Miss. 209. § 188.
- Heiskell v. Mayor, etc.** 65 Md. 125. § 290.
- Helm v. Chapman**, 66 Cal. 291. § 240.
- Hemphill v. Bank of Ala.** 6 S. & M. 44. § 190.
- Hemstrat v. Wassum**, 49 Cal. 273. § 138.
- Henderson's Distilled Spirits**, 14 Wall. 44. § 361.
- Henderson v. Alexander**, 2 Ga. 81. § 411.
- v. Bisc**, 3 Starkie, 158. § 212.
- v. Griffin**, 5 Pet. 151. § 187.
- v. Maxwell**, L. R. 5 Ch. Div. 892. § 458.
- v. Sherborne**, 2 M. & W. 236. §§ 143, 358.
- Hendrickson v. Fries**, 45 N. J. L. 555. § 429.
- v. Hendrickson**, 7 Ind. 13. § 109.
- Hendrix v. Rieman**, 6 Neb. 516. §§ 283, 284.
- Henger v. Abbott**, 6 Wall. 532. § 136.
- Hennepin County v. Jones**, 18 Minn. 199. § 119.
- Henry v. Adey**, 3 East, 221. § 190.
- v. Chester**, 15 Vt. 460. §§ 362, 365.
- v. Davis**, 13 W. Va. 230. § 452.
- v. Sargeant**, 13 N. H. 321. § 12.
- v. Tilson**, 17 Vt. 479. §§ 218, 288.
- Henschall v. Schmidt**, 50 Mo. 454. §§ 206, 482.

- Hensley v. Tarpey**, 8 Cal. 288. § 296.
Henthorn v. Doe, 1 Blackf. 157.
 §§ 295, 298.
Hepburn v. Griswold, 8 Wall. 603.
 § 206.
Herber v. State, 7 Tex. 69. § 470.
Herbert, Succession of, 5 La. Ann.
 121. § 138.
Herbert v. Easton, 43 Ala. 547. § 164.
Heridia v. Ayers, 12 Pick. 344. §§ 193,
 198.
Hering v. Chambers, 103 Pa. St. 172.
 § 315.
Hernance, In re, 71 N. Y. 481. §§ 219,
 274.
Herold v. State, 21 Neb. 50. §§ 231,
 402.
Herr v. Seymour, 76 Ala. 270. § 138.
Herrick v. Minneapolis, etc. R. R. Co.
 31 Minn. 11. § 14.
Herron v. Carson, 26 W. Va. 62.
 §§ 140, 156.
Herschfeld v. Clarke, 11 Ex. 712.
 § 420.
 v. Dixel, 12 Ga. 582. § 190.
Hershoff v. Treasurer, 45 N. J. L. 288.
 § 210.
Hershy v. Latham, 42 Ark. 305. § 146.
Hersom's Case, 39 Me. 476. § 333.
Hess v. Johnson, 3 W. Va. 645. § 206.
 v. Pegg, 7 Nev. 23. §§ 117, 256.
Hester v. Keith, 1 Ala. (N. S.) 316.
 §§ 452, 453.
Heward v. State, 13 Sm. & M. 261.
 §§ 227, 349.
Hewes v. Reis, 40 Cal. 255. § 365.
Hewey v. Nourse, 54 Me. 256. § 200.
Heydon's Case, 3 Rep. 7b. §§ 162,
 207, 300.
Hibernia R. R. Co. v. De Camp, 47
 N. J. L. 43. § 387.
Hickman v. Alpaugh, 21 Cal. 225.
 § 184.
 v. Gaither, 2 Yerg. 200. § 316.
Hickok v. Hine, 23 Ohio St. 523.
 § 388.
Hickory Tree Road, In re, 43 Pa. St.
 139. §§ 138, 164, 217.
Hicks v. Bell, 3 Cal. 219. § 397.
Hicks v. Jamison, 10 Mo. App. 35.
 §§ 260, 261.
Higginbotham v. State, 19 Fla. 557.
 § 166.
Higgins v. State, 64 Md. 419. §§ 138,
 152.
Hightstown v. Glenn, 47 N. J. L. 105.
 § 128.
Hightower v. Wells, 6 Yerg. 249.
 § 168.
Higler v. People, 44 Mich. 299. § 271.
Higley v. Gilmer, 3 Mont. 433. § 112.
Hilm v. Curtis, 31 Cal. 402. § 214.
Hildreth v. Crawford, 65 Iowa, 339.
 § 68.
 v. Gwindon, 10 Cal. 490. § 454.
Hilke v. Eisenbeis, 104 Pa. St. 514.
 § 264.
Hill, Ex parte, 3 C. & P. 225. § 268.
Hill, Ex parte, 6 Ch. Div. 63. § 240.
Hill, Ex parte, 40 Ala. 121. § 75.
Hill v. Bacon, 43 Ill. 477. § 298.
 v. Berry, 75 N. Y. 229. § 373.
 v. Grange, 1 Plowd. 178. § 413.
 v. Grigsby, 32 Cal. 55. § 184.
 v. Kessler, 63 N. C. 437. § 476.
 v. Mitchell, 5 Ark. 608. § 300.
 v. Nye, 17 Hun. 467. § 463.
 v. Pressley, 96 Ind. 447. § 114.
 v. Smith, Morris, 70. § 137.
 v. Sunderland, 3 Vt. 507. § 169.
Hillhouse v. Chester, 3 Day, 166.
 § 253.
Hillyard v. Miller, 10 Pa. St. 326.
 § 145.
Hinde v. Vattier, 5 Pet. 398. § 293.
Hindmarsh v. Charlton, 8 H. of L.
 Cas. 166. § 236.
Hine v. Pomeroy, 39 Vt. 211. § 167.
Hines v. Freeholders, etc. 45 N. J. L.
 504. § 127.
 v. R. R. Co. 95 N. C. 434. §§ 210,
 211.
Hingle v. State, 24 Ind. 28. § 120.
Hintermister v. First Nat. Bank, 64
 N. Y. 212. § 349.
Hinze v. People, 92 Ill. 406. §§ 170,
 173, 176, 180.
Hirn v. State, 1 Ohio St. 15. § 473.

- Hirschburg v. People, 6 Colo. 145. §§ 137, 138, 142, 167.
- Hirst v. Molesbury, L. R. 6 Q. B. 130. § 351.
- Hiss v. Baltimore, etc. R. R. Co. 52 Md. 242. § 171.
- Hitchner v. Ehlers, 44 Iowa, 40. § 377.
- Hoa v. Lefranc, 18 La. Ann. 393. § 206.
- Hoagland v. Sacramento, 52 Cal. 142. § 206.
- Hoare v. Silverlock, 12 Q. B. 624. § 304.
- Hobart v. Supervisors, 17 Cal. 23. §§ 71, 75.
- Hobbs v. Memphis, etc. R. R. Co. 9 Heisk. 879. § 294.
- Hockaday v. Wilson, 1 Head, 113. § 138.
- Hodges v. Baltimore Pass. R'y Co. 58 Md. 603. §§ 129, 130. v. Buffalo, 2 Denio, 110. § 380.
- Hodsden v. Harridge, 2 Williams' Saund. 64a. § 424.
- Hoetzel v. East Orange, 50 N. J. L. 354. § 159.
- Hoffman v. Delihanty, 13 Abb. Pr. 388. § 256. v. Duel, 5 John. 232. §§ 111, 113. v. Dunlop, 1 Barb. 185. § 207. v. Parsons, 27 Minn. 236. § 101. v. Peters, 51 N. J. L. 244. § 222.
- Hogan v. Cushing, 49 Wis. 169. § 398. v. Devlin, 2 Daly, 184. § 462. v. State, 36 Wis. 226. § 405.
- Hoguet v. Wallace, 28 N. J. L. 526. §§ 413, 434, 435, 437.
- Holbrook v. Bliss, 9 Allen, 69. § 322.
- Holbrook v. Holbrook, 1 Pick. 248. §§ 212, 213, 215, 241, 246, 288, 322. v. Nichol, 36 Ill. 161. § 133.
- Holcomb v. Davis, 56 Ill. 413. § 75.
- Holden v. James, 11 Mass. 396. §§ 119, 169.
- Holding, Ex parte, 56 Ala. 458. § 451.
- Holl v. Deshler, 71 Pa. St. 299. §§ 215, 219.
- Holland v. Davies, 36 Ark. 446. § 450. v. Mayor, 11 Md. 186. § 365. v. Osgood, 8 Vt. 280. § 451. v. State, 34 Ga. 455. § 349.
- Hollenback v. Fleming, 6 Hill, 303. §§ 207, 390.
- Holley v. Holley, Lit. Sel. Cas. 506. § 184.
- Hollingsworth v. Virginia, 3 Dall. 378. § 165.
- Hollingworth v. Palmer, 4 Ex. 267. § 246.
- Hollis v. Francois, 1 Tex. 118. § 111.
- Hollister Bank, Matter of, 27 N. Y. 383. § 371.
- Hollister v. Hollister Bank, 2 Keyes, 245. §§ 371, 398, 399.
- Hollman v. Bennett, 44 Miss. 322. §§ 207, 290, 291, 401.
- Holman's Appeal, 106 Pa. St. 502. §§ 264, 301.
- Holman's Heirs v. Bank of Norfolk, 12 Ala. 369. § 194.
- Holman v. Johnson, 1 Cowp. 343. § 12. v. King, 7 Met. 384. § 192.
- Holmes v. Broughton, 10 Wend. 75. §§ 184, 190. v. Carley, 31 N. Y. 290. § 437. v. French, 68 Me. 525. § 165. v. Harrington, 20 Mo. App. 661. § 296. v. Hunt, 122 Mass. 505. § 307. v. Jennison, 14 Pet. 540. § 254. v. Paris, 75 Me. 559. §§ 243, 246, 429.
- Holt v. Agnew, 67 Ala. 360. § 289. v. Green, 73 Pa. St. 198. § 335.
- Holyland v. Lewin, L. R. 26 Ch. Div. 266. § 246.
- Holyoke Co. v. Lyman, 15 Wall. 500. § 378.
- Homan v. Liswell, 6 Cow. 659. § 111.
- Home Ins. Co. v. Swigert, 104 Ill. 653. § 74. v. Taxing District, 4 Lea, 644. §§ 135, 138, 162.

- Home Ins. Co. v. United States, 8 Ct. of Cl. 449. § 20.
 Homer v. Commonwealth, 106 Pa. St. 221. §§ 137, 143.
 Homestead Cases, 22 Gratt. 266. § 477.
 Homestead Cases, 31 Tex. 677. § 422.
 Honey v. Clark, 37 Tex. 686. § 483.
 Hook v. Gray, 6 Barb. 398. § 336.
 Hooker v. Hooker, 10 Sm. & M. 599. § 480.
 Hooper v. Mayor, etc. 12 Md. 464. § 290.
 Hope v. Deaderick, 8 Humph. 1. § 8.
 v. Gainesville, 72 Ga. 246. § 96.
 v. Johnson, 2 Yerg. 123. § 10.
 Hopkins v. Haywood, 13 Wend. 265. § 239.
 v. Jones, 22 Ind. 310. § 206.
 v. Sandiége, 31 Miss. 668. § 400.
 Hopt v. Utah, 110 U. S. 574. §§ 466, 468.
 Horn v. Lockhart, 17 Wall. 570. § 20.
 Hornbuckle v. Toombs, 18 Wall. 648. § 397.
 Horne v. Railroad Co. 1 Cold. 72. § 322.
 Horner v. State, 1 Oregon, 281. § 353.
 Horton v. Sledge, 29 Ala. 478. § 184.
 Hoskinson v. Adkins, 77 Mo. 537. § 458.
 Hotham v. Sutton, 15 Ves. 320. §§ 246, 276, 279.
 Hough v. Windus, L. R. 12 Q. B. Div. 229. § 240.
 Houghtaling v. Ball, 19 Mo. 85. §§ 184, 297.
 Houghton, Appeal of, 42 Cal. 35. § 395.
 Houghton County v. Auditor-Gen. 41 Mich. 283. § 365.
 v. Commissioners of St. L. O. 23 Mich. 270. § 136.
 Houk v. Barthold, 73 Ind. 21. §§ 416, 440.
 Housatonic R. R. Co. v. Lee & H. R. R. Co. 118 Mass. 391. § 388.
 House Ave., Matter of Opening, 67 Barb. 350. § 399.
 House v. House, 5 Har. & J. 125. § 350.
 v. State, 41 Miss. 737. § 138.
 Householder v. Granby, 40 Ohio St. 430. § 452.
 Houston v. Boyle, 10 Ired. 496. § 206.
 v. Moore, 5 Wheat. 1. § 68.
 Houston, etc. R'y Co. v. Bradley, 45 Tex. 171. § 371.
 v. Ford, 53 Tex. 364. §§ 151, 153.
 v. Odum, 53 Tex. 343. §§ 41, 51.
 Howard v. Bodington, L. R. 2 P. Div. 203. § 447.
 v. Central Bank, 3 Ga. 390. § 411.
 v. Ives, 1 Hill, 263. § 115.
 v. Mansfield, 30 Wis. 75. § 240.
 v. Moot, 64 N. Y. 262. § 478.
 v. State, 5 Ind. 183. § 166.
 v. Williams, 2 Pick. 80. § 372.
 Howard Association's Appeal, 70 Pa. St. 344. §§ 152, 238, 332, 333.
 Howard Co., Division of, 15 Kan. 104. § 300.
 Howe v. Peckham, 6 How. Pr. 229. § 289.
 Howell v. Hair, 15 Ala. 194. §§ 368, 426.
 v. State, 71 Ga. 224. §§ 88, 96, 307.
 v. Stewart, 54 Mo. 400. §§ 325, 336.
 Howes, Matter of, 21 Vt. 619. § 110.
 Howey v. Miller, 67 N. C. 459. § 290.
 Howland v. Luce, 16 John. 135. § 448.
 Howland Coal & Iron W. v. Brown, 13 Bush, 685. §§ 85, 87, 92, 93.
 Hoyt v. Commissioners of Taxes, 23 N. Y. 224. § 236.
 v. McNeil, 13 Minn. 390. § 297.
 Hubbard v. Johnstone, 3 Taunt. 177. § 361.
 v. State, 2 Tex. App. 506. § 166.
 Hubbell v. Denison, 20 Wend. 181. § 207.
 v. Weldon, Lator, 139. § 454.
 Huber v. People, 49 N. Y. 132. §§ 80, 95.

- Huber v. Steiner**, 2 Bing. N. C. 202. § 479.
- Hudler v. Golden**, 36 N. Y. 446. §§ 207, 441.
- Huddleston v. Askey**, 56 Ala. 218. §§ 255, 256.
- Hudson v. Buck**, 51 N. J. L. 155. § 128.
v. Jefferson Co. Ct. 28 Ark. 359. § 454.
v. Tooth, L. R. 3 Q. B. Div. 46. § 300.
- Hudson Co. Freeholders v. Freeholders**, 49 N. J. L. 228. § 129.
- Hudspeth v. Davis**, 41 Ala. 389. § 478.
- Hudston v. Midland R. Co.**, L. R. 4 Q. B. 366. § 256.
- Huecke v. Milwaukee City R'y Co.** 69 Wis. 401. § 449.
- Huensteine v. Lynham**, 28 Gratt. 62. § 480.
- Huffman v. State**, 30 Ala. 532. § 320.
v. State, 29 Ala. 40. § 349.
- Hugg v. Camden**, 39 N. J. L. 620. § 448.
- Huggins v. Bambridge, Willes**, 241. § 333.
v. Kavanagh, 53 Iowa, 368. § 377.
- Hughes v. Cannon**, 2 Humph. 589. § 483.
v. Chester, etc. R'y Co. 1 Drew. & Sm. 524. § 213.
v. Chester, etc. R'y Co. 8 Jur. (N. S.) 221. § 370.
v. Farrar, 45 Me. 72. § 256.
v. Felton, 11 Colo. 489. § 395.
v. Griffiths, 106 Eng. C. L. 332. § 115.
- Hull v. Hull**, 2 Strob. Eq. 174. § 431.
v. Miller, 4 Neb. 503. §§ 47, 49, 50, 51.
- Humboldt Co. v. Churchill Co.** 6 Nev. 30. § 330.
- Humboldt Co. v. County Com'rs**, 6 Nev. 30. § 101.
- Humes v. Missouri, etc. R'y Co.** 82 Mo. 221. § 125.
- Humphrey v. Chamberlain**, 11 N. Y. 274. §§ 207, 394.
- Humphreys v. Green**, L. R. 10 Q. B. Div. 148. § 427.
- Humphreyville Cop. Co. v. Sterling**, 1 Brun. Col. Cas. 3. § 191.
- Hunt v. Grant**, 19 Wend. 90. § 451.
v. Jennings, 5 Blackf. 195. §§ 162, 464.
v. Murray, 17 Iowa, 313. § 109.
- Hunter v. Glenn**, 1 Bailey, 542. § 424.
v. Nockolds, 1 McN. & Gord. 651. § 210.
- Huntington v. Brinkerhoff**, 10 Wend. 278. § 424.
v. Forkson, 6 Hill, 149. § 207.
- Huntingtower v. Gardiner**, 1 B. & C. 297. § 355.
- Huntzinger v. Brock**, 3 Grant's Cas. 243. § 476.
- Hurford v. Omaha**, 4 Neb. 336. §§ 139, 203, 455.
- Hurlburt v. Merriam**, 3 Mich. 144. § 40.
- Hurley v. Town of Texas**, 20 Wis. 634. §§ 156, 161.
- Hurst v. Hawn**, 5 Oregon, 275. § 138.
- Hurth v. Bower**, 30 Hun, 151. § 396.
- Huth v. Ins. Co.** 8 Bosw. 538. § 184.
- Hyatt v. Taylor**, 42 N. Y. 258. § 238.
- Hyde v. Cogan**, 2 Doug. 699. §§ 360, 416.
v. Hyde, L. R. 1 P. & D. 134. § 247.
v. Wabash, etc. R. R. Co. 61 Iowa, 441. § 13.
v. White, 24 Tex. 137. § 39.
- Hyde Park v. Cemetery Asso.** 119 Ill. 141. § 158.
v. Chicago, 124 Ill. 156. § 101.
- Hydrick v. Burke**, 30 Ark. 124. § 184.
- Hyman v. State**, 87 Tenn. 109. § 101.
- Iana, The**, L. R. 1 P. C. 426. § 364.
- Ihmsen v. Monongahela Nav. Co.** 32 Pa. St. 152. §§ 222, 223.
- Iles v. West Ham Union**, L. R. 8 Q. B. Div. 69. § 362.
- Illinois, etc. Canal v. Chicago**, 14 Ill. 334. §§ 165, 464.

- Illinois Cent. R. R. Co. v. Chicago, etc. R. R. Co. 122 Ill. 473. §§ 387, 388.
 v. Wren, 43 Ill. 77. § 52.
 Illinois, etc. R. R. Co. v. Gay, 5 Ill. App. 393. § 454.
 Independent School District v. Burlington, 60 Iowa, 500. § 130.
 India, The, 33 L. J. Rep. P. M. & A. 193; Br. & L. 221. §§ 137, 146.
 Indiana Central R'y v. Potts, 7 Ind. 681. §§ 86, 88.
 Indiana, etc. R'y Co. v. Attica, 56 Ind. 476. § 390.
 Indianapolis v. Huegele, 115 Ind. 581. § 92.
 v. Imberry, 17 Ind. 175. § 206.
 Indianapolis, etc. R. R. Co. v. Case, 15 Ind. 42. § 298.
 v. Kercheval, 16 Ind. 84. § 473.
 v. Stephens, 28 Ind. 429. § 298.
 Industrial School District v. Whitehead, 13 N. J. Eq. 290. §§ 154, 204.
 Industry, The, 1 Gall. 114. §§ 143, 349.
 Inge v. Murphy, 10 Ala. 885. §§ 191, 192.
 Inglis v. Haigh, 8 M. & W. 769. § 426.
 v. Trustees, etc. 3 Pet. 99. § 187.
 Ingraham v. Hart, 11 Ohio, 255. §§ 190, 192.
 v. Regan, 23 Miss. 213. § 256.
 v. Speed, 30 Miss. 140. § 240.
 Ingram's Case, Coke Litt. 234a. § 429.
 Ingram v. State, 27 Ala. 17. § 298.
 Inhabitants of Charlestown v. County Com'rs, 3 Met. 203. § 386.
 Inkster v. Carver, 16 Mich. 484. §§ 92, 331.
 Innis v. Templeton, 95 Pa. St. 262. § 458.
 Insurance Co. v. Stokes, 9 Phila. 80. § 210.
 International Patent P. etc. Co., In re, 37 L. T. (N. S.) 351. § 350.
 Intoxicating Liquor Cases, 25 Kan. 751. § 326.
 Iowa Land Co. v. Soper, 39 Iowa, 112. § 125.
 Ireland v. Palestine, etc. T. Co. 19 Ohio, 369. § 474.
 Ironsides, The, Lushington, 458. §§ 480, 481.
 Irresistible, The, 7 Wheat. 551. §§ 11, 166, 225.
 Irving v. Humphreys, Hopk. 364. §§ 111, 113.
 v. McLean, 4 Blackf. 52. § 297.
 Irwin, Succession of, 33 La. Ann. 63. § 103.
 Isabelle v. Iron Cliffs Co. 57 Mich. 120. §§ 112, 114.
 Isham v. Bennington Iron Co. 19 Vt. 230. § 225.
 Isitt v. Beeston, L. R. 4 Ex. 159. § 265.
 Itawamba v. Candler, 62 Miss. 193. § 398.
 Iverson v. State, 52 Ala. 170. § 138.
 Ivey v. McQueen, 17 Ala. 408. § 372.
 Jackman v. Dubois, 4 John. 216. § 402.
 v. Garland, 64 Me. 133. § 107.
 Jackson v. Bradt, 2 Cai. 303. §§ 202, 240, 246.
 v. Butler, 8 Minn. 117. § 478.
 v. Cairns, 20 John. 301. § 401.
 v. Catlin, 8 John. 520. § 194.
 v. Catlin, 2 John. 248. §§ 194, 390.
 v. Chew, 12 Wheat. 153. § 187.
 v. Collins, 3 Cow. 89. §§ 234, 246.
 v. Cory, 8 John. 385. § 378.
 v. Dillon, 2 Overt. 261. § 483.
 v. Gilchrist, 15 John. 89. §§ 212, 213, 483.
 v. Hammond, 2 Cai. Cas. 337. § 378.
 v. Hobby, 20 John. 361. § 207.
 v. Lamphire, 3 Pet. 290. §§ 378, 474, 478.
 v. Lervy, 5 Cow. 397. § 337.
 v. Moye, 33 Ga. 296. § 228.
 v. Noble, 54 Iowa, 641. §§ 373, 377.
 v. Phelps, 3 Caines, 62. § 229.
 v. Shepherd, 6 Cow. 444. §§ 207, 390.

- Jackson v. State**, 76 Ala. 26. § 138.
v. Thurman, 6 John. 322. § 234.
v. Warren, 32 Ill. 331. §§ 207, 435.
v. Young, 5 Cow. 269. §§ 448, 452.
- Jackson, etc. R. R. Co. v. Davison**, 65 Mich. 416. §§ 379, 390.
- Jacksonville v. Basnett**, 20 Fla. 525. §§ 94, 483.
- Jacob v. State**, 3 Humph. 493. § 184.
v. United States, 1 Brock. 520. §§ 399, 400.
- Jacobs, Re**, 98 N. Y. 98. §§ 370, 373.
- Jacobs v. Brett**, L. R. 20 Eq. 6. § 396.
v. Graham, 1 Blackf. 392. §§ 111, 112.
v. Kruger, 19 Cal. 411. § 429.
v. Smallwood, 63 N. C. 112. § 478.
- Jacoby v. Shafer**, 105 Pa. St. 610. § 283.
- Jacquins v. Clark**, 9 Cush. 279. § 482.
v. Commonwealth, 9 Cush. 279. §§ 206, 469.
- Jacubeck v. Hewitt**, 61 Wis. 96. § 398.
- James v. Catherwood**, 3 D. & R. 190. § 12.
v. Commonwealth, 12 S. & R. 220. § 137.
v. Dubois, 16 N. J. L. 285. §§ 164, 165, 168.
v. Rowland, 52 Md. 462. § 201.
- Janes v. Buzzard**, Hempst. 259. § 168.
- Janney v. Buell**, 55 Ala. 408. §§ 140, 399.
- January v. January**, 7 T. B. Mon. 542. § 478.
- Janvrin v. De la Mere**, 14 Moore's P. C. 334. § 310.
- Jaques v. Golightly**, 2 W. Bl. 1073. § 325.
- Jarman, Ex parte**, L. R. 4 Ch. Div. 838. §§ 256, 462.
- Jarvis v. Jarvis**, 3 Edw. Ch. 462. §§ 206, 483.
v. Robinson, 21 Wis. 523. §§ 294, 301.
- Jasper v. Porter**, 2 McLean, 579. § 293.
- Jefferson Co. v. Reitz**, 56 Pa. St. 44. § 157.
- Jefferys v. Boosey**, 4 H. of L. 815. §§ 196, 210, 239, 240, 246.
- Jenkins v. Crevier**, 50 N. J. L. 351. § 396.
v. Ewin, 8 Heisk. 456. § 256.
v. Union Turnpike Co. 1 Cai. Cas. 86. § 193.
v. Wild, 14 Wend. 539. § 369.
- Jenkinson v. Thomas**, 4 T. R. 665. § 349.
- Jennings v. Love**, 24 Miss. 249. § 241.
- Jerome v. Ross**, 7 John. Ch. 315. § 387.
- Jersey City v. Hudson**, 13 N. J. Eq. 420. §§ 333, 386.
- Jersey Co. v. Davison**, 25 N. J. L. 415. §§ 322, 324.
- Jesson v. Wright**, 2 Bligh, 2. § 247.
- Jessup v. Carnegie**, 80 N. Y. 441. § 256.
- Jewell v. Weed**, 18 Minn. 272. §§ 235, 237.
- Jewett v. Wanshura**, 43 Iowa, 574. §§ 376, 377.
- Jenison v. Dyson**, 9 M. & W. 540. § 310.
- Johnes v. Johnes**, 3 Dow, 15. § 410.
- Johns v. State**, 78 Ind. 332. § 143.
- Johnson, Ex parte**, 7 Cow. 424. § 449.
- Johnson v. Ballou**, 28 Mich. 379. § 309.
v. Bond, Hempst. 533. § 478.
v. Burrell, 2 Hill, 238. § 464.
v. Bush, 2 Barb. Ch. 207. § 152.
v. Byrd, Hempst. 434. § 138.
v. Chicago, etc. R. R. Co. 64 Wis. 425. § 371.
v. Common Council, 16 Ind. 227. § 306.
v. Drummond, 16 Ill. App. 641. § 375.
v. Haines, 4 Dall. 64. § 432.
v. Higgins, 3 Met. (Ky.) 566. §§ 85, 330, 478.
v. Hudson, 11 East, 180. § 336.
v. Johnson, 52 Md. 668. §§ 463, 480.

- Johnson v. Johnson**, 26 Ind. 441. § 206.
v. Joliet, etc. R. R. Co. 23 Ill. 202. § 345.
v. Koockogey, 23 Ga. 183. § 482.
v. Meeker, 1 Wis. 436. § 164.
v. Merchandise, 2 Paine, 601. § 104.
v. People, 83 Ill. 431. §§ 87, 88.
v. Railroad Co. 49 N. Y. 456. § 324.
v. Railroad Co. 49 N. Y. 455. §§ 236, 237, 238.
v. Richardson, 44 Ark. 365. §§ 483, 484.
v. Robertson, 31 Md. 476. §§ 296, 306.
v. State, 33 Miss. 363. § 449.
v. Stout, 42 Minn. 514. § 398.
v. Upham, 2 E. & E. 250. § 210.
v. Winslow, 63 N. C. 552. § 169.
Johnston's Estate, 33 Pa. St. 511. §§ 140, 156.
Johnston v. Bank, 3 Strob. Eq. 263. § 191.
v. Pate, 95 N. C. 63. § 462.
v. Rankin, 70 N. C. 550. § 398.
v. Spicer, 107 N. Y. 185. § 103.
v. Wilson, 29 Gratt. 379. § 296.
Jollie v. Jaques, 1 Blatch. 618. § 458.
Jonas v. Cincinnati, 18 Ohio, 318. § 365.
Jones' Appeal, 3 Grant, 169. § 220.
Jones, In re, 7 Ex. 586. § 262.
Jones v. Brown, 2 Ex. 332. § 333.
v. Cavins, 4 Ind. 305. § 109.
v. Collins, 16 Wis. 594. §§ 207, 420.
v. Columbus, 25 Ga. 610. § 101.
v. Commissioner, 21 Mich. 236. § 132.
v. Dexter, 8 Fla. 270. §§ 257, 333.
v. Hays, 4 McLean, 521. §§ 185, 293.
v. Hutchinson, 43 Ala. 721. §§ 29, 41, 43, 45, 294.
v. Jones, 18 Me. 308. § 219.
v. Jones, 104 N. Y. 234. § 174.
v. Kearns, Mart. & Y. 241. § 196.
Jones v. Maffet, 5 S. & R. 523. § 190.
v. Robbins, 8 Gray, 329. § 176.
v. Smart, 1 T. R. 44. §§ 430, 431.
v. Smith, 8 Gray, 500. § 336.
v. Smith, 14 Mich. 334. § 397.
v. State, 1 Ga. 610. § 469.
v. State, 1 Kan. 273. §§ 447, 451.
v. State, 1 Iowa, 395. §§ 167, 225.
v. Surprise, 64 N. H. 243; 4 New Eng. Rep. 292. §§ 231, 402.
v. Tatham, 20 Pa. St. 398. §§ 194, 333, 335.
v. Theall, 3 Nev. 233. § 26.
v. Thompson, 12 Bush, 394. §§ 102, 170.
v. Water Com'rs, 34 Mich. 273. § 240.
v. Wootten, 1 Harr. (Del.) 77. §§ 206, 229.
Jones' Heirs v. Perry, 10 Yerg. 59. § 5.
Jordan v. Dobson, 2 Abb. (U. S.) 398. § 480.
v. Giblin, 12 Cal. 100. § 394.
v. Winner, 45 Iowa, 65. § 206.
Jordt v. State, 31 Tex. 571. § 347.
Journey v. Gibson, 56 Pa. St. 57. §§ 164, 201, 483.
Judd v. Fulton, 10 Barb. 117. §§ 110, 111.
Judge of Campbell County Court v. Taylor, 8 Bush, 206. § 365.
Judson v. Leach, 7 Cow. 152. § 204.
Juliand v. Rathbone, 39 N. Y. 369. § 459.
Julius v. Lord Bishop of Oxford, L. R. 5 App. Cas. 214. §§ 460, 462.
Jump v. Batton, 35 Mo. 196. § 63.
Junction City v. Webb, 23 Pac. Rep. 1073. § 134.
Justices v. Griffin, etc. Plk. R. Co. 9 Ga. 475. § 378.
Kadgin v. Miller, 13 Ill. App. 474. § 374.
Kamerick v. Castleman, 21 Mo. App. 587. § 133.
Kane v. New York, etc. R'y Co. 49 Conn. 139. § 134.
v. State, 78 Ind. 103. § 96.

- Kankakee Co. v. Aetna Life Ins. Co.** 106 U. S. 668. § 157.
- Kaolatype Engraving Co. v. Hoke**, 30 Fed. Rep. 444. § 305.
- Kansas City, etc. R. R. Co. v. Campbell**, 62 Mo. 585. § 391.
- Kansas Pac. R'y Co. v. Dunmeyer**, 113 U. S. 629. § 379.
- v. Lundin**, 3 Colo. 94. § 371.
- v. Wyandotte**, 16 Kan. 587. § 221.
- Karr v. Washburn**, 56 Wis. 303. § 420.
- Kate Heron, The**, 6 Sawyer, 106. §§ 247, 253, 291.
- Kean v. Stetson**, 5 Pick. 492. § 388.
- Kearney v. Fitzgerald**, 43 Iowa, 580. § 377.
- Kearns v. Cordwainers' Co.** 6 C. B. (N. S.) 388. §§ 212, 213.
- Keech v. Baltimore, etc. R. R. Co.** 17 Md. 32. § 290.
- Keemer v. Herr**, 98 Pa. St. 6. § 398.
- Keenan v. Stimson**, 32 Minn. 377. § 14.
- Keeton v. Keeton**, 20 Mo. 530. § 424.
- Keith v. Clark**, 97 U. S. 465. § 20.
- v. Quinney**, 1 Ore. 364. §§ 240, 246, 292.
- Keitler v. State**, 4 Greene (Iowa), 291. § 395.
- Keller v. Commonwealth**, 71 Pa. St. 413. § 159.
- v. Corpus Christi**, 50 Tex. 614. §§ 392, 398.
- v. Houlihan**, 32 Minn. 486. § 462.
- v. State**, 12 Md. 325. §§ 164, 166.
- v. State**, 11 Md. 531. §§ 78, 349.
- Kelley v. State**, 6 Ohio St. 269. §§ 121, 122, 123, 174, 179.
- v. Story**, 6 Heisk. 202. § 306.
- Kellock's Case**, L. R. 3 Ch. 781. § 333.
- Kellogg, Ex parte**, 3 Cow. 372. § 449.
- Kellogg v. Oshkosh**, 14 Wis. 623. § 136.
- v. Page**, 44 Vt. 356. § 447.
- Kelly v. Meeks**, 87 Mo. 396. § 70.
- v. State**, 92 Ind. 236. § 117.
- Kelly's Heirs v. McGuire**, 15 Ark. 555. §§ 215, 240, 241, 259.
- Kelly Tp. v. Union Tp.** 5 Watts & S. 535. §§ 202, 324.
- Kelsey v. Kendall**, 48 Vt. 24. §§ 133, 206.
- Kendall v. Dodge**, 3 Vt. 360. § 10.
- v. United States**, 12 Pet. 524. § 257.
- Kenfield v. Irwin**, 52 Cal. 164. § 451.
- Kennedy, In re**, 2 S. C. 216. § 476.
- Kennedy v. Cunningham**, 2 Met. (Ky.) 538. § 342.
- v. Gies**, 25 Mich. 83. § 246.
- v. Kennedy**, 2 Ala. 571. § 246.
- v. Palmer**, 6 Gray, 316. §§ 110, 182.
- Kenny v. Clarkson**, 1 John. 385. § 190.
- Kent v. Somervell**, 7 Gill & J. 265. §§ 210, 213.
- Kephart v. Farmers', etc. Bank**, 4 Mich. 602. § 322.
- Keppel v. Petersburg R. R. Co., Chase's** Dec. 167. § 298.
- Kerkow v. Bauer**, 15 Neb. 150. §§ 303, 377.
- Kerlin v. Bull**, 1 Dall. (Pa.) 175. §§ 322, 324.
- Kerlinger v. Barnes**, 14 Minn. 526. § 133.
- Kermott v. Ayer**, 11 Mich. 181. § 184.
- Kernion v. Hills**, 1 La. Ann. 419. § 310.
- Kerr, Matter of**, 42 Barb. 119. § 473.
- Kerr v. Haverstick**, 94 Ind. 180. § 113.
- Kerrigan v. Force**, 68 N. Y. 381. §§ 120, 129, 198, 332.
- v. Force**, 9 Hun, 185. § 193.
- Kesler v. Smith**, 66 N. C. 154. § 152.
- Kessel v. Albetis**, 56 Barb. 362. §§ 181, 362.
- Ketcham v. Fox**, 52 Hun, 284. § 374.
- Keyes v. Westford**, 17 Pick. 273. § 380.
- Keyport St. B. Co. v. Farmers' Transportation Co.** 18 N. J. Eq. 24. §§ 298, 300, 301.
- Kibbe v. Ditto**, 93 U. S. 674. § 146.

- Kichner v. Meyers**, 35 Ohio St. 85; 35 Am. Rep. 598. § 376.
Kielley v. Carson, 4 Moore's P. C. 85. § 17.
Kiernan, In re, 6 T. & C. 320. § 101.
Kiersted v. State, 1 G. & J. 231. § 309.
Kilbourn v. Thompson, 103 U. S. 168. §§ 8, 294, 395.
Kilburn v. Deming, 2 Vt. 404. § 422.
Kile v. Yellowhead, 80 Ill. 208. § 298.
Kilgore v. Magee, 85 Pa. St. 412. §§ 35, 128, 330.
Kilgow v. Miles, 6 Gill & J. 268. 115.
Killebrew v. Murphy, 3 Heisk. 546. § 298.
Killip v. McKay, 13 N. Y. St. Rep. 5. § 303.
Kilpatrick v. Byrne, 25 Miss. 571. § 368.
Kimball v. Lamson, 2 Vt. 138. § 253.
 v. Rosendale, 42 Wis. 407. § 129.
Kimbray v. Draper, L. R. 3 Q. B. 160. §§ 206, 482.
Kimbro v. Bank of Fulton, 49 Ga. 419. § 218.
Kimm v. Osgood's Adm'r, 19 Mo. 60. §§ 111, 112.
Kinard v. Moore, 3 Strob. 193. § 364.
Kinderley v. Jervis, 25 L. J. Ch. 541. §§ 236, 238.
King, Ex parte, 2 Bro. C. C. 158. § 194.
King v. Adderly, 2 Doug. 463. § 112.
 v. Arundel, Hob. 110. §§ 27, 44.
 v. Banks, 61 Ga. 20. §§ 94, 98.
 v. Birmingham, 8 B. & C. 29. § 336.
 v. Bridges, 8 East, 53. § 142.
 v. Burridge, 3 P. Wms. 496. § 193.
 v. Cornell, 106 U. S. 395. § 154.
 v. Davis, 1 Leach's Cas. 271. § 142.
 v. Dedham Bank, 15 Mass. 447. § 473.
 v. Dowdall, 2 Sandf. 131. § 115.
 v. Downs, 3 T. R. 569. § 138.
King v. Haley, 86 Ill. 106. § 375.
 v. Herefordshire, 3 Barn. & Ald. 581. § 112.
 v. Kent, 29 Ala. 542. § 298.
 v. Moore, Jeff. (Va.) 8. § 110.
 v. Pease, 4 B. & Ad. 30. §§ 254, 258.
 v. Thompson, 87 Pa. St. 365. § 273.
 v. Thurston, 1 Lev. 91. § 105.
 v. Wilson, 1 Dill. 555. § 185.
King of Two Sicilies v. Wilcox, 1 Sim. (N. S.) 301. § 12.
Kingsford v. Great W. R'y Co. 16 C. B. (N. S.) 761. § 420.
Kingsley v. Kingsley, 20 Ill. 203. §§ 184, 192.
Kinney v. Mallory, 3 Ala. 626. § 138.
Kinsey v. Heyward, 1 Ld. Raym. 434. § 424.
Kirk v. Armstrong, Hempst. 283. § 454.
Kirkpatrick v. Gibson, 2 Brock. 388. §§ 256, 333.
 v. New Brunswick, 40 N. J. Eq. 46. §§ 93, 95.
Kirkstall Brewery, Re, 5 Ch. Div. 535. § 255.
Kistler v. Hereth, 75 Ind. 177. § 426.
Kitchen v. Bartsch, 7 East, 53. § 310.
 v. Shaw, 6 Ad. & E. 729. § 270.
 v. Smith, 101 Pa. St. 452. § 137.
Klein v. Kinkad, 16 Nev. 194. §§ 98, 96.
Kline v. Baker, 99 Mass. 253. §§ 188, 190, 192.
Knapp v. Brooklyn, 97 N. Y. 520. § 257.
Knaust, In re, 101 N. Y. 188. § 88.
Kneeland v. Milwaukee, 15 Wis. 454. § 317.
Knight v. Aroostook R. R. 67 Me. 291. § 154.
 v. Bate, 2 Cowp. 738. § 424.
 v. Freeholders of Ocean Co. 49 N. J. L. 485. § 333.
 v. West Jersey R. R. Co. 108 Pa. St. 250. § 14.

- Kniper v. Louisville**, 7 Bush, 599. § 365.
- Knoup v. Piqua Bank**, 1 Ohio St. 603. §§ 164, 167.
- Knox v. Baldwin**, 80 N. Y. 610. §§ 154, 163, 167.
- v. Cleveland**, 13 Wis. 249. § 480.
- Knoxville v. Lewis**, 12 Lea, 180. §§ 87, 102.
- Knoxville, etc. R. R. Co. v. Hicks**, 9 Baxt. 442. § 4.
- Koch v. Bridges**, 45 Miss. 247. §§ 139, 234, 237, 326, 455.
- Koerner v. Oberly**, 56 Ind. 284. § 374.
- Kohn v. Carrollton**, 10 La. Ann. 719. § 132.
- Kollock v. Parcher**, 25 Wis. 372. § 398.
- Koning v. Bayard**, 2 Paine, 251. § 334.
- Koontz v. Franklin Co.** 76 Pa. St. 754. § 473.
- v. Howsare**, 100 Pa. St. 504. § 284.
- Korah v. Ottawa**, 32 Ill. 121. § 145.
- Koser, Ex parte**, 60 Cal. 187. §§ 123, 129.
- Kossuth County v. Wallace**, 60 Iowa, 508. § 469.
- Kountze v. Omaha**, 5 Dill. 443. §§ 186, 330.
- Krach v. Heilman**, 53 Ind. 517. §§ 375, 376.
- Kramer v. Holster**, 55 Miss. 243. § 394.
- Kreiger v. Shelby R. R. Co.** 84 Ky. 66. § 383.
- Kreiter v. Nichols**, 28 Mich. 496. § 374.
- Kring v. Missouri**, 107 U. S. 221. §§ 465, 466, 467.
- Kroop v. Forman**, 31 Mich. 144. § 456.
- Kuckler v. People**, 5 Park. Crim. Rep. 212. § 470.
- Kuhns v. Krammis**, 20 Ind. 490. § 102.
- Kunkle v. Franklin**, 13 Minn. 127. § 206.
- Kupfert v. Building Asso.** 80 Pa. St. 465. § 201.
- Kutztown Alley, In re**, 2 Woodw. Dec. (Pa.) 373. § 204.
- Kyle v. Malin**, 8 Ind. 34. § 380.
- Lacon v. Higgins**, 3 Stark. 178. § 190.
- v. Hooper**, 6 T. R. 224. § 253.
- Lackawana Iron Co. v. Little Wolf**, 38 Wis. 152. § 448.
- Lafayette v. Cox**, 5 Ind. 38. § 380.
- La France v. Krayner**, 42 Iowa, 143. § 377.
- La Grange v. Chapman**, 11 Mich. 499. § 298.
- v. Cutler**, 6 Ind. 354. § 217.
- Lair v. Killmer**, 25 N. J. L. 522. §§ 208, 350.
- Lake v. Caddo Parish**, 37 La. Ann. 788. § 240.
- v. State**, 18 Fla. 501. § 135.
- v. Williamsburg**, 4 Denio, 520. § 365.
- Lakeman v. Moore**, 32 N. H. 410. § 226.
- Lamar v. Micou**, 114 U. S. 218. §§ 185, 293.
- Lamb v. Lynd**, 44 Pa. St. 336. § 384.
- v. Schottler**, 54 Cal. 319. §§ 165, 464.
- Lambertson v. Hagan**, 2 Pa. St. 25. §§ 10, 201, 206.
- Lammer, Re**, 7 Biss. 269. § 264.
- Lamond v. Eiffe**, 3 Q. B. 910. § 324.
- Lamphear v. Buckingham**, 33 Conn. 237. § 320.
- Lampton v. Haggard**, 3 T. B. Mon. 149. § 306.
- Landford v. Dunklin**, 71 Ala. 594. § 256.
- Land Grant Railway v. Commissioners**, 6 Kan. 252. § 12.
- Landers v. Staten Island R. R. Co.** 14 Abb. Pr. (N. S.) 346. § 397.
- Landis v. Landis**, 39 N. J. L. 274. §§ 137, 152.
- Lane's Appeal**, 105 Pa. St. 49. § 371.
- Lane v. Bennett**, 1 M. & W. 70. § 430.
- v. Burnap**, 39 Mich. 736. § 457.
- v. Cary**, 19 Barb. 539. § 440.

- Lane v. Nelson**, 79 Pa. St. 407. §§ 480, 482, 484.
v. Schomp, 20 N. J. Eq. 82. § 261.
v. State, 49 N. J. L. 673. § 102.
v. Wheeler, 101 N. Y. 17. § 454.
Lanfear v. Mestier, 18 La. Ann. 497. § 298.
Lang v. Phillips, 27 Ala. 311. § 110.
v. Scott, 1 Blackf. 405. §§ 204, 325.
Langdeau v. Hanes, 21 Wall. 527. § 19.
Lange, In re, 85 N. Y. 307. § 457.
Langdon v. Summers, 10 Ohio St. 79. § 398.
v. Young, 33 Vt. 136. § 184.
Languille v. State, 4 Tex. App. 312. § 206.
Lanning v. Carpenter, 20 N. Y. 447. §§ 181, 183.
Lanzetti, Succession of, 9 La. Ann. 333. §§ 82, 87.
Lapeyre v. United States, 17 Wall. 191. § 182.
La Plaisance Bay Harbor Co. v. Monroe, Walk. Ch. (Mich.) 155. § 378.
Larrabee v. Talbot, 5 Gill, 426. § 107.
Larrison v. R. R. Co. 77 Ill. 11. §§ 46, 52, 91, 183.
Larzelere v. Haubert, 109 Pa. St. 515. § 246.
La Selle v. Whitfield, 12 La. Ann. 81. § 333.
Lash v. Von Neida, 109 Pa. St. 207. § 333.
Lasure v. State, 19 Ohio St. 43. § 469.
Lathrop v. Mills, 19 Cal. 513. §§ 174, 180.
v. Stedman, 42 Conn. 583. §§ 212, 213.
Lattess v. Holmes, 4 T. R. 660. §§ 105, 107.
Laude v. Chicago, etc. R'y Co. 33 Wis. 640. §§ 133, 134, 167.
Lauer v. State, 22 Ind. 461. § 92.
Lauve, Succession of, 6 La. Ann. 529. § 314.
Laughlin v. Commonwealth, 13 Bush, 261. §§ 164, 468.
Laughter v. Seela, 59 Tex. 177. § 287.
Laura, The, 114 U. S. 411. § 309.
Law v. Hodson, 11 East, 300. § 336.
v. Law, Cases Temp. Talbot, 140; 3 P. Wms. 391. § 429.
Lawrence v. Allen, 7 How. 785. § 254.
v. Grambling, 13 S. C. 125. § 135.
v. King, L. R. 3 Q. B. 345. § 256.
Lawrence R. R. Co. v. Mahoning Co. 35 Ohio St. 1. § 482.
Lawson v. De Bolt, 78 Ind. 563. §§ 132, 154.
v. Jeffries, 47 Miss. 686. § 119.
Lay v. Succession of O'Neil, 29 La. Ann. 722. § 20.
Layng v. Paine, Willes, 571. § 429.
Lea v. Bumm, 83 Pa. St. 237. §§ 169, 170.
Lead Smelting Co. v. Richardson, 3 Burr. 1341. § 266.
Leard v. Leard, 30 Ind. 171. § 137.
Learned v. Corley, 43 Miss. 689. §§ 219, 234, 241, 246, 324.
Leavenworth v. Brockway, 2 Hill, 201. § 184.
Leavenworth Co. v. Miller, 7 Kan. 479. § 124.
Leavenworth, etc. R. R. Co. v. United States, 92 U. S. 733. § 379.
Le Couteulx v. Buffalo, 33 N. Y. 333. § 380.
Lee v. Barkhamsted, 46 Conn. 213. § 240.
v. Carlton, 3 T. R. 642. § 115.
v. Clary, 38 Mich. 223. § 390.
v. Cook, 1 Wyom. T'y, 413. § 206.
v. Forman, 3 Met. (Ky.) 114. § 401.
v. King, 21 Tex. 577. § 184.
v. Lincoln, 1 Story, 610. § 254.
v. Simpson, 3 C. B. 871. §§ 355, 429.
v. State, 49 Ala. 43. § 448.
Lees v. Summersgill, 17 Ves. 508. § 212.
Leese v. Clark, 20 Cal. 387. § 300.
Leffingwell v. Warren, 2 Black, 599. §§ 185, 186, 480.
Leforest v. Tolman, 117 Mass. 109. § 208.

- Leftwiche's Case, 5 Rand. 657. § 166.
 Legg v. Mayor, etc. 42 Md. 203. §§ 29,
 41, 42, 45, 110, 183, 294.
 Leggate v. Clark, 111 Mass. 308. § 458.
 Leggett v. Hunter, 19 N. Y. 445.
 § 194.
 Lehigh Co. v. Meyer, 102 Pa. St. 479.
 §§ 223, 267.
 Lehigh Water Co. v. Easton, 121 U. S.
 388. §§ 378, 384.
 Lehman, Durr & Co. v. Robinson, 59
 Ala. 219. § 255.
 v. McBride, 15 Ohio St. 573. §§ 80,
 131, 132, 135.
 Leigh v. Kent, 3 T. R. 362. §§ 137,
 310.
 v. Thornton, 1 B. & Ald. 625.
 § 426.
 Leighton v. Walker, 9 N. H. 59.
 §§ 142, 154.
 Leitensdorfer v. Webb, 20 How. 176.
 § 19.
 Leland v. Tousey, 6 Hill, 328. §§ 202,
 399.
 v. Wilkinson, 6 Pet. 317. § 194.
 Lemp v. Hastings, 4 Greene (Ia.), 448.
 § 313.
 Leonard v. Canton, 35 Miss. 189.
 §§ 300, 365, 380.
 v. Columbia N. Co. 84 N. Y. 48.
 § 256.
 v. Columbia St. Nav. Co. 84 N. Y.
 48. § 14.
 v. Wiseman, 31 Md. 201. § 237.
 Leonie v. Taylor, 20 Mich. 148. § 234.
 Leroy v. Chabolla, 2 Abb. (U. S.) 448.
 § 283.
 Les Bois v. Bramell, 4 How. 449.
 § 201.
 Leschi v. Territory, 1 Wash. Ty, 13.
 §§ 104, 166.
 Lessley v. Phipps, 49 Miss. 790. §§ 164,
 477.
 Lester v. Garland, 15 Ves. 248. §§ 111,
 112.
 Leverson v. Regina, L. R. 4 Q. B. 394.
 §§ 301, 310.
 Levett's Case, 1 Hale, 474. § 355.
 Levy v. State, 6 Ind. 281. § 198.
- Levy v. Stewart, 11 Wall. 244. § 368.
 Lewis v. Aylott, 45 Tex. 190. § 287.
 v. Brackenridge, 1 Blackf. 220.
 § 206.
 v. Calor, 1 Fost. & Fin. 306. § 115.
 v. Foster, 1 N. H. 61. §§ 164, 166.
 v. McClure, 8 Ore. 273. § 296.
 v. McIlvaine, 16 Ohio, 347. § 164.
 v. State, 3 Head, 127. §§ 291,
 462.
 v. Stout, 22 Wis. 234. § 155.
 v. Webb, 3 Me. 326. § 119.
 v. Woodfolk, 85 Tenn. 25. § 104.
 License Cases, 5 How. 504. § 7.
 Lide v. Parker, 60 Ala. 165. § 184.
 Life Ins. Co. v. Ray, 50 Tex. 512.
 § 463.
 Lillard v. McGee, 4 Bibb, 165. § 202.
 Lima v. Cemetery Asso. 42 Ohio St.
 128. §§ 367, 380.
 Limestone Co. v. Rather, 48 Ala. 433.
 § 448.
 Lincoln v. Battelle, 6 Wend. 475.
 §§ 190, 297.
 Lincoln, etc. Asso. v. Graham, 7 Neb.
 173. § 201.
 Lindenmuller v. People, 21 How. Pr.
 156. § 407.
 Lindsay v. Cundy, L. R. 1 Q. B. Div.
 358. §§ 230, 403.
 v. Williams, 17 Ala. 229. § 298.
 Lindsey v. Rottaken, 32 Ark. 619.
 § 321.
 v. Rutherford, 17 B. Mon. 245.
 § 336.
 Lindzey v. State, 65 Miss. 542. §§ 142,
 470.
 Lining v. Bentham, 2 Bay, 1. § 342.
 Linn v. Scott, 3 Tex. 67. § 201.
 Linsing v. Washburn, 20 Cal. 534.
 § 119.
 Linton's Appeal, 104 Pa. St. 223.
 § 284.
 Linton v. Blakeney Joint Co-op. So-
 ciety, 3 H. & C. 853. §§ 164, 225.
 Lion Ins. Asso. v. Tucker, L. R. 13
 Q. B. Div. 180. §§ 239, 240, 247.
 Lippencott v. Leeds, 77 Pa. St. 420.
 § 338.

- Lippincott v. Hopkins, 57 Pa. St. 328. § 338.
- Lipscomb v. Dean, 1 Lea, 546. § 8.
- Litch v. Brotherson, 25 How. Pr. 416. § 482.
- Lithbridge v. Chapman, 15 Vin. Abr. 103. § 424.
- Litchfield v. Vernon, 41 N. Y. 123. § 362.
- Little v. Poole, 9 B. & C. 192. § 336.
- Littlefield v. Winslow, 19 Ma. 394. § 365.
- Little Rock, etc. R. R. Co. v. Barker, 39 Ark. 491. § 371.
- v. Howell, 31 Ark. 119. §§ 215, 239, 241.
- Little Schuylkill Nav. Co. v. Richards, 57 Pa. St. 142. § 377.
- Liverpool Borough Bank v. Turner, 2 De G. F. & J. 502; 30 L. J. Ch. 139. §§ 203, 447.
- Livingston v. Harris, 11 Wend. 329. § 337.
- v. Jordan, Chase's Dec. 454. § 20.
- v. Moore, 7 Pet. 469. § 185.
- v. Van Ingen, 9 John. 507. § 202.
- Lobrano v. Nelligan, 9 Wall. 205. § 194.
- Lock v. Miller, 3 Stew. & Port. 18. §§ 139, 290.
- Locke's Appeal, 72 Pa. St. 491. §§ 67, 72, 75.
- Lockett v. Usry, 28 Ga. 345. §§ 10, 482.
- Lockhart v. Troy, 48 Ala. 579. § 135.
- Lockwood v. Crawford, 18 Conn. 361. §§ 184, 190, 192.
- Logan v. Courtown, 13 Beav. 22. § 237.
- v. State, 3 Heisk. 442. § 104.
- v. Walton, 12 Ind. 639. § 206.
- Lohman v. State, 81 Ind. 15. § 303.
- Lombard v. Antioch College, 60 Wis. 459. § 170.
- v. Trustees, etc. 73 Ga. 322. § 322.
- v. Whiting, Walker (Miss.), 229. § 392.
- London Tobacco Pipe Makers v. Woodruffe, 7 B. & C. 838. § 285.
- Long v. Culp, 14 Kan. 412. §§ 217, 219.
- Longes v. Kennedy, 2 Bibb, 607. §§ 296, 306.
- Longey v. Leach, 57 Vt. 377. § 400.
- Longlois v. Longlois, 48 Ind. 60. §§ 133, 137, 163.
- Looker v. Davis, 47 Mo. 140. §§ 223, 224.
- Looney v. Hughes, 30 Barb. 605. § 449.
- Lord v. Parker, 3 Allen, 127. § 290.
- Lord Advocate v. Sinclair, L. R. 1 Scotch App. 178. § 310.
- Loring v. Halling, 15 John. 119. § 253.
- Lorman v. Benson, 8 Mich. 18. § 181.
- v. Clarke, 2 McLean, 568. § 185.
- Losch v. St. Charles, 65 Mich. 555. § 102.
- Lougee v. Washburn, 16 N. H. 134. § 184.
- Loughridge v. Huntington, 56 Ind. 253. § 114.
- Louisiana v. New Orleans, 102 U. S. 203. §§ 471, 476.
- v. Pillsbury, 105 U. S. 278. §§ 78, 94.
- Louisiana State Bank v. Flood, 3 Mart. (N. S.) 341. § 193.
- Louisiana State Lottery Co. v. Richoux, 23 La. Ann. 745. § 88.
- Louisville v. Commonwealth, 9 Dana, 70. § 285.
- v. Savings Bank, 104 U. S. 469. §§ 104, 110, 182, 183.
- Louisville, etc. Co. v. Ballard, 2 Met. (Ky.) 168. §§ 85, 93, 96.
- Louisville, etc. R. R. Co. v. County Court, 1 Sneed, 668. §§ 317, 320, 331.
- v. Mississippi, 133 U. S. 587. § 185.
- Lovejoy v. Whipple, 18 Vt. 379. § 336.
- Lowenberg v. People, 27 N. Y. 336. § 168.
- Lower Chatham, In re, 35 N. J. L. 497. § 237.
- Lowndes County v. Hunter, 49 Ala. 507. §§ 102, 170.

- Lowry v. Francis**, 2 Yerg. 534. § 472.
Lucas v. Commissioners, 44 Ind. 541. § 320.
 v. Ladew, 28 Mo. 342. § 184.
 v. McBlair, 12 Gill & J. 265. § 210.
Lucas County v. Chicago, B. & Q. R'y
 Co. 67 Iowa, 541. § 133.
Luck v. State, 96 Ind. 16. § 295.
Lucy v. Levington, 1 Vent. 175. § 194.
Ludeling v. His Creditors, 4 Mart. (N. S.) 603. § 482.
Ludington v. United States, 15 Ct. of CL 453. § 259.
Luehrman v. Taxing Dist. 2 Lea, 425. §§ 88, 97.
Lueken v. People, 3 Ill. App. 375. § 375.
Luke v. Calhoun Co. 56 Ala. 415. § 167.
 v. Calhoun Co. 52 Ala. 115. § 305.
Luling v. Racine, 1 Biss. 316. § 120.
Lull v. Fox, etc. Improvement Co. 19 Wis. 100. § 377.
Lusher v. Scites, 4 W. Va. 11. §§ 8, 181, 183.
Luther v. Saylor, 8 Mo. App. 424. §§ 87, 88.
Lycoming F. Ins. Co. v. Woodworth, 83 Pa. St. 223. § 263.
Lyddy v. Long Island City, 104 N. Y. 218. §§ 138, 140.
Lyman v. Martin, 2 Utah, 136. § 41.
Lyn v. Wyn, Bridg. 122. § 217.
Lynch v. State, 9 Ind. 541. § 342.
Lynchburg v. N. & W. R. R. Co. 80 Va. 237. § 280.
Lynde v. Noble, 20 John. 80. § 435.
Lynes v. State, 5 Port. 236. § 399.
Lyon v. Jerome, 26 Wend. 485. § 387.
 v. Smith, 11 Barb. 124. § 154.
Mabry v. Baxter, 11 Heisk. 682. §§ 206, 482.
MacDougall v. Paterson, 11 C. B. 755. §§ 258, 461, 462.
Mace v. Cammel, Lofft. 782. § 213.
Macnaghten's Case, 10 C. & F. 200. § 355.
Macnawhoe Plantation v. Thompson, 36 Me. 365. §§ 365, 464.
Macoleta v. Packard, 14 Cal. 179. § 19.
Macon v. Macon Savings Bank, 60 Ga. 133. § 280.
Macon, etc. R. R. Co. v. Johnson, 38 Ga. 409. § 371.
 v. Little, 45 Ga. 370. § 26.
Maddox v. Graham, 2 Met. (Ky.) 56. §§ 138, 378.
Madison, etc. P. R. Co. v. Reynolds, 3 Wis. 287. § 260.
Magruder v. Carroll, 4 Md. 335. §§ 215, 239, 480.
 v. State, 40 Ala. 347. § 142.
Mahomet v. Quackenbush, 117 U. S. 508. §§ 93, 96.
Mahoney v. Wright, 10 Irish C. L. (N. S.) 420. §§ 147, 157.
Mahoon v. Greenfield, 52 Miss. 434. § 355.
Maize v. State, 4 Ind. 342. §§ 67, 75.
Malcolm v. Rogers, 5 Cow. 188. § 463.
Mallan v. May, 13 M. & W. 511. § 250.
Mallett v. Simpson, 94 N. C. 37. § 345.
Maloney v. Bruce, 94 Pa. St. 249. § 364.
Malonny v. Mahar, 1 Mich. 26. § 309.
Mallory v. Hiles, 4 Met. (Ky.) 53. § 104.
Malloy v. Commonwealth, 115 Pa. St. 25. § 157.
Maltby v. Cooper, Morris (La.), 59. § 426.
Mandere v. Bonsignore, 28 La. Ann. 415. § 194.
Mangun v. Webster, 7 Gill, 78. § 295.
Manhattan R. R. Co., Matter of, 102 N. Y. 301. § 457.
Manlove v. White, 8 Cal. 376. § 136.
Manly v. Downing, 15 Neb. 637. § 398.
Mann v. Illinois, 94 U. S. 113. § 7.
 v. McAtee, 37 Cal. 11. §§ 133, 206, 482.

- Mansell v. Regina**, 8 E. & B. 111. §§ 307, 312.
- Manuel v. Manuel**, 13 Ohio St. 458. §§ 283, 287.
- Maple v. Myers**, 12 Pa. St. 122. § 364.
- Maple Lake v. Wright Co.** 12 Minn. 403. §§ 215, 219.
- Marblehead v. County Com'rs**, 5 Gray, 451. § 388.
- Marchant v. Langworthy**, 6 Hill, 646; 3 Denio, 526. § 452.
- Mariner v. Dyer**, 2 Me. 165. § 342.
- Market Bank v. Pacific Bank**, 27 Hun, 465. § 306.
- Marqueze v. Caldwell**, 48 Miss. 23. § 256.
- Marion v. State**, 20 Neb. 233. §§ 467, 469, 470.
- Mark's Ex'r v. Russell**, 40 Pa. St. 372. § 115.
- Marks v. Trustees of Purdue University**, 37 Ind. 161. § 117.
- Marquis of Chandos v. Commissioners**, 6 Ex. 464. § 362.
- Marr v. Enloe**, 1 Yerg. 452. § 8.
- Marsh v. Higgins**, 9 C. B. 551. §§ 463, 481.
- v. Nelson, 101 Pa. St. 51. § 366.
- v. Supervisors, 42 Wis. 502. § 452.
- Marshall v. Grimes**, 41 Miss. 27. § 332.
- v. Vultee, 1 E. D. Smith, 294. §§ 207, 443.
- Marshalsea's Case**, 10 Rep. 73a. § 300.
- Marson v. Lund**, 13 Q. B. 664. § 462.
- Marston v. Tryon**, 108 Pa. St. 270. § 358.
- Martin, Ex parte**, L. R. 4 Q. B. Div. 212. § 341.
- Martin v. Archer**, 3 Hill (S. C.), 211. § 424.
- v. Broach, 6 Ga. 21. §§ 77, 88.
- v. Ford, 5 T. R. 101. § 349.
- v. Gleason, 139 Mass. 183. § 232.
- v. Hemming, 18 Jur. 1002. § 300.
- v. Hewitt, 44 Ala. 418. § 97.
- v. Hughes, 67 N. C. 293. § 476.
- v. Hunter's Lessee, 1 Wheat. 326. §§ 21, 239, 247, 307.
- Martin v. Jennings**, 10 La. Ann. 553. § 202.
- v. Martin, 51 Me. 366. § 298.
- v. Martin, 1 Sm. & M. 176. § 184.
- v. O'Brien, 34 Miss. 21. §§ 239, 240.
- v. Robinson, 67 Tex. 368. § 322.
- v. State, 22 Tex. 214. § 206.
- v. Waddle, 16 Pet. 411. § 378.
- Martindale v. Martindale**, 10 Ind. 566. § 133.
- Martinsville v. Frieze**, 33 Ind. 507. § 132.
- Marvin v. Bates**, 13 Mo. 217. § 424.
- Mason v. Armitage**, 13 Ves. 36. § 212.
- v. Boom Co. 3 Wall. Jr. 252. § 221.
- v. Crosby, Davies, 303. § 427.
- v. Finch, 3 Ill. 223. §§ 215, 245.
- v. Haile, 12 Wheat. 370. §§ 471, 476.
- v. Harper's Ferry Bridge Co. 17 W. Va. 397. § 157.
- v. Johnson, 24 Ill. 159. § 424.
- v. Mason's Widow, 12 La. 465. § 184.
- v. Mulholn, 6 Dana, 140. § 193.
- v. Rogers, 4 Litt. 377. § 234.
- v. Spencer, 35 Kan. 512. §§ 129, 130.
- v. Wash, 1 Ill. 16. § 297.
- Masterson v. Beasley**, 3 Ohio, 301. § 420.
- Mastronada v. State**, 60 Miss. 86. §§ 164, 166.
- Matheson v. Hearin**, 29 Ala. 210. § 318.
- Mathews v. Densmore**, 43 Mich. 461. § 393.
- v. Shores, 24 Ill. 27. §§ 229, 309.
- Mathewson v. Phoenix Iron Foundry**, 20 Fed. Rep. 281. § 168.
- Mathieson v. Harrod**, L. R. 7 Eq. 270. § 458.
- Matthews, Ex parte**, 52 Ala. 51. §§ 256, 333.
- Matthews v. Ansley**, 31 Ala. 20. §§ 17, 184.
- v. Commonwealth, 18 Gratt. 689. §§ 218, 241, 246, 267.

- Matthews v. Phillips**, 2 Salk. 424. § 424.
v. Sands, 29 Ala. 136. §§ 257, 390.
v. Skinner, 62 Mo. 329. §§ 207, 381.
v. Zane, 7 Wheat. 164. § 104.
Matthewson v. Spencer, 3 Sneed, 518. § 483.
Mattison v. Hart, 14 C. B. 385. § 258.
Mattox v. Hightshue, 39 Ind. 95. § 458.
Maull v. Vaughn, 45 Ala. 134. § 476.
Maxwell v. Collins, 8 Ind. 38. §§ 240, 246.
May v. Jameson, 11 Ark. 368. § 190.
May's Heirs v. Frazee, 4 Litt. 392. § 194.
May v. Great W. R'y Co., L. R. 7 Q. B. 377. §§ 237, 238.
v. Rice, 91 Ind. 549. §§ 60, 64.
Mayer, Matter of, 50 N. Y. 507. §§ 83, 88, 93.
Mayers v. State, 7 Ark. 68. § 166.
Maynard v. Valentine, 2 Wash. T'y, § 6.
Mayor v. Davis, 6 Watts & S. 269. § 329.
v. Dearmon, 2 Sneed, 121. §§ 119, 124, 137, 154.
v. Hartridge, 8 Ga. 23. §§ 363, 366.
v. Howard, 6 Har. & J. 388. §§ 239, 240, 283, 288.
v. Macon, etc. R. R. Co. 7 Ga. 221. §§ 158, 378.
v. Minor, 70 Ga. 191. § 157.
v. Magruder, 84 Md. 381. § 223.
v. State, 30 Md. 118. §§ 78, 82, 164, 166.
v. State, 4 Ga. 26. §§ 77, 88.
Mayor of Baltimore v. State, 15 Md. 376. §§ 312, 330, 331.
Mayor of London v. The Queen, 13 Q. B. 33. § 139.
Mayor, etc. v. Baltimore, etc. R. R. Co. 6 Gill, 288. § 386.
v. Central R. R. etc. Co. 50 Ga. 620. § 364.
- Mayor, etc. v. Clunet**, 23 Md. 469. § 72.
v. Doris, 6 W. & S. 269. § 370.
v. Dechert, 32 Md. 369. § 170.
v. Finney, 53 Ga. 317. § 75.
v. Green Mount Cemetery, 7 Md. 517. § 243.
v. Groshon, 30 Md. 436. § 154.
v. Harwood, 32 Md. 471. § 183.
v. Howard, 6 Har. & J. 383. §§ 202, 215.
v. Jersey City R. R. Co. 20 N. J. Eq. 360. §§ 138, 145.
v. Lord, 17 Wend. 285; 18 id. 126. §§ 207, 370, 441.
v. Marriott, 9 Md. 160. § 462.
v. Moore, 6 H. & J. 381. §§ 213, 322.
v. Ohio, etc. R. R. Co. 26 Pa. St. 365. § 378.
v. Reitz, 50 Md. 575. §§ 93, 95.
v. Root, 8 Md. 95. §§ 213, 324, 410, 411, 428.
v. Sands, 105 N. Y. 210. § 341.
v. Second Ave. R. R. Co. 32 N. Y. 261. § 385.
v. Trigg, 46 Mo. 288. §§ 131, 132.
Mays v. Cincinnati, 1 Ohio St. 269. §§ 365, 380.
Maysville, etc. R. R. Co. v. Herrick, 13 Bush, 122. § 259.
Maxey v. Loyal, 38 Ga. 531. § 476.
Maxwell v. Bay City, 46 Mich. 278. § 407.
v. Collins, 8 Ind. 38. §§ 219, 428, 429.
v. Goetschius, 40 N. J. L. 383. § 480.
v. Wessels, 7 Wis. 103. § 454.
McAfee v. Southern R. R. Co. 36 Miss. 669. §§ 138, 148.
McAnnich v. Miss. & M. R. R. Co. 20 Iowa, 338. § 125.
McArthur v. Nelson, 81 Ky. 67. §§ 93, 96.
McBee v. Hoke, 2 Speers, 138. § 448.
McBride's Appeal, 72 Pa. St. 480. § 254.

- McCabe v. Emerson**, 18 Pa. St. 111. § 10.
 v. Kenny, 52 Hun, 514. § 102.
McCallie v. Chattanooga, 3 Head, 321. § 124.
McCalment v. State, 77 Ind. 250. § 167.
McCann v. State, 13 Sm. & M. 471. § 142.
McCardle, Ex parte, 7 Wall. 506. §§ 165, 327, 330, 464.
McCartee v. Orphan Asylum Society, 9 Cow. 437. §§ 287, 325.
McCarthy v. Commonwealth, 110 Pa. St. 243. § 129.
McCarty v. Wells, 51 Hun, 171. §§ 374, 375.
McCarver v. Jenkins, 2 Heisk. 629. § 448.
McCaslin v. State, 44 Ind. 151. §§ 88, 93, 96.
McCloskey v. McConnell, 9 Watts, 17. § 324.
McClung v. Silliman, 3 Pet. 270. §§ 186, 368.
McCluskey v. Cromwell, 11 N. Y. 601. §§ 234, 237.
McComb v. Gilkey, 29 Miss. 146. § 194.
McConky v. Superior Court of Alameda Co. 56 Cal. 83. § 252.
McCool v. Smith, 1 Black, 459. §§ 138, 148, 152, 240, 247, 253, 291, 346, 464.
 v. State, 7 Ind. 379. § 109.
McCormack v. Terre Haute, etc. R. R. 9 Ind. 283. § 204.
McCormick v. Alexander, 2 Ohio, 74. §§ 207, 410.
 v. Sullivan, 10 Wheat. 202. § 187.
McCorry v. King, 3 Humph. 267. § 184.
McCowan v. Davidson, 43 Ga. 480. §§ 464, 465.
McCracken v. Hayward, 2 How. 612. §§ 206, 471, 477.
McCraney v. McCraney, 5 Iowa, 232. § 482.
McCready v. Sexton, 29 Iowa, 356. § 171.
McCuen v. State, 19 Ark. 634. § 167.
McCulloch v. Maryland, 4 Wheat. 327. §§ 197, 307, 362, 473.
 v. State, 11 Ind. 424. §§ 46, 330.
McDade v. People, 29 Mich. 50. § 373.
McDaniel v. Webster, 2 Houst. 305. § 476.
McDeed v. McDeed, 67 Ill. 545. §§ 184, 192.
McDermut v. Lorillard, 1 Edw. Ch. 273. § 223.
McDonald v. Kirby, 3 Heisk. 607. § 306.
 v. Myles, 12 Sm. & M. 279. § 184.
McDonough, In re Election of, 105 Pa. St. 488. § 459.
McDougal v. Hennepin Co. 4 Minn. 184. § 428.
McDougal v. Dougherty, 14 Ga. 674. §§ 219, 281.
McEwen v. Den, 24 How. 242. §§ 133, 206.
 v. Montgomery Ins. Co. 5 Hill, 104. § 440.
McFarland v. Bank of the State, 4 Ark. 410. § 283.
 v. Butler, 8 Minn. 116. § 478.
 v. Stone, 17 Vt. 173. § 322.
McFate's Appeal, 105 Pa. St. 323. § 288.
McGavick v. State, 34 N. J. L. 509. §§ 159, 225.
McGee v. McGee, 10 Ga. 477. § 341.
 v. McCann, 69 Me. 79. § 373.
McGeehan v. Burke, 37 La. Ann. 156. § 133.
McGill v. State, 34 Ohio St. 239. §§ 121, 122, 123.
McGinnis v. State, 24 Ind. 500. § 298.
McGlade's Appeal, 99 Pa. St. 338. § 370.
McGowan v. State, 9 Yerg. 184. § 402.
McGrath v. State, 46 Md. 633. §§ 78, 86, 88, 95.
McGraw v. Walker, 2 Hilt. 404. § 114.
McGuire v. Evans, 5 Ired. Eq. 269. § 220.
McInery v. Galveston, 58 Tex. 334. § 234.

- McIniffe v. Wheelock**, 1 Gray, 600. § 115.
- McIntire v. Western N. C. R. R. Co.** 67 N. C. 278. § 398.
- McIntosh v. Lee**, 57 Iowa, 356. § 302.
- McInturf v. State**, 20 Tex. App. 335. § 470.
- McIntyre v. Ingraham**, 35 Miss. 25. §§ 240, 245, 246, 276, 279, 282, 300.
- v. Marine**, 93 Ind. 193. § 132.
- McIves v. Ragan**, 2 Wheat. 29. § 427.
- McKee v. McKee**, 17 Md. 352. §§ 255, 256.
- McKeen v. Delancy**, 5 Cr. 32. §§ 187, 191, 310, 317.
- McKenna v. Edmundstone**, 91 N. Y. 231. § 157.
- McKennie v. Gorman**, 68 Ala. 442. § 47.
- McKenzie v. State**, 11 Ark. 594. § 333.
- v. Wardwell**, 61 Me. 136. § 190.
- McKineron v. Bliss**, 31 Barb. 180. §§ 17, 184.
- McKinney v. Memphis Overton Hotel Co.** 12 Heisk. 104. § 124.
- McKinnon v. Bliss**, 21 N. Y. 206. §§ 194, 298.
- McKune v. Weller**, 11 Cal. 49. §§ 446, 455.
- McLain v. New York**, 3 Daly, 32. §§ 193, 198.
- McLaughlin v. Hoover**, 1 Ore. 31. §§ 151, 202, 293.
- v. State**, 66 Ind. 193. § 454.
- McLellan v. Young**, 54 Ga. 399. § 428.
- McLelland v. Shaw**, 15 Tex. 319. §§ 218, 322.
- McLeod v. Burroughs**, 9 Ga. 213. §§ 10, 11, 253, 378.
- McLean County v. Bloomington**, 106 Ill. 209. § 364.
- McMahon v. Mayor, etc.** 33 N. Y. 642. § 371.
- McManning v. Farrar**, 46 Mo. 376. § 206.
- McMannis v. Butler**, 49 Barb. 176. §§ 463, 464.
- McMannus v. Garvin**, 77 N. Y. 36. § 400.
- McMaster v. Lomax**, 2 Myl. & K. 32. § 300.
- McMechen v. Mayor, etc.** 2 H. & J. 41. §§ 164, 400.
- McMicken v. Commonwealth**, 58 Pa. St. 213. §§ 255, 256.
- McMillan v. Bellows**, 37 Hun, 214. § 168.
- McMinn v. Whelan**, 27 Cal. 300. § 394.
- McMullen v. Guest**, 6 Tex. 278. §§ 183, 167.
- McNair v. Hunt**, 5 Mo. 300. § 19.
- McNamara v. Minn. etc. R. R. Co.** 12 Minn. 388. §§ 206, 256, 482.
- McNeely v. Woodruff**, 13 N. J. L. 352. § 152.
- McNeil v. Collinson**, 130 Mass. 167. § 373.
- v. Commonwealth**, 12 Bush, 727. §§ 57, 136.
- McNichol v. Pacific Exp. Co.** 12 Mo. App. 401. § 296.
- v. United States, etc. Agency**, 74 Mo. 457. § 201.
- McNiel, Ex parte**, 13 Wall. 236. § 185.
- McNiel v. Holbrook**, 12 Pet. 84. § 185.
- McNulty v. Batty**, 10 How. 72. § 185.
- McPhail v. Gerry**, 55 Vt. 174. § 232.
- McPherson v. Leonard**, 29 Md. 377. §§ 63, 65.
- McQueen v. Middleton, etc.** Co. 16 John. 5. § 207.
- McQuilkien v. Stoddard**, 8 Blackf. 581. § 162.
- McRae v. Holcomb**, 46 Ark. 306. §§ 222, 223, 224.
- v. Mattoon**, 13 Pick. 53. § 191.
- McRee v. M'Lemore**, 8 Heisk. 440. § 165.
- McRoberts v. Washburne**, 10 Minn. 23. §§ 137, 145, 325.
- McVey v. McVey**, 51 Mo. 406. § 157.
- McWhorter v. Donald**, 39 Miss. 779. §§ 394, 400.
- McWilliams v. Adams**, 1 Macq. H. of L. Cas. 120. §§ 196, 283, 288.

- Main Street, In re**, 98 N. Y. 454. § 257.
Mead v. Bagnall, 15 Wis. 156. §§ 104, 109, 160.
 v. Stratton, 87 N. Y. 493. § 375.
Meade v. Deputy Marshal, 1 Brock. 324. § 218.
Mears v. Stewart, 31 Ark. 17. § 155.
Mecham v. McKay, 37 Cal. 154. § 395.
Mechanics', etc. Bank's Appeal, 31 Conn. 63. §§ 164, 223.
Mechanics' & Traders' Bank v. Bridges, 30 N. J. L. 112. § 159.
Medbury v. Watson, 6 Met. 246. § 373.
Medford v. Learned, 16 Mass. 215. § 206.
Medical College v. Muldon, 46 Ala. 603. §§ 133, 135.
Medley, In re, 134 U. S. 160. § 466.
Meeks v. Vassault, 3 Saw. 206. § 424.
Meidel v. Anthis, 71 Ill. 241. § 374.
Melody v. Reab, 4 Mass. 471. §§ 139, 290, 347, 366, 400.
Memphis v. Fisher, 9 Baxt. 239. §§ 119, 124.
 v. Laskie, 9 Heisk. 511. § 428.
Memphis F. Co. v. Mayor, 4 Cold. 419. § 41.
Mendon v. County of Worcester, 10 Pick. 235. §§ 215, 238, 322.
Menges v. Dentler, 33 Pa. St. 495. § 484.
 v. Frick, 73 Pa. St. 137. §§ 111, 114.
Meracle v. Down, 64 Wis. 323. §§ 41, 42, 45.
Mercer v. Ogilvy, 3 Paton. 434. § 112.
 v. State, 17 Ga. 146. § 206.
Merchants' Bank, Re, 2 La. Ann. 68. § 109.
Merchants' Bank v. Bliss, 13 Abb. Pr. 225. § 358.
 v. Cook, 4 Pick. 405. §§ 254, 346.
Merchants' Ins. Co. v. Ritchie, 5 Wall. 541. § 165.
Meredith v. Chancey, 59 Ind. 466. § 114.
Meriam v. Harsen, 2 Barb. Ch. 270. § 314.
Merriam, In re, 84 N. Y. 596. § 457.
Merriam v. Moody's Ex'rs, 25 Iowa, 163. § 380.
Merrifield v. Robbins, 8 Gray, 150. § 190.
Merrill v. Crossman, 68 Me. 412. § 283.
 v. Dawson, Hempst. 563. §§ 185, 293.
 v. Melchior, 30 Miss. 516. § 350.
 v. Sherburne, 1 N. H. 203. §§ 6, 11, 164, 206.
Merritt v. Knife Falls B. Corp'n, 34 Minn. 245. §§ 119, 125.
Mersey Steel & Ir. Co. v. Naylor, L. R. 9 Q. B. Div. 878. § 322.
Merwin v. Ballard, 66 N. C. 398. §§ 206, 482.
 v. Chicago, 45 Ill. 133. § 428.
Meshke v. Van Doren, 16 Wis. 319. §§ 193, 198.
Meshmeier v. State, 11 Ind. 482. §§ 67, 169, 178, 180.
Metropolitan Asylum Dist. v. Hill, L. R. 6 App. Cas. 208. § 322.
Metropolitan Board of Health v. Schmades, 10 Abb. Pr. (N. S.) 205. §§ 106, 160.
Metropolitan Board of Works v. Steed, L. R. 8 Q. B. Div. 447. §§ 219, 252.
Metropolitan District R'y Co. v. Sharpe, L. R. 5 App. Cas. 431. § 217.
Metropolitan Gas Light Co., Matter of, 96 N. Y. 477. § 169.
Mew, In re, 31 L. J. Bankr. 89. § 300.
Mewherter v. Price, 11 Ind. 201. §§ 87, 102, 170.
Mewster v. Spalding, 6 McLean, 24. § 185.
Meyer v. Kalkmann, 6 Cal. 582. § 397.
 v. Meyer, 23 Iowa, 375. § 422.
Meyers v. Kirt, 57 Iowa, 421. §§ 373, 376.
Michel v. Michel, 5 Madd. 72. § 279.
Mitchell v. Brown, 1 E. & E. 267. §§ 142, 143, 144.
Michigan State Bank v. Hastings, 1 Doug. (Mich.) 227. § 473.

- Micklethwait, In re**, 11 Ex. 452. § 362.
- Middleton, Matter of Village of**, 82 N. Y. 196. § 170.
- Middleton v. New Jersey, etc. Co.** 26 N. J. Eq. 269. §§ 133, 134, 167.
- v. Sage, 8 Conn. 221. § 386.
- Midland R'y Co. v. Ambergate R'y Co.** 10 Hare, 369. §§ 231, 403.
- v. Pye, 10 C. B. (N. S.) 191. § 407.
- Migneault v. Malo**, L. R. 4 P. C. 136. § 310.
- Milburn v. State**, 1 Md. 17. §§ 218, 234, 246, 411.
- Miles v. McDermott**, 31 Cal. 272. § 115.
- v. State, 40 Ala. 39. §§ 142, 143.
- v. Williams, 1 P. Wms. 249. §§ 290, 291.
- Milford v. Worcester**, 7 Mass. 48. § 336.
- Miller's Case**, 1 W. Black. 451. § 165.
- Miller v. Avery**, 2 Barb. Ch. 532. § 297.
- v. Craig, 11 N. J. Eq. 175. § 370.
- v. Edwards, 8 Colo. 528. §§ 137, 138.
- v. Fiery, 8 Gill, 147. § 10.
- v. Goodwin, 70 Ill. 659. § 41.
- v. Graham, 17 Ohio St. 1. §§ 206, 482.
- v. Grandy, 13 Mich. 540. § 420.
- v. Hurford, 11 Neb. 377. § 57.
- v. Kirkpatrick, 29 Pa. St. 226. § 328.
- v. McQuerry, 5 McLean. 469. § 293.
- v. Mercier, 3 Mart. (N. S.) 236. § 156.
- v. Miller, 16 Mass. 59. § 206.
- v. Miller, 44 Pa. St. 170. § 327.
- v. Moore, 1 E. D. Smith, 739. §§ 206, 476.
- v. Reynolds, 5 Martin (N. S.), 665. § 463.
- v. Ruble, 107 Pa. St. 395. § 458.
- v. Salomons, 7 Ex. 560. §§ 196, 237, 238, 246, 259.
- Miller v. State**, 3 Ohio St. 475. §§ 46, 48, 49, 50, 80.
- v. State, 33 Miss. 361. § 138.
- v. Wentworth, 82 Pa. St. 280. § 458.
- Millered v. Railroad Co.** 9 How. Pr. 238. § 290.
- Mills v. Charleton**, 29 Wis. 400. § 101.
- v. St. Clair Co. 8 How. 581. § 378.
- v. Scott, L. R. 8 Q. B. 496. § 337.
- v. Wilkins, 6 Mod. 62. §§ 196, 210.
- v. Williams, 11 Ired. 553. §§ 380, 473.
- Millvale Borough v. Evergreen R'y Co.** 131 Pa. St. 1. § 101.
- Milne v. Huber**, 3 McLean, 212. § 163.
- Milwaukee, etc. R. R. Co. v. Faribault**, 23 Minn. 167. § 388.
- v. Milwaukee, 34 Wis. 271. § 364.
- Mims v. Swartz**, 37 Tex. 13. § 293.
- Miner v. Clark**, 15 Wend. 425. § 440.
- Miners' Bank v. United States**, 1 Greene (Ia.), 553. §§ 378, 473.
- Minet v. Leman**, 20 Beav. 269. §§ 321, 333, 407.
- Minis v. United States**, 15 Pet. 445. §§ 218, 222.
- Minneapolis Gas L. Co. v. Minneapolis**, 36 Minn. 159. § 384.
- Minor v. Cardwell**, 37 Mo. 353. § 12.
- v. Mechanics' Bank, 1 Pet. 46. §§ 246, 460, 462.
- Minturn v. Larue**, 23 How. 435. §§ 365, 378, 380.
- Mirehouse v. Rennell**, 1 Cl. & Fin. 546. §§ 237, 238.
- Mississippi, etc. Co. v. Prince**, 34 Minn. 71. §§ 78, 87, 88, 103, 170.
- Missouri, etc. R. R. Co. v. K. P. R. R. Co.** 97 U. S. 491. § 379.
- v. Lee, 35 Am. & Eng. R. R. Cas. 364. § 371.
- Mitchell v. Doggett**, 1 Fla. 356. § 164.
- v. Duncan, 7 Fla. 13. §§ 143, 151, 202, 283, 288, 399, 462.
- v. Halsey, 15 Wend. 241. § 156.
- v. Mitchell, 5 Madd. 72. § 246.

- Mitchell v. Mitchell**, 1 Gill, 66. §§ 207, 434, 437.
 v. Rockland, 45 Me. 496. § 366.
 v. Tucker, 10 Mo. 262. § 19.
 v. United States, 9 Pet. 732. § 19.
 v. Wells, 37 Miss. 235. § 188.
 v. Woodson, 37 Miss. 567. §§ 111, 253.
Mitford v. Elliott, 8 Taunt. 13. § 228.
Mixer v. Sibley, 53 Ill. 61. § 368.
Moar v. Covington City Nat. Bank, 80 Ky. 305. § 112.
Mobile v. Rowland, 26 Ala. 498. § 428.
Mobile Bay Road Co. v. Yeind, 29 Ala. 325. § 439.
 v. Malone, 46 Ala. 391. § 283.
Mobile, etc. R. R. Co. v. State, 29 Ala. 573. §§ 104, 169.
Mobile Savings Bank v. Patty, 16 Fed. Rep. 751. § 161.
Mobile & O. R. Co. v. Whitney, 39 Ala. 471. § 12.
Modawell v. Holmes, 40 Ala. 391. § 306.
Moeller v. Harvey, 16 Phila. 66. § 262.
Moers v. Reading, 21 Pa. St. 189. § 75.
Mohawk Bridge Co. v. Utica, etc. R. R. Co. 6 Paige, 554. § 104.
Mohawk, etc. R. R. Co., Matter of, 19 Wend. 143. § 452.
Monck v. Hilton, 2 Ex. Div. 268. § 240.
Monet v. Jones, 10 Sm. & Marsh. 237. § 136.
Mongeon v. People, 55 N. Y. 613. §§ 10, 136, 133, 143, 167, 218, 225.
Monk v. Jenkins, 2 Hill's Ch. 12. §§ 392, 454.
Monroe v. Douglass, 5 N. Y. 447. §§ 184, 297.
 v. Paddock, 75 Ind. 422. § 113.
Monroe Co. Com'rs v. May, 67 Ind. 502. § 298.
Monson v. Chester, 22 Pick. 385. § 400.
Montague v. Smith, 17 Q. B. 688. § 256.
Montague v. State, 54 Md. 487. § 198.
Montclair v. Ramsdell, 107 U. S. 155. §§ 82, 84, 86, 88.
Montel & Co. v. Consolidated Coal Co. 39 Md. 164. § 154.
Montgomery v. Board of Education, 74 Ga. 41. § 138.
 v. Commonwealth, 91 Pa. St. 125. § 129.
 v. Deeley, 8 Wis. 709. § 294.
 v. Hobson, Meigs, 437. § 483.
 v. Kasson, 16 Cal. 189. § 472.
 v. Plank R. Co. 31 Ala. 76. § 194.
 v. State, 2 Tex. App. 506. § 166.
 v. Wright, 72 Ala. 411. § 120.
Montgomery, etc. Asso. v. Robinson, 69 Ala. 413. §§ 78, 80, 82, 85, 88, 93.
Montoursville Overseers v. Fairfield Overseers, 112 Pa. St. 99. § 458.
Montrose Peerage, 1 Macq. 406. §§ 196, 247.
Montville v. Haughton, 7 Conn. 543. §§ 329, 453.
Moody v. Seaman, 46 Mich. 74. §§ 183, 168.
 v. State, 48 Ala. 115. §§ 24, 41, 43, 45, 181, 294, 300.
 v. Threlkeld, 13 Ga. 55. § 410.
Moores v. Bunker, 29 N. H. 420. § 333.
Moog v. Randolph, 77 Ala. 597. §§ 29, 41, 43, 45, 200, 311.
Moon v. Durden, 2 Ex. 22. §§ 206, 464.
Mooney v. Union Pacific R. R. Co. 60 Iowa, 346. § 14.
Moore, Ex parte, 62 Ala. 471. §§ 87, 103, 170.
Moore v. Brown, 11 How. 424. § 453.
 v. Cooley, 2 Hill, 412. § 398.
 v. Gwynn, 5 Ired. 187. § 192.
 v. Houston, 3 Serg. & R. 169. § 253.
 v. Indianapolis, 120 Ind. 483. § 431.
 v. Kenockee, 75 Mich. 332. § 134.
 v. Luce, 29 Pa. St. 260. § 480.
 v. McClief, 16 Ohio St. 51. § 398.
 v. Mausert, 49 N. Y. 332. §§ 138, 137.

- Moore v. Maxwell**, 18 Ark. 469. § 194.
v. New Orleans, 32 La. Ann. 726. §§ 136, 180.
v. Police Jury, 32 La. Ann. 1013. § 103.
v. Railroad Co. 34 Wis. 173. § 154.
v. State, 43 N. J. L. 203. §§ 467, 479, 480.
v. Usher, 10 Eng. Ch. 107. § 194.
Moore's Lessee v. Vance, 1 Ohio, 1. § 140.
Morant v. Taylor, 1 Ex. D. 194. §§ 196, 210.
Morford v. Unger, 8 Iowa, 82. §§ 87, 88, 101.
Morgan v. Bolles, 36 Conn. 175. § 400.
v. Crawshaw, L. R. 5 H. of L. 304. §§ 266, 306, 311.
v. Davenport, 60 Tex. 230. § 256.
v. Monmouth Plank R. Co. 26 N. J. L. 99. § 170.
v. Wolte, 37 Ohio St. 23. § 123.
v. Smith, 4 Minn. 104. § 229.
v. State, 12 Ind. 448. § 298.
v. Stell, 5 Binn. 318. § 104.
v. Thorne, 7 M. & W. 400. §§ 163, 165.
Morley v. Greenhalgh, 3 B. & S. 374. § 280.
Morlot v. Lawrence, 1 Blatch. 608. § 139.
Morrall v. Sutton, 1 Phil. 533. §§ 138, 247.
Morrill v. State, 38 Wis. 434. § 232.
Morris v. Barrett, 97 Eng. C. L. 139. § 115.
v. Chicago, etc. R. R. Co. 65 Iowa, 727. § 14.
v. Davidson, 49 Ga. 361. §§ 181, 293.
v. State, 62 Tex. 728. §§ 483, 484.
v. Vanderen, 1 Dall. 64. § 17.
v. Van Voast, 19 Wend. 283. §§ 416, 442.
Morris Aqueduct v. Jones, 36 N. J. L. 206. § 207.
Morris Canal, etc. Co. v. Central R. R. Co. 16 N. J. Eq. 419. § 378.
Morris, etc. R. R. Co. v. Newark, 10 N. J. Eq. 352. § 388.
Morris & Essex R. R. Co. v. Central R. R. Co. 31 N. J. L. 205. § 388.
Morrissee v. Royal British Bank, 1 C. B. (N. S.) 67. §§ 133, 461, 462.
Morrison v. Barksdale, Harper, 101. § 310.
v. Fake, 1 Pin. (Wis.) 133. § 393.
v. Rice, 35 Minn. 436. § 138.
v. St. Louis, etc. R. R. Co. 96 Mo. 602. § 132.
v. Springer, 15 Iowa, 304. § 331.
v. State, 40 Ark. 448. § 169.
v. Stevenson, 69 Ala. 448. § 256.
v. Thistle, 67 Mo. 596. § 338.
Morrow v. Wood, 56 Ala. 1. § 418.
Morse v. Goold, 11 N. Y. 281. §§ 206, 476.
v. Presby, 25 N. H. 302. § 391.
v. Williamson, 35 Barb. 472. § 454.
Mosby v. Ins. Co. 31 Gratt. 629. § 137.
Moseley v. Mastin, 37 Ala. 216. § 306.
v. Tift, 4 Fla. 402. § 363.
Moser v. White, 29 Mich. 59. § 201.
Moses v. Mayor, etc. 52 Ala. 198. § 90.
Mosier v. Hilton, 15 Barb. 659. §§ 93, 117.
Mosley v. Vt. Mut. F. Ins. Co. 55 Vt. 142. § 306.
Mostyn v. Fabrigas, 1 Cowper, 174. § 184.
Moulton v. Posten, 52 Wis. 169. § 302.
Mounsey v. Ismay, 34 L. J. Ex. 56; 3 H. & C. 486. §§ 265, 300.
Mount v. Kesterson, 6 Cold. 452. § 447.
Mt. Holly Paper Co.'s Appeal, 99 Pa. St. 513. § 283.
Mouras v. The A. C. Brewer, 17 La. Ann. 82. § 166.
Movius v. Arthur, 95 U. S. 144. §§ 138, 157.
Moyce v. Newington, 4 Q. B. Div. 32. § 246.
Moyer v. Gross, 2 P. & W. 171. § 300.
v. Penn. Slate Co. 71 Pa. St. 293. § 371.

- Moyle v. Jenkins**, 51 L. J. Q. B. 112; L. R. 8 Q. B. Div. 116. §§ 219, 245.
Mugler v. Kansas, 123 U. S. 623. § 370.
Muhl's Adm'r v. Mich. Southern R. R. Co. 10 Ohio St. 272. § 371.
Muir v. Galloway, 61 Cal. 498. § 115.
 v. Keay, L. R. 10 Q. B. 594. § 262.
Muldoon v. Levi, 25 Neb. 457. § 97.
Mulkey v. State, 16 Tex. App. 53. § 166.
Mullaly v. Mayor, etc. 6 T. & C. 168. § 444.
Mullen v. People, 31 Ill. 444. §§ 142, 143, 202.
 v. State, 34 Ind. 540. § 97.
Mulford v. Clewell, 21 Ohio St. 191. §§ 374, 375.
Mulligan v. Cavanagh, 46 N. J. L. 45. § 154.
Mullin v. McCreary, 54 Pa. St. 230. § 290.
Mullins v. Treasurer of Surrey, L. R. 5 Q. B. Div. 170. §§ 222, 223.
Munday v. Rahway, 43 N. J. L. 338. § 475.
Mundy v. Monroe, 1 Mich. 68. § 478.
Munford v. Pearce, 70 Ala. 452. § 194.
Municipal Building Society v. Kent, L. R. 9 App. Cas. 273. §§ 235, 407.
Municipality v. Hart, 6 La. Ann. 570. § 429.
Municipality No. 3 v. Michoud, 6 La. Ann. 605. §§ 82, 103, 170, 480.
Munn v. Burch, 25 Ill. 35. § 295.
 v. Illinois, 94 U. S. 113. § 370.
Munro v. Butt, 8 E. & B. 754. § 324.
Munroe v. Guillaume, 3 Keyes, 30. § 190.
Munson v. Hallowell, 26 Tex. 475. § 256.
Murdock v. Memphis, 20 Wall. 617. §§ 154, 156.
Murfree v. Carmack, 4 Yerg. 270. § 111.
Murphy, In re, 23 N. J. L. 180. § 333.
Murphy, In re, 1 Woolw. 141. § 467.
Murphy v. Leader, 4 Irish L. 143; Jebb & Bourke, 75. § 436.
Murray v. Baker, 3 Wheat. 541. § 424.
 v. Charleston, 96 U. S. 432. § 475.
 v. Gibson, 15 How. 133. § 421.
 v. Hoboken Land Imp. Co. 18 How. 284. § 68.
 v. Hobson, 1 Colo. 66. § 260.
 v. Keyes, 35 Pa. St. 384. §§ 252, 256.
 v. New York Cent. R. R. Co. 4 Keyes, 274. §§ 234, 246, 442.
Muscogee R. R. v. Neal, 26 Ga. 121. § 135.
Musgrove v. Vicksburg, etc. R. R. Co. 50 Miss. 677. §§ 136, 162, 163, 164.
Mutual Ass. Society v. Watts, 1 Wheat. 279. § 191.
Myer v. Car Co. 102 U. S. 1. § 156.
Myers v. Conway, 55 Iowa, 166. § 376.
 v. Farrell, 47 Miss. 281. § 393.
 v. Manhattan Bank, 20 Ohio, 295. § 8.
 v. Marshall Co. 55 Miss. 344. § 154.
 v. Perigal, 2 D. Mac. & G. 619. § 236.
 v. State, 1 Conn. 502. § 208.
Myrick v. Hasey, 27 Me. 17. § 333.
Nalle v. Ventress, 19 La. Ann. 373. § 184.
Napier v. Hodges, 31 Tex. 287. § 288.
Nash v. Allen, 4 Q. B. 784. § 212.
 v. Mitchell, 8 Hun, 471. § 338.
 v. State, 2 Greene (La.), 286. § 438.
 v. Sullivan, 29 Minn. 206. § 379.
 v. White's Bank, 37 Hun, 57. § 133.
Nashville, etc. R. R. Co. v. Foster, 10 Lea, 351. § 13.
National Bank v. Barber, 24 Kan. 534. § 169.
 v. Bryant, 13 Bush, 419. § 299.
 v. Com'rs, 14 Fed. Rep. 239. § 101.
 v. Matthews, 98 U. S. 621. § 327.

- National Bank v. Southern, etc. Co.** 55 Ga. 36. § 88.
v. Whitney, 103 U. S. 99. § 327.
v. Williams, 46 Mo. 17. § 115.
v. Yankton Co. 101 U. S. 129. §§ 70, 197.
Naught v. Oneal, 1 Ill. 36. § 164.
Naylor v. Field, 29 N. J. L. 287. § 149.
Nazareth L. B. I. v. Commonwealth, 14 B. Mon. 266. § 153.
Nazro v. Merchants' Ins. Co. 14 Wis. 295. §§ 211, 260.
Neaderhauser v. State, 28 Ind. 257. § 303.
Neagle, In re, 39 Fed. Rep. 833; 135 U. S. 1. § 341.
Neal v. Burrows, 34 Ark. 491. § 447.
v. Moultrie, 12 Ga. 104. § 424.
v. Roberts, 1 Dev. & Batt. L. 81. § 331.
v. Sawyer, 60 Ga. 352. § 422.
Neass v. Mercer, 15 Barb. 318. § 478.
Neeld's Road, 1 Pa. St. 353. § 283.
Neely v. State, 4 Baxt. 174. § 175.
Neelly v. Lancaster, 47 Ark. 175. § 400.
Neenan v. Smith, 50 Mo. 525. §§ 322, 324.
Neeves v. Burrage, 14 Ad. & El. (N. S.) 504. § 181.
Negro Bell v. Jones, 10 Md. 322. § 240.
Neifing v. Town of Pontiac, 56 Ill. 172. § 92.
Neitzel v. Concordia, 14 Kan. 446. § 231.
Nellis v. Clark, 4 Hill. 424. § 336.
Nelson v. Allen, 1 Yerg. 360. §§ 307, 309, 311.
v. Kerr, 2 T. & C. 299. § 231.
v. McCrary, 60 Ala. 301. §§ 15, 184, 206, 476.
Nesbitt v. Lushington, 4 T. R. 783. § 264.
Nester v. Busch, 64 Mich. 657. § 102.
Neuendorff v. Duryea, 69 N. Y. 557. §§ 93, 102.
Nevil v. Clifford, 63 Wis. 435. § 129.
New v. McKechnie, 95 N. Y. 682. § 374.
New Albany, etc. R. R. Co. v. Connelly, 7 Ind. 32. § 325.
Newark Plank R. Co. v. Elmer, 9 N. J. Eq. 754. § 378.
New Brunswick v. Williamson, 44 N. J. L. 165. § 159.
Newburgh Turn. Co. v. Miller, 5 John. Ch. 113. § 462.
Newby v. Blakey, 3 H. & N. 57. § 479.
Neweberg v. Gaultier, 4 Ill. App. 348. § 377.
Newell v. People, 7 N. Y. 97. § 324.
v. Wheeler, 48 N. Y. 486. § 290.
New Haven v. Whitney, 36 Conn. 873. §§ 140, 204, 325, 326.
New Jersey v. Wilson, 7 Cr. 164. § 472.
New Jersey Southern R. R. Co. v. Long Branch Com'rs, 39 N. J. L. 28. § 388.
Newland v. Marsh, 19 Ill. 370. §§ 252, 332.
New London v. Brainard, 22 Conn. 552. §§ 380, 381.
New London Northern R. R. Co. v. Boston, etc. R. R. Co. 102 Mass. 389. §§ 138, 165.
Newman, Ex parte, 9 Cal. 502. § 330.
Newman v. Emporia, 41 Kan. 583. § 128.
v. Keffer, 1 Brunner Col. Cas. 502. § 185.
v. Samuels, 17 Iowa. 518. § 483.
New Orleans v. Holmes, 13 La. Ann. 502. § 107.
v. Poutz, 14 La. Ann. 853. § 314.
v. Salamander Ins. Co. 25 La. Ann. 650. §§ 240, 332.
v. St. Rome, 9 La. Ann. 573. §§ 207, 452.
New Orleans Canal, etc. Co. v. Templeton, 20 La. Ann. 141. § 298.
New Orleans, etc. R. R. Co. v. Hemp-hill, 35 Miss. 17. §§ 234, 236.
v. Municipality, 7 La. Ann. 148. § 429.

- Newport Marsh Trustees, Ex parte, 16 Sim. 346. §§ 337, 383.
- New Portland v. New Vineyard, 16 Me. 69. §§ 108, 193.
- Newsom v. Greenwood, 4 Ora. 119. §§ 164, 482.
- v. Cocke, 44 Miss. 352. § 331.
- Newton v. Cocke, 10 Ark. 169. § 297.
- v. Commissioners, 100 U. S. 559. § 473.
- v. Cowie, 4 Bing. 234. § 458.
- New York v. Miln, 11 Pet. 102. § 197.
- New York Cent. etc. R. R. Co., Matter of, 60 N. Y. 112. § 369.
- New York Elevated R. R. Co., Matter of, 70 N. Y. 327. § 183.
- New York, etc. R. R. Co. v. Van Horn, 57 N. Y. 473. §§ 133, 164, 480, 481.
- New York & Brooklyn Bridge, Matter of, 72 N. Y. 527. § 239.
- N. Y. Prot. E. Pub. School, Matter of, 47 N. Y. 556. § 452.
- Niantic Savings Bank v. Douglas, 5 Ill. App. 579. § 390.
- Niblack v. Goodman, 67 Ind. 174. §§ 132, 168.
- Nichol v. Nashville, 9 Humph. 252. §§ 365, 380.
- Nicholas v. Phelps, 15 Pa. St. 36. § 324.
- Nicholl v. Allen, 1 B. & S. 934. § 205.
- Nichols v. Bertram, 3 Pick. 342. § 473.
- v. Levy, 5 Wall. 433. § 187.
- v. Squire, 5 Pick. 168. § 142.
- v. Walter, 37 Minn. 264. § 128.
- v. Wells, Sneed (Ky.), 255. § 239.
- Nicholson v. Fields, 31 L. J. Ex. 235. § 348.
- v. Thompson, 5 Rob. (La.) 357. § 463.
- Nicol v. Paul, L. R. 1 Scotch App. 181. § 310.
- Niemeyer v. Wright, 75 Va. 239. §§ 335, 336.
- Niles v. Ransford, 1 Mich. 338. § 390.
- Nixon v. Piffet, 16 La. Ann. 379. §§ 138, 152, 202.
- Noble v. State, 1 Greene (Iowa), 325. §§ 284, 287.
- Noell v. Fisher, 3 Call, 215. § 429.
- Nolen v. Harden, 43 Ark. 307. § 221.
- Norfolk v. Chamberlaine, 29 Gratt. 534. § 206.
- Norman v. Heist, 5 W. & S. 171. §§ 480, 484.
- Norris v. Crocker, 13 How. 429. §§ 11, 142, 143.
- v. Harris, 15 Cal. 226. § 184.
- v. Hundred of Gawtry, Hob. 139. § 112.
- v. Trustees, etc. 7 G. & J. 7. § 473.
- v. Wrenshall, 34 Md. 492. § 474.
- North Bridgewater Bank v. Copeland, 7 Allen, 139. § 206.
- North Canal St. Road Case, 10 Watts, 351. §§ 140, 165, 464.
- North Chicago Rolling Mills Co. v. Morrissey, 111 Ill. 646. § 371.
- N. E. R'y v. Leadgate, L. R. 5 Q. B. 161. § 430.
- North Hempstead v. Hempstead, 2 Wend. 109. § 337.
- Northrop v. Cooper, 23 Kan. 432. § 114.
- Northwestern Manuf'g Co. v. Wayne Circuit Judge, 58 Mich. 381. § 96.
- Norwegian Street, 81 Pa. St. 349. §§ 455, 456.
- Norwich Gas Light Co. v. Norwich City Gas Co. 25 Conn. 18. § 378.
- Notley v. Buck, 8 B. & C. 164. § 237.
- Nunally v. White, 3 Met. (Ky.) 584. § 329.
- Nunes v. Wellisch, 12 Bush, 363. § 257.
- Nunn v. Fabian, L. R. 1 Ch. 35. § 427.
- Nusser v. Commonwealth, 25 Pa. St. 126. §§ 143, 144, 158, 159.
- Nuth v. Tamplin, L. R. 8 Q. B. Div. 253. §§ 218, 238, 259.
- Nutter v. Accrington Local Board, L. R. 4 Q. B. 375. § 230.
- Nymph, Schooner, The, 1 Sumn. 516. § 356.
- Oates v. National Bank, 100 U. S. 239. §§ 246, 332.
- Oakland Tp v. Martin, 104 Pa. St. 303. § 333.

- Oath Before Justice, Matter of**, 12 Coke, 130. § 341.
- Oatman v. Bond**, 15 Wis. 20. § 478.
- O'Brien v. County Commissioners**, 51 Md. 15. §§ 483, 484.
- v. Dillon**, 9 Ir. Ch. (N. S.) 318. §§ 335, 336.
- O'Byrnes v. State**, 51 Ala. 25. §§ 256, 333.
- O'Conner v. Warner**, 4 Watts & S. 227. § 10.
- O'Connor v. Towns**, 1 Tex. 107. § 112.
- Odell v. De Witt**, 53 N. Y. 643. § 341.
- O'Donnell v. McIntyre**, 37 Hun, 615. § 456.
- v. Sweeney**, 5 Ala. 467. § 336.
- O'Ferrall v. Simplot**, 4 Iowa, 400. §§ 15, 184.
- O'Flaherty v. McDowell**, 6 H. L. Cas. 142. §§ 138, 145, 202, 204.
- Ogbourne v. Ogbourne's Adm'r**, 60 Ala. 616. § 154.
- Ogden v. Blackledge**, 2 Cranch, 272. §§ 10, 11, 137, 201, 206, 229.
- v. Folliott**, 3 T. R. 733. § 12.
- v. Saunders**, 12 Wheat. 266. §§ 169, 332, 465, 471, 472, 474, 478, 479.
- v. Strong**, 2 Paine, 584. §§ 137, 234, 237, 239.
- v. Witherspoon**, 2 Haywood, 404. § 137.
- O'Hanlon v. Myers**, 10 Rich. L. 128. § 137.
- O'Hare v. National Bank**, 77 Pa. St. 96. § 336.
- Ohio, etc. R. R. Co. v. McClelland**, 25 Ill. 140. § 473.
- Ohio Life Ins. & Tr. Co. v. Debolt**, 16 How. 416. §§ 319, 378.
- Ohio Life Ins. etc. Co. v. Merchants' Ins. etc. Co.** 11 Humph. 1. § 385.
- O'Kane v. State**, 69 Ind. 183. § 96.
- Olcott v. Frazier**, 5 Hill, 562. § 456.
- O'Leary v. County of Cook**, 28 Ill. 534. § 96.
- v. Frisbey**, 17 Ill. App. 553. § 377.
- Oleson v. R. R. Co.** 36 Wis. 383. §§ 136, 154.
- Olive v. Walton**, 33 Miss. 114. §§ 218, 246, 400.
- Olive Cemetery Co. v. Philadelphia**, 93 Pa. St. 129. § 243.
- Oliver, In re**, 17 Wis. 681. §§ 68, 73.
- Olmstead, Matter of**, 17 Abb. New Cas. 320. § 232.
- O'Meara v. Commissioners**, 3 T. & C. 236. § 95.
- Omit v. Commonwealth**, 21 Pa. St. 426. § 157.
- Ong v. Sumner**, 1 Cincin. Sup. Ct. 424. § 146.
- Openheim v. Wolf**, 3 Sandf. Ch. 571. § 306.
- Opinion of Justices**, 7 Mass. 528. §§ 240, 250, 324, 348.
- Opinion of Justices**, 117 Mass. 603. § 473.
- Opinion of Justices**, 126 Mass. 551. § 307.
- Opinion of Justices**, 136 Mass. 578. § 321.
- Opinion of Justices**, 41 N. H. 553. § 336.
- Opinion of Justices**, 45 N. H. 607. § 294.
- Opinion of Justices**, 52 N. H. 622. § 181.
- Opinion of Justices**, 22 Pick. 573. § 331.
- Orange, etc. R. R. Co. v. Alexandria**, 17 Gratt. 176. §§ 218, 240, 246.
- Ordway v. Central National Bank of Baltimore**, 47 Md. 217. § 360.
- Oregon, etc. Co., In re**, 3 Sawy. 614. § 136.
- Oregon R'y Co. v. Portland**, 9 Ore. 231. § 388.
- O'Reilly v. Bard**, 105 Pa. St. 569. § 371.
- Oriental Bank v. Freeze**, 18 Me. 109. §§ 10, 163.
- v. Wright**, L. R. 5 App. Cas. 842. § 362.
- Ornamental Woodwork Co. v. Brown**, 2 H. & C. 63. §§ 237, 238.
- O'Rourke v. O'Rourke**, 43 Mich. 58. § 184.

- Orr v. Baker, 4 Ind. 86. § 364.
 ▼ Rhine, 45 Tex. 345. §§ 198, 463.
- Osborn, Ex parte, 24 Ark. 479. §§ 138, 143.
- Osborn v. Bank of U. S. 9 Wheat 738. § 473.
 ▼ Nicholson, 13 Wall 662. § 478.
- Osborne v. Huger, 1 Bay, 176. §§ 110, 206.
- Osburn v. Staley, 5 W. Va. 85. §§ 41, 42, 43, 48.
- Oshe v. State, 37 Ohio St. 500. § 80.
- Oswego Bridge Co. v. Fish, 1 Barb. Ch. 547. § 164.
- Ott v. Soulard, 9 Mo. 581. § 295.
- Overfield v. Sutton, 1 Metc. (Ky.) 621. § 256.
- Overmyer v. Williams, 15 Ohio, 31. § 381.
- Overseers v. Overseers, 20 John. 1. § 334.
 ▼ Smith, 2 S. & R. 363. § 333.
- Overseers of Pittstown v. Overseers of Pittsburgh, 18 John. 407. § 344.
- Owen v. Boyle, 15 Me. 147. §§ 190, 192.
 ▼ Slatter, 26 Ala. 551. § 112.
- Owens v. Withee, 3 Tex. 166. § 439.
- Owings v. Hull, 9 Pet. 624. §§ 22, 185, 293.
- Oxford Poor Rate, 8 E. & B. 184. § 295.
- Oxley v. Bridge, 1 Doug. 67. § 112.
- Pacific Mail Steamship Co. v. Joliffe, 2 Wall. 450. §§ 11, 164.
- Pacific R. R. Co. v. Cass County, 53 Mo. 17. § 157.
- Pacific Railroad v. Governor, 23 Mo. 353. §§ 31, 51, 63, 294.
- Pacific, etc. Tel. Co. v. Commonwealth, 66 Pa. St. 70. § 167.
- Pacific, Town of, v. Seifert, 79 Mo. 210. § 40.
- Pack v. Barton, 47 Mich. 520. §§ 26, 46.
- Packard v. Richardson, 17 Mass. 143. §§ 307, 310.
- Packer v. Noble, 103 Pa. St. 183. § 246.
 ▼ Sunbury, etc. R. R. Co. 19 Pa. St. 211. § 220.
- Packet Co. v. Keokuk, 95 U. S. 80. §§ 170, 171.
- Paddock v. Cameron, 8 Cow. 212. § 322.
- Padelford v. Mayor, etc. 14 Ga. 433. § 197.
- Paducah & M. R. R. Co. v. Stovall, 12 Heisk. 1. § 124.
- Page v. Allen, 58 Pa. St. 338. § 328.
- Paget v. Curtis, 15 La. Ann. 451. § 184.
- Paine v. Insurance Co. 11 R. I. 411. § 294.
 ▼ Spratley, 5 Kan. 525. §§ 380, 390.
- Palmer, Matter of, 40 N. Y. 561. § 164.
- Palmer v. Aldridge, 16 Barb. 131. § 296.
 ▼ Conly, 4 Denio, 374; 2 N. Y. 182. §§ 166, 482.
- ▼ Cross, 1 Sm. & M. 48. § 464.
- ▼ Hicks, 6 John. 133. § 386.
- ▼ Lacock, 107 Pa. St. 346. § 342.
- ▼ Palmer, 36 Mich. 487. § 368.
- ▼ State, 7 Cold. 82. § 247.
- ▼ York Bank, 18 Me. 166. §§ 208, 358.
- Palms v. Shawano Co. 61 Wis. 211. §§ 234, 260.
- Pana v. Bowler, 107 U. S. 529. § 154.
- Panaud v. Jones, 1 Cal. 488. § 314.
- Pancoast v. Addison, 1 H. & J. 350. § 424.
 ▼ Ruffin, 1 Ohio, 177. § 410.
- Pangborn v. Westlake, 36 Iowa, 646. § 336.
- ▼ Young, 32 N. J. L. 29. §§ 35, 183, 294.
- Panter v. Att'y-General, 6 Brown, P. C. 486. §§ 105, 107.
- Papin v. Ryan, 32 Mo. 21. § 181.
- Parker v. Bogardus, 5 N. Y. 309. § 464.
 ▼ Commonwealth, 6 Pa. St. 507. §§ 67, 75, 180.

- Parker v. Fassit**, 1 Har. & J. 337. § 424.
v. Great W. R'y Co. 7 M. & Gr. 253. § 378.
v. Hubbard, 64 Ala. 203. § 188.
v. Pomeroy, 2 Wis. 112. § 320.
v. Taswell, 2 De G. & J. 559. § 256.
Parkinson v. Brandenburg, 35 Minn. 294. § 110.
v. State, 14 Md. 184. §§ 78, 82, 88, 92, 104, 107, 215, 239, 247, 254.
Parmelee v. Lawrence, 48 Ill. 331. § 164.
Parramore v. Taylor, 11 Gratt. 220. § 256.
Parrott v. Stevens, 87 Conn. 93. § 141.
Parsons v. Bedford, 3 Pet. 433. § 254.
v. Chamberlin, 4 Wend. 512. § 253.
v. Circuit Judge, 37 Mich. 287. § 234.
v. McCracken, 9 Leigh, 495. § 426.
v. McGavock, 2 Tenn. Ch. 581. § 428.
v. Paine, 26 Ark. 124. § 206.
v. Thompson, 1 H. Bl. 322. § 429.
v. Tuolumne Co. W. Co. 5 Cal. 43. § 397.
Partington, Ex parte, 6 Q. B. 653. §§ 223, 267.
Partington v. Attorney-General, L. R. 4 H. L. 122. §§ 348, 362.
Parton v. Hervey, 1 Gray, 119. § 336.
Partridge v. Badger, 25 Barb. 146. § 385.
v. Dorsey, 3 Har. & J. 307. § 194.
v. Ins. Co. 15 Wall. 573. § 185.
v. Naylor, Cro. Eliz. 480. § 353.
v. Strange, 1 Plow. 79. § 105.
Patchin v. Brooklyn, 2 Wend. 377. § 343.
Paterson v. McCausland, 3 Bland's Ch. 71. § 305.
Paterson, City of, v. Society, 24 N. J. L. 885. § 75.
Pattee v. Greely, 13 Met. 284. § 336.
Patten v. Rhymer, 3 E. & E. 1. § 324.
v. Smith, 4 Conn. 450. § 422.
Patterson v. Brindle, 9 Watts, 93. § 420.
v. Caldwell, 1 Met. (Ky.) 489. § 137.
v. Tatum, 3 Sawyer, 164. §§ 155, 327.
v. Winn, 5 Pet. 233. § 15.
Pattison v. Bankes, 2 Cowper, 543. § 213.
Paul, In re, 94 N. Y. 497. §§ 87, 96, 170.
Paul v. Stone, 112 Mass. 27. § 114.
Pausch v. Guerrard, 67 Ga. 319. § 159.
Pauska v. Daus, 31 Tex. 67. § 184.
Pawlet v. Clark, 9 Cr. 292. § 472.
Payne v. Conner, 3 Bibb, 180. § 137.
v. Treadwell, 16 Cal. 220. §§ 295, 298.
Peables v. Hannaford, 18 Me. 106. § 112.
Peabody v. School Com. 115 Mass. 833. § 384.
Peachee v. State, 63 Ind. 399. § 88.
Peacock v. Banks, Minor (Ala.), 387. § 184.
v. Regina, 93 Eng. C. L. 264. § 115.
Peake v. Yeldell, 17 Ala. 636. § 191.
Pearce v. Atwood, 13 Mass. 324. § 288.
v. Bank of Mobile, 33 Ala. 693. §§ 221, 223.
v. Langfit, 101 Pa. St. 507. § 306.
Pearl v. Conley, 7 Sm. & M. 358. § 367.
Pearpont v. Graham, 4 Wash. C. C. 232. § 111.
Pearson v. Darrington, 32 Ala. 227. § 320.
v. Flannagan, 52 Tex. 266. § 452.
v. International Distillery, 73 Iowa, 348. § 137.
v. Lovejoy, 53 Barb. 407. §§ 207, 440.
Pease v. Howard, 14 John. 479. § 369.

- Pease v. Peck, 18 How. 595. §§ 40, 310, 312.
- Peate v. Dicken, 1 C. M. & R. 422. § 270.
- Peck v. Pease, 5 McLean, 486. § 191.
- v. Weddell, 17 Ohio St. 271. § 260.
- Pecquet v. Pecquet, 17 La. Ann. 204. § 295.
- Peet v. Nalle, 30 La. Ann. Pt. II, 949. § 220.
- Peik v. Chicago, etc. R. R. Co. 94 U. S. 164. § 185.
- Pelham v. Messenger, 16 La. Ann. 99. § 367.
- v. Woolsey, 16 Fed. Rep. 418. § 92.
- Pell v. Newark, 40 N. J. L. 550. § 127.
- v. Ulmar, 18 N. Y. 139. § 398.
- Pellen v. Inhab. of Wonsford, 9 Barn. & Cr. 134. § 112.
- Pemble v. Clifford, 2 McCord, 81. § 184.
- Penberthy v. Lee, 51 Wis. 261. § 452.
- Pendleton v. Bank of Kentucky, 2 J. J. Marsh. 148. § 401.
- v. Perkins, 49 Mo. 565. § 428.
- Penn v. Baltimore, 1 Ves. Sr. 454. § 194.
- Penn. Co. v. Frana, 13 Ill. App. 91. § 306.
- Penniman v. Cole, 8 Met. 496. § 115.
- Pennington v. Cox, 2 Cranch, 33. § 215.
- v. Gibson, 16 How. 80. §§ 22, 185, 203.
- v. Townsend, 7 Wend. 276. § 336.
- v. Woolfolk, 79 Ky. 13. §§ 80, 101, 103.
- Pennock v. Dialogue, 2 Pet. 18. § 333.
- Pennsylvania Hall, In re, 5 Pa. St. 204. § 165.
- Penn. R. R. v. Butler, 57 Pa. St. 335. § 371.
- Pennsylvania R. R. Co. v. Canal Commissioners, 21 Pa. St. 22. §§ 164, 383.
- v. Keller, 67 Pa. St. 300. § 371.
- Pennywit v. Foote, 27 Ohio St. 600. § 20.
- Penobscot R. R. v. Bartlett, 12 Gray, 244. §§ 191, 192.
- Penrose v. Martyr, E. B. & E. 499. § 444.
- Pensacola v. Louisville, etc. R. R. Co. 21 Fla. 492. § 390.
- v. Reese, 20 Fla. 437. § 456.
- Pensacola Telegraph Co. v. W. U. Tel. Co. 96 U. S. 1. § 383.
- People v. Adirondack Co. 57 Barb. 656. § 456.
- v. Allen, 1 Lans. 248. § 198.
- v. Allen, 6 Wend. 486. §§ 139, 203, 448.
- v. Allen, 42 N. Y. 404. § 90.
- v. Arensberg, 103 N. Y. 123. § 96.
- v. Banks, 67 N. Y. 568. §§ 92, 135.
- v. Berberich, 11 How. Pr. 333. § 222.
- v. Bigler, 5 Cal. 23. § 330.
- v. Board of State Auditors, 9 Mich. 327. § 473.
- v. Bond, 10 Cal. 563. § 475.
- v. Bowen, 21 N. Y. 520. §§ 55, 117.
- v. Bowen, 30 Barb. 24. § 117.
- v. Briggs, 50 N. Y. 558. §§ 46, 86, 88, 94, 101, 103, 170, 237, 331, 341.
- v. Brislin, 80 Ill. 423. §§ 88, 93, 96.
- v. Brooklyn, 69 N. Y. 605. § 154.
- v. Bull, 46 N. Y. 68. § 331.
- v. Burns, 5 Mich. 114. §§ 73, 75, 215, 240, 324.
- v. Burt, 43 Cal. 560. §§ 30, 138, 140, 204.
- v. Russell, 59 Mich. 104. § 142.
- v. Butler, 3 Cow. 347. § 468.
- v. Butler, 16 John. 203. § 200.
- v. Butte, 4 Mont. 174. §§ 72, 75.
- v. C. P. R. R. Co. 43 Cal. 432. § 121.
- v. Calder, 30 Mich. 87. § 190.
- v. Canal Com'rs, 3 Scam. 153. § 407.

People v. Carr, 36 Hun. 488. § 154.
v. Chapin, 105 N. Y. 309. § 342.
v. Chee Kee, 61 Cal. 404. § 302.
v. Chew, 6 Cal. 636. § 342.
v. Cicott, 16 Mich. 283. § 314.
v. Clark, 1 Cal. 406. §§ 104, 110.
v. Clute, 50 N. Y. 451. § 260.
v. Collins, 3 Mich. 343. §§ 67, 73.
v. Commissioners, 3 Hill. 601.
 §§ 218, 239, 341.
v. Commissioners, 54 N. Y. 276.
 §§ 36, 40, 51.
v. Commissioners, 59 N. Y. 92.
 § 473.
v. Commissioners, 47 N. Y. 501.
 § 93.
v. Comm'rs of Highways, 53
 Barb. 70. § 90.
v. Common Council, 13 Abb. Pr.
 (N. S.) 121. § 102.
v. Common Council of Brooklyn,
 22 Barb. 404. § 454.
v. Comstock, 78 N. Y. 356. § 331.
v. Cook, 14 Barb. 259. §§ 448,
 451, 455.
v. Cooper, 83 Ill. 585. §§ 170,
 176, 180.
v. Cooper, 6 Hill. 516. §§ 124,
 339.
v. Croton Aqueduct Board, 26
 Barb. 248. § 440.
v. Daniell, 50 N. Y. 271. § 395.
v. Davenport, 91 N. Y. 574.
 §§ 210, 211, 246.
v. Davis, 61 Barb. 456. §§ 120,
 168, 198.
v. Dayton, 55 N. Y. 377. § 309.
v. Denahy, 20 Mich. 349. §§ 78,
 82, 98.
v. Deming, 1 Hilt. 271. §§ 138, 256.
v. Devlin, 33 N. Y. 269. §§ 36, 54.
v. De Wolf, 62 Ill. 253. §§ 41, 45,
 52, 181, 294.
v. Doe, 1 Mich. 451. § 449.
v. Draper, 15 N. Y. 532. §§ 330,
 395.
v. Eddy, 57 Barb. 593. §§ 341, 343.
v. Fleming, 7 Colo. 230. §§ 78, 80,
 101, 103, 135, 137.

People v. Frisbie, 26 Cal. 135. § 206.
v. Gadway, 61 Mich. 285. § 102.
v. Gardner, 59 Barb. 198. § 464.
v. Gates, 57 Barb. 291. § 456.
v. Gill, 7 Cal. 356. §§ 167, 225,
 227.
v. Goddard, 8 Colo. 432. §§ 93,
 95.
v. Green, 58 N. Y. 295. §§ 464,
 473.
v. Grippen, 20 Cal. 677. § 138.
v. Hadden, 3 Denio. 220. § 400.
v. Hall, 8 Colo. 485. §§ 103, 169,
 170.
v. Harper, 91 Ill. 357. § 198.
v. Hatch, 33 Ill. 9. §§ 26, 59.
v. Henshaw, 76 Cal. 436. § 121.
v. Hicks, 15 Barb. 160. § 341.
v. Hill, 3 Utah, 334. §§ 258, 260.
v. Hill, 8 N. Y. 449. § 120.
v. Hills, 35 N. Y. 499. §§ 80, 101,
 198.
v. Hillsdale, etc. T. Co. 2 John.
 190. § 456.
v. Hobson, 48 Mich. 27. §§ 143,
 166.
v. Hoffman, 97 Ill. 234. § 260.
v. Hoffman, 116 Ill. 587. § 72.
v. Holley, 12 Wend. 481. § 448.
v. Hoym, 20 How. Pr. 76. § 407.
v. Hulse, 3 Hill. 309. §§ 207,
 254, 357, 400, 438.
v. Hurst, 41 Mich. 328. § 94.
v. Ins. Co. 19 Mich. 392. §§ 82, 92.
v. Inst. of Prot. Deaconesses, 71
 Ill. 229. § 78.
v. Irvin, 21 Wend. 128. § 256.
v. Jackson, etc. Plank Road Co.
 9 Mich. 285. §§ 473, 474.
v. Jobs, 7 Colo. 475. § 169.
v. Kenney, 96 N. Y. 294. §§ 169,
 170.
v. King, 28 Cal. 265. § 260.
v. Kinsman, 51 Cal. 92. § 206.
v. Knight, 13 Mich. 424. § 405.
v. Lake Co. 33 Cal. 487. § 449.
v. Lambert, 5 Mich. 349. §§ 190,
 192.
v. Lambier, 5 Denio. 9. § 386.

- People v. Lawrence**, 41 N. Y. 137. §§ 88, 97.
v. Lawrence, 36 Barb. 185. §§ 60, 66, 80, 88, 213, 345, 407.
v. Livingston, 6 Wend. 526. § 163.
v. Loewenthal, 93 Ill. 191. §§ 45, 46, 96, 307, 311.
v. Luby, 56 Mich. 551. § 170.
v. Lyman, 2 Utah, 30. §§ 299, 300.
v. Lytle, 1 Idaho, 143. § 136.
v. McCain, 51 Cal. 360. § 206.
v. McCallum, 1 Neb. 182. §§ 88, 132.
v. McCann, 16 N. Y. 58. §§ 103, 120.
v. McClave, 99 N. Y. 83. § 324.
v. McClellan, 31 Cal. 101. § 342.
v. McDonald, 69 N. Y. 362. § 483.
v. McElroy, 72 Mich. 446; 40 N. W. Rep. 750. §§ 91, 330.
v. Mahaney, 13 Mich. 481. §§ 41, 43, 48, 78, 82, 88, 131, 135, 181, 294.
v. Manhattan Co. 9 Wend. 351. § 473.
v. Marx, 99 N. Y. 377. § 370.
v. May, 3 Mich. 598. §§ 254, 307, 309.
v. Mayor, etc. of N. Y. 32 Barb. 102. § 140.
v. Meighan, 1 Hill, 298. § 453.
v. Metzker, 47 Cal. 524. § 384.
v. Miner, 47 Ill. 33. § 159.
v. Mitchell, 4 Sandf. 466. § 453.
v. Mitchell, 35 N. Y. 551. §§ 483, 484.
v. Molyneux, 40 N. Y. 113. §§ 211, 284.
v. Morris, 13 Wend. 325. § 239.
v. N. Y. etc. R. R. Co. 84 N. Y. 565. § 274.
v. O'Brien, 38 N. Y. 193. §§ 95, 198.
v. O'Brien, 111 N. Y. 1. § 210.
v. O'Neil, 51 Cal. 91. § 206.
v. Palmer, 52 N. Y. 83. §§ 138, 157.
v. Palmer, 109 N. Y. 110. § 139.
- People v. Parks**, 58 Cal. 635. §§ 80, 92, 103.
v. Peacock, 98 Ill. 172. §§ 206, 350, 482.
v. Peck, 11 Wend. 604. § 450.
v. Peralta, 3 Cal. 379. § 397.
v. Pico, 62 Cal. 50. § 402.
v. Platt, 17 John. 195. §§ 206, 472.
v. Pond, 67 Mich. 98. § 94.
v. Porter, 90 N. Y. 68. §§ 169, 173, 174.
v. Power, 25 Ill. 187. § 473.
v. Purdy, 2 Hill, 31. §§ 36, 66, 294.
v. Quigg, 59 N. Y. 83. § 157.
v. Recorder, 6 Hill, 492. § 207.
v. Reynolds, 5 Gilm. 1. §§ 72, 75.
v. Richards, 108 N. Y. 137. § 274.
v. River Raisin, etc. R. R. Co. 13 Mich. 389. §§ 294, 380.
v. Rochester, 5 Lans. 11. § 449.
v. Salomon, 51 Ill. 37. §§ 72, 75, 107.
v. San Francisco, etc. R. R. Co. 28 Cal. 254. § 138.
v. San Francisco, etc. R. R. Co. 35 Cal. 606. § 331.
v. Schemerhorn, 19 Barb. 540. §§ 454, 455.
v. Schoonmaker, 63 Barb. 44. §§ 234, 237, 238.
v. Shepard, 36 N. Y. 285. § 330.
v. Sheriff of Broome, 19 Wend. 87. § 114.
v. Sloan, 2 Utah, 326. § 167.
v. Starne, 35 Ill. 121. § 48.
v. Stevens, 13 Wend. 341. § 239.
v. Stout, 23 Barb. 349. § 67.
v. Supervisors, 8 N. Y. 317. §§ 35, 54.
v. Supervisors, 16 N. Y. 425. §§ 10, 200, 201, 206, 229.
v. Supervisors, 34 N. Y. 268. § 452.
v. Supervisors, 43 N. Y. 10. §§ 102, 103, 194, 198.

- People v. Supervisors**, 67 N. Y. 109.
 §§ 133, 137, 152, 168.
v. Supervisors, 3 Barb. 332. § 11.
v. Supervisors, 56 Barb. 542. § 462.
v. Supervisors, 63 Barb. 83. § 482.
v. Supervisors, 6 Hun. 304. §§ 207, 390.
v. Supervisors, 40 Hun. 353. § 157.
v. Supervisors, 13 Abb. New Cas. 421. § 237.
v. Supervisor, 14 Mich. 336. § 420.
v. Supervisors, 16 Mich. 254. § 91.
v. Supervisors, 20 Mich. 95. § 483.
v. Sweetser, 1 Dak. 295. §§ 252, 260.
v. Thompson, 67 Cal. 627. § 451.
v. Tibbets, 4 Cow. 384. §§ 434, 482.
v. Tiphaine, 3 Park. Cr. 241. § 137.
v. Tisdale, 57 Cal. 104. §§ 142, 143.
v. Trustees, 26 Hun. 488. § 168.
v. Tyler, 36 Cal. 522. § 168.
v. Tyler, 7 Mich. 161. § 213.
v. Utica Ins. Co. 15 John. 381. §§ 241, 254, 380, 436.
v. Walker, 17 N. Y. 502. § 112.
v. Wallace, 70 Ill. 680. §§ 49, 122, 127.
v. Weston, 3 Neb. 312. §§ 283, 284.
v. Whipple, 47 Cal. 592. § 49.
v. Whitney's Point, 102 N. Y. 81. § 391.
v. Williams, 64 Cal. 87. § 298.
v. Willsea, 60 N. Y. 507. § 101.
v. Wintermute, 1 Dak. 63. § 168.
v. Wood, 71 N. Y. 371. § 211.
v. Woods, 7 Cal. 579. § 475.
v. Wright, 70 Ill. 388. §§ 124, 135, 193, 198.
Peoria, etc. R. R. Co. v. Duggan, 109 Ill. 537. § 125.
Pepperell v. Burrell, 2 Dowl. P. C. 674. § 112.
Perchard v. Heywood, 8 T. R. 472. § 194.
Perdicaris v. Bridge Co. 29 N. J. L. 367. § 194.
Perkins v. Perkins, 62 Barb. 531. §§ 283, 290.
v. Sewell, 1 W. Black. 659. § 300.
v. Thornburgh, 10 Cal. 189. §§ 204, 327.
Perrine v. Chesapeake, etc. Canal Co. 9 How. 172. § 381.
Perry v. Commonwealth, 3 Gratt. 632. § 206.
v. Gross, 25 Neb. 826. § 101.
v. Mitchell, 5 Denio. 537. § 342.
v. New Orleans R. R. Co. 55 Ala. 413. § 194.
v. Newsom, 1 Ired. Eq. 28. §§ 194, 199, 218.
v. State, 87 Ala. 30. § 469.
Perry County v. Jefferson Co. 94 Ill. 214. § 332.
v. Railroad Co. 58 Ala. 546. §§ 29, 41, 43, 46.
Perryman v. Greer, 39 Ala. 133. § 400.
Peters v. Bain, 133 U. S. 670. § 185.
v. Condron, 2 S. & R. 80. § 432.
Petersburg v. Metzker, 21 Ill. 205. § 380.
Petrie v. Columbia, etc. R. R. Co. 35 Am. & Eng. R. R. Cas. 430; 29 S. C. 303. § 371.
Pettit v. Fretz, 33 Pa. St. 118. § 400.
Petty, In re, 22 Kan. 477. § 470.
Peugnet, Matter of, 67 N. Y. 444. § 133.
Peyton v. Moseley, 3 T. B. Mon. 77. §§ 139, 153.
v. Smith, 4 McCord. 476. § 10.
Phelan v. Johnson, 7 Ir. L. 535. § 333.
Phelps v. Hawley, 52 N. Y. 23. § 462.
v. Rightor, 9 Rob. (La.) 531. § 283.
v. Rooney, 9 Wis. 70. § 475.
v. Wood, 9 Vt. 399. § 425.
Philadelphia v. Ridge Ave. R'y Co. 102 Pa. St. 190. § 332.
Philadelphia Bank v. Lambeth, 4 Rob. 463. § 184.
Philadelphia & Erie R. R. Co. v. Catawissa R. R. Co. 53 Pa. St. 20. §§ 229, 231, 307, 402.

- Philadelphia, etc. R. R. Co. v. Lehman, 56 Md. 209. § 302.
- Phillips v. Ash, 63 Ala. 414. §§ 140, 399.
- v. Commonwealth, 44 Pa. St. 197. § 333.
- v. Covington, etc. Co. 2 Met. (Ky.) 221. §§ 80, 85, 93.
- v. Evans, 1 Cr. & M. 450. § 448.
- v. Hopwood, 10 B. & C. 39. §§ 162, 165.
- v. Hunter, 2 H. Black. 402. § 13.
- v. Mayor, 1 Hilt. 483. §§ 97, 120, 170.
- v. Missouri Pac. R. R. Co. 86 Mo. 540. § 125.
- v. Phillips, L. R. 1 P. & D. 173. § 430.
- v. Poland, L. R. 1 C. P. 204. § 271.
- v. Pope's Heirs, 10 B. Mon. 172. § 234.
- v. Schumacher, 10 Hun. 405. § 129.
- v. State, 15 Ga. 518. § 246.
- Philpott v. St. George's Hospital, 6 H. of L. Cas. 338. §§ 247, 254.
- Pickering v. Fisk, 6 Vt. 107. § 12.
- Pickett v. Pipkin, 64 Ala. 520. § 194.
- Pierce v. Delamater, 1 N. Y. 17. § 138.
- v. Kimball, 9 Me. 59. §§ 169, 193, 198.
- Pierpont v. Crouch, 10 Cal. 315. §§ 30, 140.
- Piggott v. Rush, 4 Ad. & El. 912. §§ 424, 426.
- Pike's Estate, 45 Wis. 391. § 256.
- Pike v. Hoard, Eden, 184. § 237.
- v. Megoum, 44 Mo. 491. § 229.
- Pilkington v. Cooke, 16 M. & W. 615. § 159.
- Pillon v. Bushnell, 5 Barb. 156. § 234.
- Pinn v. Nicholson, 6 Ohio St. 178. §§ 50, 80.
- Pinckney v. Burrage, 31 N. J. L. 21. § 426.
- Pingree v. Snell, 42 Me. 53. §§ 154, 255.
- Pinkerton v. Easton, L. R. 16 Eq. 492. § 431.
- Pinkham v. Dorothy, 55 Me. 135. § 366.
- Pioche v. Paul, 22 Cal. 110. § 314.
- Pioneer, The, Deady, 72. § 335.
- Piscataqua Bridge Co. v. New Hampshire Bridge Co. 7 N. H. 35. §§ 169, 378.
- Pitman v. Bump, 5 Ore. 17. §§ 10, 464.
- v. Commonwealth, 2 Rob. (Va.) 813. §§ 142, 143, 166.
- v. Flint, 10 Pick. 504. § 333.
- Pitte v. Shipley, 46 Cal. 154. §§ 246, 255.
- Pittsburg's Appeal, 115 Pa. St. 4. § 380.
- Pittsburg v. Walter, 69 Pa. St. 365. § 456.
- Pittsburg, etc. R. R. Co. v. S. W. Pa. R'y Co. 77 Pa. St. 173. § 324.
- v. Vining's Adm'r, 27 Ind. 513. § 371.
- Planche v. Fletcher, 1 Doug. 251. § 12.
- Plantation No. 9 v. Bean, 36 Me. 359. § 165.
- Planters' Bank v. Sharp, 6 How. 391. §§ 473, 474.
- v. State, 6 Sm. & M. 628. §§ 138, 202.
- Platt v. Lock, 1 Plowd. 35. § 413.
- v. Stewart, 10 Mich. 260. § 391.
- Plowman, Ex parte, 53 Ala. 440. § 443.
- Plumb v. Sawyer, 21 Conn. 351. § 206.
- Plummer v. People, 74 Ill. 361. §§ 91, 210.
- v. Plummer, 37 Miss. 185. §§ 307, 310, 311.
- Plumstead Board of Works v. Spackman, L. R. 13 Q. B. Div. 878. §§ 218, 322.
- Pochin v. Duncombe, 1 H. & N. 856. § 308.
- Poe v. State, 85 Tenn. 495. § 255.
- Poindexter v. Barker, 2 Hayw. 173. § 190.
- Polk's Lessee v. Wendall, 9 Cr. 98. §§ 187, 191.

- Pollard, *Ex parte*, 40 Ala. 99. §§ 85, 135, 206, 476.
- Pollard v. Wegener, 13 Wis. 569. § 394.
- Pomeroy v. Ainsworth, 22 Barb. 118. § 184.
- Pomfret v. Windsor, 2 Ves. 480. § 184.
- Pond v. Maddox, 38 Cal. 572. § 132.
- v. Negus, 3 Mass. 230. §§ 448, 449, 450.
- Pons v. State, 49 Miss. 1. § 143.
- Poock v. Lafayette Bdg. Ass. 71 Ind. 357. § 260.
- Pool v. Wedemeyer, 56 Tex. 287. § 407.
- Poor Directors v. R. R. Co. 7 Watts & S. 236. § 168.
- Poor District v. Poor District, 109 Pa. St. 579. § 207.
- Pope v. Phifer, 3 Heisk. 701. §§ 119, 124.
- Porter v. Cocke, Peck, 30. § 184.
- v. Waring, 69 N. Y. 250. § 306.
- Porterfield v. Clark, 2 How. 76. § 187.
- Portland v. Stock, 2 Oregon, 69. § 132.
- Portland Bank v. Aphthorp, 12 Mass. 252. § 307.
- v. Maine Bank, 11 Mass. 204. § 111.
- Portsmouth Livery Co. v. Watson, 10 Mass. 91. § 193.
- Port Wardens of N. Y. v. Cartwright, 4 Sandf. 236. § 370.
- Posey v. Pressley, 60 Ala. 243. §§ 255, 256.
- Post v. Garrow, 18 Neb. 682. § 115.
- v. Supervisors, 105 U. S. 667. §§ 41, 48, 53, 181.
- Postmaster-General v. Early, 12 Wheat. 148. § 201.
- Potter v. National Bank, 102 U. S. 163. § 224.
- v. Safford, 50 Mich. 46. §§ 215, 240.
- Potwin v. Johnson, 108 Ill. 70. § 72.
- Poulson v. Thirst, L. R. 2 C. P. 449. § 243.
- v. Union Nat. Bank, 40 N. J. L. 563. § 138.
- Pound v. Plumstead, L. R. 7 Q. B. 183. § 404.
- Powdrell v. Jones, 2 Smale & G. 407. § 246.
- Powell v. Brandon, 24 Miss. 863. § 184.
- v. De Blane, 23 Tex. 66. § 191.
- v. Jackson, 51 Mich. 129. § 26.
- v. State, 69 Ala. 10. §§ 169, 175.
- v. Tuttle, 3 N. Y. 396. §§ 207, 362, 390.
- Power v. Penny, 59 Miss. 5. § 483.
- Powers' Appeal, 29 Mich. 504. §§ 112, 114, 207.
- Powers v. Barney, 5 Blatch. 202. §§ 160, 363.
- v. Bergen, 6 N. Y. 358. § 194.
- v. Inferior Ct. 23 Ga. 65. § 75.
- v. Shepard, 48 N. Y. 540. §§ 133, 147.
- Powlter's Case, 11 Coke, 33. § 210.
- Prangley, *In re*, 4 Ad. & El. 781. § 112.
- Pratt v. Short, 79 N. Y. 437. § 336.
- v. Street Commissioners, 139 Mass. 559. §§ 154, 156.
- Prell v. McDonald, 7 Kan. 426. §§ 189, 193.
- Prentiss v. Danaher, 20 Wis. 311. § 229.
- Presbrey v. Williams, 15 Mass. 193. §§ 111, 112, 114.
- Prescott v. Beebe, 17 Kan. 320. § 95.
- President, etc. of L. v. Harrison, 9 B. & C. 524. § 160.
- Preston v. Louisville, 84 Ky. 118. § 128.
- v. Surgoine, Peck, 80. § 184.
- Pretty v. Solly, 26 Beav. 606. § 217.
- Price v. Hopkin, 13 Mich. 318. § 107.
- v. Nesbitt, 29 Md. 263. § 164.
- v. White, 27 Mo. 275. §§ 193, 198.
- v. Whitman, 8 Cal. 412. §§ 112, 115.
- Prieger v. Exchange, etc. Ins. Co. 6 Wis. 89. § 298.
- Prigg v. Pennsylvania, 16 Pet. 539. §§ 197, 253.
- Prigge v. Adams, Skin. 350. § 198.

- Prince v. Lamb, Breese, 378. § 184.
 Pringle v. Carter, 1 Hill (S. C.), 53. § 395.
 Pritchett v. Stanislaus Co. 73 Cal. 310. § 121.
 Pritz, Ex parte, 9 Iowa, 30. §§ 129, 130.
 Probasco Co. v. Moundsville, 11 Wa. V. 501. § 364.
 Proprietors of Fryeburg Canal v. Frye, 5 Me. 38. § 193.
 Proprietors of Locks, etc. v. Lowell, 7 Gray, 223.
 Prospect Park, etc. R. R. Co., In re, 67 N. Y. 371 § 92.
 Protection Life v. Palmer, 81 Ill. 88. § 111.
 Protector, The, 1 W. Rob. 45. § 364.
 Protestant Ep. Pub. School, In re Application of, 58 Barb. 161. §§ 206, 464.
 Providence v. Union R. R. Co. 12 R. I. 473. § 157.
 Providence Bank v. Billings, 4 Pet. 514. § 473.
 Providence Co. v. Chase, 108 Pa. St. 319. § 454.
 Providence, etc. R. R. Co. v. Norwich, etc. R. R. 138 Mass. 277. § 389.
 Pryce v. Monmouthshire Canal & Ry. Co., L. R. 4 App. Cas. 842. § 362.
 Pryor v. Ryburn, 16 Ark. 671. §§ 368, 426.
 Public School Trustees v. Trenton, 30 N. J. Eq. 667. § 138.
 Pue v. Stetzel, 16 Md. 539. § 260.
 Pugh v. Duke of Leeds, 2 Cowp. 714. § 112.
 v. State, 2 Head, 227. § 298.
 Pullan v. Cincinnati, etc. R. R. Co. 4 Biss. 35. § 381.
 Purdy v. People, 4 Hill, 384. §§ 36, 181, 182.
 Pursell v. New York Life Ins. Co. 42 N. Y. Super. Ct. 383. §§ 155, 327.
 Putnam v. Longley, 11 Pick. 489. §§ 322, 407.
 Pyle v. Maulding, 7 J. J. Marsh. 202. §§ 111, 112.
 Quackenbush v. Danks, 1 Denio, 128. §§ 206, 476.
 Quarrier v. Colston, 1 Phil. 147. § 12.
 Quarterbaum v. State, 79 Ala. 1. § 331.
 Queen v. Castro, L. R. 9 Q. B. 360. § 247.
 v. Champneys, L. R. 6 C. P. 384. § 157.
 v. Justices, etc. 8 Ad. & El. 932. § 112.
 v. The Justices, 7 Jurist, 396. § 115.
 v. Pearce, L. R. 5 Q. B. 386. §§ 230, 231.
 v. St. Giles, 3 E. & E. 224. § 133.
 Quick v. Miller, 103 Pa. St. 67. § 400.
 v. Whitewater Township, 7 Ind. 570. § 220.
 Quigley v. Gorham, 5 Cal. 418. § 247.
 Quilter v. Mapleson, L. R. 9 Q. B. Div. 672. § 463.
 Quin v. O'Keeffe, 10 Irish C. L. (N. S.) 393. §§ 218, 219, 246, 260, 322, 324.
 Quinlon v. Rogers, 12 Mich. 168. § 175.
 Quinn v. Fidelity Ben. Asso. 100 Pa. St. 382. §§ 207, 437.
 v. Lowell Electric L. Co. 140 Mass. 106. § 267.
 Rader v. Township of Union, 39 N. J. L. 509. §§ 103, 170, 180.
 Radnorshire Co. Road Board v. Evans, 3 B. & S. 400. § 268.
 Rafael v. Verelst, 2 W. Black. 1058. § 12.
 Rafferty v. Buckman, 46 Iowa, 195. § 375.
 Ragio v. State, 86 Tenn. 272. §§ 103, 119, 124.
 Ragland v. The Justices, 10 Ga. 65. §§ 242, 411, 420.
 v. Wynn, 37 Ala. 32. § 298.
 Railroad v. Hurst, 11 Heisk. 625. § 20.
 v. McKaskill, 94 N. C. 746. § 398.
 v. Murrell, 11 Heisk. 715. § 463.

- Railroad Co. v. Bank of Ashland**, 12 Wall. 229. §§ 22, 185, 293.
v. Barron, 5 Wall. 90. § 371.
Railroad Cos. v. Schulte, 103 U. S. 118. § 171.
Railroad Tax Cases, 13 Fed. Rep. 722. § 30.
Railway Co. v. Board Public Works, 28 W. Va. 264. § 10.
v. Loftin, 98 U. S. 559. § 364.
Ralston v. Lothain, 18 Ind. 303. § 10.
Ramagno v. Crook, 85 Ala. 226. § 92.
Ramchander v. Hammond, 2 John. 200. § 367.
Ramsden v. Gibbs, 1 B. & C. 319. § 429.
Ramsey v. Glenn, 33 Kan. 271. § 14.
Rand v. Commonwealth, 9 Gratt. 738. § 468.
v. Rand, 4 N. H. 267. § 111.
Randall v. Pryor, 4 Ohio, 424. § 342.
v. Van Rensselaer, 1 John. 95. § 12.
Randolph v. Bayne, 44 Cal. 366. § 232.
v. State, 9 Tex. 521. §§ 208, 279, 349.
Rankin v. Pine, 4 Abb. Pr. 309. § 369.
v. Tenbrook, 6 Watts, 388. § 364.
Ranoul v. Griffie, 3 Md. 54. § 288.
Rantz v. Barnes, 40 Ohio St. 43. § 377.
Rape v. Heaton, 9 Wis. 328. §§ 184, 297.
Rathbone v. Bradford, 1 Ala. (N. S.) 312. §§ 10, 104.
Ratzky v. People, 29 N. Y. 124. §§ 469, 470.
Raudebaugh v. Shelley, 6 Ohio St. 307. §§ 151, 202.
Raverty v. Fridge, 3 McLean, 230. § 483.
Rawley v. Rawley, 1 Q. B. D. 466. § 210.
Rawlings v. Jennings, 13 Ves. 46. § 276.
Rawlins v. Vidvard, 34 Hun, 205. § 374.
Rawls v. Kennedy, 23 Ala. 240. § 222.
Rawson v. Parsons, 6 Mich. 401. § 449.
Raymond v. State, 54 Miss. 562. § 386.
Raynard v. Chase, 1 Burr. 2. § 208.
Raynham v. Canton, 3 Pick. 293. § 191.
Read v. Edwards, 17 C. B. (N. S.) 245. § 256.
v. Frankfort Bank, 28 Ma. 318. §§ 10, 476.
v. Levy, 30 Tex. 738. § 332.
v. Stewart, 129 Mass. 407. § 358.
v. Storey, 6 H. & N. 423. § 139.
Reading v. Savage, 124 Pa. St. 328. § 1:8.
Ready v. Chamberlain, 52 How. Pr. 123. § 115.
Red Rock v. Henry, 106 U. S. 596. §§ 138, 154, 157.
Reed v. Clark, 3 McLean, 480. § 40.
v. Davis, 8 Pick. 514. §§ 208, 258.
v. Northfield, 13 Pick. 94. §§ 208, 358, 360.
v. Omnibus R. R. Co. 33 Cal. 212. § 174.
v. Ownby, 44 Mo. 204. § 314.
v. Rawson, 2 Litt. 189. § 206.
v. State, 12 Ind. 641. § 88.
v. Thompson, 88 Ill. 245. § 375.
v. Toledo, 18 Ohio, 161. § 365.
v. Wilson, 41 N. J. L. 29. § 295.
Reel v. Overall, 39 Ala. 138. § 400.
Reeves v. White, 17 Q. B. 995. § 396.
Regina v. Adamson, L. R. 1 Q. B. Div. 201. § 462.
v. Allen, L. R. 1 C. C. 367. § 255.
v. Arnold, 5 B. & S. 322. § 432.
v. Badcock, 6 Q. B. 787. § 257.
v. Barclay, L. R. 8 Q. B. Div. 306. § 362.
v. Bennett, 14 Cox C. C. 45. § 355.
v. Bishop, 5 Q. B. Div. 259. § 355.
v. Bishop of Oxford, L. R. 4 Q. B. Div. 525. § 462.
v. Boteler, 4 B. & S. 989. § 462.

- Regina v. Brown*, 17 Q. B. 833. § 262.
 v. Bullock, L. R. 1 C. C. 117. § 256.
 v. Buttle, L. R. 1 C. C. 250. § 256.
 v. Cambridgeshire Justices, 7 Ad. & E. 491. § 403.
 v. Chantrell, L. R. 10 Q. B. 587. § 314.
 v. Cleworth, 4 B. & S. 927. § 270.
 v. Cohen, 8 Cox C. C. 41. § 355.
 v. Collingwood, 12 Q. B. 681. § 418.
 v. Cutbush, L. R. 2 Q. B. 379. § 310.
 v. Dean, 12 M. & W. 39. §§ 355, 429.
 v. Doubleday, 3 El. & El. 501. § 281.
 v. Edmundson, 28 L. J. M. C. 215; 2 E. & E. 77. §§ 268, 281.
 v. Fordham, 11 A. & El. 73. § 139.
 v. Frost, 9 C. & P. 129. §§ 256, 307.
 v. Gibbons, 12 Cox C. C. 237. § 355.
 v. Harden, 2 Ellis & B. 188. § 145.
 v. Harvey, L. R. 1 C. C. R. 284. §§ 355, 429.
 v. Houghton, 1 El. & Bl. 501. § 213.
 v. Hertford College, L. R. 3 Q. B. Div. 707. § 300.
 v. Horton, 11 Cox C. C. 670. § 355.
 v. Ingall, L. R. 2 Q. B. Div. 199. § 448.
 v. Ingham, 5 B. & S. 257. § 256.
 v. Inhabitants, etc. 2 Q. B. 84. § 138.
 v. Ipswich Union, 2 Q. B. Div. 269. § 206.
 v. Justices, 7 Ad. & E. 480. §§ 230, 231.
 v. Kershaw, 6 E. & B. 1007. § 404.
 v. Lichfield, 2 Q. B. 693. § 270.
 v. Llangian, 4 B. & S. 249. §§ 145, 261.
- Regina v. Mallow Union*, 12 Ir. Ch. (N. S.) 35. §§ 206, 210, 239, 322, 328, 400.
 v. Mayor, etc. 7 E. & B. 910. § 448.
 v. Mayor of Harwich, 8 Ad. & E. 919. § 462.
 v. Mews, 6 Q. B. Div. 47; L. R. 8 App. Cas. 339. § 151.
 v. Midland R. Co. 4 E. & B. 958. § 266.
 v. Moore, 13 Cox C. C. 544. § 355.
 v. Most, L. R. 7 Q. B. Div. 251. § 294.
 v. O'Brien, 15 L. T. (N. S.) 419. § 355.
 v. Overseers of South Weald, 5 B. & S. 391. § 462.
 v. Payne, L. R. 1 C. C. 27. § 281.
 v. Pearce, L. R. 5 Q. B. Div. 389. § 402.
 v. Phillips, L. R. 1 Q. B. 648. § 261.
 v. Pilkington, 2 E. & B. 546. § 418.
 v. Pratt, 4 E. & B. 800. §§ 255, 256.
 v. Price, L. R. 6 Q. B. 411. § 256.
 v. Prince, L. R. 2 C. C. R. 154. § 355.
 v. St. Luke's, L. R. 7 Q. B. 153. § 441.
 v. Scaife, 17 Q. B. 238. § 310.
 v. Seale, 5 E. & B. 1. § 327.
 v. Shiles, 1 Q. B. 519. § 261.
 v. Skeen, Bell C. C. 134. § 416.
 v. Sleep, L. & C. 44. §§ 355, 429.
 v. Smith, 1 L. & C. 131. § 227.
 v. South Weald, 5 B. & S. 391. § 256.
 v. Spratley, 6 E. & B. 363. §§ 246, 275.
 v. Stock, 3 Nev. & Perry, 420. § 147.
 v. Stock, 8 Ad. & E. 405. § 257.
 v. Sykes, L. R. 1 Q. B. Div. 52. § 333.
 v. Tithe Commissioners, 14 Q. B. 459. § 461.

- Regina v. Tolson**, L. R. 23 Q. B. Div. 168. § 355.
v. Tonbridge Overseers, L. R. 13 Q. B. Div. 342. §§ 288, 324.
v. Turner, 9 Cox C. C. 145. § 355.
v. Vine, L. R. 10 Q. B. 195. § 206.
v. Wilcox, 7 Q. B. 317. § 210.
v. Williams, 2 C. & K. 1001. § 462.
v. Willmetts, 3 Cox C. C. 281. § 355.
v. Wood, L. R. 4 Q. B. 355. § 254.
v. Woodrow, 15 M. & W. 404. § 355.
v. Wymondham, 2 Q. B. 541. § 418.
v. Youle, 6 H. & N. 753. § 142.
v. Zulueta, 1 C. & K. 215. § 300.
Rehoboth v. Hunt, 1 Pick. 224. § 472.
Reiche v. Smythe, 13 Wall. 162. §§ 218, 242, 260.
Reid v. Morton, 119 Ill. 118. § 170.
v. State, 20 Ga. 681. § 206.
v. Strider, 7 Gratt. 76. § 10.
Reis v. Graff, 51 Cal. 86. §§ 201, 206.
Reiser v. The Wm. Tell S. F. Asso. 39 Pa. St. 147. §§ 2, 6, 10, 201.
Reithmiller v. People, 44 Mich. 280. §§ 215, 235, 240, 407.
Remington v. State, 1 Oregon, 281. § 353.
Ramsen, In re Petition of, 59 Barb. 317. § 464.
Renfroe v. Colquitt, 74 Ga. 619. §§ 349, 351, 359.
Renick v. Boyd, 99 Pa. St. 555. § 273.
Renner v. Bennett, 21 Ohio St. 431. § 221.
Rensselaer, etc. R. R. Co. v. Davis, 43 N. Y. 137. § 387.
Renwick v. Morris, 3 Hill, 621. §§ 202, 399.
v. Morris, 7 Hill, 575. § 399.
Renten v. Bauer, 3 Kan. 505. § 108.
Report of County Auditors, In re, 1 Woodw. (Pa.) 270. § 333.
Respublica v. Mesca, 1 Dall. 73. § 17.
v. Sparhawk, 1 Dall. 357. § 370.
Restall v. London, etc. R'y Co., L. R. 8 Ex. 141. § 163.
Rex v. Abbot, 2 Doug. 553. § 396.
v. Adderley, 2 Doug. 402. § 253.
v. Archbishop of Canterbury, 11 Q. B. 665. § 247.
v. Banbury, 1 A. & E. 142. § 237.
v. Banks, 1 Esp. 144. § 355.
v. Barhans, 8 B. & C. 99. § 324.
v. Barlow, 2 Salk. 609. §§ 461, 462.
v. Bond, 1 B. & Ald. 392. § 350.
v. Bristol Dock Co. 6 B. & C. 191. § 282.
v. Buggs, Skin. 428. §§ 193, 198.
v. Bullock, 1 Taunt. 80. § 244.
v. Cator, 4 Burr. 2026. § 142.
v. Charlesworth, 2 Lowndes, M. & P. 117. § 262.
v. Cornforth, 2 Str. 1162. § 249.
v. Cowell, 2 East's P. C. 617. § 266.
v. Cumberworth Half, 5 Q. B. 484. § 282.
v. Cunningham, 5 East, 478. § 266.
v. Davis, 1 Leach, 271. §§ 143, 166.
v. Denbyshire, 4 East, 142. § 448.
v. Dorsetshire, 15 East, 200. § 324.
v. Downs, 3 T. R. 569. § 143.
v. Elkins, 4 Burr. 2130. § 115.
v. Great Driffield Inhabitants, 8 B. & C. 690. § 310.
v. Handy, 6 T. R. 286. § 349.
v. Havering Alte Bower, 5 B. & Ald. 691. § 461.
v. Heath, 2 East's P. C. 609. § 166.
v. Hodnett, 1 T. R. 96. § 234.
v. Hogg, 1 T. R. 721. § 308.
v. Hymen, 7 T. R. 536. § 353.
v. Inhabitants, 1 T. R. 96. § 240.
v. Inhabitants of Shipton, 8 B. & C. 94. § 259.
v. Inhabitants of Stoke Damarel, 7 B. & C. 570. § 282.
v. Jefferies, 1 Strange, 446. § 40.

- Rex v. Justices**, 4 Nev. & M. 378. §§ 112, 113.
- v. Justices of London**, 3 Burr. 1456. §§ 165, 225.
- v. Justices of Middlesex**, 2 B. & Ad. 818. §§ 105, 136, 221.
- v. Justices of Norfolk**, 4 B. & Ad. 238. § 462.
- v. Leek Wootton**, 16 East, 122. § 307.
- v. Leicester**, 9 D. & R. 772; 7 B. & C. 12. §§ 139, 448.
- v. Liverpool**, 4 Burr. 2244. § 365.
- v. Loom**, 1 Moo. C. C. 160. § 266.
- v. Luffe**, 8 East, 193. §§ 305, 418.
- v. McKenzie, R. & R. C. C.** 429. §§ 143, 166.
- v. Manchester, etc. Water-Works Co.** 1 B. & C. 630. § 262.
- v. Marks**, 3 East, 160. § 213.
- v. Mayor of London**, 9 B. & C. 27. § 396.
- v. Meshita**, 6 Ad. & E. 153. § 292.
- v. Midland R'y Co.**, L. R. 10 Q. B. 389. § 219.
- v. Middlesex**, 1 Dow. P. C. 117. § 138.
- v. Middlesex**, 2 B. & Ad. 818. § 160.
- v. Morgan**, Str. 1066. § 136.
- v. Mortlake**, 6 East, 397. § 260.
- v. Newark-upon-Trent**, 3 B. & C. 71. § 223.
- v. Newcomb**, 4 T. R. 368. §§ 139, 203.
- v. Northleach & W. Road**, 5 B. & Ad. 978. §§ 140, 145, 147.
- v. Palmer**, 1 Leach C. C. 352. § 282.
- v. Peckham, Carth.** 406. § 253.
- v. Poor Law Commissioner**, 6 Ad. & E. 17. §§ 237, 238, 255, 324.
- v. Proprietors Manchester & S. Water-Works**, 1 B. & C. 630. § 279.
- v. Ramsgate**, 6 B. & C. 712. § 324.
- v. Robinson**, 2 Burr. 803. § 325.
- Rex v. Rogers**, 10 East, 573. § 137.
- v. Sadi**, 1 Leach C. C. 468. § 289.
- v. St. George's Hanover Square**, 3 Camp. 222. § 202.
- v. St. Peter & St. Paul in B. 1 Bott**, 443. § 212.
- v. Sedgley**, 2 B. & Ad. 65. § 266.
- v. Shrewsbury**, 3 B. & Ad. 216. § 279.
- v. Simpson**, 1 Str. 45. § 290.
- v. Sparrow**, 2 Str. 1123. § 448.
- v. Sutton**, 4 M. & S. 532. § 213.
- v. Swiney, Alcock & Napier**, 131. § 136.
- v. Trustees, etc.** 5 Ad. & E. 563. § 351.
- v. Wallis**, 5 T. R. 375. § 270.
- v. Waterford**, 9 Q. B. 635. § 333.
- v. Wells**, 4 Dowl. 562. § 137.
- v. Whiteley**, 3 H. & N. 143. § 152.
- v. Williams**, 1 W. Black. 93. §§ 210, 410.
- v. Worcestershire**, 5 M. & S. 457. § 204.
- v. Wright**, 1 Ad. & E. 437. § 333.
- v. Yorkshire**, 1 Doug. 192. § 324.
- v. Younger**, 5 T. R. 452. § 310.
- Reynolds v. Blue**, 47 Ala. 711. § 64.
- v. Holland**, 35 Ark. 56. §§ 219, 234, 238, 246.
- v. Orvis**, 7 Cow. 269. §§ 327, 390.
- v. Robinson**, 64 N. Y. 589. § 400.
- v. State**, 1 Ga. 222. § 206.
- Rhoades v. Delaney**, 50 Ind. 253. § 114.
- Rhoads v. Hoernerstown Building, etc. Asso.** 82 Pa. St. 180. § 156.
- Rhodes v. Smethurst**, 4 M. & W. 42. § 424.
- v. Weldey**, 46 Ohio St. 234. § 255.
- Ricard v. Smith**, 37 Miss. 644. § 394.
- v. Williams**, 7 Wheat. 59. § 322.
- Rice's Succession**, 21 La. Ann. 614. § 181.
- Rice v. Foster**, 4 Harr. 479. §§ 67, 75.
- v. Kirkman**, 3 Humph. 415. § 394.
- v. Montgomery**, 4 Biss. 75. § 306.
- v. Parkman**, 16 Mass. 326. § 194.

- Rice v. R. R. Co.** 1 Black, 358. §§ 164, 215, 240, 246, 289, 291, 378, 379.
- v. Ruddiman**, 10 Mich. 125. §§ 107, 160.
- v. Shook**, 27 Ark. 137. § 298.
- v. Wright**, 46 Miss. 679. § 165.
- Rich v. Flanders**, 39 N. H. 304. §§ 206, 331.
- v. Keyser**, 54 Pa. St. 86. §§ 255, 256.
- v. Rayle**, 2 Humph. 404. § 326.
- Richards v. Dagget**, 4 Mass. 537. § 322.
- v. Dyke**, 3 Q. B. 256. § 396.
- v. Emswiler**, 14 La. Ann. 658. § 367.
- v. McBride**, L. R. 8 Q. B. Div. 119. §§ 219, 258, 261.
- v. Richards**, 76 N. Y. 188. § 103.
- v. Rote**, 68 Pa. St. 248. § 484.
- Richardson, In re**, 2 Story, 571. §§ 104, 110.
- v. Cook**, 37 Vt. 599. § 206.
- v. Crandall**, 48 N. Y. 356. § 330.
- v. Mass. Charitable Asso.** 181 Mass. 174. § 385.
- v. Pulver**, 63 Barb. 67. § 338.
- v. Richardson**, 6 Ohio, 125. § 424.
- Richland Co. v. Richland Center**, 59 Wis. 591. § 473.
- Richmond v. Shickler**, 57 Iowa, 486. § 377.
- v. Smith**, 15 Wall. 429. § 186.
- Richmond R. R. Co. v. Louisa R. R. Co.** 13 How. 81. §§ 164, 378, 381.
- Ricketson v. Richardson**, 26 Cal. 149. § 394.
- Rider v. Maul**, 46 Pa. St. 376. § 364.
- Ridge Avenue R'y Co. v. Philadelphia**, 124 Pa. St. 219. § 97.
- Ridout v. Pain**, 3 Atk. 493. § 220.
- Riggin v. Collier**, 6 Mo. 568. § 306.
- Riggins v. State**, 4 Kan. 173. §§ 206, 482.
- Riggs v. Brewer**, 64 Ala. 282. §§ 138, 204.
- v. Martin**, 5 Ark. 506. § 10.
- Right v. Martin**, 11 Ind. 123. § 164.
- Rigoney v. Neiman**, 73 Pa. St. 330. § 252.
- Ripple v. Ripple**, 1 Rawle, 386. § 297.
- Risewick v. Davis**, 19 Md. 82. §§ 104, 391, 392.
- River Wear Com'rs v. Adamson**, L. R. 1 Q. B. Div. 546; 2 App. Cas. 764. §§ 300, 322.
- Rivers v. Cole**, 38 Iowa, 677. §§ 206, 482.
- Rives v. Guthrie**, 1 Jones' L. 88. § 253.
- Road in Hatfield Township**, 4 Yeates, 392. § 165.
- Road in Salem Township**, 103 Pa. St. 250. § 454.
- Roane v. Innis**, Wythe (Va.), 62. § 442.
- Robb v. Gurney**, 2 Rich. (N. S.) 559. § 151.
- Roberts' Will, Matter of**, 8 Paige, 446. § 190.
- Roberts v. Cannon**, 4 Dev. & Bat. L. 267. § 407.
- v. Fowler**, 3 E. D. Smith, 632. § 398.
- v. State**, 2 Overt. 423. § 166.
- v. Yarboro**, 41 Tex. 452. §§ 223, 224, 328.
- Robertson v. Demoss**, 23 Miss. 298. § 137.
- v. Land Commissioners**, 44 Mich. 274. § 472.
- v. State**, 12 Tex. App. 541. § 132.
- Robbins v. State**, 8 Ohio St. 131. § 157.
- Robinson's Case**, 131 Mass. 376. § 321.
- Robinson v. Bidwell**, 22 Cal. 379. §§ 170, 180.
- v. Dauchy**, 3 Barb. 20. § 184.
- v. Emerson**, 4 H. & C. 355. § 143.
- v. Fair**, 128 U. S. 53. § 395.
- v. Foster**, 12 Iowa, 186. § 112.
- v. Gilman**, 20 Me. 299. § 190.
- v. Howe**, 13 Wis. 341. § 478.
- v. Lane**, 19 Ga. 337. § 101.
- v. Perry**, 17 Kan. 248. § 122.
- v. Schmidt**, 48 Tex. 13. §§ 392, 393.
- v. Skipworth**, 32 Ind. 312. §§ 78, 102.
- v. State**, 15 Tex. 311. § 332.

- Robinson v. Varnell, 16 Tex. 382.
 §§ 218, 251, 322.
 v. Waddington, 13 Ad. & El.
 (N. S.) 753. § 112.
 Robison v. Miner, 68 Mich. 549. § 85.
 Roche v. Mayor of Jersey City, 40
 N. J. L. 257. §§ 154, 204.
 Rochester v. Barnes, 26 Barb. 657.
 § 140.
 Rockhill v. Nelson, 24 Ind. 422. § 315.
 Rock Hill College v. Jones, 47 Md. 1.
 § 164.
 Rockhold v. Blevins, 6 Baxt. 115.
 § 20.
 Rockwell v. Clark, 44 Conn. 534.
 § 205.
 v. Hubbell, 2 Doug. (Mich.) 197.
 §§ 476, 482.
 Roddam v. Morley, 1 De G. & J. 1.
 § 367.
 v. Ferrars, 2 B. & P. 547. § 368.
 v. Hersey, 3 Wils. 275. §§ 104,
 110.
 Roff v. Johnson, 40 Ga. 555. § 284.
 Rogers' Case, 2 Greenlf. 303. § 193.
 Rogers, Ex parte, 7 Cow. 526. § 390.
 Rogers v. Goodwin, 2 Mass. 475.
 §§ 310, 311, 314.
 v. Hillhouse, 3 Conn. 398. § 426.
 v. Kennard, 54 Tex. 30. § 326.
 v. Kneeland, 10 Wend. 218. § 334.
 v. Murray, 3 Paige, 390. § 454.
 v. Rogers, 3 Wend. 503. §§ 215,
 219.
 v. State, 6 Ind. 31. § 132.
 v. Stephens, 86 N. Y. 623. § 99.
 v. Vass, 6 Iowa, 405. § 223.
 v. Watrous, 8 Tex. 62. § 154.
 v. Windoes, 48 Mich. 623. § 81.
 Rohrbacher v. City of Jackson, 51
 Miss. 735. §§ 26, 237.
 Roles v. Rosewell, 5 T. R. 538. § 462.
 Rolfe v. McComb, 2 Head, 558. § 184.
 Rolland v. Commonwealth, 82 Pa. St.
 306. §§ 252, 260.
 Rolle v. Whyte, L. R. 3 Q. B. 305.
 § 256.
 Romaine v. Kinshiner, 2 Hilt. 519.
 § 314.
 Rood v. Chicago, etc. R'y Co. 43 Wis.
 146. § 166.
 v. McCargar, 49 Cal. 117. §§ 170,
 176.
 Roose v. Perkins, 9 Neb. 304. §§ 374,
 375.
 Roosevelt v. Godard, 52 Barb. 553.
 § 332.
 v. Maxwell, 3 Blatch. 391. § 254.
 Rosecrants v. Shoemaker, 60 Mich. 4;
 26 N. W. Rep. 794. § 375.
 Rosenberg v. Frank, 58 Cal. 387.
 § 395.
 Rosenplanter v. Roessle, 54 N. Y. 262.
 §§ 237, 238.
 Ross' Case, 2 Pick. 165. § 468.
 Ross v. Austill, 2 Cal. 183. § 298.
 v. Barland, 1 Pet. 655. § 442.
 v. Roswell, 60 Ind. 235. § 302.
 v. Davis, 97 Ind. 79. §§ 87, 93,
 102.
 v. Duval, 13 Pet. 45. §§ 68, 482.
 v. Jones, 22 Wall. 576. § 368.
 v. M'Lung, 6 Pet. 283. § 187.
 v. Reddick, 2 Ill. 73. § 193.
 v. Winsor, 48 N. J. L. 95. § 128.
 Rothgerber v. Dupuy, 64 Ill. 452.
 §§ 366, 398.
 Rottenberry v. Pipes, 53 Ala. 447,
 § 206.
 Rounds v. Waymart, 81 Pa. St. 395.
 § 157.
 Roundtree, Ex parte, 51 Ala. 42. § 256.
 Rowa, The, 7 Ex. Div. 247. § 268.
 Rowan v. Runnels, 5 How. 134. § 319.
 Rowberry v. Morgan, 9 Ex. 730.
 § 115.
 Rowley v. Stray, 32 Mich. 70. §§ 321,
 407.
 Royle v. Hamilton, 4 Ves. 437. § 253.
 Ruckmaboye v. Lulloobhoy Matti-
 chand, 8 Moore's P. C. 4. § 255.
 Ruckman v. Ransom, 35 N. J. L. 565.
 § 151.
 Rude v. Mitchell, 97 Mo. 365. § 398.
 Rudderow v. State, 31 N. J. L. 512.
 § 234.
 Rue v. Alter, 5 Denio, 119. §§ 290,
 364.

- Ruddy, Goods of, L. R. 2 P. & D. 330. §§ 419, 440.
- Ruffner v. Hamilton Co. 1 Disney, 39. § 138.
- Ruggles v. Illinois, 108 U. S. 526. §§ 234, 240, 292, 300, 381.
- v. Washington Co. 3 Mo. 496. §§ 215, 240.
- Rumsey v. People, 19 N. Y. 48. §§ 181, 183.
- Rusling v. Sebree, 12 Bush, 198. § 241.
- Russel v. Transylvania University, 1 Wheat. 432. § 390.
- Russell v. Cage, 66 Tex. 428. § 384.
- v. Farquhar, 55 Tex. 359. §§ 234, 241, 429.
- v. Irby, 13 Ala. 131. § 399.
- v. Martin, 15 Tex. 238. § 306.
- v. Mayor, etc. 2 Denio, 461. § 370.
- v. Wheeler, Hempst. 3. §§ 391, 435, 440.
- Rutgers v. New Brunswick, 42 N. J. L. 51. §§ 127, 128.
- Ruther v. Harris, L. R. 1 Ex. Div. 97. § 259.
- Rutherford v. Greene, 2 Wheat. 196. §§ 206, 259.
- v. Hamilton, 97 Mo. 543. § 128.
- v. Heddens, 82 Mo. 388. § 129.
- v. Maynes, 97 Pa. St. 78. § 390.
- Rutland v. Mendon, 1 Pick. 154. §§ 255, 333.
- Ryan's Case, 45 Mich. 173. § 138.
- Ryan v. Commonwealth, 80 Va. 385. §§ 395, 463.
- v. Couch, 66 Ala. 244. § 289.
- v. Johnson, 5 Cal. 86. § 121.
- v. Lynch, 68 Ill. 160. §§ 41, 45, 48, 181.
- v. State, 32 Tex. 280. § 207.
- v. State, 5 Neb. 276. § 220.
- Ryder v. Cohn, 37 Cal. 69. § 19.
- Ryegate v. Wardsboro, 30 Vt. 746. §§ 215, 238, 239.
- Ryers, Matter of, 72 N. Y. 1. § 169.
- Ryerson v. Laketon, 52 Mich. 509. § 365.
- v. Utley, 16 Mich. 269. §§ 78, 82, 85, 87, 88, 102.
- Sacalaris v. Eureka, etc. R. R. Co. 18 Nev. 155. § 306.
- Sacia v. De Graaf, 1 Cow. 356. §§ 207, 368, 426.
- Sackett, etc. Streets, Matter of, 74 N. Y. 95. §§ 87, 88, 98, 102, 169, 170.
- Sackett v. Sackett, 8 Pick. 309. §§ 16, 17, 184.
- Saco v. Gurney, 34 Me. 14. §§ 165, 166.
- Sacramento v. Bird, 15 Cal. 294. §§ 154, 204.
- Sadler v. Langham, 34 Ala. 311. § 331.
- Sage v. Brooklyn, 89 N. Y. 189. § 324.
- Saginaw Gas Light Co. v. Saginaw, 28 Fed. Rep. 529. §§ 378, 384.
- St. Charles v. Nolle, 51 Mo. 123. § 365.
- St. Cross v. Howard, 6 T. R. 338. § 247.
- St. Lawrence, etc. R. R. Co. v. Lett, 26 Am. & Eng. R. R. Cas. 454. § 371.
- St. Louis v. Alexander, 23 Mo. 589. § 161.
- v. Goebel, 32 Mo. 295. § 354.
- v. Green, 7 Mo. App. 468. §§ 92, 95.
- v. Laughlin, 49 Mo. 559. §§ 275, 365.
- v. Shields, 62 Mo. 247. § 117.
- v. Teifel, 42 Mo. 578. §§ 78, 82, 87, 89, 93, 101.
- St. Louis Co. Ct. v. Sparks, 10 Mo. 117. § 448.
- St. Louis G. L. Co. v. American F. Ins. Co. 33 Mo. App. 348. § 305.
- St. Louis, etc. R'y Co. v. Berry, 41 Ark. 509. § 364.
- v. Clark, 53 Mo. 214. § 237.
- v. Wilder, 17 Kan. 244. § 453.
- St. Martin v. New Orleans, 14 La. Ann. 113. § 217.
- St. Paul v. Colter, 12 Minn. 50. § 88.
- St. Paull v. Lewis, 4 Watts, 402. § 308.
- St. Paul, etc. R'y Co., Matter of, 34 Minn. 227. § 387.

- St. Paul, etc. R. R. Co. v. Greenhalgh, 26 Fed. Rep. 563. § 379.
 v. Phelps, 26 Fed. Rep. 569. §§ 379, 393.
 Salkeld v. Johnson, 2 C. B. 756. § 300.
 v. Johnson, 2 Ex. 256. § 210.
 v. Johnson, 1 Hare, 196. § 212.
 Sallee v. Ireland, 9 Mich. 154. § 112.
 v. Waters, 17 Ala. 482. § 422.
 Salling v. McKinney, 1 Leigh, 42. § 429.
 Salomon v. State, 28 Ala. 83. § 306.
 Salter v. Burt, 20 Wend. 205. § 115.
 Salters v. Tobias, 3 Paige, 338. § 200.
 Saltoun v. Advocate-General, 3 Macq. 659. § 247.
 Sampeyrac v. United States, 7 Pet. 222. §§ 206, 482.
 Sams v. King, 18 Fla. 557. §§ 219, 220, 221.
 Sam Slick, The, 2 Curt. 480. §§ 363, 426.
 Samuels v. Commonwealth, 10 Bush, 491. § 324.
 San Antonio v. Gould, 34 Tex. 49. § 80.
 v. Mehaffy, 96 U. S. 312. § 96.
 Sanders v. State, 77 Ind. 227. §§ 153, 167, 226, 227.
 San Diego v. Granniss, 77 Cal. 511. §§ 239, 246.
 Sandiman v. Breach, 7 B. & C. 96. § 270.
 Sands v. Campbell, 31 N. Y. 345. § 426.
 Sanford v. Thompson, 18 Ga. 554. § 13.
 San Francisco v. Hazen, 5 Cal. 169. §§ 215, 239.
 Sangamon Co. v. Springfield, 63 Ill. 66. § 473.
 San Mateo County v. R. R. Co. 8 Sawyer, 238. §§ 41, 45.
 San Pedro, The, 2 Wheat. 132. § 215.
 Santa Maria, The, 10 Wheat. 442. § 299.
 Sansom v. Greenough, 55 Iowa, 127. § 373.
 Santissima Trinidad, The, 7 Wheat. 283. § 297.
 Santo v. State, 2 Iowa, 165. §§ 67, 72, 180, 331.
 Sarahass v. Armstrong, 16 Kan. 192. § 296.
 Sasscer v. Farmers' Bank, 4 Md. 409. § 296.
 Satterlee v. Matthewson, 2 Pet. 380. §§ 465, 474, 480, 482, 483.
 Saul v. His Creditors, 5 Mart. (N. S.) 569. §§ 12, 138, 191.
 Saunders v. Carroll, 12 La. Ann. 793. § 206.
 v. Provisional Municipality, 24 Fla. 226. §§ 101, 132.
 Savage v. O'Neil, 44 N. Y. 298. § 184.
 v. State, 18 Fla. 970. § 110.
 v. Walshe, 26 Ala. 619. § 449.
 Savannah v. Kelly, 108 U. S. 184. § 157.
 Savannah, etc. R'y Co. v. Geiger, 21 Fla. 669. § 170.
 Savings Bank v. Allen, 28 Conn. 97. § 164.
 v. United States, 19 Wall. 227. §§ 222, 223.
 Savings Institution v. Makin, 23 Mo. 230. §§ 221, 222.
 Sawyers v. Baker, 72 Ala. 49. § 154.
 Sayre v. Elyton Land Co. 73 Ala. 85. § 394.
 v. Pollard, 77 Ala. 608. §§ 41, 45.
 v. Pollard, 51 Mich. 129. § 26.
 v. Wheeler, 32 Iowa, 559. § 184.
 Scaggs v. Baltimore, etc. R. R. Co. 10 Md. 268. §§ 219, 236, 269, 329, 398, 431.
 Scaife v. Stovall, 67 Ala. 237. §§ 290, 398.
 Scales v. State, 47 Ark. 476. § 135.
 Scanlan v. Childs, 33 Wis. 663. § 309.
 Schafer v. Smith, 63 Ind. 226. § 374.
 v. Eneu, 54 Pa. St. 304. § 484.
 v. State, 49 Ind. 460. § 374.
 Scheftels v. Tabert, 46 Wis. 439. § 134.
 Schenley's Appeal, 70 Pa. St. 98. § 263.
 Schenley v. Commonwealth, 36 Pa. St. 29. § 484.

- Schlandecker v. Marshall**, 72 Pa. St. 200. § 257.
- Schlegel v. Am. Beer, etc. Co.** 12 Abb. New Cas. 280; 64 How. Pr. 196. § 237.
- Schliet v. State**, 56 Ind. 173. § 303.
- Schmidt, Ex parte**, 24 S. C. 363. § 157.
- Schmidt v. Hoyt**, 1 Edw. Ch. 652. § 402.
- v. Mitchell**, 84 Ill. 195. § 374.
- Schneider v. Hosier**, 21 Ohio St. 98. § 374.
- v. Staples**, 66 Wis. 167. §§ 137, 145, 154.
- School Directors v. School Directors**, 73 Ill. 249. §§ 132, 260.
- School Inspectors v. People**, 20 Ill. 525. § 395.
- School Trustees v. Commissioners**, 1 Nev. 335. § 56.
- Schooner Enterprise**, 1 Paine, 32. §§ 347, 349, 353.
- Schooner Harriet, The**, 1 Story, 251. §§ 349, 350, 356.
- Schooner Industry, The**, 1 Gall. 114. § 349.
- Schooner Nymph, The**, 1 Sumn. 516. § 356.
- Schooner Pauline's Cargo v. United States**, 7 Cranch, 152. § 237.
- Schooner Rachel v. United States**, 6 Cr. 329. §§ 163, 164.
- Schriefer v. Wood**, 5 Blatch. 215. §§ 247, 254.
- Schroder v. Crawford**, 94 Ill. 357. §§ 374, 375.
- Schulherr v. Bordeaux**, 64 Miss. 59. § 72, 75.
- Schulenberg v. Harriman**, 21 Wall. 44. § 379.
- Schuster v. Supervisors**, 27 Minn. 253. § 339.
- Schuyler v. Mercer**, 4 Gilm. 20. § 139.
- Schuykill Nav. Co. v. Loose**, 19 Pa. St. 15. § 207.
- Schwenke v. Union Depot & R. R. Co.** 7 Colo. 512. §§ 147, 157, 159.
- Scogins v. Perry**, 46 Tex. 111. §§ 392, 393.
- Scorpion S. M. Co. v. Marsano**, 10 Nev. 370. § 394.
- Scotia, The**, 14 Wall. 170. §§ 293, 295, 296.
- Scott v. Duke**, 3 La. Ann. 253. § 482.
- v. Lunt's Adm'r**, 7 Pet. 603. § 184.
- v. Searles**, 1 Sm. & M. 590. § 283.
- v. Simons**, 70 Ala. 352. §§ 154, 400.
- v. State**, 22 Ark. 369. §§ 215, 228.
- Scovern v. State**, 6 Ohio St. 288. § 327.
- Scoville v. Canfield**, 14 John. 338. § 12.
- Scrafford v. Gladwin Supervisors**, 41 Mich. 647. § 114.
- Scruggs v. Brackin**, 4 Yerg. 528. §§ 301, 307.
- Scudder v. Trenton Delaware Falls Co.** 1 N. J. Eq. 694. § 169.
- Scutt's Case**, 2 Va. Cas. 54. § 166.
- Seal v. State**, 13 Sm. & M. 286. § 445.
- Seale v. Mitchell**, 5 Cal. 403. §§ 314, 315.
- Seamans v. Carter**, 15 Wis. 548. § 206.
- Searing v. Brinkerhoff**, 5 John. Ch. 329. § 208.
- Searles v. Kanawha, etc. R. R. Co.** 37 Am. & Eng. R. R. Cas. 179. § 371.
- Sears v. Burnham**, 17 N. Y. 445. § 451.
- v. Cottrell**, 5 Mich. 254. §§ 5, 21, 197.
- Seat of Government Case**, 1 Wash. T'y, 115. § 65.
- Seay v. Bank of Rome**, 66 Ga. 609. §§ 93, 96.
- Second Ave. Church, Matter of**, 66 N. Y. 395. §§ 221, 365.
- Second German Am. B. Asso. v. Newman**, 50 Md. 62. § 101.
- Second Municipality v. Morgan**, 1 La. Ann. 111. § 175.
- Sedgwick v. Bunker**, 16 Kan. 498. § 206.
- Seekonk v. Rehoboth**, 8 Cush. 371. §§ 111, 113.
- Seely v. State**, 11 Ohio, 501. § 333.
- Seidenbender v. Charles**, 4 S. & R. 159. § 336.

- Selby, *In re*, 6 Mich. 193. § 456.
 Selden v. Preston, 11 Bush, 191. § 20.
 Sellars v. Carpenter, 72 Me. 497.
 § 342.
 v. Fite, 3 Baxt. 131. § 447.
 Selma, etc. R. R. Co., *Ex parte*, 45
 Ala. 696. § 311.
 Selman v. Wolfe, 27 Tex. 68. § 386.
 Semmes v. Hartford Ins. Co. 13 Wall.
 158. § 368.
 Semple v. Hagar, 27 Cal. 163. § 181.
 Sequestration Cases, 30 Tex. 688.
 § 478.
 Seven Hickory v. Ellery, 103 U. S.
 423. § 55.
 Sewall v. Jones, 9 Pick. 412. §§ 363,
 367.
 Sewell v. Taylor, 29 L. J. M. C. 50.
 § 262.
 Seymour v. Bailey, 66 Ill. 288. § 20.
 v. Judd, 2 N. Y. 464. § 456.
 v. Marvin, 11 Barb. 80. §§ 296,
 306.
 v. Phillips, etc. Co. 7 Biss. 460.
 § 342.
 Shadwell v. Angel, 1 Burr. 56. § 115.
 Shakman v. Schlueter, 46 N. W. Rep.
 542. § 459.
 Shallow v. Salem, 136 Mass. 136.
 § 201.
 Shannon v. People, 5 Mich. 71. § 154.
 Sharp, *Ex parte*, 10 Jur. (N. S.) 1018.
 § 432.
 Sharp v. Johnson, 4 Hill, 92. §§ 207,
 290, 365, 390, 456.
 v. Mayor, etc. 31 Barb. 572.
 §§ 82, 95, 360, 437.
 v. Speir, 4 Hill, 76. §§ 257, 290,
 363, 365, 387, 390, 400, 454,
 456.
 v. Warren, 6 Price, 131. §§ 138,
 151.
 Shattuck v. Daniel, 52 Miss. 834.
 § 20.
 Shaw v. Brown, 35 Miss. 246. §§ 12,
 189.
 v. Clark, 49 Mich. 384. §§ 350,
 352.
 v. Dodge, 5 N. H. 465. § 59.
 Shaw v. Morley, L. R. 3 Ex. 137. § 280.
 v. Orr, 30 Iowa, 585. § 449.
 v. Railroad Co. 101 U. S. 557.
 § 290.
 v. Rudder, 9 Irish C. L. (N. S.)
 219. § 210.
 Shawnee Co. v. Carter, 2 Kan. 115.
 § 363.
 Shear v. Commissioners of Columbia,
 14 Fla. 146. §§ 139, 147.
 Shedd v. Moran, 10 Ill. App. 618. § 14.
 Sheets v. Hanbest, 81 Pa. St. 100.
 § 246.
 v. Selden, 2 Wall. 177. §§ 111,
 112.
 Shelby v. Guy, 11 Wheat. 361. §§ 185,
 186, 191, 424, 479.
 Sheley v. Detroit, 45 Mich. 431.
 §§ 235, 407.
 Shelton v. Baldwin, 26 Miss. 439.
 § 157.
 Shepardson v. Railroad Co. 6 Wis.
 605. § 137.
 Shepherd v. People, 25 N. Y. 406.
 § 470.
 Sheppard v. Gosnold, Vaughan, 169.
 § 307.
 v. Johnson, 2 Humph. 296. § 124.
 v. State, 1 Tex. App. 522. § 164.
 Sherborn v. Wells, 3 B. & S. 784.
 § 256.
 Sheridan v. Stevenson, 44 N. J. L. 371.
 § 157.
 Sheriff v. Caddo Parish, 37 La. Ann.
 788. § 300.
 Sherman v. Dodge, 6 John. Ch. 107.
 § 454.
 v. State, 17 Fla. 888. §§ 142, 143.
 v. Story, 30 Cal. 276. §§ 27, 28,
 30, 183.
 Sherman Co. v. Simons, 109 U. S. 735.
 § 194.
 Sherwin v. Bugbee, 16 Vt. 444. §§ 311,
 328.
 Sherwood v. Judd, 3 Bradf. 419. § 13.
 v. Reade, 7 Hill, 431. §§ 207, 362,
 390.
 Shiel v. Mayor, etc. 6 H. & N. 796.
 § 370.

- Shields v. Bennett, 4 W. Va. 83. §§ 78, 80, 82, 83, 88, 93, 135, 170.
 v. Perkins, 2 Bibb, 230. § 313.
- Shiletto v. Thompson, L. R. 1 Q. B. Div. 12. § 280.
- Ship Cotton Planter, 1 Paine, 23. § 280.
- Shipley v. Terre Haute, 74 Ind. 297. §§ 93, 96.
- Shipman v. Hanbest, 4 T. R. 109. §§ 168, 396.
- Shivers v. Newton, 45 N. J. L. 469. §§ 85, 86, 87, 88, 102.
 v. Wilson, 5 Har. & John. 130. §§ 391, 392.
- Shoemaker v. Lansing, 17 Wend. 327. §§ 218, 239.
 v. Smith, 37 Ind. 122. § 103.
 v. State, 20 N. J. L. 153. § 143.
- Shonk v. Brown, 61 Pa. St. 327. §§ 483, 484.
- Shotwell's Ex'r v. Dennman, 1 N. J. L. 174. § 358.
- Shotwell v. Harrison, 22 Mich. 410. § 293.
- Shrader, Ex parte, 33 Cal. 283. § 11.
- Shrewsbury v. Boylston, 1 Pick. 105. § 260.
- Shrewsbury, Earl of, v. Scott, 6 C. B. (N. S.) 1. §§ 194, 196.
- Shriedley v. State, 23 Ohio St. 130. § 232.
- Shropshire v. State, 12 Ark. 190. § 306.
- Shugart v. Egan, 83 Ill. 56. §§ 374, 375.
- Shumaker v. Johnson, 35 Ind. 33. § 458.
- Shumate v. Williams, 34 Ga. 251. § 411.
- Shumway v. Bennett, 29 Mich. 465. § 5.
- Shute v. Wade, 5 Yerg. 8. § 322.
- Sibley v. Smith, 2 Mich. 486. §§ 290, 363, 390, 454, 455.
- Sickles v. Sharp, 13 John. 497. §§ 349, 359.
- Sidney v. White, 12 Ala. 728. § 191.
- Sidwell v. Evans, 1 Pen. & W. 383. § 192.
- Siebold, Ex parte, 100 U. S. 371. §§ 21, 197.
- Siegbert v. Stiles, 39 Wis. 533. § 303.
- Sifred v. Commonwealth, 104 Pa. St. 179. § 143.
- Sika v. Chicago, etc. R. R. Co. 21 Wis. 370. § 147.
- Sill v. Village of Corning, 15 N. Y. 297. § 395.
 v. Worswick, 1 H. Black. 672. § 13.
- Silver v. Ladd, 7 Wall. 219. §§ 218, 417.
- Silvergood v. Storrick, 1 Watts, 532. § 342.
- Simco v. State, 8 Tex. App. 406. §§ 206, 482.
- Simmons v. Bradley, 27 Wis. 689. § 154.
 v. Jacobs, 52 Me. 147. § 111.
 v. Trumbo, 9 W. Va. 358. § 306.
- Simms v. Southern Exp. Co. 38 Ga. 129. § 297.
- Simonds v. Powers, 28 Vt. 354. §§ 217, 219, 246.
- Simonson v. Durfee, 50 Mich. 80. § 115.
- Simonton v. Barrell, 21 Wend. 362. §§ 414, 416, 437.
- Simpkin, Ex parte, 105 Eng. C. L. 392. § 115.
- Simpson v. Bailey, 3 Oregon, 515. § 96.
 v. Fogo, 1 H. & M. 195. § 13.
 v. Robert, 35 Ga. 180. § 259.
 v. Unwin, 3 B. & Ad. 134. §§ 355, 429.
 v. Willard, 14 S. C. 191. § 307.
- Sims v. Hampton, 1 S. & R. 411. §§ 111, 112, 115.
- Singer v. Hasson, 50 L. T. 326. § 482.
- Singer M. Co. v. Graham, 8 Oregon, 17. § 211.
- Single v. Supervisors, 38 Wis. 363. § 483.
- Sinnott v. Whitechapel, 3 C. B. (N. S.) 674. § 324.
- Skinner v. Collector, 42 N. J. L. 407. §§ 127, 128.

- Skinner v. Usher**, L. R. 7 Q. B. 423. §§ 256, 262.
 v. Wilhelm, 63 Mich. 568. § 103.
Skyrme v. Occidental, etc. Co. 8 Nev. 219. § 134.
Slack v. Highgate Archway Co. 5 Taunt. 792. § 345.
 v. Jacob, 8 W. Va. 640. §§ 78, 82, 96, 330, 331, 332.
 v. Maysville, etc. R. R. Co. 13 B. Mon. 22. §§ 8, 75.
Slade v. Drake, Hobart, 295. § 204.
Slaughter-House Cases, 16 Wall. 36. §§ 164, 370, 473.
Slauson v. Racine, 13 Wis. 398. § 177.
Slidell v. Grandjean, 111 U. S. 412. §§ 378, 379.
Slinger v. Henneman, 38 Wis. 504. §§ 67, 69, 174.
Sloan v. Johnson, 14 S. & M. 47. § 208.
 v. Pacific Co. 61 Mo. 24. § 473.
Smalls v. White, 4 Neb. 357. § 135.
Small v. Edrick, 5 Wend. 137. §§ 111, 112.
 v. Small, 18 Atl. Rep. 497. § 333.
Smets v. Weatherbee, R. M. Charlt. 537. § 104.
Smith, Ex parte, 40 Cal. 419. §§ 137, 157, 158.
Smith, Ex parte, L. R. 3 Q. B. Div. 52. § 333.
Smith v. Adams, 5 De Gex, M. & G. 712. §§ 218, 246.
 v. Allen, 39 Miss. 469. § 428.
 v. Appleton, 19 Wis. 468. § 475.
 v. Arapahoe Dist. Ct. 4 Colo. 235. § 165.
 v. Argall, 6 Hill, 479. §§ 207, 400.
 v. Banker, 3 How. Pr. 142. § 225.
 v. Bartram, 11 Ohio St. 691. §§ 184, 192.
 v. Bell, 10 M. & W. 378. §§ 219, 258.
 v. Bohler, 72 Ga. 546. §§ 93, 96.
 v. Brown, L. R. 6 Q. B. 729. § 255.
Smith v. Cassity, 9 B. Mon. 192. § 114.
 v. Causey, 28 Ala. 568. § 208.
 v. Charter Oak Ins. Co. 64 Mo. 330. § 368.
 v. Commonwealth, 8 Bush, 108. §§ 78, 82, 93, 97.
 v. Crittenden, 16 Mich. 152. § 449.
 v. Dist. Court, 4 Colo. 235. § 464.
 v. Drew, 5 Mass. 514. §§ 325, 399.
 v. Dunn, 64 Cal. 164. § 119.
 v. Estes, 46 Me. 158. § 167.
 v. Gould, 4 Moore P. C. 21. § 184.
 v. Harris, 34 Ga. 182. § 111.
 v. Helmer, 7 Barb. 416. § 340.
 v. Hickman, Cooke, 330. §§ 138, 154, 288.
 v. Hoyt, 14 Wis. 252. §§ 109, 162.
 v. Janesville, 26 Wis. 291. § 73.
 v. Judge, 17 Cal. 557. §§ 2, 5, 9, 121.
 v. Kernochen, 7 How. 198. § 185.
 v. Kibbee, 9 Ohio St. 563. § 206.
 v. Lindo, 27 L. J. C. P. 200; 4 C. B. (N. S.) 395. §§ 247, 292.
 v. Lockwood, 13 Barb. 209. §§ 204, 325.
 v. Louisville, etc. R. R. Co. 63 Miss. 510. § 480.
 v. Madison, 7 Ind. 86. § 380.
 v. Mayor, etc. 34 How. Pr. 508. §§ 95, 103.
 v. Mitchell, Rice, 316. §§ 184, 256.
 v. Moffat, 1 Barb. 65. §§ 207, 290, 360, 435, 437, 444.
 v. Morrison, 22 Pick. 430. § 107.
 v. Mumford, 9 Cow. 29. § 207.
 v. Nobles Co. 37 Minn. 535. § 154.
 v. Odell, 1 Pin. (Wis.) 449. § 395.
 v. People, 47 N. Y. 330. §§ 137, 152, 153, 223, 242, 284, 324.
 v. Philadelphia, 81 Pa. St. 38. § 240.
 v. Randall, 3 Hill, 495. §§ 207, 400.
 v. Randall, 6 Cal. 47. § 246.
 v. Rines, 2 Sumn. 354. § 432.

- Smith v. Rowles**, 85 Ind. 264. § 114.
 v. Smith, 17 Gratt. 545. § 184.
 v. Smith, 19 Wis. 522. § 256.
 v. Speed, 50 Ala. 276. §§ 138, 151, 300.
 v. Spooner, 3 Pick. 229. § 367.
 v. State, 28 Ind. 321. §§ 211, 231, 402.
 v. State, 66 Md. 215. §§ 237, 332.
 v. State, 14 Mo. 147. § 154.
 v. State, 1 Stew. 506. §§ 142, 154.
 v. State, 17 Tex. 191. §§ 350, 352.
 v. Stevens, 82 Ill. 554. §§ 207, 298, 416, 440.
 v. Stevens, 10 Wall. 321. §§ 204, 325, 326.
 v. Strong, 2 Hill. 241. § 193.
 v. Tallapoosa, 2 Woods. 574. § 185.
 v. Tilly, 1 Keble. 712. § 310.
 v. Van Gilder, 56 Ark. 527. § 480.
 v. Waters, 25 Ind. 397. § 363.
Smithee v. Garth, 33 Ark. 17. § 41.
Smoot v. Fitzhugh, 9 Port. 72. § 190.
 v. Hart, 33 Ala. 69. § 429.
Smythe v. Fiske, 23 Wall. 374. § 162.
Sneed v. Commonwealth, 6 Dana. 339. §§ 227, 234, 237, 332, 349.
Sneider v. Heidelberger, 45 Ala. 126. § 476.
Snell v. Bridgewater, etc. Co. 24 Pick. 296. § 254.
 v. Campbell, 24 Fed. Rep. 880. § 166.
Snoddy v. Cage, 5 Tex. 106. § 256.
Snyder v. Bauchman, 8 S. & R. 336. § 342.
 v. Snyder, 3 Barb. 621. § 464.
 v. Warford, 11 Mo. 513. § 125.
 v. Warren, 2 Cow. 518. § 111.
Society, etc. v. Wheeler, 2 Gall. 139. §§ 206, 482.
Society for Propagating the Gospel v. New Haven, 8 Wheat. 493. §§ 206, 472.
Solomon v. Commissioners, 41 Ga. 157. §§ 55, 229, 309.
Solomons v. Freeman, 4 T. R. 557. § 115.
Solyer v. Romanet, 52 Tex. 562. § 298.
Somerset v. Dighton, 12 Mass. 382. §§ 206, 240, 246.
South v. State, 86 Ala. 617. § 469.
South Carolina v. Gaillard, 101 U. S. 433. §§ 165, 464.
South Carolina R. R. Co. v. Nix, 68 Ga. 572. § 12.
Southampton Bridge Co. v. Local Board of Southampton, 8 E. & B. 804. § 396.
Southgate v. Goldthwaite, 1 Bailey. 367. § 223.
South & North Ala. R. R. Co. v. Morris, 65 Ala. 193. §§ 169, 331.
 v. Wood, 74 Ala. 449. §§ 296, 306.
South Ottawa v. Perkins, 94 U. S. 260. §§ 41, 42, 48, 53, 181, 182, 183.
Southwark Bank v. Commonwealth, 26 Pa. St. 446. §§ 136, 138, 160, 168, 294, 300.
South's Heirs v. Hay, 3 Bibb. 522. § 202.
Southwestern R. R. Co. v. Cohen, 49 Ga. 627. §§ 350, 432.
Southworth, Matter of, 5 Hun. 55. § 156.
Sovereign v. State, 7 Neb. 409. §§ 131, 132, 135.
Spackman, Ex parte, 1 Macn. & G. 170. §§ 219, 268.
Spangler v. Jacoby, 14 Ill. 279. §§ 41, 43, 48, 462.
Sparhawk v. Sparhawk, 116 Mass. 315. § 176.
Sparks v. Clapper, 30 Ind. 204. § 206.
Sparrow v. Commissioner of Land Office, 56 Mich. 567. § 170.
 v. Davidson College, 77 N. C. 35. § 252.
 v. Strong, 3 Wall. 97. § 298.
Spalding v. Alford, 1 Pick. 33. §§ 107, 137.
 v. Lowell, 23 Pick. 71. § 381.
Speckert v. Louisville, 78 Ky. 287. §§ 164, 166.
Speed v. Crawford, 3 Met. (Ky.) 207. § 26.

- Speer v. Mayor, etc.** 42 Alb. L. J. 232. § 47.
 v. Plank R. Co. 22 Pa. St. 376. §§ 46, 51.
 v. School Directors, 50 Pa. St. 150. §§ 331, 332.
Spence v. McGowan, 53 Tex. 30. §§ 392, 393.
Spencer's Case, 6 Coke, 9b. § 424.
Spencer v. McBride, 14 Fla. 403. §§ 479, 482.
 v. Metropolitan Board, L. R. 22 Ch. Div. 162. § 246.
 v. State, 5 Ind. 41. §§ 136, 234.
Spensley v. Lancashire Ins. Co. 54 Wis. 433. § 305.
Spieries v. Parker, 1 T. R. 141. § 222.
Spooner v. Fletcher, 3 Vt. 133. § 422.
Sprague v. Birdsall, 2 Cow. 419. § 366.
Sprecher v. Wakeley, 11 Wis. 432. § 476.
Spring Street, Re, 112 Pa. St. 258. § 204.
Spring v. Collector, 78 Ill. 101. §§ 223, 267.
Springfield v. Commissioners, 6 Pick. 501. § 165.
 v. Conn. R. R. Co. 4 Cush. 63. § 388.
Springfield Bank v. Merrick, 14 Mass. 322. § 336.
Spring Valley Wat. Works v. San Mateo W. Works, 64 Cal. 123. § 387.
Sprott v. United States, 20 Wall. 459; 8 Ct. of Cl. 499. § 20.
Sprowl v. Lawrence, 33 Ala. 674. §§ 246, 302, 410, 418, 437.
Squires' Case, 12 Abb. Pr. 38. § 232.
Staats v. Hudson River R. R. Co. 4 Abb. App. Dec. 287. § 151.
Stacy v. Vermont, etc. R. R. Co. 32 Vt. 551. § 320.
Stafford v. Bank, 16 How. 135. § 454.
 v. Canal & Banking Co. 17 How. 283. § 454.
 v. His Creditors, 11 La. Ann. 470. § 156.
Stafford v. Ingersol, 3 Hill, 38. §§ 202, 399.
 v. Mayor, etc. 7 John. 541. § 391.
Stanberry v. Nelson, Wright (Ohio), 766. § 306.
Stange v. Dubuque, 62 Iowa, 303. §§ 129, 130.
Steinland v. Hopkins, 9 M. & W. 178. § 267.
Stanley v. Bolt, 5 Wall. 119. § 194.
 v. Wharton, 9 Price, 301. §§ 208, 360.
Staples v. Fox, 45 Miss. 667. §§ 392, 398.
Starin v. Town of Genoa, 23 N. Y. 439. § 75.
Starr v. Camden, etc. R. R. Co. 24 N. J. L. 592. § 388.
State v. Absence, 4 Porter, 397. § 334.
 v. Acuff, 6 Mo. 54. § 260.
 v. Adams, 64 N. H. 243. § 402.
 v. Adams, 51 N. H. 568. § 231.
 v. Addington, 2 Bailey, 516. § 166.
 v. Ah Sam, 15 Nev. 27. § 86.
 v. Alexander, 14 Rich. 247. §§ 138, 142, 143.
 v. Algood, 87 Tenn. 163. §§ 132, 330.
 v. Andrews, 20 Tex. 230. §§ 133, 137.
 v. Arlin, 39 N. H. 179. § 470.
 v. Atherton, 19 Nev. 332. § 93.
 v. Atkins, 35 Ga. 319. § 239.
 v. Atwood, 11 Wis. 422. § 206.
 v. Auditor, 41 Mo. 25. § 206.
 v. Aulman, 76 Iowa, 624. § 97.
 v. Babcock, 21 Neb. 599. § 283.
 v. Baker, 47 Miss. 95. § 355.
 v. Baldwin, 45 Conn. 134. §§ 133, 134, 137, 163.
 v. Baltimore County, 39 Md. 516. §§ 120, 198.
 v. Baltimore, etc. R. R. Co. 12 Gill & J. 399. §§ 283, 288.
 v. Bank, 1 S. C. 63. § 478.
 v. Bank, 12 Rich. L. 609. §§ 104, 166.
 v. Bank of Md. 6 Gill & J. 205. § 385.

- State v. Bank of Newbern**, 1 Dev. & Bat. Eq. 219. § 381.
- v. Bank of Smyrna**, 2 Houst. 99. § 364.
- v. Barbee**, 3 Ind. 258. § 117.
- v. Barker**, 4 Kan. 379. § 472.
- v. Barrow**, 30 La. Ann. pt. 1, 657. § 147.
- v. Bartlett**, 30 Me. 132. § 355.
- v. Baum**, 33 La. Ann. 981. §§ 96, 103.
- v. Beasley**, 5 Mo. 91. § 260.
- v. Bell**, 3 Ired. L. 506. § 288.
- v. Belvidere**, 25 N. J. L. 563. § 157.
- v. Beneke**, 9 Iowa, 203. § 67.
- v. Benjamin**, 2 Oregon, 125. § 143.
- v. Bentley**, 23 N. J. L. 532. § 378.
- v. Bergen**, 34 N. J. L. 438. § 198.
- v. Berry**, 25 Mo. 355. § 206.
- v. Berry**, 12 Iowa, 58. § 202.
- v. Beswick**, 13 R. I. 211. § 154.
- v. Blair**, 32 Ind. 313. § 429.
- v. Board, etc.** 26 Ind. 522. §§ 86, 92.
- v. Boogher**, 71 Mo. 631. § 142.
- v. Bosworth**, 13 Vt. 402. § 312.
- v. Bowen**, 16 Kan. 475. § 299.
- v. Bowers**, 14 Ind. 195. §§ 88, 92.
- v. Boyd**, 19 Nev. 43. § 129.
- v. Boyd**, 2 Gill & J. 374. §§ 411, 423.
- v. Boyle**, 10 Kan. 113. §§ 167, 226.
- v. Bradford**, 36 Ga. 422. §§ 206, 463, 481.
- v. Brandt**, 41 Iowa, 593. §§ 252, 260.
- v. Branim**, 23 N. J. L. 484. § 157.
- v. Brassfield**, 81 Mo. 151. §§ 84, 98.
- v. Brewer**, 22 La. Ann. 273. §§ 166, 255, 256.
- v. Brewster**, 3 Am. & Eng. Corp. Cas. 551. § 133.
- v. Brewster**, 39 Ohio St. 653. §§ 123, 132.
- v. Brookover**, 22 W. Va. 214. § 165.
- State v. Brown**, 3 Heisk. 1. § 267.
- v. Brown**, 31 Me. 522. § 354.
- v. Brown**, 19 Fla. 563. § 169.
- v. Brown**, 30 La. Ann. 78. § 482.
- v. Bruner**, 17 Mo. App. 274. § 306.
- v. Buchanan Co. Ct.** 41 Mo. 254. § 419.
- v. Buckley**, 54 Ala. 599. §§ 41, 43, 48.
- v. Buckman**, 18 Fla. 267. §§ 236, 237.
- v. Burnett**, 6 Heisk. 186. § 124.
- v. Burton**, 11 Wis. 50. § 137.
- v. Cain**, 8 W. Va. 720. § 135.
- v. California Min. Co.** 15 Nev. 234. § 122.
- v. Campbell**, 44 Wis. 529. §§ 134, 154, 166.
- v. Canterbury**, 28 N. H. 195. §§ 231, 402.
- v. Canton**, 43 Mo. 48. § 349.
- v. Carney**, 20 Iowa, 82. § 449.
- v. Cassidy**, 22 Minn. 325. §§ 83, 88.
- v. Cazeau**, 8 La. Ann. 109. §§ 210, 212, 213.
- v. Chamberlin**, 37 N. J. L. 388. § 174.
- v. Chambers**, 93 N. C. 600. §§ 193, 198.
- v. Chase**, 5 H. & J. 303. §§ 310, 311.
- v. Chase, Governor**, 5 Ohio St. 528. § 432.
- v. Cincinnati**, 19 Ohio, 197. § 137.
- v. Cincinnati Gas Light Co.** 18 Ohio St. 262. §§ 378, 383, 384.
- v. Clark**, 5 Dutcher, 96. § 218.
- v. Clark**, 57 Mo. 25. § 255.
- v. Clark**, 54 Mo. 216. §§ 153, 283.
- v. Clarke**, 54 Mo. 17. §§ 169, 170, 235.
- v. Clarksville, etc. Co.** 2 Sneed, 88. §§ 241, 247, 254.
- v. Cleveland**, 80 Mo. 108. § 306.
- v. Click**, 2 Ala. 26. §§ 104, 448, 452.

State v. Clinton, 27 La. Ann. 40. §§ 87, 94.

v. Clinton, 28 La. Ann. 201. § 170.

v. Cloksey, 5 Sneed, 482. § 300.

v. Cole, 2 McCord, 117. § 454.

v. Commissioner, 37 N. J. L. 240. § 140.

v. Commissioners, 41 Kan. 630. § 90.

v. Commissioners, 5 Ohio St. 497. § 176.

v. Commissioners, 38 N. J. L. 320. §§ 173, 180.

v. Commissioners, etc. 4 Wis. 414. § 472.

v. Commissioners, etc. 34 Wis. 162. § 240.

v. Commissioner of R. R. Taxation, 37 N. J. L. 228. § 287.

v. Conklin, 34 Wis. 21. § 267.

v. Conkling, 19 Cal. 501. §§ 154, 168, 204.

v. Cook, 20 Ohio St. 252. § 311.

v. Cooke, 24 Minn. 247. §§ 72, 75.

v. Cooler, 8 S. E. Rep. 692. §§ 469, 470.

v. Cooper, 5 Blackf. 258. § 331.

v. Copeland, 3 R. I. 33. §§ 67, 180.

v. Cordoza, 5 S. C. 297. § 330.

v. Corson, 59 Me. 137. § 469.

v. Corwin, 4 Mo. 609. §§ 204, 325.

v. County Commissioners, 17 Nev. 96. §§ 88, 97.

v. County Commissioners, 29 Md. 516. § 449.

v. County Court, 50 Mo. 317. § 117.

v. County Court, 53 Mo. 128. § 137.

v. County Judge, 2 Iowa, 282. §§ 78, 82, 87, 88.

v. County of Dorsey, 28 Ark. 378. § 183.

v. Court Com. Pleas, 36 N. J. L. 72. § 75.

v. Courtney, 73 Iowa, 619. § 155.

v. Covington, etc. 29 Ohio St. 102. §§ 80, 81.

State v. Craig, 23 Ind. 185. § 142.

v. Cram, 16 Wis. 343. § 236.

v. Crawford, 11 Kan. 32. §§ 167, 226.

v. Crawford, 35 Ark. 237. §§ 41, 49.

v. Crawley, 33 La. Ann. 782. §§ 103, 170.

v. Cross, 4 Jones (N. C.), 421. § 166.

v. Cross, 68 Iowa, 180. § 184.

v. Cross, 38 Kan. 696. § 135.

v. Cumberland & Penn. R. R. Co. 40 Md. 22. § 122.

v. Custer, 65 N. C. 339. § 252.

v. Daley, 29 Conn. 272. §§ 142, 164, 166.

v. Dalon, 35 La. Ann. 1141. §§ 103, 120, 170.

v. Daniel, 28 La. Ann. 38. § 88.

v. Davis, 22 La. Ann. 77. § 257.

v. Davis, 70 Md. 237. § 160.

v. De Bar, 58 Mo. 395. § 157.

v. De Gress, 53 Tex. 387. § 322.

v. Deshler, 25 N. J. L. 177. § 248.

v. Dewa, R. M. Charlt. 400. §§ 5, 11.

v. Dexter, 10 R. I. 341. § 5.

v. Doherty, 60 Me. 504. § 206.

v. Dombaugh, 20 Ohio St. 173. § 331.

v. Donchey, 8 Iowa, 396. § 109.

v. Douglass, 33 N. J. L. 363. § 225.

v. Douglass, 5 Sneed, 608. §§ 222, 300.

v. Dousman, 28 Wis. 541. §§ 118, 130, 176.

v. Dudley, 2 Ohio St. 607. § 151.

v. Duffy, 7 Nev. 342. §§ 119, 120.

v. Duke, 42 Tex. 455. § 173.

v. Duncan, 16 Lea, 79. § 143.

v. Dunning, 9 Ind. 20. §§ 108, 109, 345.

v. Easton, etc. R. R. Co. 36 N. J. L. 181. § 388.

v. Elizabeth, 40 N. J. L. 278. § 170.

v. Elvina, 32 N. J. L. 362. § 88.

- State v. Engle**, 21 N. J. L. 347. § 253.
v. Eskridge, 1 Swan, 413. §§ 223, 328, 343.
v. Exnicios, 33 La. Ann. 253. §§ 103, 170.
v. Fagan, 22 La. Ann. 545. §§ 55, 330.
v. Fiala, 47 Mo. 320. § 157.
v. Field, 17 Mo. 529. § 69.
v. Fields, 2 Bailey, 554. § 332.
v. Fitzporter, 17 Mo. App. 271. § 157.
v. Fletcher, 5 N. H. 257. § 333.
v. Fletcher, 1 R. I. 193. § 166.
v. Foote, 11 Wis. 14. §§ 54, 106, 109.
v. Forney, 21 Neb. 223. § 267.
v. Francis, 26 Kan. 724. §§ 41, 43, 46, 48.
v. Frederick, 45 Ark. 347. § 306.
v. Gaines, 1 Lea, 734. § 135.
v. Garland, 7 Ired. L. 48. § 333.
v. Garrett, 29 La. Ann. 637. §§ 87, 88, 89, 101.
v. Geiger, 65 Mo. 306. § 135.
v. Gillick, 7 Iowa, 287. § 449.
v. Gilman, 33 W. Va. 146. § 370.
v. Glenn, 18 Nev. 39. §§ 85, 51.
v. Goetze, 22 Wis. 363. §§ 158, 217, 222.
v. Goyette, 11 R. I. 592. § 303.
v. Grady, 34 Conn. 118. §§ 142, 143.
v. Graham, 16 Neb. 74. § 129.
v. Graham, 38 Ark. 519. § 350.
v. Gumber, 37 Wis. 298. §§ 134, 142, 166, 167.
v. Gupton, 8 Ired. 271. § 254.
v. Haygood, 13 S. C. 46. §§ 41, 45.
v. Hall, 2 Bailey, 151. § 356.
v. Hallock, 14 Nev. 202. § 137.
v. Hamblin, 4 Rich. (N. S.) 1. §§ 142, 143.
v. Hammer, 42 N. J. L. 435. § 127.
v. Hammett, 7 Ark. 492. § 298.
v. Hanger, 5 Ark. 412. § 179.
v. Harkness, 1 Brev. 276. § 223.
- State v. Harris**, 17 Ohio St. 603. §§ 447, 449.
v. Harrison, 11 La. Ann. 722. § 98.
v. Haskell Co. 40 Kan. 65. § 94.
v. Hastings, 24 Minn. 78. §§ 41, 46, 183.
v. Hayes, 78 Mo. 307. § 303.
v. Haynes, 72 Mo. 377. § 345.
v. Hays, 49 Mo. 604. § 330.
v. Heidorn, 74 Mo. 410. § 161.
v. Helmes, 3 N. J. L. *1050. § 198.
v. Heman, 70 Mo. 441. §§ 235, 260.
v. Herrmann, 75 Mo. 340. § 129.
v. Heyward, 3 Rich. 389. § 473.
v. Hilmantel, 21 Wis. 566. § 459.
v. Hinchman, 27 Pa. St. 479. § 294.
v. Hitchcock, 1 Kan. 186. §§ 55, 117.
v. Hoagland, 51 N. J. L. 62. § 127.
v. Holman, 3 McCord, 306. § 279.
v. Horner, 34 Md. 569. § 449.
v. Horsey, 14 Ind. 185. §§ 142, 143.
v. Hudson County, 37 N. J. L. 12. § 87.
v. Hurds, 19 Neb. 317. §§ 103, 170.
v. Ingersoll, 17 Wis. 631. §§ 183, 137, 154, 166.
v. Intoxicating Liquors, 19 Atl. Rep. 913. § 332.
v. Intoxicating Liquors, 73 Ma. 278. § 296.
v. Jackson, 39 Me. 291. § 193.
v. Jaeger, 63 Mo. 403. § 325.
v. Jernigan, 3 Murph. 18. § 259.
v. Johnson, 26 Ark. 281. § 66.
v. Jones, 22 Ark. 331. § 397.
v. Judge, 12 La. Ann. 777. §§ 240, 300.
v. Judge, 14 La. Ann. 486. §§ 109, 137.
v. Judge, 29 La. Ann. 223. § 26.
v. Judge, 37 La. Ann. 578. § 155.
v. Judge Bermudez, 12 La. 352. § 463.

State v. Judge of St. Louis P. Ct. 38 Mo. 529. § 157.
 v. Judges, 21 Ohio St. 1. §§ 121, 122, 193, 198.
 v. Kalb, 50 Wis. 178. § 473.
 v. Kantler, 33 Minn. 69. § 169.
 v. Keith, 63 N. C. 140. § 467.
 v. Kelley, 34 N. J. L. 75. §§ 140, 147, 154.
 v. Kellogg, 41 Mo. 16. § 153.
 v. Kempf, 69 Wis. 470. § 384.
 v. King, 12 La. Ann. 593. § 166.
 v. King, 44 Mo. 283. §§ 218, 223, 244.
 v. Kinne, 41 N. H. 238. § 333.
 v. Krebs, 64 N. C. 604. § 381.
 v. Lancaster Co. 17 Neb. 87. § 103.
 v. Lasater, 9 Baxt. 584. §§ 78, 82, 88.
 v. Lean, 9 Wis. 284. §§ 110, 193.
 v. Learned, 47 Me. 426. § 469.
 v. Lewis, 5 Mo. App. 465. § 159.
 v. Liedtke, 9 Neb. 462. § 45.
 v. Little Rock, etc. R. R. Co. 31 Ark. 701. § 41.
 v. Loftin, 2 Dev. & Bat. 31. § 325.
 v. Long, 78 N. C. 571. § 166.
 v. Lorell, 23 Iowa, 304. §§ 350, 351.
 v. Loyd, 2 Ind. 659. § 166.
 v. McCann, 4 Lea, 1. §§ 80, 103.
 v. McCann, 21 Ohio St. 198. § 119.
 v. McConnell, 3 Lea, 332. §§ 46, 88, 93, 96, 97.
 v. McCoy, 2 Speers, 711. § 252.
 v. McCracken, 42 Tex. 383. §§ 80, 260.
 v. Mace, 5 Md. 337. §§ 253, 397.
 v. McFetridge, 64 Wis. 130. § 364.
 v. McGarry, 21 Wis. 496. § 273.
 v. McLean, 9 Wis. 292. § 455.
 v. McLelland, 18 Neb. 236. §§ 41, 43, 46, 294.
 v. Macon Co. Ct. 41 Mo. 453. §§ 137, 202.
 v. Madison, 15 Wis. 30. § 475.
 v. Madson, 45 N. W. Rep. 856. § 101.

State v. Mann, 21 Wis. 684. § 240.
 v. Manning, 14 Tex. 603. § 469.
 v. Marsh, 37 Ark. 356. § 169.
 v. Marshall, 13 Tex. 55. § 356.
 v. Massey, 103 N. C. 356. § 142.
 v. Mayhew, 2 Gill, 487. § 307.
 v. Maynard, 14 Ill. 419. § 395.
 v. Mayor, 5 Port. 279. § 380.
 v. Mayor, 35 N. J. L. 196. §§ 239, 240, 247.
 v. Milburn, 9 Gill, 105. § 333.
 v. Miles, 2 Nott & McCord, 1. § 252.
 v. Miller, 58 Ind. 399. § 143.
 v. Miller, 30 N. J. L. 368. § 159.
 v. Miller, 23 Wis. 634. § 342.
 v. Miller, 45 Mo. 495. §§ 76, 80, 82, 88, 92.
 v. Mills, 34 N. J. L. 177. §§ 157, 364.
 v. Mister, 5 Md. 11. § 283.
 v. Mitchell, 31 Ohio St. 592. § 129.
 v. Mitchell, 5 Ired. L. 350. § 252.
 v. Montclair R'y Co. 35 N. J. L. 328. § 388.
 v. Mooty, 3 Hill (S. C.), 187. § 283.
 v. Morrill, 16 Ark. 384. § 342.
 v. Morris Canal, etc. Co. 13 N. J. L. 192. § 421.
 v. Morrow, 26 Mo. 131. §§ 147, 327.
 v. Myers, 10 Iowa, 448. § 252.
 v. Newark, 28 N. J. L. 491. § 140.
 v. Newark, 3 Dutch. 185. § 206.
 v. Newark, 25 N. J. L. 399. § 164.
 v. Newark, 34 N. J. L. 236. §§ 88, 101.
 v. Newton, 59 Ind. 173. §§ 169, 170.
 v. Nicholls, 30 La. Ann. 980. § 300.
 v. Northern, etc. R'y Co. 18 Md. 193. § 397.
 v. Norton, 23 N. J. L. 33. §§ 139, 290.
 v. Norwood, 12 Md. 195. §§ 164, 463.
 v. Noyes, 47 Me. 189. §§ 345, 473.
 v. Noyes, 30 N. H. 279. § 75.

State v. Nutt, Phil. L. 20. § 166.
 v. O'Conner, 13 La. Ann. 486.
 § 166.
 v. O'Neill, 24 Wis. 149. §§ 73, 75.
 v. Oskins, 28 Ind. 364. § 229.
 v. Parker, 91 N. C. 650. § 333.
 v. Parker, 26 Vt. 362. §§ 67, 73.
 v. Parkhurst, 9 N. J. L. 427.
 § 169.
 v. Partlow, 91 N. C. 550. § 261.
 v. Patterson, 2 Ired. L. 346.
 §§ 184, 189.
 v. Percy, 44 Mo. 159. § 159.
 v. Persinger, 76 Mo. 346. § 170.
 v. Pierce, 14 Ind. 302. §§ 142, 143.
 v. Pierson, 44 Ark. 265. § 289.
 v. Pinckney, 22 S. C. 484. § 464.
 v. Piper, 17 Neb. 614. § 119.
 v. Pitts, 58 Mo. 556. § 449.
 v. Platt, 2 S. C. 150. §§ 41, 43, 45,
 49, 182.
 v. Pollard, 6 R. I. 200. § 155.
 v. Pool, 74 N. C. 402. §§ 252, 260.
 v. Powder Mfg. Co. 50 N. J. L. 75.
 § 132.
 v. Powers, 36 Conn. 77. §§ 348,
 410, 416.
 v. Powers, 38 Ohio St. 54. §§ 117,
 123.
 v. Poydras, 9 La. Ann. 65. § 246.
 v. Preston, 34 Wis. 675. § 253.
 v. Price, 12 G. & J. 260. § 306.
 v. Pugh, 43 Ohio St. 98. § 180.
 v. Rackley, 2 Blackf. 249. § 153.
 v. Ranson, 73 Mo. 78. §§ 78, 82.
 v. Rauscher, 1 Lea, 96. § 124.
 v. Ray, 97 N. C. 510. § 298.
 v. Reader, 60 Iowa, 527. § 295.
 v. Reed, 4 H. & McH. 10. § 213.
 v. Reitz, 62 Ind. 159. §§ 124, 127.
 v. Richmond, etc. R. R. Co. 73
 N. C. 527. § 473.
 v. Riordan, 24 Wis. 484. §§ 117,
 118, 130.
 v. Robertson, 41 Kan. 200. § 330.
 v. Robinson, 1 Kan. 17. § 331.
 v. Robinson, 42 Minn. 107. § 365.
 v. Rogers, 10 Nev. 250. §§ 65,
 154.

State v. Rollins, 8 N. H. 550. §§ 15,
 168.
 v. Rorie, 23 Ark. 726. § 352.
 v. Rosenstock, 11 Nev. 128. § 170.
 v. Ross, 49 Mo. 416. §§ 167, 226.
 v. Russell, 17 Mo. App. 16. § 306.
 v. Ryan, 13 Minn. 370. § 469.
 v. S. & S. Orphan Home, 37 Ohio
 St. 275. § 231.
 v. Schnierle, 5 Rich. L. 299.
 § 111.
 v. School Board Fund, 4 Kan.
 261. § 109.
 v. Scudder, 39 N. J. L. 203. § 206.
 v. Seaborn, 4 Dev. 305. § 154.
 v. Severance, 49 Mo. 401. §§ 157,
 311, 312.
 v. Shaffer, 21 Iowa, 486. § 226.
 v. Showers, 34 Kan. 269. § 325.
 v. Silver, 9 Nev. 227. §§ 78, 88,
 102, 103.
 v. Sinks, 42 Ohio St. 345. §§ 176,
 180.
 v. Slaughter, 70 Mo. 484. § 168.
 v. Slotter, 38 Iowa, 321. § 275.
 v. Smalls, 11 S. C. 262. §§ 41, 44.
 v. Smith, 5 Humph. 394. § 247.
 v. Smith, 38 Conn. 397. §§ 206,
 482.
 v. Smith, 67 Me. 328. §§ 139, 203,
 449.
 v. Smith, 52 Wis. 134. § 253.
 v. Smith, 46 Iowa, 670. §§ 252,
 255.
 v. Smith, 44 Tex. 443. §§ 142,
 143.
 v. Smith, 35 Minn. 257. § 101.
 v. Sneed, 25 Tex. (Supp.) 66. § 467.
 v. Solomon, 33 Ind. 450. § 279.
 v. Solomons, 3 Hill (S. C.), 96.
 §§ 208, 467, 482.
 v. Sorrells, 15 Ark. 664. § 331.
 v. Spaude, 37 Minn. 322. § 125.
 v. Squires, 26 Iowa, 345. §§ 93,
 117, 129, 130, 480, 483.
 v. Standley, 76 Iowa, 215. § 128.
 v. Stark, 18 Fla. 255. §§ 175, 176.
 v. State Auditor, 32 La. Ann. 89.
 § 92.

- State v. State Bank**, 5 Ind. 356. § 452.
v. Stephenson, 2 Bailey, 334. §§ 208, 210, 234, 242.
v. Sterling, 8 Mo. 697. § 473.
v. Stinson, 17 Me. 154. § 152.
v. Stoll, 17 Wall. 425. §§ 154, 157.
v. Stumpf, 23 Wis. 630. § 459.
v. Stunkle, 41 Kan. 456. § 95.
v. Sturgess, 10 Oregon, 58. § 157.
v. Studt, 31 Kan. 245. § 154.
v. Sullivan, 14 Rich. L. 281. § 469.
v. Supervisors, 25 Wis. 339. §§ 117, 118, 130.
v. Supervisors, 62 Wis. 376. § 179.
v. Swift, 10 Nev. 176. §§ 35, 183.
v. Swisher, 17 Tex. 441. § 67.
v. Swope, 7 Ind. 91. § 333.
v. Taylor, 35 N. J. L. 184. § 362.
v. Thompson, 10 La. Ann. 122. § 314.
v. Tombeckbee Bank, 2 Stew. 30. § 473.
v. Tootle, 2 Harr. 541. § 298.
v. Towle, 48 N. H. 97. § 438.
v. Town of Union, 33 N. J. L. 350. §§ 78, 82, 86, 87, 88, 483, 484.
v. Treasurer, 41 Mo. 16. § 157.
v. Trenton, 38 N. J. L. 64. §§ 217, 225, 325.
v. Timme, 54 Wis. 318. § 229.
v. Troutman, 72 N. C. 551. § 146.
v. Tucker, 46 Ind. 355. §§ 82, 85, 96, 97, 117.
v. Turnpike Co. 16 Ohio St. 308. §§ 240, 246, 260, 267.
v. Tuttle, 53 Wis. 45. §§ 169, 170.
v. Twitty, 2 Hawkes, 441. § 190.
v. Union Bank, 9 Yerg. 164. § 336.
v. Upchurch, 9 Ired. 454. § 208.
v. Van Stralen, 45 Wis. 437. §§ 134, 166.
v. Vicksburg, etc. R. R. Co. 51 Miss. 361. § 237.
v. Wapello Co. 13 Iowa, 388. § 314.
v. Wardens, 23 La. Ann. 720. §§ 95, 102, 103.
- State v. Warren**, 28 Md. 338. § 164.
v. Washington Social L. Co. 11 Ohio, 96. § 385.
v. Washoe Co. 6 Nev. 104. § 238.
v. Watts, 23 Ark. 304. §§ 138, 143.
v. Weigel, 48 Mo. 29. §§ 215, 239, 246.
v. Weir, 33 Iowa, 134. §§ 67, 72.
v. Welch, 21 Minn. 22. § 193.
v. Wheeler, 64 Me. 532. § 115.
v. Wheeler, 25 Conn. 290. §§ 169, 170.
v. Whetstone, 13 La. Ann. 376. § 208, 290.
v. Whisner, 35 Kan. 271. § 56.
v. Whitener, 93 N. C. 590. § 253.
v. Whitworth, 8 Lea, 594. §§ 88, 93, 95.
v. Whitworth, 8 Port. (Ala.) 434. §§ 142, 154.
v. Wilbor, 1 R. I. 199. § 138.
v. Wilcox, 42 Conn. 364. §§ 72, 75.
v. Wilcox, 45 Mo. 458. §§ 67, 120, 124, 125, 127.
v. Wilcox, 3 Yerg. 278. § 349.
v. Williams, 5 Wis. 308. § 298.
v. Williams, 13 S. C. 558. § 288.
v. Williams, 8 Ind. 191. § 221.
v. Williams, 2 Strob. 474. § 279.
v. Willis, 66 Mo. 131. § 470.
v. Wilmington, etc. R. R. Co. 74 N. C. 143. § 206.
v. Wilson, 43 N. H. 419. § 154.
v. Wilson, 48 N. H. 398. § 469.
v. Wilson, 7 Ind. 516. § 170.
v. Wilson, 12 Lea, 246. §§ 88, 169.
v. Wiltz, 11 La. Ann. 439. §§ 126, 236, 238, 322.
v. Wise, 7 Ind. 645. § 306.
v. Wish, 15 Neb. 448. §§ 134, 137, 138, 142, 167.
v. Wolfarth, 42 Conn. 155. § 206.
v. Woodson, 41 Mo. 227. § 391.
v. Yewell, 63 Md. 120. § 138.
v. Young, 47 Ind. 150. §§ 85, 92, 103.
v. Young, 3 Kan. 445. § 344.

- State Bank v. Cooper**, 2 Yerg. 599.
 §§ 5, 119, 124.
v. Knoop, 16 How. 369. §§ 472, 473, 480.
v. Plainfield Bank, 34 N. J. Eq. 450. § 13.
State Board of Assessors v. Central R. R. Co. 48 N. J. L. 146. § 122.
State Lime, etc. Co.'s Appeal, 77 Pa. St. 429. §§ 88, 101.
State Lottery Co. v. Richoux, 23 La. Ann. 743. §§ 31, 33.
Stayton v. Hulings, 7 Ind. 144. § 459.
Steamboat Co. v. Collector, 18 Wall. 478. § 137.
Steamboat Farmer v. McCraw, 31 Ala. 659. § 206.
Steamboat Northern Indiana v. Miliken, 7 Ohio St. 383. § 80.
Steamboat Ohio v. Stunt, 10 Ohio St. 582. §§ 371, 372.
Steamer Mary Blane v. Beehler, 12 Mo. 477. §§ 111, 112, 114.
Steamship Co. v. Joliffe, 2 Wall. 450. §§ 134, 156.
Stebbins v. Anthony, 5 Colo. 356. §§ 111, 112, 114.
v. State, 22 Tex. App. 32. §§ 154, 155.
Steckert v. East Saginaw, 22 Mich. 104. § 462.
Steele v. Midland R. Co., L. R. 1 Ch. 282. § 300.
v. Steele, 64 Ala. 438. §§ 480, 481.
v. Thompson, 42 Mich. 596. § 377.
Steers v. Lashley, 6 T. R. 61. § 336.
Stein v. Ashby, 30 Ala. 363. § 320.
v. Leeper, 78 Ala. 517. §§ 41, 43, 45, 78, 86, 91.
Steiner v. Cox, 4 Pa. St. 13. § 311.
Stephen v. State, 11 Ga. 225. § 306.
Stephens v. Ballou, 27 Kan. 594. §§ 137, 138, 151.
v. Robinson, 2 Crompt. & J. 209. § 335.
v. Watson, 1 Salk. 45. § 325.
Stephens Co. v. R. R. Co. 33 N. J. L. 229. § 198.
- Stephenson v. Doe**, 8 Blackf. 508. §§ 165, 193, 424.
v. Higginson, 3 H. of L. Cas. 638. §§ 219, 254.
v. Osborne, 41 Miss. 119. § 164.
Stetson v. Kempton, 18 Mass. 272. § 380.
Stevens v. Andrews, 31 Mo. 205. § 478.
v. Bomar, 9 Humph. 546. § 295.
v. Brown, 20 W. Va. 450. § 12.
v. Cheney, 36 Hun. 1. § 373.
v. Fassett, 27 Me. 266. § 234.
v. Gourley, 7 C. B. (N. S.) 99. § 459.
v. Ross, 1 Cal. 94. § 333.
v. State, 2 Ark. 291. § 370.
Steward v. Greaves, 10 M. & W. 712. §§ 145, 152, 202, 204.
Stewart v. Commonwealth, 10 Watts, 307. § 367.
v. Davidson, 10 Sm. & M. 351. § 480.
v. Griffith, 33 Mo. 13. § 194.
v. Keemle, 4 S. & R. 72. § 324.
v. Stringer, 41 Mo. 400. §§ 290, 394.
v. Swanzy, 23 Miss. 502. § 190.
Stickworth, Estate of, 7 Nev. 223. § 164.
Stief v. Hart, 1 N. Y. 20. §§ 341, 348.
Stiefel v. Maryland Institute, 61 Md. 144. §§ 87, 170.
Stiles v. Easley, 51 Ill. 275. § 368.
Stillman v. Isham, 11 Conn. 123. § 428.
Stimpson v. Pond, 2 Curtis, 502. § 325.
Stine v. Bennett, 13 Minn. 153. §§ 107, 108, 206, 345.
Stingle v. Nevel, 9 Oregon, 62. § 133.
Stinson v. Smith, 8 Minn. 366. § 57.
Stirman v. State, 21 Tex. 734. § 154.
Stockett v. Bird, 18 Md. 484. §§ 153, 158, 159, 215, 216, 428.
Stocking v. Hunt, 3 Denio, 274. §§ 164, 476.
Stockle v. Silsbee, 41 Mich. 616. § 103.
Stoddard v. Sloan, 65 Iowa, 680. § 298.
Stoeber v. Immell, 1 Watts, 258. §§ 11, 165, 166.

- Stokes v. Macken**, 62 Barb. 145. §§ 181, 184, 189.
 v. People, 53 N. Y. 164. § 469.
 v. Rodman, 5 R. I. 405. § 206.
Stone v. Bassett, 4 Minn. 298. § 478.
 v. Dickinson, 5 Allen, 59. § 377.
 v. Lannon, 6 Wis. 497. § 358.
 v. Mississippi, 101 U. S. 814. § 473.
 v. Stone, 1 R. I. 425. § 275.
 v. Yeovil, L. R. 1 C. P. Div. 691. §§ 240, 324.
 v. Wisconsin, 94 U. S. 181. § 185.
Storm v. Cotzhausen, 38 Wis. 139. § 283.
Story v. Furman, 25 N. Y. 214. §§ 474, 476.
Stoughton v. Baker, 4 Mass. 522. § 333.
Stourbridge Canal v. Wheeley, 2 Barn. & Ad. 792. § 378.
Stout v. Keyes, 2 Doug. (Mich.) 184. § 184.
Stowell v. Zouch, 1 Plowd. 361. §§ 222, 253, 290.
Strader v. Graham, 10 How. 82. § 197.
Stradling v. Morgan, 1 Plowd. 206. § 204.
Straight v. Crawford, 73 Iowa, 676. § 138.
Straus v. Eagle Ins. Co. 5 Ohio St. 59. § 381.
Strauss v. Heiss, 48 Md. 292. §§ 110, 139, 160.
Street v. Commonwealth, 6 Watts & S. 209. §§ 138, 139.
Streissguth v. Reigelman, 71 Wis. 212. § 393.
Streubel v. Milwaukee, etc. R. R. Co. 12 Wis. 67. § 164.
Striker v. Kelly, 7 Hill, 9. §§ 63, 390, 452.
 v. Kelly, 2 Denio, 323. § 390.
Strode v. Stafford Justices, 1 Brock. 162. §§ 215, 239, 241.
Strong v. Birchard, 5 Conn. 357. § 251.
 v. Clem, 12 Ind. 639. § 206.
 v. Darling, 9 Ohio, 201. § 336.
- Strong v. Dennis**, 13 Ind. 514. § 206.
 v. State, 1 Blackf. 193. § 470.
Strother v. Hutchinson, 4 Bing. N. C. 83. § 413.
Stuart v. Earl of Butte, 3 Ves. 212. §§ 246, 276, 279.
 v. Kinsella, 14 Minn. 525. §§ 88, 103.
 v. Laird, 1 Cranch, 299. §§ 307, 309, 311.
Studley v. Sturt, 2 Strange, 782. § 115.
Stump v. Napier, 2 Yerg. 35. § 184.
Sturgeon v. State, 1 Blackf. 39. § 325.
Sturges v. Crowninshield, 4 Wheat. 202. §§ 236, 238, 322, 471, 476, 478.
Sturgis v. Hull, 48 Vt. 302. § 206.
Suche, In re, 1 Ch. Div. 48. § 206.
Suckley v. Rotchford, 12 Gratt. 60. § 342.
Suffolk Bank v. Worcester Bank, 5 Pick. 106. § 358.
Sullivan's Appeal, 77 Pa. St. 107. § 272.
Sullivan v. Adams, 3 Gray, 476. § 137.
 v. Brewster, 1 E. D. Smith, 681. § 476.
 v. Hense, 2 Colo. 424. § 296.
 v. La Crosse, etc. P. Co. 10 Minn. 386. § 290.
 v. Mitcalfe, L. R. 5 C. P. Div. 455. § 249.
 v. Oneida, 61 Ill. 242. § 469.
 v. People, 122 Ill. 385. § 295.
 v. People, 15 Ill. 233. § 138.
Sumner v. Miller, 64 N. C. 688. § 482.
Sumter Co. v. Gainesville Nat. Bank, 62 Ala. 464. §§ 174, 180.
Sunbury, etc. R. R. Co. v. Cooper, 33 Pa. St. 278. § 330.
Sun Mut. Ins. Co. v. Mayor, 8 N. Y. 241; 5 Sandf. 10. §§ 78, 88, 95.
Supervisors v. Auditor-General, 65 Mich. 408. § 95.
 v. Auditor-General, 68 Mich. 659. § 102.
 v. Board of Commissioners, 12 Minn. 403. §§ 150, 153.
 v. Briggs, 3 Denio, 173. § 164.

- Supervisors v. Heenan**, 2 Minn. 330.
 §§ 29, 41, 43, 45, 80, 92, 97,
 181, 294.
v. Kaime, 39 Wis. 468. § 453.
v. Lackawana I. & C. Co. 93 U. S.
 619. § 138.
v. People, 25 Ill. 181. §§ 46, 96,
 462.
v. Schenck, 5 Wall. 772. § 429.
v. Stanley, 105 U. S. 305. § 171.
v. United States, 4 Wall. 446.
 § 462.
v. United States, 18 Wall. 71.
 §§ 185, 319.
Surgett v. Lapice, 8 How. 48. §§ 307,
 308.
Surlott v. Pratt, 3 A. K. Marsh. 174.
 § 184.
Surtees v. Ellison, 9 B. & C. 750.
 § 162.
Sussex Peerage Case, 10 Cl. & Fin. 85.
 §§ 190, 219, 234, 237, 247.
Sutherland v. De Leon, 1 Tex. 250.
 §§ 212, 481, 482.
Sutterly v. Camden Common Pleas,
 41 N. J. L. 495. § 127.
Sutton v. Chenault, 18 Ga. 1. § 480.
v. Hays, 17 Ark. 462. § 286.
v. Sutton, L. R. 22 Ch. Div. 511.
 §§ 213, 233.
Swan v. Blair, 3 Cl. & F. 632. § 336.
Swann v. Buck, 40 Miss. 268. §§ 34,
 61, 62, 63, 64, 107, 138, 141,
 154, 204, 215, 241.
v. Jenkins. 82 Ala. 478. §§ 379,
 393.
Swans, Case of, 7 Coke, 82. § 305.
Swartwout v. Mich. Cent. R. R. Co.
 24 Mich. 389. §§ 101, 135, 239,
 241.
Swayze v. Britton, 17 Kan. 625. § 95.
Sweepston v. Barton, 39 Ark. 549.
 § 450.
Swett v. Sprague, 55 Me. 190. § 114.
Swickard v. Bailey, 3 Kan. 507.
 § 479.
Swift's Appeal, 111 Pa. St. 516. § 324.
Swift v. Applebone, 23 Mich. 252.
 § 208.
Swift v. Luce, 27 Me. 285. §§ 234, 431,
 432.
v. Newport, 7 Bush, 37. §§ 101,
 136.
v. Tyson, 16 Pet. 1. §§ 246, 429.
Swift Courtney, etc. Co. v. United
 States, 14 Ct. of Cl. 481. § 309.
Swigert, Matter of, 119 Ill. 83. § 272.
Swinfin v. Lowry, 37 Minn. 345.
 § 375.
Sydnor v. Gascoigne, 11 Tex. 455.
 § 314.
Sykes v. People, 127 Ill. 117. § 95.
Syracuse Bank v. Davis, 16 Barb. 188.
 § 164.
Syracuse Savings Bank v. Seneca
 Falls, 86 N. Y. 317. § 133.
Tabor v. Cook, 15 Mich. 322. § 332.
Tackett v. Volger, 85 Mo. 480. § 395.
Tadlock v. Eccles, 20 Tex. 782.
 §§ 78, 80.
Tafoya v. Garritt, 1 New Mex. 486.
 § 154.
Taggart v. McGinn, 14 Pa. St. 155.
 § 10.
Talbot v. Seeman, 1 Cranch, 38. § 190.
Tallamón v. Cardenas, 14 La. Ann.
 509. § 168.
Tallman v. Syracuse, etc. R. R. Co. 4
 Keyes, 128. § 442.
Talmadge v. Coal, etc. Co. 3 Head,
 337. § 378.
Tankersley v. Richardson, 2 Stewart,
 • 130. § 439.
Tappan v. Campbell, 9 Yerg. 436.
 § 184.
Tappen, Matter of, 36 How. Pr. 390.
 §§ 87, 102.
Tarlton v. Briscoe, 4 Bibb, 73. § 184.
v. Peggs, 18 Ind. 24. § 104.
Tarver v. Commissioners' Court, 17
 Ala. 527. § 462.
Tate v. Stoltzfoos, 16 S. & R. 35.
 § 483.
Taunton v. St. James, 9 B. & C. 831.
 § 222.
Tayloe v. Thompson, 5 Pet. 358.
 § 319.

- Taylor v. Bank of Illinois, 7 T. B. Mon. 576. § 190.
 v. Boardman, 25 Vt. 581. § 297.
 v. Carroll, 145 Mass. 95. § 373.
 v. Corbiere, 8 How. Pr. 385. § 115.
 v. Crowland Gas Co. 10 Ex. 293. § 335.
 v. Graham, 18 La. Ann. 656. § 298.
 v. Keeler, 30 Conn. 324. § 206.
 v. Chandler, 9 Heisk. 349. § 124.
 v. McGill, 6 Lea, 294. §§ 218, 411.
 v. Mitchell, 57 Pa. St. 209. § 206.
 v. Newman, 4 B. & S. 89. §§ 210, 355.
 v. Oldham Corporation, L. R. 4 Ch. Div. 395. §§ 159, 212, 217.
 v. Palmer, 31 Cal. 240. §§ 115, 215, 239, 240, 241.
 v. Penn. Co. 78 Ky. 348. § 14.
 v. Place, 4 R. L. 324. §§ 3, 4, 10.
 v. Porter, 4 Hill, 146. § 5.
 v. Rountree, 15 Lea, 725. § 463.
 v. Rushing, 2 Stew. (Ala.) 160. § 164.
 v. St. Helens, L. R. 6 Ch. Div. 264. § 378.
 v. State, 26 Ala. 283. §§ 104, 106.
 v. State, 7 Blackf. 93. §§ 166, 225.
 v. Stearns, 18 Gratt. 244. § 478.
 v. Taylor, 10 Minn. 107. §§ 300, 326.
 v. United States, 2 How. 197. §§ 347, 361.
 v. Wilkinson, L. R. 4 Q. B. Div. 228. § 243.
 v. Williams, 78 Va. 422. § 396.
 Telfer v. Northern R. R. Co. 30 N. J. L. 188. § 371.
 Tempe v. State, 40 Ala. 350. § 167.
 Temple v. Hays, Morris (Ia.), 12. § 104.
 v. State, 15 Tex. App. 304. § 306.
 Templeton v. Horne, 82 Ill. 491. §§ 164, 206.
 v. Morgan, 16 La. Ann. 438. § 299.
 Tennant's Case, 3 Neb. 409. § 26.
 Tennant v. Brookover, 12 W. Va. 337. § 482.
 Tennessee v. Davis, 100 U. S. 251. § 21.
 v. Sneed, 96 U. S. 69. §§ 471, 476, 478.
 Terrett v. Taylor, 9 Cr. 43. § 472.
 Terrill v. Jennings, 1 Met. (Ky.) 450. § 444.
 Territory v. Lee, 2 Mont. 124. § 25.
 v. O'Connor, 41 N. W. Rep. 746. § 330.
 Territt v. Woodruff, 19 Vt. 182. § 184.
 Terry v. Merchants' & Planters' Bank, 66 Ga. 177. § 293.
 Teter v. Clayton, 71 Ind. 237. § 168.
 Tetzner v. Naughton, 12 Ill. App. 148. § 374.
 Tewksbury v. Schulenberg, 41 Wis. 584. § 405.
 Texas v. White, 7 Wall. 733. § 20.
 Texas Land Co. v. Williams, 48 Tex. 602. § 342.
 Thames, etc. Ins. Co. v. Hamilton, L. R. 12 App. Cas. 484. § 275.
 Thatcher v. Powell, 6 Wheat. 119. §§ 187, 391.
 Tharp v. Fleming, 1 Houston, 580. § 194.
 Thayer v. Dudiey, 3 Mass. 296. §§ 288, 322.
 v. Felt, 4 Pick. 354. § 115.
 v. Hedges, 22 Ind. 282. § 21.
 v. Seavey, 11 Me. 284. § 165.
 Theriat v. Hart, 2 Hill, 380. § 256.
 Thistle v. Frostburg Coal Co. 10 Md. 129. § 480.
 Thomas v. Beckman, 1 B. Mon. 29. § 184.
 v. Collins, 58 Mich. 64. §§ 102, 160.
 v. Dakin, 22 Wend. 9. § 36.
 v. Douglass, 2 John. Cas. 226. § 112.
 v. Huesman, 10 Ohio St. 152. § 398.
 v. Railroad Co. 101 U. S. 82. § 381.
 v. Richmond, 12 Wall. 349. § 380.
 v. Scott, 23 La. Ann. 689. § 109.

- Thomas v. Stephenson**, 2 E. & B. 108. § 493.
v. Wabash, etc. R. R. Co. 40 Fed. Rep. 126. § 102.
Thomason, Ex parte, 16 Neb. 238. §§ 102, 103.
Thomason, Ex parte, 7 Md. 151. § 170.
Thomason v. Ashworth, 73 Cal. 73. § 125.
v. Dill, 34 Ala. 175. § 320.
Thompson v. Bassett, 5 Ind. 535. § 166.
v. Buckhannon, 2 Marsh. 416. § 453.
v. Bulson, 73 Ill. 277. §§ 215, 239.
v. Caldwell, 3 Litt. 136. § 479.
v. Clay, 60 Mich. 62. § 207.
v. Cox, 8 Jones' (N. C.) L. 311. § 395.
v. Egbert, 17 N. J. L. 459. § 400.
v. Farrer, 9 Q. B. Div. 372. § 246.
v. Floyd, 2 Jones' L. 313. §§ 68, 70.
v. Haskell, 25 Ill. 215. § 298.
v. Howe, 46 Barb. 287. § 166.
v. Lee County, 3 Wall. 327. §§ 380, 484.
v. Musser, 1 Dall. 402. § 190.
v. Read, 41 Iowa, 48. § 10.
v. Smith, 7 Serg. & R. 209. § 364.
v. State, 20 Ala. 54. § 246.
v. State, 26 Ark. 323. § 452.
v. Strickland, 52 Miss. 574. § 322.
v. Ward, L. R. 6 C. P. 353. § 441.
v. Weller, 85 Ill. 197. §§ 400, 401.
Thornburg v. Thornburg, 18 W. Va. 522. § 482.
Thorne v. Cramer, 15 Barb. 112. §§ 67, 180.
v. San Francisco, 4 Cal. 127. § 206.
Thornton v. Lane, 11 Ga. 459. § 213.
v. McGrath, 1 Duv. 349. § 483.
Thorpe v. Adams, L. R. 6 C. P. 125. § 157.
v. Corwin, 20 N. J. L. 311. § 426.
v. R. & B. R. R. Co. 27 Vt. 140. §§ 370, 373, 473.
v. Schooling, 7 Nev. 15. §§ 138, 154.
Thouvenin v. Rodriguez, 24 Tex. 468. § 399.
Thrasher v. Everhart, 3 Gill & J. 234. §§ 188, 190.
Thurston v. Percival, 1 Pick. 415. §§ 184, 297.
v. Prentiss, 1 Mich. 193. §§ 204, 325, 456.
Ticknor's Estate, Matter of, 13 Mich. 44. §§ 241, 271.
Tide Water Canal Co. v. Archer, 9 Gill & J. 479. § 387.
Tidey v. Mollett, 16 C. B. (N. S.) 298. § 256.
Tiernan v. Rinker, 102 U. S. 123. § 169.
Tierney v. Dodge, 9 Minn. 166. § 157.
Tiger v. Morris Pleas, 42 N. J. L. 631. §§ 127, 128.
Tilford v. Ramsey, 43 Mo. 410. §§ 10, 229.
Tilley v. Hudson R. R. Co. 24 N. Y. 474. § 371.
Tillman v. Cocke, 9 Baxt. 429. § 169.
Tilton v. Swift, 40 Iowa, 78. §§ 206, 469, 482.
Timlow v. Railroad Co. 99 Pa. St. 284. § 194.
Timm v. Harrison, 109 Ill. 593. §§ 131, 135.
Timms v. Williams, 3 Q. B. 413. § 396.
Tims v. State, 26 Ala. 165. § 137.
Tindal v. Drake, 60 Ala. 170. § 194.
Tingue v. Port Chester, 101 N. Y. 294. § 101.
Tinkham v. Tapscott, 17 N. Y. 152. § 222.
Tioga R. R. Co. v. Blossburg, etc. R. R. Co. 20 Wall. 137. § 185.
Tipton v. Carrigan, 10 Ill. App. 318. § 226.
v. Davis, 5 Hayw. 278. § 309.
Tisdell v. Combs, 7 Ad. & E. 796. § 279.
Titcomb v. Insurance Co. 8 Mass. 328. § 225.
Titus v. Scantling, 4 Blackf. 89. § 184.
Titusvill's Appeal, 108 Pa. St. 600. § 358.

- Tivey v. People, 8 Mich. 128. §§ 11, 163, 481.
- Trimmer v. Heagy, 16 Pa. St. 484. § 458.
- Tobin v. Hartshorn, 69 Iowa. 648. § 167.
- Todd v. Clapp, 118 Mass. 495. § 201.
v. Flournoy's Heirs, 56 Ala. 99. § 194.
v. Landry, 5 Martin, 459. § 165.
- Toledo, etc. R. R. Co. v. Dunlap, 47 Mich. 456. § 94.
v. Jacksonville, 67 Ill. 37. § 473.
- Tolford v. Church, 66 Mich. 431. § 97.
- Toll v. Wright, 37 Mich. 93. § 368.
- Tolmie v. Dean, 1 Wash. T'y, 47. § 462.
- Tolson v. Kaye, 3 Brod. & B. 222. § 368.
- Tomkins v. Ashby, 6 B. & C. 541. § 362.
- Tomlinson v. Bullock, L. R. 4 Q. B. Div. 230. § 110.
v. Greenfield, 31 Ark. 557. § 302.
- Tomson v. Ward, 1 N. H. 9. § 333.
- Tong v. Marvin, 15 Mich. 60. §§ 146, 338.
- Tonnele v. Hall, 4 N. Y. 140. §§ 240, 292, 300.
- Torrance v. McDougald, 12 Ga. 526. § 215.
- Torrey v. Corliss, 33 Me. 333. § 206.
v. Millbury, 21 Pick. 64. §§ 448, 455.
- Torreyson v. Board of Examiners, 7 Neb. 19. § 211.
- Toutill v. Douglas, 83 L. J. Q. B. 66. § 225.
- Touzalín v. Omaha, 25 Neb. 817. § 102.
- Towell v. Hollwey, 81 Ind. 154. § 113.
- Towle v. Larrabee, 26 Me. 464. § 336.
v. Marrett, 3 Greenlf. 22. § 154.
- Towles, Ex parte, 48 Tex. 413. §§ 170, 173, 175.
- Town of Fox v. Town of Kendall, 97 Ill. 72. § 75.
- Towns v. Mead, 16 C. B. 123. § 424.
- Townsend's Case, Plowd. 113. § 140.
- Townsend v. Brown, 24 N. J. L. 80. §§ 228, 378.
v. Deacon, 3 Ex. 706. §§ 424, 425.
v. Jamison, 9 How. 407. § 479.
v. Little, 109 U. S. 504. §§ 158, 226.
v. Read, 10 C. B. (N. S.) 308. § 252.
v. Todd, 91 U. S. 452. § 185.
v. Townsend, Peck, 1. § 478.
- Tracy v. Elizabethtown, etc. R. R. Co. 80 Ky. 259. § 387.
v. Tuffly, 134 U. S. 206. §§ 138, 154.
- Trade Mark Cases, 100 U. S. 82. § 173.
- Trapnall, Ex parte, 6 Ark. 9. § 236.
- Trask v. Green, 9 Mich. 366. § 10.
- Treacy, In re Petition of, 59 Barb. 525. § 464.
- Treadwell v. Commissioners, 11 Ohio St. 190. § 378.
- Treasurer v. Wygall, 46 Tex. 447. § 164.
- Treasurers v. Lang, 2 Bailey, 430. § 213.
- Treat v. Strickland, 23 Me. 234. § 167.
- Trevor's Case, Cro. Jac. 269; 12 Coke, 369. § 429.
- Trigally v. Mayor, etc. 6 Cold. 382. § 70.
- Trigg v. State, 49 Tex. 645. § 256.
- Triplett v. Graham, 58 Ia. 135. § 400.
- Tripp v. Overocker, 7 Colo. 72. § 169.
- Trist v. Cabenas, 18 Abb. Pr. 143. § 482.
- Troup v. Smith, 20 John. 33. § 427.
- Troy, etc. R. R. Co. v. Tibbits, 18 Barb. 297. § 399.
- Trueman v. Lambert, 4 M. & S. 238. § 212.
- Trustees v. Bailey, 10 Fla. 238. § 119.
v. Laird, 4 De G. M. & G. 732. § 137.
v. McConnel, 12 Ill. 140. § 380.
v. Osborne, 9 Ind. 458. § 365.
- Trustees of V. University v. Indiana, 14 How. 268. § 473.
- Tuckahoe C. Co. v. T. R. R. Co. 11 Leigh, 42. § 878.

- Tuohy v. Chase**, 30 Cal. 524. § 449.
- Turley v. County of Logan**, 17 Ill. 153. § 48.
- v. Thomas**, 8 C. & P. 103. § 296.
- Turner v. Board of Commissioners**, 27 Kan. 314. §§ 169, 170, 197.
- v. Fish**, 28 Miss. 306. § 296.
- v. Patton**, 49 Ala. 406. § 298.
- v. State**, 40 Ala. 21. §§ 142, 144, 260, 470.
- Turney v. Wilton**, 36 Ill. 395. §§ 133, 390.
- Turnpike Co. v. Davidson Co.** 3 Tenn. Ch. 396. § 473.
- v. State**, 3 Wall. 210. § 378.
- v. State**, 1 Sneed, 474. § 247.
- Turtle v. Hartwell**, 6 T. R. 426. §§ 207, 410, 416, 430.
- Tuskaloosa Bridge Co. v. Jemison**, 33 Ala. 476. §§ 207, 439.
- v. Olmstead**, 41 Ala. 9. §§ 131, 132, 135.
- Tuten v. Gazan**, 18 Fla. 751. § 190.
- Tuttle v. Gates**, 24 Me. 395. § 115.
- v. Griffin**, 64 Iowa, 455. § 315.
- v. State**, 4 Conn. 68. § 367.
- v. Strout**, 7 Minn. 465. § 92.
- v. Walton**, 1 Ga. 51. § 400.
- Tuxbury's Appeal**, 67 Me. 267. § 333.
- Twenty-eight Cases**, In re, 2 Ben. 63. § 361.
- Twenty-eighth St.** 102 Pa. St. 140. § 396.
- Two Hundred Chests of Tea**, 9 Wheat. 430. § 254.
- Twycross v. Grant**, 2 C. P. D. 530. § 207.
- Twyne's Case**, 3 Co. 82b. § 444.
- Tylee v. Yates**, 3 Barb. 222. § 336.
- Tyler v. People**, 8 Mich. 320. § 331.
- v. Trabue**, 8 B. Mon. 306. § 190.
- Tynan v. Walker**, 35 Cal. 634. §§ 236, 415, 425.
- Tyng v. Commercial Warehouse Co.** 58 N. Y. 308. § 381.
- Tyson v. State**, 28 Md. 587. § 122.
- v. Thomas, McC. & Y.** 127. §§ 137, 337.
- Uhler v. Semple**, 29 N. J. Eq. 288. § 190.
- Uncas National Bank v. Rith**, 23 Wis. 339. § 204.
- Underwood v. Irving**, 3 Cow. 59. § 207.
- v. McDuffee**, 15 Mich. 361. § 132.
- Union v. Rader**, 39 N. J. L. 509. §§ 86, 88, 93.
- Union Bank v. Jacobs**, 6 Humph. 315. § 385.
- v. Laird**, 2 Wheat. 390. § 459.
- Union Canal Co. v. Young**, 1 Whart. 410. § 423.
- Union Horse Shoe Works v. Lewis**, 1 Abb. (U. S.) 518. § 185.
- Union Ins. Co. v. Hoge**, 21 How. 35. §§ 229, 309.
- v. United States**, 6 Wall. 759. § 252.
- Union Iron Co. v. Pierce**, 4 Biss. 327. §§ 166, 206.
- Union Pac. R. R. Co. v. Dunden**, 34 Am. & Eng. R. R. Cas. 88. § 371.
- v. United States**, 10 Ct. of Cl. 559; 91 U. S. 72. § 199.
- Union Passenger R'y Co.'s Appeal**, 81* Pa. St. 91. §§ 80, 90.
- United Hebrew B. Asso. v. Benshimol**, 130 Mass. 325. §§ 133, 134, 167, 480.
- United States v. Arredondo**, 6 Pet. 738. § 378.
- v. Athens Armory**, 35 Ga. 344. §§ 349, 356.
- v. Babbitt**, 1 Black, 55. §§ 223, 267, 334.
- v. Bank**, 6 Pet. 29. § 309.
- v. Barr**, 4 Sawy. 254. §§ 154, 167.
- v. Barrels of High Wines**, 7 Blatch. 459. § 361.
- v. Barrels of Spirits**, 2 Abb. (U. S.) 305. § 361.
- v. Bassett**, 2 Story, 389. §§ 215, 241, 246, 347.
- v. Beaty**, Hempst. 487. § 354.
- v. Boisdore**, 8 How. 113. § 165.

- United States v. Bowen**, 100 U. S. 508. §§ 156, 161.
- v. Breed**, 1 Sumn. 159. §§ 254, 846, 861.
- v. Burchard**, 125 U. S. 176. § 442.
- v. Case of Pencils**, 1 Paine, 406. §§ 142, 143.
- v. Cases of Cloths**, Crabbe, 356. § 361.
- v. Central Pac. R. R. Co.** 118 U. S. 235. § 171.
- v. Cheeseman**, 3 Sawy. 424. § 154.
- v. Clafin**, 97 U. S. 546. §§ 137, 138, 154, 155.
- v. Dickey**, Morris (Ia.), 412. § 325.
- v. Dickson**, 15 Pet. 141. § 223.
- v. Distilled Spirits**, 10 Blatchf. 428. § 361.
- v. Ferreira**, 13 How. 40. § 10.
- v. Fifty-six Barrels of Whisky**, 1 Abb. (U. S.) 93. § 353.
- v. Finlay**, 1 Abb. (U. S.) 364. § 166.
- v. Fisher**, 2 Cr. 358. §§ 197, 210.
- v. Four Thousand Am. Gold Coin**, 1 Woolw. 217. § 298.
- v. Fox**, 94 U. S. 315. § 187.
- v. Freeman**, 3 How. 565. §§ 283, 414.
- v. Garrelson**, 42 Fed. Rep. 22. § 353.
- v. Gear**, 3 How. 120. §§ 136, 138.
- v. Gilmore**, 8 Wall. 330. §§ 206, 222, 229, 255, 309, 402.
- v. Green**, 4 Mason, 427. § 333.
- v. Hall**, 2 Wash. 366. § 466.
- v. Harris**, 106 U. S. 629. § 173.
- v. Harris**, 1 Sumn. 21. § 283.
- v. Hartwell**, 6 Wall. 395. §§ 234, 237, 350, 473.
- v. Hawkins**, 4 Martin (N. S.), 317. §§ 215, 240.
- v. Helen**, 6 Cranch, 203. § 225.
- v. Hewes**, Crabbe, 307. §§ 333, 335.
- v. Hirsch**, 100 U. S. 33. § 156.
- v. Hoar**, 2 Mason, 311. § 333.
- v. Hodson**, 10 Wall. 395. § 361.
- v. Huggett**, 40 Fed. Rep. 636. § 349.
- United States v. Hunter**, Pet. C. C. 16. § 322.
- v. Isham**, 17 Wall. 496. § 232.
- v. Jarvis**, Davies, 274. §§ 218, 240.
- v. Johns**, 4 Dall. 412. § 190.
- v. Johnson**, 2 Sawyer, 482. § 298.
- v. Jones**, 3 Wash. 209. § 247.
- v. King**, 7 How. 883. § 181.
- v. Kirby**, 7 Wall. 486. §§ 218, 332.
- v. Klein**, 13 Wall. 128. § 10.
- v. Kohnstamm**, 5 Blatchf. 222. § 225.
- v. Lacher**, 134 U. S. 624. § 156.
- v. Langston**, 118 U. S. 389. § 150.
- v. Lytle**, 5 McLean, 9. § 309.
- v. McKenzie**, 2 Brock. 393. § 219.
- v. Megill**, 1 Wash. 463. §§ 247, 253, 291.
- v. Mann**, 1 Gall. 177. § 11.
- v. Martin**, 94 U. S. 400. § 336.
- v. Mayor**, etc. 2 Am. L. Reg. (N. S.) 394. § 365.
- v. Moore**, 95 U. S. 760. § 309.
- v. Morrison**, 4 Pet. 124. §§ 186, 191.
- v. Morse**, 3 Story, 87. §§ 371, 419.
- v. Moulton**, 5 Mason, 537. § 349.
- v. New Bedford Bridge**, 1 Woodh. & M. 401. §§ 208, 342.
- v. Olney**, 1 Abb. (U. S.) 275. § 361.
- v. One Hundred Barrels of Spirits**, 2 Abb. (U. S.) 305. §§ 138, 253.
- v. One Hundred and Twelve Casks of Sugar**, 8 Pet. 277. § 254.
- v. One Hundred and Twenty-nine Packages**, 2 Am. L. Reg. (N. S.) 419. § 361.
- v. Palmer**, 3 Wheat. 610. § 210.
- v. Passmore**, 4 Dall. 372. § 11.
- v. Paul**, 6 Pet. 141. §§ 257, 350.
- v. Pearce**, 2 McLean, 14. § 355.
- v. Percheman**, 7 Pet. 51. § 19.
- v. Philadelphia**, 11 How. 609. § 181.

- United States v. Powers' Heirs**, 11 How. 577. § 19.
- v. Ragsdale**, Hempst. 497. §§ 208, 236, 238, 349.
- v. R. R. Co.** 1 Abb. (U. S.) 196. § 232.
- v. Ramsay**, Hempst. 481. § 208.
- v. Rathbone**, 2 Paine, 578. § 197.
- v. Reese**, 92 U. S. 214. § 173.
- v. Reissinger**, 128 U. S. 398. § 167.
- v. Rhodes**, 1 Abb. (U. S.) 36. § 234.
- v. Rossvally**, 3 Ben. 157. § 260.
- v. Samperyac**, 1 Hempst. 118. § 10.
- v. Sarchet**, Gilpin, 273. § 254.
- v. Saunders**, 22 Wall. 492. § 240.
- v. Schooner Peggy**, 1 Cranch, 103. § 197.
- v. Sheldon**, 2 Wheat. 119. §§ 350, 351.
- v. Ship Recorder**, 1 Blatch. 218. §§ 307, 312.
- v. Six Fermenting Tubs**, 1 Abb. (U. S.) 364. § 166.
- v. Sixty-seven Packages**, 17 How. 85. § 138.
- v. Star**, Hempst. 469. §§ 206, 208.
- v. Stern**, 5 Blatch. 512. § 260.
- v. Ten Cases of Shawls**, 2 Paine, 162. §§ 252, 351.
- v. Ten Thousand Cigars**, 1 Woolw. 123. § 141.
- v. The Peggy**, 1 Cr. 103. § 164.
- v. The Sadie**, 41 Fed. Rep. 306. § 321.
- v. Three Tons of Coal**, 6 Biss. 379. § 361.
- v. Tingey**, 5 Pet. 115. § 453.
- v. Turner**, 11 How. 663. §§ 181, 189, 293, 295.
- v. Twenty-five Cases of Cloth**, Crabbe, 356. § 138.
- v. Tynen**, 11 Wall. 88. §§ 142, 143, 154, 155, 165.
- v. Union Pacific R. R. Co.** 91 U. S. 72. § 300.
- United States v. Walker**, 22 How. 299. § 138.
- v. Warner**, 4 McLean, 463. § 238.
- v. Watts**, 1 Bond, 580. § 363.
- v. Webster**, Davies, 38. §§ 212, 300.
- v. Wigglesworth**, 2 Story, 369. §§ 361, 362, 363.
- v. Wilder**, 13 Wall. 254. § 368.
- v. Willetts**, 5 Ben. 220. § 361.
- v. Wilson**, Baldw. 78. § 255.
- v. Wiltberger**, 5 Wheat. 76. §§ 208, 234, 349.
- v. Winn**, 3 Sumn. 209. §§ 343, 350, 357.
- v. Wyngall**, 5 Hill, 16. §§ 202, 341, 399. § 458.
- United States Bank v. Longworth**, 1 McLean, 35. § 10.
- United States Express Co. v. Ellyson**, 28 Iowa, 370. § 125.
- United States Tr. Co. v. Brady**, 20 Barb. 119. § 117.
- Unity v. Burrage**, 103 U. S. 447. §§ 93, 96, 103, 170, 193, 198.
- University of North Carolina v. Fay**, 1 Murph. 58. § 472.
- Upson**, In re, 89 N. Y. 67. § 93.
- Usener v. State**, 8 Tex. App. 177. § 46.
- Utica Water-Works Co. v. Utica**, 81 Hun, 426. § 95.
- Utsey v. Hiott**, 30 S. C. 360. § 122.
- Uwchlan Township Road**, 30 Pa. St. 156. §§ 165, 206, 464.
- Vail v. Dinning**, 44 Mo. 210. § 397.
- v. Easton**, etc. R. R. Co. 44 N. J. L. 237. § 157.
- v. McKernan**, 21 Ind. 421. § 342.
- Vanada v. Hopkins**, 1 J. J. Marsh. 285. § 306.
- Van Antwerp**, In re, 1 T. & C. 423; 56 N. Y. 261. § 483.
- Van Antwerp**, In re, 1 T. & C. 423. § 99.
- Van Antwerp**, Matter of, 56 N. Y. 261. § 170.
- Vanatta v. Anderson**, 3 Bin. 417. § 342.

- Van Buren v. Wylie**, 56 Mich. 501. § 350.
- Vance v. Grainger**, N. C. Conf. 71. § 426.
- v. Gray**, 9 Bush, 656. § 260.
- Van Denburgh v. President, etc.** 66 N. Y. 1. § 168.
- Vanderberg**, In re, 28 Kan. 243. § 48.
- Vanderbilt v. Adams**, 7 Cow. 349. § 473.
- Vanderburgh v. Rensselaer**, 6 Paige, 147. §§ 111, 113.
- Vanderkar v. Railroad Co.** 13 Barb. 390. § 11.
- Vander Donckt v. Thelluson**, 8 C. B. 812. § 190.
- Vanderstolph v. Boylan**, 50 Mich. 330. § 339.
- Vanderwerker v. People**, 5 Wend. 530. § 298.
- Van Deusen v. Hayward**, 17 Wend. 67. § 453.
- Vandike v. Roskam**, 67 Pa. St. 330. § 364.
- Vane v. Vane**, L. R. 8 Ch. 383. § 428.
- Van Fleet v. Van Fleet**, 49 Mich. 610. §§ 206, 215, 324.
- Van Giesen v. Bloomfield**, 47 N. J. L. 442. § 128.
- Van Hagan**, Ex parte, 25 Ohio St. 426. §§ 138, 151.
- Vanhorne v. Dorrance**, 2 Dall. 304. §§ 363, 390.
- Vandall v. South T. F. Dock Co.** 40 Cal. 83. § 381.
- Vairin v. Edmonson**, 5 Gilm. 270. §§ 113, 114.
- Vallance v. Falle**, L. R. 13 Q. B. Div. 109. § 204.
- Valton v. National Loan, etc. Co.** 19 How. Pr. 515. § 369.
- Van Hook v. Whitlock**, 2 Edw. 304. §§ 340, 434.
- Van Horne v. Petrie**, 2 Cai. 213. § 371.
- Van Horenburgh v. Case**, 4 Hill, 541. § 371.
- Van Inwagen v. Chicago**, 61 Ill. 31. § 163.
- Van Loon v. Lyon**, 4 Daly, 149. §§ 314, 317.
- Vanneman v. Young** (N. J.), 20 Atl. Rep. 53. § 456.
- Van Ness v. Pacard**, 2 Pet. 137. § 184.
- Van Norman v. Jackson Circuit Judge**, 45 Mich. 204. §§ 10, 393, 402.
- Van Rensselaer v. Ball**, 19 N. Y. 100. § 206.
- v. Kearney**, 11 How. 297. § 187.
- v. Livingston**, 12 Wend. 490. § 206.
- v. Sheriff**, 1 Cow. 443. §§ 208, 322.
- v. Snyder**, 13 N. Y. 299. § 206.
- v. Snyder**, 9 Barb. 302. § 138.
- v. Snyder**, 9 Barb. 302; 13 N. Y. 299. § 478.
- Van Riper v. Essex P. R. B'd**, 38 N. J. L. 23. §§ 283, 288.
- v. Parsons**, 40 N. J. L. 123. § 127.
- Van Sicklen v. Burlington**, 27 Vt. 70. § 345.
- Van Swartow v. Commonwealth**, 24 Pa. St. 131. § 193.
- Van Slyke v. Trempealeau, etc. Ins. Co.** 39 Wis. 390. § 395.
- Van Valenburgh v. Torrey**, 7 Cow. 252. §§ 168, 208, 398.
- Van Winkle v. Constantine**, 10 N. Y. 314. §§ 422, 483.
- Van Wyck v. Hills**, 4 Rob. 140. § 184.
- Vanzant v. Waddel**, 2 Yerg. 260. §§ 5, 119, 124.
- Vardeman v. Lawson**, 17 Tex. 10. § 184.
- Vaughan v. Swayzie**, 56 Miss. 704. § 483.
- Vauxhall Bridge Co. v. Earl Spencer**, 2 Mad. 356. § 194.
- Vavasour v. Ormrod**, 6 B. & C. 430. § 222.
- Vawter v. Pac. R'y Co.** 84 Mo. 679. § 14.
- Veats v. Danbury**, 37 Conn. 412. § 165.

- Veazie v. China**, 50 Me. 518. § 454.
Venour v. Sellon, L. R. 2 Ch. Div. 523. § 233.
Ventress v. Smith, 10 Pet. 161. § 344.
Vicar, etc. of St. Sepulchre's, Ex parte, 33 L. J. Ch. 373. § 238.
Vicksburg, etc. R'y Co. v. Dennis, 116 U. S. 665. § 364.
v. State, 62 Miss. 105. § 363.
Victory v. Fitzpatrick, 8 Ind. 281. §§ 204, 325.
Vidal v. Girard's Heirs, 2 How. 128. § 15.
Vielie v. Towers, Colman & Cai. 90. § 371.
Vietor v. Arthur, 104 U. S. 498. §§ 156, 161.
Vigo's Case, 21 Wall. 648. §§ 207, 416, 440.
Vincent, Ex parte, 26 Ala. 145. §§ 247, 291.
Vincent v. Nantucket, 12 Cush. 103. § 380.
Vining v. Bricker, 14 Ohio St. 331. § 336.
Vinsant v. Knox, 27 Ark. 266. §§ 41, 46.
Vinton v. Builders', etc. Asso. 109 Ind. 351. § 245.
Virden v. Allen, 107 Ill. 505. § 96.
Virginia City, etc. R. R. Co. v. Lyon County, 6 Nev. 68. § 236.
Virginia Coupon Cases, 114 U. S. 305. §§ 173, 174.
Viterbo v. Friedlander, 120 U. S. 707. § 239.
Viti v. Dixon, 12 Mo. 479. § 114.
Volans v. Owen, 74 N. Y. 526. § 375.
Volmer v. State, 34 Ark. 487. § 167.
Von Baumbach v. Bade, 9 Wis. 559. § 475.
Von Hoffman v. Quincy, 4 Wall. 535. §§ 206, 471, 476, 477, 478.
Voorhees v. Martin, 12 Barb. 508. § 341.
Vorhees v. Bank of United States, 10 Pet. 449. § 222.
Wabash, etc. Co. v. Beers, 2 Black, 448. § 472.
Wade v. St. Mary's School, 43 Md. 178. §§ 164, 165.
Wadsworth Board of Works v. United Telephone Co., L. R. 13 Q. B. Div. 904. § 390.
Wagar v. Briscoe, 38 Mich. 587. § 398.
Wagner v. Stoll, 2 Rich. (N. S.) 539. § 151.
Wainwright, In re, 1 Phil. 258. §§ 218, 219, 246, 324.
Wait v. Van Allen, 22 N. Y. 319. § 207.
Wakefield v. Phelps, 37 N. H. 295. §§ 287, 288.
v. Smart, 8 Ark. 488. § 424.
Wakeley v. Mohr, 15 Wis. 609. § 170.
Wakker, In re, 3 Barb. 162. §§ 82, 100.
Wakker, Re, 1 Edm. Sel. Cas. 575. § 198.
Waldby v. Callendar, 8 Mich. 430. § 397.
Waldo v. Bell, 13 La. Ann. 329. §§ 202, 314, 399.
Wales v. Belcher, 3 Pick. 508. §§ 75, 193, 469.
v. Muscatine, 4 Iowa, 302. § 428.
v. Stetson, 2 Mass. 146. §§ 322, 473.
Walker v. Board of Public Works, 16 Ohio, 540. § 370.
v. Burt, 37 Ga. 20. § 392.
v. Caldwell, 4 La. Ann. 298. §§ 78, 131, 132.
v. Chapman, 22 Ala. 116. § 448.
v. Chicago, 56 Ill. 277. §§ 366, 398, 441.
v. Ducros, 18 La. Ann. 703. § 342.
v. Forbes, 31 Ala. 9. §§ 190, 191.
v. Griffith, 60 Ala. 361. §§ 46, 47.
v. Sheftall, 73 Ga. 806. § 371.
v. State, 7 Tex. App. 245. §§ 133, 134, 143.
v. State, 49 Ala. 329. § 170.
v. Whitehead, 16 Wall. 814. §§ 206, 471, 476.

- Walkins v. Eureka Springs**, 49 Ark. 181. § 135.
Wall, Ex parte, 48 Cal. 279. §§ 67, 75, 183.
Wall v. Garrison, 11 Colo. 515. § 132.
 v. State, 18 Tex. 682. § 166.
 v. State, 23 Ind. 153. §§ 186, 142.
Wallace v. Burden, 17 Tex. 467. § 184.
 v. Finch, 24 Mich. 255. § 355.
 v. Holmes, 9 Blatchf. 65. § 204.
 v. San Jose, 29 Cal. 180. § 380.
 v. Seales, 36 Miss. 53. § 284.
 v. Stevens, 74 Tex. 559. § 328.
 v. Taliaferro, 2 Call (Va.), 389. §§ 255, 201, 463.
Waller v. Harris, 20 Wend. 562. §§ 196, 207, 235.
Wallwyn v. Lee, 9 Ves. 25. § 194.
Wally v. Kennedy, 2 Yerg. 554. §§ 119, 124.
Walpole v. Elliott, 18 Ind. 258. § 483.
Walsh v. Boyle, 30 Md. 262. §§ 111, 112, 113.
 v. Dousman, 28 Wis. 541. §§ 118, 130.
 v. Trustees, etc. 96 N. Y. 427. § 383.
Walsingham's Case, 2 Plowd. 565. § 228.
Walston v. Commonwealth, 16 B. Mon. 15. §§ 206, 469, 482.
Walter v. People, 32 N. Y. 147. § 469.
Walton, Ex parte, L. R. 17 Ch. Div. 746. §§ 238, 241, 246, 323, 414.
Walton v. Dickerson, 4 Rich. L. 568. § 480.
 v. State, 62 Ala. 197. §§ 289, 349, 350.
Walwin v. Smith, 1 Salk. 177. § 353.
Wanet v. Corbet, 13 Ga. 441. § 307.
Wanestead Board v. Hill, 13 C. B. (N. S.) 479. § 275.
Warburton v. Loveland, 2 Dow. & Cl. 489. § 236.
 v. Loveland, 1 Hudson & Brooke, 648. § 258.
Ward v. Flood, 48 Cal. 36. § 119.
 v. Hartford, 12 Conn. 404. § 428.
 v. Henry, 19 Wis. 76. § 306.
Ward v. Thompson, 48 Iowa, 588. § 377.
 v. Walters, 63 Wis. 44. § 114.
Warder v. Arell, 2 Wash. (Va.) 282. § 463.
Wardle v. Townsend, 75 Mich. 305. § 90.
Ware v. Owens, 42 Ala. 212. § 206.
 v. St. Louis, etc. Co. 47 Ala. 667. § 135.
Warehouse Co. v. Lewis, 56 Ala. 514. § 246.
Warfield, Matter of Will of, 23 Cal. 71. §§ 311, 314.
Warfield v. Fox, 53 Pa. St. 382. §§ 367, 426.
 v. Ravasies, 38 Ala. 518. § 400.
Waring v. Jackson, 1 Pet. 570. § 187.
Warne v. Beresford, 2 M. & W. 848. § 165.
 v. Varley, 6 T. R. 443. § 348.
Warner v. Beers, 23 Wend. 125. § 36.
 v. Commonwealth, 2 Va. Cas. 95. § 190.
 v. Commonwealth, 1 Pa. St. 154. § 208.
 v. Fowler, 8 Md. 25. §§ 290, 450.
Warnick v. Grosholz, 3 Grant's Cases, 234. § 192.
Warren v. Commonwealth, 37 Pa. St. 45. § 469.
 v. Englehart, 13 Neb. 283. § 371.
 v. Jones, 9 S. C. 288. § 480.
 v. Lusk, 16 Mo. 102. § 184.
 v. Mayor, 2 Gray, 84. §§ 176, 180.
 v. Shuman, 5 Tex. 441. § 217.
 v. Windle, 3 East, 205. § 168.
Warren R. R. Co. v. Belvidere, 35 N. J. L. 584. § 137.
Warrick v. Rounds, 17 Neb. 411. § 375.
Warrington v. Furbor, 8 East, 242. §§ 208, 362.
Washer v. Elliott, L. R. 1 C. P. Div. 174. § 268.
Washington v. Page, 4 Cal. 388. § 80.
 v. Washington, 69 Ala. 281. § 483.
Wassel v. Armstrong, 35 Ark. 247. § 224.

- Wassel v. Tunnah**, 25 Ark. 101. §§ 218, 240, 324.
Water Commissioners v. Brewster, 42 N. J. L. 125. § 234.
Water Commissioners of Amsterdam, 96 N. Y. 351. § 387.
Waterford v. Hensley, Mart. & Yerg. (Tenn.) 275. § 260.
Waterhouse v. Keen, 4 B. & C. 200. 252.
Waters v. Campbell, 4 Sawyer, 121. § 267.
Watertown v. Mayo, 109 Mass. 315. § 370.
Watervliet T. Co. v. McKean, 6 Hill, 616. §§ 260, 347.
Water Works Co. v. Burkhart, 44 Ind. 364. § 154.
Wathen v. Beaumont, 11 East, 271. § 115.
Watkins v. Holman, 16 Pet. 60. § 8.
 v. Major, L. R. 10 C. P. 662. § 355.
 v. Wassell, 20 Ark. 410. §§ 204, 325.
Watrous v. Blair, 32 Iowa, 58. § 336.
Watson v. Blaylock, 2 Mills (S. C.), 351. § 137.
 v. Hoge, 7 Yerg. 344. §§ 229, 234, 236.
 v. Kent, 78 Ala. 602. § 138.
 v. Martin, 34 L. J. M. C. 50. § 351.
 v. Mercer, 8 Pet. 88. §§ 465, 483.
 v. Oates, 58 Ala. 647. § 194.
 v. State, 55 Ala. 158. § 303.
 v. Stone, 40 Ala. 451. § 20.
 v. Tarpley, 18 How. 517. § 429.
Waugh v. Middleton, 8 Ex. 852. §§ 258, 260, 463, 481.
 v. Riley, 68 Ind. 482. § 168.
Waxahachie v. Brown, 67 Tex. 519. § 380.
Wayman v. Southard, 10 Wheat. 1. §§ 3, 67, 68, 222, 229.
Weakley v. Pearce, 5 Heisk. 401. § 168.
Wear River Commissioners v. Adamson, L. R. 1 Q. B. Div. 549. § 238.
Weatherford v. Weatherford, 8 Port. 171. § 104.
Weaver v. Lapsley, 43 Ala. 224. § 80.
 v. McElhenon, 18 Mo. 89. § 306.
Webb, Re, 24 How. Pr. 247. § 223.
Webb v. Anspach, 8 Ohio St. 522. § 398.
 v. Baird, 6 Ind. 13. § 366.
 v. Bird, 10 C. B. (N. S.) 268; 18 id. 841. § 265.
 v. Fairmaner, 3 M. & W. 473. §§ 111, 112.
 v. Knight, 2 Q. B. Div. 530. § 254.
 v. Mullen, 78 Ala. 111. § 400.
Webber v. Howe, 36 Mich. 150. § 164.
Weber v. Weber, 47 Mich. 569. § 400.
Webster v. County Commissioners, 63 Me. 27. § 167.
 v. French, 12 Ill. 302. §§ 112, 458.
 v. Little Rock, 44 Ark. 536. §§ 41, 43.
 v. Morris, 66 Wis. 366. §§ 15, 184.
 v. People, 98 Ill. 343. § 385.
 v. Rose, 6 Heisk. 93. § 473.
Weckler v. First Nat. Bank, 42 Md. 581. § 381.
Weed v. Lyon, Walk. Ch. 77. § 456.
 v. Tucker, 19 N. Y. 422. § 443.
Weeks v. Hull, 19 Conn. 376. § 111.
 v. Weeks, 5 Ired. Eq. 111. § 106.
Weil, In re, 83 N. Y. 543. § 457.
Weil v. State, 46 Ohio St. 450. § 95.
Weill v. Kenfield, 54 Cal. 111. §§ 41, 43, 45, 250, 346.
Weinman v. Wilkinsburg, etc. R'y Co. 118 Pa. St. 192. § 129.
Weir v. Cram, 37 Iowa, 649. § 72.
Weister v. Hade, 52 Pa. St. 474. §§ 242, 420.
Welch v. Battern, 47 Iowa, 147. § 109.
 v. Hannibal, etc. R'y Co. 26 Mo. App. 358. § 110.
 v. Kline, 57 Pa. St. 423. § 324.
 v. Stowell, 2 Doug. (Mich.) 332. § 370.
 v. Sullivan, 8 Cal. 188. § 316.
 v. Wadsworth, 30 Conn. 149. §§ 166, 474.

- Welker v. Potter, 18 Ohio St. 85.
§§ 127, 457.
- Weller v. Weyand, 2 Grant's Cas. 103.
§ 392.
- Wells, Ex parte, 21 Fla. 280. § 170.
- Wells v. Bright, 4 Dev. & Batt. L.
173. § 110.
- v. Child, 12 Allen, 333. §§ 368,
426.
- v. County Commissioners, 79 Me.
522. § 388.
- v. Supervisors, 102 U. S. 625.
§ 140.
- Welman, Matter of, 20 Vt. 653. § 110.
- Wendel v. State, 62 Wis. 300. § 385.
- Wendell v. Durbin, 26 Wis. 390.
§ 454.
- Werborn v. Austin, 77 Ala. 381.
§ 154.
- Werner v. Edmiston, 24 Kan. 147.
§ 377.
- West v. Blake, 4 Blackf. 234. §§ 193,
198.
- v. Creditors, 1 La. Ann. 365.
§ 104.
- v. Downman, L. R. 14 Ch. Div.
111. § 204.
- v. Francis, 5 B. & Ald. 737. § 256.
- v. Pickesimer, 7 Ohio, 235. § 424.
- v. Sansom, 44 Ga. 295. § 478.
- West Boston Bridge v. County Com-
missioners, 10 Pick. 270. § 388.
- Westbrook v. Miller, 56 Mich. 148.
§ 309.
- v. Rosborough, 14 Cal. 180. § 451.
- v. Willey, 47 N. Y. 457. § 457.
- West End, etc. R. R. Co. v. Atlanta
St. R. R. Co. 49 Ga. 151. § 140.
- Western Union R. R. v. Fulton, 64
Ill. 271. § 206.
- Western Union Tel. Co. v. State, 62
Tex. 630. §§ 170, 180.
- Westervelt v. Gregg, 12 N. Y. 202.
§ 480.
- v. People, 20 Wend. 416. § 405.
- West F. R. R. Co. v. Johnson, 5 How.
(Miss.) 273. § 107.
- West Ham Overseers v. Iles, L. R. 8
App. Cas. 386. § 213.
- Westinghausen v. People, 44 Mich.
265. § 405.
- W. Phila. R. R. Co. v. Union R. R. Co.
9 Phila. 495. §§ 86, 90, 102.
- Weston v. Charleston, 2 Pet. 464.
§ 254.
- v. Supervisors, 44 Wis. 242. § 364.
- West River Br. Co. v. Dix, 16 Vt. 446;
6 How. 507. § 473.
- Wetumpka v. Winter, 29 Ala. 651.
§ 247.
- Weyand v. Stover, 35 Kan. 545.
§§ 48, 98.
- Westerfield, Ex parte, 55 Cal. 550.
§§ 123, 129.
- Wetherbee v. Dunn, 32 Cal. 106. § 299.
- Wetmore v. State, 55 Ala. 198. §§ 309,
310.
- v. Tracy, 14 Wend. 250. § 202.
- Wharton v. State, 5 Cold. 1. § 166.
- Wheatley v. Lane, 1 Saund. 210. § 413.
- Wheaton v. Peters, 8 Pet. 591. § 458.
- Wheeler v. Chicago, 24 Ill. 105. § 448.
- v. Chubbuck, 16 Ill. 361. § 107.
- v. McCormick, 8 Blatch. 267.
§§ 218, 246, 428, 429.
- v. Mills, 40 Barb. 614. § 456.
- v. Philadelphia, 77 Pa. St. 338.
§§ 121, 128, 193, 198.
- v. Roberts, 7 Cow. 536. § 168.
- v. Winn, 53 Pa. St. 122. § 437.
- Whidden v. Drake, 5 N. H. 13. § 428.
- v. Seelye, 40 Me. 247. § 184.
- Whiple v. Mills, 9 Cal. 611. § 454.
- Whipple v. Judge, 26 Mich. 343.
§§ 240, 383.
- v. Williams, 4 How. Pr. 208. § 115.
- Whistler v. Forster, 14 C. B. (N. S.)
248. § 324.
- Whitborn v. Evans, 2 East, 135. § 107.
- Whitcomb v. Rood, 104 Pa. St. 228.
§ 284.
- v. Rood, 20 Vt. 52. § 333.
- White v. Boot, 2 T. R. 274. § 137.
- v. Crutcher, 1 Bush, 472. § 112.
- v. German Ins. Co. 15 Neb. 660.
§ 113.
- v. Hart, 13 Wall. 646. §§ 206,
476.

- White v. Haworth**, 21 Mo. App. 439. §§ 111, 114.
v. Ivey, 34 Ga. 186. § 275.
v. Johnson, 23 Miss. 68. §§ 139, 202, 283, 287.
v. Lincoln, City of, 5 Neb. 505. § 78.
v. Nashville, etc. R. R. Co. 7 Heisk. 515. § 138.
v. Railroad Co. 7 Heisk. 518. § 228.
v. Steam Tug, 6 Cal. 462. § 360.
v. White, 2 Met. (Ky.) 185. § 225.
White Co. v. Key, 30 Ark. 603. § 441.
Whited v. Lewis, 25 La. Ann. 568. §§ 31, 33, 103, 170.
Whitehead v. Commonwealth, 19 Gratt. 640. § 455.
v. Wells, 29 Ark. 99. § 104.
Whiteley v. Chappell, L. R. 4 Q. B. 147. § 431.
Whitesides v. Poole, 9 Rich. 68. § 297.
White W. Valley Canal Co. v. Vallette, 21 How. 414. § 385.
Whitford v. Panama R. R. Co. 23 N. Y. 465. § 297.
Whiting v. Mt. Pleasant, 11 Iowa, 482. §§ 87, 88, 101.
Whitlock v. Castro, 22 Tex. 108. § 306.
Whitman v. Hapgood, 10 Mass. 437. § 206.
Whitney v. Brunette, 15 Wis. 61. § 393.
v. Gauche, 11 La. Ann. 432. § 301.
v. Thomas, 23 N. Y. 281. § 456.
v. Whitney, 14 Mass. 298. §§ 240, 436.
Whittaker v. Canal Co. 87 Pa. St. 34. § 378.
Whyte v. Mayor, etc. 2 Swan, 364. § 384.
Wieman v. Anderson, 42 Pa. St. 311. § 338.
Wiener v. Davis, 18 Pa. St. 331. §§ 246, 370.
Wight v. Warner, 1 Doug. (Mich.) 384. §§ 327, 391.
Wiggin v. Peters, 1 Met. 127. § 111.
Wiggins F. Co. v. Chicago & A. R. Co. 5 Mo. App. 347. §§ 295, 306.
Wilber v. Paine, 1 Ohio, 117. §§ 207, 410, 427.
Wilbur v. Crane, 13 Pick. 284. §§ 139, 290.
Wilcox v. Hemming, 58 Wis. 144. § 170.
v. Jackson, 109 Ill. 261. § 306.
v. State, 3 Heisk. 110. § 138.
Wilder v. Lumpkin, 4 Ga. 208. § 206.
v. Maine Cent. R. 65 Me. 332. § 206.
v. Railway Co. 70 Mich. 382. § 119.
Wilderman v. Baltimore, 8 Md. 551. § 164.
Wiles v. Peck, 26 N. Y. 47. § 338.
Wiley v. Yale, 1 Met. 553. § 325.
Wilford v. State, 43 Ark. 62. § 452.
Wilkinson v. Adam, 1 Ves. & B. 466. § 336.
v. Colley, 5 Burr. 2698. § 435.
v. Leland, 2 Pet. 657. §§ 194, 206, 215, 240, 241, 245.
Willard v. Conduit, 10 Tex. 213. § 192.
v. Fralick, 31 Mich. 431. §§ 207, 392, 393.
v. Newburyport, 12 Pick. 227. § 380.
Willcox v. Huggins, Fitzg. 172; 3 Str. 907. § 424.
Willets v. Jeffries, 5 Kan. 473. §§ 226, 464.
William Gray, Brig. The, 1 Paine, 16. § 355.
Williams v. Beard, 1 Rich. (N. S.) 309. § 286.
v. Bidleman, 7 Nev. 68. § 129.
v. Bruffy, 96 U. S. 176. § 20.
v. Cammack, 27 Miss. 209. § 75.
v. Cheney, 3 Gray, 215. § 336.
v. Commissioners, 35 Me. 345. § 11.
v. Ellis, L. R. 5 Q. B. Div. 176. §§ 241, 280.
v. Evans, L. R. 1 Ex. Div. 277. § 259.

- Williams v. Golding**, L. R. 1 C. P. 69. § 276.
v. Johnson, Adm'x, 30 Md. 500. § 206.
v. McDonal, 3 Pin. 331. §§ 219, 242, 246, 423.
v. Middlesex, 4 Met. 76. §§ 163, 165.
v. Newton, 14 M. & W. 757. § 310.
v. People, 24 N. Y. 405. §§ 103, 120, 123.
v. People, 17 Ill. App. 274. § 215.
v. Peyton, 4 Wheat. 74. § 390.
v. Potter, 2 Barb. 316. §§ 138, 139.
v. Pritchard, 4 T. R. 2. §§ 157, 158, 230.
v. Regina, 7 Q. B. 250. § 142.
v. Sangar, 10 East, 66. § 362.
v. Smith, 4 H. & N. 559. §§ 206, 482.
v. State, 67 Ga. 260. §§ 297, 300.
v. State, 64 Ind. 553. § 298.
v. State, 6 Lea, 549. §§ 41, 43, 46.
v. State, 6 Blackf. 36. § 363.
v. Swansea C. Nav. Co., L. R. 3 Ex. 158. §§ 139, 213.
v. Tripp, 11 R. I. 447. § 364.
v. Wade, 1 Met. 82. § 184.
v. Weaver, 94 N. C. 134. § 476.
v. Williams, 5 Ohio, 444. § 426.
v. Williams, 8 N. Y. 541. § 184.
Williamson v. Farrow, 1 Bailey, 611. §§ 112, 253.
v. Field, 2 Sandf. Ch. 533. § 206.
v. Keokuk, 44 Iowa, 83. §§ 101, 103.
v. New Jersey, 130 U. S. 189. § 365.
v. Suydam, 6 Wall. 723. § 194.
Williamsport v. Commonwealth, 84 Pa. St. 487. § 345.
Willing v. Bozman, 52 Md. 44. § 159.
Willingham v. Smith, 48 Ga. 580. § 223.
Willion v. Berkley, 1 Plowd. 236. § 333.
Willison v. Watkins, 3 Pet. 43. § 368.
Willmarth v. Crawford, 10 Wend. 342. § 385.
Willis v. Jelineck, 27 Minn. 18. § 480.
v. Owen, 48 Tex. 48. §§ 67, 317.
v. R. R. Co. 82 Barb. 398. §§ 364, 372.
v. R. R. Co. 61 Tex. 432. § 14.
v. Thorp, L. R. 10 Q. B. 383. § 275.
Wills v. Auch, 8 La. Ann. 19. § 390.
v. Russell, 100 U. S. 621. §§ 255, 261.
Wilson v. Arnold, 5 Mich. 98. §§ 207, 393, 401.
v. Biscoe, 11 Ark. 44. §§ 215, 239.
v. Booth, 57 Mich. 249. § 375.
v. Buckman, 13 Minn. 441. § 206.
v. Carson, 12 Md. 54. §§ 190, 192.
v. Halifax, L. R. 3 Ex. 114. §§ 243, 262.
v. Herbert, 41 N. J. L. 454. § 226.
v. Knubley, 7 East, 128. §§ 196, 212.
v. Lewis, 10 R. I. 285. § 428.
v. Nightingale, 8 Q. B. 1034. §§ 219, 245.
v. Ohio, etc. R'y Co. 64 Ill. 542. 465, 466.
v. Palmer, 75 N. Y. 250. § 454.
v. Rastall, 4 T. R. 757. § 333.
v. Shorick, 21 Iowa, 332. § 202.
v. Smith, 5 Yerg. 379. §§ 190, 295.
v. Spaulding, 19 Fed. Rep. 304. §§ 210, 211.
v. State Bank, 3 La. Ann. 196. § 448.
v. Wall, 34 Ala. 238. § 480.
v. Wentworth, 25 N. H. 247. § 350.
v. West Hartlepool Co. 2 De G. J. & S. 475. § 427.
Wilton v. Chambers, 7 Ad. & E. 532. § 307.
Wimbish v. Tailbois, 1 Plowd. 38. § 413.
Winchester's Case, 3 Rep. 4. § 419.
Winchester v. Cain, 1 Rob. (La.) 421. § 420.

- Windham v. Chetwynd, 1 Burr. 419. § 307.
- Windsor v. China, 4 Greenl. 298. §§ 111, 112.
- Wing v. Benham, 76 Iowa, 17. § 376.
- Winn v. Ficklan, 54 Ga. 529. § 340.
- v. Jones, 6 Leigh, 74. §§ 156, 161.
- Winona v. Whipple, 24 Minn. 61. § 260.
- Winona, etc. R. R. Co. v. Barney, 113 U. S. 618. § 379.
- Winooski v. Gokey, 49 Vt. 282. § 198.
- Winslow v. Kimball, 25 Me. 493. §§ 234, 436.
- Winter v. Dickerson, 42 Ala. 92. § 168.
- v. Jones, 10 Ga. 190. §§ 237, 331, 332.
- v. Montgomery, 65 Ala. 403. § 331.
- Winterfield v. Stauss, 24 Wis. 394. §§ 252, 255.
- Wis. Cent. R. R. Co. v. Taylor Co. 52 Wis. 37. § 300.
- Wisconsin Telephone Co. v. Oshkosh, 62 Wis. 32. §§ 306, 383.
- Wise v. Bigger, 79 Va. 369. §§ 41, 43, 44, 45, 46.
- v. State, 34 Ga. 348. § 452.
- Wishmier v. State, 97 Ind. 160. §§ 93, 95.
- Wiswall v. Hall, 3 Paige, 313. § 379.
- Witherspoon v. Dunlap, 1 McCord, 546. § 341.
- Witkouski v. Witkouski, 16 La. Ann. 232. § 168.
- Wolcott v. Des Moines Co. 5 Wall. 681. § 379.
- v. Pond, 19 Conn. 597. §§ 207, 443.
- v. Wigton, 7 Ind. 44. § 66.
- Wohlscheid v. Bergarth, 46 Mich. 46. § 107.
- Wolf v. Lowry, 10 La. Ann. 272. § 314.
- Wolfe v. Henderson, 28 Ark. 304. §§ 164, 167.
- v. McCaull, 76 Va. 876. § 56.
- Wolff v. New Orleans, 103 U. S. 858. § 475.
- v. Oxholm, 6 M. & S. 99. § 12.
- Wolfkell v. Mason, 16 Abb. Pr. 221. § 476.
- Wolsey v. Chapman, 101 U. S. 755. § 379.
- Womack v. Womack, 17 Tex. 1. § 482.
- Womelsdorf v. Heifner, 104 Pa. St. 1. § 398.
- Wood's Case, 1 Co. 40a. § 228.
- Wood, Ex parte, 34 Kan. 645. §§ 102, 103.
- Wood, In re, L. R. 7 Ch. 306. § 256.
- Wood v. Bank, 9 Cow. 194. § 204.
- v. Chapin, 13 N. Y. 509. § 449.
- v. Commonwealth, 11 Bush, 220. § 112.
- v. Election Com'rs, 58 Cal. 561. § 157.
- v. Kennedy, 19 Ind. 68. §§ 166, 474.
- v. Mayor, etc. 34 How. Pr. 501. § 480.
- v. Oakley, 11 Paige, 400. § 464.
- v. Rowcliffe, 6 How. 191. § 210.
- v. State, 47 Ark. 488. § 154.
- v. United States, 16 Pet. 342. §§ 138, 152, 301.
- Woodard v. Brien, 14 Lea, 520. §§ 119, 124.
- Woodbury v. Berry, 18 Ohio St. 456. §§ 237, 261, 332.
- Woodman v. Fulton, 47 Miss. 682. § 479.
- Wood Mowing, etc. Co. v. Caldwell, 54 Ind. 276. §§ 300, 333.
- Woodrow v. O'Conner, 28 Vt. 776. § 184.
- Woodruff v. State, 3 Ark. 285. §§ 218, 410, 411, 412.
- Woods v. Buie, 5 How. (Miss.) 285. § 10.
- v. Jackson Co. 1 Holmes, 379. § 138.
- v. State, 36 Ark. 36. § 354.
- v. Wicks, 7 Lea, 40. § 12.
- Woodstock v. Hooker, 6 Conn. 85. § 190.

- Woodward v. Chicago, etc. R. Co.** 21 Wis. 309. § 306.
v. Donally, 27 Ala. 196. § 12.
v. Foxe, 3 Lev. 299; 2 Vent. 187. § 429.
v. London, etc. R'y Co. 3 Ex. Div. 121. § 265.
v. R'y Co. 23 Wis. 400. § 371.
- Woodworth v. Paine's Adm'r, Breese** (Ill.), 374. § 279.
v. Spaffords, 2 McLean, 175. §§ 22, 185.
v. State, 26 Ohio St. 196. §§ 219, 279.
- Wooley v. Watkins**, 22 Pac. Rep. 102. § 468.
- Woolheather v. Risley**, 38 Iowa, 486. § 377.
- Woolsey v. Cade**, 54 Ala. 378. §§ 255, 256.
- Worcester Bank v. Cheney**, 94 Ill. 430. § 298.
- Worcester, etc. R. R. Co. v. R. R. Com'rs**, 118 Mass. 561. § 388.
- Workingmen's Bank v. Converse**, 33 La. Ann. 963. § 296.
- Workingmen's Building Asso. v. Coleman**, 89 Pa. St. 428. § 456.
- Wormley v. Hamburg**, 40 Iowa, 25. § 469.
- Worthen v. Badgett**, 32 Ark. 496. §§ 41, 46, 183.
v. Ratcliffe, 42 Ark. 330. § 164.
- Worthley v. Steen**, 43 N. J. L. 542. § 127.
- Wright, In re, L. R. 3 Ch. Div.** 78. § 256.
- Wright v. Bolles Woodenware Co.** 50 Wis. 167. § 353.
v. Bolton, 8 Ala. 548. § 439.
v. Dalasfield, 23 Barb. 498. § 184.
v. Defrees, 8 Ind. 298. § 330.
v. Forrestal, 65 Wis. 341. §§ 114, 229, 309.
v. Frant, 4 B. & S. 118. § 261.
v. Hale, 6 H. & N. 227. §§ 206, 482.
v. Hammer, 5 Md. 375. § 434.
v. Hawkins, 28 Tex. 452. §§ 193, 298.
- Wright v. Nagle**, 101 U. S. 791. § 378.
v. Oakley, 5 Met. 400. §§ 134, 156.
v. Phillips, 2 Greene (Iowa), 191. § 298.
v. Sperry, 21 Wis. 331. § 448.
v. Williams, 1 M. & W. 99. § 246.
- Wroughton v. Turtle**, 11 M. & W. 561. § 362.
- Wulftange v. McCollom**, 83 Ky. 361. § 102.
- Wyandotte v. Drennan**, 46 Mich. 478. § 473.
- Wynehamer v. People**, 43 N. Y. 378. §§ 172, 370.
- Wynkoop v. Cooch**, 89 Pa. St. 450. § 170.
- Wynne, In re, Chase's Dec.** 227. § 110.
- Wynne v. Middleton**, 1 Wils. 125. §§ 208, 444.
v. Wynne, 2 Swan, 405. § 480.
- Wyth v. Blackman**, 1 Ves. Sr. 197. § 253.
- Wythe v. Thurston**, 2 Ambler, 555. § 253.
- Yale v. Dederer**, 18 N. Y. 271. § 338.
- Yates' Case**, 4 John. 318. § 256.
- Yates v. Lansing**, 9 John. 395. § 342.
- Yazoo R. R. Co. v. Thomas**, 132 U. S. 174. §§ 212, 364.
- Yeager v. Weaver**, 64 Pa. St. 425. §§ 78, 86, 87, 210.
- Yeaton v. United States**, 5 Cr. 281. §§ 163, 164, 165, 166, 467.
- Yell v. Lane**, 41 Ark. 53. § 299.
- Yellow River Imp't Co. v. Arnold**, 46 Wis. 214. §§ 93, 97, 101, 193, 198.
- Yerby v. Lackland**, 6 Har. & J. 446. §§ 391, 392.
- Yerger, Ex parte**, 8 Wall. 85. § 327.
- York's Appeal**, 100 Pa. St. 69; 17 W. N. C. 33. § 315.
- York, etc. R'y Co. v. The Queen**, 1 E. & B. 858. § 235.
- Young v. Bank of Alexandria**, 4 Cr. 384. § 193.
v. Beardsley, 11 Paige, 93. §§ 201, 229.

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| <p>Young v. Grattridge, L. R. 4 Q. B. 166.
 § 281.
 v. Higgon, 6 M. & W. 49. §§ 111,
 112.
 v. Hughes, 4 H. & N. 76. § 206.
 v. McKenzie, 3 Ga. 40. §§ 290, 366.
 v. Martin, 2 Yeates, 312. § 390.
 Youngblood v. Sexton, 22 Mich. 406.
 § 143.
 Youngs v. Ransom, 31 Barb. 49. § 296.
 Yung Jon, Ex parte, 28 Fed. Rep. 308.
 § 92.</p> | <p>Zander v. Coe, 5 Cal. 230. § 395.
 Zeigler v. Gaddis, 44 N. J. L. 363.
 §§ 128, 130.
 v. South, etc. R. R. Co. 58 Ala.
 594. § 331.
 Zimmerman v. Helser, 32 Md. 274.
 § 190.
 v. Perkiomen, etc. Co. 81* Pa. St.
 96. § 168.
 Zouch v. Empsey, 4 Barn. & Ald. 522.
 § 112.
 Zurn v. Woedel, 113 Pa. St. 336. § 338.</p> |
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PART FIRST.

THE ENACTMENT, DURATION AND PROOF OF STATUTORY LAWS.

CHAPTER I.

THE LEGISLATIVE POWER AS DISTINGUISHED FROM OTHER SOVEREIGN POWERS, AND THE GENERAL NATURE OF STATUTORY LAW.

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| <p>§ 1. Order of subjects.</p> <p>2. The legislative a distinct power.</p> <p>6. The nature of legislative power.</p> <p>7. Statutory laws, in general.</p> <p>9. Rules of action.</p> <p>10. Legislative rules of action — Essential limitations.</p> <p>12. Statutes have no extraterritorial effect.</p> | <p>§ 14. Extraterritorial operation of laws in colonization of a new country.</p> <p>17. English statutes passed after the establishment of the colonies.</p> <p>19. Continuance of laws on change of sovereignty.</p> <p>20. Laws of states in rebellion.</p> <p>21. Federal and state statutes.</p> <p>23. Territorial statutes.</p> |
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§ 1. **The order of subjects.**—The elementary nature of statutory law; the source and extent of its authority; the process of enactment; its commencement and duration, and the mode of proving it, when necessary, are subjects which naturally precede any consideration of the legal principles by which courts determine its meaning, construction and effect. Therefore, this order and sequence of topics will be pursued.

§ 2. **The legislative a distinct power.**—In our republican system a written constitution is the great charter by which the sovereign people establish and maintain government, define, distribute and limit its powers. It is the organic and paramount law.

In the federal constitution, and in the state constitutions, the three fundamental powers — the legislative, executive and judicial — have been separated, organized in three distinct departments. This separation is deemed to be of the greatest importance; absolutely essential to the existence of a just and

free government.¹ This is not, however, such a separation as to make these departments wholly independent; but only so

¹ About the middle of the last century Baron Montesquieu uttered words of wisdom to patriots and statesmen. He said: "When the legislative and executive powers are united in the same person, or the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty of the judiciary power if it be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man, or the same body, whether of nobles or of the people, to exercise these three powers—that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." *Spirit of Laws*, B. 11, ch. VI.

Dr. Paley remarks in his *Moral Philosophy*, B. 6, ch. 8: "The first maxim of a free state is that the laws be made by one set of men, and administered by another; in other words, that the legislative and judicial characters be kept separate. When these offices are united in the same person or assembly, particular laws are made for particular cases, springing oftentimes from partial motives, and directed to private ends. Whilst they are kept separate general laws are made by one body of men, without foreseeing whom they may affect; and when made, they must be applied by the other, let them affect whom they will."

Blackstone, in his *Commentaries* (vol. 1, 146), says: "In all tyrannical governments the supreme magistracy, or the right both of making and of enforcing laws, is vested in the same man, or one of the same body of men; and whenever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But when the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject."

He also says in another part of his *Commentaries* (vol. 1, 269): "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative."

In *Dash v. Van Kleeck*, 7 John. 508,

that one department shall not exercise the power nor perform the functions of another. They are mutually dependent, and could not subsist without the aid and co-operation of each other. Under the constitutions the legislature is empowered to make laws; it has that power exclusively; the executive has the power to carry them by all executive acts into effect, and the judiciary has the exclusive power to expound them as the law of the land between suitors in the administration of justice. The legislature can do no executive acts, but it can legislate to regulate the executive office, prescribe laws to the executive which that department, and every grade of its officers, must obey. The legislature cannot decide cases, but it can pass laws which will furnish the basis of decision, and the courts are bound to obey them.¹ The functions of each branch are as distinct as the stomach and lungs in our bodies. They are intended to co-operate; not to be antagonistic; they are functions in the same system; when each functionary does its appropriate work no interference or conflict is possible.²

§ 3. A distinguished writer and jurist says: "When we speak of a separation of the three great departments of the government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution. This has been shown with great clearness and accuracy by the author of the *Federalist*.³ It was obviously the view taken of the subject by Montesquieu and Blackstone in their commentaries; for they were each speaking with approbation of a constitution of government which embraced this division of powers in a general view; but which at the

Kent, C. J., speaking of the legislative and judicial powers, said: "It is a well-settled axiom that the union of these two powers is tyranny." *Federalist*, No. 47.

¹ *Smith v. Judge*, 17 Cal. 557.

² *Reiser v. The Wm. Tell S. F. Asso.* 39 Pa. St. 147.

³ *Federalist*, No. 42.

same time established an occasional mixture of each with the others, and a mutual dependency of each upon the others. The slightest examination of the British constitution will at once convince us that the legislative, executive and judiciary departments are by no means totally distinct and separate from each other. The executive magistrate forms an integral part of the legislative department; for parliament consists of king, lords and commons; and no law can be passed except by the consent of the king. Indeed, he possesses certain prerogatives, such as, for instance, that of making foreign treaties, by which he can to a limited extent impart to them a legislative force and operation. He also possesses the sole appointing power to the judicial department, though the judges, when once appointed, are not subject to his will or power of removal. The house of lords also constitutes not only a vital and independent branch of the legislature, but is also a great constitutional council of the executive magistrate, and is in the last resort the highest appellate judicial tribunal. Again, the other branch of the legislature, the commons, possess in some sort a portion of the executive and judicial power, in exercising the power of accusation by impeachment; and in this case, as also in the trial of peers, the house of lords sits as a grand court of trial for public offenses. The powers of the judiciary department are indeed more narrowly confined to their own proper sphere. Yet still the judges occasionally assist in the deliberations of the house of lords by giving their opinion upon matters of law referred to them for advice; and thus they may, in some sort, be deemed assessors to the lords in their legislative as well as judicial capacity.”¹ As co-ordinate branches of one government they are politically connected and bound together; but their powers and functions are not blended; they occupy no common ground, nor do they exercise any concurrent jurisdiction.

To some extent, and for certain purposes, the powers appropriate in their nature to one department are exercised by each of the others; sometimes by express direction of the supreme law; but otherwise only when it is done incidentally or as a means of exercising its own proper power.²

¹Story on Const. § 525.

kins v. Holman, 16 Pet. 60, 61;

²Taylor v. Place, 4 R. I. 324; Wat- Wayman v. Southard, 10 Wheat. 1,

§ 4. The whole legislative power delegated to the federal government is vested in congress, with the exceptions made in the constitution, as in the instance of making treaties. Congress has only enumerated powers; the residue is retained by the states, and is vested by their constitutions in their legislatures, subject to restrictions and limitations in the federal constitution and that of the particular state. In creating a legislative department of a state government, and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the constitution of the United States.¹ So all the executive power which can be exercised is vested in the executive department, and all the operative judicial power in the judiciary department.²

§ 5. The power which is entirely and exclusively vested in the judiciary department is the power conferred on judicial courts and tribunals to administer punitive and remedial justice to and between persons subject to, or claiming rights under, the law of the land. The exercise of this power includes invariably *actor, reus* and *judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings. It is part of this judicial power to determine what the law is; and all questions involving the validity and effect of statutes when thus determined are authoritatively settled.³

§ 6. **The legislative power.**—It results from this division of the fundamental powers that the legislature is confined to the exercise of the law-making power; its sole function is the enactment of laws. None of these great powers are defined

42; *The Auditor v. Atchison*, etc. R. R. Co. 6 Kans. 500; s. c. 7 Am. R. 575; *Flint*, etc. P. R. Co. v. *Woodhull*, 25 Mich. 99.

¹Cooley's Const. Lim. (4th ed.) 100; *Donnell v. State*, 48 Miss. 661; *Governor v. McEwen*, 5 Humph. 241; *Knoxville*, etc. R. R. Co. v. *Hicks*, 9 Baxt. 442.

²Taylor v. Place, 4 R. I. 324.

³Shumway v. Bennett, 29 Mich.

465; *Taylor v. Porter*, 4 Hill, 146; *Vanzant v. Waddel*, 2 Yerg. 260; *State Bank v. Cooper*, id. 599; *Jones' Heirs v. Perry*, 10 id. 59; *Greene v. Briggs*, 1 Curtis, 311; *State v. Dews*, R. M. Charl. 400; *Sears v. Cottrell*, 5 Mich. 254. See *Smith v. Judge*, 17 Cal. 558; *State v. Dexter*, 10 R. I. 341; *Murray's Lessee v. Hoboken*, etc. Co. 18 How. 272.

in constitutions. They are distributed by name, and, therefore, their scope and limits have to be determined from their intrinsic nature. They are deemed thus sufficiently distinguishable. A state legislature, by this grant of legislative power, is vested with all power which is of that nature, whether it had been exercised wholly by the parliament of Great Britain, or in part, by prerogative, by the crown.¹ As legislative power is merely a power to make laws, its nature may be inferred from the definition of statutory law; for a statute formulates whatever is resolved, ordained or enacted by the forms of legislation in the exercise of that power.

§ 7. Statutory law, in general.—A statute is, in a general sense, the written will of the legislature rendered authentic by certain prescribed forms and solemnities,² prescribing rules of action or civil conduct.³ This is comprehensive as applied to

¹ In *Merrill v. Sherburne*, 1 N. H. 203, Woodbury, J., said: "No particular definition of judicial power is given in the constitution, and considering the general nature of the instrument none was to be expected. Critical statements of the meanings in which all important words were to be employed would have swollen into volumes; and when these words possessed a customary signification a definition of them would have been useless."

Lowrie, C. J., in *Reiser v. The William Tell Saving Fund Association*, 39 Pa. St. 146, said: "We must again insist that the making of laws and the application of them to cases as they arise are clearly and essentially different functions, and that one of them is allotted by the constitution to the legislature and the other to the courts. 9 Casey, 495. Chief Justice Gibson expressed this in *Greenough v. Greenough*, 1 Jones, 494: 'Every tyro or sciolist knows that it is the province of the legislature to enact, of the judiciary to expound, and of the executive to enforce.'"

In *Maynard v. Valentine*, 1 W.

Coast Rep. 843, Greene, C. J., speaking of the distinction between legislative and judicial functions, said: "It could not be destroyed without destruction of one or the other function. For it consists in diversity of the deep-seated organic relations which court and legislature respectively bear to the central sovereignty which speaks and acts through them. The sovereign, through the legislative organ, speaks spontaneously, and imposes on that organ no obligation to reply to any petition. It speaks through its courts upon petition only, and obliges its courts to answer every petition. The voice of the court is explanatory, and assertative of that of the legislature; the voice of the legislature is determinative of that of the court. Legislatures declare about persons and things in general, and, in particular, what the sovereign will is. Courts declare what, according to that will, the parties before them are bound or free to do or suffer. In fine, the legislature gives, and the court applies, the law." 2 Wash. T'y, 3.

² 1 Kent's Com. 447.

³ 1 Black. Com. 44.

persons. "Statute law may, we think," says Wilberforce, "be properly defined as the will of the nation expressed by the legislature, expounded by the courts of justice. The legislature, as the representative of the nation, expresses the national will by means of statutes. These statutes are expounded by the courts so as to form the body of the statute law."¹ Mr. Austin says: "A law in the literal and proper sense of the word may be defined as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."² He also says: "Legislative powers are powers of establishing laws and issuing other commands."³

In what capacity does a legislature act in issuing *other* commands? In other words, in what other way, or to what other end, may "legislative powers" act or issue commands than to establish laws? It would seem to be a truism that the product of law-making is law. The foregoing definitions confine law to persons. If it is so confined, then the legislature in the exercise of the law-making or legislative power may not legislate in regard to *things*. Nor should those doctrines and principles which have been accepted as part of the common law, relating to things, be regarded as law. The truth is that law is a *rule*, not necessarily a rule of conduct, though a rule of conduct is a law — a branch, not the whole of it. As a *rule* a statute may, besides prescribing a rule of civil conduct to sentient subjects, create or establish legal qualities and relations, operating as a fiat. Statutes may be institutive, creating and organizing legal entities and endowing them with qualities and powers — for example, public and private corporations. They create offices, courts, and other governmental agencies; they define crimes and torts; property, corporeal and incorporeal; titles, contracts; prescribe remedies and punishments; they impart a legal vitality to and regulate all the minutia of civil polity, including every social and business relation or institution deemed conducive to the well-being and happiness of the governed.⁴

§ 8. As a *rule* for persons, it is not a transient, sudden order from a superior to or concerning a particular person, but some-

¹ Wilb. St. L. 8.

³ Id. § 230.

² Austin's Jurisprudence, vol. 1, p. 3.

⁴ License Cases, 5 How. 504, 583; Mann v. Illinois, 94 U. S. 113, 125.

thing permanent, uniform and universal.¹ It is a rule, because not merely advisory, but imperative; it emanates from the supreme power as a command, and does not depend for effect on the approval or consent of its subjects; it is a rule of *civil* conduct, because it does not extend into the subjective domain of morals or religion; it is prescribed, and therefore operates prospectively, though it may under certain circumstances and limitations operate retrospectively, as will be seen hereafter.² It is permanent, uniform and universal, not in the sense of being irrevocable or necessarily operating upon all the persons and things within the jurisdiction of the legislature, but because a law in general has a continuing effect and operates impartially throughout the state or some district of it, or upon the whole or a class of the public.³

¹ 1 Black. Com. 44.

² See *post*, ch. XVII.

³ In *Slack v. Maysville, etc.* R. R. Co. 13 B. Mon. 22, Marshall, J., speaking for the court, said: "It would be difficult, perhaps impossible, to define the extent of the legislative power of the state, unless by saying that so far as it is not restricted by the higher law of the state and federal constitutions, it can do everything which can be effected by means of a law. It is the great, *supervising, controlling, creative and active* power in the state, subject to the fundamental restrictions just referred to. Whatever legislative power the whole commonwealth has, is by the constitution vested in the legislative department, which, representing the popular majorities in the several local divisions of the state, and under no other restraint but such as is imposed by the fundamental law, by its own wisdom and its own responsibilities, may regulate the conduct and command the resources of all, for the safety, convenience and happiness of all, to be promoted in such manner as its own discretion may determine. The legislative department performs and finishes its office by the mere enactment of a law."

The nature and scope of legislative power in the enactment of *laws* as treated in an article on "The Constitutionality of Local Option Laws" in 12 Am. L. Reg. (N. S.) 129, are too narrow. Contrary to the assumptions there made, it is believed that all valid acts of the legislature, whether national or state, are laws. The enumerated powers granted to congress are legislative in their nature; no other would vest in a state legislature under a general grant of legislative power. Other clauses in the constitutions, requiring or regulating the action of the legislature in reference to specific subjects in the internal system or polity of the state, are not intended to confer or regulate any other than the power of making laws — saving the special jurisdiction in cases of impeachment, and such as relate to the autonomy of the separate branches or are incidental to the exercise of its legislative function. *Hope v. Deaderick*, 8 Humph. 1; *Lusher v. Seitz*, 4 W. Va. 11; *Myers v. Manhattan Bank*, 20 Ohio, 295; *Anderson v. Dunn*, 6 Wheat. 204-235; *Kilbourn v. Thompson*, 103 U. S. 168; *Von Holst*, Const. L. § 28. The taxing power is legislative. *Marr v. Enloe*, 1 Yerg. 452; *Lipscomb v. Dean*, 1 Lea, 546.

§ 9. Rules of action.— Courts judicially formulate rules of action, but only by applying to a particular party an existing law. The court ascertains by trial that the party is within a rule which is law, and the facts necessary to its special operation upon him. What that law enjoins in general the court adjudicates and administers in the particular case. Thus, in a statute before me is this provision: "Every person guilty of fighting any duel, although no death or wound ensues, is punishable by imprisonment in the penitentiary not exceeding one year." This is a statute — a law. Mr. A. is accused of the offense and brought before a court of competent jurisdiction, by proper form of accusation and by proper arrest, and not pleading guilty a trial takes place. The court ascertains by the verdict of a jury that A. is guilty of the acts denounced in the statute. The sentence based on that verdict is that "you, Mr. A., be imprisoned in the penitentiary one year." The statute was general that every person so guilty should be so imprisoned. That was making a law — prescribing a rule of conduct. The court having judicially ascertained that A. had done these acts applied the law to him — repeats the statutory rule of action on A. Enacting the rule is legislative; trying A. and applying the rule to him, repeating and formulating it for accomplishing the imprisonment provided for in the rule, is judicial.

§ 10. Legislative rules of action — Essential limitations.— Even rules of action are not valid laws, if, when enacted by the legislature, they are judicial in their nature or trench on the jurisdiction and functions of the judiciary. The legislature may prescribe rules of decision which will govern future cases; these rules will have the force of law; so general rules of practice, regulating remedies and so operating as not to take away or impair existing rights, may be made applicable to pending as well as subsequent actions.¹ But it has no power

¹ *Riggs v. Martin*, 5 Ark. 506; 18 Ind. 303; *Evans v. Montgomery*, Smith v. Judge, 17 Cal. 558; *United States v. Samperey*, 1 Hempst. 118; *Freeze*, 18 Me. 109; *Read v. Frankfort Bank*, 23 id. 318; *Woods v. Buie*, 5 How. (Miss.) 285; *United States R. S. B. v. Barclay*, 30 id. 120; *Hope v. Johnson*, 2 Yerg. 123; *Lockett v. Usry*, 28 Ga. 345; *Ralston v. Lothain*, 4 Watts & S. 218; *Oriental Bank v. Taggart v. McGinn*, 14 Pa. St. 155; *Van Norman v. Judge*, 45 Mich. 204.

to administer judicial relief,—it cannot decide cases, nor direct how existing cases or controversies shall be decided by the courts; it cannot interfere by subsequent acts with final judgments of the courts. It cannot modify such judgments,¹ nor grant or order new trials.² No declaratory act, that is, one professing to enact what the law now is or was at any past time, can affect any existing rights or controversies.³

§ 11. The merits of every legal controversy depend on the rights of the parties as determined by the law as it was when the rights in question accrued, or the wrong complained of was done.⁴ A statutory right, however, is inchoate until re-

¹ Denny v. Mattoon, 2 Allen, 361.

² Atkinson v. Dunlap, 50 Me. 111; Griffin v. Cunningham, 20 Gratt. 31; Reid, Adm'r, v. Strider, 7 id. 76; Calhoun v. McLendon, 42 Ga. 405; Reiser v. Wm. Tell, etc. Assoc. 39 Pa. St. 147; Carleton v. Goodwin, 41 Ala. 153; O'Conner v. Warner, 4 Watts & S. 227; Arnold v. Kelley, 5 W. Va. 446; De Chastellux v. Fairchild, 15 Pa. St. 18; Greenough v. Greenough, 11 id. 489; McCabe v. Emerson, 18 id. 111; United States v. Klein, 13 Wall. 128; United States v. Samperyac, 1 Hempst. 118; Bagg's Appeal, 43 Pa. St. 512; Taylor v. Place, 4 R. I. 324; Erie, etc. R. R. Co. v. Casey, 1 Grant's Cas. 274; Miller v. Fiery, 8 Gill, 147; Crane v. McGinnis, 1 Gill & J. 463; Trask v. Green, 9 Mich. 366; Bates v. Kimball, 2 D. Chip. 77; Burch v. Newbury, 10 N. Y. 374; Commonwealth v. Johnson, 42 Pa. St. 448; Inhabitants of Durham v. Inhab. of L. 4 Greenl. 140; Ex parte Darling, 16 Nev. 98; Davis v. Village of Menasha, 21 Wis. 491; Kendall v. Dodge, 3 Vt. 360.

³ Tilford v. Ramsey, 43 Mo. 410; People v. Supervisors, 16 N. Y. 425, 432; Ogden v. Blackledge, 2 Cranch, 272; Gordon v. Inghram, 1 Grant's Cas. 152; Dash v. Van Kleeck, 7 John. 477; Mongeon v. People, 55 N. Y. 613; McLeod v. Burroughs, 9

Ga. 213; Lambertson v. Hagan, 2 Pa. St. 25; Peyton v. Smith, 4 McCord, 476; Hall v. Goodwyn, id. 442; Grigsby v. Peak, 57 Tex. 142; Van Norman v. Judge, 45 Mich. 204. It was held (Alvord v. Little, 16 Fla. 158) that an act extending the time to appeal, passed after the expiration of the time allowed therefor by existing law, did not affect vested rights, because it applied only to the remedy. So does a statute of limitations; but an act would not be sustained which revived a right of action after it was barred by the existing law. Girdner v. Stephens, 1 Heisk. 280; Adamson v. Davis, 47 Mo. 268; Thompson v. Read, 41 Iowa, 48; Pitman v. Bump, 5 Oregon, 17; Wood on Lim. § 11. The legislature is not only incapable of performing judicial functions, but it can confer no other than judicial powers on the courts. The Auditor v. Atchison, etc. R. R. Co. 6 Kans. 500; S. C. 7 Am. R. 575; Burgoyne v. Supervisors, 5 Cal. 9; Dickey v. Hurlburt, id. 343; Hayburn's Case, 2 Dall. 409; Railway Co. v. Board Pub. Works, 28 W. Va. 264. See United States v. Ferreira, 13 How. 40.

⁴ Pacific, etc. Co. v. Joliffe, 2 Wall. 450; Vanderkar v. Railroad Co. 13 Barb. 390; People v. Supervisors, 3 id. 332.

duced to possession or fixed and perfected by a judgment.¹ It is judicial to determine what the law was or is; and the kind and measure of redress due to parties, founded upon the facts of a case, by application of that law. New laws cannot be passed to affect existing controversies, or to interfere with the administration of justice according to those principles.

To pass new rules for the regulation of new controversies is in its nature a legislative act; but if these rules interfere with the past or the present, and do not look wholly to the future, they violate the definition of a law as a rule of civil conduct; because no rule of civil conduct can with consistency operate upon what occurred before the rule itself was promulgated.² Whether in their inquiries the legislature and the courts proceed upon the same or different evidence does not change the nature of legislative acts. Nor can their inquiries, deliberations, orders and decrees be both judicial and legislative, because a marked difference exists between the functions of judicial and legislative tribunals. The former decide upon the legality of claims and conduct; the latter make rules upon which in connection with the constitution these decisions should be founded.³ Legislative power prescribes rules of conduct for the future government of the citizen or subject; while judicial power punishes or redresses wrongs growing out of a violation of rules previously established. The distinction lies, in short, between a sentence and a rule.⁴

§ 12. Statutes have no extraterritorial effect.—Statutes derive their force from the authority of the legislature which enacts them; and hence, as a necessary consequence, their authority as statutes will be limited to the territory or country to which the enacting power is limited. It is only within

¹ *Norris v. Crocker*, 13 How. 429; *The Irresistible*, 7 Wheat. 551; *Calhoun v. McLendon*, 42 Ga. 407; *United States v. Mann*, 1 Gallison, 177; *United States v. Passmore*, 4 Dall. 372; *Town of Guilford v. Supervisors*, 13 N. Y. 143; *Hampton v. Commonwealth*, 19 Pa. St. 329; *Stoever v. Immell*, 1 Watt., 258; *Williams v. Commissioners*, 35 Me. 345; *Tivey v. People*, 8 Mich. 128; *Commonwealth v. Duane*, 1 Binn. 601. It de-

volves on the courts, not the legislature, to determine the meaning of "head of a family," as used in the constitutional provision for a homestead.

² *Merrill v. Sherburne*, 1 N. H. 204.

³ *Id.*; *State v. Dews*, R. M. Charl't. 400; *Bedford v. Shilling*, 4 S. & R. 411; *Ogden v. Blackledge*, 2 Cranch, 273; *McLeod v. Burroughs*, 9 Ga. 213.

⁴ *Ex parte Shrader*, 33 Cal. 283; *Cooley's Con. L.* 110, 111.

these boundaries that the legislature is law maker, that its laws govern people, that they operate of their own vigor upon any subject. No other laws have effect there as statutes. Statutes of other states, or national jurisdictions, are foreign laws, of which the courts do not take judicial notice. They may be proved and taken into consideration in proper cases, subject to the provisions of domestic statutes and of the constitution; but they are so considered only by the principles of the common and international law, originating in the comity which exists between nations and by force of the federal constitution between the states of the Union.¹

The observance or recognition of foreign laws rests in comity and convenience, and in the aim of the law to adapt its remedies to the great ends of justice.² But there is a limit to this principle of comity; and cases may and do arise where the observance of foreign laws would neither be convenient nor answer the purposes of justice. Foreign laws are not regarded where they conflict with our own regulations, our local policy, or do violence to our views of religion or public morals.³

Whatever force and obligation the laws of one country have in another depends upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent. When

¹ *Shaw v. Brown*, 35 Miss. 246, 316; *Minor v. Cardwell*, 37 Mo. 353; *Clarke v. Pratt*, 20 Ala. 470; *Harrison v. Harrison*, id. 629; *Cockrell v. Gurley*, 26 id. 405; *Woodward v. Donally*, 27 id. 196; *Mobile & O. R. Co. v. Whitney*, 39 id. 471; *Bank of Augusta v. Earle*, 13 Pet. 519; *Carey v. Cincinnati, etc. R. R. Co.* 5 Iowa, 357; *Debevoise v. N. Y. etc. R. R. Co.* 98 N. Y. 377; *S. C.* 50 Am. R. 683; *Land Grant Railway v. Commissioners*, 6 Kan. 252; *Pickering v. Fisk*, 6 Vt. 107; *Andrews v. Herriott*, 4 Cow. 508, and note; *Saul v. His Creditors*, 5 Mart. (N. S.) 569; 3 Am. & Eng. Cyclop. L. 502.

Articles 798 and 799 of the penal code of Texas provide for the punishment of robbery, theft, and the know-

ingly receiving of stolen property, though perpetrated in a foreign country or state, if the property was brought into the state, provided that by the law of the foreign country or state the inculpatory act would have been the offense charged in the indictment. It was held in *Cummins v. State*, 12 Tex. App. 121, that in such a case the law of the foreign country or state is an element of the offense and an issuable fact to be alleged in the indictment, but the indictment need not aver that the accused was punishable or amenable to the laws of the foreign country or state.

² *Pickering v. Fisk*, 6 Vt. 107; *Story*, Conf. L. § 35.

³ *Id.*

a statute or the unwritten or common law of the country forbids the recognition of the foreign law, the latter is of no force whatever. When both are silent, then the question arises, which of the conflicting laws is to have effect. Generally, force and effect will be given by any state to foreign laws in cases where from the transactions of the parties they are applicable, unless they affect injuriously her own citizens, violate her express enactments, or are *contra bonos mores*.¹

The courts of one state will not enforce the penal,² nor the police, revenue or political laws of another.³ Crimes are in their nature local, and the jurisdiction of them is local.⁴ They are cognizable and punishable exclusively in the country where they are committed.⁵

§ 13. As every nation possesses an exclusive sovereignty and jurisdiction within its own territory, its laws affect and bind directly all property, whether real or personal, within that territory; and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it. A state may, therefore, regulate the manner and circumstances under which such property, in possession or in action, within it shall be held, transmitted, bequeathed, transferred or sued for; the condition, capacity, and state of all persons within it; the validity of contracts and other acts done within it; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice in all cases calling for the in-

¹ Lawrence's Wheaton (2d ed.), 162; S.) 301; Holman v. Johnson, 1 Cowp. Bouv. L. Dic. tit. Conflict of Laws; 343; James v. Catherwood, 3 D. & R. Story, Conf. L. §§ 23, 29; Minor v. 190 (16 Eng. C. L. 165); Randall v. Cardwell, 37 Mo. 354; 3 Am. & Eng. Van Rensselaer, 1 John. 95; Stevens Cyclop. L. 502-503; Caldwell v. Van- v. Brown, 20 W. Va. 450; Woods v. vliссengен, 9 Hare, 425; Fenton v. Wicks, 7 Lea, 40. See South Carolina Livingstone, 3 Macq. H. L. Cas. 497; R. R. Co. v. Nix, 68 Ga. 572; Whart. Gardner v. Lewis, 7 Gill, 377; Beard Am. L. § 253.

v. Basye, 7 B. Mon. 144.

²The Antelope, 10 Wheat. 66, 123; Scoville v. Canfield, 14 John. 338; Commonwealth v. Green, 17 Mass. 515; Folliott v. Ogden, 1 H. Black. 135; Ogden v. Folliott, 3 T. R. 733; Wolff v. Oxholm, 6 M. & S. 99; King of Two Sicilies v. Wilcox, 1 Sim. (N.

³James v. Catherwood, 3 D. & R. 190; Planche v. Fletcher, 1 Doug. 251; Bristol v. Sequeville, 5 Exch. 275; Quarrier v. Colston, 1 Phil. 147. See Henry v. Sargeant, 13 N. H. 321. ⁴Rafael v. Verelst, 2 W. Black. 1058.

⁵Story's Conf. L. § 620.

terposition of its tribunals to protect and vindicate and secure the wholesome agency of its own laws within its own domains.¹

Transitory rights accruing under any municipal laws may be enforced in another jurisdiction, subject to the principles just stated, that they be not repugnant to its policy or prejudicial to its interests; and personal states and relations, originating under and valid by the law of the domicile or place of contract, will be universally recognized as valid, subject to the same condition.² A legal title, duly acquired in any one country, is a good title over all the world.³

§ 14. Where either by common law or statute a right of action has become fixed and a legal liability incurred, if transitory, it may be enforced in the courts of any state which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the state where it is sought to be enforced. The statute has no extraterritorial force, but rights under it will always in comity be enforced, if not against the policy of the laws of the forum. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action,⁴ while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought.⁵

¹ Story, Conf. L. §§ 18, 29, 30; Chicago, etc. R. R. Co. v. Doyle, 60 Miss. 977; Debovoise v. N. Y. etc. R. R. Co. 98 N. Y. 377; Phillips v. Hunter, 2 H. Black. 403; Sill v. Worswick, 1 H. Black. 672; Campbell v. Hall, 1 Cowp. 208; Liverm. Dis. 26-30; Hyde v. Wabash, etc. R. R. Co. 61 Iowa, 441; S. C. 47 Am. R. 820; Lawrence's Wheat. 160, 161; Davis v. Jacquelin, 5 Harr. & J. 100.

² Nashville, etc. R. R. Co. v. Foster, 10 Lea, 351; State Bank Receiver v. Plainfield Bank, 84 N. J. Eq. 450; Whart. Am. L. ch. V; Bank of Augusta v. Earle, 13 Pet. 519, 589; Sherwood v. Judd, 3 Bradf. 419; Sanford v. Thompson, 18 Ga. 554.

³ Simpson v. Fogo, 1 H. & M. 195; Crispin v. Doglioni, 3 S. & T. 96; Beard's Ex'r v. Basye, 7 B. Mon. 144.

⁴ Herrick v. Minneapolis, etc. R. R. Co. 31 Minn. 11; S. C. 47 Am. R. 771; Knight v. West Jersey R. R. Co. 108 Pa. St. 250; S. C. 56 Am. R. 200; Dennick v. R. R. Co. 103 U. S. 11; Leonard v. Columbia St. Nav. Co. 84 N. Y. 48; S. C. 38 Am. R. 491; Central R. R. Co. v. Swint, 73 Ga. 651; Morris v. Chicago, etc. R. R. Co. 65 Iowa, 727; S. C. 54 Am. R. 39; Shedd v. Moran, 10 Ill. App. 618; Ramsey v. Glenn, 33 Kan. 271; Boyce v. Wabash R'y Co. 63 Iowa, 70; S. C. 50 Am. R. 730; Keenan v. Stimson, 32 Minn. 377; Bishop v. Globe Co. 135 Mass. 132; Taylor v. Penn. Co. 78 Ky. 348; S. C. 39 Am. R. 244. See Willis v. R. R. Co. 61 Tex. 432; Vawter v. Pac. R'y Co. 84 Mo. 679; S. C. 54 Am. R. 105.

⁵ Id.; Burlington, etc. R. R. Co. v.

§ 15. **Extraterritorial operation of laws in case of colonization of a new country.**—It was declared by the lords of the privy council in England, over a hundred and fifty years ago, upon appeal from the foreign plantations, that if there be a new uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go they carry the laws with them; therefore, such new found country is governed by the laws of England.¹ English statutes enacted prior to the settlement of the colonies in America were brought thither with the common law; or rather the common law, and the statutes amendatory of it, by the colonists from England, as a birthright; not to operate of their own vigor in the colonies, as statutes, but as part of the unwritten law. The colonists brought the laws of the mother country as they brought the mother tongue; not all the laws, but such as were adapted to their needs in the new country under the novel conditions and circumstances which there existed.²

§ 16. The existence of this law in the colonies was recognized and sanctioned by the royal charters, subject to modification by colonial usage and legislation. Our colonial ancestors could live under the old laws, or make new ones. When they legislated, their own laws governed them; when they did not, the laws they brought with them were their rules of conduct.³

Thompson, 31 Kan. 180; S. C. 47 Am. R. 497; Mooney v. Union Pacific R. Co. 60 Iowa, 346. "A contract, so far as concerns its formal making, is to be determined by the law of the place where it is solemnized, unless the *lex situs* of property disposed of otherwise requires; so far as concerns its interpretation, by the law of the place where its terms are settled, unless the parties had the usages of another place in view; so far as concerns the remedy, by the law of the place of suit; and so far as concerns its performance, by the law of the place of performance." Whart. Conf. L. (2d ed.) § 401.

¹ Mem. 2 P. Wms. 75; 1 Black. Com. 107; Blankard v. Galdy, 2 Salk. 411; Dutton v. Howell, Show. P. C. 82;

Adj.-Gen. v. Ranee Surnomoye Dossee, 9 Moore (Ind. App.), 387; Commonwealth v. Leach, 1 Mass. 60; Commonwealth v. Knowlton, 2 id. 534; Boehm v. Engle, 1 Dall. 15; Bogardus v. Trinity Church, 4 Paige, 198. See Chalmers' Colonial Op. 206, 232.

² State v. Rollins, 8 N. H. 550, 561; Commonwealth v. Knowlton, 2 Mass. 534; Patterson v. Winn, 5 Pet. 233; Clawson v. Primrose, 4 Del. Ch. 643; O'Ferrall v. Simplot, 4 Iowa, 400; Vidal v. Girard's Heirs, 2 How. 128; Webster v. Morris, 66 Wis. 366; Dodge v. Williams, 46 id. 92; Nelson v. McCrary, 60 Ala. 301.

³ Sackett v. Sackett, 8 Pick. 309; 1 Kent's Com. 473; Commonwealth v. Knowlton, *supra*.

The English statutes thus imported, though the written law in England, and there in force as the expression of the sovereign will, did not cling to the emigrant and attend him to the colonies against his will to preserve his subjection to the crown; but he brought it as a boon for his protection.¹ In the colonies these statutes were interwoven with the common law. Their authority was the same as that which gave force and sanction to the common law; the force of each depended on the same consideration—the presence of this spirit in the emigrant's mind and their adaptation to his condition and circumstances in the colonies. In 1774 the congress declared the right of the colonies to the common law and statutes of the mother country.²

§ 17. English statutes passed after the establishment of the colonies.—The colonies were subject to the authority of parliament; they were a part of the British domain.³ It could,

¹ The declaration of Dr. Franklin quoted by Mr. Wharton (Wharton's Am. L. § 22, note) truly states the force of English laws brought to this country by the colonists. He said: "The settlers of colonies in America did not carry with them the laws of the land as being bound by them wherever they should settle. They left the realm to avoid the inconveniences and hardships they were under where some of these laws were in force, particularly ecclesiastical laws, those for the payment of tithes, and others. Had it been understood that they were to carry those laws with them, they had better have stayed at home among their friends unexposed to the risks and toils of a new settlement. They carried with them a right to such part of the laws of the land as they should judge advantageous or useful to them: a right to be free from those that they thought hurtful, and a right to make such others as they should think necessary, not infringing the general rights of Englishmen; and such new laws as they were to form as agree-

able as might be to the laws of England." See speech of Burke on moving resolutions of conciliation, March 22, 1775.

² Journal of Cong. Oct. 14, 1774.

³ In a late work, entitled "Parliamentary Government in the British Colonies," by Alpheus Todd, p. 128, it is said: "Subject, however, to the constitutional oversight and discretion of the crown, by which all colonial legislation is liable to be controlled or annulled, if exercised unlawfully or to the prejudice of other parts of the empire, complete powers of legislation appertain to all duly constituted colonial governments. Every local legislature, whether created by charter from the crown or by imperial statute, is clothed with supreme authority, within the limits of the colony, to provide for the peace, order and good government of the inhabitants thereof. (See Baron Burke's judgment in *Kielley v. Carson*, 4 Moore's Privy Council Rep. 85.) This supreme legislative authority is subject, of course, to the paramount supremacy of the imperial parlia-

and to some extent it did, legislate directly for their government. But its enactments did not extend to the colonies unless the intention to so extend them was manifested in the statutes.¹ Nor did such statutes, in which no such intention was expressed, become part of the unwritten law of the colonies.²

In some instances, statutes of England passed after the emigration, and not in terms made applicable to the colonies, were adopted by the colonial courts; thus by long practice they acquired the authority of law.³ By statutory and constitutional provision, the common law and English statutes, prior to specified dates, have been very generally adopted, or assumed by the courts to be in force so far as consistent with our condition and system of government, not only by states formed from the colonies, but in the newer states.⁴ The legislative and juridical history of the colonies does not confirm the theory that English laws were imposed on the colonies by authority of parliament, or that their adoption is traceable alone and everywhere to the nationality of the colonists. They unconsciously, by usage and custom, adopted laws adapted to their situation and needs, according to such enlightenment as they had, under the conjoint influence of dissenting religion and national bias. They legislated to the same end, and under the same influence; independently of the crown, despite the restrictions in their constitutions, and the practice or requirement in some cases to legislate in the name of the king and the ostensible recognition of his veto power.⁵

ment over all minor and subordinate legislatures within the empire. The functions of control exercisable by the imperial legislature are practically restrained, however, by the operation of certain constitutional principles. . . . It may suffice to observe that the right of local self-government conceded to all British colonies wherein representative institutions have been introduced confers upon the local legislature, with co-operation and consent of the crown, as an integral part of such institution, ample and unreserved powers to de-

liberate and determine absolutely in regard to all matters of local concern."

¹ *McKineron v. Bliss*, 31 Barb. 180. See *Brice v. State*, 2 Overt. 254; *Egnew v. Cochrane*, 2 Head, 329.

² *Matthews v. Ansley*, 31 Ala. 20; *Carter v. Balfour*, 19 Ala. 829; *Sackett v. Sackett*, 8 Pick. 309; *Commonwealth v. Knowlton*, 2 Mass. 534.

³ *Commonwealth v. Knowlton*, *supra*.

⁴ *Id.*; *Morris v. Vanderen*, 1 Dall. 64, 67; *Respublica v. Mesca*, *id.* 73.

⁵ Edmund Burke, in his speech in

The original British colonies had been practically self-governing, and the result of the revolution was to confirm their right of self government. The people of the several colonies, in provisional union, won in that struggle the sovereignty of themselves. The republican system which replaced the colonial constitutions abrogated only the prior laws which were inconsistent with the genius and form of the new government.

§ 18. The first settlements were not all made by English people, nor were all the English settlements made by persons of the same class or from the same motives. Von Holst has truly remarked, that "the thirteen colonies had been founded at very different times and under very different circumstances. Their whole course of development, their political institutions, their religious views and social relations, were so divergent, the one from the other, that it was easy to find more points of difference than of similarity and comparison..

moving resolutions of conciliation March 22, 1775, said: "When I know that the colonies in general owe little or nothing to any care of ours, and that they are not squeezed into this happy form by the constraints of watchful and suspicious government, but that, through a wise and salutary neglect, a generous nature has been suffered to take her own way to perfection—when I reflect upon these effects, when I see how profitable they have been to us, I feel the pride of power sink, and all presumption in the wisdom of human contrivances melt and die away within me,—my vigor relents,—I pardon something to the spirit of liberty." Having addressed a series of considerations to show the futility and inexpedience of employing force against the revolting colonies, he said: "Lastly, we have no sort of *experience* in favor of force as an instrument in the rule of our colonies. Their growth and their utility has been owing to methods altogether different. Our ancient indulgence has been said to be pursued

to a fault. It may be so; but we know, if feeling is evidence, that our fault was more tolerable than our attempt to mend it, and our sin more salutary than our penitence. . . . But there is still behind a third consideration, concerning this object, which serves to determine my opinion on the sort of policy which ought to be pursued in the management of America, even more than the population and its commerce; I mean its *temper and character*. In this character of Americans, a love of freedom is the predominating feature which marks and distinguishes the whole; and as an ardent is always a jealous affection, your colonies become suspicious, restive, and untractable, whenever they see the least attempt to wrest from them by force, or shuffle from them by chicane, what they think the only advantage worth living for. This fierce spirit of liberty is stronger in the English colonies, probably, than in any other people of the earth, and this from a great variety of powerful causes."

Besides, commercial intercourse between the distant colonies, in consequence of the great extent of their territory, the scantiness of the population, and the poor means of transportation at the time, was so slight, that the similarity of thought and feeling, which can be the result only of a constant and thriving trade, was wanting."¹ It is not surprising, therefore, that the same English statutes were not equally applicable to the local condition in all the colonies.

In Dana's Abridgment² it is said, "there is no question more difficult to be answered than this: 'What British statutes were adopted in the British colonies?' In the chartered colonies but few were adopted and practiced upon; in the proprietary colonies, not many; in the royal colonies, usually a great many."

§ 19. Continuance of laws after a change of sovereignty.—Laws, customary and statutory, continue in force, though they originate under a sovereign whose power has ceased by cession of the country and all political jurisdiction, or by conquest. "The usage of the world is," says Chief Justice Marshall, "if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state."³ Among civilized na-

¹ Von Holst, Const. Hist. U. S. vol. I, p. 2. Pet. 541; United States v. Percheman, 7 id. 51; Mitchel v. United States, 9

² Vol. 6, ch. 196, art. 7. Pet. 732; Mitchell v. Tucker, 10 Mo.

³ The American Ins. Co. v. Canter, 1 262; Leitensdorfer v. Webb, 20 How.

tions having established laws, the rule is that laws, usages and municipal regulations, in force at the time of the conquest, remain in force until changed by the new sovereign.¹

176; *Langdeau v. Hanes*, 21 Wall. 527; *Chicago, etc. R. R. Co. v. McGlinn*, 114 U. S. 542; *Whart. Am. L. § 154*.

¹ *United States v. Powers' Heirs*, 11 How. 577; *Chew v. Calvert*, 1 Miss. (Walk.) 54; *Fowler v. Smith*, 2 Cal. 39, 568; *Blankard v. Galdy*, 2 Salk. 411; *Macoleta v. Packard*, 14 Cal. 179; *Campbell v. Hall*, 1 Cowp. 209.

Fowler v. Smith, *supra*, was a case which arose before there was any legislation of the state of California changing the original Mexican law of interest. It was an action to foreclose a mortgage for purchase money. There was an express promise to pay interest at two per cent. per month. It was stated that by the law of Mexico all contracts to pay a higher rate than six per cent. per annum, either upon money loaned or otherwise, were void. Murray, J., speaking for the court, said: "I cannot approach the point [error having been alleged to the ruling of the trial court that the contract was not usurious] without great hesitation, well knowing that I shall have to contend with what, by many, is considered the settled rule upon this subject. But the frequency of these pleas, and the growing disposition of counsel to apply the principles of the civil or Mexican law to every contract entered into before the passage of the act abolishing all laws previously existing in California, require that some adjudication should be had which may govern these cases for the future. The argument of the appellant is based upon the well-recognized principle of international law that the laws of a ceded country remain in force until changed by the conquering or acquiring power. This

principle is to be found in almost every work upon the subject of national law, and is reiterated and affirmed by the courts of England and the United States. Its application to this case can, however, only be determined by an examination of the rule and the particular circumstances under which it is sought to be applied.

"The law of nations is said to be founded on right, reason, sound morality and justice; but although it is said to be binding upon nations in their intercourse and transactions, still we find the courts of the United States and Europe in many instances differing in their application of the rules, and even disregarding them. As the world has advanced in civilization and learning, the influence of religion has been felt and recognized by the christian countries of Europe in their intercourse with each other. War has been stripped of many of its most disgusting features. It is no longer considered as the normal condition of man and nations; but only justifiable when resorted to to preserve national honor, prosperity and happiness. . . .

"In an acquired territory containing a population governed in their business and social relations by a system of laws of their own, well understood and generally accepted, it is but reasonable that the inhabitants should continue to regulate their conduct and commercial transactions by their own laws, until the same are changed. The reason is obvious and founded, in many instances, on the difference of language and systems of jurisprudence, the peculiar circumstances of the country, the confusion conse-

For a still stronger reason, this would be true in case of acquisitions by purchase and cession.¹

§ 20. **Laws of states in rebellion.**—The laws of the insurgent states passed during the rebellion, not enacted in aid of

quent on such change, and the time necessary to ascertain the applicability of the new laws. It will be observed that the rule presupposes that the acquired country contains a population governed by well settled laws of their own. Let us inquire whether these reasons apply with equal force to this case.

“California, at the time of its acquisition by the United States, contained but a sparse population. It had long been looked upon as one of the outposts of civilization. Its commercial, agricultural and mineral resources undeveloped, it was considered of little importance by the Mexican government. The body of Mexican laws had been extended over it; but there was nothing upon which they could act, and they soon fell into disuse. The system of government was patriarchal, and administered without much regard to the forms of law, which were scarcely alike in any two districts. Such was the state of the country when the discovery of our mineral wealth roused the whole civilized world to its importance. In a few months the emigration from older states exceeded five times the original population of the country. A state government was immediately formed to meet the wants of this unexpected population. The whole world was amazed by our sudden progress; and even the federal government, startled from her usual caution by so novel a spectacle, beheld us take our place as a sovereign state, before her astonishment had subsided.

Emigration brought with it business, litigation, and the thousand attendants that follow in the train of enterprise and civilization. The laws of Mexico, written in a different language, and founded on a different system of jurisprudence, were to them a sealed book. The necessities of trade and commerce required prompt action. This flood of population had destroyed every ancient landmark; and finding no established laws or institutions, they were compelled to adopt customs for their own government. The proceedings in courts were conducted in the English language; and justice was administered by American judges without regard to Mexican laws. Custom was for all purposes law. No law concerning usury was recognized or supposed to exist. Under this peculiar system this country acquired its present wealth and prosperity. But it would have been much better for the permanent interests of this country, that its progress had been less rapid, if, after escaping from the tutelage of a territorial government, we are to be fettered by the dead carcass of a law which expired at its birth, for want of human transactions on which to subsist; the application of which would overturn almost every contract entered into before the act abolishing all laws, etc.,—would unhinge business and entirely destroy confidence in the country.

“There is no case like the present to be found in the history of the world. In every instance cited in

¹ *United States v. Powers' Heirs, supra; McNair v. Hunt*, 5 Mo. 300, 308.

the rebellion but relating to the domestic affairs of the people of the state as a community, were valid after the war and the restoration of the states to all their rights in the Union.¹ The same general form of government, the same general laws for the administration of justice and the protection of private rights, which had existed in the states prior to the rebellion, remained during its continuance and afterwards. As far as the acts of the states did not impair, or tend to impair, the supremacy of the national authority, or the just rights of the citizens under

the books the acquired country had a population of its own, governed by known laws; and the rate of emigration had been small, compared to the number of the original inhabitants. History may be searched in vain for an instance parallel with the emigration to this country. If it would be unjust to compel a densely populated state to take notice of the laws of the conqueror or acquiring power, without any other act than that of submission or cession, it would be still more unjust in this country, where the American population so greatly outnumbered the natives, to compel us to apply their law, instead of our own, to contracts. In this case, the rule consequent upon the discovery of an uninhabited territory might almost apply; and to construe these contracts by a system of laws not adapted to the age nor to the spirit of our institutions, altering the plain meaning of the parties, and giving to them conditions which were never intended, would work the grossest injustice."

A rehearing was granted, and at a subsequent term a different conclusion was arrived at, and the foregoing views were rejected. A majority of the court, by Heydenfeldt, J., said: "When the territory now comprised in the state of California was under Mexican dominion, its judicial system was that of the Roman law, modi-

fied by Spanish and Mexican legislation. Upon the formation of the present state government *that system was ordained by a constitutional provision* to be continued until it should be changed by the legislature." 2 Cal. 568. See *Ryder v. Cohn*, 37 Cal. 69, per Rhodes, J., dissenting.

When the King of England conquers a country, there, the conqueror, by saving the lives of the people conquered, gains a right and property in such people, in consequence of which he may impose upon them such laws as he pleases. But until such laws are given by the conquering prince, the laws and customs of the conquered country hold place, unless they are contrary to the conqueror's religion, enact something *malum in se*, or are silent; in all such cases the laws of the conquering country prevail. 2 P. Wms. 75.

¹ *Horn v. Lockhart*, 17 Wall. 570; *Texas v. White*, 7 id. 733; *Sprott v. United States*, 20 Wall. 459; *S. C. 8 Ct. of Cl. 499*; *Williams v. Bruffy*, 96 U. S. 176; *Watson v. Stone*, 40 Ala. 451; *Home Ins. Co. v. United States*, 8 Ct. of Cl. 449; *Hawkins v. Filkins*, 24 Ark. 286; *Harlan v. State*, 41 Miss. 566; *Berry v. Bellows*, 30 Ark. 198; *Shattuck v. Daniel*, 52 Miss. 834; *Cook v. Oliver*, 1 Woods, 437; *Hatch v. Burroughs*, id. 439; *Seymour v. Bailey*, 66 Ill. 288.

the constitution, they have, in general, been treated as binding.¹

These laws, necessary in their recognition and administration to the existence of organized society, were the same, with slight exception, whether the authorities of the state acknowledged allegiance to the true or the false federal power. They were the fundamental principles for which civil society is organized into government in all countries, and must be respected in their administration under whatever dominant authority they may be exercised. It is only when in the use of these powers substantial aid and comfort was given or intended to be given to the rebellion, when the functions necessarily reposed in the state for the maintenance of civil society were perverted to the manifest and intentional aid of treason against the government of the Union, that these acts are void.²

§ 21. **Federal and state statutes.**—The sovereign power of making laws in the United States is divided and qualified; a part is vested in the federal congress, and a part in the several state legislatures. Congress has a legislative power only in respect to certain subjects enumerated in the federal constitution; the state legislatures have a general legislative power within the several states. They have not an unlimited power; for the power of each is diminished by the legislative power granted to congress, and it is also restricted by various provisions in the state constitutions.³

The acts of congress passed in the exercise of the enumerated powers are the supreme law of the land,—in the states, in the District of Columbia, in the territories throughout the

¹ *Williams v. Bruffy*, 96 U. S. 176; *Keith v. Clark*, 97 id. 465; *Livingston v. Jordan*, Chase's Dec. 454; *Selden v. Preston*, 11 Bush, 191; *Pennywit v. Foote*, 27 Ohio St. 600; *Dillard v. Alexander*, 9 Heisk. 719; *Rockhold v. Blevins*, 6 Baxt. 115; *Dow v. Johnson*, 100 U. S. 158; *Dorr v. Gibboney*, 3 Hughes, 382.

² *Sprott v. United States*, 20 Wall. 464; *Thorrington v. Smith*, 8 id. 10. The occupation of a place by a Confederate army and the installation of a temporary civil government under its

military cover, suspended co-extensively with their potential range the government and the laws of the state, and not only compelled but legalized submission to the authority, however spurious, of the *de facto* power. *Baker v. Wright*, 1 Bush, 500; *Lay v. Succession of O'Neil*, 29 La. Ann. 722; *Railroad v. Hurst*, 11 Heisk. 625.

³ *Donnell v. State*, 48 Miss. 679; *Thayer v. Hedges*, 22 Ind. 282; *Blair v. Ridgely*, 41 Mo. 63; *Sears v. Cottrell*, 5 Mich. 251, 256.

federal domain, or over such part as such acts are by their terms intended to operate. The state government cannot gainsay such laws, nor resist their authority. All individuals within the territory to which such laws are applicable are subject to their constraining and restraining effect. In the same sense, the state laws are supreme within the state on all the subjects to which they constitutionally relate. The federal government cannot gainsay such laws nor resist their authority.¹

Both federal and state laws in their proper domain of subjects are supreme laws of the land; the former as concerning the interests of all the states or the Union, and the latter as concerning the local affairs and internal interests of the particular state.

§ 22. Both the federal and state laws belong to one system, and though emanating from different legislative bodies, they are not hostile nor foreign to each other. In each state, the laws of congress applicable thereto operate of their own vigor. All persons must take notice of them, and are presumed to know them; all branches of the state government take notice of them; they are within the judicial knowledge of the state courts.

The laws of one state are foreign to other states, and are so regarded in their jurisprudence even as administered in the federal courts. But the laws of each state are laws operating within the territorial sovereignty of the Union, and therefore, as to the federal courts, they are not foreign laws. All the federal courts take judicial notice of the public statutes of the states. In *Owings v. Hull*,² a resort was had to the laws of Louisiana to determine the evidentiary value of a copy of a bill of sale on record in a notary's office. Mr. Justice Story, speaking for the court, said: "We are of opinion that the circuit court [sitting in the district of Maryland] was bound to take judicial notice of the laws of Louisiana. The circuit courts of the United States are created by congress, not for the pur-

¹ *Ableman v. Booth*, 21 How. 506; *Hunter*, 1 Wheat. 304, 343; *Donnell v. State*, 48 Miss. 679; *Cooley's Const. Lim.* 7-27.

Tennessee v. Davis, 100 U. S. 257; ² 9 Pet. 624.
Ex parte Siebold, id. 371; *Martin v.*

pose of administering the local law of a single state alone, but to administer the laws of all the states in the Union, in cases to which they respectively apply. The judicial power conferred on the general government by the constitution extends to many cases arising under the laws of the different states. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. That jurisprudence is then, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts.”¹

§ 23. Territorial laws.—It is settled that congress has a plenary power of legislation over territory belonging to the United States, subject to the restrictions resulting from our republican system and the constitutional guaranties of personal rights.² “All territory,” says Waite, C. J., speaking for the supreme court,³ “within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of congress. The territories are but political subdivisions of the outlying dominion of the United States. They bear much the same relation to the general government that the counties do to the states, and congress may legislate for them as states do for their respective municipal organizations. The organic law of a territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but congress is supreme, and, for the purposes of this department of its governmental authority, has all the

¹ *Pennington v. Gibson*, 16 How. 80, 81; *Railroad Company v. Bank of Ashland*, 12 Wall. 229; *Woodworth v. Spaffords*, 2 McLean, 175; *Cheever v. Wilson*, 9 Wall. 121; *Bennett v. Bennett, Deady*, 300. In this last case Deady, J., said: “The national and state governments, although vested with distinct jurisdictions, are in no sense foreign to each other, but are subordinate and limited parts of one complete system of government. On

principle, then, in the courts of the United States, the judgment of a state court ought to be regarded as a domestic judgment—a judgment given within the territorial sovereignty of the United States, and provable in the ordinary way by the certificate of the custodian of the original—the clerk of the court.”

² *Whart. Am. L. § 464.*

³ *First National Bank v. Yankton*, 101 U. S. 129.

powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the constitution. In the organic act of Dakota there was no express reservation of the power in congress to amend the acts of the territorial legislature; but none was necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories, and all the departments of the territorial government. It may do for the territories what the people, under the constitution of the United States, may do for the states."

§ 24. The existence of this authority in congress was from the early days of the republic a foregone conclusion. It does not rest on any acknowledged specific grant in the constitution, nor did it await a discovery of any other power from which by general agreement it was to be implied. In *American Insurance Co. v. Canter*,¹ Marshall, C. J., said: "Perhaps the power of governing a territory belonging to the United States which has not, by becoming a state, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned." And in another part of the opinion he said: "In legislating for them [the territories] congress exercises the combined powers of the general and of a state government."² In the late case which has been referred to,³ the chief justice, delivering the opinion of the court, recognizes the same uncertainty of derivation, and repeats the announcement absolutely that the existence of the power is conceded.⁴

¹ 1 Pet. 511, 541.

² *Dred Scott v. Sandford*, 19 How. 445; *Benner v. Porter*, 9 How. 242.

³ *First National Bank v. Yankton*, *supra*.

⁴ In *Dred Scott v. Sandford*, 19 How. 393, the learning on this point was exhausted. In the opinion of the court, delivered by Taney, C. J., it is said: "The counsel for the plaintiff

§ 25. Territories have but temporary governments — Are in tutelage to become states.— The federal constitution provides for the admission of new states.¹ The provision is general and has been applied not only to the admission of new states in territory belonging to the government when the constitution was adopted, but to new states formed in newly-acquired territory. It has been decided to be contrary to the constitution to acquire territory with any other view than to the formation and admission of new states.²

has laid much stress upon that article in the constitution which confers on congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;' but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to or was claimed by the United States, and was within their boundaries as settled by the treaty with Great Britain; and can have no influence upon a territory afterwards acquired from a foreign government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more."

In another part of the opinion the authority of congress over territory subsequently acquired was thus discussed:

"And indeed the power exercised by congress to acquire territory and establish a government there, according to its own unlimited discretion, was viewed with great jealousy by the leading statesmen of the day. And in the *Federalist* (No. 38), written by Mr. Madison, he speaks of the acquisition of the Northwestern Territory by the confederated states, by the cession from Virginia, and the

establishment of a government there, as an exercise of power not warranted by the articles of confederation, and dangerous to the liberties of the people. And he urges the adoption of the constitution as a security and safeguard against such an exercise of power.

"We do not mean, however, to question the power of congress in this respect. The power to expand the territory of the United States by the admission of new states is plainly given; and in the construction of this power by all the departments of the government, it has been held to authorize an acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a state, and not to be held as a colony and governed by congress with absolute authority; and, as the propriety of admitting a new state is committed to the sound discretion of congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a state upon an equal footing with the other states, must rest upon the same discretion."

¹Sec. 3, art. 4.

²In the majority opinion in *Dred Scott v. Sandford*, already cited, the chief justice said: "There is certainly no power given by the constitution to

"The very fact," says Mr. Wharton, "that territories are infant states, to be admitted into the Union on maturity, shows that they are to be governed on the same general principles, as far as is applicable, as are states, just as infants, *mutatis mutandis*, are governed on the same general principles, so far as concerns safeguards, as are adults."¹ Only a political change is produced by admission into the Union as a state. Congress then ceases to legislate for its people, or in regard to their internal and domestic concerns. They have thus been admitted to the exercise of the right of self-government. The territorial laws enacted by congress or the local legislature continue in force so far as they are consistent with the new condition of statehood and the provisions of the state constitution.²

the federal government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new states. That power is plainly given; and if a new state is admitted, it needs no further legislation by congress, because the constitution itself defines the relative rights and powers and duties of the state, and the citizens of the state and the federal government. But no power is given to acquire a territory to be held and governed permanently in that character." He amplifies thus on another page: "The principle upon which our governments rest, and upon which alone they continue to exist, is the union of states, sovereign and independent, within their own limits in their internal and domestic concerns, and bound together as one people by a general government possessing certain enumerated and restricted powers, delegated to it by the

people of the several states, and exercising supreme authority within the scope of the powers granted to it, throughout the dominion of the United States. A power, therefore, in the general government to obtain and hold colonies and dependent territories over which they might legislate without restriction, would be inconsistent with its own existence in its present form. Whatever it acquires it acquires for the benefit of the people of the several states who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted." See historical notes in opinion of Mr. Justice Campbell in same case, pp. 507-508. Whart. Am. L. §§ 462, 464.

¹ Id. § 464.

² *Ante*, § 19. See *Benner v. Porter*, 9 How. 234; *Territory v. Lee*, 2 Mont. 124; *Am. Ins. Co. v. Canter*, 1 Pet. 511.

CHAPTER II.

THE LEGISLATURE, AND THE ESSENTIAL PARLIAMENTARY PROCEDURE.

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| <p>§ 26. The legislature.</p> <p>27. Common-law record of legislation conclusive.</p> <p>28. Our legislative record.</p> <p>30. Effect of constitutional regulations of legislative procedure.</p> <p>33. States holding statutes conclusive in Missouri and Mississippi.</p> <p>35. Same in Louisiana, etc.</p> <p>36. Evidence of statutes in New York; Indiana.</p> | <p>§ 41. Constitutional regulations of procedure, where mandatory.</p> <p>42. Legislative journals and files are evidence.</p> <p>46. Presumption in favor of validity of statutes.</p> <p>49. Required reading of bills.</p> <p>51. Necessity of signature of presiding officers.</p> <p>52. How validity of statutes tried.</p> <p>52. When acts should be approved.</p> |
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§ 26. **The legislature.**—It is a primary requisite to the enactment of laws that there be a legal legislature. In time and place the members entitled so to do must lawfully convene.¹

The American legislature, acting under written constitutions, can only exercise a delegated power. It must keep within the limits of power granted to it and observe the directions as to membership, the time of meeting and length of its sessions, procedure in its deliberations, the number of votes necessary for any purpose, and the making of its records.

When convened in extra session and limited by the constitution to business for which the session was specially called, all acts passed relating to other subjects will be void.²

If the constitution prohibits the introduction of bills after a certain period in a session, the regulation cannot be evaded by substituting new measures by amendment of pending bills.³

¹ Tennant's Case, 3 Neb. 409; State v. Judge, 29 La. Ann. 223; Macon, etc. R. R. Co. v. Little, 45 Ga. 370; Gormley v. Taylor, 44 Ga. 76. See Rohrbacker v. Jackson, 51 Miss. 735; People v. Hatch, 33 Ill. 9, 151.

² Davidson v. Moorman, 2 Heisk. 575; Jones v. Theall, 3 Nev. 233. See Speed v. Crawford, 3 Met. (Ky.) 207.

³ Pack v. Barton, 47 Mich. 520; Powell v. Jackson, 51 id. 129. See Sayre v. Pollard, 77 Ala. 608.

But whatever is within the proper scope of amendment is admissible after that period, and this embraces whatever is germane to the purpose which the bill had in view. Therefore, it was held that a bill to organize a township might be changed by amendment to organize the same territory into a county.¹

§ 27. **The common-law record of legislation conclusive.**—The British parliament, including the three great estates of the realm—the king, lords and commons,—possesses a transcendent power. It enacts laws by a procedure devised by itself, and it is subject to no paramount law. When a statute is framed and recorded according to its traditional forms as an act of parliament, it is a record which expresses the will of the sovereign power. General acts are “enrolled by the clerk of the parliament, and delivered over into the chancery, which enrollment in the chancery makes them the original record.” Private acts filed, sealed, and remaining with the clerk of parliament, are also original records.² The record is deemed a

¹ Pack v. Barton, *supra*.

² King v. Arundel, Hob. 110; 5 Comyn's Dig. Parliament; 1 Phil. Evi. 316. Anciently, the manner of proceeding in parliament was much different from what it is at the present day; for, formerly, the bill was in the form of a petition, and these petitions were entered upon the lords rolls, and upon these rolls the royal assent was likewise entered; and upon this, as a groundwork, the judges used, at the end of the parliament, to draw up the act of parliament into the form of the statute which was afterwards entered upon the rolls, called the *statute-rolls*; which were different from those called the *lords-rolls*, or the rolls of parliament; upon these *statute-rolls* neither the bill nor petition from the commons, nor the answer of the lords, nor the royal assent, were entered, but only the statute, as it was drawn up and penned by the judges; and this was the method till about Henry the Fifth's time. In his time, it was desired that the acts of parlia-

ment might be drawn up and penned by the judges before the end of parliament; and this was by reason of a complaint then made, that the statutes were not equally and fairly drawn up and worded. After the parliament was dissolved or prorogued in Henry the Sixth's time, the former method was altered, and these bills *contententes formam actus parliamenti* were first used to be brought into the house. The bills (before they were brought into the house) were ready drawn, in the form of an act of parliament, and not in the form of a petition, as before; upon which bill it was written by the commons, *soite baile al seigneurs*; and by the lords, *soit bayle al roye*; and by the king, *le roy le veut*; all this was written upon the bill, and the bill, thus indorsed, was to remain with the clerk of the parliament, and he was to enter the bill thus drawn at first, in the form of an act of parliament or statute, upon the *statute rolls*, without entering the answer of the king, lords or commons upon the

high record. It imports absolute verity, and must be tried by itself, *teste meipso*. This is the dignity and quality of all technical records. No plea can raise any other question regarding a record than that of its existence. Upon that issue the record itself is the only evidence; the trial is merely by the record. A record or enrollment is a monument of so high a nature, and imports in itself such absolute verity, that if it be pleaded that there is no such record there is no trial by witnesses, jury or otherwise than by the court inspecting the record itself.¹ The court being bound to take judicial notice of the laws, no plea can be necessary or permitted denying the existence of the record of an act of parliament. In Prince's Case² it was resolved "that against a general act of parliament, or such act whereof the judges *ex officio* ought to take notice, the other party cannot plead *nul tiel record*; for of such acts the judges ought to take notice; but if it be misrecited the party ought to demur in law upon it. And, in that case, the law is grounded upon great reason; for God forbid, if the record of such acts should be lost or consumed by fire or other means, that it should tend to the general prejudice of the commonwealth; but rather, although it be lost or consumed, the judges, either by the printed copy, or by the record in which it was pleaded, or by other means, may inform themselves of it."³

§ 28. **Legislative records.**—The conclusiveness of records is a conclusion of the common law. We have in America the common law so far as it is suited to our condition. A technical record here has the same effect as by the common law of England, except as it is modified by the written law, or conditions are so changed as to render the common law inapplicable. The conditions in respect to legislation in this country, where a mandatory procedure is prescribed in a constitution, are not the same as in England.⁴

statute rolls, and then issued out writs to the sheriffs, with transcript of the statute rolls, viz.: of the bill drawn at first in the form of a statute and without the answer of the king, lords and commons, to the bill, to proclaim the statute. Bac. Abr. title Court of Parliament, F.

¹ 2 Black. Com. 331.

² 8 Coke, 28.

³ Dwarries on St. 613; Sherman v. Story, 30 Cal. 276; Eld v. Gorham, 20 Conn. 8.

⁴ The dissenting opinion of Smith, C. J., in Green v. Weller, 32 Miss. 704, is instructive on this point. He says:

§ 29. A legislature in our republican system of government is a representative body. Its power is delegated by a charter from the people — a constitution. This is a sacred instrument,

"In Great Britain there is no written fundamental law defining and limiting the powers of the government, by which the validity of the acts of any of the departments may be tested. The parliament, in a political and legislative sense, is omnipotent and supreme. The power and jurisdiction of parliament, says Lord Coke, are so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds. 4 Inst. 36. 'And so long,' adds Sir William Blackstone, 'as the British constitution lasts, it may be safely affirmed that the power of parliament is absolute and uncontrolled.' 2 Com. 162.

"A void act of legislation necessarily implies the existence of a superior and controlling power in the state. There are but two conceivable reasons for which an act can be void. First, for want of power in the legislature to pass it. Second, because it has not been passed in the method required to make it valid. And the universally received doctrine in England 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 whatever. The idea, therefore, of an unconstitutional law of parliament can have no existence under the English system of government. The parliament rolls, which are transcripts of the acts, made up under the supervision of officers appointed by parliament, and declared by law to be records, necessarily, I may say naturally, are conclusive evidence of the existence of the statute, and imply the due performance of the necessary prerequisites in their enact-

ment. It is a rule which flows from the absolute and unlimited jurisdiction and power of parliament.

"The principles of the common law, unsuited to our condition, or repugnant to the spirit of our government, have no existence within this commonwealth. It required no act of positive legislation to repeal them. They have been excluded by the silent operation of our institutions. It is clear, therefore, that this rule, as a principle of the common law, can have no operation within this state.

"For under the American theory of government the *jus summi imperii*, the supreme, absolute, uncontrolled authority does not reside in any of the departments of the government, nor in all of them united. It is inherent in the people, from whom all power is derived, and upon whose consent all government is founded. The constitution derives its existence from the immediate act and consent of the people. It is a law to the government which derives its just powers therefrom, or from the assent of the governed, for whose benefit that power is intrusted. As the constitution is the supreme law, all the acts of the government or the departments thereof, done in contravention of its provisions, are inoperative and void. An act of the legislature which has not been passed in conformity with the directions of the constitution, is equally void with one whose terms violate its provisions. Bill of Rights, art. 3.

"The judiciary, like all the departments, are bound by the constitution, and sworn to support it. It is, therefore, their duty to pronounce an act of the legislature null, and to refuse

and upon it as a foundation is reared the whole fabric of our civil government. It confers all the powers deemed necessary to that government; in its limitations is all the security of the people against usurpation. Therefore, it is one of the beneficent axioms of our constitutional jurisprudence that the people are the source of all the power possessed and exercised by the organized state; its restrictions are of the nature of prohibitions and mandatory. The authority which confers the power to make laws has the acknowledged right to qualify the grant and peremptorily regulate the exercise of the power conferred; so that acts of legislation to be valid must not only be within the grant and not exceeding the restrictions imposed, but also be passed or adopted in the mode or by the procedure prescribed.¹

§ 30. Effect of constitutional provisions prescribing parliamentary procedure.—The federal constitution and that of nearly every state in the Union contain directions in respect to the manner of enacting as well as of authenticating statutes. These directions vary in terms and to considerable extent in substance. As to some very important particulars compliance will not appear upon the face of the statute. The procedure thus regulated and directed includes the meeting of the two houses, their action respectively in the introduction, amendment and passage of bills, communications between the houses, the time of presenting bills to the governor for approval, and of his action thereon. In part their procedure is historically entered, and in some particulars required to be entered in the legislative journals; in part it so occurs that material points will not be or are not required to be mentioned in any record or official memorial; as for instance when a bill is presented to the governor, or when he approves it. Legislative journals were in use in the British parliament at the time

to give it effect, if it be void for either of these causes."

In *Sherman v. Story*, 30 Cal. 253, is a lucid and thorough exposition of the common law on this subject, and it seems to have been properly applied to the case under consideration, for there was no departure from a constitutional practice complained of.

¹ *Legg v. Mayor*, etc. 42 Md. 203; *Moog v. Randolph*, 77 Ala. 597; *Jones v. Hutchinson*, 43 id. 721; *Perry County v. Railroad Co.* 58 id. 546; *Moody v. State*, 48 id. 115; *S. C. 17 Am. R. 28*; *Supervisors v. Heenan*, 2 Minn. 330.

our legislative practice under constitutions commenced, and had been for centuries. If the process of enacting laws is not regulated by constitution; or if so regulated, the provisions on that subject are deemed addressed solely to the law-making department, the journals hold the same place in our polity and jurisprudence as is assigned to them by the common law. They cannot be appealed to to impeach the regular record of a statutory enactment. That record whatever it may be imports absolute verity; imports the regular enactment of the statute by the proper forms of legislation; it speaks in its own words the sovereign will. Found in the proper custody it proves and identifies itself; it is a record not to be contradicted by the legislative journals, nor by any other evidence.¹

§ 31. States holding statutes conclusive—Missouri.—If the enrollment or original record of a statute is regular on its face; that is, if the act is framed with no infirmity on its face, is duly promulgated,² or properly authenticated and deposited in the proper office, it is conclusively presumed to have been regularly enacted; the record is invulnerable to collateral attack and proves itself. This is the rule in several states having constitutions regulating the legislative procedure and requiring legislative journals to be kept. A leading case on this subject is *Pacific Railroad v. The Governor*.³

The act under discussion had been vetoed by the governor, and the question was whether it had been subsequently passed by the proceedings required by the constitution.⁴

¹*Sherman v. Story*, 30 Cal. 253; *People v. Burt*, 43 id. 560; *Railroad Tax Cases*, 13 Fed. Rep. 722. See *ante*, § 28; *post*, § 52.

²*State Lottery Co. v. Richoux*, 23 La. Ann. 743; S. C. 8 Am. R. 602; *Whited v. Lewis*, 25 La. Ann. 568.

³23 Mo. 353.

⁴The case arose under the constitution of 1820, which contained these provisions: “. . . They [the houses] shall each, from time to time, publish a journal of their proceedings, except such parts as may, in their opinion, require secrecy; and the yeas and nays on any question shall be entered

on the journal, at the desire of any two members.” Art. 3, sec. 18.

Sec. 21. “Bills may originate in either house, and may be altered, amended or rejected by the other; and every bill shall be read on three different days in each house, unless two-thirds of the house where the same is depending shall dispense with this rule; and every bill, having passed both houses, shall be signed by the speaker of the house of representatives and by the president of the senate.”

Art. 4, sec. 10. “Every bill which shall have been passed by both houses

Scott, J., delivering the opinion of the court, used this language: "Whilst the power of the courts to declare a law unconstitutional is admitted on all hands as being necessary to preserve the constitution from violation, yet such power is claimed and exercised in relation to laws which show on their face that the constitutional limit has been transcended. The reason of this principle limits the claim of jurisdiction to such cases. The constitution is designed to limit the powers of the government, and to confine each of the departments to its appropriate sphere. If the legislature exceed its powers in the enactment of a law, the courts being sworn to support the constitution must judge that law by the standard of the constitution and declare its [in]validity. But the question whether a law on its face violates the constitution is very different from that growing out of the non-compliance with the forms required to be observed in its enactment. In the one case a power is exercised, not delegated, or which is prohibited, and the question of the validity of the law is determined from the language of it. In the other, the law is not, in its terms, contrary to the constitution; on its face it is regular, but resort is had to something behind the law itself in order to ascertain whether the general assembly, in making the law, was governed by the rules prescribed for its action by the constitution. This would seem like an inquisition into the conduct of the members of the general assembly, and it must be seen at once that it is a very delicate power, the frequent exercise of which must lead to endless confusion in the administration of the law."

§ 32. Further on in the opinion the learned judge said: "The sense of the words in which the forms to be observed in legis-

of the general assembly, shall, before it becomes a law, be presented to the governor for his approval. If he approve, he shall sign it; if not, he shall return it, with his objections, to the house in which it shall have originated, and the house shall cause the objections to be entered at large on its journal, and shall proceed to reconsider the bill. If, after such reconsideration, a majority of all the members elected to that house shall agree

to pass the same, it shall be sent together with the objections to the other house, by which it shall be in like manner reconsidered, and if approved by a majority of all the members elected to that house, it shall become a law. In all such cases the votes of both houses shall be taken by yeas and nays; the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. . . ."

lation are prescribed may be matter of doubt. Different opinions may be entertained as to the meaning of the language in which they are expressed, as well as to the end or object of them. This very case furnishes an illustration of the truth of this remark. The members of the general assembly may conscientiously believe that they have pursued the constitutional course.¹ But to give the executive and judicial departments a right to revise this exercise of their judgment, would it not be subjecting the legislature to a surveillance which, instead of making it a co-ordinate department, would subject it to a dependence on the others? There is a fitness in making each department the sole judge of the rules prescribed for its conduct; this is necessary to render them co-ordinate, and not dependent on each other. . . . We do not maintain that

¹ In *State v. Mead*, 71 Mo. 266, the conditions here deprecated were fully adopted as a result of subsequent changes in the constitution. The act in question was passed under a constitution containing the following provision:

"No bill shall become a law until the same shall have been signed by the presiding officers of each of the two houses in open session. And before such officer shall affix his signature to any bill he shall suspend all other business, declare that such bill will now be read, and that if no objection be made he will sign the same, to the end that it shall become a law. The bill shall then be read at length, and if no objection be made he shall in the presence of the house, in open session, and before any other business is entertained, affix his signature, which fact shall be noted on the journal and the bill immediately be sent to the other house. When it reaches the other house the presiding officer thereof shall immediately suspend all other business, announce the reception of the bill, and the same proceedings shall thereupon be observed in every respect as in the house

in which it was first signed. If in either house any member shall object that any substitution, omission or insertion has occurred, so that the bill proposed to be signed is not the same in substance and form as when considered and passed by the house, or that any particular clause of this article of the constitution has been violated in its passage, such objections shall be passed upon by the house, and, if sustained, the presiding officer shall withhold his signature, but if such objection shall not be sustained, then any five members may embody the same over their signatures, in a written protest, under oath, against the signing of the bill. Said protest, when offered in the house, shall be noted upon the journal, and the original shall be annexed to the bill to be considered by the governor in connection therewith."

The first clause was held mandatory, but the others directory, except that in case of protest they were submitted with the bill to the governor, and to be considered by him,—that this was the remedy provided by the constitution for any supposed infraction of those clauses.

the legislature can prevent a scrutiny into its acts, which the constitution designed should be made, by any mode of authentication it may adopt. We have endeavored to show that the constitution never contemplated that objections of the character urged against the law whose validity is now under consideration should be raised against a bill passed with the approval of the governor. There is no reason why objections of like character should be raised against a bill passed against his will. . . . Upon the whole, we are of the opinion that the objections taken against the mode of passing this law by the general assembly on its reconsideration are untenable, and the constitution and law preclude an inquiry as to the existence of such objections; the constitution regarding the provisions alleged to have been violated in the passage of this law as merely directory, and, being so, a departure from them, even if there was a departure, would not render the law void."

§ 33. Statute-record conclusive in Louisiana and Mississippi.—All the constitutions of Louisiana have required each house of the general assembly to keep and publish weekly a journal of its proceedings, and to enter therein the yeas and nays of the members on any question at the desire of any two of them. And also has provided that "No bill shall have the force of a law until on three several days it be read in each house of the general assembly, and free discussion be allowed thereon, unless, in case of urgency, four-fifths of the house where the bill shall be depending deem it expedient to dispense with this rule." In *State Lottery Co. v. Richoux*,¹ it was said by the court: "When a legislative act is duly promulgated according to the constitution and laws under which it is passed, we find no authority in the judiciary department to look behind it and determine its validity or invalidity from the proceedings of the general assembly in adopting it. Such a course, it would seem, is not sustainable on the theory of the independent and separate action of the three branches of the state government. Where a legislative act is attacked on the ground that it contains provisions that are unconstitutional, the question of its validity is properly within the scope of judicial action. The courts have power, when a constitu-

¹ 23 La. Ann. 748; S. C. 8 Am. R. 602. See *Whited v. Lewis*, 25 La. Ann. 568.

tional question is raised, to examine whether the thing ordered, permitted or forbidden to be done may have effect under the sanction of the constitution. The question should be, is the law itself constitutional as to its provisions and what it declares, and not whether it is constitutional as to the manner of its enactment or the proceedings by which it was enacted."

§ 34. In Mississippi the same subject was thus discussed in *Green v. Weller*:¹ "It may be that legislative acts may be passed without a compliance with the requirements of the constitution. If such defect or violation appear on the face of the act, or by that which constitutes the record, which can be judicially noticed, the power of the court to determine the question is indisputable. But if the proper record shows that the act has received the sanctions required by the constitution as evidence of its having been passed agreeably to the constitution, and its provisions be not repugnant to the constitution, the regularity and stability of government and the peace of society require that it should have the force of a valid law."²

§ 35. *Same — In other states.*— The constitution of Nevada requires particular proceedings in the passage of a legislative act. Each house must keep a journal of its own proceedings which shall be published; that "every bill shall be read by sections on three several days in each house, unless in case of emergency two-thirds of the house where such bill may be pending shall deem it expedient to dispense with this rule; but the reading of a bill by sections on its final passage shall in no case be dispensed with, and the vote on the final passage of any bill or joint resolution shall be taken by yeas and nays to be entered on the journals of each house; and a majority of all the members elected to each house shall be necessary to pass every bill or joint resolution; and all bills or joint resolutions so passed shall be signed by the presiding officers of the respective houses, and by the secretary of the senate and clerk of the assembly."³ It is there held that the court, for the purpose of informing itself of the existence and terms of a law, cannot look beyond the enrolled act certified by these officers who are charged by the constitution with the duty of

¹ 32 Miss. 690.

³ Art. 4, sec. 18.

² Const. 1868, art. 4, secs. 14, 23. See *Swann v. Buck*, 40 Miss. 268.

certifying and with the duty of deciding what laws have been enacted.¹ Like rulings have been made under similar constitutional provisions in Pennsylvania,² Iowa,³ New Jersey⁴

¹ *State v. Swift*, 10 Nev. 176; *State v. Glenn*, 18 id. 39.

² Const. 1873, art. 3, sec. 4; art. 2, sec. 12; *Commonwealth v. Martin*, 107 Pa. St. 185; *Kilgore v. Magee*, 85 id. 412.

³ Const. 1846, art. 3, secs. 9, 11; Const. 1857, art. 3, secs. 9, 17; *Clare v. State*, 5 Iowa, 510; *Duncombe v. Prindle*, 12 id. 1.

⁴ Const. 1876, art. 4, sec. 4. In the leading case in that state on this subject (*Pangborn v. Young*, 32 N. J. L. 29), the court by Beasley, C. J., said: "From the earliest times, so far as I am able to ascertain, it has been the invariable course of legislative practice in this state, for the speaker of each house to sign the bill as finally engrossed and passed. It is likewise certified by indorsement by the clerk of the house in which it originated. With these attestations of authenticity upon it, it is then filed in the office of the secretary of state. This has been the course of proceeding from certainly a very remote period to the present time; under our present constitution the written approval of the governor is requisite. There seems, therefore, to be no doubt whatever that these copies, thus authenticated and filed, are to be regarded as enrolled bills, corresponding in their general character, and partaking, if not in all, at least in most respects, of the nature of parliamentary rolls. In the statute book they are frequently referred to as enrolled bills; and if we go back to provincial times we find indorsed upon these copies, with the executive approval, a direction to enroll them, which meant nothing more than to file them. These are the character-

istics and nature of the copies of legislative bills deposited according to the ordinary routine in the office of the secretary of state. . . . The principal argument in favor of this judicial appeal from the enrolled law to the legislative journal, and which was much pressed in the discussion at the bar, was, that the existence of this power was necessary to keep the legislature from overstepping the bounds of the constitution. The course of reasoning urged was that if the court cannot look at the facts and examine the legislative action, that department of the government can, at will, set at defiance, in the enactment of statutes, the restraints of the organic law. This argument, however specious, is not solid." The answer of the court, briefly stated, was that if the legislature intends a violation of the constitution in the enactment of a statute it is futile to rely on its journals or any extrinsic evidence to show the irregularity. The journals are under its direction, and not kept nor authenticated in a manner to weigh as evidence against enrolled acts. "In my estimation," said the chief justice, "the doctrine in question if entertained would, as against legislative encroachments, be useless as a guard to the constitution, and it certainly would be attended with many evils. Its practical application would be full of embarrassment. If the courts, in order to test the validity of a statute, are to draw the comparison between the enrolled copy of an act and the entries on the legislative journal, how great, to have the effect of exploding the act, must be the discrepancy between the two? Will the omission of any provision,

and New York since the adoption of the constitution of 1846.¹

§ 36. Evidence of statutes in New York.— Though the constitution of New York provides that the votes required on the passage of bills shall be taken by yeas and nays and entered on the journals, it is nevertheless held that a certificate made pursuant to a statute by the secretary of state on acts being deposited in his office, certifying the day, month and year when the same became a law, excludes all resort to any other evidence of its passage, and makes the act so deposited and certified the original record of it, invulnerable under the common-law rules applicable to enrolled acts of parliament. The statute² provides that such certificate shall be conclusive evidence of the facts therein declared.³

§ 37. Same.— State of Indiana.— The Indiana constitution of 1851 required each house to keep a journal of its proceedings and publish the same.⁴ It also provides that “every bill shall be read by sections, on three several days in each house, unless, in case of emergency, two-thirds of the house where such bill may be depending shall, by a vote of yeas and nays, deem it expedient to dispense with this rule; but the reading of a bill by sections, on its final passage, shall in no case

no matter how unimportant, have that effect? The difficulty of a satisfactory answer to these and similar interrogatories is too apparent to need comment. And, again, to notice one among the many practical difficulties which suggest themselves, what is to be the extent of the application of this doctrine? If an enrolled statute of this state does not carry within itself conclusive evidence of its own authenticity, it would seem that the same principle must be extended to the statutes, however authenticated, of other states.” The court also mentions that in the frame of the state government there are three co-ordinate branches, in all things equal and independent, each in its sphere the trusted agent of the public; and it is arrogating an authority, not

given to the judiciary, to inquire into the veracity of the certificate by which the legislature by its officers authenticates its enactments. In the opinion of the court, the power to certify to the public laws itself has enacted is one of the trusts of the constitution to the legislature of the state.

¹ Art. 3, secs. 11, 15; *People v. Supervisors*, 8 N. Y. 317, 327, 328.

² 1 R. S. p. 187, §§ 10, 11.

³ See *People v. Devlin*, 33 N. Y. 269, 283; *People v. Commissioners*, 54 id. 276; *Purdy v. People*, 4 Hill, 384; *People v. Purdy*, 2 id. 31; *DeBow v. People*, 1 Denio, 14; *Warner v. Beers*, 23 Wend. 125; *Thomas v. Dakin*, 22 id. 9.

⁴ Art. 4, sec. 12.

be dispensed with; and the vote on the passage of every bill or joint resolution shall be taken by yeas and nays.”¹ By another section it is declared that “a majority of all the members elected to each house shall be necessary to pass every bill or joint resolution; and all bills and joint resolutions so passed shall be signed by the presiding officers of the respective houses.”² A like vote after a veto will adopt the bill, and give it the force of law; but no similar certificate of the presiding officers in that case is provided for.³ If the governor fail for three days, Sundays excepted, to act upon a bill after it is presented to him, it becomes a law without his signature, unless a general adjournment prevents its return, and he does not, within five days after the adjournment, file his objections thereto in the office of the secretary of state. No verification of these facts appears to be provided for in the constitution preliminary to the deposit of the act with the secretary of state. The constitution also prohibits the presentation to the governor of any bill during the last two days before the final adjournment.

§ 38. In *Evans v. Browne*,⁴ the act appears without the governor's approval. It was accompanied, however, by a statement signed by the governor, and it may be inferred he caused it to be filed. In his statement he explains that it was a house bill amended in the senate, and the amendments concurred in by the house the day after forty-two members had resigned by delivering their resignations to him in writing, and thereby as claimed reducing the number below a constitutional quorum. The bill was certified by the presiding officers. It was held that where a statute is authenticated by the signature of the presiding officers of the two houses, the courts will not search further to ascertain whether such facts existed as gave constitutional warrant to those officers to thus authenticate the act as having received legislative sanction in such manner as to give it the force of law. The court say: “The framers of our government have not constituted it [the judiciary] with faculties to supervise co-ordinate departments and correct or prevent abuses of their authority. It cannot authenticate a statute; that power does not belong to it; nor can it

¹ Art. 4, sec. 18.

² Art. 4, sec. 25.

³ See art. 5, sec. 14.

⁴ 50 Ind. 514.

keep the legislative journal. It ascertains the statute law by looking at its authentication, and then its function is merely to expound and administer it. It cannot, we think, look beyond that authentication, because of the constitution itself."

§ 39. In *Bender v. State*,¹ it was held not for the court to look beyond the enrolled act of the legislature to ascertain whether there had been a compliance with the injunction of the constitution that "No bill shall be presented to the governor within the last two days next preceding the final adjournment of the general assembly."²

§ 40. It thus appears that in these several states legislative acts may be enrolled; that is, become of record in the office of the secretary of state by agencies not appointed in the constitution, and without any verification on certain points as to which there are positive directions or prohibitions in the constitution, without verification by any officer charged in the constitution with the duty to know the essential facts, or standing in such relation to the people that in his certificate should be reposed an absolute confidence that the requirements of the constitution have been obeyed in all the procedure which it regulates. If it may be said that there are no certificates required by the constitution to authenticate the journals, so it may be said that none is so required to verify the entire process of enactment, whether the act be enrolled with or without executive approval.

The printed statutes under all the authorities may be corrected by reference to the enrolled act, especially if the discrepancy is pointed out before public acquiescence in or ratification of the statute as published.³

¹ 53 Ind. 254.

² In the Texas constitution the governor must act on every bill presented to him one day previous to the adjournment of the legislature before the adjournment; otherwise it will become a law without his approval; and under it it is held that the governor must have the bill at least twenty-four hours before the adjournment. *Hyde v. White*, 24 Tex. 137; Const. 1845, art. 5, § 17; Const.

1868, art. 4, § 25; Const. 1866, art. 5, § 17.

³ *Hulburt v. Merriam*, 3 Mich. 144; *Reed v. Clark*, 3 McLean, 480; *People v. Commissioners*, 54 N. Y. 276; *Greer v. State*, 54 Miss. 378; *De Bow v. People*, 1 Denio, 9; *Rex v. Jefferies*, 1 Strange, 446.

It was held in *Town of Pacific v. Seifert*, 79 Mo. 210, that the original roll, as deposited with the secretary of state, is the best evidence of a leg-

§ 41. Constitutional regulations of procedure, where mandatory.—The authority of the organic law is universally acknowledged; it speaks the sovereign will of the people. The sovereign power of the state being inherently in them, their injunctions in the constitution regarding the process of legislation is as authoritative as are those touching the substance of it. If the former are treated as directory to the legislature, acts passed in violation of them, either by intention, inadvertence, or erroneous construction, are nevertheless valid; and the same would be true of like violations of the constitution in respect to the substance of legislation. The law has always been recognized as clear and indisputable, and has been settled without dissent, that acts which are unconstitutional on their face are nullities. And it was settled early in our constitutional jurisprudence that it was the peculiar function and duty of the judiciary to pronounce on their validity. In the exercise of this function the judiciary does not trench on the domain of the legislative department, though it pronounces judgment on its official work. The courts are bound by statutes when they are constitutional, but when otherwise it is the duty of the courts to treat them as void. Acts which contravene any provision of the constitution in their substance are invalid though the constitution has not declared that consequence. The function of the courts is the same to determine the validity of acts questioned on the ground of having been passed by a proceeding not in accordance with the procedure prescribed in the constitution. In a large majority of the states in which the question has arisen, the courts have

islative enactment. Where, however, there is a discrepancy between the charter of the town as published in the printed laws of the state and the statute roll on file in the office of the secretary of state in this, that in the former it was provided that the trustees of the town might impose fines for breach of any of the ordinances not to exceed twenty dollars in amount, and in the latter the word twenty was ninety, and for aught that appeared on the record this discrepancy was first brought to the atten-

tion of the defendant upon the trial, about twenty years after the enactment of the charter, in an action by the town to recover of him the penalty of \$90 for refusing to take out a merchant's license as required by an ordinance, it was held that, under these exceptional circumstances, the printed copy of the charter should control in determining the defendant's liability. See *Att'y-General v. Joy*, 55 Mich. 94; *Pease v. Peck*, 18 How. 595.

held constitutional provisions in reference to parliamentary procedure in legislation to be mandatory, and against permitting any careless or dishonest officer's certificate or use of the great seal, or filing for record of documents having the form of legislative acts, to give the force of law to such acts, if they have not been constitutionally enacted. These courts unite in holding that a valid statute can be passed only in the manner prescribed by the constitution; and when the provisions of that instrument in regard to the manner of enacting laws are disregarded in respect to a particular act, it will be declared a nullity though having the forms of authenticity.¹

§ 42. **Legislative journals and files as evidence.**—The subject of proof has been a prominent one in the discussion of the constitutional provisions relative to legislative procedure. The inconvenience, and sometimes great hardship, to the public resulting from allowing records and published statutes to be, at any time, modified or avoided by extrinsic evidence has been the principal cause of the diversity of judicial opinion

¹ *Legg v. Mayor, etc.* 42 Md. 203; *Berry v. Baltimore, etc.* R. R. Co. 41 id. 446; *S. C. 20 Am. R.* 69; *People v. Mahaney*, 13 Mich. 481; *Green v. Graves*, 1 Doug. 351; *Att'y-General v. Joy*, 55 Mich. 94; *Meracle v. Down*, 64 Wis. 323; *South Ottawa v. Perkins*, 94 U. S. 260; *State v. Platt*, 2 S. C. 150; *S. C. 16 Am. R.* 647; *State v. McLelland*, 18 Neb. 236; *Board of Supervisors v. Heenan*, 2 Minn. 330; *State v. Hastings*, 24 Minn. 78; *Burt v. Winona, etc.* R. R. Co. 31 id. 472; *S. C. 4 Am. & Eng. Cor. Cas.* 426; *Wise v. Bigger*, 79 Va. 369; *Fowler v. Peirce*, 2 Cal. 165; *Smithee v. Campbell*, 41 Ark. 471; *Webster v. Little Rock*, 44 Ark. 536; *Worthen County Clerk v. Badgett*, 32 id. 496; *State v. Little Rock, etc.* R. R. Co. 31 id. 701; *State v. Crawford*, 35 id. 237; *Vinsant v. Knox*, 27 id. 266; *Smithee v. Garth*, 33 id. 17; *Burr v. Ross*, 19 id. 250; *Post v. Supervisors*, 105 U. S. 667; *State v. Francis*, 26 Kan. 724; *Williams v. State*, 6 Lea, 549; *Gaines v. Horrigan*, 4 Lea. 608; *Memphis F. Co. v. Mayor*, 4 Cold. 419; *Spangler v. Jacoby*, 14 Ill. 297; *People v. Starne*, 35 id. 121; *Ryan v. Lynch*, 68 id. 160; *Miller v. Goodwin*, 70 id. 659; *People v. DeWolf*, 62 id. 253; *Houston, etc. R. R. Co. v. Odum*, 53 Tex. 343; *Blessing v. Galveston*, 42 id. 641; *Opinion of Justices*, 35 N. H. 579, 52 id. 622; *Weill v. Kenfield*, 54 Cal. 111; *County of San Mateo v. R. R. Co.* 8 Sawyer, 238; *S. C. 8 Am. & Eng. R. R. Cas.* 1; *Moog v. Randolph*, 77 Ala. 597; *Jones v. Hutchinson*, 43 id. 721; *Perry County v. R. R. Co.* 58 id. 546; *Dane v. McArthur*, 57 id. 454; *Moody v. State*, 48 id. 115; *S. C. 17 Am. R.* 28; *Sayre v. Pollard*, 77 Ala. 608; *State v. Buckley*, 54 id. 599; *Stein v. Leeper*, 78 id. 517; *Osburn v. Staley*, 5 W. Va. 85; *S. C. 13 Am. R.* 640; *Gardner v. Collector*, 6 Wall. 499; *State v. Smalls*, 11 S. C. 262; *State v. Hagood*, 13 S. C. 46; *Bond Debt Cases*, 12 id. 200; *Lyman v. Martin*, 2 Utah, 136; *Brown v. Nash*, 1 Wyoming, 85.

which exists on this subject. The tendency, however, of the law's growth is to preserve the supremacy of constitutional authority, leaving it to the wisdom of the legislature to mitigate any incidental inconvenience by closer observance of the prescribed procedure, and more diligent attention to the making and preservation of a public record of the essentials. The cases cited in the preceding section hold the constitutional injunctions imperative; and as the constitutions require the keeping and publication of legislative journals, these are treated as sources of information to be relied on by the courts as well as the public. In *Fordyce v. Godman*,¹ the court say "if it could be shown that the requisite vote were not given on the passage of a bill, and the evidence were rejected because the bill was properly authenticated, the court would, in effect, hold that a single presiding officer might, by his signature, give the force of law to a bill which the journal of the body over which he presides and which was kept under the supervision of the whole body showed not to have been voted for by the constitutional number of members." The court concluded that "the plain provisions of the constitution are not to be thus nullified, and the evidence which it requires to be kept under the supervision of the collective body must control when a question arises as to the due passage of a bill."²

§ 43. The courts have been exceedingly conservative in their researches involving the validity of statutes having a regular record or authentication; they have not opened the door to all kinds of evidence nor freely consulted all sources of information. They have given great weight to such authentication; irregularity by departing from a practice laid down by the constitution is not readily inferred, where written evidence should exist, in the absence of proof of that nature.

The intention of constitutional provisions that they should operate as conditions, or be treated as mandatory, is inferred largely from the accompanying requirement that legislative journals be kept, preserved and given publicity by publication, and that certain steps in the process of legislation be therein

¹ 20 Ohio St. 1.

Ottawa v. Perkins, 94 U. S. 260;

² *Berliner v. Town of W.* 14 Wis. 378; *Bound v. R. R. Co.* 45 Wis. 543; *Meracle v. Down*, 34 Wis. 323; *South* 446; *Legg v. Mayor, etc.* 42 Md. 203; *Osburn v. Staley*, 5 W. Va. 86; *Berry v. Baltimore, etc.* R. R. Co. 41 Md.

recorded.¹ The parliamentary history of any act in question in the legislative journals and files is the only evidence which the cases generally recognize,² though some cases intimate that other evidence may be considered.³ Parol evidence of the action of the two houses is excluded.⁴

§ 44. The journals, by being required by the constitution or laws, are records. At common law the legislative journals were not strictly records; while admissible in evidence for certain purposes as official memorials or remembrances, they were not admissible to show that an act of parliament had not been passed according to its own rules.⁵ But when required, as is extensively the case in this country, by a paramount law, for the obvious purpose of showing how the mandatory provisions of that law have been followed in the methods and forms of legislation, they are thus made records in dignity, and are of great importance.⁶ The legislative acts regularly authenticated are also records; the acts passed, duly authenticated, and such journals are parallel records, but the latter are superior when explicit and conflicting with the other, for the acts authenticated speak decisively only when the journals are silent, and not even then as to particulars required to be entered therein.

In *Gardner v. The Collector*,⁷ Mr. Justice Miller, speaking for the whole court on the question of proving the date of the president's approval of a bill, laid down this general rule: that "on principle as well as authority, whenever a question arises

¹ *Osburn v. Staley*, 5 W. Va. 86; 115; *Gaines v. Harrigan*, 4 Lea, 608; *People v. Mahaney*, 13 Mich. 481; *Perry County v. R. R. Co.* 58 Ala. Spangler v. Jacoby, 14 Ill. 297; *State* 546; *Jones v. Hutchinson*, 43 id. 721; *v. Buckley*, 54 Ala. 599; *Jones v. Stein v. Leeper*, 78 id. 517; *Spangler v. Hutchinson*, 43 id. 721; *Jacoby*, 14 Ill. 297; S. C. 58 Am. Dec. 571.

² *Moog v. Randolph*, 77 Ala. 597; *Osburn v. Staley*, 5 W. Va. 86; *Happel v. Brethauer*, 70 Ill. 166; *Wise v. Bigger*, 79 Va. 269; *State v. McLelland*, 18 Neb. 236; *Board of Supervisors v. Heenan*, 2 Minn. 330; *People v. Mahaney*, 13 Mich. 481; *Webster v. Little Rock*, 44 Ark. 536; *Smithee v. Campbell*, 41 id. 471; *Weill v. Kenfield*, 54 Cal. 111; *State v. Francis*, 26 Kans. 724; *Williams v. State*, 6 Lea, 549; *Moody v. State*, 48 Ala.

³ *State v. Platt*, 2 S. C. 150; S. C. 16 Am. R. 647.

⁴ *Berry v. Baltimore, etc. R. R. Co.* 41 Md. 446; *Wise v. Bigger*, 79 Va. 269.

⁵ *King v. Arundel*, Hob. 110.

⁶ *Opinion of Justices*, 35 N. H. 579; 52 id. 622; *Wise v. Bigger*, 79 Va. 269; *State v. Smalls*, 11 S. C. 262.

⁷ 6 Wall. 499, 511.

in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

§ 45. A statute will not be declared void for having been enacted in violation of provisions of the constitutions relating to procedure on the admissions of parties in pleadings or otherwise, but only on facts being ascertained from proper evidence.¹ When it clearly appears by the journals and legislative files that any required proceeding was omitted; as when one of the prescribed readings did not take place, or was by title, when required by sections or at length;² or when it appears that the bill, passed by one branch of the legislature, was in materially different terms from the bill passed by the other branch, or when one branch wholly failed to pass it;³ or when the bill approved by the governor and authenticated as the law requires is materially different from the bill passed by the two houses,⁴ it will be held a nullity.

§ 46. **Presumption in favor of validity of statutes.**—When an act is found lodged in the office of the secretary of state, with the public acts passed at the same session, signed by the presiding officers, approved and signed by the governor, and it is published by authority as one of the public statutes of the state, or is otherwise authenticated according to law, and in proper custody, the presumption is that it was regularly

¹Happel v. Brethauer, 70 Ill. 166; Wolf, 62 Ill. 253; Opinions of Justices, Legg v. Mayor, etc. 42 Md. 203. 35 N. H. 579; 52 id. 622.

²Ryan v. Lynch, 68 Ill. 160; Supervisors v. Heenan, 2 Minn. 330; Weill v. Kenfield, 54 Cal. 111; People v. Loewenthal, 93 Ill. 191; State v. Hagood, 13 S. C. 46. See County of San Mateo v. R. R. Co. 8 Am. & E. R. R. Cas. 1; S. C. 13 Fed. Rep. 722.

³Bound v. R. R. Co. 45 Wis. 543; Meracle v. Down, 64 id. 323; Wise v. Bigger, 79 Va. 269; People v. De Moog v. Randolph, 77 Ala. 597; Moody v. State, 48 id. 115; S. C. 17 Am. R. 28; Jones v. Hutchinson, 43 Ala. 721; Sayre v. Pollard, 77 id. 608; Stein v. Leeper, 78 id. 517; Legg v. Mayor, etc. 42 Md. 203; State v. Liedtke, 9 Neb. 462; Berry v. Baltimore, etc. R. R. Co. 41 Md. 446; S. C. 20 Am. R. 69; State v. Platt, 2 S. C. 150; S. C. 16 Am. R. 647; State v. Hagood, 13 S. C. 46.

passed, unless there is evidence of which the courts take judicial notice showing the contrary.¹ The journals are records, and in all respects touching proceedings under the mandatory provisions of the constitution will be effectual to impeach and avoid the acts recorded as laws and duly authenticated, if the journals affirmatively show that these provisions have been disregarded. In the absence of such an affirmative showing, and even in cases of doubt, it will be presumed that a quorum was present; that the necessary readings occurred;² that amendments made by one branch, though extensive, were germane;³ that they were concurred in by the other branch, though the journals may be silent.⁴

§ 47. As all particulars of compliance with the constitution are not specially required to be entered on the journals, such compliance will be presumed in the absence of proof to the contrary; the silence of the journals will not be accepted as proof that a proceeding required and not found recorded was omitted, even though it be a proceeding required in the two houses, and such as would appear in the journals if it occurred and they contained a memorial of all that was done.⁵ The presumption of regularity is exemplified also in cases where notice is required to be published before application to the legislature for certain private or local legislation. In the absence of any entry in the journals showing such previous notice or alluding to it, it will be presumed in favor of the law, that such notice was given, and that the legislature exacted proof of it.⁶ The legislature need not express on the

¹ See *post*, § 52; *Opinions of Justices*, 35 N. H. 579; 52 *id.* 622; *Larrison v. R. R. Co.* 77 Ill. 11; *State v. Francis*, 26 Kan. 724; *State v. McLelland*, 18 Neb. 236; *People v. Briggs*, 50 N. Y. 558; *Williams v. State*, 6 Lea, 549; *State v. McConnell*, 3 *id.* 332; *Miller v. State*, 3 Ohio St. 475; *Supervisors v. People*, 25 Ill. 181; *Perry County v. R. R. Co.* 58 Ala. 546; *Bound v. R. R. Co.* 45 Wis. 543; *Harrison v. Gordy*, 57 Ala. 49; *People v. Loewenthal*, 93 Ill. 191; *Speer v. Plank* R. Co. 22 Pa. St. 376; *Wise v. Bigger*, 79 Va. 269.

² *McCulloch v. State*, 11 Ind. 424; *Supervisors v. People*, 25 Ill. 181; *Miller v. State*, 3 Ohio St. 475.

³ *Miller v. State*, *supra*; *Pack v. Barton*, 47 Mich. 520.

⁴ *State v. Hastings*, 24 Minn. 78; *Walker v. Griffith*, 60 Ala. 361; *Blessing v. Galveston*, 42 Tex. 641; *Miller v. State*, 3 Ohio St. 475; *Vinsant v. Knox*, 27 Ark. 279; *English v. Oliver*, 28 *id.* 317; *Usener v. State*, 8 Tex. App. 177; *Worthen v. Badgett*, 32 Ark. 516; *Supervisors v. People*, 25 Ill. 181.

⁵ *Id.*

⁶ *Walker v. Griffith*. 60 Ala. 361:

journals the cause, or the facts constituting the occasion or urgency, for dispensing with the rule requiring three readings on different days when it has power to dispense with it.¹

§ 48. If the constitution, however, requires a certain proceeding in the process of legislation to be entered in the journals, the entry is a condition on which the validity of the act will depend. The vital fact that on the final passage of a bill the required number of votes are given in its favor is extensively directed by constitutions to be entered on the journals. Under the operation of these provisions, there is no presumption that the required vote was given if the journal is silent. It must affirmatively appear by the journals that this constitutional requirement has been complied with.²

Harrison v. Gordy, 57 id. 49; McKemie v. Gorman, 68 id. 442; Brodnax v. Groom, 64 N. C. 244; Speer v. Mayor, etc. 42 Alb. L. J. 232 (Ga.).

¹ Hull v. Miller, 4 Neb. 503.

² State v. Buckley, 54 Ala. 599; State v. Francis, 26 Kan. 724; In re Vanderberg, 28 id. 243; Weyand v. Stover, 35 id. 545; South Ottawa v. Perkins, 94 U. S. 260; People v. Mahaney, 13 Mich. 481; Spangler v. Jacoby, 14 Ill. 297; People v. Starne, 35 id. 121; Ryan v. Lynch, 68 id. 160; Post v. Supervisors, 105 U. S. 667; Osburn v. Staley, 5 W. Va. 85; Boul-din v. Lockhart, 1 Lea, 195.

Where it appeared upon the journals of the house of representatives that the bill did not receive the requisite vote on its third reading in that body, but did upon its final passage by the house after its return from the senate with amendments, it was held a substantial compliance. Bond Debt Cases, 12 S. C. 200.

In Osburn v. Staley, *supra*, it appeared that the full senate had consisted of twenty-two members; that one afterwards resigned. On the final passage of the bill in question, after such resignation, there were eleven votes in its favor, and it was

declared passed and by a majority of the members elected. Held, that there was doubt whether the vote was not sufficient, and the act was sustained by resolving the doubt in favor of its validity.

In State v. Francis, *supra*, the act in question was passed in the house by a vote in its favor, including to make the required majority, the votes of four members (who were identified) beyond the maximum membership fixed by the constitution; held void.

Under the Michigan constitution, requiring on the final passage of a bill a majority of all the members elected, it was held that the court would not enter into an inquiry whether *de facto* members were properly elected. People v. Mahaney, *supra*.

In Turley v. County of Logan, 17 Ill. 153, it was said by the court that "while the absence of facts in the journals may rebut the presumption raised by the signatures of the proper officers, and the publication of the act as a law, still we cannot doubt the power of the same legislature, at the same or a subsequent session, to correct its own journals by amendments which show the true facts as they actually occurred, when they

In *Miller v. State*,¹ Thurman, C. J., used this emphatic language: "That the power to make laws is vested in the assembly alone, and that no act has any force that was not passed by the number of votes required by the constitution, are nearly or quite self-evident propositions. These essentials relate to the authority by which, rather than to the mode in which, laws are to be made."

§ 49. **Required readings of bills.**—The readings required of bills are intended to afford opportunities for deliberate consideration of them in detail, and for amendment.² Hence, amendments are admissible during the progress of a bill through the process of enactment; they are not subject to the same rule as bills in regard to the number of readings. They must be germane to the subject of the bill, and are not required to be read three times.³ Nor does concurrence by one house in amendments made by the other require the yeas and nays, and their entry on the journal, under the provision for these things on the final passage of bills.⁴

It is not necessary that everything which is to become law by the adoption of a bill be read. Thus a bill may be passed for the adoption of the common law, and it would not be necessary to set it forth in the bill. An act was held valid which provided for the punishment as at common law of misdemeanors for which no punishment was provided by statute.⁵

The requirement that bills be read on different days will not prevent one house from reading a bill the first time on the same day it was read the third time and passed in the other house.⁶

§ 50. What shall be sufficient cause for suspending the rule requiring the readings on different days is solely within the discretion of the legislative body voting it, where power to dispense with it is given.⁷

are satisfied that by neglect or design the truth has been omitted or suppressed."

¹ 3 Ohio St. 475.

² *State v. Platt*, 2 S. C. 150; S. C. 16 Am. R. 647.

³ *Miller v. State*, 3 Ohio St. 475; *People v. Wallace*, 70 Ill. 680; *State v. Platt*, *supra*.

⁴ *Hull v. Miller*, 4 Neb. 503.

⁵ *Dew v. Cunningham*, 28 Ala. 471; *Dane v. McArthur*, 57 Ala. 454; *People v. Whipple*, 47 Cal. 592; *Bibb County Loan Asso. v. Richards*, 21 Ga. 592.

⁶ *Chicot Co. v. Davies*, 40 Ark. 200; *State v. Crawford*, 35 id. 237.

⁷ *Hull v. Miller*, 4 Neb. 503.

The requirement that there be three readings and that they occur on three different days, being intended to prevent hasty and imprudent legislation, ought on principle to be, and by the weight of authority is, regarded as mandatory.¹ In Ohio it seems to be regarded as directory.²

§ 51. Necessity of signature of presiding officers.—Where the constitution requires every bill passed to be signed by the presiding officers of the respective houses, it is mandatory, and cannot be dispensed with where the journals are not records, and the act when passed and duly authenticated is conclusive as a record. But where such fact is required to be entered on the journal it is necessary as the evidence of the due passage of the bill.³ If the constitution does not require their signing, it is not deemed essential.⁴ And since it is no part of the essential process of legislation, and is designed solely to verify the passage of the bill or resolution, where the legislative journals and files are records of which the court takes judicial notice, or which may be brought to judicial notice, and from them it plainly appears that the bill or resolution, not signed by one or both of the presiding officers, was regularly considered and passed, there is much reason to sustain it as valid notwithstanding the absence of those signatures. If that evidence will prevail to avoid a statute erroneously signed by them, it should suffice to sustain one which was duly passed, though lacking that particular verification, if the other record evidence sufficiently shows the essential proceedings.⁵ The signature of the presiding officer is in such cases only a certificate to the governor that the bill or resolution has passed the requisite number of readings, and been adopted by the constitutional majority of the house over which he presides. But where the vote must be determined by the journals, the absence of the signatures of the presiding officers is not fatal, if the governor has signed the bill, for it will be pre-

¹ *Ante*, § 45; Cooley, Const. L. 170. ⁴ *Speer v. Plank Road Co.* 22 Pa. St.

² *Miller v. State*, 3 Ohio St. 481; 376.

Pim v. Nicholson, 6 id. 178.

³ *People v. Commissioners*, 54 N. Y. 276; *Pacific R. R. Co. v. The Governor*, 23 Mo. 364; Cooley's Const. Lim. 153; *Burrough, Pub. Securities*, 425.

⁵ *Hull v. Miller*, 4 Neb. 503; *Cottrell v. State*, 9 Neb. 128; *Commissioners v. Higginbotham*, 17 Kan. 75; *State v. Glenn*, 18 Nev. 39; *Houston, etc. R. R. Co. v. Odum*, 53 Tex. 343.

sumed that the governor had sufficient evidence, the assurance which the journals afford to the court, of its passage at the time of his approval.

§ 52. **How the validity of statutes is tried.**—The court takes judicial notice of all general laws. This is a cardinal rule, and necessarily includes cognizance of whatever must be considered in determining what the law is; not because it is the prerogative of the courts arbitrarily to determine what are the public statutes, nor because they are required or supposed to have a knowledge of those laws without evidence of them, but because they have the means, and it is their duty, to make themselves acquainted with them.¹ Whatever extrinsic facts are proper to be considered, the courts may have recourse to to aid them in their duty to ascertain the law. Judicial knowledge takes in its whole range and scope at once; it embraces simultaneously, in contemplation of law, all the facts to which it extends. It would be a solecism to hold that a statute regularly authenticated is *prima facie* valid, if there exist facts of which the court must take judicial notice showing it to be void.

On principle and the weight of authority the courts take judicial notice of the legislative journals. If they invalidate a statute it is not apparently valid, for in every view of it the court perceives what impugns it and prevents its having force. And if the court has other sources of information which explored disclose facts fatal to an act, it is void from the beginning, void on its face; for what is manifest to the judicial mind is legally palpable to the whole public. None can plead ignorance of it. It is, however, held in some of the states that the courts do not take such judicial notice of legislative journals and extrinsic facts. In *Grob v. Cushman*,² the court say: "It is true that they are public records, but it does not follow that they are to be regarded as within the knowledge of the courts like public laws. Like other records and public documents they should be brought before the court as evidence. But when offered they prove their own authenticity. Until so produced they cannot be regarded by the courts." It is held in that

¹ *Eld v. Gorham*, 20 Conn. 8.

Peoria, etc. R. R. Co. 77 id. 18; *People*

² 45 Ill. 124, 125; *Illinois Cent. R. R. v. De Wolf*, 62 Ill. 253.

Co. v. Wren, 43 Ill. 77; *Larrison v.*

state not to be the province of the court, at the suggestion or request of counsel, to explore the journals for the purpose of ascertaining the manner in which a law duly certified went through the legislature and into the hands of the governor.¹

§ 53. These cases came under review in the supreme court of the United States in *Town of South Ottawa v. Perkins*,² and that court was in doubt and divided on the question whether by the state decision the validity of a statute was a conclusion of law or fact, when the statute, properly authenticated, is avoided by the legislative journals showing it was not constitutionally enacted. The majority, by Bradley, J., say: "In our judgment it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The court is bound to know the law without taking the advice of a jury on the subject. When once it became a settled construction of the constitution of Illinois that no act can be deemed a valid law unless by the journals of the legislature it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble, unless the parties bring the matter to their attention; but on general principles the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States."³

§ 54. The investigation upon an objection that an act was unconstitutionally passed may be expected to be made primarily by the parties; they will desire to be heard in respect to the source and the evidentiary quality of information obtained, and the effect of facts considered. Doubtless this interest of the parties, and a conservatism of the courts restraining them from a consideration of any important ingredient of a case without notice to the parties, and the aid of their counsel, have induced the course of decision in Illinois and in some other states in which it is held that the courts will not take judicial notice of the legislative journals, though they are required by the constitution to be kept, and will be considered only when brought before the court as evidence.⁴ It has been intimated

¹ *Illinois Cent. R. R. Co. v. Wren*,
supra.

² 94 U. S. 260.

³ *Post v. Supervisors*, 105 U. S. 667.

⁴ *Burt v. Winona*, etc. R. R. Co. 31 Minn. 472; S. C. 4 Am. & Eng. Corp.

in some cases that the objection should be made by plea,¹ which implies that the validity may be made to depend on the determination of an issue of fact. But this notion has been abandoned in the court in which it originated, and never obtained a footing in any other jurisdiction.² The court is required to take notice *ex officio* of general laws; its peculiar function is to determine what the law is, and expound it; therefore it would be at once absurd and inconvenient to submit such a question to a jury. It is more logical and more consistent with principle to treat the evidence, so called, produced upon such an objection as being presented for the information of the court in the same sense in which law-books are read; facts are only incidental to the research, as when a court must deal with them to some extent, to learn if authorities cited are authentic. In *Gardner v. The Collector*,³ Miller, J., said of the public statute in question: "It is one of which the court takes judicial notice, without proof, and therefore the use of the words 'extrinsic evidence' is inappropriate. Such statutes are not proved as issues of fact as private statutes are."

§ 55. When acts should be approved.—The legislative power is generally in terms vested by the organic law in the legislature or general assembly consisting of two branches; though in acts of congress organizing territorial governments it has been usual to vest it in the governor and general assembly. He is thus made a constituent of the legislature, as the king in the English system is a constituent of parliament. The legislative practice, however, is the same in the territories as in the states, and the same as in parliament, as to the part taken by the executive in the enactment of laws. The two houses formulate and adopt in the first instance all legislative measures, and the executive acts merely to approve or disapprove these measures. His function is of the same nature as that of members of the two houses, except that it is negative, and that by pursuing the course prescribed in the para-

Cas. 426; *Ballou v. Black*, 17 Neb. 389.

People v. Commissioners, 54 N. Y. 276; *State ex rel. v. Foote*, 11 Wis.

¹ *People v. Supervisors*, 8 N. Y. 317; 11.

Falconer v. Campbell, 2 McLean, 195.

³ 6 Wall. 508.

² *People v. Devlin*, 33 N. Y. 269;

mount law acts may acquire the force of laws without his concurrence.¹

¹ In *People v. Bowen*, 21 N. Y. 520 et seq. (S. C. 30 Barb. 24), Denio, J., thus discusses the nature of the duty and power of the executive in the enactment of laws: "The question as to the nature of the governor's agency raises, I think, rather a dispute about terms than one concerning the substance of things. Whatever the authority touching the enactment of laws, with which the governor is clothed, shall be called, it is of the same general nature with that which is exercised by the members of the two houses. He is to consider as to the constitutionality, justice and public expediency of such legislative measures as shall have been agreed upon by the two houses, by the ordinary majorities, and be presented to him; and he is to accord or withhold his approbation according to the result of his deliberations. This is plainly the function of a legislator. The sovereign of England, who is charged with the same duty in respect to acts of parliament, is considered to be a constituent part of the supreme legislative power. 1 Bl. Com. 261. It is true that his determination to disapprove a bill deprives it of any effect, while one disallowed by the governor may yet be established by an extraordinary concurrence of votes in the houses. Thus, though the action of the executive is less potential here than in England, the quality of the act, namely, deliberating and determining upon the propriety of laws proposed to be enacted, is precisely the same. Besides making his determination the governor is required, in case it is unfavorable to the law, to submit his objections to the legislature which is to examine them, and again pass upon them in

the light of the discussion which they have thus undergone. To my mind it is clear that this involves a participation on the part of the governor with the two houses of the legislature in the enactment of laws. It would not be correct language to say that he forms a branch of the legislature, for the constitution has limited that designation to the senate and assembly; but it would be equally incorrect to affirm that the sanction which he is required to give to or withhold from bills before they can become operative does not render him a participator in the function of making laws. The forty-seventh number of 'The Federalist,' written by Mr. Madison, treats of the separation of the great departments of the government, and it is there shown that the concurrence of the executive magistrate with the proper legislature in the enactment of laws as arranged in the constitution of the United States is not, in spirit, a violation of the principle, so strongly insisted upon by Montesquieu and other writers upon constitutional government, that constitutional liberty cannot exist where the legislative and executive powers are united in the same person. Mr. Madison considers the qualified veto accorded to the president as effecting a partial distribution of the legislative authority between him and the congress, but argues that it is not objectionable, because neither authority can, in any case, exercise the whole power of the other. He shows, also, that in certain states, in the constitutions of which the principle of Montesquieu is laid down in terms with great positiveness, there is an intermingling of the legislative and executive departments in the actual

In New York it is held that after the final adjournment of the legislature the governor may act upon bills submitted to him.¹ Such seems to have been the practice sanctioned by judicial decision under similar constitutional provisions in Georgia,² Illinois³ and Louisiana.⁴

arrangement of the details of government. Our own constitution furnishes another example; for though it is declared that the whole legislative authority shall be vested in the senate and assembly; still no law can be enacted which has not been submitted to the judgment of the governor. His agency cannot, therefore, be considered as merely a power to refer back bills for further consideration by the legislature. His approval is regarded as generally essential to the enactment of laws, though his disapproval is not necessarily fatal to them, but may be overcome, where the legislature, upon a consideration of his objections, shall repass them by an extraordinary majority."

¹ *Id.* Denio, J., continuing the opinion from which we quoted in the last note, said that, in his opinion, "it is not a just construction of the power intrusted to the governor to consider it as merely an authority to require a further consideration of bills which he shall disapprove. In one respect the effect of the governor's determination is different when the legislature is in session and when it is not. In the latter case, if he approves, the concurrence of the whole law-making power is secured, precisely as though the legislature was in session. The bill has received the concurrence of all the functionaries which the constitution requires shall unite in enacting a perfect law. He cannot state objections, for there is no public body in existence to whom they can be submitted. If he neglect to act, which he will of course do if

the bill is disapproved of by him, it falls to the ground by the express provisions of the constitution, for the grounds of his disapproval cannot be passed upon by the legislature. But if the proposed law meets with his approval, there is no reason why the public will, expressed by all the official bodies and persons with whom the constitution has intrusted the province of making laws, should fail of effect.

"It has been argued that, as the governor cannot, in the recess of the legislature, compel the reconsideration of bills to which he is unwilling to yield his consent, he might be induced to approve those which are, in some respects, objectionable, but which contain other provisions important to the public welfare. This argument is not without force, but I think it should be assumed that he would never interpose a veto to a bill which he did not conscientiously believe ought not to become a law, and that he would never approve one to which such objection, in his opinion, existed. Should a bill of the character suggested be left in his hands at the adjournment, the remedy for the public inconvenience, which might be occasioned by the failure to enact the sound parts, would be found in the power to again call the legislature together, which is vested in him for this and the like occasions."

² *Solomon v. Commissioners*, 41 Ga. 157.

³ *Const.* 1848, art. 4, § 21; *Seven Hickory v. Ellery*, 103 U. S. 423.

⁴ *State v. Fagan*, 22 La. Ann. 545.

§ 56. The organic act of Nevada territory vested the legislative power in the governor and legislative assembly. It was therefore held that, being a part of the legislative body, he could only concur in the passage of a law whilst the other branches had a legal existence.¹ The signing of a bill by the governor is the mode appointed in the constitutions for him to signify his approval. When he has signed it it will become a law though he send a message to the legislature, or the house in which it originated, setting forth objections to it.² So it has been held that after a bill has been regularly passed by the two houses, and has been presented to the governor for approval, it cannot be recalled by their joint resolution.³ The schedule of the Kansas constitution provides that all officers under the territorial government should continue in the exercise of the duties of their respective departments until superseded under the authority of the constitution. Under this provision it was held that the territorial governor properly approved an act after the act of admission had passed.⁴

§ 57. **How a bill will become a law without approval.**—Without the express approval of the executive a bill passed by the legislature can become a law only in two cases. First, when he fails to return it with his objections within the time prescribed by the constitution; second, when it is passed over his objections by the required vote.⁵ Many constitutions provide that an act shall become a law without the governor's signature if he retain it for a certain number of days after it is presented to him for approval,⁶ unless the adjournment of the legislature shall prevent him from returning it within that time, and in that case that it shall not become a law. The adjournment intended by this provision is the final adjournment, not adjournments from time to time.⁷ Where Sundays are excepted in the specification of the period; and under the provision sometimes added, that "the governor may approve, sign and file in the office of the secretary of state within three days after the adjournment of the legislature, any act passed during

¹ School Trustees v. Commissioners, 1 Nev. 335; Birdsall v. Carrick, 8 Nev. 154.

² State v. Whisner, 35 Kan. 271.

³ Wolfe v. McCaull, 76 Va. 876.

⁴ State v. Hitchcock, 1 Kan. 186.

⁵ Birdsall v. Carrick, 8 Nev. 154.

⁶ McNeil v. Commonwealth, 12 Bush, 727.

⁷ Miller v. Hurford, 11 Neb. 377.

the last three days of the session, and the same shall become a law," Sundays will be excepted by construction, as intended by the constitution, in order to give the governor three full working days after the adjournment. Such time being expressly granted in the limitation of time during the session, it is deemed not unreasonable to hold that there is implied the same exception of Sundays in the period given after the adjournment, for there is the same and stronger reason for it in the greater number of important bills usually passed during the last days of a session.¹

§ 58. This provision is made in Iowa for bills passed during the last three days of a session: that they "shall be deposited by him [the governor] in the office of the secretary of state within thirty days after the adjournment, with his approval, if approved by him, and with his objections, if he disapproves thereof." In a case in which the bill was presented to the governor during the last three days of the session, and he omitted to sign it, but within the thirty days filed it without objections with the secretary of state, it was held that it did not become a law—it could only become a law by his subsequent approval of it.²

§ 59. When a bill has been presented to the executive for his approval his responsibility commences, and the time specified in the constitution for his action is important and mandatory, for precise consequences of his action or non-action are defined. It must be presented to him during the session of the legislature, and he can only return it with objections when the body is in session to which the return must be made. If the session is ended or interrupted by adjournment; if the members have dispersed, and the officers are not in attendance, he cannot return it to the house in which it originated. He is not authorized to return a bill to the speaker of the house, to the clerk, or to any other officer, but only to the house in which it originated, and that can only be as a body.³ The return of a bill by laying it on the speaker's table and the announcement of a message from the governor, before the adjournment of the house, is a sufficient return of it, though

¹ *Stinson v. Smith*, 8 Minn. 366.

³ *People v. Hatch*, 33 Ill. 9, 135.

² *Darling v. Boesch*, 25 N. W. Rep. 887; S. C. 67 Iowa, 702.

the house was at the time taking a vote by ayes and noes on a motion to adjourn, which was carried.¹

The computation of the time for different purposes, both for executive action on bills presented for approval and in determining when acts take effect, is a subject of considerable interest. The discussion of it will be deferred until the latter topic is reached.²

¹ Opinion of Justices, 45 N. H. 608. As to what shall be regarded as a return, and what should be considered as a day in this connection, the justices in this opinion say: "Nor are we by any means prepared to say that the legislative day was ended necessarily by the adjournment of the house, even though it might have been at the usual hour in the afternoon; or that the return of the bill at any convenient time during the day to the speaker, although after the house adjourned for the day, would not have been sufficient. The provision of the constitution in relation to this subject should receive a reasonable construction; and it can hardly be supposed that the time limited for the return of the bill has expired because that branch of the legislature in which the bill originated has adjourned for the day, if the five days limited by the constitution have not expired. The word "day," in its common acceptance, means a civil day

of twenty-four hours, beginning and ending at midnight." *Shaw v. Dodge*, 5 N. H. 465; *Colby v. Knapp*, 13 id. 175. This opinion answers the question whether the bill was properly presented to the governor. It was left in the executive office in the governor's absence, and it came to his notice on the following day. It is supposed that custom and habit have designated where the executive business is done; and leaving the bill there on the governor's table, even in his absence, is a presentation. The justices say as to personal presentation elsewhere: "It would be absurd to hold that the officers of the senate and house of representatives are obliged, in order to perform their duty, to follow the governor wherever he may chance to go, whether in the state or out of it, upon his private business as well as public, and present it to him in person wherever he may happen to be."

² See *post*, ch. V.

CHAPTER III.

FORMS OF LEGISLATION—REFERENCE TO THE ENACTING POWER, AND THE DELEGATION OF IT.

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| <p>§ 60. Forms of legislation.</p> <p>62. Constitutional regulations of, directory in certain states.</p> <p>64. Mandatory in others.</p> <p>65. As to enacting style.</p> <p>67. Legislative power cannot be delegated.</p> | <p>§ 69. What is a delegation of legislative power.</p> <p>70. Exceptions which have been established.</p> <p>71. Effect of submitting laws, etc., to popular vote.</p> <p>75. Local laws may be submitted.</p> |
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§ 60. **Forms of legislation.**—A bill is a form or draft of a law presented to a legislature, but not yet enacted, or before it is enacted; a proposed or projected law.¹ This is the meaning of a bill in practice, and has been judicially commended.² It is an act after it has gone through the process of enactment and become a law. A legislative act or statute is a bill passed and approved under the introductory words, formula or style, "Be it enacted." The term bill is sometimes loosely applied to mean the same as an act, as well as to other forms of proposed or completed legislation.³ These terms, *bill* and *act*, are used as synonymous in some of our constitutions.⁴

§ 61. Ordinances have sometimes been distinguished from statutes in practice; not that to ordain is of less force than the expression to enact, but, as Lord Coke says, because an ordinance has not the assent of the king, lords and commons, being made by only one or two of those powers. It is, however, stated in Bacon's Abridgment that this distinction has been disputed. It is there laid down that "with regard to parliamentary forms this much seems agreed: that where the proceeding consisted only of a petition from parliament, and an answer from the king, these were entered on the parliament roll; and if the matter was of a public nature, the whole was

¹ Webster's Dict.

² May v. Rice, 91 Ind. 549.

³ Cushing, L. & P. of Leg. Ass.

§ 2055.

⁴ People v. Lawrence, 36 Barb. 185.

then usually styled an ordinance; if, however, the petition and answer were not only of a public but a novel nature, they were then formed into an act by the king, with the aid of his council and judges, and entered on the statute roll.”¹ It is also laid down by the same authority that an ordinance on the parliamentary roll, with the king’s assent upon it, has, nevertheless, equal force with a statute.² The term ordinance is more usually applied to the acts of a corporation, and as synonymous with by-law.³ It has, however, been often used in more solemn acts of the states and of the general government.⁴ Resolutions, or joint resolutions, are a form of legislation which has been in frequent use in this country, chiefly for administrative purposes of a local or temporary character, and sometimes for private purposes only. It is recognized in many of our constitutions, in which, and in the rules and orders of our legislative bodies, it is put upon the same footing and made subject to the same regulations as bills properly so called.⁵ By legislative practice and usage, joint resolutions have the force of law, whether applied to administrative, local or temporary matters, or intended for important measures.⁶

§ 62. Constitutional forms directory in certain states.—Many constitutions provide that laws shall be enacted by bill, and direct that the style shall be, “Be it enacted,” etc. In a few states such provisions have been held to be directory. Thus, in *Swann v. Buck*,⁷ it was so held that a joint resolution passed by all the forms of legislation was valid—that the word “resolved” is as potent to declare the legislative will as the word “enacted.” The court say: “The argument against requiring a literal compliance with any form of words in the enacting clause, as a condition of giving effect to a statute, would be very strong on the score of convenience; for the plainest expressions of the legislative will, and the most urgent in their character, would be constantly liable to be defeated by the slightest omission or departure from the established phraseology. No possible good could be achieved by such strictness, and the greatest evil might result from it. There

¹ Bac. Abr. Statute A.

² Id.

³ Bish. Written Laws, § 18.

⁴ Cush. L. & Pr. Leg. Ass. § 2046.

⁵ Cushing, L. & Pr. Leg. Ass. § 2403;

Swann v. Buck, 40 Miss. 293.

⁶ Id.

⁷ 40 Miss. 268.

are no exclusive words in the constitution negating the use of any other language, and we think the intention will be best effectuated by holding the clause to be directory only."

§ 63. The several constitutions of Mississippi make a plain distinction between bills and resolutions, as does the constitution of Indiana. There seems to be many of the contrasts pointed out in the opinion in *May v. Rice*,¹ which will presently be referred to particularly.² The constitutions of Maryland have made no provision for any form of legislation but by "original bill." They have provided that "The style of all laws . . . shall be, 'Be it enacted by the general assembly of Maryland;'" and all laws shall be passed by original bill."³ The case of *McPherson v. Leonard*⁴ does not altogether follow *Swann v. Buck*⁵ in the reasoning upon which the court arrived at the conclusion that the foregoing provisions are directory. The Mississippi case concedes that, to be valid, an act should refer to the enacting authority. That was the point of the objection to the act in the Maryland case. The court held the above provisions directory, and, therefore, as the court said, "may be disregarded without rendering the act void." It was so held upon the rule applicable in the construction of statutes that provisions which relate to form, and not to the essence and substance of the thing to be done, are directory unless the statute is restrictive to the mode and form prescribed.⁶ The constitution of Missouri prescribes also a precise style, and declares it shall be the style of the laws of that state.⁷ The act in question in the *City of Girardeau v. Riley*⁸ had no enacting clause or style. That provision of the constitution was held directory and the act valid, and upon the same argument put forth in

¹ 91 Ind. 546. Const. 1817, art. 3, § 4, 23, 24; art. 4, §§ 15, 16; art. 6, §§ 2, 8, 10, 11, 14. Const. 1832, art. 3, § 4, 23, 24; art. 5, §§ 15, 16; art. 7, §§ 2, 6, 7, 9, 10. Const. 1868, art. 4, §§ 23, 24, 25, 26, 32; art. 12, §§ 2, 4, 8, 11.

² See *post*, § 64.

³ Const. 1851, art. 3, §§ 17, 18, 19, 20; Const. 1864, art. 3, §§ 26, 27, 28; Const. 1867, art. 3, §§ 27, 28, 29, 32.

⁴ 29 Md. 377.

⁵ 40 Miss. 293.

⁶ Citing *Sedgw. on St. & Con. L.* 368 et seq., and cases there cited; *Smith on S. & C. Con.* § 679; *Striker v. Kelly*, 7 Hill, 24; *Pacific R. R. v. The Governor*, 23 Mo. 368. See *post*, §§ 448, 451.

⁷ Const. 1820, art. 3, § 36; Const. 1865, art. 4, § 26; Const. 1875, art. 4, § 24.

⁸ 52 Mo. 424.

McPherson v. Leonard.¹ The court remarked on the similarity of the language as to process requiring writs to run in the name of the state, and that that provision had been held to be directory.²

§ 64. **Constitutional forms mandatory in other states.**—The requirement that laws shall be passed under a precise enacting style, commencing with the words, "Be it enacted," and referring to the enacting authority, has been held mandatory in Indiana, Nevada, Alabama, Rhode Island and West Virginia. In other states the courts have held other provisions of the constitutions of like nature to be mandatory.³ In Indiana the constitution plainly distinguishes between bills and resolutions, as does the constitution of Mississippi. In *May v. Rice*,⁴ the question was whether money could be appropriated by a joint resolution. It was held that such a resolution is ineffectual for that purpose. The constitution prohibits the drawing of money from the state treasury, except in pursuance of appropriations made by *law*. It also requires that "the style of *every law* shall be: 'Be it enacted by the general assembly of the state of Indiana,' and no law shall be enacted except by bill."⁵ The resolution was held not, *eo nomine*, enacted as a "bill." The opinion answers three inquiries: 1st. "Is it essential to constitute a law, in the sense in which that term is used in the constitution, that the enactment shall have been presented and passed as a bill? 2d. Is it essential in the enactment of a law that the words prescribed for the enacting clause shall be used, or may the words 'Be it resolved' be substituted for 'Be it enacted?' Out of these inquiries," say the court, "springs the more general one: 3d. Is this resolution a law, in any sense, as that term is used in these sections of the constitution . . . in relation to the appropriation of money?" The first two were answered in the affirmative, and the last in the negative.

The opinion points out important differences in the procedure for the passage of bills from that which may be followed in the adoption of resolutions, showing that the former only

¹ *Supra*.

² *Davis v. Wood*, 7 Mo. 165; *Jump v. Batton*, 35 id. 196; *Doan v. Boley*, 38 id. 449.

³ See *ante*, §§ 29-35; *post*, § 79.

⁴ 91 Ind. 546.

⁵ Const. 1851, art. 4, sec. 1; art. 10, sec. 3.

are intended for the enactment of laws. These differences may be observed in other constitutions, and therefore a considerable extract from the opinion has been quoted in note below.¹ The words of the enacting style need not precede a preamble, but should precede the entire law.²

¹ Zollards, J.: "Is a resolution a bill? Perhaps as accurate a definition of a bill as can be found is that given in Webster's Dictionary: 'A form or draft of a law, presented to a legislature, but not yet enacted; a proposed or projected law.' 'In some cases statutes are called bills, but usually they are qualified by some description; as, a bill of attainder.' Bills and acts are sometimes used as synonymous terms. Cushing, sec. 2055. The definition of a bill as given by Webster is that usually accepted and acted upon; but as we shall see, our constitution extends it. The idea conveyed by the word *bill* is different from that conveyed by the word *resolution*. The distinction between a bill and resolution is clearly kept up in the constitution of this state as an examination of its provisions will show. We call attention to some of the sections of article 4. Bills may originate in either house, except revenue bills. Sec. 17. The vote on the passage of a bill or joint resolution shall be taken by yeas and nays. The bill must be read by sections on three different days, etc. Sec. 18. A joint resolution of different sections doubtless may be passed upon one reading. Every *act* shall embrace but one subject and matters properly connected therewith, which subject shall be embraced in the title. Sec. 19. There is no such provision in relation to joint resolutions. No *act* shall ever be revised or amended by mere reference to its title. Sec. 21. This section

has no reference to joint resolutions. No "act" shall take effect until the same shall have been published and circulated in the several counties of the state by authority, except in cases of emergency, etc. Sec. 28. This can have no reference to joint resolutions. They take effect as soon as passed. Bills and joint resolutions must be passed by a vote of a majority of the members of the legislature, and when so passed shall be signed by the presiding officers of the respective houses. These requisites they have in common, but the distinction is clearly kept up. Sec. 25. In section 14 of article 5, a bill is recognized as still a bill, after its passage and until it has reached the governor. Every bill which has passed, etc., shall be presented to the governor. The governor is required either to sign the bill, or return it to the house in which it may have originated, with his objections, etc. If he sign the bill, it becomes a law. If he veto it, and it is not repassed by the requisite vote, it does not become a law. Nothing of the kind is required in relation to a joint resolution under our constitution as we understand and interpret that instrument. Such a resolution, if passed by the requisite vote, and signed by the presiding officers, is in full force. Nothing would be added to its validity and force by the signature of the governor, nor has he any power to defeat it by a veto. It does not go to him for any purpose of approval or disap-

² Barton v. McWhinney, 85 Ind. 481.

§ 65. Same — The required enacting style must be adopted.— The same question arose in Nevada as in *McPherson v. Leonard*.¹ The provision of the constitution in Nevada

proval. It appears from the constitutional debates that a proposition to include joint resolutions with bills in the above section, so that they should be sent to the governor, was voted down. 2 Deb. Const. Conv. p. 1331. This action of the convention is the more significant when we recollect that the convention was in a work of reform, adapting the new constitution to the increased wants and dangers of a rapidly increasing and progressive population, and that the constitution of 1816, which was being superseded, provided for joint resolutions as well as bills to be sent to the governor for his approval or disapproval, and to be treated by him and the legislature as bills if vetoed by him. It is very apparent from this examination of the constitution that the terms *bill* and *joint resolution*, as used therein, do not mean the same thing. They are widely different. Their functions are altogether different. Authority to act by joint resolution is given, affirmatively, by the constitution in but few instances.

"By such resolution, the two houses may adjourn for more than three days. Art. 4, sec. 10. Certain officers may be removed by such resolution. Art. 6, sec. 7. Possibly under section 17 of article 5, the powers granted to grant pardons, etc., may be exercised by such resolution. Besides the authority thus granted, a joint resolution doubtless may be the means of expressing the legislative will in reference to the discharge of an administrative duty, if such expression falls short of the enactment of a law. The general and most

common use of resolutions is in the adoption of rules and orders relative to the proceedings of the legislative body. Cushing, *supra*, sec. 779; Mays Par. Prac. pp. 440, 447, 450. Our conclusion upon this branch of the case is that a joint resolution under our constitution is not a bill, and that laws for the appropriation of money for public purposes or the payment of private claims . . . cannot be enacted by joint resolution. This view is sustained by the cases of *Barry v. Viall*, 12 R. I. 1, 18; *Reynolds v. Blue*, 47 Ala. 711; *Brown v. Fleischner*, 4 Oregon, 132; *Boyen v. Crane*, 1 W. Va. 176."

In deference to the opinion in *Swann v. Buck*, 40 Miss. 268, the court in *May v. Rice* appear to consider the expression "every law," in the provision of the Indiana constitution relative to the enacting style, as more comprehensive and exclusive than the expression "the laws of this state" in the corresponding provision of the Mississippi constitution. The latter are the words of the Mississippi constitution, and the court, in *Swann v. Buck*, said, "there are no exclusive words in the constitution negating the use of any other language;" meaning, doubtless, that the constitution did not forbid the use of any other words, or the passage of a law without those prescribed; for "the laws of this state" include all, as much as the expression "every law." If a command broad enough affirmatively to include all the laws implies a negative, then one is implied from the language of the constitutions of both states.

¹ 29 Md. 386; *ante*, § 2.

is that "the enacting clause of every law shall be as follows: 'The people of the state of Nevada, represented in senate and assembly, do enact.'" In the case in which the question was discussed,¹ it appeared that an act was passed in the enacting clause of which there was omitted the words "senate and." The act was held unconstitutional and void. In the opinion, the court responds to the declaration in the Maryland case that the enacting style is not of the essence and substance of the enactment. Hawley, C. J., said that statement is clearly erroneous and the opinion fallacious. "How can it be said that these words are not of the essence and substance of a law when the constitution declares that the enacting clause of every law shall contain them." He quoted, with apparent approval from the dissenting opinion of Stewart, J., in the Maryland case, that it is incumbent on the law-making department to pursue the constitutional mode. "If a positive requirement of this character . . . can be disregarded, so may others of a different character; and where will the limit be affixed or practical discrimination made as to what parts of the organic law of the state are to be held advisory, directory or mandatory? Disregard of the requirements of the constitution, although, perchance, in matters of mere form and style, in any part, in law, may establish dangerous examples, and should in all proper ways be discountenanced. The safer policy, I think, is to follow its plain mandates in matters that may appear not to be material, in order that the more substantial parts may be duly respected. If those who are delegated with the trust of making the laws, from the purest motives improvidently omit the observances of the constitution under any circumstances, such oversight may be referred to in the future by others, with far different views, as precedents, and for the purpose of abuse. A higher responsibility is imposed upon those selected by the people for the discharge of legislative duty, and a greater obligation is demanded of them to exemplify, by their practice, a careful compliance with the constitution. By a vigilant observance of its commands, the more reasonable is the probability that the best order will be secured. It is unnecessary to illustrate, by any

¹State v. Rogers, 10 Nev. 250.

argument, the soundness of this general consideration, which I am sure all will admit to be unquestionable, that a strict conformity is an axiom in the science of government. I certainly entertain such profound conviction of its truth that I do not feel authorized to give my approval to this act as a valid law; but, on the contrary, am constrained to say that the omission of the style required by the constitution is fatal to its validity.”¹

§ 66. The modern constitutions go more and more into detail in regulating the exercise of the several powers which they grant. The object is manifestly to correct existing or apprehended mischief; not to legislate merely for order and convenient system. These regulations are in the fundamental law; they express the sovereign will of the people, and ought to be treated as limitations on the exercise of those powers. The modes prescribed for the exercise of the granted powers cannot be severed from the substantive things authorized to be done; the manner directed is the means—the appointed action—through which alone the power is effective for the substantive objects intended to be accomplished. The legislature must be constituted, sit at the time and place, and proceed in the methods dictated by its creator; otherwise it is not clothed with nor exercising the sovereign legislative power. The great weight of authority supports this view.²

¹Cushing's L. & Pr. Leg. Ass. J. 819, § 2102; Seat of Government Case, 1 Wash. T. 115.

²See *ante*, §§ 30, 41; *post*, § 79; Cooley, Con. L. 94. This learned author says the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. “Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they then must be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character

to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power

§ 67. The legislative power cannot be delegated.—The power to make laws for a state vested in the legislature is a sovereign power, requiring the exercise of judgment and discretion. It is a delegated power,—delegated in a constitution by the people in whom inherently are all the powers. On common-law principles, as well as by settled constitutional law, it is a power which cannot be delegated.¹

This is a general rule or maxim; but like all other rules of the common law it is flexible, extending as far as the reason and principles on which it is founded go, and ceasing when the reason ceases. It admits of exceptions connected with the principle which supports the rule, or which may be presumed

which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only." *State v. Johnson*, 26 Ark. 281; *Wolcott v. Wigton*, 7 Ind. 44; per *Bronson* in *People v. Purdy*, 2 Hill, 36; *Greencastle Township v. Black*, 5 Ind. 566; *Opinion of Judges*, 6 Shepley, 458. See *People v. Lawrence*, 36 Barb. 177. "The essential nature and object of constitutional law being restrictive upon the powers of the several departments of the government, it is difficult to comprehend how its provisions can be regarded as merely directory." *Nicholson, C. J.*, in *Cannon v. Mathes*, 8 Heisk. 504, 517. Mr. Cooley adds that "We impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the pow-

ers delegated, and with a view to leave as little as possible to implication." *People v. Supervisors of Chenango*, 8 N. Y. 328.

¹ *Carlisle v. Carlisle's Adm.* 2 Harr. 318; *Berger v. Duff*, 4 John. Ch. 368; *Hunt v. Burrell*, 5 John. 137; *Farnsworth v. Lisbon*, 62 Me. 451; *Brewer v. Brewer*, id. 62; *State v. Hudson County*, 37 N. J. L. 12; *State v. Copeland*, 3 R. I. 33; *Willis v. Owen*, 43 Tex. 41; *People v. Collins*, 3 Mich. 343; *Rice v. Foster*, 4 Harr. 479; *State v. Parker*, 26 Vt. 362; *Lockes' Appeal*, 72 Pa. St. 491; *Parker v. Commonwealth*, 6 id. 507; *State v. Swisher*, 17 Tex. 441; *Barto v. Himrod*, 8 N. Y. 483; *People v. Stout*, 23 Barb. 349; *Thorne v. Cramer*, 15 Barb. 112; *Bradley v. Baxter*, id. 122; *State v. Wilcox*, 45 Mo. 458; *Santo v. State*, 2 Iowa, 165; *Ex parte Wall*, 48 Cal. 279; *Geebrick v. State*, 5 Iowa, 491; *State v. Beneke*, 9 id. 203; *State v. Weir*, 33 id. 134; *S. C.* 11 Am. R. 115; *Commonwealth v. McWilliams*, 11 Pa. St. 61; *Maize v. State*, 4 Ind. 342; *Mesheimer v. State*, 11 id. 482; *Cincinnati, etc. R. R. Co. v. Commissioners*, 1 Ohio St. 77; *Cooley's Con. Lim.* 142; *Slinger v. Henneman*, 38 Wis. 504; *Wayman v. Southard*, 10 Wheat. 1, 42; *Alcorn v. Hamer*, 38 Miss. 652.

to have been intended by the party or people who are the original source of the power.

§ 68. The legislative department as an integral part of our political system is confined to the exercise of its proper powers, and possesses them exclusively, as the other departments severally have theirs. As the possessor of the law-making power, it may confer authority and impose duties upon the others and regulate the exercise of their several functions. It may pass general laws for that purpose, giving them expressly or by necessary implication an incidental discretion to employ the proper means to fill up and regulate the details for themselves and subordinates, though the exercise of that discretion be *quasi* legislative. This is illustrated by laws empowering the courts in the exercise of their jurisdiction to adopt rules of practice and forms of procedure;¹ and by the powers

¹Wayman v. Southard, 10 Wheat. 1; Bank of United States v. Halstead, id. 51; Coleman v. Newby, 7 Kan. 88; Anderson v. Levely, 58 Md. 192; Thompson v. Floyd, 2 Jones' L. 313; Ross v. Duval, 13 Pet. 45.

In Wayman v. Southard, *supra*, Marshall, C. J., said: "It will not be contended that congress can delegate to the courts, or to any other tribunal, powers which are strictly and exclusively legislative. But congress may certainly delegate to others powers which the legislature may rightfully exercise itself. Without going further for examples, we will take that the legality of which the counsel for the defendants admit. The seventeenth section of the judiciary act, and the seventh section of the additional act, empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by congress. The courts, for example, may make rules directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the leg-

islature without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department.

"The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and a general power given to those who are to act under such general provisions to fill up the details. The seventeenth section of the judiciary act of 1787, ch. 20, enacted 'That all the said courts shall have power to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States;' and the seventh section of the act referred to as the additional act (act 1793, ch. 22, § 7) details more at large the powers conferred by the seventeenth section of the judiciary act. These sections were held to give the court full jurisdiction over all matters of practice." The question in this case related to execution.

"A general superintendence," say

granted to the president in such cases as that disclosed in *Houston v. Moore*.¹ An act of congress authorized the president in certain exigencies to call forth such number of the militia of the states most convenient to the scene of action as he might judge necessary, and to issue his orders for that purpose to such officers of the militia as he should think proper.² It prescribed a punishment for failing to obey the orders of the president as an offense against the laws of the United States.³ Another conspicuous example of such discretion confided to the president was the act of congress in 1863 empowering him to suspend the writ of *habeas corpus*.⁴

The true distinction is between the delegation of power to

the court, "over this subject seems to be properly within the judicial province, and has always been so considered. It is, undoubtedly, proper for the legislature to prescribe the manner in which these ministerial offices shall be performed, and this duty will never be devolved on any other department without urgent reasons. But in the mode of obeying the mandate of a writ issuing from a court, so much of that which may be done by the judiciary, under the authority of the legislature, seems to be blended with that for which the legislature must expressly and directly provide, that there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its courts. 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."

In *Coleman v. Newby*, *supra*, Valentine, J., said: "If the legislature says that the district courts shall, in certain cases, be clothed with certain

discretionary power, where does the supreme court get authority to say that the district court shall not be clothed with such discretionary power by making rules limiting that discretion? It is not in the nature of things for one court to exercise discretion for another court; and if it cannot, who shall say that it can, as a judicial act or otherwise, make rules limiting or regulating the decision of another court? An attempt to do so is an attempt to legislate. It is claimed, however, that the legislature have authorized the supreme court to make rules for the district court; but this the legislature could not do if they would. The making of rules is not a subject of judicial power, as has already been shown; and the legislature cannot bring under the judicial power a matter which from its nature is not a subject for judicial determination." *Murray v. Hoboken Land Imp. Co.*, 18 How. 284; *Auditor of State v. A. T. & S. Fe R. R. Co.* 6 Kan. 500.

¹ 5 Wheat. 1.

² Act 2d May, 1862.

³ In re Griner, 16 Wis. 423.

⁴ In re Oliver, 17 Wis. 681; *Coe v. Schultz*, 47 Barb. 64; *Hildreth v. Crawford*, 65 Iowa, 339; 21 N. W. Rep. 667.

make the law which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.¹

§ 69. **What is a delegation of legislative power?**—The constitution vests this power in the legislature; it must there remain by force of the constitution. It is exclusively vested in the legislature. The legislature cannot divest itself of the power, nor impart it to others, except in accordance with this distinction, though there are some recognized exceptions which will presently be considered. Legislative power is delegated contrary to the maxim stated when the legislature attempts to confer on others a power of substantive legislation, to be exercised independently or in conjunction with the legislature, or when it constitutes an inferior legislature or law-making body. An instance of such delegation is furnished by the case *Slinger v. Henneman*.² A section of a statute relative to dogs made the owner of any dog liable to the owner of domestic animals wounded by it for the damages without proving a knowledge of its vicious disposition; by a provision of the act, power was given to the board of supervisors to determine whether or not during the current year their county should be governed by the provisions of the act of which that section constituted a part. It was held that the legislature could not confer that power. The court pertinently remark that it could no more confer such a power than to authorize the board of supervisors of a county to abolish in such county the days of grace on commercial paper, or to suspend the statute of limitations. A similar statute in Missouri was held void for the same reason.³ A general statute formulating a road system contained a provision that "if the county court of any county should be of opinion that the provisions of the act should not be enforced, they might, in their discretion, suspend the operation of the same for any specified length of time; and thereupon the act should become inoperative in such county for the period specified in such order, and thereupon order the road to be opened and kept in good repair under the

¹ *Cincinnati, etc. R. R. Co. v. Commissioners*, 1 Ohio St. 77.

² 38 Wis. 504, 508-510.

³ *State v. Field*, 17 Mo. 529.

laws theretofore in force." Gamble, J., said, "this act, by its own provisions, repeals the inconsistent provisions of a former act, and yet it is left to the county court to say which act shall be in force in their county. The act does not submit the question to the county court as an original question, to be decided by that tribunal, whether the act shall commence its operation within the county; but it became by its own terms a law in every county not excepted by name in the act. It did not then require the county court to do any act in order to give it effect. But being the law in the county, and having by its provisions superseded and abrogated the inconsistent provisions of the previous laws, the county court is . . . empowered to suspend this act, and revive the repealed provisions of the former act. When the question is before the county court, for that tribunal to determine which law shall be in force, it is urged before us that the power then to be exercised by the court is strictly legislative power, which, under our constitution, cannot be delegated to that tribunal or to any other body of men in the state. In the present case the question is not presented in the abstract; for the county court of Salem county, after the act had been for several months in force in that county, did, by order, suspend its operation; and during that suspension, the offense was committed which is the subject of the present indictment."

§ 70. **Exceptions which have been established.**—There are some valid delegations of legislative power. Congress has delegated it to territorial governments; other legislatures have delegated it to municipalities. Congress has power to annul territorial legislation; so state legislatures may annul municipal laws; but the annulling act has only the effect of a repeal. They are valid until annulled; they are not thus made void from the beginning. The delegation of legislative power to cities is a limited one—to make by-laws or ordinances; but still a delegation of legislative power.¹ The delegation of power in these instances is to formulate and put in force rules of civil conduct of more or less scope. The territorial grant extends to "all rightful subjects of legislation;" it is granted as broadly as by constitutions to the state legislatures. The power to legislate for the territories was granted to congress by the fed-

¹ Kelly v. Meeks, 87 Mo. 396; S. C. 13 Am. & Eng. Corp. Cas. 220.

eral constitution.¹ The delegation of it to the territorial government is a departure from the general rule, but consistent with the principles which support the rule; for it is a concession of the right of self-government to those who would otherwise have no voice in making the laws which govern them. The delegation of this power to municipalities is justified on the ground of presumed intention of the people, from the immemorial practice in this country and in England of creating their local governments.² These departures decentralize the governing power; the governed have thus a direct voice in the regulation of their local affairs.

¹ *Dred Scott v. Sandford*, 19 How. 393; *National Bank v. County of Yankton*, 101 U. S. 129.

² *Triggally v. Mayor, etc.* 6 Cold. 382; *Clarke v. Rochester*, 28 N. Y. 605; *Cooley's Con. Lim.* 143. This subject is thus discussed by Battle, J., in *Thompson v. Floyd*, 2 Jones' L. 313: "Neither is it necessary for us to consider the general question whether the general assembly can delegate any portion of its legislative functions to any man or set of men acting either in an individual or corporate capacity. That it may has been too long settled and acquiesced in by every department of the government and by the people to be now disputed or even discussed. The taxing power is unquestionably a legislative power, and one of the highest importance, and yet it has, ever since the adoption of the constitution, been partially delegated to the justices of the county courts and to every incorporated city, town and village throughout the state. The power to pass laws and ordinances for the government of the members of a corporation is a legislative power, and yet no person has yet thought it an infringement of the constitution for the legislature to confer the power of making by-laws upon the corporation itself. The power of prescribing

rules for the orderly conduct of business in a court of justice is a legislative power, and yet it has often been intrusted to the courts themselves with the approbation of everybody. The truth is, that in the management of all the various and minute details which a highly civilized and refined society requires, the general assembly must have, and are universally conceded to have, the power to act by means of agents, which agents may be either individuals or political bodies, most generally the latter. Without such power the legislature would be an unwieldy body, incapable of accomplishing one-half of the great purposes for which it was created.

"The act [in question] authorized the county court to ascertain a fact, i. e., whether a majority of them were in favor of surrendering the jurisdiction of having jury trials in that court, and in the event of the fact being thus found, enacted that thereafter such jurisdiction should be taken from them and vested exclusively in the superior court of the county. When the fact was ascertained and the consequence ensued, the county courts were *functi officio*—had no further power over the matter; they had not in any proper sense legislative power."

§ 71. Effect of submitting laws or questions controlling their effect to popular vote.—The legislature having the general power of enacting laws may enact them in its own form when not restricted, and give them such effect, to be worked out in such a way and by such means as it chooses to prescribe. It may provide that a law shall go into effect at one time or another; absolutely or on condition; upon certain terms or on a certain event, or without regard to future events.¹

§ 72. It is agreed by all the authorities that an act may be valid though its taking effect is made to depend on a future contingent event. The case of the *Cargo of Brig Aurora v. United States*² presents an instance of such an act.

The result of a popular vote is an uncertain event; but there is some diversity of decision on the question whether the taking effect of a general act can be made to depend on such a contingency. Very few cases, however, have come before the courts involving that question. *Barto v. Himrod*³ is an early one of that limited number, decided in 1853. An act "establishing free schools throughout the state" was by its terms

¹ *Hobart v. Supervisors*, 17 Cal. 23. In *Blanding v. Burr*, 13 Cal. 357, Field, J., said of a local law providing for its submission to popular vote: "The act in question authorizes the issuance of the bonds upon the condition that objection to their issuance was not interposed in a specified manner. As an emanation of the legislative will it was perfect in all its parts. The condition upon the exercise of authority was imposed by the legislature itself, and involved no delegation of legislative authority. Laws may be absolute, dependent upon no contingency, or they may be subject to such conditions as the legislature, in its wisdom, may impose. They may take effect only upon the happening of events which are future and uncertain; and, among others, the voluntary act of the parties upon whom they are designed to operate. They are not less perfect and complete when passed by the legislature,

though future and contingent events may determine whether or not they shall ever take effect. In anticipation of invasion or insurrection or local disturbance, or other emergencies requiring the exercise of special powers, acts were constantly passed, and yet no one has ever questioned their validity as laws, because dependent in their operation upon occasions which may never arise. So the legislature may confer a power without desiring to enforce its exercise, and leave the question whether it shall be assumed to be determined by the electors of a particular district. The legislature may determine absolutely what shall be done, or it may authorize the same thing to be done upon the consent of third parties. It may command, or it may only permit; and in the latter case, as in the former, its acts have the efficacy of laws."

² 7 Cranch, 382.

³ 8 N. Y. 483.

to be submitted to the qualified voters of the state to determine "whether this act shall or shall not become a law." The act — not merely the provisions for submission — was held void, because there was a delegation of legislative power to the people; they were to decide whether it should become a law or not. The act was framed and duly passed by the legislature and approved. It provided for a system of free schools. It enacted that it should be voted upon; what should be the effect of a majority in the negative, and the effect of a majority in the affirmative. In one event the system was to be practically adopted — put in operation; in the other, it was to be abandoned; these effects were alternatives in the act; it was so written. If valid, the system would go into effect or not, because the legislature had so provided. In either case the act would operate as a law. The expressions, therefore, in one event, that the act should "become a law," and in the other that it should "not become a law," were precisely equivalent in substance to "take effect" or "not take effect." And Ruggles, C. J., said: "If, by the terms of the act, it had been declared to be law from the time of its passage, to take effect in case it should receive a majority of votes in its favor, it would nevertheless have been invalid, because the result of the popular vote upon the expediency of the law is not such a future event as the statute can be made to take effect upon, according to the meaning and intent of the constitution."¹

¹The chief justice amplified in this language: "The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expediency of the law; an event on which the expediency of the law in the judgment of the law makers depends. On this question of expediency the legislature must exercise its own judgment definitively and finally. When a law is made to take effect upon the happening of such an event, the legislature in effect declare the law inexpedient if the event should not happen; but expedient if it should happen. They appeal to no other

man or men to judge for them in relation to its present or future expediency. They exercise that power themselves, and thus perform the duty which the constitution imposes upon them.

"But in the present case, no such event or change of circumstances affecting the expediency of the law was expected to happen. The wisdom or expediency of the free-school act, abstractly considered, did not depend on the vote of the people. If it was unwise or inexpedient before that vote was taken, it was equally so afterwards. The event on which the act was made to take effect was nothing else than the vote of the people

A case arose in Iowa involving a similar question, and it was decided in the same way.¹ It recognized the validity of laws made to take effect upon the happening of a contingent event. On the question whether the result of a popular vote on the act going into effect was an event on which its going into effect could be made to depend, the court used this language: "If the people are to say whether an act shall become a law, they become, or are put in the place of, the law makers. And here is the constitutional objection. Their will is not a contingency upon which certain things are, or are not, to be done under the law, but it becomes the determining power whether such shall be the law or not. This makes them the 'legislative authority,' which, by the constitution, is vested in the senate and house of representatives, and not in the people." The legislature cannot refer a bill to the people for them to make it a law by popular vote. When such vote is called for to give the force of law to a proposal or plan of a law formulated by the legislature and submitted to the people, the courts only declare a truism, on which there is no dissent, in holding acts so adopted unconstitutional. But if an act is adopted by the legislature as a law, and, pursuant to its provisions, it is submitted to the people, and on their expression of approval or disapproval, as a fact or event, the act by its terms does or does not take effect, or takes effect at one particular date rather than another, then apparently the only question is whether the legislature can pass a law to take effect on such a contingency. The authorities would seem now to have established the doctrine, though not universally, that the

on the identical question which the constitution makes it the duty of the legislature itself to decide. The legislature has no power to make a statute dependent on such a contingency, because it would be confiding to others that legislative discretion which they are bound to exercise themselves, and which they cannot delegate or commit to any other man or men to be exercised. They have no more authority to refer such a question to the whole people than to an individual. The people are sov-

ereign, but their sovereignty must be exercised in the mode which they have pointed out in the constitution. All legislative power is derived from the people; but when the people adopted the constitution, they surrendered the power of making laws to the legislature, and imposed it upon that body as a duty."

¹Santo v. State, 2 Iowa, 165. See Geebrick v. State, 5 id. 491; Weir v. Cram, 37 id. 649; State v. Weir, 33 id. 134.

result of a popular vote is a contingency on which laws may be enacted to take effect.¹

In a very late case in Mississippi,² Campbell, J., delivering the opinion of the court, said: "On the question of the right to make an act of the legislature to depend for its operation on a future contingency, argument was exhausted long ago, and the principle established by oft-repeated examples, and by adjudications in this state and elsewhere in great numbers, that this may be done without violating the constitution. It is idle to talk of precedent and subsequent contingencies or conditions, between defeating the operation of an act or putting it in operation. There is no such distinction. It is merely fanciful and deceptive. It is for the legislature in its discretion to prescribe the future contingency, and it is not an objection on constitutional grounds that a popular vote is made the contingency."

§ 73. Same — Cases maintaining constitutionality of such acts.—Two cases arose in 1854 involving the question whether a provision of an act was valid which referred to the people a choice of the time when an act should take effect. One was *State v. Parker*.³ By the terms of the act it was to take effect on the second Tuesday of March, 1853, with a proviso "that if a majority of the ballots to be cast as hereinafter provided shall be 'no,' then this act shall take effect on the first Monday of December, A. D. 1853." The act was held valid. The case must have been determined in the same way had the proviso for submission to the people been held void, and the act otherwise valid; but the proviso was sustained upon thorough consideration. Redfield, C. J., delivering the opinion of the court, used this language: "It seems to me that the distinction attempted between the contingency of a popular vote and other future uncertainties is without all just foundation in sound policy or sound reasoning, and that it has too often

¹See cases cited *ante*, §§ 71, 72; *nolds*, 5 Gilm. 1; *Alcorn v. Hamer*, People v. Hoffman, 116 Ill. 587; S. C. 38 Miss. 652; *Guild v. Chicago*, 82 Ill. 11 Am. & Eng. Corp. Cas. 40; *Potwin* 472; *Locke's Appeal*, 72 Pa. St. 491; *v. Johnson*, 108 Ill. 70; *Fell v. State*, People v. Butte, 4 Mont. 174; *State v. 42 Md. 71*; *Mayor, etc. v. Clunet*, 23 Wilcox, 42 Conn. 364; *State v. Cooke*, id. 469; *Bull v. Read*, 13 Gratt. 88; 24 Minn. 247. *Burgess v. Pue*, 2 Gill, 11; *People v. Schullherr v. Bordeaux*, 64 Miss. 59. *Salomon*, 51 Ill. 37; *People v. Rey-* ²26 Vt. 357.

been made more from necessity than choice — rather to escape from an overwhelming analogy than from any obvious difference in principle in the two classes of cases; for . . . one may find any number of cases in the legislation of congress where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts or restrictions of other countries.”

The other case is *People v. Collins*.¹ The act in question was passed in February, 1853. It provided in substance that if a majority of the votes were “yes,” the act should “become a law of the state from and after the 1st day of December, 1853, and if a majority were ‘no,’ then the act should take effect and become a law from and after the 1st day of March, 1870.” The court was equally divided on the question of the validity of the act.²

In *Smith v. Janesville*,³ the supreme court of Wisconsin held a general act valid which by its provisions was to take effect only after approval by a majority of the electors voting on the subject at a general election. The court by Dixon, C. J., thus maintains the validity of acts referred to the people for approval or disapproval: “This,” he says, “is no more than providing that the act should take effect on the happening of a certain future contingency, that contingency being a popular vote in its favor. No one doubts the general power of the legislature to make such regulations and conditions as it pleases with regard to the taking effect or operation of laws. They may be absolute or conditional, and contingent; and if the latter, they may take effect on the happening of any event which is future and uncertain. Instances of this kind of legislation are not unfrequent. The law of congress suspending the writ of *habeas corpus* during the late rebellion is one.⁴ . . . It being conceded that the legislature possesses this general power, the only question here would seem to be whether a vote of the people in favor of a law is to be excluded from the number of these future contingent events upon which it may be provided that it shall take effect. A similar question was before this court in a late case⁵ and was

¹ 3 Mich. 343.

⁴ In re Oliver, 17 Wis. 681.

² See *People v. Burns*, 5 Mich. 114.

⁵ *State v. O'Neill*, 24 Wis. 149.

³ 26 Wis. 291.

very elaborately discussed. We came unanimously to the conclusion in that case, that a provision for a vote of the electors of the city of Milwaukee in favor of an act of the legislature, before it should take effect, was a lawful contingency, and that the act was valid. That was a law affecting the people of Milwaukee particularly, while this was one affecting the people of the whole state. There the law was submitted to the voters of that city, and here it was submitted to those of the state at large. What is the difference between the two cases? It is manifest, on principle, that there cannot be any."

§ 74. The operation and terms of an act may be made to depend on foreign legislation. A statute of Illinois provides a general rate of taxation and scale of fees to be paid by foreign insurance companies doing business in that state. It also provides, by way of exception, that where the laws of the state to which such foreign company belonged had imposed, or should thereafter impose, upon Illinois insurance companies doing business therein a higher rate of taxation than is required by the laws of Illinois, then the insurance companies of that state doing business in Illinois should there pay the higher rate charged in the state to which they belonged upon Illinois companies doing business in such state. The validity of this statute came in question in a late case in that state.¹ It was objected to on the ground that thereby the legislature had abdicated its legislative functions and surrendered them to a foreign state. The court denied the force of this objection, and by Mulkey, J., thus answered it: "It is competent for the legislature to pass a law the ultimate operation of which may by its own terms be made to depend upon some contingency, as upon the affirmative vote by the electors of a given district, or upon any other indifferent contingency the legislature in its wisdom may prescribe. Where the contingency upon which the ultimate operation of a law is made to depend consists of a vote of the people, or the action of some foreign deliberative or legislative body, as is the case here, it is erroneous to suppose the legislature in such case abandons its own legislative functions, or delegates its powers to the people in the one case or to such foreign deliberative or legislative body in the other. In either case the law is complete when it comes from the

¹ *Home Ins. Co. v. Swigert*, 104 Ill. 653; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *People v. Fire Association*, 92 N. Y. 311.

hands of the legislature, otherwise it would be inoperative and void; for we fully recognize the principle that a law, properly so called, cannot have a mere fragmentary or inchoate existence; and even if it could, neither the people by a vote, nor any other independent body, could complete the unfinished work of the legislature, and thus make it a law. But while this is so, nothing is better settled than that the operation and even remedial character of a perfect and complete law may, by virtue of limitations contained in the law itself, based upon contingent extraneous matters, be enlarged, diminished or wholly defeated. Such laws, though adopted, and absolutely perfect in all their parts, yet by their own limitations they are applicable to a hypothetical condition of things only, and which may or may not ever happen."

§ 75. Local laws dependent on popular vote generally held valid.—It is now settled that laws, at least of local application, may be imperative or permissive; they may authorize the people of cities, villages, townships, counties, groups of counties, or other limited districts, not otherwise defined than for the purposes of such acts, to determine for themselves local questions of police, taxation, or any other matter affecting their local welfare; and the law may be conditioned to carry into effect their determination or option.¹ They have thus been authorized to decide by popular vote and execute their decision to contribute for the building of railroads or other like public improvements;² to divide a county or organize a new one;³ to establish or remove a county seat;⁴ whether there shall be license or prohibition of the liquor traffic;⁵

¹ *Blanding v. Burr*, 13 Cal. 343; *People v. Salomon*, 51 Ill. 37.

² *Starin v. Town of Genoa*, 23 N. Y. 439; *Clarke v. Rochester*, 28 N. Y. 605; *Grant v. Courter*, 24 Barb. 242; *Corning v. Greene*, 23 id. 33; *Cincinnati, etc. R. R. Co. v. Commissioners*, 1 Ohio St. 77; *Hobart v. Supervisors*, 17 Cal. 23; *Moers v. Reading*, 21 Pa. St. 189; *Bank of Rome v. Village of Rome*, 18 N. Y. 38; *Cotton v. Leon County*, 6 Fla. 610; *Powers v. Inferior Ct.* 23 Ga. 65; *State v. O'Neill, Mayor, etc.* 24 Wis. 149; *Alcorn v.*

Hamer, 38 Miss. 652; *Slack v. Maysville, etc. R. R. Co.* 18 B. Mon. 1.

³ *People v. Reynolds*, 5 Gilm. 1; *People v. Burns*, 5 Mich. 114.

⁴ *Barnes v. Supervisors*, 51 Miss. 305; *Ex parte Hill*, 40 Ala. 121; *Commonwealth v. Painter*, 10 Pa. St. 214.

⁵ *Caldwell v. Barrett*, 73 Ga. 604; *Hammond v. Haines*, 25 Md. 541; *Commonwealth v. Weller*, 14 Bush, 218; *State v. Cooke*, 24 Minn. 247; *Fell v. State*, 42 Md. 71; *Locke's Appeal*, 72 Pa. St. 491; *S. C.* 13 Am. R. 716; *Doone v. State*, 12 Tex. App. 184; *Groesch v.*

whether paupers shall be a county or a township charge;¹ whether they will have a system of free schools;² whether domestic animals shall be permitted to run at large.³ The people locally interested may have the option to accept or reject a municipal charter or amendatory acts,⁴ or local police law.⁵

Acts giving such local options have not unfrequently been framed to secure it by making a new law go into effect or not according to the result of a popular vote.

In *State v. Noyes*,⁶ the people in a town meeting adopted a general law to suppress bowling alleys, and thereby, pursuant to its provisions, put it locally in operation.

In Mississippi an act for local taxation was, by its terms, suspended, and ceased to have effect by a protest of a majority of the legal voters.⁷

By the terms of a local act of Wisconsin it was to be void unless the legal voters of the city to which it was applicable should vote to accept it. It was an act to establish a board of public works. It was held valid; that it was a constitutional act to take effect or go into operation only upon a contingency provided in the law itself.⁸

In a Virginia act for local free schools it was provided that the act should not be carried into effect until a majority of the people of the district should approve it. It was sustained as constitutional.⁹

In *Boyd v. Bryant*,¹⁰ a general police law, to take effect upon local adoption, was held constitutional.

State, 42 Ind. 547; *Schulherr v. Bordeaux*, 64 Miss. 59; *Commonwealth v. Bennett*, 108 Mass. 27; *State v. Wilcox*, 42 Conn. 364; *State v. Court Com. Pleas*, 36 N. J. L. 72; S. C. 13 Am. R. 422; *Barnes v. Supervisors*, 51 Miss. 307; *Alcorn v. Hamer*, 38 id. 745.

¹ *Town of Fox v. Town of Kendall*, 97 Ill. 72.

² *Bull v. Read*, 13 Gratt. 78.

³ *Holcomb v. Davis*, 56 Ill. 413; *Erlinger v. Boneau*, 51 id. 94; *Dalby v. Wolf*, 14 Iowa, 228.

⁴ *Mayor, etc. v. Finney*, 54 Ga. 317; *Wales v. Belcher*, 3 Pick. 508; *City of Paterson v. Society*, 24 N. J. L. 385; *People v. Butte*, 4 Mont. T. 179; S. C. 47 Am. R. 346.

⁵ *Boyd v. Bryant*, 35 Ark. 69; S. C. 37 Am. R. 6.

⁶ 30 N. H. 279.

⁷ *Williams v. Cammack*, 27 Miss. 209.

⁸ *State v. O'Neill, Mayor, etc.* 24 Wis. 149.

⁹ *Bull v. Read*, 13 Gratt. 78.

¹⁰ 35 Ark. 69; S. C. 37 Am. R. 6.

Such cases as *Rice v. Foster*,¹ *Parker v. Commonwealth*,² *Ex parte Wall*,³ and *Maize v. State*,⁴ are now exceptional, and are simply out of harmony with the law as generally held throughout the country.

On the whole it may perhaps be considered a sound conclusion, and I think it is supported by a preponderance of authority, that whether an act is general or local the legislature may in their wisdom take into consideration the wishes of the public, and determine not to impose a law on an unwilling or non-consenting people. Having the power to make their laws conditional to take effect only on the happening of contingent events, what the event shall be on which the taking effect of an act shall depend is not a judicial question, but wholly and absolutely within the discretion of the legislature, like the emergency which will induce them to make an act take immediate effect, and that the result of a popular vote is a contingent event within that discretion.

¹ 4 Harr. 479.

³ 48 Cal. 279.

² 6 Pa. St. 507, now overruled in *Locke's Appeal*, 72 id. 491.

⁴ 4 Ind. 342, substantially overruled by *Groesch v. State*, 42 Ind. 547.

CHAPTER IV.

CONSTITUTIONAL REQUIREMENT THAT NO ACT EMBRACE MORE THAN ONE SUBJECT AND THAT IT BE EXPRESSED IN THE TITLE.

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| <p>§ 76. Substantial agreement of constitutional provisions.</p> <p>79. Regarded as mandatory.</p> <p>82. Liberally construed to sustain legislation.</p> <p>85. Provisions must be germane.</p> <p>86. Requirement to state subject in title.</p> <p>87. Provisions can have no greater scope than subject in the bill.</p> <p>88. Title need not index details of act.</p> <p>89. "Etc." may increase scope of title.</p> | <p>§ 90. Title too general.</p> <p>91. Title should accompany bill in process of passage.</p> <p>93. What general title includes.</p> <p>98. Acts which relate to plurality of similar subjects.</p> <p>101. Title and subject of amendatory and supplementary acts.</p> <p>102. Provisions not within subject in the title.</p> <p>103. Effect of act containing more than one subject.</p> |
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§ 76. Substantial agreement of constitutional provisions—
Exceptions.—In the constitutions of a large majority of the states are provisions relating to the title and singleness of the subject-matter of legislative acts. It is not uniformly expressed in the same words, but it is in substance the same—that no law shall embrace more than one subject which shall be expressed in the title.¹

¹**Alabama—1865:** Art. 4, sec. 2.

Each law shall embrace but one subject, which shall be described in the title.

1868: Each law shall contain but one subject, which shall be clearly expressed in the title. Art. 4, sec. 2.

1875, adds: Except general appropriation bills, general revenue bill, and bills adopting a code, digest or revision of statutes.

California—1849: Art. 4, sec. 25.

Every law enacted by the legislature shall express but one ob-

ject, and that shall be expressed in the title.

Colorado—No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.

Florida—1868: Art. 4, sec. 14.

Each law enacted in the legislature shall embrace but one sub-

In the constitutions of New York, Wisconsin, and in the Illinois constitution of 1848, the provision is confined to private

ject, and matter properly connected therewith, which subject shall be briefly expressed in the title.

Georgia — 1865: Nor shall any law or ordinance pass which refers to more than one subject-matter or contains matter different from what is expressed in the title thereof. Art. 2, sec. 4.

Illinois — 1848: Art. 3, sec. 23. No private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title.

1870: Art. 4, sec. 13. No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, etc. (as in Colorado).

Indiana — 1851: Art. 4, sec. 19. 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, etc. (as in Colorado constitution).

Iowa — 1846: Art. 3, sec. 26. Same as in Indiana.

1857: Art. 3, sec. 29. Same as in Indiana.

Kansas — 1855: Art. 4, sec. 14. Every act shall contain but one subject, which shall be clearly expressed in its title.

1857: Art. 5, sec. 20. Every law enacted by the legislature shall embrace but one subject, and that shall be expressed in its title, and any extraneous matter introduced in a bill which shall pass shall be void.

1859: Art. 2, sec. 16. No bill shall contain more than one subject, which shall be clearly expressed in its title.

Kentucky — 1850: No law shall relate to more than one subject, and that shall be expressed in the title. Art. 2, sec. 37.

Louisiana — Every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title.

1852: Art. 115.

1864: Art. 118.

1868: Art. 114. Every law shall express its object or objects in its title.

Maryland — 1851: Art. 3, sec. 17. Every law enacted by the legislature shall embrace but one subject, and that shall be described in the title.

1864: Art. 3, sec. 28; art. 3, sec. 29.

Michigan — 1850: Art. 4, sec. 20. No law shall embrace more than one object, which shall be expressed in its title.

Minnesota — 1857: Art. 4, sec. 27. No law shall embrace more than one subject, which shall be expressed in its title.

Missouri — 1865: Art. 4, sec. 32. No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed. *State v. Miller*, 45 Mo. 495.

Nevada — 1864: Art. 4, sec. 17. Each law enacted by the legislature shall embrace but one subject and matter properly connected therewith, which subject

and local laws. It will be noticed that in several the injunction is against embracing more than one "object" in a bill.

shall be briefly expressed in the title.

New Jersey — 1844: Art. 4, sec. 7.

To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

New York — 1846: Art. 3, sec. 16.

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.

Ohio — 1851: Art. 2, sec. 16. No bill shall contain more than one subject, which shall be clearly expressed in its title.

Oregon — 1857: Art. 4, sec. 20.

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.

Pennsylvania — Added in 1864 by amendment to constitution of 1838, art. 2, sec. 3. No bill shall be passed by the legislature containing more than one subject, which shall be expressed in the title, except appropriation bills.

1873: Art. 3, sec. 3. No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title.

South Carolina — Every act or resolution having the force of law

shall relate to but one subject, and that shall be expressed in the title.

1868: Art. 2, sec. 20.

Texas — 1845: Art. 7, sec. 24. Every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title.

1866: Art. 7, sec. 24.

1868: Art. 12, sec. 17.

1876: Art. 3, sec. 35. No bill (except general appropriation bills which may embrace the various subjects and accounts for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its 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 so expressed.

Tennessee — 1870: Art. 2, sec. 17. No bill shall become a law which embraces more than one subject; that subject to be expressed in the title.

Virginia — 1850: Art. 4, sec. 16. No law shall embrace more than one object, which shall be expressed in its title.

1864: Art. 4, sec. 16.

1870: Art. 5, sec. 15.

West Virginia — 1861-1863: Same as in Virginia.

1872: Art. 6, sec. 30. No act hereafter passed shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof as shall not be so expressed.

In many instances the subject or object is required to be "*clearly*" and in one "*briefly*" expressed in the title. The provision that only one subject shall be embraced in an act is in some states qualified by adding "and matters properly connected therewith."

§ 77. The former constitution of Georgia merely inhibited the passage of any law containing matter different from that expressed in its title. Under it, according to the rulings and practice in that state, when there was added to the words in the title the phrase "and for other purposes," it gave an unlimited capacity to the body of the act.¹ The present constitution, however, prohibits the passage of any law which refers to more than one subject-matter or contains matter different from what is expressed in the title.

§ 78. **The mischief intended to be remedied — The purpose of these restrictive provisions.**— In the construction and application of this constitutional restriction the courts have kept steadily in view the correction of the mischief against which it was aimed. The object is to prevent the practice, which was common in all legislative bodies where no such restriction existed, of embracing in the same bill incongruous matters having no relation to each other, or to the subject specified in the title, by which measures were often adopted without attracting attention.² Such distinct subjects represented diverse interests, and were combined in order to unite the members of the legislature who favored either in support of all.³ These combinations were corruptive of the legislature and dangerous to the state.⁴ Such omnibus bills sometimes included more than a hundred sections on as many different subjects, with a title appropriate to the first section, "and for other purposes."⁵

The failure to indicate in the title of the bill the object in-

Wisconsin — 1848: Art. 4, sec. 18. low. 49 Ga. 241; Black v. Cohen, 52 Ga. 626.

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. ² Louisiana v. Pilsbury, 105 U. S. 278.

³ Shields v. Bennett, 8 W. Va. 83; Town of Fishkill v. F. & B. Co. 23 Barb. 634.

¹ Martin v. Broach, 6 Ga. 21; S. C. 50 Am. Dec. 306; Mayor, etc. v. State, 4 Ga. 26; Board of Education v. Bar-

⁴ People v. Mahaney, 13 Mich. 494.

⁵ Yeager v. Weaver, 64 Pa. St. 425.

tended to be accomplished by the legislation often resulted in members voting ignorantly for measures which they would not knowingly have approved. And not only were legislators thus misled, but the public also; so that legislative provisions were stealthily pushed through in the closing hours of a session which, having no merit to commend them, would have been made odious by popular discussion and remonstrance if their pendency had been seasonably announced. The constitutional clause under discussion is intended to correct these evils; to prevent such corrupting aggregations of incongruous measures by confining each act to one subject or object; to prevent surprise and inadvertence by requiring that subject or object to be expressed in the title.¹

§ 79. **Regarded as mandatory.**—The efficiency of this constitutional remedy to cure the evil and mischief which has been pointed out depends on judicial enforcement; on this constitutional injunction being regarded as mandatory, and compliance with it essential to the validity of legislation. The mischief existed notwithstanding the sworn official obligation of legislators; it might be expected to continue notwithstanding that that obligation is formulated and emphasized in this constitutional injunction, if it be construed as addressed exclusively to them, and only directory. It would, in a general sense, be a dangerous doctrine to announce that any of the

¹ *Davis v. State*, 7 Md. 160; *Parkinson v. State*, 14 Md. 184; *Slack v. Jacob*, 8 W. Va. 640; *State v. County Judge*, 2 Iowa, 282; *Brieswick v. Mayor*, 51 Ga. 639; *State ex rel. Att'y Gen'l v. Ranson*, 73 Mo. 78; *Montgomery, etc. Asso. v. Robinson*, 69 Ala. 413; *McGrath v. State*, 46 Md. 633; *People v. Mahaney*, 13 Mich. 494; *Grubbs v. State*, 24 Ind. 295; *Harris v. People*, 59 N. Y. 602; *People v. Denahy*, 20 Mich. 349; *Durkee v. City of Janesville*, 26 Wis. 697; *People v. Fleming*, 7 Colo. 230; *Stein v. Leeper*, 78 Ala. 517; *County Comm. v. Meekins*, 50 Md. 39; *Keller v. State*, 11 Md. 531; *County Commissioners v. Franklin R. R. Co.* 34 Md. 163; *Mayor, etc. v. State*, 30 Md. 118; *State v. Lasater*,

9 *Baxter*, 584; *Ryerson v. Utley*, 16 Mich. 269; *Smith v. Commonwealth*, 8 Bush, 108; *People v. Inst. of Prot. Deaconesses*, 71 Ill. 229; *White v. City of Lincoln*, 5 Neb. 505; *Mississippi, etc. Co. v. Prince*, 10 Am. & Eng. Cor. Cas. 391; *Sun Mut. Ins. Co. v. Mayor*, 8 N. Y. 241; *S. C. 5 Sandf.* 10; *Town of Fishkill v. F. & B. Co.* 22 Barb. 634; *Robinson v. Skipworth*, 23 Ind. 312; *City of St. Louis v. Teifel*, 42 Mo. 578; *Dorsey's Appeal*, 72 Pa. 192; *Walker v. Caldwell*, 4 La. Ann. 298; *State v. Town of Union*, 33 N. J. L. 350; *Gifford v. New Jersey R. R. Co.* 2 Stockt. 172; *Tadlock v. Eccles*, 20 Tex. 782; *Yeager v. Weaver*, 64 Pa. St. 427; *State v. Silver*, 9 Nev. 227.

provisions of the constitution may be obeyed or disregarded at the mere will or pleasure of the legislature, unless it is clear beyond all question that such was the intention of the framers of that instrument. It would seem to be a lowering of the proper dignity of the fundamental law to say that it descends to prescribing rules of order in unessential matters which may be followed or disregarded at pleasure.¹ The fact is this: that whatever constitutional provision can be looked upon as a directory merely is very likely to be treated by the legislature as if it was devoid of moral obligation, and to be therefore habitually disregarded.²

§ 80. The provision has been held mandatory in Tennessee on its particular language. Thus, in *Cannon v. Mathes*,³ Nicholson, C. J., called attention to the words: "No bill shall become a law which embraces more than one subject." "This," he said, "is a direct, positive and imperative limitation upon the power of the legislature. It matters not that a bill has passed through three readings in each house on different days, and has received the approval of the governor, still it is not a law of the state if it embraces more than one subject." So, in *Central & G. R. Co. v. People*,⁴ the last clause in the provision, as adopted in Colorado and several other states, was held decisive. That clause is, "but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."⁵ But in all the states having such a restrictive provision in which the question has arisen, except Ohio,⁶ and California under her former constitution,⁷ the command has been held to be mandatory.⁸

¹ *Commissioners of Sedgwick Co. v. Bailey*, 13 Kan. 607.

² *Cooley*, Const. Lim. *78.

³ 8 Heisk. 504.

⁴ 5 Colo. 39.

⁵ Art. 5, sec. 21.

⁶ *Miller v. State*, 3 Ohio St. 475; *Pim v. Nicholson*, 6 Ohio St. 176; *Steamboat Northern Indiana v. Milliken*, 7 Ohio St. 383; *Lehman v. McBride*, 15 Ohio St. 573; *State v. Covington*, etc. 29 Ohio St. 102; *Oshe v. State*, 37 Ohio St. 500.

⁷ *Washington v. Page*, 4 Cal. 388; *Pierpont v. Crouch*, 10 Cal. 315.

⁸ *People v. Hills*, 35 N. Y. 449; *Gaskin v. Meek*, 42 N. Y. 186; *People v. Allen*, 42 N. Y. 378; *People v. Lawrence*, 36 Barb. 185; *Huber v. People*, 49 N. Y. 132; *People v. Parks*, 58 Cal. 635; *People v. Fleming*, 7 Colo. 230; *Central & G. R. Co. v. People*, 5 Colo. 39; S. C. 9 Am. & Eng. R. R. Cas. 546; *Montgomery, etc. Asso. v. Robinson*, 69 Ala. 413; *Supervisors v. Heenan*, 2 Minn. 330; *Cannon v.*

§ 81. The courts possess and exercise the same power to expound and apply the provision of the constitution under consideration as they do to construe and enforce any other. It is as fatal to an act to be framed contrary to the constitution in its title and by embracing a plurality of subjects, as it would be to insert provisions to operate contrary to its other limitations.¹

The courts of Ohio, in holding this constitutional clause directory, are not to be understood as conceding that it is without obligatory force. On the contrary it is declared to be a direction to the general assembly which each member is under the solemn obligation of his oath to observe and obey. To the legislature it is of equal obligation with a mandatory provision, but a failure to observe it does not render the act void. It is there a rule of decision based on grounds of expediency.²

The present constitution of California, besides adding to the clause as it stood in the former constitution, another direction implying that provisions in an act on a subject not expressed in the title are void, contains a general provision that "the provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."³

The constitutional provision under consideration does not apply to statutes lawfully enacted before its adoption,⁴ nor to city ordinances, unless the constitution is broad enough in terms to embrace municipal legislation, or the same requirement is enacted in the charter.⁵

§ 82. **Liberal construed to sustain legislation not within the mischief.**—The courts with great unanimity enforce this constitutional restriction in all cases falling within the mis-

Hemphill, 7 Tex. 184; Cannon v. 383; Pennington v. Woolfolk, 79 Mathes, 8 Heisk. 504; State v. McCann, Ky. 13.

4 Lea, 1; Shields v. Bennett, 8 W. Va. 85; Phillips v. Covington, etc. Co. 2 Met. (Ky.) 221; Commissioners of Sedgwick Co. v. Bailey, 13 Kan. 607; Weaver v. Lapsley, 43 Ala. 224; Union Passenger R'y Co.'s Appeal, 81* Pa. St. 91; State v. Miller, 45 Mo. 495; Tadlock v. Eccles, 20 Tex. 782; City of San Antonio v. Gould, 34 Tex. 49; State v. McCracken, 42 Tex.

¹ Id.; Davis v. State, 7 Md. 151; S. C. 61 Am. Dec. 331, and reporter's note, 340.

² State v. Covington, 29 Ohio St. 102.

³ Const. 1879, art. 1, sec. 22.

⁴ Rogers v. Windoes, 48 Mich. 628.

⁵ Baumgartner v. Hasty, 100 Ind.

chiefs intended thereby to be remedied. And, in cases not within those mischiefs, they construe it liberally to give convenient and necessary freedom, so far as is compatible with the remedial measure, to the law-making power. They agree that whilst it is necessary to so expound this provision as to prevent the evils it was designed to remove, it is no less desirable to avoid the opposite extreme, the necessary effect of which would be to embarrass the legislature in the legitimate exercise of its powers, by compelling a needless multiplication of separate acts as well as to introduce a perplexing uncertainty as to the validity of many important laws which must be daily acted upon.¹ To facilitate proper legislation, it will not be interpreted in a strict, narrow or technical sense,² but reasonably.³

In *State v. Miller*⁴ the court say: "The courts in all the states where a like or similar provision exists have given a very liberal interpretation, and have endeavored to construe it so as not to limit and cripple legislative enactment any further than what was necessary by the absolute requirement of the law."⁵

The supreme court of Louisiana, in commenting on an argument of counsel which demanded a strict construction, uses this language: "We think the argument invokes an interpretation too rigorous and technical. 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."⁶ The intent of this provision of the constitution is to prevent the union in one act of incongruous matter, and of objects having no connection or relation; to require singleness of subject-matter, and an indicative or suggestive title to prevent

¹ *Parkinson v. State*, 14 Md. 184, 194; *People v. Mahaney*, 13 Mich. 481, 495; *City of St. Louis v. Tiefel*, 42 Mo. 578; *Montgomery Mut. B. & L. Asso. v. Robinson*, 69 Ala. 413; *In re Wakker*, 3 Barb. 162; *Sharp v. Mayor*, etc. 31 Barb. 572; *People v. Ins. Co.* 19 Mich. 392; *Atkinson v. Duffy*, 16 Minn. 49; *State v. Lasater*, 9 Baxt. 584; *Smith v. Commonwealth*, 8 Bush, 108; *Mayor, etc. of Annapolis v. State*, 30 Md. 112; *Ryerson v. Utley*, 16 Mich.

269; *State ex rel. Atty. Gen. v. Ranson*, 73 Mo. 78; *Slack v. Jacob*, 8 W. Va. 640; *State v. Town of Union*, 33 N. J. L. 350; *Shields v. Bennett*, 8 W. Va. 83.

² *Municipality No. 3 v. Michoud*, 6 La. Ann. 605.

³ *Ryerson v. Utley*, 16 Mich. 269.

⁴ 45 Mo. 497.

⁵ *Cooley's Const. Lim.* 176.

⁶ *Succession of Lanzetti*, 9 La. Ann. 333.

surprise by having matter of one nature embraced in a bill, while its title is silent or expresses another. But there must be some limit to the division of matter into separate bills or acts.¹ A reasonable construction permits the single subject to be comprehensive enough for practical purposes, for it only necessitates the separation of entireties, and great latitude is allowed in stating the subject in the title.

But a disregard of the constitutional restriction even in an otherwise meritorious bill will be fatal.² The departure, however, must be plain and manifest, and all doubts will be resolved in favor of the law.³ The objections should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one subject, or, when it contains but one subject, on the ground that it is not sufficiently expressed in the title.⁴ Legislation is also liberally construed to render it, in proper cases, conformable with this feature of the fundamental law. This liberality will be fully illustrated in the ensuing sections.

§ 83. The subject or object of a statute.—The subject of a statute is the matter of public or private concern in respect to which its provisions are enacted; its object is its general aim or purpose.⁵ The constitutional clause under consideration, in some instances, is that no law shall embrace more than one *subject*; in others, no more than one *object*. These words are not strictly synonymous; but the provisions thus verbally varying have received substantially the same construction. The decisions made in New Jersey, Michigan and West Virginia are freely quoted in the other states; practically the same rule or principle of construction is acknowledged, and no distinctions have been established on the use of one of these words instead of the other, though allusion has sometimes been made to this difference of terms.⁶ The particular object of a statute cannot be expressed without also expressing the

¹ State v. County Judge, 2 Iowa, 280.

² People v. Denahy, 20 Mich. 349; State v. Tucker, 46 Ind. 355.

³ State v. County Judge, 2 Iowa, 282.

⁴ Montclair v. Ramsdell, 107 U. S. 155.

⁵ Matter of Mayer, 50 N. Y. 507; Dorsey's Appeal, 72 Pa. St. 192.

⁶ Shields v. Bennett, 8 W. Va. 83; State v. Cassidy, 22 Minn. 325.

subject of it. Thus in an act to divide the state into judicial districts, the subject and object are identical; that is, the answer would be the same respectively to questions pointed by those words. There is, therefore, no impropriety in using them indifferently.

§ 84. There is no constitutional restriction as to the scope or magnitude of the single subject of a legislative act. One to establish the government of the state embraces but a single subject or object, yet it includes all its institutions, all its statutes.¹ The unity of such an act, covering the multiform concerns of a commonwealth, is the congruity of all the details as parts of one "stupendous whole," of one government. That is the grand subject of such a statute or system of laws; it is equally the object of all its varied titles of chapters and sections.

There is similar unity in acts creating municipal corporations. Such a statute creates the corporate entity, invests it with and regulates the exercise of the necessary legislative, taxing, judicial and police powers. It embraces but one subject. The separate provisions granting, defining and regulating these powers are but parts of a whole, and essential to make a whole—the municipality.² One act may define all the crimes and provide a procedure in prosecutions. Each crime is distinct; the practice is distinct; but all the provisions of such an act are congruous parts of a larger subject which is an entirety.³ The California codes are good illustrations of comprehensive acts, each of which is a composite unity. One is entitled "An act to establish a political code." The first section defines its scope and parts: "This act shall be known as the political code of the state of California, and is divided into five parts as follows: Part 1. Of the sovereignty and people of the state, and of the political rights and duties of all persons subject to its jurisdiction. 2. Of the chief political divisions, seat of government, and legal distances of the state. 3. Of the government of the state. 4. Of the government of counties, cities and towns. 5. Of the definitions and sources of law; the common law; the publication and effect of the codes; and the ex-

¹ Bowman v. Cockrill, 6 Kan. 311. Grover v. Trustees, etc. 45 N. J. L.

² Harris v. People, 59 N. Y. 599; 399.

Montclair v. Ramsdell, 107 U. S. 147; ³ State v. Brassfield, 81 Mo. 151, 162.

press repeal of the statutes." The constituents of this section are congruous as parts of a political system. But in less comprehensive legislation, the subject or object may admit of joining only the topics in one of these subdivisions. So in legislating still more in detail the subject may be so circumscribed that even two topics in one subdivision would render the act multifarious.¹ The constitution does not enumerate the integers of statutory law, and therefore the legislature may make such divisions as it thinks proper, if it confines each act to a single subject; nor is it any objection, under this clause of the constitution, that an act does not dispose of the whole subject to which it relates.²

§ 85. The provisions of an act must be germane to one subject.— Whatever may be the scope of an act, it can embrace but one subject, and all its provisions must relate to that subject; they must be parts of it, incident to it or in some reasonable sense auxiliary to the object in view. That subject must be expressed in the title of the act. The constitutional requirement is addressed to the subject, not to the details of the act. The subject must be single; the provisions, to accomplish the object involved in that subject, may be multifarious.³ It is a matter of some difficulty, in many instances, to determine precisely what is the subject of an act by reason of the contrariety of its provisions and the complexity of its machinery and aims. All acts are not methodically framed; they do not always declare directly the subject or ultimate end in the enacting part, and then define its constituents and adjuvants, so that the coherence and subordination of the parts, and their relation to a subject in which they converge, can be at once perceived. In the body of an act the subject in which the operation of all the details unite, or are intended to unite, is not unfrequently left to inference. If it can be made out by construction, is single, and embraces all the provisions of the act, it is enough so far as the purview is concerned.⁴ The statement of the subject in the title when correctly and comprehensively expressed will furnish a key to the

¹ *Grover v. Trustees, etc.* 45 N. J. L. 399.

² *Davis v. State*, 7 Md. 158.

³ *Block v. State*, 66 Ala. 493.

⁴ *State v. Tucker*, 46 Ind. 355; *State v. Young*, 47 Ind. 150; *Robison v. Miner*, 68 Mich. 549.

intended unity of the enacting part. The whole act can be valid only when the subject so stated includes all the provisions in the body of the act.¹ None of the provisions of a statute will be held unconstitutional when they all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in the title.²

§ 86. **The requirement to state the subject in the title.**—The direction is, generally, that the subject be “expressed in the title.” It is varied in some instances. In Nevada it is to be *briefly* expressed; in several it is to be *clearly* expressed. These qualifying words do not add any new element; they merely assist in the interpretation. A brief statement of the subject will suffice under the provision as it is generally worded;³ and the decisions in Nevada afford no ground for inferring that a prolix title, otherwise unobjectionable, would vitiate an act.⁴ The requirement that it be *clearly* expressed imports no more than that it be expressed; though it may add some emphasis.⁵ { If the title does not clearly express the subject, but is ambiguous and suggestive of doubt, still it is believed the doubt, if possible, would be resolved in favor of the validity of the act.⁶ } The title of an act was formerly no part of it, and was not much resorted to in the exposition of the act; but under this constitutional clause it is an indispensable part of every act.⁷

§ 87. **The subject in an act can be no broader than the statement of it in the title.**—It is required not only that an act shall contain but one subject, but that that subject be ex-

¹ Montgomery M. B. & L. Asso. v. Robinson, 69 Ala. 413; Ex parte Polard, 40 Ala. 99; Grover v. Trustees, etc. 45 N. J. L. 399; Shivers v. Newton, 45 N. J. L. 469; Ryerson v. Utley, 16 Mich. 269.

² Howland Coal & Iron W. v. Brown, 13 Bush, 685; Phillips v. Bridge Co., 2 Met. (Ky.) 222; Louisville, etc. Co. v. Ballard, 2 Met. (Ky.) 168; Chiles v. Drake, 2 Met. (Ky.) 150; Johnson v. Higgins, 3 id. 566.

³ Shivers v. Newton, 45 N. J. L. 469.

⁴ State v. Ah Sam, 15 Nev. 27.

⁵ Dorsey's Appeal, 72 Pa. St. 192;

Commonwealth v. Martin, 107 Pa. St. 185; W. Phila. R. R. Co. v. Union R. R. Co. 9 Phila. 495; Carr v. Thomas, 18 Fla. 736; Evans v. Memphis, etc. R. R. Co. 56 Ala. 246; Board of Com'rs v. Baker, 80 Ind. 374; Township of Union v. Rader, 39 N. J. L. 509.

⁶ Montclair v. Ramsdell, 107 U. S. 147; State v. Board, etc. 26 Ind. 522; People v. Briggs, 50 N. Y. 553.

⁷ McGrath v. State, 46 Md. 633; State v. Town of Union, 33 N. J. L. 350; Indiana Central R'y Co. v. Potts, 7 Ind. 681; Yeager v. Weaver, 64 Pa. St. 427; Stein v. Leeper, 78 Ala. 517.

pressed in the title. The title, thus made a part of each act, must agree with it by expressing its subject; the title will fix bounds to the purview, for it cannot exceed the title-subject, nor be contrary to it.¹ An act will not be so construed as to extend its operation beyond the purpose expressed in the title.² It is not enough that the act embraces but a single subject or object, and that all its parts are germane; the title must express that subject, and comprehensively enough to include all the provisions in the body of the act.³ The unity and compass of the subject must, therefore, always be considered with reference to both title and purview. The unity must be sought, too, in the ultimate end which the act proposes to accomplish, rather than in the details leading to that end.⁴ The particular effect of the purview exceeding the title, or of the latter misrepresenting the purview, will be discussed in another section.⁵ The title cannot be enlarged by construction when too narrow to cover all the provisions in the enacting part, nor can the purview be contracted by construction to fit the title;⁶ but the title, if not delusively general, may be sufficient though more extensive than the purview.⁷

§ 88. **Requisites of title — It need not index the details of the act.**—The title must state the subject of the act for the purpose of information to members of the legislature and pub-

¹ Board of Com'rs v. Baker, 80 Ind. 374; Matter of Tappen, 36 How. Pr. 390; State v. Garrett, 29 La. Ann. 637; Coutieri v. Mayor, etc. 44 N. J. L. 58; Mississippi, etc. Boom Co. v. Prince, 10 Am. & Eng. Cor. Cas. 391; S. C. 34 Minn. 71; Ex parte Moore, 62 Ala. 471; Matter of Blodgett, 89 N. Y. 392.

² Bates v. Nelson, 49 Mich. 459.

³ Mewherter v. Price, 11 Ind. 201; Ryerson v. Utley, 16 Mich. 269; Dorsey's Appeal, 72 Pa. St. 192; Ross v. Davis, 97 Ind. 79; Knoxville v. Lewis, 12 Lea, 180; Stiefel v. Md. Inst. for Blind, 61 Md. 144; Town of Fishkill v. Fishkill, etc. P. R. Co. 22 Barb. 634; Grover v. Trustees, etc. 45 N. J. L. 399; Shivers v. Newton, 45 N. J. L. 469; Cooley's Const. L. 179; Greaton v. Griffin, 4 Abb. Pr. (N. S.) 310.

⁴ State v. Town of Union, 33 N. J. L. 350; State v. County Judge, 2 Iowa, 280; City of St. Louis v. Tiefel, 42 Mo. 578; Morford v. Unger, 8 Iowa, 82; Whiting v. Mt. Pleasant, 11 Iowa, 482; Clinton v. Draper, 14 Ind. 295; Supervisors v. People, 25 Ill. 181; Succession of Lanzetti, 9 La. Ann. 329.

⁵ See post, §§ 102, 103.

⁶ Howland Coal & Iron Works v. Brown, 13 Bush, 681; In re Paul, 94 N. Y. 497; Matter of Sackett, etc. Sts. 74 N. Y. 95; State v. Clinton, 27 La. Ann. 40.

⁷ Yeager v. Weaver, 64 Pa. St. 427; In re De Vaucene, 31 How. Pr. 337; Luther v. Saylor, 8 Mo. App. 424; Johnson v. People, 83 Ill. 431; Coutieri v. New Brunswick, 44 N. J. L. 58; Garvin v. State, 13 Lea, 162.

lic while the bill is going through the forms of enactment.¹ It is not required that the title should be exact and precise.² It is sufficient if the language used in the title, on a fair construction, indicates the purpose of the legislature to legislate according to the constitutional provision; so that making every reasonable intendment in favor of the act, it may be said that the subject or object of the law is expressed in the title.³ As said by the supreme court of Illinois, the constitution does not require that "the subject of the bill shall be specifically and exactly expressed in the title; hence we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required."⁴ It may be general, but must be specific enough to answer reasonably the purpose for which the subject is required to be expressed in the title.⁵

When the subject is stated in the title the constitution is so far complied with that no criticism of the mode of statement

¹ *Grover v. Trustees, etc.* 45 N. J. L. Pa. St. 429; *Atkinson v. Duffy*, 16 399; *McGrath v. State*, 46 Md. 633; Minn. 49.

People v. Lawrence, 36 Barb. 185; *Dorsey's Appeal*, 72 Pa. St. 192; *Indiana Cent. Ry. Co. v. Potts*, 7 Ind. 681; *Shields v. Bennett*, 8 W. Va. 83; *People v. McCallum*, 1 Neb. 182; *State v. County Judge*, 2 Iowa, 282; *Sun Mut. Ins. Co. v. Mayor, etc.* 8 N. Y. 252; *Mississippi, etc. Boom Co. v. Prince*, 10 Am. & Eng. Cor. Cas. 392; *S. C.* 34 Minn. 71; *Harris v. People*, 59 N. Y. 602; *Parkinson v. State*, 14 Md. 184; *Ryerson v. Utley*, 16 Mich. 269; *Brewster v. Syracuse*, 10 N. Y. 116; *National Bank v. Southern, etc. Co.* 55 Ga. 36; *Town of Fishkill v. Fishkill, etc.* P. R. Co. 22 Barb. 634; *Hargrave v. Weber*, 66 Mich. 59.

² *Grover v. Trustees, etc.* 45 N. J. L. 399; *Daubman v. Smith*, 47 N. J. L. 200; *In re Mayer*, 50 N. Y. 506; *People v. Briggs*, 50 N. Y. 558; *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 745; *Johnson v. People*, 83 Ill. 431.

³ *Grover v. Trustees, etc. supra*; *State Line, etc. R. R. Co.'s Appeal*, 77

Johnson v. People, 83 Ill. 436.

⁵ *Shivers v. Newton*, 45 N. J. L. 469; *State v. Garrett*, 20 La. Ann. 637; *Montclair v. Ramsdell*, 107 U. S. 147; *Matter of Sackett, etc.* Sta. 74 N. Y. 95; *Shields v. Bennett*, 8 W. Va. 83; *Green v. Mayor, etc. R. M. Charl.* 368; *Mayor, etc. v. State*, 4 Ga. 26; *City of Eureka v. Davis*, 21 Kan. 580; *Grover v. Trustees, etc.* 45 N. J. L. 399; *People v. McCallum*, 1 Neb. 183; *Montgomery, etc. Asso. v. Robinson*, 69 Ala. 413; *American Printing House v. Dupuy*, 37 La. Ann. 188; *State v. Wilson*, 12 Lea, 246; *State v. McConnell*, 3 Lea, 332; *State v. Whitworth*, 8 Lea, 594; *Commonwealth v. Green*, 58 Pa. St. 226; *Luehrman v. Taxing Dist.* 2 Lea, 425; *Clinton Water Com'rs v. Dwight*, 101 N. Y. 9; *In re Knaust*, 101 N. Y. 188; *Greaton v. Griffin*, 4 Abb. Pr. (N. S.) 310; *Daubman v. Smith*, 47 N. J. L. 200; *State v. Elvins*, 32 N. J. L. 362; *Parkinson v. State*, 14 Md. 184; *Falconer v. Robinson*, 46 Ala. 340.

will affect the validity of the act. The statute is valid in such a case; the degree of particularity in expressing the subject in the title is left to the discretion of the legislature.¹ No particular form has been prescribed in the constitution for expressing the subject or purpose of a statute in its title.² It need not index the details of the act, nor give a synopsis of the means by which the object of the statute is to be effectuated by the provisions in the body of the act.³ ✕

§ 89. "Etc." may increase the scope of a title — "And for other purposes" will not.— It has been decided in Tennessee that "etc." added to a title has force in extending the enumeration which precedes it.⁴ The question arose as to the validity of provisions in an act having this title: "An act to punish as felons all parties who may engage in keeping or conducting halls or houses for conduct of games of keno, faro, three-card monte and mustang, etc." Turney, J., delivering the opinion of the court, said: "The 'etc.' used at the end and as part of the title may not be rejected; it has a meaning. Webster defines it, 'et cetera,' 'and others,' 'and so forth.' This definition applied here makes it import 'and the rest of

¹ In *re* Mayer, 50 N. Y. 504; *Sun Mut. Ins. Co. v. Mayor*, etc. 8 N. Y. 241; *State v. Town of Union*, 33 N. J. L. 350; *State v. Newark*, 34 N. J. L. 236; *Montgomery, etc. Asso. v. Robinson*, 69 Ala. 413; *Ryerson v. Utley*, 16 Mich. 269; *People v. Mahaney*, 13 Mich. 494; *Morford v. Unger*, 8 Iowa, 82; *Whiting v. Mt. Pleasant*, 11 Iowa, 492; *Indiana Cent. R. R. Co. v. Potts*, 7 Ind. 681; *State v. Bowers*, 14 Ind. 195; *State v. County Judge*, 2 Iowa, 280; *Brewster v. Syracuse*, 19 N. Y. 116.

² *Grover v. Trustees*, etc. 45 N. J. L. 399; *People v. McCallum*, 1 Neb. 182.

³ *People v. McCallum*, *supra*; *Stuart v. Kinsella*, 14 Minn. 525; *St. Paul v. Colter*, 12 Minn. 50; *State v. Daniel*, 28 La. Ann. 38; *McCaslin v. State*, 44 Ind. 151; *Collins v. Henderson*, 11 Bush, 74; *Sun Mut. Ins. Co. v. Mayor*, etc. 8 N. Y. 241; *Conner v. Mayor*,

etc. 5 N. Y. 285; *People v. Lawrence*, 41 N. Y. 137; *Daubman v. Smith*, 47 N. J. L. 200; *Luehrman v. Taxing Dist. 2 Lea*, 425; *Township of Union v. Rader*, 39 N. J. L. 507; *Brown v. State*, 73 Ga. 38; *Reed v. State*, 12 Ind. 641; *State v. Lasater*, 9 Baxt. 584; *State v. Miller*, 45 Mo. 495; *Hammond v. Lesseps*, 31 La. Ann. 337; *Peachee v. State*, 63 Ind. 399; *Howell v. State*, 71 Ga. 224; *Luther v. Saylor*, 8 Mo. App. 424; *Martin v. Broach*, 50 Am. Dec. 306; *People v. Brislin*, 80 Ill. 423; *Bright v. McCulloch*, 27 Ind. 223; *State v. Cassidy*, 22 Minn. 325; *State v. County Comm'rs*, 13 Am. & Eng. Cor. Cas. 203; S. C. 17 Nev. 96; *Goldsmith v. Rome R. R. Co.* 62 Ga. 473; *State v. Silver*, 9 Nev. 227; *Gabbert v. Jefferson R. R. Co.* 11 Ind. 365.

⁴ *Garvin v. State*, 13 Lea, 162.

the games,' or 'other games.' It gives the members of the legislature notice that the subject of the title is drawn or elaborated in the body of the act; that the reformatory force of the act is not to be confined to houses, or to persons keeping houses for playing the four games recited, but is extended to other games. It has a significant and pointed conclusion which could not escape the attention of any member of the legislature who has regard to his obligations and duties. It said to him in terms, other games are leveled at besides the four mentioned in the title, and you are invited to look at them. It admonished him, the act is not made to cover a legislation incongruous in itself. By fair intendment, the bill had a necessary and proper connection with the act. . . . It cannot be objected that the title upon the subject is broader than the act under it. The title notified the legislature of a thoroughly comprehensive thrust at all parties engaged in conducting gambling houses; the act confines the thrust to parties conducting houses in the playing of nine games. The record shows there are a great many other games which are played everywhere, besides these mentioned in the act, of which, however, we presume the draftsman of the act was uninformed, but which might have been embraced under the title to his act. . . . It is now insisted the abbreviation 'etc.' has no meaning at all, or, at most, means 'and for other purposes.' . . . The abbreviation may no longer be called such. It is thoroughly incorporated into our language, is defined by our lexicographers, and is a perfect English word in almost common use.

"It cannot mean 'and for other purposes,' for the reason that such definitions would include any and all purposes, however foreign to the object of the legislation, one of the inconveniences and inconsistencies intended to be remedied by the present constitution." The phrase, "and for other purposes," expresses no specific purpose, and imports indefinitely something different from that which precedes it in the title. It is therefore universally rejected as having no force or effect, wherever this constitutional restriction operates.¹

¹ *City of St. Louis v. Tiefel*, 42 Mo. 637; *Commonwealth v. Green*, 58 Pa. 578; *State v. Garrett*, 29 La. Ann. St. 233.

§ 90. A title too general to answer the purpose intended, or otherwise misleading, will vitiate the act.—A title so general as practically to conceal the subject of the statute, or a false or delusive title, will be treated as not constitutionally framed, and the act held void.¹ An act “to legalize and authorize the assessment of street improvements and assessments” was held void for undue generality in not mentioning the place where it was intended to operate. It was a local act, and yet it did not name the city to which it applied.² So an act “to regulate a road in the town of Palatine, Montgomery county,” was held to conceal its true subject and to be false and delusive.³ The following acts, as entitled, received the same construction: An act to fix the salaries of the officers of a particular city, and confined to that city in its provisions, but entitled “An act to fix and regulate the salaries of city officers in cities of this state.”⁴ An act legalizing by its provisions a lottery scheme for a private partnership, under the title of “An act to establish the Mobile Charitable Association for the benefit of the common school fund of Mobile county, without distinction of color.”⁵ A supplement to a railroad charter providing for extension of its track into a new territory under a clause in the title “to lay additional tracks.”⁶

The case of *Anderson v. Hill*⁷ involves an act with a misleading title. The title of the act is “to provide for the straightening or otherwise deepening the channel of the Dowagiac river in Van Buren county.” There were three sections in the act. They authorized either or both of the two named townships in Van Buren county to vote money to be raised by tax, and the expenditure of it “for such river improvements.” It was held unconstitutional in part on the ground

¹ *People v. Allen*, 42 N. Y. 404.

² *Durkee v. City of Janesville*, 28 Wis. 697. In *Neuendorff v. Duryea*, 69 N. Y. 557, an act by its provisions local to New York City was general in its title: “An act to preserve the public peace and order on the first day of the week, commonly called Sunday.” It was held sufficient to cover provisions prohibiting dramatic performances on that day, since the cessation of such entertainments was

one of the particulars going to make up the public peace and good order.

³ *People v. Comm’rs of Highways*, 53 Barb. 70.

⁴ *Coutieri v. New Brunswick*, 44 N. J. L. 58.

⁵ *Moses v. Mayor*, etc. 52 Ala. 198.

⁶ *Union Passenger R’y Co.’s Appeal*, 81* Pa. St. 91; *West Phila. R. R. Co. v. Union R. R. Co.* 9 Phila. 495.

⁷ 54 Mich. 477.

that "the object" was not sufficiently stated in the title. The court say: "The state having the right to engage in and carry on works of internal improvement by the expenditure of grants to the state of lands, the obvious inference from the language of the title would be that the state proposed to provide for the straightening or deepening of the channel of the Dowagiac river by doing what they constitutionally could do, namely, by appropriating land for that purpose. This is the method she has provided for making her internal improvements since 1850. In view of the constitutional restriction, and the long course of practice pursued by the state in making internal improvements, would any one be justified in assuming that the language in the title of this act was intended to embrace the object of permitting the legal voters of the township of Decatur to vote a tax upon the taxable property of the township to aid the state in carrying on the work of straightening and deepening the channel of the Dowagiac river? Yet such was the real as well as the principal object of the act. Without this legislation the state possessed full power, acting under its state board of control of swamp lands, to make the improvement named in the title of the act. The state has never acted and has no occasion to act under the provisions of act No. 323 [the act in question]. The circuit court, however, finds as a fact, that the Dowagiac state ditch mentioned in the contract [for work on the ditch entered into with the state] was the same improvement as that contemplated by the special act No. 323. If this be true, then clearly the object of the act was not expressed in the title and could not be otherwise than in some manner indicating that the object of the law was to authorize or enable the townships of Decatur and Hamilton to aid the state in straightening or deepening the channel of the Dowagiac river in the county of Van Buren. As well might an act to authorize the construction of a railroad from one point to another include provisions for municipalities along its route to vote aid in its construction, without violating the constitution."¹

§ 91. The title should accompany a bill in its passage through the legislature.—It is during the passage of a bill that its title is intended by the constitution to impart informa-

¹ See *Brooks v. Hydorn*, 76 Mich. 273; *State v. Com'rs*, 41 Kan. 630.

tion to the public and to members of the legislature of the general subject of legislation. To effectuate that intent the title should accompany the bill in all its stages through the process of enactment. As stated by Simonton, P. J.: "If a bill can be passed with a title which does not denote its subject, and after its passage the title can be amended so as for the first time to express its purpose, the constitutional provision is of little value."¹ Only such portions of a bill as were included in the subject as expressed in the title when it passed the two houses,² and when approved by the governor,³ will acquire the force of law. A mere clerical mistake or a mere clerical change, not altering the sense of the title, will be disregarded.⁴

§ 92. Title and subject-matter liberally construed to sustain legislation.⁵ In cases not clearly within the mischief intended to be remedied by requiring the subject or object of an act to be single and expressed in the title, legislation will not be adjudged void on any nice or hypercritical interpretation.⁶ Sound policy and legislative convenience dictate a liberal construction of the title and subject-matter of statutes to

¹ *Commonwealth v. Martin*, 107 Pa. St. 185. In *Attorney-General v. Rice*, 64 Mich. 385, it appeared that to an act to organize the township of Ironwood, in the county of Ontonagon, it was objected that it had been substituted after the time for introducing new bills had expired for a skeleton bill entitled "An act to organize the township of Au Train;" that therefore the title of the bill as introduced did not express the object of the act as passed. The court say: "We cannot extend the provisions of the constitution beyond its express terms in this respect. If the object of the act as passed is fully expressed in its title, the form or *status* of such title at its introduction, or during any of the stages of legislation before it becomes a law, is immaterial. To hold otherwise would, in many cases, prevent any alteration or amendment of a bill after its introduction, as, in

legislative practice, it frequently becomes necessary to amend the title as introduced in order to conform to changes in the bill. The title to a bill is usually adopted after it has passed the house, and it is not an essential part of a bill, although it is of a law. *Larrison v. Peoria*, etc. R. R. Co. 77 Ill. 17." The facts stated in the contention were not accepted by the court, and it was held that the journals not showing the facts, parol evidence was not admissible. *People v. McElroy*, 72 Mich. 446; *Brooks v. Hydorn*, 76 id. 273.

² *Binz v. Weber*, 81 Ill. 288.

³ *Stein v. Leeper*, 78 Ala. 517.

⁴ *Plummer v. People*, 74 Ill. 361; *People v. Supervisors*, 16 Mich. 254.

⁵ See *ante*, § 82.

⁶ *Gillitt v. McCarthy*, 34 Minn. 318; *St. Louis v. Green*, 7 Mo. App. 468; *Supervisors v. Heenan*, 2 Minn. 330; *People v. Parks*, 58 Cal. 635.

maintain their validity; infraction of this constitutional clause must be plain and obvious to be recognized as fatal. The subject of an act may be expressed generally in the title,¹ or spelled out from details, and occasionally from details which are independent and unconnected except through some general subject as *cousins german* are related through a common ancestor.² An act in relation to grading Eighth avenue in a city was held a subject broad enough for provisions to make the grade of intersecting streets conform to the altered grade of that avenue.³ An act, among other things, for "laying out" certain portions of a city, and to provide means therefor, might contain provisions for opening streets. In so ruling the court say: "The words 'laying out' must be interpreted in a broad and liberal sense, . . . and may be regarded as covering the opening, for without such opening the laying out would be of no avail." An act "to indemnify the owners of sheep in case of damage committed by dogs," properly contained a provision imposing a license fee upon the owners and keepers of dogs;⁴ and an act "to regulate the foreclosure of real estate," a provision that the right of redemption might be waived,⁵ as well as provisions to otherwise regulate rights of redemption from sales under executions, judgments, orders or decrees of courts, and under mortgages by advertisement;⁶ an act "for the registration of all adult persons in each county," a provision that whenever it should be necessary to ascertain the number of adult persons with a view to any action by county commissioners or other county officers, the list

¹ *Ante*, § 88.

² *Attorney-General v. Joy*, 55 Mich. 94; *State v. Young*, 47 Ind. 150; *Bitters v. Board, etc.* 81 Ind. 125; *State v. Board, etc.* 26 Ind. 522; *State v. Miller*, 45 Mo. 495; *State v. Bowers*, 14 Ind. 195; *Lauer v. State*, 22 Ind. 461; *In re Dept. Pub. Parks*, 86 N. Y. 437; *People v. Ins. Co.* 19 Mich. 392; *Garvin v. State*, 13 Lea, 162; *Neifing v. Town of Pontiac*, 56 Ill. 172; *People v. Banks*, 67 N. Y. 568; *Ramagnano v. Crook*, 85 Ala. 226; *Burnside v. Lincoln Co. Court*, 86 Ky. 423; *Indianapolis v. Huegele*, 115 Ind. 581.

³ *In re Blodgett*, 27 Hun, 12.

⁴ *In re Dept. Pub. Parks*, 86 N. Y. 437.

⁵ *Cole v. Hall*, 103 Ill. 30.

⁶ *Atkinson v. Duffy*, 16 Minn. 49. *In Tuttle v. Strout*, 7 id. 465, under an act "for a homestead exemption," exemptions of personal property having no special connection with land occupied as a homestead were sustained. Such provisions would appear clearly beyond the scope of the title.

⁷ *Gillitt v. McCarthy*, 84 Minn. 318.

on file should be taken as conclusive on that subject.¹ An act "to repeal all existing laws, rules and provisions of law restricting or controlling the right of a party to agree with an attorney, solicitor or counselor for his compensation, and to more accurately fix and determine the costs to be allowed to the prevailing parties in suits at law in the circuit court," contained provisions for the taxation of costs in suits at law, including attorneys' fees, and also permitting parties to suits to make such private arrangements with their attorneys for carrying on suits as they might agree upon. The court held that the object of the act was to settle and declare the law of compensation for skill and services in suits at law in the circuit court, and was not multifarious.² Acts entitled to regulate the *sale* of intoxicating liquor will justify provisions against *giving* it away to consumers.³ An act "to regulate the sale of opium and suppress opium dens" was held sufficient to cover provisions forbidding a sale or gift of opium to any one but a druggist or practicing physician, except on the prescription of a practicing physician.⁴ Expenses may be provided for under a title relating to "debts."⁵ An act with a general title for relief of a named railroad company was held properly to have authorized the extension of its tracks through certain streets and avenues of a city, and to consolidate with any other company and thus to form a new one; that an act for relief of a railroad company must be one to remove some restriction upon its powers, or to give it greater powers.⁶ Though a title be broad it will be restrained by construction to lawful purposes.⁷ An act "to authorize the town of P. to raise money to construct a dock" was held broad enough for provisions to maintain it afterwards and to collect wharfage.⁸

¹ *Eureka v. Davis*, 21 Kan. 580.

² *Inkster v. Carver*, 16 Mich. 484. In *Howland Coal & Iron Works v. Brown*, 13 Bush, 681, it was held that an act professing by its title to provide for establishing a *criminal court* is not so restricted by this title that the body of the act may not confer also some other than criminal jurisdiction. The opinion construes the word *criminal* as merely part of the name of the court, and being so used

does not preclude conferring in part civil jurisdiction.

³ *Parkinson v. State*, 14 Md. 184; *Williams v. State*, 48 Ind. 306.

⁴ *Ex parte Yung Jon*, 28 Fed. Rep. 308.

⁵ *State v. State Auditor*, 32 La. Ann. 89.

⁶ *In re Prospect Park, etc.* R. R. Co. 67 N. Y. 371.

⁷ *Allor v. Board, etc.* 43 Mich. 76.

⁸ *Town of Pelham v. Woolsey*, 16 Fed. Rep. 418.

The court said: "One purpose of the constitutional provision referred to was to prevent secret or fraudulent legislation, or people from being misled by the title. . . . And that reasonable notice of the object of the bill should be given by the title;" and in referring to the foregoing title, in connection with the subject-matter, used this language: "It is true that strictly the maintenance of this work, or the power to keep and maintain the same in good repair at the expense of the town," is not identically the same as "constructing the dock," spoken of in the title. No one, however, could imagine that the dock was to be abandoned by the town the moment its original construction was completed. Subsequent repair is necessary in the nature of the case; and authority to construct the dock would therefore, in a general sense, seem to imply and include the power to keep it constructed by means of necessary repairs." The provision for charging dockage was connected with the construction as a means of raising the money to pay the cost.

§ 93. The subject or object stated generally in the title includes incidents and subsidiary details. — It appears already from what has been said in the preceding sections and the cases which have been cited, that the constitutional provision in question permits an announcement of the subject in general terms in the title of an act; that to facilitate legislation which is intended to be germane to that subject, a very liberal construction is adopted, both of the constitutional requirement and of legislation affected by it, to sustain all laws not within the mischief intended to be remedied. It only remains to illustrate some general principles which the course of decision has established for determining the singleness of legislative subjects; whether the provisions under them are congruous and pertinent; and the consequences of a total or partial departure from the constitutional injunction.

Where the title of a legislative act expressed a general subject or purpose which is single, all matters which are naturally and reasonably connected with it, and all measures which will or may facilitate the accomplishment of the purpose so stated, are properly included in the act, and are germane to its title.¹

¹ *In re Mayer*, 50 N. Y. 504; *State Commissioners*, 47 N. Y. 501; *Smith v. Squires*, 26 Iowa, 345; *People v. v. Commonwealth*, 8 Bush, 108;

The degree of relationship of each provision is not material, if it legitimately tends to the end disclosed in the title.¹ Whatever the scope of the subject, it comprehends not only its constituent parts, but its general incidents, and those which pertain to either of its parts, and everything contributory to the purpose the title expresses or necessarily implies.² This principle is recognized in several of the constitutions, which confine an act to a single subject, "and the matters properly connected therewith."

§ 94. **Same—Acts of incorporation.**—Any definite subject is generally capable of almost infinite arbitrary division; many particular or subordinate subjects may be included in one general subject,³ and each of these particular or subordinate subjects may be selected for the subject of the bill, and may itself be divisible and may embrace other particular or subordinate subjects. Acts to create corporations contain

Shields v. Bennett, 8 W. Va. 83; *Shipley v. Terre Haute*, 74 Ind. 297; *Black v. Cohen*, 52 Ga. 621; *Golden Canal Co. v. Bright*, 8 Colo. 144; *Wishmier v. State*, 97 Ind. 160; *McCaslin v. State*, 44 Ind. 151; *Ewing v. Hoblitzelle*, 85 Mo. 64; *State v. Ather-ton*, 13 Am. & Eng. Cor. Cas. 203; *S. C.* 19 Nev. 332; *People v. Brislin*, 80 Ill. 423; *Howland Coal & Iron Works v. Brown*, 13 Bush, 681; *Mosier v. Hilton*, 15 Barb. 657; *City of St. Louis v. Tiefel*, 42 Mo. 578; *State v. Whitworth*, 8 Lea, 594; *Phillips v. Covington*, etc. *Bridge Co.* 2 Met. (Ky.) 219; *Brown v. State*, 73 Ga. 38; *Township of Union v. Rader*, 39 N. J. L. 509; *Montgomery M. B. & L. Asso. v. Robinson*, 69 Ala. 413; *Goldsmith v. Georgia R. R.* 62 Ga. 485; *Town of Abington v. Cabeen*, 106 Ill. 200; *Mayor, etc. v. Reitz*, 50 Md. 575; *Farmers' L. & T. Co. v. Oregon*, etc. *R. R. Co.* 24 Fed. Rep. 407; *State v. McConnell*, 3 Lea, 332; *Allen v. Tison*, 50 Ga. 374; *Adams v. Webster*, 26 La. Ann. 142; *Campbell v. Board of Pharmacy*, 45 N. J. L. 241; *McArthur v. Nelson*, 81 Ky. 67; *Halleman v. Halle-*

man, 65 Ga. 476; *Daubman v. Smith*, 47 N. J. L. 200; *Yellow River Imp't Co. v. Arnold*, 46 Wis. 214; *Unity v. Burrage*, 103 U. S. 447; *Ackley School Dist. v. Hall*, 113 U. S. 135; *Gillitt v. McCarthy*, 34 Minn. 318; *Central Plk. R. Co. v. Hannaman*, 22 Ind. 484; *Smith v. Bohler*, 72 Ga. 546; *Kirkpatrick v. New Brunswick*, 40 N. J. Eq. 46; *Crawfordsville, etc. T. Co. v. Fletcher*, 104 Ind. 97; *People v. Goddard*, 8 Colo. 432; *Mahomet v. Quackenbush*, 117 U. S. 508; *Seay v. Bank of Rome*, 66 Ga. 609; *State v. Squires*, 26 Iowa, 346; *Louisville, etc. R. R. Co. v. Ballard*, 2 Met. (Ky.) 165; *In re De Vaucene*, 31 How. Pr. 337; *Bowman v. Cockrill*, 6 Kan. 311; *Farmers' Ins. Co. v. Highsmith*, 44 Iowa, 330; *Town of Fishkill v. Fishkill*, 22 Barb. 634; *Atkinson v. Duffy*, 16 Minn. 49; *In re Dept. Public Parks*, 86 N. Y. 437; *English v. State*, 7 Tex. App. 171; *Klein v. Kinkead*, 16 Nev. 194; *Ross v. Davis*, 97 Ind. 79.

¹ *In re Mayer*, 50 N. Y. 504.

² *In re Upson*, 89 N. Y. 67.

³ *People v. Briggs*, 50 N. Y. 553, 562.

general subjects capable of much division; they are not confined to the mere creation of a corporate entity. Such an act defines the powers of the corporate body and regulates their exercise. An act to incorporate a city may contain provisions relating to the various subjects upon which municipal legislation may be required for the preservation of the peace, the promotion of its growth and prosperity, and for the raising of revenue for its government.¹ It may confer the necessary legislative, taxing, judicial and police powers — the grant of them is one subject.² The whole thing, the creation of the municipality, is that subject; the parts of it are separate subjects, but parts of one general subject.³ So an act to consolidate a city and provide for its government embraces but one subject. It may properly embrace the details for uniting different municipalities, providing for the payment of their debts, the government of the city, and all the minutia to which the general administration of its affairs would lead.⁴ The revision of an act which has incorporated a municipality announces but one subject. It may treat of the essential parts of the whole as well as may the original creative enactment.⁵ An act to revise and consolidate the several acts in relation to the charter of a city embraces but one subject. The charter consists of the creative act and all acts in force relating to the corporation. The word consolidate signifies that all the acts are to be brought into and re-enacted in one act. The subject is broad enough to embrace the details of the city government.⁶ “An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all railroad and other corporations owning and operating any railroad in this state,” covers but one object. It is to bring together the legislation concerning the creation and management of railroads.⁷ An act

¹ *Louisiana v. Pilsbury*, 105 U. S. 278; *City of Jacksonville v. Basnett*, 20 Fla. 525; *People v. Briggs*, 50 N. Y. 560.

² *Harris v. People*, 59 N. Y. 599; *Attorney-General v. Amos*, 60 Mich. 372; *People v. Pond*, 67 id. 98; *People v. Hurst*, 41 id. 328.

³ *Id.*

⁴ *Louisiana v. Pilsbury*, *supra*; *City of Covington v. Voskotter*, 80 Ky. 219; *State v. Haskell Co.* 40 Kan. 65.

⁵ *Harris v. People*, 59 N. Y. 602.

⁶ *People v. Briggs*, 50 N. Y. 560, 561.

⁷ *Toledo, etc. R. R. Co. v. Dunlap*,

to prescribe the manner of organizing corporations, public or private, is prospective, and provides the mode of creating new corporations. In such an act provisions to modify the charter of an existing corporation is a new subject, not germane to the title.¹ An act so entitled will operate to govern the incorporation of all subsequent companies; it is not multifarious on that account, but an act which in terms incorporates several companies is so.²

§ 95. The subject expressed in the title includes not only all matters which are constituent parts of it, but all matter directly incidental to it.³ An act "concerning drainage" includes for this reason assessments upon lands benefited to pay the expense.⁴ An act providing for the sale of school lands may define the rights acquired by a purchaser.⁵ So a grant of lands in aid of a public improvement may contain a provision exempting the land from taxation for a limited time.⁶ An act to regulate a specified business may prescribe penalties for violations of the act.⁷ An act "to authorize the Utica Water-Works Company to increase its capital stock and to contract with the common council of a city named for a supply of water in that city for the extinguishment of fires" was held to embrace but one subject, namely, the giving of authority to two corporate bodies therein named to enter into a contract for the purpose therein specified. The power to increase the capital of the company was given simply to enable it to raise such

47 Mich. 456; *Continental Improvement Co. v. Phelps*, id. 299.

¹ *Ayeridge v. Town Commissioners*, 60 Ga. 405; *City Council v. Port Royal*, 74 Ga. 658. See *State v. Clinton*, 27 La. Ann. 40.

² *King v. Banks*, 61 Ga. 20; *Ex parte Conner*, 51 id. 571.

³ *Central Plk. R. Co. v. Hannaman*, 22 Ind. 484; *Mayor, etc. v. Reitz*, 50 Md. 574; *City of St. Louis v. Green*, 7 Mo. App. 468; *Golden Canal Co. v. Bright*, 8 Colo. 144; *State v. Whitworth*, 8 Lea, 504; *McGrath v. State*, 46 Md. 633; *Brown v. State*, 73 Ga. 38; *Carson v. State*, 69 Ala. 235; *English v. State*, 7 Tex. App. 171.

⁴ *Wishmier v. State*, 97 Ind. 160.

⁵ *Prescott v. Beebe*, 17 Kan. 320. It was held in *Swayze v. Britton*, 17 Kan. 625, that an act "concerning notaries public" was not broad enough to include a provision authorizing notaries public protesting commercial paper to give notice thereof to parties secondarily liable. This conclusion cannot be reconciled with the rule of construction generally adopted.

⁶ *Board of Supervisors v. Auditor-General*, 65 Mich. 408.

⁷ *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485; *Weil v. State*, 46 Ohio St. 450; *Sykes v. People*, 127 Ill. 117; *State v. Stunkle*, 41 Kan. 456.

sums of money as might be necessary for a performance of its contract; it was a mere incident to the main object.¹ An act to establish a court necessarily includes provisions for the appointment or election of a judge and other officers, how and by whom jurors should be chosen and summoned.² An act to make further provision for the government of a city or county is one to provide ways and means for its support, a revenue act, not one which can contain any provision to reorganize or change the government or its organic law.³ Under a title to enable a public corporation to raise money by tax, provisions may be included not only prescribing the procedure to assess and collect the tax, but the objects may be designated for which the money is to be raised.⁴ An act entitled a supplement to "An act concerning taxes" is not open to the objection that it embraces more than one subject expressed in its title because it deals with several details of the matter of taxes.⁵ A statute embracing only one general subject, indicated by its title, is constitutional, no matter how fully it may enter into the details of that subject.⁶ An act for the more rigid collection of the revenue properly provides for the dif-

¹ *Utica Water-works Co. v. Utica*, 31 Hun, 426; *O'Meara v. Commissioners*, 3 T. & C. 236.

² *Commonwealth v. Green*, 58 Pa. St. 233.

³ *Gaskin v. Meek*, 42 N. Y. 186; *People v. O'Brien*, 38 id. 193. This last case decides that there cannot be included in a revenue bill entitled to give authority to raise money by tax for the use of a city corporation, and regulating its disbursement, a provision amending the charter in relation to the official term of councilmen and the time of their election. See *Huber v. People*, 49 N. Y. 132.

⁴ *Sun Mut. Ins. Co. v. Mayor*, etc. 8 N. Y. 252; *Sharp v. Mayor*, etc. 31 Barb. 572-575; *Smith v. Mayor*, etc. 34 How. Pr. 508.

⁵ *Kirkpatrick v. New Brunswick*, 40 N. J. Eq. 46; *Brown v. State*, 73 Ga. 38.

⁶ *Crawfordsville*, etc. T. Co. v. *Fletcher*, 104 Ind. 97; *Golden Canal*

Co. v. Bright, 8 Colo. 144; *People v. Goddard*, id. 432.

In *Ackley School District v. Hall*, 113 U. S. 135, was considered an "Act to authorize independent school districts to borrow money and issue bonds therefor for the purpose of erecting and completing school-houses, legalizing bonds heretofore issued, and making school orders draw six per cent. interest in certain cases," which was held not in violation of the provisions of the state constitution (Iowa), that "every act shall embrace but one subject and matter properly connected therewith, which subject shall be expressed in the title."

The act is thus summarized in the opinion of the court:

"The act contains six sections, the fourth providing that 'all school orders shall draw six per cent. interest after having been presented to

ferent classes of taxes and defines the duties of officers charged with their collection. It may define the jurisdiction of justices in revenue cases and prescribe the practice.¹ An act "to regulate the use of water for irrigation, and providing for settling the priority of rights thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulations and use," is only equivalent to the briefer title which might have been adopted: An act to regulate the use of water for irrigation. This was held to be the controlling purpose of the law; that the rest of the title refers to nothing which is not germane to the subject thus expressed. Incidental to a proper regulation of the use of water diverted from natural streams in (Colorado) is a determination of the priorities of water rights.²

the treasurer of the district and not paid for want of funds, which fact shall be indorsed upon the order by the treasurer.' As there are two kinds of school districts in Iowa, 'district township' and 'independent district,' — the latter carved out of the former, — it is contended that the title to the act in question embraces two subjects: one relating to matters in which independent school districts alone are concerned, and the other to matters in which the township district and independent districts are concerned; that whether school orders, which may be issued for many purposes, by districts of either kind, should bear interest or not, is wholly foreign to the borrowing of money to build school-houses in independent districts. Iowa Code, 1873, ch. 9, tit. 12.

"We are not referred to any adjudication by the supreme court of Iowa which supports the point here made. On the contrary the principles announced in *State v. County Judge*, 2 Iowa, 281, show that the act before us is not liable to the objection that its title embraces more than one

subject . . . The doctrines of that case have been approved by the same court in subsequent decisions, and they are decisive against the point here raised. *Morford v. Unger*, 8 Iowa, 83; *Davis v. Woolhough*, 9 id. 104; *People v. Brislin*, 70 Ill. 423; *McAurich v. R. R. Co.* 20 Iowa, 342; *Farmers' Ins. Co. v. Highsmith*, 44 Iowa, 334. The general subject to which this special act relates is the system of common schools. That system is maintained through the instrumentality of district schools of different kinds. Provisions in respect to these instrumentalities — those referring to the erection and completion of school-houses in independent school districts with money raised upon negotiable bonds, and others, to the rate of interest which all school orders shall bear — relate to the same general object and are only steps towards its accomplishment."

¹ *State v. Whitworth*, 8 Lea, 594; *Ensign v. Barse*, 107 N. Y. 329. See *State v. Wardens*, 23 La. Ann. 720.

² *Golden Canal Co. v. Bright*, 8 Colo. 144.

§ 96. A subject expressed in the title includes all subsidiary details, which are means for carrying into effect the object or purpose of the act disclosed in that subject.¹ An act to incorporate a railroad or other like company may, besides granting its corporate powers, confer on townships or municipalities through which its road passes, or which otherwise derive a public advantage from the enterprise and improvement of such company, power to subscribe to the capital stock of, or make donations to, the company; and it may provide for elections to decide as to such subscriptions or donations; for taxation to pay such subscriptions or donations, if voted; and for the issue of bonds to represent the same.² It may also provide for the personal liability of stockholders for labor.³ A charter to create an institution for the education of young men presents a subject which embraces everything which is designed to facilitate that object; everything intended and adapted to promote the well-being of the institution or its students.⁴ An act to establish a house of refuge for the correction and reformation of juvenile offenders may include an appropriation, not only of money, but land with directions for its sale.⁵ An act incorporating a bank may provide that all parties liable on any bill negotiated at the bank may be sued in one action.⁶ An act for the benefit of a turnpike company may authorize it to borrow money and to execute mortgages to secure its payment; to sell the road, right of way, etc., applying the

¹ *Farmers' Ins. Co. v. Highsmith*, 15 *id.* 20; *Fireman's Benefit Assoc. v. Lounsbury*, 21 *Ill.* 511; *People v. 44 Iowa*, 330; *State v. Tucker*, 46 *Ind.* 355; *State v. Baum*, 33 *La. Ann.* 981; *Allen v. Tison*, 50 *Ga.* 374; *Brown v. State*, 73 *Ga.* 38; *McArthur v. Nelson*, 81 *Ky.* 67; *State v. McConnell*, 8 *Lea*, 832; *Smith v. Bohler*, 72 *Ga.* 546; *Farmers' L. & T. Co. v. Oregon*, etc. *R. R. Co.* 24 *Fed. Rep.* 407; *Floyd v. Perrin*, 30 *S. C.* 1; *Fahey v. State*, 27 *Tex. App.* 146.

² *Mahomet v. Quackenbush*, 117 *U. S.* 508; *Town of Abington v. Ca-been*, 106 *Ill.* 200; *S. C.* 12 *Am. & Eng. R. R. Cas.* 581; *Connor v. Green Pond*, etc. *R. R. Co.* 23 *S. C.* 427; *Board of Super. v. People*, 25 *Ill.* 181; *Bellville R. R. Co. v. Gregory*, 15 *id.* 20; *Fireman's Benefit Assoc. v. Lounsbury*, 21 *Ill.* 511; *People v. Loewenthal*, 93 *Ill.* 191; *City of Vir-den v. Allan*, 107 *id.* 505; *Slack v. Jacob*, 8 *W. Va.* 640; *Hope v. Gains-ville*, 72 *Ga.* 246; *Unity v. Burrage*, 103 *U. S.* 447; *San Antonio v. Me-haffy*, 96 *U. S.* 312; *Binz v. Weber*, 81 *Ill.* 288; *People v. Brislin*, 80 *Ill.* 423.

³ *Shpley v. Terre Haute*, 74 *Ind.* 297.

⁴ *O'Leary v. County of Cook*, 28 *Ill.* 534.

⁵ *McCaslin v. State*, 44 *Ind.* 155; *Klein v. Kinkead*, 16 *Nev.* 194.

⁶ *Davis v. Bank of Fulton*, 81 *Ga.* 69.

proceeds to the payment of its debts; may authorize a judicial sale at the instance of creditors giving the purchaser the rights and powers of the company.¹ An act to establish state depositories and prescribe their duties and liabilities will cover provisions requiring a bond, and regulating the enforcement of it in case of default.² A statute of limitations may be inserted in a tax law for the purpose of aiding and assisting in the collection of taxes.³ As a means of enforcing a law for regulating and licensing the sale of intoxicating liquors, it may provide that a house where such liquors are sold, if kept in a disorderly manner, may be deemed a common nuisance; that so keeping it shall cause a forfeiture of the license, and subject the proprietor to a fine.⁴ For a like purpose the act may provide that the applicant for a license shall give a bond to the state conditioned, among other things, that he will pay all fines and costs that may be assessed against him for violating the provisions of the act.⁵ As a means of enforcing the payment of a special tax on dealers in liquors, it is germane to provide that upon failure to pay such tax the dealer may be indicted and punished for a misdemeanor.⁶ An act entitled "to prevent deception in the sale of dairy products, and to preserve the public health," goes beyond its title in making the manufacture of imitation butter a crime.⁷ A provision for submitting an act or any question on which its operation depends to a popular vote is germane to the subject or object of such act, and is a means to facilitate its execution.⁸

§ 97. The subject or object stated generally in the title includes the abolition of things inconsistent — Cases of substitution.— It is germane to the subject of an act to repeal previous acts relating to it.⁹ Such repeal is ancillary to the pur-

¹ *Louisville, etc. Co. v. Ballard*, 2 Wayne Circuit Judge, 58 Mich. 381; *Met. (Ky.)* 165.

² *Seay v. Bank of Rome*, 66 Ga. 609. *Arensberg*, 105 N. Y. 123.

See Wardle v. Townsend, 75 Mich. 385. ³ *City of Virden v. Allan*, 107 Ill. 505; *Caldwell v. Barrett*, 73 Ga. 604;

⁴ *Bowman v. Cockrill*, 6 Kan. 311. *Simpson v. Bailey*, 3 Oregon, 515;

⁵ *Fletcher v. State*, 54 Ind. 462; *Unity v. Burrage*, 103 U. S. 447.

O'Kane v. State, 69 Ind. 183. ⁶ *Yellow River Imp. Co. v. Arnold*,

⁷ *Kane v. State*, 78 Ind. 103. 46 Wis. 215; *State v. County Com'rs*,

⁸ *Brown v. State*, 73 Ga. 38; *Howell* 18 Am. & Eng. Cor. Cas. 203; *Gabbert v. Jeffersonville R. R. Co.* 11 Ind. 365;

v. State, 71 Ga. 224. ⁹ *Northwestern Manuf'g Co. v. Burke v. Monroe County*, 77 Ill. 610;

pose of the new legislation. When one legislative scheme or system is intended to supersede another, the subject of the act which makes the change naturally includes the removal of the existing legislative institution intended to be abolished or re-organized, in whole or in part, and the establishment of the new in its place.¹ One act may divide the state into judicial circuits for judicial purposes, provide for election of judges, fix the time for holding courts; also abolish an existing court, and transfer its unfinished business to the new court.² So one act properly includes all provisions for effecting the change of a steam railroad running in a tunnel in the street of a city to a surface railway, including the subject of compensation to the owner of the railroad and raising the means to pay it.³ It may happen, when partial substitutions occur, that a residuum of the previous state of things will remain, in a disrupted condition, requiring some fresh legislation not germane to the disrupting act. In such case the whole situation will not be re-arranged by one act. The unity of the original condition being destroyed, the validity of the new legislation will depend on its own subject being single.⁴

§ 98. Acts which relate to a plurality of similar subjects.—

Such subjects may be grouped and treated as a class for general legislation embracing all or a part. There is evident in the later constitutions a strong preference for such legislation, and against special, where general acts are appropriate and practicable. Generalizations to answer all cognate wants require preparation and reflection. A particular need first attracts the attention of the legislator, and when he proceeds to frame a measure with reference to it, how comprehensive he will make it depends on his leisure, his courage, his capacity and his public spirit. There is a marked difference between an act treating of individual subjects as such, and embracing more than one, and an act which aims at a single purpose

Martin v. Hewitt, 44 Ala. 418; Tol-
ford v. Church, 66 Mich. 431; State v.
Aulman, 76 Iowa, 624; Muldoon v.
Levi, 25 Neb. 457. See Ridge Avenue
R'y Co. v. Philadelphia, 124 Pa. St.
219.

¹ Luehrman v. Taxing Dist. 2 Lea,
425; Smith v. Commonwealth, 8

Bush, 108; State v. McConnell, 3
Lea. 332; Mullen v. State, 34 Ind. 540;
Phillips v. Mayor, etc. 1 Hilt. 483;
Supervisors v. Heenan, 2 Minn. (231),
333.

² State v. Tucker, 46 Ind. 355.

³ People v. Lawrence, 41 N. Y. 137.

⁴ Cutlip v. Sheriff, 3 W. Va. 588.

involving a plurality of subjects, and concerning all of them, or several of them. The former is generally multifarious;¹ the latter valid as dealing with a unity. One general law may provide how all municipal corporations may be organized, how all private corporations may be formed; but one act to create two corporations is void for duplicity.² One act may define all the crimes, or all belonging to one class;³ but one act which creates two separate offenses deals with two subjects.⁴ The multiplicity of persons or things which will be affected by the legislation is immaterial if the subject be single. An act authorizing two counties to issue bonds to erect a court-house in each was held to embrace but one subject—that of building court-houses.⁵ Such an act might properly embrace all counties. That it is not so general, and only applies to two, does not affect this question. It may have been as extensive as the occasion in the state required. But where the legislation concerns separate things without unity in any consideration or purpose it is within the constitutional inhibition. Thus a law provided for the expenditure of certain highway taxes on two distinct state roads, and for the location and construction of a third state road, and for the expenditure of certain other taxes upon that; it was held to embrace more than one subject. The three roads were held to be “three distinct objects of legislation,” which might with entire propriety have been provided for by separate acts; and, indeed, ought to have been, in view of the care which is taken by the constitution to compel each distinct object of legislation to be considered separately.⁶

¹In re Paul, 94 N. Y. 497; State v. Harrison, 11 La. Ann. 722.

²King v. Banks, 61 Ga. 20; Ex parte Connor, 51 id. 571.

³State v. Brassfield, 81 Mo. 162.

⁴In re Paul, *supra*.

⁵Allen v. Tison, 50 Ga. 374; Weyand v. Stover, 35 Kan. 545.

⁶People v. Denahy, 20 Mich. 349. Cooley, J., delivering the opinion of the court, said: “*These objects* have certainly no *necessary connection*, and being grouped together in one bill, legislators are not only precluded

from expressing by their votes their opinion upon each separately, but they are so united as to unite a combination of interest among the friends of each in order to secure the success of all, when, perhaps, neither could be passed separately. The evils of that species of omnibus legislation which the constitution designed to prohibit are all invited by acts thus framed; and although we have no reason to suppose that those evils actually existed in the present case, or that there was any purpose on the

In *Daubman v. Smith*¹ the act was entitled "to transfer the charge and keeping of the jails and the custody of the prisoners in the counties of Essex and Hudson from the sheriff to the board of chosen freeholders, and for the employment of prisoners, and to regulate the term of service therein." Magie, J., said, in delivering the opinion of the court: "I am compelled to the conclusion that the legislation in question is in obvious opposition to the constitutional provision in one or the other of its phases. For, if the object of this act may be taken to be the regulation of the jails and the custody of the prisoners in the two counties named in the first eight sections, then the ninth section, in providing for the extension of the scheme to other counties, introduces another and different object, and the act embraces more than one object."²

"If, on the other hand, the object of this act may be taken to be the regulation of the jails and then of the prisoners in all the counties of the state, then that object is not expressed in the title. If such was the object of the act, the fact that with respect to some counties it was mandatory, and with respect to others optional, might not be objectionable. The matters

part of the legislature to disregard the constitutional requirement, yet we cannot be governed by these considerations, if the act is of a class which is actually prohibited.

"The act, it will be seen, is not one which establishes a general system for the expenditure of non-resident highway taxes, or for the construction of state roads. It singles out two state roads and provides for the expenditure of certain non-resident highway taxes upon each. It then proceeds to provide for the location and construction of a third state road and the expenditure of certain other taxes upon that.

"The three objects are as separate and distinct as the three great lines of railroad crossing the state, and the same arguments which might be advanced in support of this act would support also an act which would single out those three railroads for

special and peculiar legislation in respect to which the roads have no necessary connection. A combination of that description would at once be pronounced unconstitutional by general consent, but would not differ at all, in principle, from the present act, in which the combination of objects is equally apparent, and equally unnecessary for the proper purpose of legislation. The only difference there could be in the two cases would be that, in a case of a combination of interests among powerful corporations to secure favorable legislation on their behalf, a purpose to evade the constitutional requirement would generally be very apparent, while in this case we do not imagine it to have existed at all; but the question of violation of the constitution is not a question of intent."

¹ 47 N. J. L. 200.

² In *re Sackett*, etc. Sts. 74 N. Y. 95.

comprehended in the act would seem to be germane to such an object. But the title does not express such an object." The act had more scope than the title, and the excess was so much as applied to a county not named in the title.

§ 99. A curative act may apply to any number of instruments or proceedings. One act legalized the proceedings in three separate towns, though taken distinct from each other, to issue bonds in aid of a railroad. By miscarriage of some promoters of them they failed to comply with the law under which they were set on foot, so as not to be efficacious. It was held that the bill contained but one subject.¹ The court said it was a local bill, to have effect upon that separate portion of the state. The object of it was to legalize and validate certain doings in that territory, which, although carried on distinct from each other, had a common aim and purpose. So an act to confirm, reduce and levy certain assessments in the city of B. was held to embrace but one subject.²

§ 100. One act may relate to all or a portion of the courts of a state in defining their jurisdiction or regulating their practice. In the *Matter of Wakker*,³ an act in relation to justices and police courts of New York was held not to be obnoxious to constitutional objection on account of two courts being the subject of legislation. The court say: "It was the object of this law to establish justices' courts of civil and criminal jurisdiction within this city, and to abolish such minor jurisdictions as stood in the way of the courts to be created. The well-known jurisdiction of justices of the peace for the country is divided by this statute between the new justices created by it, upon one set of whom is conferred the civil and upon the other the criminal jurisdiction of the country magistrates. The office of justice, its tenure and jurisdiction, and the compensation of its incumbents are provided for, and clerks are ordered and compensated by this law." It provided also that its provisions should be applicable to the justices and clerk of the marine court. That court was substantially a justice's court, it being distinguishable only by having additional jurisdiction in certain marine cases not cognizable by justices. On this point the court say: "It would be giving an undue importance to this

¹ *Rogers v. Stephens*, 86 N. Y. 623. ³ 3 Barb. 162.

² *In re Van Antwerp*, 1 T. & C. 423.

one feature in respect to jurisdiction to hold that this alone deprived it of the character of a justice's court, while it possessed all the main characteristics of that tribunal. It is still a court of inferior and limited jurisdiction, conducted, in all respects material to this argument, as a justice's court. If this be correct, then, in the strictest construction of the article of the constitution under consideration, a statute in relation to justices' courts, confined to the organization and regulation of these courts, may properly embrace in its provisions the marine court."

An act was held valid in Kentucky which regulated the jurisdiction of several courts, the inferior courts of the state. It was an act to regulate the civil jurisdiction of justices of the peace, police judges and quarterly courts, and the appellate jurisdiction of the circuit courts on appeals from their judgments, and to authorize the quarterly courts to appoint clerks. The act was treated as one to regulate the jurisdiction of several of the courts of the state. The subject was deemed single.¹

§ 101. The title and subject of amendatory and supplementary acts.—The constitutional requirement under discussion as applied to acts of this character when they contain matter which might appropriately have been incorporated in the original act under its title is satisfied generally if the amendatory or supplemental act identifies the original act by its title, and declares the purpose to amend or supplement it.² Under such a title, alterations by excision, addition or substitution may be made.³

¹ Allen v. Hall, 14 Bush, 85.

² State Line, etc. R. R. Co.'s Appeal, 77 Pa. St. 429; Craig v. First Presb. Church, 88 id. 42; Millvale Borough v. Evergreen R'y Co. 131 id. 1; Second German Am. B. Asso. v. Newman, 50 Md. 62; Swartwout v. Railroad Co. 24 Mich. 389; Gibson v. State, 16 Fla. 291; Morford v. Unger, 8 Iowa, 82; People v. Willsea, 60 N. Y. 507; Brandon v. State, 16 Ind. 197; Mills v. Charleton, 29 Wis. 400; Yellow River Imp't Co. v. Arnold,

46 Wis. 214, 224; Hoffman v. Parsons, 27 Minn. 236; Jones v. Columbus, 25 Ga. 610; City of St. Louis v. Tiefel, 42 Mo. 578; State v. Newark, 34 N. J. L. 236; Robinson v. Lane, 19 Ga. 337; Perry v. Gross, 25 Neb. 826; Williamson v. Keokuk, 44 Iowa, 88; National Bank v. Com'rs, 14 Fed. Rep. 239; Saunders v. Provisional Municipality, 24 Fla. 226; Albersson v. Mayor, 82 Ga. 30. See Hyman v. State, 87 Tenn. 109; Hyde Park v. Chicago, 124 Ill. 156. But

³ Robinson v. Lane, *supra*.

It is not enough to refer to the original act merely by the number of the chapter of published laws which includes it.¹

see *State v. Smith*, 35 Minn. 257. In that case it appears that outside of the general law for the assessment and collection of taxes an independent or cumulative act *in pari materia* was in force requiring notice of the expiration of redemption after a tax sale. A subsequent statute, entitled generally as an act to amend the general law, contained a provision expressly repealing this separate statute, which was probably equivalent to providing that redemption should expire absolutely by lapse of the redemption period without notice to the party who had the right of redemption. This was matter germane to the original bill which was amended, and under the rule stated in the text the title was sufficient. The court, however, held otherwise, and Dickinson, J., delivering the opinion of the court, said: "An amendatory law is for the amendment not of what *might have been* enacted under the title of the original statute, but of what *was* enacted; not of what the original law might have been, but of what it was. Hence the sufficiency of the title of an act merely declared to be amendatory of a prior law, to justify the legislation which may be enacted under it, depends not alone upon the fact that the title of the original statute was so comprehensive that the legislation might have been properly enacted in such prior law, but it depends also upon the nature and extent of the prior enactment to amend which is the declared purpose or subject of the latter act. This seems self-evident; but to test the correctness of the rule invoked, let us apply it to supposable cases. We will assume that under

the title of the law of 1878, "An act to provide for the assessment and collection of taxes," the only legislation adopted had been a change of the prior law in respect to the time of meeting of the state board of equalization or of the manner of publishing the delinquent list. Now, suppose a later act, declared in its title to be amendatory of that act, to consist of two sections; the first amending the prior act by prescribing a different time for the meeting of the state board or a different manner of publishing the delinquent list. The second section, we will suppose, simply declares the repeal of section 2 of a law of 1873 (Sp. Laws, 1873, ch. 111), authorizing railroad corporations to adopt the scheme of substituted taxation in that act provided; or let the supposed second section declare the repeal of the law of 1877 (chapter 105), which required an annual return by railroad corporations of land sold from their untaxable land grant, so that the same might be properly subjected to taxation; or again, let the supposed second section be like that now in question,— simply the repeal of the act of 1877, respecting the giving of notice of the expiration of the period for redemption; or let us suppose that the so-called amendatory act had consisted only of such repeal of the law of 1877. In such cases the mind is at once impressed with the incongruity between the subject of the act as expressed in its title and the enactment under it. Yet the principle relied upon by the respondent would sustain such legislation, because it might have been adopted under the title of the original law. The fault in the asserted

¹ *People v. Hills*, 35 N. Y. 449.

The true and actual subject or object must be expressed in the title and not by way of reference to something else to show it.¹

An act entitled to amend the charter of a named municipal corporation may contain a provision changing the territorial boundary of the municipality.² Under such a title provisions have sometimes been enacted curing defects in and validating municipal proceedings taken of course subsequent to the enactment of the original charter. Such provisions are germane to the object of the incorporation, but not to the function or act of creating a corporation, prescribing and distributing its powers, and regulating their exercise. Such curative provisions are retrospective, and are not of the nature of a charter,³ while the original act is constitutive and wholly prospective.⁴

§ 102. Provisions in an act not within the subject expressed in the title.—The title of an act defines its scope; it can contain no valid provision beyond the range of the subject there stated.⁵ A title importing a prospective statute will

rule is that it does not regard the nature and extent of the original enactment which it is the declared purpose of the later act to amend, but only the title of it; it rests upon the assumption that the enactment was as comprehensive as under its title it might have been. We think it cannot be relied upon to aid in the determination of such cases, and, if recognized as a rule without qualification, that it would open a way to the accomplishment of the very evils which the constitutional provision was intended to prevent." Re-affirmed in *State ex rel. Nash v. Madson*, 45 N. W. Rep. 856.

¹ *Id.*; *People v. Briggs*, 50 N. Y. 553; *Tingue v. Port Chester*, 101 N. Y. 294, 303; *People v. Fleming*, 7 Colo. 231; *Pennington v. Woolfolk*, 79 Ky. 13. It was decided in *State v. Garrett*, 29 La. Ann. 637, that parts of a statute could be repealed by reference to the numbers of the sections repealed. But see *Second German*

American Banking Association v. Newman, *supra*.

² *Whiting v. Mt. Pleasant*, 11 Iowa, 482; *Morford v. Unger*, 8 Iowa, 82; *Swift v. Newport*, 7 Bush, 37; *Humbolt County v. County Com'rs*, 6 Nev. 30.

³ See *post*, § 483.

⁴ *Williamson v. Keokuk*, 44 Iowa, 88; *In re Kiernan*, 6 T. & C. 320; *State v. Newark*, 34 N. J. L. 236, and *Humbolt Co. v. County Com'rs*, 6 Nev. 30, are liable to criticism for embracing provisions which are not strictly cognate with the purpose of the act as stated in the title. See *Dolese v. Pierce*, 124 Ill. 140.

⁵ *State v. Silver*, 9 Nev. 227; *People v. Common Council*, 13 Abb. Pr. (N.S.) 121; *Lowndes County v. Hunter*, 49 Ala. 507; *State v. Wardens*, 23 La. Ann. 720; *Brieswick v. Mayor*, etc. 51 Ga. 639; *Davis v. State*, 7 Md. 115; *In re Tappen*, 36 How. Pr. 390; *Ex parte Thomason*, 10 Neb. 238; *Mewherter v. Price*, 11 Ind. 199; *People v. Gad-*

not cover a retrospective provision.¹ An act to prescribe the manner of creating corporations cannot constitutionally embrace provisions amending existing charters.² A title importing exclusively a public statute will not cover provisions of a private nature not mentioned in the title.³ An act purporting by its title to legalize and make valid certain county bonds may not authorize the issue of new bonds for like reasons to other persons.⁴ Provisions directing the manner of executing a judgment may not be embraced in an act professing by its title to regulate fees on judicial sales.⁵ Under a title providing for work in the improvement of certain named streets in a city, no provisions can be enacted for work on others not named.⁶ A title confined to leasehold estates will not cover provisions relating to freeholds.⁷ So an act whose title refers only to revenue for state and county purposes cannot provide for municipal revenues.⁸ It has been made a question whether an act entitled to regulate the jurisdiction of a class of inferior courts and providing for an appeal could properly regulate the jurisdiction and practice of the appellate court in the cases so appealed. It appears to the writer to be an extraneous subject.⁹

way, 61 Mich. 285; *Church v. Detroit*, 64 id. 571; *Nester v. Busch*, id. 657; *Losch v. St. Charles*, 65 id. 555; *Supervisors v. Auditor-Gen'l*, 68 id. 659; *Ellis v. Hutchinson*, 70 id. 154; *Eaton v. Walker*, 76 id. 579; *Fidelity Ins. Co. v. Shenandoah V. R. R. Co.* 9 S. E. R. 759; *Thomas v. Wabash*, etc. R. R. Co. 40 Fed. Rep. 126; *Touzalín v. Omaha*, 25 Neb. 817; *McCabe v. Kenny*, 52 Hun. 514; *Lane v. State*, 49 N. J. L. 673; *Hatfield v. Commonwealth*, 120 Pa. St. 395; *Wulfstange v. McCollom*, 83 Ky. 361.

¹ *Thomas v. Collins*, 58 Mich. 64.

² *Ayeridge v. Town Com'rs*, 60 Ga. 405; *City Council v. Port Royal*, etc. 74 Ga. 658.

³ *People v. Supervisors*, 43 N. Y. 10. But see *Neuendorff v. Duryea*, 69 N. Y. 557.

⁴ *Board of Commissioners v. Baker*, 80 Ind. 374.

⁵ *Gaskin v. Anderson*, 55 Barb. 259.

⁶ *In re Sackett, etc. Streets*, 74 N. Y. 95.

⁷ *Dorsey's Appeal*, 72 Pa. St. 192.

⁸ *Ross v. Davis*, 97 Ind. 79; *Bugher v. Prescott*, 23 Fed. Rep. 20; *Knoxville v. Lewis*, 12 Lea, 180.

⁹ *Jones v. Thompson*, 12 Bush, 394; *Fagua v. Mullen*, 13 Bush, 467; *Kuhns v. Krammis*, 20 Ind. 490, overruled in *Robinson v. Skipworth*, 23 Ind. 311. The title of the act in question in this case was: "The election and qualification of justices of the peace and defining their jurisdiction, powers and duties in civil cases." The act contained a provision in regard to cases appealed from justices' courts to the circuit and common pleas courts, that "such cases shall stand for trial in the court of common pleas or circuit courts whenever such transcript has been filed ten

An act which by its title is directed against the adulteration of milk, and professing to regulate the sale of milk, does not extend to the provision against producing unwholesome milk by any other process than adulteration.¹ So, where the title of an act referred only to bills and promissory notes, no other contracts could be affected or made the subject of legislation in the body of the act.² A title of legislation relating to the

days before the first day of the term thereof, and be there tried under the same rules and regulations prescribed for trials before justices; and amendments of the pleadings may be made on such terms as to costs and continuances as the court may order." In *Kahns v. Krammis* the court said: "Appeals from justices of the peace entirely remove the causes appealed from the justices. They are not tried upon error but *de novo*, and are never returned to the justices. The final judgment regulating the rights of the parties is rendered in the appellate court. Such being the case, all legislation touching the manner of rendering judgment in such cases should be in acts regulating proceedings in the appellate courts; and provisions in the justice's act assuming to prescribe the practice in the trial and judgment of such causes in the appellate courts is in no manner connected with the act regulating the practice in justice's court." "But," the court inquires in the overruling opinion in *Robinson v. Skipworth*, "is there not a natural and proper connection between this matter and the subject of the act? It is plain that to constitute this connection the matter need not form any part of the subject. For it is well said by Mr. Justice Perkins in delivering the opinion of this court in the case of *The Bank of the State of Indiana v. The City of New Albany*, 11 Ind. 139, that as to sec. 19, art. 4 (of the constitution), referred to, that "every act

shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." The title incorporating the bank is "An act incorporating the bank without branches." We have already seen that the extent and manner of taxing the capital stock of the bank, when created, is a matter properly connected with the subject of chartering the institution, and it is only the subject, and not the matter properly connected therewith, that must be expressed in the title. The chain connecting the matter of section 70 (*supra*) with the subject of the act is unbroken. We follow the case in all its stages, from the commencement of the action to the final judgment of the justice; then follows the appeal; then the proceedings in the appellate court, step by step, to final judgment, including costs in the action." Here the cases on which the jurisdiction is exercised are treated as "matter properly connected therewith," even after they have passed beyond that jurisdiction. It is not the purpose of the act to provide for cases—they are connected with the subject of the act—the justice's jurisdiction—while they are subjects of that jurisdiction—no longer. They are incidents; and when they have passed out of the sphere of the principal, they are no longer connected with it in theory or practice.

¹ *Shivers v. Newton*, 45 N. J. L. 469.

² *Mewherter v. Price*, 11 Ind. 199.

transportation of freight will not permit any provision relative to passenger transportation.¹ Nor is a title providing for the acknowledgment of deeds and other conveyances of land broad enough to include provisions defining the consequences of a failure to record such instruments.² Under the phrase "to lay additional tracks," in the title of an act supplementary to the charter of a railway company, a new route cannot be substituted for that established under the original charter.³ An act confined by the title to "the preservation of the Muskegon river improvement" may include authority to collect tolls and expend the money for that object, but a provision for raising means to pay and authorizing payment for the original construction of the work is beyond the object expressed in the title.⁴ An act "to secure complete records in the courts" does not warrant a provision for obtaining recovery from a delinquent officer who had been already paid for completing the record.⁵ An act "to provide revenue by taxation of corporations, associations and limited partnerships" is too restricted to embrace individual taxation.⁶ Provisions for attaching unorganized territory to a judicial district cannot be enacted under a title to regulate the terms of court in it.⁷

§ 103. Effect of acts containing more than one subject.—If an act contain more than one subject, and more than one subject is expressed in the title, the whole act is void.⁸

In *State v. Lancaster Co.*,⁹ Maxwell, J., said: "The rule is well settled that where the title to an act actually indicates, and the act itself actually includes, two distinct objects, where the constitution declares it shall embrace but one, the whole act must be treated as void, from the manifest impossibility of choosing between the two and holding the act valid as to one

¹ *Evans v. Memphis, etc. R. R. Co.* 56 Ala. 246.

² *Carr v. Thomas*, 18 Fla. 736.

³ *West Phila. R. R. Co. v. Union R. R. Co.* 9 Phila. 495.

⁴ *Ryerson v. Utley*, 16 Mich. 269.

⁵ *Lowndes County v. Hunter*, 49 Ala. 507.

⁶ *Commonwealth v. Martin*, 107 Pa. St. 185.

⁷ *Ex parte Wood*, 34 Kan. 645.

⁸ *State v. McCann*, 4 Lea, 1; *Skinner v. Wilhelm*, 63 Mich. 568; *Johnston v. Spicer*, 107 N. Y. 185; *Re Commissioners*, 49 N. J. L. 488; *Ragio v. State*, 86 Tenn. 272; *State v. Lancaster Co.* 17 Neb. 87; *Moore v. Police Jury*, 32 La. Ann. 1013; *Davis v. State*, 7 Md. 151; *Pennington v. Woolfolk*, 79 Ky. 13.

⁹ 17 Neb. 87.

and void as to the other.¹ But this rule will apply only in those cases where it is impossible from an inspection of the act itself to determine which act, or rather which part of the act, is void and which is valid. Where this can be done the rule does not apply, unless it shall appear that the invalid portion was designed as inducement to pass the valid, so that the whole taken together will warrant the belief that the legislature would have passed the valid part alone." So if the body of an act embrace more than one subject, and only one be mentioned in the title, the whole act will be void, unless the subject mentioned in the title is so independently treated in the act as to be capable of separation from the other subject. This result must be the conclusion though the act be passed under a constitution like that of California, containing the condition added to the inhibitory clause in question.

In *People v. Parks*,² McKee, J., thus characterizes the act in question, entitled an act "to promote drainage:" "It will thus be seen that the body and scope of the act included a combination of subjects; the construction of reservoirs for the storage of *debris* from mines; the protection of mines, towns or cities from inundation, by the erection of embankments or dykes; the drainage of certain districts of the state by the rectification of river channels, and the levy of special taxes to carry on a system of public works, are all inseparably conjoined in the body of the act. The extraordinary powers conferred upon the district board of directors are to be exercised for the benefit of all the subjects conjointly; and the money to be raised by the exercise of these powers is to be expended for all without distinction as to any particular ones, thus rendering it impossible to disjoin the subjects embraced in the act which are not expressed in its title so as to adjudge the one void and the other valid as might be done under section 24 of article 4 of the constitution."³

Where the provisions of a statute which are not connected with its subject are separable, they will be declared void and the residue sustained.⁴ In states where this constitutional restriction applies only to local and private acts, the joinder of

¹ Cooley's Const. Lim. 147.

253; *State v. Crowley*, 33 La. Ann.

² 58 Cal. 624, 638.

782.

³ See *State v. Exnicios*, 33 La. Ann.

⁴ *State v. Dalon*, 35 La. Ann. 1141;

provisions of a public or general nature with those of a local or private nature will not invalidate the former though the latter may be void for duplicity of subjects in the act or for not being germane to the title.¹

Cooley's C. L. 181; *People v. Briggs*, No. 3 v. Michoud, 6 La. Ann. 605; *Ex parte Moore*, 62 Ala. 471; *Mississippi & R. River B. Co. v. Prince*, 10 Am. & Eng. Corp. Cas. 391; *Ex parte Thomason*, 16 Neb. 238; *Davis v. State*, 7 Md. 151; *State v. Wardens*, 23 La. Ann. 720; *State v. Silver*, 9 Nev. 227; *Gibson v. Belcher*, 1 Bush, 145; *Stockle v. Silsbee*, 41 Mich. 616; *People v. Fleming*, 7 Colo. 230; *Bugher v. Prescott*, 23 Fed. Rep. 20; *Rader v. Township of Union*, 39 N. J. L. 509; *Daubman v. Smith*, 47 N. J. L. 200; *Grubbs v. State*, 24 Ind. 295; *Rushing v. Sebree*, 12 Bush, 198; *Central & G. R. R. Co. v. People*, 5 Colo. 39.

¹ *People v. Supervisors*, 43 N. Y. 10; *Richards v. Richards*, 76 N. Y. 186, 189; *People v. McCann*, 16 N. Y. 58; *Williams v. People*, 24 N. Y. 405.

Cooley's C. L. 181; *People v. Briggs*, 50 N. Y. 566, 568; *Succession of Irwin*, 33 La. Ann. 63; *State v. Ex-nicios*, 33 La. Ann. 253; *Unity v. Burrage*, 103 U. S. 447; *State v. Young*, 47 Ind. 150; *Shoemaker v. Smith*, 37 Ind. 122; *Richards v. Richards*, 76 N. Y. 188; *Ex parte Wood*, 34 Kan. 645; *Dorsey's Appeal*, 72 Pa. St. 192; *Commonwealth v. Martin*, 107 Pa. St. 185; *Stuart v. Kinsella*, 14 Minn. 524; *State v. Lancaster Co.* 17 Neb. 87; *Smith v. Mayor*, 34 How. Pr. 508; *Allegheny Co. Home's Case*, 77 Pa. St. 77; *Adams v. Webster*, 26 La. Ann. 142; *State v. Baum*, 33 La. Ann. 981; *Williamson v. Keokuk*, 44 Iowa, 88; *State v. Hurds*, 19 Neb. 316; *Whited v. Lewis*, 25 La. Ann. 568; *People v. Hall*, 8 Colo. 485; *Fuqua v. Mullen*, 13 Bush, 467; *Municipality*

CHAPTER V.

TIME OF TAKING EFFECT.

<p>§ 104. When silent as to commencement.</p> <p>105. Acts of parliament formerly took effect from first day of session.</p> <p>106. Actual date of passage adopted in this country.</p> <p>107. Legislature may fix the time for act to take effect.</p>	<p>§ 108, 109. Constitutional regulations.</p> <p>110. Precise time of taking immediate effect.</p> <p>111-115. Computation of time when to take effect in specific number of days.</p>
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§ 104. When silent as to commencement.— When no other time is fixed a statute takes effect from the date of its passage — from the date of the last act necessary to complete the process of legislation and to give a bill the force of law.¹ When approved by the executive the act of approval is the last act, and the date of it is the date of passage of the act.² If passed after a veto, the date of the final vote is the date of passage. When a bill becomes a law by the non-action of the executive, under constitutional regulations, the non-action of the executive is a *quasi* approval, not complete until the lapse

¹ *Matthews v. Zane*, 7 Wheat. 164, 211; *Louisville v. Savings Bank*, 104 U. S. 469; *Johnson v. Merchandise*, 2 Paine, 601; *The Brig Ann*, 1 Gall. 61; *Heard v. Heard*, 8 Ga. 380; *Fairchild v. Gwynne*, 14 Abb. Pr. 121; *Baker v. Compton*, 52 Tex. 252; *Temple v. Hays*, *Morris* (Ia.), 12; *In re Richardson*, 2 Story, 571; *Roe v. Hersey*, 3 Wils. 275; *Leschi v. Washington T'y*, 1 Wash. T. 13; *Rathbone v. Bradford*, 1 Ala. (N. S.) 312; *Adm'r of Weatherford v. Weatherford*, 8 Port. 171; *People v. Clark*, 1 Cal. 406; *State v. Click*, 2 Ala. 26; *Taylor v. State*, 26 Ala. 283; *Mobile R. R. Co. v. State*, 29 id. 573; *Branch Bank v. Mur-*

phy, 8 id. 119; *Dyer v. State*, *Meigs*, 237; *Logan v. State*, 3 Heisk. 442; *Day v. McGinnis*, 1 id. 310; *Dowling v. Smith*, 9 Md. 242; *Smets v. Weathersbee*, R. M. Charl't. 537; *Goodsell v. Boynton*, 2 Ill. 555; *Tarleton v. Peggs*, 18 Ind. 24; *West v. Creditors*, 1 La. Ann. 365; *Parkinson v. State*, 14 Md. 184; *State v. Bank*, 12 Rich. L. 609; *Bassett v. United States*, 2 Ct. of Cl. 448.

² *Gardner v. The Collector*, 6 Wall. 499; *Louisville v. Savings Bank*, 104 U. S. 469; *Mead v. Bagnall*, 15 Wis. 156; *Smets v. Weathersbee*, R. M. Charl't. 537; *Risewick v. Davis*, 19 Md. 82.

of the time prescribed for his affirmative action under the given conditions.

In the absence of evidence of the precise time when approved, an act operates during the whole of the day of approval.¹ The constitution of Tennessee provides that no act shall become a law until, among other things which are legislative, it "be signed by the respective speakers."² This signing, though thus made essential, is held not to fix the date of passage; not being legislative but ministerial in its nature, when it has been performed, the act by relation takes effect from the conclusion of the proceeding which is legislative.³

When no future date is fixed, the act takes effect immediately; no time is allowed for publication. There would be hardship if all acts were left so to take effect. The reason of the rule was well stated by Mr. Doddridge, of counsel, in *Matthews v. Zane*:⁴ "It being practically impossible actually to notify every person in the community of the passage of a law, whatever day might be appointed for its taking effect, no general rule could be adopted less exceptionable. The general rule may, in some instances, produce hardship; but if ignorance of the law was admitted as an excuse, too wide a door would be left open for the breach of it." Where statutes are liable to produce injustice by taking immediate effect, the legislature will, except through inadvertence, appoint a future day from whence they are to be in force. Blackstone, after treating of the promulgation of laws, and the duty of legislatures to make them public, says, "all laws should therefore be made to commence *in futuro*, and be notified before their commencement, which is implied in the term prescribed."⁵

¹ *Mallory v. Hiles*, 4 Met. (Ky.) 53; *Matter of Carrier*, 13 Bankr. Reg. 208; *Whitehead v. Wells*, 29 Ark. 99.

² Art. II, sec. 18.

³ *Lewis v. Woodfolk*, 58 Tenn. 25.

⁴ 7 Wheat. 179.

⁵ 1 Black. Com. 45; 1 Kent's Com. 458; *Ship Cotton Planter*, 1 Paine, 23; *Cross v. Harrison*, 16 How. 196. See *Lessee of Albertson v. Robeson*, 1 Dall. 9. Yeates, J., in *Morgan v. Stell*, 5 Bin. 318, gave this statement of the case: Albertson, claiming certain

lands by descent in Bucks county, brought an ejectment against Robeson for their recovery. The title of the land was clearly shown to have been at one time in the ancestor of the lessee of the plaintiff; but at a subsequent period the lands were decreed to the defendant by this court, in pursuance of certain chancery powers delegated to them by an old act of assembly. The royal assent was refused to this law in *England*, and it so happened that the repeal *precedes*

§ 105. **Acts of parliament formerly took effect from the first day of the session.**—By the common law the parliament roll being the exclusive record of statutes, and no other date appearing than that of the beginning of the session, laws took effect from that date, when no other was provided by the act. Until the statute of 33 Geo. III., ch. 13, there was no indorsement on the roll of the day on which the bills received the royal assent, and all acts passed in the same session were considered as having received the royal assent on the same day, and were referred to the first day of the session.¹ By the statute of 33 Geo. III. it was provided that a certain parliamentary officer should indorse on every act of parliament “the day, month and year when the same shall have passed and shall have received the royal assent; and such indorsement shall be taken to be a part of such act, and to be the date of its commencement, where no other commencement shall be therein provided.”

§ 106. **The actual date of passage adopted in this country.** The injustice of permitting laws to have retroactive effect by relation is so manifest that it has not had much countenance in the United States. Without departing from the rule, except by constitutional direction, that the legislative record is conclusive, statutes have not generally had effect from any date prior to their actual passage. The fiction that all laws are enacted on the first day of the legislative session is not adopted. The actual date either appears in pursuance of legislative and executive practice upon the statute itself, or it is otherwise shown by official records; and this date is popularly known and judicially recognized.

In North Carolina the fiction appears to be recognized as part of the common law, and all laws take effect by relation from the first day of the session.² Courts are bound *ex officio*

the decree of the court above two months, but the repeal was not known here when the decree was made. The court determined, upon full argument, that the unknown repeal could not affect the right of the defendant under the decree, and the jury found accordingly, and the decision gave general satisfaction to the profession.

¹ *Rex v. Justices of Middlesex*, 2 Barn. & Ad. 818; *Panter v. Att’y General*, 6 Brown, P. C. 486; *Latless v. Holmes*, 4 T. R. 660; *Partridge v. Strange*, 1 Plow. 79; *King v. Thurston*, 1 Lev. 91; *Bac. Abr. title Statute, C.*; 1 Kent’s Com. 456.

² *Hamlet v. Taylor*, 5 Jones’ L. 36; *Weeks v. Weeks*, 5 Ired. Eq. 111; S. C. 47 Am. Dec. 358. See

to take notice as well of the time when public acts go into operation as of their provisions.¹ Statutes of the same session passed on different days are not to be regarded as having effect from the same day because they pertain to the same subject.²

§ 107. **The legislature may fix a future day for an act to take effect.**—The power to enact laws includes the power, subject to constitutional restrictions, to provide when in the future, and upon what conditions or event, they shall take effect.³ Where a particular time for the commencement of a statute is appointed, it only begins to have effect and to speak from that time, unless a different intention is manifest,⁴ and will speak and operate from the beginning of that day.⁵ Where the provisions of a revising statute are to take effect at a future period, and the statute contains a clause repealing the former statute upon the same subject, the repealing clause will not take effect until the other provisions come into operation.⁶ The period between the passage of a law and the time of its going into effect is allowed to enable the public to become acquainted with its provisions; but until it becomes a law, they are not compelled to govern their actions by it. Thus, an act which was to go into effect at a future day, established new periods of time for the limitation of actions. It was held not applicable to a case having several years to run where the act would be

Boston v. Cummins, 60 Am. Dec. 717, 722; S. C. 16 Ga. 102.

¹ *State v. Foote*, 11 Wis. 14.

² *Taylor v. State*, 31 Ala. 383; *Metropolitan Board v. Schmades*, 10 Abb. Pr. (N. S.) 205.

³ *People v. Salomon*, 51 Ill. 37; *New Orleans v. Holmes*, 13 La. Ann. 502; *Carpenter v. Montgomery*, 7 Blackf. 415; *Gorham v. Springfield*, 21 Me. 58; *Cooper v. Curtis*, 30 id. 488; *Parkinson v. State*, 14 Md. 184.

⁴ *Bac. Abr. tit. Statutes, C.*; *Rice v. Ruddiman*, 10 Mich. 125; *Price v. Hopkin*, 13 Mich. 318; *Gilkey v. Cook*, 60 Wis. 133; *Jackman v. Garland*, 64 Me. 133; *Swann v. Buck*, 40 Miss. 305; *Grinad v. State*, 84 Ga. 270; *Fairchild v. Gwynne*, 14 Abb. Pr. 121; *Latless v. Holmes*, 4 T. R. 660; *Panter v. Att'y*

Gen. 6 Brown, P. C. 486; *Dean v. King*, 13 Ired. L. 20; *Wheeler v. Chubbuck*, 16 Ill. 361; *Boston v. Cummins*, 16 Ga. 102; S. C. 60 Am. Dec. 717; *Evansville, etc. R. R. Co. v. Barbee*, 74 Ind. 169; *Larrabee v. Talbott*, 5 Gill, 426; *Charless v. Lamberson*, 1 Iowa, 435; *Davenport v. Railroad Co.* 37 id. 624; *Wohlscheid v. Bergrath*, 46 Mich. 46. See *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Town of Fox v. Town of Kendall*, 97 Ill. 72, 75. Upon the enactment of a new penalty for an offense, the former penalty is not superseded until the statute prescribing the new penalty takes effect. *Grinad v. State*, *supra*.

⁵ *Rice v. Ruddiman*, 10 Mich. 125.

⁶ *Spaulding v. Alford*, 1 Pick. 33.

a bar the moment it took effect. It could not operate to put the party on diligence before it went into operation. As it gave him no future time after it became a law, it was inoperative as to that case.¹ The exception of injuries "already sustained" in a statute is to be construed as spoken when it took effect.²

The terms "heretofore" and "hereafter" will be construed as spoken at the time the act takes effect.³ The bankrupt law enacted on the 19th day of August, 1841, was provided to take effect only from and after February 1, 1842. This was equivalent to declaring that it should have no effect until that day, and hence it did not suspend the operation of the state insolvent laws until that day.⁴

If a particular day is named for an act to take effect, but it is not approved until after that day, its provisions, in terms prospective, will not have effect until after the date of approval.⁵ And if the main and principal clause of an act is to come into operation from a day named, the other subsidiary clauses may also be held to commence from that day, though it be not so expressed, if it would be inconvenient that they should commence from the passing of the act.⁶

Where a general statute provides that acts shall take effect at a specified day after the adjournment of the session, it will govern all future legislation unless there is some indication of a contrary purpose. Acquiescence in such a statute is presumed unless dissent is shown.⁷ It will govern private as well as public acts.⁸ An act may be brought into effect at an earlier day than that appointed in its provisions by an amendatory or supplemental act. Thus the Mississippi constitution provides that, if acts are silent on the time when they shall take effect, they shall go into effect sixty days after their passage. After an original act a supplemental act was passed which provided that it go into effect immediately. This provision was held to embrace and give immediate effect to the original act.⁹ A

¹ Price v. Hopkins, *supra*. But see Hedger v. Rennaker, 3 Met. (Ky.) 255; Stine v. Bennett, 13 Minn. 153; Smith v. Morrison, 22 Pick. 430.

² Jackman v. Garland, 64 Me. 133.

³ Evansville, etc. R. R. Co. v. Barbee, 59 Ind. 592; S. C. 74 id. 171.

⁴ Larrabee v. Talbott, 5 Gill, 426.

⁵ Burn v. Carvalho, 4 Nev. & M. 893.

⁶ Whitborn v. Evans, 2 East, 135.

⁷ Jackman v. Garland, 64 Me. 133.

⁸ Cooper v. Curtis, 30 Me. 488.

⁹ West F. R. R. Co. v. Johnson, 5

statute may be framed to take effect on the happening of a future event,¹ and this event may be the passage of a law in another state.²

§ 108. **Constitutional provisions regulating the time of acts taking effect.**—In many state constitutions are regulations of this sort; that acts shall take effect a certain number of days after their passage, or after the end of the session, unless the acts themselves otherwise provide.³ In several a larger majority is required to give immediate effect to an act than to pass it; in others there must be some emergency to warrant it. These provisions are mandatory.⁴ Where it is required by the constitution that an act shall declare that an emergency exists for making it take immediate effect, such declaration cannot be omitted. If the emergency clause be absent, the provision that the act take immediate effect will, under such constitutional requirement, be held void, and the act will take effect as though silent on that subject.⁵ The emergency clause in an act passed June 14, 1852, regulating the remission of fines and forfeitures, declared the act to be in force from and after its being filed with the clerks of the circuit courts in their respective counties. It was held that the legislature intended the act to be brought into force as soon as it could be distributed in the several counties, and though there is no express direction to the secretary of state to distribute it, the emergency clause implies such a direction; it was held also that the secretary of state is to be presumed to have done his duty, and hence that the act was in force on the 20th day of December, 1852.⁶ What may be deemed an emergency for this purpose is purely a legislative question. The courts will not inquire into it, nor entertain any question of its sufficiency.⁷ An act which contains an emergency clause and provides that it "shall take effect and be in force from and after its approval by the

How. (Miss.) 273; *Swann v. Buck*, 40 Miss. 268.

¹ *Ante*, § 71.

² 1 Am. & Eng. Corp. Cas. 1.

³ *Day v. McGinnis*, 1 Heisk. 310; *Gorham v. Springfield*, 21 Me. 58; *New Portland v. New Vineyard*, 16 Me. 69.

⁴ *Ante*, §§ 29, 41.

⁵ *Cain v. Goda*, 84 Ind. 209.

⁶ *State v. Dunning*, 9 Ind. 20; *Stine v. Bennett*, 13 Minn. 153.

⁷ *Gentile v. State*, 29 Ind. 409; 11 id.

Blackf. 415.

governor," and on his vetoing it is passed by both houses over the veto, takes effect immediately after its passage.¹

§ 109. **Taking effect on publication.**—Where the taking effect of an act depends on publication, required by its own terms or by the constitution, it is a condition, and the time can be fixed only by the date of compliance.² The provisions of the Louisiana constitution requiring the laws to be promulgated in the English language, and in the English and French languages, does not prevent the legislature from passing acts to take immediate effect.³ A joint resolution of a general nature requires the same publication as any other law.⁴ When it is provided that an act shall go into effect on publication in two newspapers, publication in one will not suffice, though officially certified to be so published.⁵ When properly published it will take effect according to its own terms, although subsequently published officially in different terms. In one instance, by the later publication, the law erroneously appeared to repeal a prohibitory section of a previous law. The erroneous publication was not allowed to avail a person who had committed the act prohibited by such prior law, which was still in force. The statute, having gone into effect on its correct publication in two newspapers, was not affected by the subsequent erroneous publication.⁶

Under a constitutional provision that "no act shall take effect until the same has been published and circulated in the several counties of this state by authority," it was held that the words "published" and "circulated" were used synonymously.⁷ And no publication or circulation is good unless done by authority.⁸ Under a general constitutional provision that "no general law shall be in force until published," publication of a general law by mistake only, in the volume of private laws, is a sufficient publication.⁹

Though going into effect only on publication, the act of

¹ Biggs v. McBride, 17 Oregon, 640.

⁵ Welch v. Battern, 47 Iowa, 147.

² Cain v. Goda, 84 Ind. 209; Welch v. Battern, 47 Iowa, 147.

⁶ Hunt v. Murray, 17 Iowa, 313; State v. Donehey, 8 Iowa, 396.

³ Thomas v. Scott, 23 La. Ann. 689; Re Merchants' Bank, 2 La. Ann. 68;

⁷ Jones v. Cavins, 4 Ind. 305.

State v. Judge, 14 La. Ann. 486.

⁸ Hendrickson v. Hendrickson, 7 Ind. 13; McCool v. State, id. 379;

⁴ State v. School Board Fund, 4 Kan. 261.

State v. Dunning, 9 id. 20.

⁹ Re Boyle, 9 Wis. 264.

record in the office of the secretary of state is the law, when different from the published copy.¹ A law would probably not be deemed to be published, so as to give it effect, if the publication materially differed from the act of record, but a slight error would be disregarded.² The date of the certificate of the secretary of state, appended to a published volume of laws, will, in the absence of any suggestion which may lead to more accurate inquiry, be taken to be the date of their publication.³

In the constitution of Wisconsin⁴ it is provided that "no general law shall be in force until published." The words "general law," here used, have the same meaning as public acts in their ordinary acceptation, as distinguished from private acts. The object of the prohibition was the protection of the people, by preventing their rights and interests from being affected by laws which they had no means of knowing. But all are bound by and are to take notice of public statutes.⁵

§ 110. **The precise time of taking immediate effect.**—At what precise time does a statute go into operation, and first have force as law, when it takes immediate effect? Passing over the fiction of relation to the first day of the session which has been mentioned, there is still to be answered the question whether it takes effect at the beginning of the day of its passage, at the beginning of the next day, or at the precise moment of the last essential act in its enactment.

The maxim that the law takes no notice of the fractions of a day is not of universal application. The legal quality of an act may depend on when it was done with reference to other acts or events occurring not merely on the same day but in the same hour. Instances, in great variety, will at once occur to the professional mind. The sequence of such related facts may always be inquired into, unless the inquiry under consideration is an exception. What shall be accepted as the commencement of a period of a given num-

¹ *Clare v. State*, 5 Iowa, 509. See *Case*, 9 Wis. 264; *Berliner v. Waterloo*, 14 Wis. 378.

² *Mead v. Bagnall*, 15 Wis. 156; ⁴ Sec. 21, art. VII.

Smith v. Hoyt, 14 id. 252.

⁵ *State v. Foote*, 11 Wis. 14; *Boyle's State ex rel. Cothren v. Lean*, 9 Wis. 284, 285.

ber of days is an inquiry presently to be considered. That is another and different inquiry; such a period need not necessarily be computed upon fractions of a day. Any general rule as to commencement of a period of several days might operate justly. An act which is made to operate six hours before the time when it was actually enacted and passed is liable to the same objection, except in degree, as when it has a commencement six days or six years before its enactment. Hardship is sometimes the result of an act taking immediate effect, and every consideration of humanity and justice is opposed to any retroaction. A statute commands only from the time it has the force of law; it should not be accorded a beginning a moment earlier than the actual time of its enactment — than the actual time of the last act in the legislative process. No person is required to anticipate the enactment of a law, though he may be charged with a knowledge of it from the moment of its adoption if it at once goes into operation.

Lord Mansfield said in *Combe v. Pitt*:¹ "Though the law does not in general allow of the fractions of a day, yet it admits it in cases where it is necessary to distinguish; and I do not see why the very hour may not be so too, where it is necessary and can be done."

In Minnesota the day of the passage is excluded where the act provides that it shall take effect "from and after its passage."² There are cases which hold that acts taking immediate effect take effect from the first moment of the day on which they were passed.³ They proceeded, however, on unsatisfactory reasons. Prentiss, J., said, in the *Matter of Welman*, "It would be as unsafe as it would be unfit to allow the commencement of a public law, whenever the question may arise, whether at a near or distant time, to depend upon the uncertainty of parol proof, or upon anything extrinsic to the law, and the authenticated recorded proceedings in passing it." It cannot be laid down as constitutional law that the commencement of public laws must be proved or provable in

¹ 3 Burr. 1423.

³ *Tomlinson v. Bullock*, L. R. 4

² *Parkinson v. Brandenburg*, 35 Q. B. Div. 230; *Matter of Howes*, 21 Minn. 294. See *State v. Messmore*, Vt. 619; *Matter of Welman*, 20 id. 653. 14 Wis. 163, 174.

this manner. The legislature may make a law take effect on the happening of an event which has to be ascertained otherwise than by the "recorded proceedings in passing it." The validity of a statute cannot be judicially determined by the court's judgment of what is *safe* and *fit*.

The law takes notice of fractions of a day when necessary. The general principle declared by Lord Mansfield is believed to be sound and established by the weight of authority, that where it is necessary to justice and it can be done, the law takes notice of the parts of a day; then the precise time when an act is done may be shown.¹ This necessity exists when an act is done on the same day that a legislative act is passed, if that statute being passed afterwards should not affect such act, or, being passed before, should do so.

It was said in *Grosvenor v. Magill*:² "It is true that for many purposes the law knows no divisions of a day; but whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day as readily as into the fractions of any other unit of time.³ The rule is purely one of convenience, which must give way whenever the rights of parties require it. There is no indivisible unity about a day which forbids one, in legal proceedings, to consider its component hours, any more than about a month which restrains us from regarding its constituent days. The law is not made of such unreasonable and arbitrary rules." The weight of American authority is that a statute which is to go into effect immediately is operative from the instant of its passage.⁴

¹ *Wells v. Bright*, 4 Dev. & Batt. L. 173; *Louisville v. Savings Bank*, 104 U. S. 469; *Savage v. State*, 18 Fla. 970; *Bigelow v. Willson*, 1 Pick. 485; *Judd v. Fulton*, 10 Barb. 117; *Lang v. Phillips*, 27 Ala. 311; *Clawson v. Eichbaum*, 2 Grant's Cas. 130; *Grosvenor v. Magill*, 37 Ill. 239; *Burgess v. Salmon*, 97 U. S. 381; *Kennedy v. Palmer*, 6 Gray, 316; *Brainard v. Bushnell*, 11 Conn. 17.

² 37 Ill. 239.

³ 2 Black. Com. 140 and notes.

⁴ *Matter of Richardson*, 2 Story, 571; *Gardner v. The Collector*, 6 Wall. 499; *Strauss v. Heiss*, 48 Md. 292; *Berry v. R. R. Co.* 41 id. 464; *Legg v. Mayor, etc.* 42 id. 211; *Louisville v. Savings Bank*, 104 U. S. 469; *People v. Clark*, 1 Cal. 406; *Clark v. Janesville*, 10 Wis. 136; *Parkinson v. Brandenburg*, 35 Minn. 294; S. C. 59 Am. R. 326; *Grosvenor v. Magill*, 37 Ill. 239; *Burgess v. Salmon*, 97 U. S. 381; *Kennedy v. Palmer*, 6 Gray, 316; *Fairchild v. Gwynne*, 14 Abb. Pr. 121;

§ 111. **Computation of time when an act is to take effect in a specified number of days.**—Such a computation must be made when by constitutional or statutory provision a statute is to go into operation in a specified number of days after its passage, or after the adjournment of the legislature, or is to take effect in a given time after its passage by the two houses, in the absence of executive action upon it. Periods of time are prescribed in statutes, or fixed by the common law, for three purposes: *First*, to limit the time *within* which only some-

Re Wynne, Chase's Dec. 227; Osborne v. Huger, 1 Bay, 176. See King v. Moore, Jeff. (Va.) 8.

In the Matter of Richardson, *supra*, Story, J., said: "It may not, indeed, be easy in all cases to ascertain the very *punctum temporis*; but that ought not to deprive the citizens of any rights created by antecedent laws and vesting rights in them. In cases of doubt, the time should be construed favorably for citizens. The legislature have it in their power to prescribe the very moment *in futuro* after the approval when a law shall have effect; and if it does not choose to do so, I can perceive no ground why a court of justice should be called on to supply the defect. But when the time can be and is fully ascertained when a bill was approved, I confess I am not bold enough to say that it became a law at any antecedent period of the same day."

In Arnold v. United States, 9 Cranch, 104, it was held that an act takes effect from its passage; on the day of its passage; that it affected a transaction of that day, on the rule, that "when a computation is to be made *from an act done*, the day on which the act is done is to be included."

In Louisville v. Savings Bank, 104 U. S. 478, the court, by Harlan, J., said: "In view of the authorities it cannot be doubted that the courts

may, when substantial justice requires it, ascertain the precise hour when a statute took effect by the approval of the executive. But it may be argued that the rule does not apply where the inquiry is as to the time when constitutional provisions become operative by popular vote; that a popular vote, given at an election covering many hours of the same day, should be deemed an indivisible act, effectual, by relation, from the moment the electors entered upon the performance of that act, to wit: from the opening of the polls. But we are of opinion that no such distinction can be maintained. In determining when a statute took effect, no account is taken of the time it received the sanction of the two branches of the legislative department, which sanction is as essential to the validity of the statute as the approval of the executive. We look to the final act of approval by the executive to find when the statute took effect, and, when necessary, inquire as to the hour of the day when that approval was in fact given. So, we perceive no sound reason why the courts may not, in proper cases, inquire as to the hour when such approval became effectual, to wit: as to the time when, by the closing of the polls, the people had adopted such provision." See Welch v. Hannibal, etc. Ry. Co. 26 Mo. App. 358.

thing may be done; *second*, to limit the time *after* which only something may be done; *third*, to fix a precise time *at* which only something may be done or commenced. The precise future time *at* which an act is appointed to be done or take effect, determinable by computation from a date or event, is in general the last point of the period; if a period of days, the last day. No fractions of a day being recognized, a period of days may for all purposes be computed by one uniform rule, unless there is, in a particular case, a different intention indicated.

The rule now supported by nearly all of the modern cases is that the time should be computed by excluding the day or the day of the event from which the time is to be computed and including the last day of the number constituting the specified period.¹ Thus, if an act is to take effect in thirty days from and after its passage, passing on the first day of March, it would go into operation on the 31st day of that month. It would commence to operate at the first moment of the last day of the thirty, ascertained by adding that number to the number of the date of passage.

It is the general rule for computing time consisting of days, weeks, months or years. In such a computation days are entire days, fractions of a day being disregarded;² and whether the computation is from an act done, or from a day or the day of a date, the day of such act, or the day or date mentioned, is to be excluded.³

¹ *Simmons v. Jacobs*, 52 Me. 147; *Berry v. Clements*, 9 Humph. 312; *Bemis v. Leonard*, 118 Mass. 502; S. C. 11 How. 398. See *Cook v. Moore*, 95 N. C. 1.

Garner v. Johnson, 22 Ala. 494; *Hall v. Cassidy*, 25 Miss. 48; *Mitchell v. Woodson*, 37 id. 567; *Ex parte Dillard*, 68 Ala. 594; *Hollis v. Francois*, 1 Tex. 118.

² *Brown v. Buzan*, 24 Ind. 194; *Jacobs v. Graham*, 1 Blackf. 392; *Cornell v. Moulton*, 3 Denio, 12; *Griffin v. Forrest*, 49 Mich. 309; *Dousman v. O'Malley*, 1 Doug. (Mich.) 450; *Blake v. Crowningshield*, 9 N. H. 304; *Portland Bank v. Maine Bank*, 11 Mass. 204; *Murfree v. Carmack*, 4 Yerg. 270;

³ *Rand v. Rand*, 4 N. H. 267; *Bemis v. Leonard*, 118 Mass. 502; *Wiggin v. Peters*, 1 Met. 127; *Seekonk v. Rehoboth*, 8 Cush. 371; *Goode v. Webb*, 52 Ala. 452; *White v. Haworth*, 21 Mo. App. 439; *Pyle v. Maulding*, 7 J. J. Marsh. 202; *Brackett v. Brackett*, 61 Mo. 223; *Hart v. Walker*, 31 id. 26; *Walsh v. Boyle*, 30 Md. 262; *Small v. Edrick*, 5 Wend. 137; *Doyle v. Mizner*, 41 Mich. 549; *Lester v. Garland*, 15 Ves. 248; *Webb v. Fairmaner*, 3 M. & W. 473; *Ex parte Fallon*, 5 T. R.

§ 112. Some cases, both English and American, make a distinction between computations from an act done and those from the date or day of the date, including the day of the act done in the former and excluding the day of the date in the latter.¹ But that distinction is not now recognized in England,² nor in but few of the states in this country.³ The rule is not so absolute, however, but that the day of the act done may be included where it is necessary to give effect to the obvious intention; and some cases assert it will be included or excluded, as occasion may require, to prevent an estoppel or save a forfeiture.⁴

283; *Young v. Higgon*, 6 M. & W. 49; *Protection Life v. Palmer*, 81 Ill. 88; *Sheets v. Selden*, 2 Wall. 177; *Cock v. Bunn*, 6 John. 326; *Hoffman v. Duel*, 5 id. 232; *Gillespie v. White*, 16 id. 117; *Dayton v. McIntyre*, 5 How. Pr. 117; *Black v. Johns*, 68 Pa. St. 83; *Menges v. Frick*, 73 Pa. St. 137; *Presbrey v. Williams*, 15 Mass. 193; *Bowman v. Wood*, 41 Ill. 203; *Hall v. Cassidy*, 25 Miss. 48; *Columbia T. Co. v. Haywood*, 10 Wend. 422; *Page v. Weymouth*, 47 Me. 238; *Carothers v. Wheeler*, 1 Oregon, 194; *Irving v. Humphreys*, Hopk. 364; *Vanderburgh v. Van Rensselaer*, 6 Paige, 147; *Gorham v. Wing*, 10 Mich. 486; *Bigelow v. Willson*, 1 Pick. 487; *Judd v. Fulton*, 10 Barb. 117; *Snyder v. Warren*, 2 Cow. 518; *Sims v. Hampton*, 1 S. & R. 411; *State v. Schnierle*, 5 Rich. L. 299; *Steamer Mary Blane v. Beehler*, 12 Mo. 477; *Kimm v. Osgood's Adm.* 19 id. 60; *Windsor v. China*, 4 Greenlf. 298; *Pearpont v. Graham*, 4 Wash. C. C. 232; *Cromelien v. Brink*, 29 Pa. St. 522; *Homan v. Liswell*, 6 Cow. 659; *Weeks v. Hull*, 19 Conn. 376; *Carson v. Love*, 8 Yerg. 215; *Duffy v. Ogden*, 64 Pa. St. 240. See *Smith v. Harris*, 34 Ga. 182.

¹ *King v. Adderley*, 2 Doug. 463; *Norris v. Hundred of Gawtry*, Hob. 139; *Castle v. Burditt*, 3 T. R. 623; *Glassington v. Rawlins*, 3 East, 407;

Clayton's Case, 5 Coke, 1; *Arnold v. United States*, 9 Cranch, 104; *Jacobs v. Graham*, 1 Blackf. 392; *White v. Crutcher*, 1 Bush, 472; *Chiles v. Smith's Heirs*, 13 B. Mon. 460; *Wood v. Commonwealth*, 11 Bush, 220.

² *Lester v. Garland*, 15 Ves. 248; *Webb v. Fairmaner*, 2 M. & W. 474; *Ex parte Fallon*, 5 T. R. 283; *Young v. Higgon*, 6 M. & W. 49; *Mercer v. Ogilvy*, 3 Paton, 434; *Hardy v. Ryle*, 9 Barn. & Cr. 603; *Pellew v. Inhab. of Wonsford*, id. 134; *Rex v. Justices*, 4 Nev. & M. 378; *Robinson v. Waddington*, 13 Ad. & El. (N. S.) 753.

³ *Calvert v. Williams*, 34 Md. 672; *Sheets v. Selden*, 2 Wall. 177; *Owen v. Slatter*, 26 Ala. 551; *Elder, Adm'r, v. Bradley*, 2 Sneed, 252; *Bemis v. Leonard*, 118 Mass. 502; *Sims v. Hampton*, 1 S. & R. 411; *Kimm v. Osgood*, 19 Mo. 60; *Pyle v. Maulding*, 7 J. J. Marsh. 202. In Kentucky the courts include the *terminus a quo* when the computation is from an act or event. *Chiles v. Smith's Heirs*, 13 B. Mon. 460; *Batman v. Megowan*, 1 Met. (Ky.) 548; *White v. Crutcher*, 1 Bush, 473; *Wood v. Commonwealth*, 11 id. 220; *Handley v. Cunningham*, 12 id. 402; *Mooar v. Covington City Nat. Bank*, 80 Ky. 305.

⁴ *Windsor v. China*, 4 Greenlf. 298; *Presbrey v. Williams*, 15 Mass. 193;

"From" is a term of exclusion,¹ and the words "to," "till" or "until," inclusive.² Not that they import this in all connections, but in their use to indicate the beginning and ending of spaces of time. If a given number of days is required to elapse between one act and another, the day of the first is excluded, and the day of the other included. An intention to exclude both days may be inferred from language clearly expressing that intent;³ as where a statute or rule of court requires a certain number of clear days,⁴ or as has been held when "at least" a given number of days is required.⁵

The rule is so generally recognized to exclude the first, or *terminus a quo*, and to include the last, or *terminus ad quem*, that it requires no particular words for its application.⁶ The *terminus a quo*, so far as it is descriptive of a period of time, is coincident with the day, or day of the act from which the computation is to be made; that day is indivisible; the period to be computed is another and subsequent period, which begins when the first period is completed. The last day of that period is an indivisible point of time—the *terminus ad quem*. When that point is reached the period is complete. *Dies inceptus pro completo habetur.*⁷

§ 113. Where a summons or notice is required to be served or given a specified number of days for a sale, to require ap-

Williamson v. Farrow, 1 Bailey, 611; Steamboat Mary Blane v. Beehler, 12 Mo. 477; Pugh v. Duke of Leeds, 2 Cowp. 714; Price v. Whitman, 8 Cal. 412, 417; O'Connor v. Towns, 1 Tex. 107.

¹ Peables v. Hannaford, 18 Me. 106.

² Thomas v. Douglass, 2 John. Cas. 226; Bunce v. Reed, 16 Barb. 347; Dakins v. Wagner, 3 Dowl. P. C. 535; Webster v. French, 12 Ill. 302. See People v. Walker, 17 N. Y. 502.

³ Douseman v. O'Malley, 1 Doug. (Mich.) 450; Sallee v. Ireland, 9 Mich. 154; Cook v. Gray, 6 Ind. 335; Robinson, Adm'r, v. Foster, 12 Iowa, 186; Isabelle v. Iron Cliffs Co. 57 Mich. 120; Powers' Appeal, 29 Mich. 504.

⁴ King v. Herefordshire, 3 Barn. & Ald. 581.

⁵ Zouch v. Empsey, 4 Barn. & Ald.

522; The Queen v. The Justices, etc. 8 Ad. & El. 932; In re Prangle, 4 Ad. & El. 781; O'Connor v. Towns, 1 Tex. 107; Walsh, Trustee, v. Boyle, 30 Md. 266; Small v. Edrick, 5 Wend. 137. See Columbia T. Co. v. Haywood, 10 Wend. 423; Stebbins v. Anthony, 5 Colo. 348, 360; Young v. Higgon, 6 M. & W. 49.

⁶ A rule made June 6th to plead in four days gives the party all of the 10th for that purpose. Clark v. Ewing, 87 Ill. 344; Pepperell v. Burrell, 2 Dowl. P. C. 674. "By the January 20" includes that day, Higley v. Gilmer, 3 Mont. 433, and until the office opens the next morning. Oxley v. Bridge, 1 Doug. 67.

⁷ Mercer v. Ogilvy, 3 Paton, 434, 442.

pearance, or of a proceeding to take place at a precise time, the day of service is excluded; the sale or proceeding may be on the last of the required number of days, and the appearance must be on or before that day.¹ The same rule applies where a period is defined to be computed from a given act or date where within such period a right, power or authority may be exercised, or beyond which such right, power or authority may immediately attach and have force. The right to appear and plead is a right so limited and defined in point of time; if not claimed and exercised within the period given therefor there is a default; this is complete on the expiration of that period, and the right of the other party to proceed thereon attaches at once on the expiration of that period. At the same point of time one right expires and another becomes operative.

§ 114. The right of appeal is one to be exercised *within* a determinate period. That period is computed from the date of the judgment. The day of the judgment is excluded in the computation.² The right of redemption is another to be exercised within a certain time, and it is computed after a sale. The day of sale is excluded from the computation.³ The redemption period expires with the last day, and it is only after its expiration that the sale can be treated as absolute.⁴

¹Kerr v. Haverstick, 94 Ind. 180; Vandenburg v. Van Rensselaer, 6 Paige, 147; Irving v. Humphreys, Hopk. 364; White v. German Ins. Co. 15 Neb. 660; Monroe v. Paddock, 75 Ind. 422; Walsh v. Boyle, 30 Md. 262; Bowman v. Wood, 41 Ill. 203; Vairin v. Edmonson, 5 Gilm. 270; Forsyth v. Warren, 62 Ill. 68; Hall v. Cassidy, 25 Miss. 48; Columbia T. Co. v. Haywood, 10 Wend. 423; Bacon v. Kennely, 56 Mich. 329; Dexter v. Cranston, 41 Mich. 448; Doyle v. Mizner, 41 Mich. 549; See-konk v. Rehoboth, 8 Cush. 371; Bemis v. Leonard, 118 Mass. 502; Towell v. Hollweg, 81 Ind. 154; Cock v. Bunn, 6 John. 326; Hoffman v. Duel, 5 id. 232; Gillespie v. White, 16 id. 117; Cressey v. Parks, 75 Me. 387; Hart's Adm'r v. Walker, 31 Mo. 26; Rex v. Justices, 4 Nev. & Man. 370. See City Council v. Adams, 51 Ala. 449.

²Carothers v. Wheeler, 1 Oregon, 194; Smith v. Cassity, 9 B. Mon. 192 (overruled in Chiles v. Smith's Heirs, 13 id. 460); Ex parte Dean, 2 Cow. 605. And see Commercial Bank v. Ives, 2 Hill, 355.

³Gorham v. Wing, 10 Mich. 486; White v. Haworth, 21 Mo. App. 439.

⁴People v. The Sheriff of Broome, 19 Wend. 87; Bigelow v. Willson, 1 Pick. 485; Cromilien v. Brink, 29 Pa. St. 522. In this case the court say: "A day is always an indivisible point of time except where it must be cut up to prevent injustice. In the sense of these statutes it has neither length nor breadth, but simply position with-

Rights of action may be asserted during the period defined in the statutes of limitation. The rule would philosophically include in the period of limitation every day in which an action could be brought, as the rights of appeal and redemption include every day in which those rights could be exercised. The right to sue commences at once after the maturity of the debt, or right of action. The day on which it matures is excluded for the same reason that the day of sale is excluded in reckoning the time of redemption, or the day on which the judgment is rendered in computing the time for appeal. The sale or rendition of judgment are acts which do not occupy the whole day; but fractions not being regarded, they are treated the same as though they took place in every part of the day, or the day as having no magnitude, as a mere point of time.¹

out magnitude. If the time of redemption were fixed at one day after the sale, that day could not be the day of the sale; for it might be made at the last moment of the day, and the owner being thus prevented from tendering on that day, would lose his right. The time mentioned must therefore be the following day. So of one year, or of two years." *Edmundson v. Wragg*, 104 Pa. St. 500.

¹ In *Presbrey v. Williams*, 15 Mass. 192, the court say: "By the statute of limitations it was intended that the plaintiff should have full six years, and no more, within which to bring his action. In this case he might have brought his action on the 1st of November, as upon a new promise then made (supposing that the action had been previously barred by the statute), and if he may also commence it on the 1st day of November, 1817, it would make seven first days of November in the six years prescribed by the statute." The facts of this case and that of *Menges v. Frick*, 73 Pa. St. 137, are not such as to fairly illustrate the rule, for in both cases the right of action matured on the day included in the former and ex-

cluded in the latter in computing the period of limitations. It is said that the new promise reviving a barred debt was made on November 1, 1810, and might have been sued on that day. The new promise like the rendition of a judgment or sale, though an act occupying but a moment, may be the first or last moment of the twenty-four hours. As a fact from which time is reckoned they occupy the day,—the day is but a point of time. In reckoning a period from that act, it is considered in law that there is not a moment of the day of such act subsequent to it. The act and the day are identical in time—space—a mere point. We may suppose a new promise made which revives a debt and an action brought on it the same day; so we may suppose a redemption from a sale on the day of the sale, or an appeal from a judgment on the day when it was rendered. Then to protect the right of suit, redemption or appeal, a court would disregard the fiction that there are no fractions of a day and ascertain if the action was brought after the right accrued, and so in the other cases whether the right exercised ex-

§ 115. When Sundays are included or excluded.— For secular purposes Sundays are *dies non utiles*. In many con-

isted. See *ante*, § 110. Paul v. Stone, 112 Mass. 27, confirms this view. The statute barred an action against an administrator unless commenced within two years "from the time of his giving bond." The court adopt the language of Wilde, J., in *Bigelow v. Willson*, 1 Pick. 485, that "the words 'time of executing the deed,' used in the statute, mean, in legal acceptance, the day of delivery, which is the same as 'the date' or 'the day of the date.'" The following cases are to the same effect: *Steamboat Mary Blane v. Beehler*, 12 Mo. 477; *Viti v. Dixon*, *id.* 479; *Blackman v. Nearing*, 43 Conn. 56; *Cornell v. Moulton*, 8 Denio, 12.

The case of *McGraw v. Walker*, 2 Hilt. 404, is not like the others. There a note was payable on the 1st day of October and therefore became due on the 4th. At the expiration of that day an action accrued and suit could have been brought on the 5th. The statute commenced running on and including that day — and hence expired with the 4th of October in the sixth year thereafter — unless the language of the statute of limitations excludes the first day upon which an action could be brought. It requires an action to be brought within the prescribed period "*after* the cause of action accrued." The inquiry narrowly is, Does a party have the prescribed period and an *additional* day to bring his action? It is the writer's opinion that the first day when he can bring suit is the first day after the accrual of the action and part of the prescribed period of limitation.

If the computation must be made backwards from a day or proceeding, it is still a period to be ascertained by excluding one day and including an-

other. Though the day from which the computation has to be made is the same sort *dies a quo*, in the reckoning, it is yet the expiration of the period. The same rule of computation applies; such periods are not construed to be periods of clear days; one terminus is included and the other excluded. While it would seem more philosophical, and preserve a symmetry in the application of the rule which excludes the *terminus a quo*, as in *Hagerman v. Ohio Building, etc. Co.* 25 Ohio St. 186, still the result is the same, when the terms are transposed. *Northrop v. Cooper*, 23 Kan. 432.

In a very learned and elaborate opinion in *Stebbins v. Anthony*, 5 Colo. 348, Beck, J., remarks that "The rule of the common law, and the rule generally adopted by the courts of the several states, is to include one day and to exclude the other, some courts including the first day in the specified time in the computation, and excluding the last day. Some courts exclude the first day, and include the last, while other courts vary their practice according to the phraseology of the statute under consideration, in some instances including the last day, and in others including both days." He concludes that the rule sustained by the general current of modern authority is that "where a statute requires an act to be performed a certain number of days *prior* to a day named, or within a definite period after a day or event specified; or where time is to be computed either prior to a day named or subsequent to a day named, the usual rule of computation is to exclude one day of the designated period and to include the other."

stitutions they are excepted from the time allowed the executive for action upon a bill which is delivered to him after its passage by the two branches of the legislature. Where that is the case, Sundays are excluded from the computation. Thus, under such a provision in the federal constitution allowing ten days, excepting Sundays, an act so passed and submitted to the president on Saturday, the 19th of February, would, in case of his non-action, take effect on the 3d of March ensuing.¹ In the absence of positive written law excluding Sundays from a period of days prescribed for any purpose, they are counted, even though the period ends on Sunday.² Where a period

Bowman v. Wood, 41 Ill. 203; Vairin v. Edmonson, 5 Gilm. 270; Forsyth v. Warren, 62 Ill. 68; Smith v. Rowles, 85 Ind. 264; Rhoades v. Delaney, 50 Ind. 253; Loughridge v. Huntington, 56 Ind. 253; Meredith v. Chancey, 59 Ind. 466; Fox v. Allensville, 46 Ind. 31; Hill v. Pressley, 96 Ind. 447; Swett v. Sprague, 55 Me. 190; Gantz v. Toles, 40 Mich. 725; Dexter v. Shepard, 117 Mass. 480; Frothingham v. March, 1 Mass. 247; Early v. Doe ex dem. Homans, 16 How. 615; Dexter v. Cranston, 41 Mich. 448; Scrafford v. Gladwin Supervisors, id. 647; Powers' Appeal, 29 Mich. 504; Bacon v. Kennedy, 56 Mich. 329; Isabelle v. Iron Cliffs Co. 57 Mich. 120.

But in Ward v. Walters, 63 Wis. 44, Taylor, J., thus states the doctrine: "In the absence of any statutory provision governing the computation of time, the authorities are uniform that where an act is required to be done a certain number of days or weeks before a certain other day upon which another act is to be done, the day upon which the first act is to be done must be excluded from the computation and the whole number of the days or weeks must intervene before the day for doing the second act." The same court, in Wright v. Forrestal, 65 Wis. 348, speaking by the same learned judge, said: "The lan-

guage [of the statute] is: 'The resolution shall lie over *at least four weeks after its introduction*, and no action shall be taken by the common council, if *within* that time a remonstrance,' etc. The question was presented to the council when the four weeks expired so that they might act on the same. They evidently construed it, as men ordinarily would, that a week was the period of time extending from Monday of one week to Monday of the next week following, and not until Tuesday of such week, and that the resolution, if introduced on Monday, had laid over four weeks when the fourth Monday thereafter had arrived, and that they were at liberty to act upon it then. We think this is the natural construction of the act, and clearly within the intention of the legislature."

¹ See Price v. Whitman, 8 Cal. 412.

² Taylor v. Palmer, 31 Cal. 244; Miles v. McDermott, id. 272; Chicago v. Vulcan Iron Works, 93 Ill. 222; Ex parte Dodge, 7 Cow. 147; King v. Dowdall, 2 Sandf. 131; Anonymous, 2 Hill, 375; Harrison v. Sager, 27 Mich. 476; Haley v. Young, 134 Mass. 364; Broome v. Wellington, 1 Sandf. 660; Ready v. Chamberlin, 52 How. Pr. 123; National Bank v. Williams, 46 Mo. 17; Creswell v. Green, 14 East, 537; Ex parte Simpkin, 105

less than a week is prescribed by statute, it has sometimes been held that an intervening Sunday should not be counted, nor if it be the last day of the period.¹ This appears to be the settled rule in Massachusetts.² It is not universally adhered to as to periods of more than one or two days.³ Subject to this qualification, where the last day is Sunday, any act required by statute to be done within the period must be done before that day. For such acts the period practically ends on the preceding day.⁴ In Pennsylvania a different rule prevails. There, in such case, the act may be done on Monday.⁵

In *Hughes v. Griffiths*,⁶ Erle, C. J., said: "I am of opinion that when the last of the seven days [a statutory period] happens to fall on a day which is declared to be a holiday, and on which the court cannot act, the party has until the next following day on which the court can act to issue the writ. It seems to me that a distinction between a thing which is to be done by the court and a mere act of a party is maintainable."⁷

If the period is fixed by contract, or is a rule of court regulating mere practice, and it ends on Sunday, that day is excluded, and the period will be deemed to include Monday.⁸

Eng. C. L. 392; *Peacock v. Regina*, 93 id. 264; *Rowberry v. Morgan*, 9 Ex. 730. See *Harker v. Addis*, 4 Pa. St. 515; *Sims v. Hampton*, 1 S. & R. 411.

¹ *Anonymous*, 2 Hill, 375; *Drake v. Andrews*, 2 Mich. 203; *National Bank v. Williams*, 46 Mo. 17; *Whipple v. Williams*, 4 How. Pr. 28; *Wathen v. Beaumont*, 11 East, 271; *Rex v. Elkins*, 4 Burr. 2130.

² *Alderman v. Phelps*, 15 Mass. 225; *Thayer v. Felt*, 4 Pick. 354; *Penniman v. Cole*, 8 Met. 496; *McIniffe v. Wheelock*, 1 Gray, 600; *Hannum v. Tourtellott*, 10 Allen, 494; *Cunningham v. Mahan*, 112 Mass. 58.

³ *Harrison v. Sager*, 27 Mich. 476; *Simonson v. Durfee*, 50 Mich. 80; *Cressey v. Parks*, 75 Me. 387; *State v. Wheeler*, 64 id. 532; *Carville v. Additon*, 62 id. 459; *Tuttle v. Gates*, 24 id. 395; *Hales v. Owen*, 2 Salk. 625; *Asmole v. Goodwin*, id. 624; *Creswell*

v. Green, 14 East, 537; *Peacock v. Regina*, 93 Eng. C. L. 262; *Taylor v. Corbiere*, 8 How. Pr. 385.

⁴ *Ex parte Simpkin*, 105 Eng. C. L. 392; *Queen v. The Justices*, 7 Jurist, 396; *Alderman v. Phelps*, 15 Mass. 225; *Cressey v. Parks*, 75 Me. 387.

⁵ *Edmundson v. Wragg*, 104 Pa. St. 500, 502.

⁶ 106 Eng. C. L. 332.

⁷ See *Harrison v. Sager*, 27 Mich. 476.

⁸ *Cock v. Bunn*, 6 John. 326; *Borst v. Griffin*, 5 Wend. 84; *Bissell v. Bissell*, 11 Barb. 96; *Anonymous*, 1 Strange, 86; *Bullock v. Lincoln*, 2 id. 914; *Studley v. Sturt*, id. 782; *Lee v. Carlton*, 3 T. R. 642; *Solomons v. Freeman*, 4 id. 557; *Harbord v. Perigal*, 5 id. 210; *Asmole v. Goodwin*, 2 Salk. 624; *Shadwell v. Angel*, 1 Burr. 56; *Simonson v. Durfee*, 50 Mich. 80; *Morris v. Barrett*, 97 Eng. C. L. 139; *Mark's Ex'r v. Russell*, 40 Pa. St. 372;

When the time for the performance of a contract, according to its terms, expires on Sunday, a performance on the following Monday is good.¹ There is, however, an important exception to this rule. Where days of grace are allowed by the law merchant, and the last day of grace falls on Sunday, the act for which such days are allowed must be done on Saturday.²

Lewis v. Calor, 1 Fost. & Fin. 306; Post v. Garrow, 18 Neb. 682. But see Muir v. Galloway, 61 Cal. 498. See Kilgour v. Miles, 6 Gill & J. 268. Hughes v. Griffiths, 106 Eng. C. L. 332. ² Anonymous, 2 Hill, 375; Campbell v. International Life, 4 Bosw. 317; Howard v. Ives, 1 Hill, 263; Salter v. Burt, 20 Wend. 205; S. C. 32 205; Avery v. Stewart, 2 Conn. 69; Am. Dec. 530.

¹ Hammond v. American Ins. Co. 10 Gray, 306; Salter v. Burt, 20 Wend.

317; Howard v. Ives, 1 Hill, 263; Salter v. Burt, 20 Wend. 205; S. C. 32

CHAPTER VI.

REQUIREMENT OF GENERAL LAWS AND THAT THEY BE OF UNIFORM OPERATION.

§ 116. Constitutional requirements.

117. They are mandatory.

120-123. General laws, or laws of
general nature.

124-126. Required uniform opera-
tion.

§ 127-129. Special and local laws.

130. Amendatory and curative acts
may not interrupt uniform
operation.

§ 116. Constitutional requirements.— It is the aim of the government to provide just and equal laws, and to prevent, as far as possible, enactments which are not such. The accomplishment of this purpose is in part intended to be secured by the framers of state constitutions by adopting therein certain provisions, mandatory to the legislature, prohibiting special or local laws on certain enumerated subjects, and as to all others, either where general laws exist, or where they can be made applicable.

Another provision adopted in several states requires that all laws of a general nature shall have a uniform operation throughout the state. This requirement is not confined to the subjects enumerated in the prohibition of special or local laws; nor is it a mere repetition in substance of the general injunction to pass general laws where they can be made applicable.

Laws of a general nature are those which relate to subjects of that nature, and deal generally with them. The requirement involves the question what is such a subject, and how comprehensively it must be treated in legislative acts. Laws to which the requirement is applicable must be so framed as to have a uniform operation throughout the state.

§ 117. These constitutional provisions mandatory.— They are mandatory to the legislature; and a compliance with them is necessary to the validity of legislation. Whether a particular act is conformable or not is a judicial question; that is,

the courts have power to determine it, and they will hold any act void which violates either of these regulations,¹ with one exception. This exception is the question whether on a non-enumerated subject, not of a general nature, a general law can be made applicable. That is a legislative question. When a special act has been passed, in such a case, it implies that in the legislative judgment a general act could not be made applicable. It is a conclusive implication, and that judgment is final; the courts will not enter at all upon the inquiry; they will accept the judgment of the legislature as exercised within its exclusive legislative domain, and give it effect.² These requirements are prospective, and do not apply to or affect the validity of existing statutes.³

§ 118. If a general law exists which is applicable to a subject, the question whether such a law can be made applicable is resolved. The legislature has by the enactment of a general law practically decided the question. Hence if, while such a general law is in force, a special or local law is passed affecting the same subject and modifying the general law, the question of its validity is judicial; it will be held invalid in the case supposed, for an applicable general law being in existence, it is no longer a question whether such a law can be made applicable; therefore the special or local law is prohibited.⁴ The injunction to pass general laws when they can be made applicable is imperative as to subjects of a general nature, where

¹ Falk, *Ex parte*, 42 Ohio St. 683; State v. Powers, 38 id. 54; State ex rel. v. Supervisors, 25 Wis. 339; State ex rel. v. Riordan, 24 id. 484.

² Gentile v. State, 29 Ind. 409; Marks v. Trustees of Purdue University, 37 id. 161; Kelly, Treasurer, v. State, 92 id. 236; State v. Tucker, 46 id. 355; State v. County Court, 50 Mo. 317; S. C. 11 Am. R. 415; State v. County Court, 51 Mo. 82; Hall v. Bray, id. 288; St. Louis v. Shields, 62 id. 247; Brown v. Denver, 7 Colo. 305; S. C. 3 Am. & Eng. Corp. Cas. 630; State v. Hitchcock, 1 Kan. 178. See Hess v. Pegg, 7 Nev. 23; Clarke v. Irwin, 5 Nev. 124; State v. Squires, 26 Iowa, 340.

³ State v. Barbee, 3 Ind. 258; Brown v. State, 23 Md. 503. By the Missouri constitution of 1875 this question is made judicial. It is legislative by the terms of the New York constitution, section 1, article VIII. Mosier v. Hilton, 15 Barb. 657; United States Tr. Co. v. Brady, 20 Barb. 119; People v. Bowen, 21 N. Y. 517; 30 Barb. 24. The New Jersey constitution in this respect is like that of New York.

⁴ State ex rel. v. Supervisors, 25 Wis. 339; State ex rel. v. Riordan, 24 id. 484; Walsh v. Dousman, 28 id. 541.

laws of a general nature are required to have a uniform operation. The questions affecting the validity of such laws are judicial; the courts must determine what are laws of a general nature which must be so framed as to operate with uniformity.¹

The enumerated subjects must be dealt with by general laws; the constitutional provision determines conclusively that they can be so dealt with. All special legislation being prohibited, no other than general laws can be valid. Under the provision prohibiting special or local laws where a general law exists which is applicable, the validity of a special or local law intended to operate in modification of an existing general law will be determined by the courts as obviously a judicial question, for it depends wholly upon judicial elements — the meaning of the constitutional provision, the scope and effect of the general law, and the sense and proposed effect of the special or local act.

§ 119. Independently of these provisions the legislature has power to pass local and special laws. A mere want of symmetry in the legislation of a state, or the mere circumstance that all parts of a state are not subjected to the same regulations, or that statutes are not made to embrace all the subjects to which they might extend if the law-maker so desired, is no objection.² As said by a learned author: "Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application; they may embrace many subjects or one, and they may extend to all citizens or be confined to particular classes, as minors, married women, or traders, or the like. The authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state, or to a single class of its citizens only."³

There are fundamental principles secured by all the constitutions, and elementary in the very definition of the "law of

¹ See *post*, § 120.

² *Lin Sing v. Washburn*, 20 Cal. 534; *State v. Duffy*, 7 Nev. 342; *Cory v. Carter*, 48 Ind. 327; *Ward v. Flood*, 48 Cal. 36; *State v. McCann*, 21 Ohio St. 198; *Merritt v. Knife Falls B.*

Corp'n, 34 Minn. 245; *County of Hennepin v. Jones*, 18 Minn. 199; *Bruce v. County of Dodge*, 20 id. 388.

³ *Cooley's Const. Lim.* 488; *State v. Piper*, 17 Neb. 614; *Smith v. Dunn*, 64 Cal. 164.

the land," which impose restrictions upon the power to enact partial, invidious and unequal laws;¹ but it would be foreign to my present purpose to enter upon that subject.

§ 120. **General laws, or laws of a general nature.**—The important questions, under these constitutional provisions, are: what are laws of a *general nature* which must have a uniform operation throughout the state? And what are *general laws* as distinguished from *special* and *local* laws? The descriptive term general laws has been in use for a long time. In the common-law classification of statutes it applies to and includes all public acts; those of which the courts take judicial notice; all except private acts. This classification will be more particularly discussed in another place. It is obvious that this term is not used in these constitutional provisions in this sense. Some cases, however, seem to have proceeded on the contrary assumption,² but I think erroneously. Public statutes may be local or special, and incapable of uniform operation throughout the state, and therefore within the purpose of these provisions. The frequency and inconvenience of such local and special legislation in public acts led to the adoption of these provisions. The enumeration of subjects as to which local or special legislation is forbidden is chiefly an enumeration of subjects upon which the prior legislation was of that character—public laws—of which courts would take judicial notice. Under these requirements it must not be by special or local but by general laws; and where the requirement of uniform operation is in force these must so operate. An act to establish a municipal court in a particular city or a particular municipal government would not be a general law, but it would

¹ *Lewis v. Webb*, 3 Me. 326; *Durham v. Lewiston*, 4 id. 140; *Holton v. James*, 11 Mass. 396; *Bull v. Conroe*, 13 Wis. 238-244; *Wally v. Kennedy*, 2 Yerg. 554; *Vanzant v. Waddel*, id. 259; *State Bank v. Cooper*, id. 605; *Ragio v. State*, 86 Tenn. 272; *Budd v. State*, 3 Humph. 483; *Pope v. Phifer*, 3 Heisk. 701; *Mayor v. Dearmon*, 2 Sneed. 121; *Daly v. State*, 13 Lea, 228; *Burkholtz v. State*, 16 id. 71; *Woodard v. Brien*, 14 id. 520;

Memphis v. Fisher, 9 Baxt. 239; *State v. Duffy*, 7 Nev. 349; *Griffin v. Cunningham*, 20 Gratt. 31; *Dorsey v. Dorsey*, 37 Md. 64; S. C. 11 Am. R. 528; *Lawson v. Jeffries*, 47 Miss. 686; S. C. 12 Am. R. 342; *Wilder v. Railway Co.* 70 Mich. 382; *Trustees v. Bailey*, 10 Fla. 238; *Arnold v. Kelley*, 5 W. Va. 446; *Cooley*, Const. L. 487.

² *Hingle v. State*, 24 Ind. 28; *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 350.

be a public law.¹ That which concerns the administration of public justice, like legislation relating to a court, though it be of limited jurisdiction and its sittings confined to a specified locality, is a public law, but local; it is a law which affects the public generally.² It is not necessary, in order to give a statute the attributes of a public law, that it shall be equally applicable to all parts of the state,³ nor that it extend in its operation to all of the inhabitants.

In some constitutions it is provided that general laws shall not be in force until published. Such a provision is contained in the constitution of Wisconsin. It was there held that an act establishing a municipal court in the city of Milwaukee was a general law, and could not have effect until after publication.⁴ The object of that provision was notice to those who must obey; hence it referred comprehensively to public laws, not merely to such as were general in distinction from local or special laws.⁵

§ 121. General laws, therefore, in this constitutional antithesis, are public laws, general in the common-law sense; but a more limited class. They are not general because they are public acts, though they are such; but general because their subject-matter is of common interest to the whole state, and not local; because the provisions embrace the whole subject, or a whole class of it. Not being confined to a part they are not partial nor special. The state contains a great variety of subjects of legislation, each requiring provisions peculiar to itself. Generic subjects may be divided and subdivided into

¹State ex rel. Webster v. Baltimore County, 29 Md. 516; County Commissioners v. Commissioners, 51 id. 465; People v. Hill, 8 N. Y. 449; City Council of Montgomery v. Wright, 72 Ala. 411; S. C. 5 Am. & Eng. Corp. Cas. 642; Cass v. Dillon, 2 Ohio St. 607, 617; City of Covington v. Voskottter, 80 Ky. 219; S. C. 3 Am. & Eng. Corp. Cas. 578; Luling v. Racine, 1 Biss. C. C. 316.

²People v. Davis, 61 Barb. 456; In re De Vaucene, 31 How. Pr. 337; State v. Dalon, 35 La. Ann. 1141; Phillips v. Mayor, etc. 1 Hilt. 483;

Healey v. Dudley, 5 Lans. 115; Williams v. People, 24 N. Y. 405; Conner v. Mayor, etc. 5 id. 285; Graves v. McWilliams, 1 Pin. 491; People v. McCann, 16 N. Y. 58; Kerrigan v. Force, 68 N. Y. 381; Falk, Ex parte, 42 Ohio St. 638.

³State ex rel. Webster v. Baltimore County, 29 Md. 516; State v. Wilcox, 45 Mo. 458.

⁴In re Boyle, 9 Wis. 264. See Luling v. Racine, 1 Biss. C. C. 316.

⁵Clark v. Janesville, 10 Wis. 196; Luling v. Racine, 1 Biss. C. C. 316.

as many classes as require this peculiar legislation. Thus laws relating to the people, for certain purposes, extend to all alike, as for protection of person and property; for other purposes they are divided into classes, as voters, sane and insane persons, minors, husbands and wives, parents and children, etc. Property is subject to division into classes. Nearly every matter of public concern is divisible, and division is necessary to methodical legislation. A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special.¹

¹ In *Wheeler v. Philadelphia*, 77 Pa. St. 338, the court say that the power of classifying subjects for legislation "existed at the time of the adoption of the constitution; it had been exercised by the legislature from the foundation of the government; it was incident to legislation, and its exercise was necessary to the promotion of the public welfare. The true question is not whether classification is authorized by the terms of the constitution, but whether it is expressly prohibited. In no part of that instrument can such prohibition be found. For the purpose of taxation real estate may be classified. Thus, timber lands, arable lands, mineral lands, urban and rural, may be divided into distinct classes, and subjected to different rates. In like manner other subjects, trades, occupations and professions may be classified. And not only things but persons may be so divided. The *genus homo* is a subject within the meaning of the constitution. Will it be contended that as to this there can be no classification? No laws affecting the personal and property rights of minors as distinguished from adults? Or of males as distinguished from females? Or, in the case of the latter, no distinction between a *feme covert* and a single woman? What becomes of all our legislation in regard to the rights

of married women if there can be no classification? And where is the power to provide any future safeguards for their separate estate? These illustrations might be multiplied indefinitely were it necessary. But it is contended that even if the right to classify exists, the exercise of it by the legislature, in this instance, is in violation of the constitution, for the reason that there is but one city in the state with a population exceeding three hundred thousand; that to form a class containing but one city is in point of fact legislating for that one city to the exclusion of all others, and constitutes the local and special legislation prohibited by the constitution. This argument is plausible, but unsound. It is true the only city in the state, at the present time, containing a population of three hundred thousand, is the city of Philadelphia. It is also true that the city of Pittsburg is rapidly approaching that number, if it has not already reached it, by recent enlargements of its territory.

"Legislation is intended not only to meet the wants of the present, but to provide for the future. It deals not with the past, but, in theory at least, anticipates the needs of a state, healthy with a vigorous development. It is intended to be permanent. At no distant day Pittsburg

Laws of a general nature are required to be made in such form that they will have a uniform operation. They must be so framed and so operate on account of being of that general nature. In *Cass v. Dillon*,¹ Thurman, J., said: "The origin of this section is perfectly well known. The legislature had often made it a crime to do in one county, or even township, what it was perfectly lawful to do elsewhere; and had provided that acts, even for the punishment of offenses, should be in force or not in certain localities, as the electors thereof respectively might decide. It was to remedy this evil and prevent its recurrence that this section was framed."

In *Kelley v. State*² the court say: "Without undertaking to discriminate nicely or define with precision it may be said that the character of a law, as general or local, depends on the character of its subject-matter. If that be of a general nature, existing throughout the state, in every county, a subject-matter in which all the citizens have a common interest — if it be a court organized under the constitution and laws within and for every county of the state, and possessing a legitimate jurisdiction over every citizen,—then the laws which relate to and regulate it are laws of a general nature, and by virtue of the prohibition referred to must have a uniform operation throughout the state." It is to be inferred from this that a law of a general nature requires a subject-matter of this extensive and all-pervading sort; and that all laws relating to and regulating it are of the same character — of a general nature. If limited in terms, so as not to extend to the whole state; that is, if the court referred to be established in only a

will probably become a city of the first class; and Scranton, or others of the rapidly growing interior towns, will take the place of the city of Pittsburg as a city of the second class. In the meantime, is the classification as to cities of the first class bad because Philadelphia is the only one of the class? We think not. Classification does not depend upon the numbers. The first man, Adam, was as distinctly a class, when the breath of life was breathed into him, as at any subsequent period. The

word was not used to designate numbers, but a rank or order of persons or things; in society it is used to indicate equality, or persons distinguished by common characteristics, as the trading classes, the laboring classes; in science, it is a division or arrangement containing the subordinate divisions of order, genus and species." See *People v. Henshaw*, 76 Cal. 436; *Pritchett v. Stanislaus Co.* 73 id. 310.

¹ 2 Ohio St. 607, 617.

² 6 Ohio St. 269.

portion of the state, not in every county, it does not have the uniform operation required. In the subsequent case of *McGill v. State*,¹ the subject received thorough reconsideration. The question was on the validity of a law relating to the selection of trial jurors in that court — whether the power to make such selection must be conferred on the same class of men or officers in every county. To the contention that such uniformity was required, the court said: “This position derives some support from what was said in *Kelley v. State*. But subsequent decisions of this court, and in which the learned judge delivering the opinion in that case concurred, show that the proposition that a law relating to or concerning a general subject-matter is a law of a general nature is not to be taken in an unqualified sense to be true. That a law of a general nature must concern a subject-matter existing and capable of uniform operation throughout the state cannot be denied; for if the law from the nature of its subject-matter is not susceptible of an operation throughout the state, it cannot, within the meaning of the constitution, be a law of a general nature. But it by no means follows that all laws pertaining to a general subject-matter, and susceptible of a uniform operation throughout the state, are laws of a general nature in the constitutional sense of that term.” Such differences of details were held not to affect the constitutionality of the law. The requirement was intended by such uniformity of operation to prevent the granting to any citizen or class of citizens of privileges or immunities which upon the same terms shall not belong to all citizens. This language is associated with the provision in question in the Iowa constitution,² and as qualified by it was adopted in other states.³

In California the provision was adopted from the constitution of Iowa. In *Smith v. Judge*,⁴ Baldwin, J., said: “The language must be carefully noted. It is not that laws shall be universal or general in their application to the same subject, nor is it even that all laws of a general nature shall be universal or general in their application to such subjects; but the expression is that these laws shall be uniform in their opera-

¹ 34 Ohio St. 239.

³ *McGill v. State*, *supra*.

² Sec. 6, art. I.

⁴ 17 Cal. 534.

tion; that is, that such laws shall bear equally in their burdens and benefits upon persons standing in the same category." The same court in a later case held that the provision means that every law shall have a uniform operation upon the citizens or persons or things of any class upon whom or which it purports to take effect, and that it shall not grant to any citizen or class of citizens privileges which, upon the same terms, shall not equally belong to all citizens.¹ In a still later case² that court said: "The constitution has not undertaken to declare that all laws shall have a uniform operation. Uniformity in that respect is made requisite only in case the law itself be one of a general nature. . . . The nature of a given statute, as being general or special, must depend in a measure upon the legislative purpose discernable in its enactment. We must not say that a statute, plainly special in its scope, must either have a uniform operation or not operate at all, for this were to add another to the limitations which the constitution has imposed upon the legislative power, and to hold in effect that no special act could be passed at all, at least if 'uniform' operation means universal operation.³ . . . Nor are we to say that a special statute—special in its aims and in the object it has in view—is by mere construction to be converted into a general statute, because the subject with which it deals might have been made the subject of a general law. It is obvious that every law upon a general subject is not *per se*, nor by constitutional intendment, necessarily of a general nature. The subject may be general, but the law and the rule it prescribes may be special. Fees of officers, for instance, constitute a general subject, one which pervades the length and breadth of the state, and extends into every political subdivision of which it is composed; yet a statute may prescribe what these fees of office shall be in a particular county.⁴ And may declare that they shall differ from fees established for the same official duties performed in another county. Such a

¹French v. Teschemaker, 24 Cal. 544; Brooks v. Hyde, 37 Cal. 375. 1849 is that "all laws of a general nature shall have a uniform operation."

²People v. C. P. R. R. Co. 43 Cal. 432. Art. 1, sec. 11. The words "throughout the state" are omitted.

³The provision requiring uniformity in the California constitution of 1849 is that "all laws of a general nature shall have a uniform operation." Art. 1, sec. 11. The words "throughout the state" are omitted.

⁴State ex rel. v. Judges, etc. 21 Ohio St. 1.

law would not be a law of a general nature involving the constitutional necessity of uniform operation; but it would be a special law upon a general subject."¹

§ 122. It is thus apparent that this provision alone does not prevent special legislation, except where, upon a subject of general concern, it would have the effect to make unjust discriminations between people or places in the same condition and circumstances; in other words, have the effect to grant to certain persons or classes privileges or immunities which, upon the same terms, are not made available to all.²

¹ Ryan v. Johnson, 5 Cal. 86.

² In McGill v. State, 34 Ohio St. 246, the court thus discussed this distinction: "In State ex rel. v. The Judges, etc. 21 Ohio St. 1, it was held that an act limiting and regulating the fees of the county officers of Hamilton county was not a law of a general but of a local nature. And in Cass v. Dillon, 2 Ohio St. 617, it was said that a law authorizing and requiring the commissioners to subscribe in behalf of the county to the stock of a railroad company was no more of a general nature than would be an act to authorize the construction of a bridge, or the erection of a poor-house; and yet it is perfectly clear that an act regulating the fees of county officers throughout the state pertains to a general subject-matter existing in every county, and in which all citizens have an interest, as do the general acts authorizing county commissioners to construct bridges, erect poor-houses and other necessary public buildings. And yet who would venture to question the power of the legislature to clothe the commissioners of a county, or the trustees of a township, by local enactment, with authority to provide all public buildings or structures that the local wants of a community might require; or who will contend that the power of the legislature is

so circumscribed and restricted as to prohibit it from requiring a tax to be levied or a court-house to be erected in one county without requiring the same thing to be done in every county in the state? The act authorizing the judges of the court of common pleas to fix the times for holding the terms of court in their respective districts is a general law, the subject-matter of which concerns all the people throughout the state. Cannot the legislature change by local enactment the term of a court so fixed? If it may do so, it is because the act authorizing the judges to fix the time for holding the courts, although general in its terms, and relating to a subject-matter that pervades all parts of the state, is not, within the meaning and intendment of the constitution, a law of a general nature. Such laws are clearly distinguishable in their nature from those that confer privileges and immunities or impose burdens upon a citizen or class of citizens that are not upon the same terms and conditions conferred and imposed upon all. It is easy to comprehend that a law defining burglary or bigamy, and its penalty, or regulating descent and distribution, or prescribing a rate of interest for the use of money, and others of a similar effect and operation, are laws of a general nature, re-

In such cases legislation must be general; it must have a uniform operation. The case of *Kelley v. State* is an apt illustration.¹ An act declaring what shall constitute a legal and sufficient fence and requiring all fields and inclosures to be inclosed therewith was held to be a law of a general nature. It did not extend to the whole state; it was not framed to have a uniform operation throughout the state, and was therefore held unconstitutional.² An act prohibiting sheep from running at large in all the counties of the state except one was held liable to the same objection.³ So of an act relating to libel and confined to publishers of newspapers.⁴ Tax laws, must provide a uniform rule.⁵

§ 123. Criminal laws must be general and have a uniform operation.⁶

In *Ex parte Falk*⁷ it was held that a statute providing punishment for an act which is *malum in se* wherever committed, being a law of a general nature, cannot be made local on the ground that the inhibited act is a greater evil in a large city than in other parts of the state. The court, by Okey, J., say: "The act inhibited . . . [having burglars' tools in his possession] is not merely immoral but plainly vicious; it is one of very serious and dangerous character; it is not merely *malum*

quiring uniform operation throughout the state. To discriminate between localities or citizens in the enactment of laws of such nature would be to grant privileges or impose burdens of a character which it was the clear purpose of the constitution to provide against. But that a law may be general and concern matters purely local or special in their nature, or may be local or special and relate to matter that may be made the subject of a general law, not only rests upon some reason but is well supported by authority."

¹ 6 Ohio St. 269.

² *Darling v. Rodgers*, 7 Kan. 592; *Frost v. Cherry*, 122 Pa. St. 417.

³ *Robinson v. Perry*, 17 Kan. 248; *Utsey v. Hiott*, 30 S. C. 360; 9 S. E. Rep. 338.

⁴ *Allen v. Pioneer Press*, 40 Minn. 117; S. C. 41 N. W. Rep. 936. See *Cobb v. Bord*, 40 Minn. 479.

⁵ *State v. Cumberland & Penn. R. Co.* 40 Md. 22; *State v. Sterling*, 20 Md. 502; *Tyson v. State*, 28 id. 587; *State Board of Assessors v. Central R. R. Co.* 48 N. J. L. 146; *Hammer v. State*, 44 N. J. L. 667; *State v. California Min. Co.* 15 Nev. 234; *Bright v. McCullough*, Treasurer, 27 Ind. 223. See *Central Iowa R. R. Co. v. Board of Supervisors*, 22 Am. & Eng. R. R. Cas. 223; S. C. 67 Iowa, 199; *People ex rel. v. Wallace*, 70 Ill. 630.

⁶ *Ex parte Westerfield*, 55 Cal. 550. *Ex parte Koser*, 60 id. 187, 191.

⁷ 42 Ohio St. 638.

prohibitum but *malum in se*; and it is a wrong to society — not merely to Cincinnati; not merely in cities, but in every county, in every township, in fact in every part of the state; and no reason can be given why it might not properly be made punishable by statute throughout the whole state as a criminal offense. Perhaps it is true that such acts may be a greater evil in large cities; possibly a greater evil in Cincinnati than in any other part of the state. But the same thing may be truthfully said with respect to many, perhaps a majority, of criminal offenses. Take the crime of arson. It is a grievous evil everywhere, and under some circumstances a most atrocious crime. It is an evil alike in town and country, but a far greater evil in a large compact city like Cincinnati than in a small village or hamlet or in a sparse rural district. But does this reason, or any other with which it may be supplemented, afford any ground, in view of our constitution, for punishing under local law? So, a person having possession of instruments for counterfeiting, or custody of a large quantity of counterfeit money, may be in a better position to carry on a nefarious business successfully, and therefore more likely to occasion harm in a crowded city than in the rural portions of the state; but a general law upon the subject, applicable to the whole state, has effected all that can be done by legislation to remedy the evil.”¹

¹ This opinion is instructive in the remarks which follow: “To the end that these statements may not mislead, it is proper to say that the general assembly is clothed in the most general terms with legislative power, and this, unrestrained by other provisions, would authorize the legislature to pass local penal statutes of every sort, and it will be seen that there is no inhibition against the passage of penal statutes which are local and even special in character. Hence it may be that a statute punishing even with death any person who should break and enter the state treasury in Columbus, Ohio, with intent to steal, or having so broken and entered, rob the treasurer of state,

would not be subject to any constitutional objection, however objectionable it might be on the ground of propriety. And other and perhaps more apt illustrations of the principle may be suggested. On the other hand, a statute, general in form, prohibiting the sale of liquors in the immediate vicinity of any college would perhaps be regarded as a general and therefore valid enactment, in force throughout the state, although every county does not contain a college. . . . Attention has been called to the fact that in *State v. Brewster*, 39 Ohio St. 653, 658, it was held that the power to classify municipal corporations expressly authorized by the constitution is addressed in a large degree

In *State v. Powers*¹ the court held that laws regulating the organization and management of common schools, pursuant to the provisions of the constitution to "secure a thorough and efficient system of common schools throughout the state,"² were laws of a general nature; that if the constitution declares a given subject for legislation to be one of a general nature, all laws in relation thereto must have a uniform operation. The court expressed some diffidence in laying down any general rule for determining subjects for legislation of a general nature, but suggested as such marriage and divorce, and the descent and distribution of estates, and others of like common and general interest to all the citizens of the state. Two propositions, however, were said to be settled: 1. That the general form of a statute is not the criterion by which its general nature is to be determined. 2. That whether a law be of a general nature or not depends upon the character of its subject-matter.³ It was admitted that on subjects concerning which uniformity was required, judicious classification and discrimination between classes were admissible.

§ 124. The uniform operation of laws of a general nature.—Where the subject-matter of an act is of a general nature, and a law deals with it by provisions which are designed for the whole state, and every part thereof, such act has a uniform operation throughout the state though the con-

to the conscience and judgment of the legislature, and 'that statutory provisions with respect to any such class are, for governmental purposes, general legislation,' and not in conflict with the constitution. This we held to be a proper construction of article 13, section 6, which is in no sense in conflict with article 2, section 26. And in this connection it is proper to say that in *Morgan v. Nolte*, 37 Ohio St. 23, we sustained the validity of a conviction under an ordinance of the city of Cincinnati, passed by virtue of Revised Statutes, sections 1692, 2108, prescribing punishment by fine and imprisonment against any person who, being a known thief, should be found in that

city; and there being no general statute punishing the act of having possession of burglar's tools, it is true, perhaps, that the substance of section 1924, if adopted in due form as an ordinance of the city of Cincinnati, under authority of sections 1692 and 2108, would be entirely valid. Nor does this militate against anything I have said; for the constitutional provision we are considering would not, under such circumstances, have any application." See *Williams v. People*, 24 N. Y. 405; *Budd v. State*, 3 Humph. 483.

¹ 38 Ohio St. 54.

² Art. 6, sec. 2.

³ Citing *Kelley v. State*, 6 Ohio St. 272; *McGill v. State*, 34 id. 228.

dition and circumstances of the state may be such as not to give the act any actual or practical operation in every part.¹ The purpose of this provision requiring a uniform operation of general laws is satisfied when a statute has the same operation in all parts of the state under the same circumstances and conditions.² The number of persons upon whom the law shall have any direct effect may be very few by reason of the subject to which it relates, but it must operate equally and uniformly upon all brought within the relations and circumstances for which it provides.³

In Indiana local laws in regard to fees and salaries are forbidden, and general laws required on that and other enumerated subjects, as well as upon all subjects on which general laws could be made applicable; and these were required to have a uniform operation throughout the state. An act gave certain officers different salaries and made such difference depend on the question of population. This legislation was held to be neither local nor special; it operates uniformly and alike in all parts of the state under like facts. It gives the same increase of compensation in all counties where there is the same excess of population.⁴

In Tennessee there are constitutional provisions in a different form, which, by judicial construction, forbid partial laws; and, as part of the law of the land, require that general and public laws shall be equally binding upon every member of the community.⁵ This requirement is satisfied if an act ex-

¹ *Leavenworth Co. v. Miller*, 7 Kan. 479; *In re De Vaucene*, 31 How. Pr. 337.

² *Groesch v. State*, 42 Ind. 547; *Heanley v. State*, 74 Ind. 99; *Elder v. State*, 96 id. 162; *State v. Wilcox*, 45 Mo. 458.

³ *People ex rel. v. Wright*, 70 Ill. 398; *People ex rel. v. Cooper*, 83 id. 585.

⁴ *Hanlon v. Board of Commissioners*, 53 Ind. 123; *State v. Reitz*, 62 id. 159; *Clem v. State*, 33 Ind. 418.

⁵ *State v. Burnett*, 6 Heisk. 186; *Vanzant v. Waddel*, 2 Yerg. 260; *Memphis v. Fisher*, 9 Baxt. 239; *Paducah & M. R. R. Co. v. Stovall*,

12 Heisk. 1; *McKinney v. Memphis Overton Hotel Co.* 12 Heisk. 104; *Budd v. State*, 3 Humph. 483; *Sheppard v. Johnson*, 2 id. 236; *Pope v. Phifer*, 3 Heisk. 701; *Brown v. Haywood*, 4 id. 357; *Burkholtz v. State*, 16 Lea, 71; *Caruthers v. Andrews*, 2 Cold. 378; *Woodard v. Brian*, 14 Lea, 520; *Daly v. State*, 13 id. 228; *McCallie v. Chattanooga*, 3 Head, 321; *Hazen v. Union Bank*, 1 Sneed, 115; *Burton v. School Commissioners*, Meigs, 589; *Taylor, McBean & Co. v. Chandler*, 9 Heisk. 349; *Ragio v. State*, 86 Tenn. 272. See art. XI, sec. 8, of Const. Tenn.

tends to and embraces all persons who are or who may come into the like situation and circumstances.¹

§ 125. The number of persons affected by a law does not control or determine the question of its validity; it is enough that the law relates to a subject of a general nature, and is general and uniform in its operation upon every person who is brought within the relation and circumstances provided for by it.² An act provided that "Every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employees of the corporation, to any person sustaining such damage." It was objected to this law that it was limited in its operation to railroad companies, and subjected them to a rule or liability from which other persons, both natural and artificial, were exempt. The objection was held untenable. The court said: "These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought into the relation and circumstances provided for is affected by it. They are general and uniform in their operation upon all persons in the like situation; and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation."³ A Missouri statute gave an exceptional measure of damages against railroad companies for injury to animals. It was objected that the act was partial in regard to the rule of damages, because if any private person, or any other person than a railroad corporation, caused a like damage, the act did not apply, and the most that could be recovered would be the value of the animal. The objection was overruled. The court said: "This right of action is given to all persons who may be thus injured. It is given as well to any association of people, and to railroad corporations whose stock may be injured

¹ Mayor, etc. v. Dearmon, 2 Sneed, Ellyson, 28 Iowa, 370; Phillips v. 121; Davis v. State, 3 Lea, 376; State Missouri Pac. R. R. Co. 86 Mo. 540; v. Rauscher, 1 id. 96. S. C. 24 Am. & E. R. Cas. 368; State v.

² McAnnich v. Miss. & M. R. R. Co. Wilcox, 45 Mo. 458; State v. Spaude, 20 Iowa, 338; Thomason v. Ashworth, 37 Minn. 322; Bannon v. State, 49 73 Cal. 73. Ark. 187; Dow v. Beidelman, id. 325.

³ Id.; United States Express Co. v.

by a railroad.”¹ Another act put all owners and operators of railroads, whether natural persons, companies or corporations, on an equal footing, by making the term railroad corporation to include them. Though directed against railroads alone, while no other common carriers are brought within its operation, it was not partial for that reason. And the court thus remarks upon it: “Had the legislature deemed it essential to the protection of human life and private property they would doubtless have extended the statute to carriers by coach and water; but as the class of property and human life protected by this provision of the statute is not exposed to like perils incident to coach and water travel, the occasion and necessity for so extending the statute did not exist. Class legislation is not necessarily obnoxious to the constitution. It is a settled construction of similar constitutional provisions that a legislative act which applies to and embraces all persons who are or who may come into like situation and circumstances is not partial.”² And a like conclusion was arrived at in respect to an act which gave a justice an exceptional jurisdiction in the particular class of actions just mentioned.³

An act providing in substance that all cities and towns theretofore incorporated under special acts and charters, and which did not then possess the power to sell personal and real property for taxes, should thereafter have and possess such power, was held general and constitutional. Though it did not apply to all cities and towns in the state, it was not therefore unconstitutional; other cities and towns possessed that power, and the act in question brought the class to which it applied into harmony with them. As the act applied to all cities and towns in the state falling within the class specified, not to make an exceptional rule, but to remove an exception, it was not local or special, but of uniform operation.⁴

¹ *Humes v. Mo. Pac. R'y Co.* 82 Mo. 221.

² *Phillips v. Mo. Pac. R'y Co.* 86 Mo. 540.

³ *Humes v. Missouri, etc. R'y Co.* 82 Mo. 221; *Snyder v. Warford*, 11 Mo. 513; *Merritt v. Knife Falls B. Corp.* 34 Minn. 245; *Central Trust Co. v. Sloan*, 65 Iowa, 655; *Peoria, etc. R. R. Co. v. Duggan*, 109 Ill. 537.

⁴ *Haskel v. Burlington*, 30 Iowa, 232; *Iowa Land Co. v. Soper*, 39 id. 112; *Bumsted v. Govern*, 47 N. J. L. 368; affirmed, 48 id. 612.

§ 126. Railroad companies have for some purposes constituted a class for general legislation; for other purposes such companies may be divided into sub-classes, and legislation in regard to one of such classes made to differ from that applied to another. An Iowa act divided the railroads of the state into classes according to business in regulating rates of freight. It was held not in conflict with the constitution, requiring laws of a general nature to have a uniform operation throughout the state.¹ Waite, C. J., said: "It operates uniformly on each class, and this is all the constitution requires. . . . It is very clear that a uniform rate of charges for all railroad companies in the state might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the general assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification." The requirement of general laws, and that they have a uniform operation, is an implied prohibition of special or local laws; so the express prohibition of local or special laws is an implied requirement that legislation shall be general. Individual cases of the enumerated class cannot be provided for. These are converse forms of similar constitutional regulation. The principal discussion, however, has occurred on the varied inhibitions of special or local enactment.

§ 127. **Special and local laws.**—Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances; local laws are special as to place.² When prohibited they are severally objectionable for not extending to the whole subject to which their provisions would be equally applicable, and thus permitting a diversity of laws relating to the same subject. The object of the prohibition of special or local laws is to prevent this diversity. Each subject as to which such laws are prohibited is by such inhibition designated as a subject of only general legislation which shall have a uniform operation. Generality in scope and uniformity of operation are both essential. A law which embraces a whole subject would still be special if not framed to have a uniform operation.

¹C., B. & Q. R. R. Co. v. Iowa, 94 U. S. 155.

²State v. Wilcox, 45 Mo. 458.

What is an integral subject of legislation? One in regard to which as a whole a law is general, and when of less scope, local or special?

There has been much discussion of this subject by the courts of New Jersey. It has there received a very definite and satisfactory solution. The principles there established for classification of subjects for legislation have been generally recognized; they will probably harmonize the well-considered cases in all the states where similar constitutional regulations are in force.

In *Van Riper v. Parsons*¹ the supreme court declared this principle: that a general law, as contradistinguished from one special or local, is a law which embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class. The second time that case passed under judicial examination in the same court the holding was thus expressed: "A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purpose of the legislature, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law but a general law, without regard to the consideration that within this state there happens to be but one individual of that class, or one place where it produces effects." The statute which the court in that case gave effect to spent its force entirely in its application to one city.

This is a leading case in that state, and has been followed by many others in that state and elsewhere affirming and exemplifying it.²

In *Rutgers v. New Brunswick*³ an act came in question which had the effect to abolish a court at a particular city,

¹ 40 N. J. L. 123.

² *Board of Assessors v. Central R. R. Co.* 48 N. J. L. 146; *Sutterly v. Camden Common Pleas*, 41 id. 495; *Field v. Silo*, 44 id. 355; *Hines v. Freeholders, etc.* 45 id. 504; *Bucklew v. R. R. Co.* 64 Iowa, 603; *Central Trust Co. v. Sloan*, 65 id. 655; *Darrow v. People*, 8 Colo. 417; *Welker v. Potter*, 18 Ohio St. 85; *People v. Wallace*, 70

Ill. 680; *State v. Hoagland*, 51 N. J. L. 62; *Bingham v. Camden*, 40 N. J. L. 156; *Pell v. Newark*, id. 71, 550; *Rutgers v. New Brunswick*, 42 id. 51; *State ex rel. Richards v. Hammer*, id. 435; *Tiger v. Morris Pleas*, id. 631; *Worthley v. Steen*, 43 id. 542; *Bumstead v. Govern*, 47 id. 363; affirmed, 48 id. 612.

³ 42 N. J. Law, 51.

established under a prior general law. This prior law provided that one district court should be established in every city in the state of fifteen thousand inhabitants. New Brunswick had a population of sixteen thousand six hundred. By a supplement to this act, the original act was amended by substituting twenty thousand in the place of fifteen thousand. This amendment was held not to be a local or special law, and that it abolished the district court in that city.

An act which for the purpose of fixing the compensation of president judges classifies them into separate classes by reference to population of the counties in which they serve was sustained as a general law. The duties of such judges are well known to vary. Those located in populous counties are likely to be called on to perform more onerous duties, and their time will probably be more fully occupied. And so such a distinction, looking at the matter of fixing compensation alone, cannot be said to be in any respect illusive.¹

A law may be general in its terms, and apply to a class constituted by having characteristics which make it a class, and yet be an illusory classification which will not warrant legislation confined to it, where special or local legislation is prohibited. The grouping must be founded on peculiarities requiring legislation, and legislation which by reason of the absence of such peculiarities is not necessary or applicable outside of that class. In other words, the true principle requires something more than a mere designation by such characteristics as will serve to classify; for the characteristics which will thus serve as a basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject-matter of the proposed legislation between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree at least account for and justify the restriction of the legislation.²

¹ *Skinner v. Collector*, 42 N. J. L. 407; *Hanlon v. Board of Commissioners*, 53 Ind. 123; *State v. Reitz*, Auditor, 62 id. 159.

² *Hammer v. State*, 44 N. J. L. 667.

§ 128. Distinctions which do not arise from substantial differences, so marked as to call for separate legislation, constitute no ground for supporting such legislation as general.¹ Where local or special legislation to regulate the internal affairs of municipalities is forbidden it must be general and applicable to all alike. No departure from this rule can be justified, except where, by reason of the existence of a substantial difference between municipalities, a general law would be inappropriate to some while it would be appropriate to others. In such case the municipalities in which the peculiarity exists would constitute a class, and the legislation would in fact be general because it would apply to all to which it would be appropriate.² An act concerning inns and taverns gave the court of common pleas the power to grant such license, but the act was restricted to cities, towns and counties by population so as to indicate an intention that it should operate in but three small towns in one county. It was objected that it was local and special, as there was no distinction of those towns from other municipalities which would in any reasonable degree account for such restriction. The court held the act unconstitutional.³ The court said the constitutional provisions against special or local laws regulating the internal affairs of municipal corporations and political divisions of the state was to secure uniformity. "The uniformity that is thus sought can only be broken by classifications of those bodies that are founded on substantial differences, such as are not illusory or fraudulent in their character."⁴

An act purporting to confer on cities having a population of twenty-five thousand a power of issuing bonds to fund their floating debt was held special, and unconstitutional on account of its operation being restricted to cities of that magnitude. There was deemed to be no connection between the number of

¹ *Id.*; *Hudson v. Buck*, 51 N. J. L. 155; *Beaver County Indexes*, 6 Pa. County Ct. 525; *Allen v. Pioneer Press*, 40 Minn. 117; *Preston v. Louisville*, 84 Ky. 118; *Cobb v. Bord*, 40 Minn. 479; *State v. Standley*, 76 Iowa, 215; *Newman v. Emporia*, 41 Kan. 583; *Nichols v. Walter*, 37 Minn. 264; *Rutherford v. Hamilton*, 97 Mo. 543;

Atlantic City Water-works Co. v. Consumers' Wat. Co. 44 N. J. Eq. 427.

² *Id.*; *Van Giesen v. Bloomfield*, 47 N. J. L. 442.

³ *Zeigler v. Gaddis*, 44 N. J. L. 363.

⁴ *Id.*; *Coutieri v. New Brunswick*, 44 N. J. L. 58; *Reading v. Savage*, 124 Pa. St. 328.

people in a city and the right to fund its floating debt.¹ Where an act provided for a change in the management of the internal affairs of towns and boroughs which were sea-side resorts and then governed by commissioners;² the court held it came within the constitutional interdict. The whole statute by its terms was confined to sea-side resorts governed by boards of commissioners. The individuals thus grouped into a class by legislative enactment are distinguished from other municipalities by these two features only, and the court said, "consequently, no legislation touching this class alone is constitutional, unless it properly relates to these peculiarities. We cannot see how the section under review is so related. That the power to expend the road tax of a municipality on its streets should be vested in its own governing body, rather than in the committee of the township of which its territory forms a part, is a proposition which seems to have no natural connection with the facts that the municipality is a sea-side resort, and that its governing body is styled a board of commissioners."³

§ 129. In respect to the enumerated subjects as to which legislation is required to be general, and special acts prohibited, though such subjects may be divided into classes distinguished

¹ *Anderson v. Trenton*, 42 N. J. L. 486. A classification may be sustained where the differences are not extreme, but exist. The test would not then be judicial, depending on whether the law was special, but legislative, whether wise or not. *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Kilgore v. Magee*, 85 id. 401; *Rutgers v. New Brunswick*, 42 N. J. L. 51; *Skinner v. Collector*, id. 407; *Fellows v. Walker*, 39 Fed. Rep. 651.

² *Ross v. Winsor*, 48 N. J. L. 95.

³ In *Closson v. Trenton*, 48 N. J. L. 438, the act in question was to establish a license and excise department in certain cities containing more than fifteen thousand inhabitants, and in which the granting of licenses is not already vested in a board of excise or in the court of common pleas. It was held local and special. The

court said: "There can be no reason suggested why cities with more than fifteen thousand inhabitants should have a system of granting licenses different from that of cities with a less population. In respect to the matter of the legislation all cities are a class, and an attempt to segregate cities into distinct classes for this purpose by a standard of population is not classification but an arbitrary selection of one or more localities." *Hightstown v. Glenn*, 47 N. J. L. 105; *Gibbs v. Morgan*, 39 N. J. Eq. 126; *Tiger v. Morris Common Pleas*, 42 N. J. L. 631; *Ernst v. Morgan*, 39 N. J. Eq. 391; *Freeholders v. Stevenson*, 46 N. J. L. 173; *Alsboth v. Philbrick*, 50 N. J. L. 581; *Bray Hudson*, 50 N. J. L. 82. See *Dobbins v. Northampton*, 50 N. J. L. 496.

by substantial differences for the purpose of legislation appropriate to such conditions as spring from these differences, there must nevertheless be a limit to such division, even founded on substantial differences. Within certain limits subjects may be grouped on the basis of such differences for general legislation; beyond those limits such differences would not be the basis of classification, but the ground of segregation by which each individual would be distinguished for special enactments.¹ The prohibition is in the way of legislation for individual cases.² It is equally fatal to such legislation though it be general in form. If a statute is plainly intended for a particular case, and looks to no broader application in the future, it is special or local, and, if such laws are prohibited on the subject to which it relates, is unconstitutional.³ The lineaments by which such cases are to be distinguished are usually so special that a law confined thereto would be anticipated to have no effect from the antecedent improbability of such a case arising. When, therefore, it is found to fit such a special case, it is deemed to have been enacted solely for it.⁴

An act came in question which gave the right to file a me-

¹Devine v. Board of Commissioners, 84 Ill. 590; Montgomery v. Commonwealth, 91 Pa. St. 125; Davis v. Clark, 106 Pa. St. 377; Westerveld, Ex parte, 55 Cal. 550; Koser, Ex parte, 60 id. 177, 191; Commonwealth v. Patten, 88 Pa. St. 258; State v. Herrmann, 75 Mo. 340; Rutherford v. Heddens, 82 id. 388; Mason v. Spencer, 35 Kan. 512; State v. Squires, 26 Iowa, 340; Stange v. Dubuque, 62 Iowa, 303; State ex rel. v. Mitchell, 31 Ohio St. 592; Frye v. Partridge, 82 Ill. 267; Pritz, Ex parte, 9 Iowa, 30; Davis v. Woolnough, id. 104; State v. Graham, 16 Neb. 74; Phillips v. Schumacher, 10 Hun, 405; Healey v. Dudley, 5 Lans. 115; Hodges v. Baltimore Pass. Ry. Co. 58 Md. 603; Central Iowa R. R. Co. v. Board of Supervisors, 67 Iowa, 199; S. C. 22 Am. & Eng. R. R. Cas. 223; Kimball v. Rosendale, 42 Wis. 407; Kerrigan v. Force, 68 N. Y. 381. See Desmond v. Dunn, 55 Cal. 242; Earle v. Board of Education, id. 489.

²Nevil v. Clifford, 63 Wis. 435; Williams v. Bidleman, 7 Nev. 68; Montgomery v. Commonwealth, 91 Pa. St. 125; Frye v. Partridge, 82 Ill. 267.

³State ex rel. v. Mitchell, 31 Ohio St. 592; State v. Herrmann, 75 Mo. 340; McCarthy v. Commonwealth, 110 Pa. St. 243; S. C. 14 Am. & Eng. Corp. Cas. 271; Hammer v. State, 44 N. J. L. 667; Devine v. Board of Commissioners, 84 Ill. 590; Davis v. Clark, 106 Pa. St. 377; Commonwealth v. Patten, 88 Pa. St. 258; Frye v. Partridge, 82 Ill. 267; Hallock v. Hollingshead, 49 N. J. L. 64; Hudson Co. Freeholders v. Buck, id. 228; State v. Boyd, 19 Nev. 43.

⁴Id.

chanic's lien in certain cases, but contained a proviso excluding from its operation counties having a population of over two hundred thousand inhabitants. It was held void as a local and special law, and therefore within the constitutional inhibition of such laws "authorizing the creation, extension or impairing of liens."¹ The classification of counties by population and the passage of laws applicable to a certain class only have within reasonable limits and for some purposes been admitted upon the assumption that counties having a small population may ultimately have one much larger. In the case under consideration, however, two counties had, at the time the law in question was passed, a greater population than two hundred thousand. As it could not be assumed that their population would ever fall below that limit they were permanently excluded from the operation of the act. The court say: "It was not then a general act. It did apply to a great number of counties; but there is no dividing line between a local and a general statute. It must be either one or the other. If it apply to the whole state, it is general. If to a part, it is local. As a legal principle it is as effectually local when it applies to sixty-five counties out of sixty-seven as if it applied to one county only. The exclusion of a single county from the operation of the act makes it local."² Where an act provided exceptionally for the holding of courts in all counties of more than sixty thousand inhabitants, adding restrictively, "in which there shall be any city incorporated, at the time of the passage of this act, with a population exceeding three thousand inhabitants, situate at a distance from the county seat of more than twenty-seven miles by the usually traveled road," the court held the act local; that it applied and was intended to apply to only one county.³

§ 130. Amendatory and curative acts.—Existing general laws required to have a uniform operation cannot be amended so as to interrupt their uniform operation.⁴ Amendments

¹ Davis v. Clark, 106 Pa. St. 377.

St. 258; State v. Herrmann, 75 Mo.

² Montgomery v. Commonwealth, 91 Pa. St. 125; Devine v. Board of Commissioners, 84 Ill. 590; McCarthy v. Commonwealth, 110 Pa. St. 243.

340; Weinman v. Wilkinsburg, etc. R'y Co. 118 Pa. St. 192.

³ Commonwealth v. Patten, 88 Pa.

⁴ State ex rel. Peck v. Riordan, 24 Wis. 484; State ex rel. Keenan v. Supervisors, 25 id. 339; State ex rel.

cannot be made to particular charters where special acts of incorporation are prohibited.¹ Nor can special curative acts be passed to give effect to proceedings defective and void, because taken in the absence of necessary statutory authority,² or because not taken in pursuance of statutes in force.³

Walsh v. Dousman, 28 id. 541; Zeigler v. Gaddis, 44 N. J. L. 363.

¹ Pritz, Ex parte, 9 Iowa, 31; Davis v. Woolnough, id. 104. See Brown v. Denver, 7 Colo. 305; Hodges v. Baltimore Union Pass. R. R. Co. 58 Md. 608.

² Independent School District v. Burlington, 60 Iowa, 500; Stange v. Dubuque, 62 Iowa, 803. See State v. Squires, 26 id. 340.

³ Mason v. Spencer, 35 Kans. 512; City of Emporia v. Norton, 18 id. 569.

CHAPTER VII.

AMENDATORY ACTS.

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| § 131. Constitutional requirement and its purpose.
132. Acts expressly amendatory.
133. Amendment "to read as follows." | 134. Repeal and re-enactment.
135. Amendments by implication not within constitutional regulation. |
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§ 131. **The constitutional requirement and its purpose.**—The requirement is substantially the same in the constitutions of many states—that no law shall be revived or revised or amended by reference to the title only; but the law revived or revised, or the section amended, shall be re-enacted or inserted at length in the new act. The provision is mandatory.¹ This requirement was intended mainly to prevent improvident legislation.² By a prevalent form of amendatory legislation the amendatory act itself was unintelligible; words were stricken out or inserted, additions or substitutions made by mere reference to the place in the old law where the change should be introduced. It required an examination of the former act and a comparison with it of the new act to understand the change. Much confusion and uncertainty ensued from this practice. After repeated amendments in this manner there was much difficulty in determining the state of the law. The requirement was intended to remedy this evil by requiring the legislature changing the law to state it entire in its amended form: the whole act, when revived or revised, or a whole section amended.³

¹ *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Walker v. Caldwell*, 4 La. Ann. 297. See *Lehman v. McBride*, 15 Ohio St. 573.

² *Lehman v. McBride*, 15 Ohio St. 573, 603.

³ *Timm v. Harrison*, 109 Ill. 593; *Sovereign v. State*, 7 Neb. 409; *Mayor,*

etc. v. Trigg, 46 Mo. 288, 290; *People v. Mahaney*, 13 Mich. 484, 497; *Davis v. State*, 7 Md. 151, 159; *Cowell v. Chamberlin*, 43 N. J. L. 387; *Draper v. Falley*, 33 Ind. 465, 469; *Blakemore v. Dolan*, 50 Ind. 194,

§ 132. **Acts expressly amendatory.**—In the amendment or revision of a statute two things are required: First, the title of the act amended or revised should be referred to; and secondly, the act as revised, or section as amended, should be set forth and published at full length.¹ In the amendment of a section the title of the act in force containing it should be referred to.² It is unavailing to refer to the original title of the act containing the section after it has been amended and formulated in a later act. The title of the later law should be referred to, for the section as part of the original act, by the amendment, has ceased to exist except as to past transactions; it is superseded by the section as amended. An amendment of a section after it has been thus displaced is void.³

It is not necessary in an amendatory statute to set forth the old act or section, but only to re-enact complete the amended section. It is intended that the law in force after the amendment shall be formulated and stated as it reads entire, and not in shreds.⁴ The supreme court of Louisiana say: ⁵ “It was in-

¹ *Feibleman v. State ex rel.* 98 Ind. 521; *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Rogers v. State*, 6 Ind. 31; *Armstrong v. Berreman*, 13 id. 422; *Sovereign v. State*, 7 Neb. 409, 413; *Walker v. Caldwell*, 4 La. Ann. 297; *Kohn v. Carrollton*, 10 La. Ann. 719; *Jones v. Commissioner*, 21 Mich. 236; *State v. Algood*, 87 Tenn. 163. See *Comstock v. Judge, etc.* 39 Mich. 195; *Earle v. Board of Education*, 55 Cal. 489, 492, 493.

² *Burnett v. Turner*, 87 Tenn. 124.

³ *Id.*; *Draper v. Falley*, 33 Ind. 465; *Town of Martinsville v. Frieze*, id. 507; *Blakemore v. Dolan*, 50 id. 194; *Ford v. Booker*, 53 id. 395; *Cowley v. Rushville*, 60 id. 327; *Niblack v. Goodman*, 67 id. 174; *Clare v. State*, 68 id. 17; *Brocaw v. Board, etc.* 73 id. 543; *Lawson v. De Bolt*, 78 id. 563; *McIntyre v. Marine*, 93 id. 193; *Robertson v. State*, 12 Tex. App. 541. See *Jones v. Commissioner*, 21 Mich. 236; *Pond v. Maddox*, 38 Cal. 572; *State v. Brewster*, 39 Ohio St. 653. In *Basnett v. Jacksonville*, 19 Fla. 664, an

act purported to amend a section which had been amended, and enacted that it should “read as follows;” held to operate to repeal all of the section amended which is not embraced in the amendment. A clerical mistake in the title of the amendatory act referring to the date when the amended act was approved will not vitiate the amendatory statute. *Saunders v. Provisional Municipality*, 24 Fla. 226. See *Wall v. Garrison*, 11 Cal. 515.

⁴ *Greencastle, etc. Co. v. State ex rel.* 28 Ind. 382; *Draper v. Falley*, 33 id. 465; *Blakemore v. Dolan*, 50 id. 194; *Rogers v. State*, 6 id. 31; *People v. McCallum*, 1 Neb. 182; *Arnoult v. New Orleans*, 11 La. Ann. 54; *Jones v. Commissioner*, 21 Mich. 236; *City of Portland v. Stock*, 2 Oregon, 69; *Colwell v. Chamberlin*, 43 N. J. L. 387; *Lehman v. McBride*, 15 Ohio St. 573, 602; *Mayor v. Trigg*, 46 Mo. 288; *State v. Powder Mfg. Co.* 50 N. J. L. 75.

⁵ *Arnoult v. New Orleans, supra.*

tended that each amendment, and each revisal, should speak for itself; should stand independent and apart from the act revised or the section amended. It was therefore provided that, *in such cases*, if the object was to *revise* an act, it should be *re-enacted* throughout; and if the object was to *amend* an act, then the section amended should be *re-enacted and published*."

If the section is subdivided into clauses or paragraphs, and an amendment is made affecting one only of the clauses or paragraphs, the entire section must nevertheless be included in the amendatory statute; it must be reconstructed entire as it is intended in the future to operate.¹ A recital of the section amended as it stood prior to the amendment will not vitiate the amendatory statute; such recital will be treated as surplusage.² If incorrectly recited it will not affect the validity of the amendatory act.³ It is not required that the amendatory act state that certain words of a specific section are stricken out and others inserted, and then set out in full the section as amended; it is sufficient if the section as amended be set out in full.⁴ The legislature may, by amendment, substitute any provision they please for any other provision, whether cognate or not, if the new section is not foreign to the subject indicated by the title of the law in which it is inserted.⁵

§ 133. **Amended so as to read as follows.**—The constitutional provision requiring amendments to be made by setting out the whole section as amended was not intended to make any different rule as to the effect of such amendments. So far as the section is changed it must receive a new operation, but so far as it is not changed it would be dangerous to hold that the mere nominal re-enactment should have the effect of disturbing the whole body of statutes *in pari materia* which had been passed since the first enactment. There must be something in the nature of the new legislation to show such an intent with reasonable clearness before an implied repeal can be

¹ *Town of Martinsville v. Frieze*, 33 Ind. 507.

⁴ *Morrison v. St. Louis, etc. R. R.* Co. 96 Mo. 602.

² *Draper v. Falley*, 33 Ind. 465.

⁵ *Underwood v. McDuffee*, 15 Mich.

³ *People v. McCallum*, 1 Neb. 182; 361, 367; *Gibson v. State*, 16 Fla. 291. *School Directors v. School Directors*, 73 Ill. 249.

recognized.¹ The amendment operates to repeal all of the section amended not embraced in the amended form.² The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule.³ But all the provisions of the prior law amended which continue in force after the passage of the amendatory act derive their force thereafter not from the original but the amendatory act. A repeal of that act would not revive the provisions as originally enacted.⁴ On the contrary, a repeal of the amendatory act would be a repeal of the provisions therein continued in force from the original act.⁵

¹ *Gordon v. People*, 44 Mich. 485; *Ely v. Holton*, 15 N. Y. 595; *Moore v. Mausert*, 49 id. 332; *People v. Supervisors*, 67 N. Y. 109; *Burwell v. Tullis*, 12 Minn. 572; *Alexander v. State*, 9 Ind. 337; *Longlois v. Longlois*, 48 id. 60-64; *Benton v. Wickwire*, 54 N. Y. 226; *The Borrowdale*, 39 Fed. Rep. 376. See *Powers v. Shepard*, 48 N. Y. 540.

² *Basnett v. Jacksonville*, 19 Fla. 664; *Nash v. White's Bank*, 37 Hun, 57; *Medical College v. Muldon*, 46 Ala. 603. Amendatory acts should not receive a forced construction to make them repealing statutes. *Lucas County v. Chicago, Burlington & Q. R'y Co.* 67 Iowa, 541.

³ *Ely v. Holton*, 15 N. Y. 595; *Moore v. Mausert*, 49 id. 332; *Nash v. White's Bank*, 37 Hun, 57; *Syracuse Savings Bank v. Town of Seneca Falls*, 86 N. Y. 317; *Goillotel v. Mayor, etc.* 87 N. Y. 441; *Calhoun v. Delhi, etc. R. R. Co.* 28 Hun, 379; *Kerlinger v. Barnes*, 14 Minn. 526; *New York, etc. R. R. Co. v. Van Horn*, 57 N. Y. 473, 477; *Murray v. Gibson*, 15 How. 421; *Gamble v. Beattie*, 4 How. Pr. 41; *Benton v. Wickwire*, 54

N. Y. 226; *Matter of Peugnet*, 67 N. Y. 444; *McEwen v. Den, Lessee*, 24 How. 242; *Walker v. State*, 7 Tex. App. 245; *Goodno v. Oshkosh*, 31 Wis. 127; *State v. Ingersoll*, 17 id. 631; *Mann v. McAtee*, 37 Cal. 11; *Kelsey v. Kendall*, 48 Vt. 24; *Bay v. Gage*, 36 Barb. 447; *Bratton v. Guy*, 12 S. C. 42; *McGeehan v. Burke*, 37 La. Ann. 156; *State v. Brewster*, 3 Am. & Eng. Corp. Cas. 551; *Kamerick v. Castleman*, 21 Mo. App. 587; *State v. Andrews*, 20 Tex. 230; *McMullen v. Guest*, 6 Tex. 275; *State v. Baldwin*, 45 Conn. 134; *Alexander v. State*, 9 Ind. 337; *Cordell v. State*, 22 id. 1; *Martindale v. Martindale*, 10 id. 566; *Fullerton v. Spring*, 3 Wis. 667; *Stingle v. Nevel*, 9 Oregon, 62; *Laude v. Chicago, etc. R'y Co.* 33 Wis. 640; *Glentz v. State*, 38 id. 549; *Powers v. Shepard*, 48 N. Y. 540; *United Hebrew B. Asso. v. Benshimol*, 130 Mass. 325; *Morrisse v. Royal British Bank*, 1 C. B. (N. S.) 67; *Middleton v. New Jersey, etc. Co.* 26 N. J. Eq. 269.

⁴ *Goodno v. Oshkosh*, 31 Wis. 127; *People v. Supervisors*, 67 N. Y. 109.

⁵ *Moody v. Seaman*, 46 Mich. 74.

The word "hereafter" used in the statute as amended must be construed distributively. As to cases within the statute as originally enacted, it means subsequent to the passage of the original act; as to cases brought within the statute by the amendment, it means subsequent to the time of the amendment.¹ It is a general rule, however, that an amended statute is construed, as regards any action had after the amendment was made, as if the statute had been originally enacted in the amended form.²

§ 134. **Repeal and re-enactment.**—Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time.³ The intention manifested is the same as in an amendment enacted in the form noticed in the preceding section. Offices are not lost;⁴ corporate existence is not ended;⁵ inchoate statutory rights are not defeated;⁶ a statutory power is not taken away⁷ nor criminal charges affected⁸ by such repeal and re-enactment of the law on which they respectively depend. This rule was applied in *Walker v. State*,⁹ though after a conviction for murder and a sentence of death pronounced, and pending an appeal therefrom, the revised penal code took effect and changed the previous penalty for the offense from "death" to "death or confinement in the penitentiary for life."

¹ *Matter of Peugnet*, 67 N. Y. 444.

² *Holbrook v. Nichol*, 36 Ill. 161; *Turney v. Wilton*, id. 385; *Conrad v. Nall*, 24 Mich. 275; *Kamerick v. Castleman*, 21 Mo. App. 587; *Queen v. St. Giles*, 3 E. & E. 224; *Ashley v. Harrington*, 1 D. Chip. 348; *Harrell v. Harrell*, 8 Fla. 46.

³ *Fullerton v. Spring*, 3 Wis. 667; *Laude v. Chicago, etc. R. R. Co.* 33 id. 640; *Scheffels v. Tabert*, 46 id. 439; *Middleton v. N. J. & C. R'y Co.* 26 N. J. Eq. 269; *Glentz v. State*, 38 Wis. 549; *Moore v. Kenockee*, 75 Mich. 332; *Junction City v. Webb*, 23 Pac. Rep. 1073 (Kan.).

⁴ *State v. Baldwin*, 45 Conn. 134.

⁵ *United Hebrew B. Asso. v. Ben-shimol*, 130 Mass. 325; *Wright v. Oakley*, 5 Met. 400, 406; *Steamship Co. v. Joliffe*, 2 Wall. 450.

⁶ *Caperon v. Strout*, 11 Nev. 304; *Skyrme v. Occidental, etc. Co.* 8 id. 219; *Moore v. Kenockee*, 75 Mich. 332.

⁷ *Middleton v. New Jersey, etc. Co.* 26 N. J. Eq. 269.

⁸ *State v. Gumber*, 37 Wis. 293; *State v. Wish*, 15 Neb. 448.

⁹ 7 Tex. App. 245.

If a greater penalty is imposed for an offense defined in the re-enacted law, the previous law is deemed repealed; and after such repeal takes effect there can be no punishment inflicted for any offense committed contrary to its provisions while they were in force.¹ A repeal is not rendered inoperative by a re-enactment where they are not simultaneous, where there is an interval of time after the repeal takes effect before the re-enactment goes into operation;² or where, instead of the old law ceasing to operate by repeal, it has served its purpose — is exhausted and spent before the re-enactment.³

§ 135. Amendments by implication not within the constitutional requirement.— It has been held in Nebraska that if a statute is intended to be amendatory, and is clearly so, it is within this provision of the constitution, though framed as an independent act and complete in itself; that being amendatory, it should be expressly so; that the law as amended should be given in full with such reference to the old law as will clearly show for what the new law is substituted.⁴ When, however, an act properly constructed amends certain sections, and the change so made impliedly modifies certain other provisions to bring them into harmony, this effect does not require the sections thus modified to be included as changed in the amendatory act.⁵ It is generally held that though a supplementary act,⁶ or an independent act, if complete in itself, though it consequentially modifies, like an amendatory act, certain existing statutes, it is not necessary to include them as thus modified. This constitutional provision is held not to apply to such cases; they are held not to be within the mischief intended to be remedied.⁷ A statute which merely fur-

¹ *State v. Van Stralen*, 45 Wis. 437; *State v. Campbell*, 44 id. 529.

² *Kane v. New York, etc. R'y Co.* 49 Conn. 139.

³ *Emporia v. Norton*, 16 Kan. 236.

⁴ *Smails v. White*, 4 Neb. 357; *Sovereign v. State*, 7 id. 409, 413.

⁵ *Swartwout v. Mich. Cent. R. R. Co.* 24 Mich. 389; *Lawrence v. Grambling*, 13 S. C. 125.

⁶ *Lockhart v. Troy*, 48 Ala. 579.

⁷ *People v. Mahaney*, 13 Mich. 484; *Denver Circle R. R. Co. v. Nestor*, 10

Colo. 403; *Evernham v. Hulit*, 45 N. J. L. 53; *Lake v. State*, 18 Fla. 501; *Timm v. Harrison*, 109 Ill. 593; *People v. Wright*, 70 id. 388; *Home Insurance Co. v. Taxing Dist.* 4 Lea, 644; *Scales v. State*, 47 Ark. 476; *Bird v. County of Wasco*, 3 Or. 282; *Harrington v. Wands*, 23 Mich. 385; *State v. Cross*, 38 Kan. 696; *Pollard, Ex parte*, 40 Ala. 77; *Ware v. St. Louis, etc. Co.* 47 id. 667; *Tuskaloosa Bridge Co. v. Olmstead*, 41 id. 9; *Fleischner v. Chadwick*, 5 Oregon,

nishes a rule of construction for prior statutes, and is not in terms an amendment, is not within the meaning of this constitutional regulation; it need not set forth the statutes affected.¹ Nor is a statute amendatory which repeals in general terms all acts and parts of acts which are inconsistent with its provisions.² Such a provision in an unconstitutional act has no effect.³

There is another kind of legislation which does not require a restatement of existing statutes referred to because not a revisal, revival or amendment of such statutes. The legislature may subject procedure to attain the objects of new legislation to existing general statutes without re-enacting them.⁴

152; *Branham v. Lange*, 16 Ind. 497; *Lehman v. McBride*, 15 Ohio St. 573; *Shields v. Bennett*, 8 W. Va. 87; *State v. Cain*, id. 720; *Anderson v. Commonwealth*, 18 Gratt. 295; *Falconer v. Robinson*, 46 Ala. 340. See *Central R. R. Co. v. Hamilton*, 71 Ga. 461; *Muscogee R. R. v. Neal*, 26 id. 121.

¹ *State v. Geiger*, 65 Mo. 306.

² *Medical College v. Muldon*, 46 Ala. 603; *State v. Gaines*, 1 Lea, 734.

³ *Campau v. Detroit*, 14 Mich. 276; *Davis, Ex parte*, 21 Fed. Rep. 396; *People ex rel. v. Fleming*, 7 Colo. 230. The provisions of an existing statute

may not be extended under the Arkansas constitution by a general reference to the title of the statute. *Watkins v. Eureka Springs*, 40 Ark. 131.

⁴ *People ex rel. v. Banks*, 67 N. Y. 575. This case was decided under section 17, article 3, of the constitution of New York, declaring that no act should be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of said act, or which shall enact that any existing law or any part thereof shall be applicable except by inserting it in such act.

CHAPTER VIII.

REPEALING ACTS.

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| <p>§ 136. Duration of statutes and power of repeal.</p> <p>137. Express and implied repeal.</p> <p>138. Repeals by implication not favored.</p> <p>139. Implication from negative or affirmative statutes.</p> <p>140. Repealing effect of affirmative statutes conferring power.</p> <p>141. Where there is grant of part of power already possessed.</p> <p>142. Repealing effect of acts changing criminal laws.</p> <p>145. Grant of greater or different power or right.</p> | <p>§ 146. Repeal by radical change of leading part.</p> <p>147. Repeal of inconsistent legislation.</p> <p>148. Reconcilement of affirmative statutes.</p> <p>154. Repeal by revision.</p> <p>157. General laws will not repeal those which are special.</p> <p>160. The later law which causes repeal.</p> <p>162. Effect of repeal as to civil rights.</p> <p>166. Effect of repealing penal laws.</p> <p>167. Saving clauses.</p> <p>168. Revival by repeal of repealing statute.</p> |
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§ 136. Duration of statutes and power of repeal.—Statutes are perpetual when no time is stated.¹ A temporary statute operates until its time expires.² The operation of statutes may be suspended; then they will come into operation when the period of suspension expires.³ A temporary statute made perpetual before its expiration is in effect perpetual from the beginning.⁴ Statutes have this duration subject to the continuous power of repeal. A state legislature has a plenary law-making power over all subjects, whether pertain-

¹ *United States v. Gear*, 3 How. 120.

² *Brown v. Barry*, 3 Dall. 365.

³ A state of war between the governments of the creditor and debtor suspends the right and opportunity of a citizen of one belligerent to sue in the courts of the other, and as a consequence the statute of limitations is suspended during the existence of the war, and that time is not computed

in limitation of the action. *Hanger v. Abbott*, 6 Wall. 532; S. C. 18 U. S. Sup. Ct. 93a, and note. The implied suspension should not continue longer than the real disability barred the institution of the action. *Braun v. Sauerwein*, 10 Wall. 218.

⁴ *Dingley v. Moor*, Cro. Eliz. 750; *Rex v. Morgan*, Str. 1066; *Rex v. Swiney, Alcock & Napier*, 131.

ing to persons or things, within its territorial jurisdiction, either to introduce new laws or repeal the old, unless prohibited expressly or by implication by the federal constitution or limited or restrained by its own.¹ It cannot bind itself or its successors by enacting irrepealable laws except when so restrained. Every legislative body may modify or abolish the acts passed by itself or its predecessors.² This power of repeal may be exercised at the same session at which the original act was passed;³ and even while a bill is in its progress and before it becomes a law.⁴ The legislature cannot bind a future legislature to a particular mode of repeal.⁵ It cannot declare in advance the intent of subsequent legislatures or the effect of subsequent legislation upon existing statutes.⁶ A repealing clause in a statute may be valid, although every other clause is unconstitutional, if such is plainly the legislative intent.⁷ But where the repeal is intended to clear the way for the operation of the act containing the repealing clause, thereby showing an intention to displace the old law with the new, if the latter is unconstitutional the repealing clause would be dependent and inoperative.⁸

§ 137. **Modes of repeal, express or implied.**—A repeal will take effect from any subsequent statute in which the legislature gives a clear expression of its will for that purpose.⁹ The

¹ *Musgrove v. Vicksburg, etc. R. R.* Co. 50 Miss. 677.

² *Bloomer v. Stolley*, 5 McLean, 158; *Swift v. Newport*, 7 Bush, 37; *McNeil v. Commonwealth*, 12 id. 727; *Moore v. New Orleans*, 32 La. Ann. 726; *City Council v. Baptist Church*, 4 Strob. 306; *Files, Auditor, v. Fuller*, 44 Ark. 273; *Wall v. State*, 23 Ind. 153; *De Groot v. United States*, 5 Wall. 419; *Monet v. Jones*, 10 Sm. & Mar. 237; *Chambers v. State*, 25 Tex. 307; *Gilleland v. Schuyler*, 9 Kan. 569. See *Oleson v. R. R. Co.* 36 Wis. 383.

³ *Spencer v. State*, 5 Ind. 41, 50; *Ham v. State*, 7 Blackf. 314; *Attorney-General v. Brown*, 1 Wis. 513; *In re Oregon, etc. Co.* 3 Sawy. 614; *Rex v. Middlesex Justices*, 2 B. & Ad.

818; *Bourgignon, etc. Assoc. v. Commonwealth*, 98 Pa. St. 54; *People v. Lyttle*, 1 Idaho, 143; *Houghton Co. v. Commissioners of St. L. O.* 23 Mich. 270; *Brown v. Barry*, 3 Dall. 365. See *Manlove v. White*, 8 Cal. 376.

⁴ *The Southwark Bank v. Commonwealth*, 26 Pa. St. 446.

⁵ *Kellogg v. Oshkosh*, 14 Wis. 623.

⁶ *Mongeon v. People*, 55 N. Y. 618.

⁷ *Ely v. Thompson*, 3 A. K. Marsh. 70.

⁸ *Ante*, § 135.

⁹ *State v. Judge*, 14 La. Ann. 486; *Casey v. Harned*, 5 Iowa, 1; *Leard v. Leard*, 30 Ind. 171. A recital in a statute that a former statute was or was not repealed is not conclusive, for it is but a legislative declaration on a judicial question.

word repeal may be used in a limited sense.¹ The suspension of a statute for a limited time is not a repeal²—it properly signifies the abrogation of one statute by another.³ It is *express* when declared in direct terms; *implied* when the intention to repeal is inferred from subsequent repugnant legislation. In neither form will the repeal be effected and operative until the repealing statute goes into effect.⁴

Laws are presumed to be passed with deliberation, and with a knowledge of all existing laws on the same subject.⁵ If they profess to make a change, by substitution, of new for old provisions, a repeal to some extent is thus suggested, and the extent readily ascertained. Thus, amendment is frequently made by enacting that a certain section shall be so amended as "to read as follows;" then inserting the substituted provision entire without specification of the change. The parts of the former law left out are repealed. This intention is manifest.⁶ There is a negative necessarily implied that such eliminated portion shall no longer be in force. The re-enacted portions are continuations and have force from their original enactment.⁷ Where a statute repeals all former laws within

United States v. Claffin, 97 U. S. 546; Ogden v. Blackledge, 2 Cranch, 272. Courts cannot regard a statute as repealed by non-user alone. Pearson v. International Distillery, 72 Iowa, 348.

¹Smith v. People, 47 N. Y. 330, 338; Rex v. Rogers, 10 East, 573; Camden v. Anderson, 6 T. R. 723; State v. Baldwin, 45 Conn. 134; Robertson v. Demoss, 23 Miss. 298, 301; State v. County Court, 53 Mo. 128. See Hirschburg v. People, 6 Colo. 145; Warren R. R. Co. v. Belvidere, 35 N. J. L. 584, 587.

²Brown v. Barry, 3 Dall. 365.

³Abb. L. Dic. tit. Repeal.

⁴Spaulding v. Alford, 1 Pick. 33.

⁵Bowen v. Lease, 5 Hill, 221, 226; Landis v. Landis, 39 N. J. L. 274, 277.

⁶Moore v. Mausert, 49 N. Y. 332; People v. Supervisors, 67 id. 109; McRoberts v. Washburne, 10 Minn. 23; State v. Andrews, 20 Tex. 230; Gossler v. Goodrich, 3 Cliff. 71; State v.

Ingersoll, 17 Wis. 631; Goodno v. Oshkosh, 31 Wis. 127; Breitung v. Lindauer, 37 Mich. 217; Longlois v. Longlois, 48 Ind. 60; Mosby v. Ins. Co. 31 Gratt. 629; State v. Wish, 15 Neb. 448. See Hirschburg v. People, 6 Colo. 145.

⁷Ely v. Holton, 15 N. Y. 595; Goodno v. Oshkosh, *supra*. The court say in this case: "The original section, as an independent and distinct statutory enactment, ceased to have any existence the very moment the amendatory act was passed and went into effect, and whatever provisions of it remained as law were such solely by virtue of being again enacted in the amendment. The original section, as a separate statute, was as effectually repealed and obliterated from the statute book as if the repeal had been made in direct and express words and none of its provisions had been re-enacted."

its purview, the intention is obvious and is readily recognized to sweep away all existing laws upon the subjects with which the repealing act deals.¹

The purview is the enacting part of a statute, in contradistinction to the preamble; and a repeal of all acts within the purview of the repealing statute should be understood as including all acts or parts of acts in relation to all cases which are provided for by the repealing act, and no more.² But a statute may have the effect to repeal a former statute or some provision of it though it be silent on the subject of repeal. In such cases repeal is inferred from necessity, if there be such conflict that the old and new statutes cannot stand together.³ Repugnancy in principle merely, between two acts, forms no reason why both may not stand.⁴ Nor is one statute repealed by the repugnant spirit of another;⁵ nor for conflict with an unconstitutional provision.⁶

It has been held that one private act will not repeal another by implication.⁷ It has been held that a statute may become repealed by adverse custom or long non-user.⁸ As repeal can only proceed from the legislature, the obsolescence of the non-used statute must be in some way recognized in subsequent legislation. Popular disregard of a statute, or custom opposed to it, will not repeal it.⁹ A statute does not cease on removal

¹Ogden v. Witherspoon, 2 Haywood, 404; Harrington v. Rochester, 10 Wend. 547.

²Payne v. Conner, 3 Bibb, 180; Commonwealth v. Watts, 84 Ky. 537; Patterson v. Caldwell, 1 Met. (Ky.) 489; Grigsby v. Barr, 14 Bush, 330. See Gorham v. Lockett, 6 B. Mon. 146.

³See next section.

⁴Smith, Ex parte, 40 Cal. 419.

⁵State v. Macon Co. Ct. 41 Mo. 453, 454. See Cass v. Dillon, 2 Ohio St. 612; State v. Cincinnati, 19 Ohio, 197.

⁶Campau v. Detroit, 14 Mich. 285; Sullivan v. Adams, 3 Gray, 476; People v. Fleming, 7 Colo. 230; Childs v. Shower, 18 Iowa, 261; Stephens v. Ballou, 27 Kan. 594; Tins v. State, 26 Ala. 165; Harbeck v. Mayor, 10 Bosw. 366; People v. Tiphaine, 3

Park. Cr. 241; Shepardson v. Railroad Co. 6 Wis. 605; State v. Burton, 11 id. 50; Miller v. Edwards, 8 Colo. 528; State v. Hallock, 14 Nev. 202; Devoy v. Mayor, 35 Barb. 264.

⁷Trustees v. Laird, 4 De G. M. & G. 732. See Schneider v. Staples, 66 Wis. 167.

⁸Hill v. Smith, Morris, 70; O'Hanlon v. Myers, 10 Rich. L. 128; Watson v. Blaylock, 2 Mills (S. C.), 351; Canady v. George, 6 Rich. Eq. 103.

⁹Kitchen v. Smith, 101 Pa. St. 452; Homer v. Commonwealth, 106 id. 221; James v. Commonwealth, 12 S. & R. 220; White v. Boot, 2 T. R. 274; Leigh v. Kent, 3 id. 362; Tyson v. Thomas, McC. & Y. 127; Rex v. Wells, 4 Dowl. 562; The India, 33 L. J. Rep. P. M. & A. 193; S. C. Br. & L.

of some of the evils it was intended to provide against.¹ Long practice may clear away ambiguities, and have a potent influence in the interpretation of a statute.² So a long disuse of a statute of a penal nature, implying that it has not been kept in popular remembrance, or an intention of the government not to enforce it, may incline a court to soften its rigors within the limits of judicial discretion. Parts of a statute may become useless and incapable of any operation on account of the repeal or radical change of other and fundamental parts. They should be deemed repealed, because lifeless fragments.³

§ 138. **Repeals by implication not favored.**—Such repeals are recognized as intended by the legislature, and its intention to repeal is ascertained as the legislative intent is ascertained in other respects, when not expressly declared, by construction.⁴ An implied repeal results from some enactment the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier act. In such case the later law prevails as the last expression of the legislative will; therefore, the former law is constructively repealed, since it cannot be supposed that the law-making power intends to enact or continue in force laws which are contradictions. The repugnancy being ascertained, the later act or provision in date or position has full force, and displaces by repeal whatever in the precedent law is inconsistent with it.⁵

221; *Hebbert v. Purchas*, L. R. 3 P. C. 650.

¹ *Mayor, etc. v. Dearmon*, 2 Sneed, 104.

² *Leigh v. Kent*, 3 T. R. 362. See *post*, § 308.

³ *Stephens v. Ballou*, 27 Kan. 594; *Steamboat Co. v. Collector*, 18 Wall. 478, 490.

⁴ *Thorpe v. Schooling*, 7 Nev. 15.

⁵ *Wood v. United States*, 16 Pet. 342; *New London, N. R. R. Co. v. Boston, etc. R. R. Co.* 102 Mass. 389; *Elrod v. Gilliland*, 27 Ga. 467; *People v. Burt*, 43 Cal. 560; *Johnson v. Byrd*, Hempst. 434; *Maddox v. Graham*, 2 Met. (Ky.) 56, 76; *Mayor, etc. v. Jersey City, etc. R. R. Co.* 20 N. J. Eq. 360; *Home Ins. Co. v. Taxing*

District, 4 Lea, 644; *Coats v. Hill*, 41 Ark. 149; *Dobbs v. Grand Junction Water Works*, L. R. 9 Q. B. Div. 158; *Rex v. Middlesex*, 1 Dow. P. C. 117; *Kinney v. Mallory*, 3 Ala. 626; *Iverson v. State*, 52 id. 170; *Smith v. Speed*, 50 id. 276; *Poulson v. Union Nat. Bank*, 40 N. J. L. 563; *Harrison v. Walker*, 1 Ga. 32; *Fowler v. Pirkins*, 77 Ill. 271; *Woods v. Jackson Co.* 1 Holmes, 379; *Hearn v. Brogan*, 64 Miss. 334; *Chapoton v. Detroit*, 38 Mich. 636; *Gates v. Shugrue*, 35 Minn. 392; *Grant County v. Sels*, 5 Oregon, 243; *Hurst v. Hawn*, id. 275; *Forqueran v. Donnally*, 7 W. Va. 114; *State v. Wish*, 15 Neb. 448; *Public School Trustees v. Trenton*, 30 N. J. Eq. 667; *State v. Yewell*, 63 Md. 120; *Hirsch-*

Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together.¹ The intention to repeal, however, will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance. Implied repeals

burg v. People, 6 Colo. 145; Parker v. Hubbard, 64 Ala. 203; Riggs v. Brewer, id. 232; Watson v. Kent, 78 id. 602; Barker v. Bell, 46 id. 216; Galena v. Amy, 5 Wall. 705; Furman v. Nichol, 8 id. 44; The Distilled Spirits, 11 id. 356; Supervisors v. Lackawana L. & C. Co. 93 U. S. 619; Movius v. Arthur, 95 id. 144; Arthur v. Homer, 96 id. 137; Clay County v. Society for Savings, 104 id. 579; Red Rock v. Henry, 106 U. S. 596; O'Flaherty v. McDowell, 6 H. L. Cas. 142; Beals v. Hale, 4 How. 37; United States v. Sixty-seven Packages, 17 How. 85; United States v. Walker, 22 id. 299; McCool v. Smith, 1 Black, 459; Morrison v. Rice, 35 Minn. 436; United States v. One Hundred Barrels of Spirits, 2 Abb. U. S. 305; Swann v. Buck, 40 Miss. 268; Bird v. County of Wasco, 3 Oreg. 284; Wilcox v. State, 3 Heisk. 110; Connors v. Carp River Iron Co. 54 Mich. 168; Pierce v. Delamater, 1 N. Y. 17; Farley v. De Waters, 2 Daly, 192; Bowen v. Lease, 5 Hill, 221; Straight v. Crawford, 73 Iowa, 676; Southwark Bank v. Commonwealth, 26 Pa. St. 446; Crow Dog, Ex parte, 109 U. S. 556; Lyddy v. Long Island City, 104 N. Y. 218; Osborn, Ex parte, 24 Ark. 479; Furman v. Nichol, 3 Cold. 432; Smith v. Hickman, Cooke, 330; Hockaday v. Wilson, 1 Head, 113; Browning v. Jones, 4 Humph. 69; State v. Watts, 23 Ark. 304; Hamlyn v. Nesbit, 37 Ind. 284; Appeal Tax Court of Baltimore v. Western Md. R. R. Co. 50 Md. 275; People v. San Francisco, etc. R. R. Co. 28 Cal. 254; Sharp v. Warren, 6 Price, 131; Ruffner v. Hamilton Co. 1 Disney, 39; Fayette Co. v. Faires, 44 Tex. 514; Sullivan v. People, 15 Ill. 233; People v. Grippen, 20 Cal. 677; Ely v. Thompson, 3 A. K. Marsh. 70; Buckallew v. Ackerman, 8 N. J. L. 48; State v. Wilbor, 1 R. I. 199; Church v. Rhodes, 6 How. Pr. 281; Central Iowa R'y Co. v. Supervisors, 67 Iowa, 199; Mongeon v. People, 55 N. Y. 613; People v. Palmer, 52 id. 83; Collins v. Chase, 71 Me. 434; Miller v. State, 33 Miss. 361; Brown v. Chancellor, 61 Tex. 437; Planters' Bank v. State, 6 Sm. & M. 623; House v. State, 41 Miss. 737; McAfee v. Southern R. R. Co. 36 Miss. 669; Gayles' Heirs v. Williams, 7 La. 162; Saul v. His Creditors, 5 Martin (N. S.), 569; S. C. 16 Ann. Dec. 212; Kinney v. Mallory, 3 Ala. 626; Dugan v. Gittings, 3 Gill, 138; Egypt Street, 2 Grant's Cas. 455; White v. Nashville, etc. R. R. Co. 7 Heisk. 518.

¹ Re Hickory Tree Road, 43 Pa. St. 139, 142; People v. Burt, 43 Cal. 560; Morrall v. Sutton, 11 Phil. 533; Commercial Bank of Natchez v. Chambers, 8 Sm. & M. 9; Constantine v. Constantine, 6 Ves. 100; Brown v. Great W. R'y Co. 9 Q. B. D. 753; Co. Lit. 112. The adoption of a treaty with the stipulations of which the provisions of a state law are inconsistent is equivalent to the repeal of such law. Denn ex demise Fisher v. Harnden, 1 Paine, 55. The repeal of an act effects also a repeal of an act amend-

are not favored.¹ One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose. When there is a difference in the whole purview of two statutes apparently relating to the same subject, the former is not repealed.² Such is the general doctrine, in which all the cases concur. In its practical administration other rules obtain suggested by the nature of the cases which occur, and the forms of legislation raising the question of repeal. There is an obvious difference in repealing effect between negative and affirmative statutes. We will endeavor to elucidate this distinction.

§ 139. *Negative and affirmative statutes.*—A negative statute is one expressed in negative words; as, for example: “*No person* who is charged with an offense against the law shall be punished for such offense unless he shall have been duly and legally convicted,” etc. “*No indictment* for any offense shall be held insufficient for want of the averment of any matter unnecessary to be proved,” etc. An *affirmative* statute is one enacted in affirmative terms. Alderson, B., observed in

atory of the act repealed. *Hem-
strat v. Wassum*, 49 Cal. 273.

¹ *Brown v. McCormick*, 28 Mich. 215; *Breitung v. Lindauer*, 37 id. 217; *Davies v. Creighton*, 33 Gratt. 696; *Succession of Hebert*, 5 La. Ann. 121; *Nixon v. Piffet*, 16 id. 379; *Desban v. Pickett*, id. 350; *Central R. R. v. Hamilton*, 71 Ga. 461; *Hockaday v. Wilson*, 1 Head, 113; *Cate v. State*, 3 Sneed, 120; *Kinney v. Mallory*, 3 Ala. 626; *Saul v. His Creditors*, 5 Martin (N. S.), 569; S. C. 16 Am. Dec. 212; *United States v. Twenty-five Cases of Cloth*, Crabbe, 356; *Ryan's Case*, 45 Mich. 173; *State v. Alexander*, 14 Rich. 247; *Van Rensselaer v. Snyder*, 9 Barb. 302, 308; *Higgins v. State*, 64 Md. 419; *State v. Watts*, 23 Ark. 304; *Collins v. Chase*, 71 Me. 434; *Harford v. United States*, 8 Cranch, 109; *Reg. v. Inhabitants*, etc. 2 Q. B. 84; *Wood v. United States*, 16 Pet. 342; *Brown v. County Commissioners*, 21 Pa. St. 37; *Street v.*

Commonwealth, 6 Watts & S. 209; *Williams v. Potter*, 2 Barb. 316; *Bowen v. Lease*, 5 Hill, 221; *People v. Deming*, 1 Hilt. 271; *Smith v. Hickman*, Cooke, 330; *Buchanan v. Robinson*, 3 Baxt. 147; *Central Iowa R'y Co. v. Supervisors*, 67 Iowa 199; *Stephens v. Bal-lou*, 27 Kan. 594; *Elizabethtown, etc. R. R. Co. v. Elizabethtown*, 12 Bush, 233; *Van Hagan, Ex parte*, 25 Ohio St. 426; *Montgomery v. Board of Education*, 74 Ga. 41; *Red Rock v. Henry*, 106 U. S. 596; *Arthur v. Homer*, 96 U. S. 137; *Dugan v. Gittings*, 3 Gill, 138; *Chew Heong v. United States*, 112 U. S. 536; *Abernathy v. State*, 78 Ala. 411; *Herr v. Seymour*, 76 id. 270; *Cook v. Meyer Bros.* 73 id. 580; *Jackson v. State*, 76 id. 26; *Tracy v. Tuffly*, 134 U. S. 206.

² *The King v. Downs*, 3 T. R. 569; *Bowen v. Lease*, 5 Hill, 221, 225; *United States v. Clafin*, 97 U. S. 546; *United States v. Gear*, 3 How. 120; *Miller v. Edwards*, 8 Colo. 523.

Mayor of London v. The Queen,¹ that "the words 'negative' and 'affirmative' statutes mean nothing. The question is whether they are repugnant or not to that which before existed. That may be more easily shown when the statute is negative than when it is affirmative, but the question is the same." If a statute contrary to a former one be expressed in negative words it operates to repeal the former; so expressed it takes away any different common-law right or remedy.² In that form it is prohibitory and generally mandatory.³ An act providing that "*no* corporation" shall interpose the defense of usury repeals the laws against usury as to corporations.⁴ An act that "*no* beer" shall be sold without a license abrogates any previous exemptions from licensing regulations.⁵

The repugnance of any previous statute contrary to an enactment in negative words is very readily seen. Not so in the case of affirmative statutes. It is upon such enactments that debatable questions of repeal more frequently arise. The repeal in either case results from repugnancy, but this is not so easily perceived when the repealing statute is affirmative in form. When it prescribes an exclusive rule it implies a negative, and repeals whatever of existing law stands in the way of its operation. The intention to make the enactment exclusive may be deduced from the nature of the subject, and its necessary operation in comparison with the necessary effect of prior laws. A statute in derogation of an existing statute will be strictly construed in consequence of implied repeals being regarded with disfavor.⁶ So an intention to change the rule of

¹ 13 Q. B. 33.

² Bac. Abr. tit. Statute, G.

³ Hurford v. Omaha, 4 Neb. 336; Bladen v. Philadelphia, 60 Pa. St. 464; State v. Smith, 67 Me. 328; People v. Allen, 6 Wend. 486; Koch v. Bridges, 45 Miss. 247; Rex v. Newcomb, 4 T. R. 368; Rex v. Leicester, 9 D. & R. 772; 7 B. & C. 12; Reg. v. Fordham, 11 A. & El. 73; Bowman v. Blyth, 7 El. & Bl. 47; Williams v. Swansea C. Nav. Co. L. R. 3 Ex. 158; Liverpool Borough Bank v. Turner, 2 De G. F. & J. 502; Great Central

Gas C. Co. v. Clarke, 11 C. B. (N. S.) 814.

⁴ Ballston Spa Bank v. Marine Bank, 16 Wis. 120; Curtis v. Leavitt, 15 N. Y. 1, 85.

⁵ Read v. Storey, 6 H. & N. 423. See Strauss v. Heiss, 48 Md. 292.

⁶ Commonwealth v. Knapp, 9 Pick. 496; State v. Norton, 23 N. J. L. 33; Melody v. Reab, 4 Mass. 471; Dwelly v. Dwelly, 46 Me. 377; Burnside v. Whitney, 21 N. Y. 148; Gibson v. Jenney, 15 Mass. 205; Wilbur v. Crane, 13 Pick. 284; Bailey v. Bryan,

the common law will not be presumed from doubtful statutory provisions; the presumption is that no such change is intended unless the statute is explicit and clear in that direction.¹ The common law will be held no further abrogated than the clear import of the language used in the statute requires.² A statute providing a remedy for an illegal tax was held not embraced in a general repeal of all laws relating to assessments in an act prescribing and regulating the method of assessing taxes.³

§ 140. Repealing effect of affirmative statutes conferring power and regulating its exercise.— In organizing the powers of government there is a definite and precise scheme or plan, and a unity and singleness of means employed to carry it into effect. There is but one chief magistrate, one legislature, one judiciary. There is but one revenue system, one police system. Public duties are defined and imposed on officers designated with certainty, without duplication or confusion, except by inadvertence. The exercise of power by one over another must be authorized by law; its possession and scope will be such as is granted; when granted, if the mode of its exercise be also prescribed, it must be followed. In the grants, and in the regulation of the mode of exercise, there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the prescribed mode.⁴ Affirmative words may and often do imply a negative, not only of what is not affirmed, but of what

3 Jones (N. C.), 357; Schuyler v. Mercer, 4 Gilm. 20; Lock v. Miller, 3 Stew. & Port. 13; White v. Johnson, 23 Miss. 68; Clarke v. State, id. 261; Williams v. Potter, 2 Barb. 316; Peyton v. Moseley, 3 T. B. Mon. 77, 80; Street v. Commonwealth, 6 Watts & S. 209; Morlot v. Lawrence, 1 Blatch. 608.

¹ People v. Palmer, 109 N. Y. 110.

² Fitzgerald v. Quann, 109 N. Y. 441.

³ Shear v. Commissioners of Columbia, 14 Fla. 146.

⁴ People v. The Mayor, etc. of N. Y. 32 Barb. 102, 121; State, the United

R. & Can. Co. pros. v. Commissioner, 37 N. J. L. 240; Rex v. Northleach & W. Road, 5 B. & Ad. 978; Janney v. Buell, 55 Ala. 408; Lessee of Moore v. Vance, 1 Ohio, 1-10; Phillips v. Ash, 63 Ala. 414; Excelsior Petroleum Co. v. Embury, 67 Barb. 231; Rochester v. Barnes, 26 Barb. 657; Johnston's Estate, 33 Pa. St. 511; Townsend's Case, Plowd. 113; State, N. Hudson Co. R. R. Co. pros. v. Kelley, 34 N. J. L. 75; Evansville v. Bayard, 39 Ind. 450; North Canal St. Road Case, 10 Watts, 351; New Haven v. Whitney, 36 Conn. 373.

has been previously affirmed, and as strongly as if expressed. An affirmative enactment of a new rule implies a negative of whatever is not included, or is different; and if by the language used a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise.¹ An intention will not be ascribed to the law-making power to establish conflicting and hostile systems upon the same subject, or to leave in force provisions of law by which the later will of the legislature may be thwarted and overthrown. Such a result would render legislation a useless and idle ceremony, and subject the law to the reproach of uncertainty and unintelligibility.² An act which required trustees to collect debts due to banks whose charters were forfeited will be repealed by a later act which requires the trustees to sell all such debts.³ If there are two acts for the assessment and collection of a tax, and by one a notice of the election to vote it must be posted ten days, and published two weeks, and the tax is not to exceed one dollar and fifty cents on the hundred dollars, and by the other, the notice is to be posted twenty days, and published three weeks, and the rate of taxation is not to exceed seventy cents on the hundred dollars, the two acts are repugnant, and the later repeals the former.⁴ An act provided that in case of land damages for laying out roads, the county court should institute and prosecute in their names, in the circuit court, proceedings to ascertain the just compensation to be paid. It was held to be inconsistent with and to repeal a prior statute which, in such cases, required that the county court award a writ of *ad quod damnum* returnable to itself.⁵ Two acts related to the same subject-matter, the ferries of New York; the former to the ferries to Long Island, and the latter to all the New York ferries. They provided different and inconsistent modes of leasing or licensing the same. The last prevailed, displacing the other.⁶ The last act fixing the salary of a public officer will repeal an earlier one fixing a different

¹ Wells v. Supervisors, 102 U. S. 625; Chandler v. Hanna, 73 Ala. 390.

² Lyddy v. Long Island City, 104 N. Y. 218.

³ Commercial Bank of Natchez v. Chambers, 8 Sm. & M. 9.

⁴ People v. Burt, 43 Cal. 560; State v. Newark, 28 N. J. L. 491; Bowen v. Lease, 5 Hill, 221.

⁵ Herron v. Carson, 26 W. Va. 62.

⁶ People v. The Mayor, etc. of N. Y. 32 Barb. 102, 121.

salary.¹ An act granting the exclusive right to construct and use street railroads in all the streets of a city will repeal a prior act of the same tenor.² If two independent officers or public boards have each power to number and alter the numbers of houses in a city, for the purpose of distinguishing them, the purpose would be frustrated by the duplication if both could act; therefore the power last granted was held exclusive.³

§ 141. **New grant of part of power already possessed.**—Where a later act grants to an officer or tribunal a part of a larger power already possessed, and in terms which interpreted by themselves import a grant of all the power the grantee is intended to exercise, it repeals the prior act from which the larger power had been derived. By a statute of Kentucky of 1799 the county courts had power to appoint county jailers to serve during their pleasure. In 1802 a provision was inserted in an act to amend the penal laws, "that the several county courts respectively shall have full power to remove the keepers of the county jails whenever it shall appear to them that such jailers have been guilty of neglect of duty." This was held to repeal the prior statute.⁴

¹ *Pierpont v. Crouch*, 10 Cal. 315.

² *West End, etc. R. R. Co. v. Atlanta St. R. R. Co.* 49 Ga. 151.

³ *Daw v. Metropolitan Board*, 12 C. B. (N. S.) 161.

⁴ *Gorham v. Luckett*, 6 B. Mon. 146. Marshall, J., said in this case: "As it is unquestionable that the power of the legislature to prescribe the tenure of the office of jailer, and to regulate the power of the county court in vacating that office, continued the same after the act of 1799 as it had been before; and as the subsequent legislative will upon a subject thus completely within its control must, if sufficiently indicated, prevail over that will as previously expressed, the inquiry is whether there is in the twentieth section of the act of 1802 any sufficient indication of the legislative will or intention that thenceforth the office of jailer should not be held at the mere pleasure of the

county court, but should only be subject to forfeiture by neglect of duty, and be thus placed on a footing with the great mass of other offices in this commonwealth. Did the legislature intend to express in this twentieth section the whole power of removal as it should thenceforth exist in the county court? If they did, then as the power previously existing is inconsistent with this intention, and as the proviso conferring the previous power is therefore inconsistent with the twentieth section of the act of 1802, intended to restrict that power, the proviso comes clearly within the purview of this twentieth section, and is embraced by the repealing clause of the statute, if indeed it would not be repealed by implication without it.

"If it were allowable to suppose that the legislature who framed and enacted this twentieth section were ignorant of the proviso in the act of

While a statute existed giving appeals to the county court from judgments of justices of the peace in all cases without

1799, and of the power thereby vested in the county court, of removing the jailer at pleasure, the inference would seem to be irresistible, that as the twentieth section of the act of 1802 was intended to confer a new power on the county court, so it was intended to express, and did express, the whole power which it was intended that they should have over the subject. This would necessarily be the construction of the section considered as conferring a new power. And as every person ignorant of the pre-existing law would, upon reading this section, understand it as conferring a new power, so every such person would understand it as conferring all the power which the court was intended to have. But supposing, as one must do, that the legislature of 1802 understood well the pre-existing law on the subject to which this twentieth section relates, that they knew that the county court had already the power of removing the jailer, not only for breach of duty, but for any other cause, and without cause and without question, then the inquiry comes, for what purpose and with what intent do these legislators introduce into this act for amending the penal laws, a section which professes to make a formal and substantial grant of power, which, construed by its terms, would be universally understood as granting a new power, and therefore as expressing the whole power which it was intended that the grantee should have? Why make an express grant of a part of the power, if understanding that the whole power, including this part, was already vested in the court, it was intended that the whole power, including this part, should still remain?

If the proviso of the act of 1799 remained in force after the enactment of the twentieth section of the act of 1802, then it is absolutely certain that so much of that section as relates to the removal of county jailers was utterly without effect, and might just as well have been out of the section. And the same is true, if any part of the pre-existing power beyond that which is expressed in this twentieth section continued to exist after its enactment. For to the extent that the power is expressed in this section, it already existed and would have continued to exist without any new grant, and the new grant can have no effect whatever, unless it have the effect of restricting the pre-existing power, by bringing it down to the measure of the new grant. Can we then say that the legislature did not intend this section to have any effect and virtually expunge it from the statute? Or must we allow to it the only effect which it can possibly have, by understanding it to be, what if construed exclusively with reference to its own terms it must be understood to be, a substantial grant of power expressing all the power the grantee was intended to have, and withholding or resuming whatever beyond this had been formerly granted? This question does not arise upon a single expression or clause of a sentence, making casual reference to a subject foreign to the context, and which may have been inadvertently introduced. Here is an entire section, which relates to no other subject but the power of removing the officers therein named, and of which the principal subject is the power of removing county jailers, and the principal object (apparently the least) to

regard to the amount, other than upon the verdict of a jury, a new statute was passed which allowed appeals from such

confer or regulate that power. The section must have been introduced deliberately, designedly and to effect some particular purpose. Are we at liberty to say that it should have no effect whatever?

"It is not a case of the re-enactment of a former law in the same words, or with additional provisions, nor of a regrant of a pre-existing power to the same or a greater extent. It is not a case of cumulative or additional power or right or remedy. Nor does it come within the rule that a subsequent affirmative statute does not repeal a previous one, which can only apply where both can have effect. This is a formal and express grant of limited power to a depository which already had unlimited power. And it can have no effect, nor be ascribed to any other purpose, but that of limiting the extent of the existing power. If certain provisions of two statutes are identical, the last need not be construed as repealing, but merely as continuing or re-affirming, the first, for which there might be various reasons. So if a statute give a remedy, or provide that certain acts shall be sufficient for the attainment or security of certain objects, and a subsequent statute declare that a part of the same remedy or some of the same acts, or other acts entirely different, shall suffice for the accomplishment of the same object, here the latter act does not necessarily repeal the former, except so far as it may be expressed or implied in the former that the end shall be attained by no other mode but that which it prescribes. If there be no such restriction in the first, there is no conflict between them. Both may stand

together with full effect, and the provisions of either may be pursued.

"But if a subsequent statute requires the same, and also more than a former statute had made sufficient, this is in effect a repeal of so much of the former statute as declares the sufficiency of what it prescribes. And if the last act professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former acts, so far as it differs from them in its prescriptions: The great object, then, is to ascertain the true interpretation of the last act. That being ascertained, the necessary consequence is, that the legislative intention thus deduced from it must prevail over any prior inconsistent intention to be deduced from a previous act.

"Since, then, the twentieth section of the act of 1802, interpreted according to its own terms, imports a substantial grant of power, and of all the power that the county courts were intended to have on the subject, and since it would be useless and without effect, unless thus understood as regulating the whole subject of the removal of jailers by the county courts, we feel bound to give to it this interpretation; and, therefore, to conclude that, after that act took effect, the county courts had no other power of removing jailers but that which the twentieth section confers, of removing them whenever it shall appear to the court that such jailers have been guilty of a neglect of duty. If this twentieth section had been the first and only enactment on the subject, all must have concurred in the conclusion that it was intended to regulate the whole subject, and that

judgments when they exceeded \$5. It was held a repeal of the former statute; for otherwise there would be imputed to the legislature the folly of enacting a statute without purpose, and which leaves the law precisely as it stood before.¹ By an act of 1776, adopted by Kentucky from Virginia, it was provided that "a person residing in any other country, for passing any lands and tenements in this commonwealth by deed, shall acknowledge or prove the same before" the mayor or chief magistrate of the city or corporation wherein or near to which he resides. But where there was no mayor or other chief magistrate within the county, then a certificate under the hands and seals of two justices or magistrates of the county, that the proof or acknowledgment has been made before them, should be sufficient. And "where any person making such conveyance shall be a *feme covert*, her interest in any

it granted all the power which the court was intended to have. The difficulty, or rather the embarrassment, in the case, arises from the fact that a previous law had given to the same grantee unlimited power on the same subject, and that this twentieth section makes no reference to the previous law, and contains no express words of restriction or change, but, granting an express and limited power, is framed as if it were the first and only act on the subject. But do not these circumstances indicate that it is to be construed as if it were the only act on the subject? Or shall the first act, which is inferior in authority so far as they conflict, so far affect the construction of the last as to deprive it of all effect? We say the last act must have effect according to its terms and its obvious intent. And as both cannot have full operation according to their terms and intent, the first and not the last act must yield. If it could be supposed to have been a matter of doubt whether, under the act of 1799, the county court had power to remove the jailers for neglect of duty, or if

any motive could be assigned for introducing a separate section expressly granting this power, except the purpose of expressing the whole power which the courts were to have, then the basis of the construction which we have assumed would be greatly weakened, if not destroyed. But we do not perceive that any other plausible motive can be assigned. And as, notwithstanding the act of 1799, it was entirely within the legislative power to withdraw, retract or modify the power of removal thereby given to the county courts, and the courts had no right of resistance or refusal, we regard the subsequent grant of a more limited power, advisedly and formally made, as implying the resumption of the old grant, and a restriction of the power according to the terms of the new one, as by the acceptance of a new lease during a subsisting term, the rights of the tenant are governed by the terms of the new grant."

¹ *Curtis v. Gill*, 34 Conn. 49; *Parrott v. Stevens*, 37 Conn. 93. See *United States v. Ten Thousand Cigars*, 1 Woolw. 123.

lands or tenements should not pass thereby unless she personally acknowledge the same before such mayor or chief magistrate, or before two justices or magistrates as aforesaid." By an act passed in 1785, entitled "An act for regulating conveyances," it was provided that "when husband and wife shall have sealed and delivered a writing purporting to be a conveyance of any estate or interest, if she appear in court and being examined privily and apart from her husband, by one of the judges thereof, etc., or if before two justices of the peace of that county in which she dwells, who may be empowered by commission, to be issued by the clerk of the court wherein the writing ought to be recorded," etc., it shall be sufficient to convey her estate. The court, by McLean, J., said: "By the act of 1776 the acknowledgment and privy examination of a *feme covert* were required to be made before the mayor or other chief magistrate, or before two justices or magistrates of the town or place where she shall reside. The acknowledgment before two justices is retained in the act of 1785 with this additional requisite, that the justices shall be commissioned, as provided, to perform this duty. This necessarily repeals that part of the prior act which authorized the acknowledgment to be taken before two justices without being commissioned. The latter act is in this regard repugnant to the former. The provisions cannot stand together, as the latter act superadds an essential qualification of the justices not required by the former.

"But the important question is whether, as the act of 1785 made no provision authorizing a mayor of a city to take the acknowledgment of a *feme covert*, that provision in the act of 1776 is repealed by it. In this respect it is clear there is no repugnancy between the two acts. The two provisions may well stand together; the latter is cumulative to the former."¹

§ 142. Repealing effect of new statutes changing criminal laws.—Penal statutes include the definition of offenses, and of punishments, not necessarily in the same act; but the definition of the offense and the prescription of the penalty are

¹ *Daviess v. Fairbairn*, 3 How. 636. See *Swann v. Buck*, 40 Miss. 268-307; *Gibbons v. Brittenum*, 56 id. 232.

so allied that legislation affecting one may affect the other.¹ Where a statute prescribes a new punishment for a common-law offense, it is still a common-law offense,² and only the punishment is changed.³ But where a common-law offense is defined and enacted by statute, which also prescribes the penalty, the common law is repealed and the offense is thus made a statutory offense.⁴ A change in the elements of the offense or in the elements or amount of the penalty will destroy the identity of the offense and effect a repeal to the extent of the repugnance.⁵ When the new law uses the same words as the old, the second is declaratory and not repugnant, and there is no repeal.⁶ A re-enactment has been held a continuation though the punishment by imprisonment is reduced.⁷ A statute fixing a penalty for a wilful and malicious trespass will not repeal an existing law fixing a different penalty for a wilful trespass. The elements of the offense defined in one section are not the same as those which constitute the offense in the other; the last act is cumulative; the two can stand

¹ *Commonwealth v. Kimball*, 21 Pick. 373; *Commonwealth v. McDonough*, 13 Allen, 581; *Flaherty v. Thomas*, 12 Allen, 428.

² *Williams v. Reg.* 7 Q. B. 250; *McCann v. State*, 13 Sm. & M. 471; *State v. Daley*, 29 Conn. 272, 276.

³ *King v. Bridges*, 8 East, 53.

⁴ *Commonwealth v. Marshall*, 11 Pick. 350; *Commonwealth v. Cooley*, 10 Pick. 37; *State v. Boogher*, 71 Mo. 631.

⁵ *Norris v. Crocker*, 13 How. 429; *Dowdell v. State*, 58 Ind. 333; *State v. Smith*, 44 Tex. 443; *State v. Whitworth*, 8 Port. (Ala.) 434; *Rex v. Cator*, 4 Burr. 2026; *King v. Davis*, 1 Leach's Cas. 271; *United States v. Tynen*, 11 Wall. 88; *Gorman v. Hammond*, 28 Ga. 85; *Mullen v. People*, 81 Ill. 444; *Michell v. Brown*, 1 E. & E. 267; *United States v. Case of Pencils*, 1 Paine, 406; *People v. Bussell*, 59 Mich. 104; *State v. Horsey*, 14 Ind. 185; *State v. Pierce*, id. 302; *Leighton v. Walker*, 9 N. H. 59; *Nichols v.*

Squire, 5 Pick. 168; *State v. Grady*, 34 Conn. 118; *State v. Daley*, 29 id. 272; *Commonwealth v. Gardner*, 11 Gray, 438; *State v. Massey*, 103 N. C. 356; *Turner v. State*, 40 Ala. 21; *Lindzey v. State*, 65 Miss. 542; *Miles v. State*, 40 Ala. 39; *Buckallew v. Ackerman*, 8 N. J. L. 48; *People v. Tisdale*, 57 Cal. 104; *Reg. v. Youle*, 6 H. & N. 753; *State v. Hamblin*, 4 Rich. (N. S.) 1; *Sherman v. State*, 17 Fla. 888; *Pitman v. Commonwealth*, 2 Rob. (Va.) 813; *Magruder v. State*, 40 Ala. 347; *Smith v. State*, 1 Stew. 506; *Wall v. State*, 23 Ind. 150; *State v. Craig*, id. 185; *Drew County v. Bennett*, 43 Ark. 364.

⁶ *Commonwealth v. Gardner*, 11 Gray 438; *State v. Gumber*, 37 Wis. 298. See *Hirschburg v. People*, 6 Colo. 145.

⁷ *State v. Wish*, 15 Neb. 448. See *Nichols v. Squire*, 5 Pick. 168; *Gorman v. Hammond*, 28 Ga. 85; *State v. Whitworth*, 8 Port. 434; *Smith v. State*, 1 Stew. 506; *Carter v. Hawley*,

together.¹ A statute establishing and defining two degrees of murder to be found by the jury, one punishable according to the existing law by death, and the other by a milder punishment, imprisonment for life, will not have the effect to repeal the law against murder which was punishable by death without distinction of degrees.²

§ 143. Where a later statute contains no reference to the former statute, and defines an offense containing some of the elements constituting the offense defined in such former statute and other elements, it is a new and substantive offense. The two statutes can stand together and there is no repeal.³ So if the later statute prescribe a punishment for acts with only a part of the ingredients or incidents essential to constitute the offense defined in a former statute.⁴ But if the same offense, identified by name or otherwise, is altered in degrees or incidents, or if a felony is changed to a misdemeanor, or *vice versa*,⁵ the statute making such changes has the effect to repeal the former statute. Two penal provisions, passed in one act or at different times, may co-exist though covering in part the same acts, and applicable in part to the same persons, and prescribing different penalties. One will not render the other nugatory contrary to the legislative intent.⁶

Where a new law covers the whole subject-matter of an old one, adds new offenses, and prescribes different penalties for those enumerated in the old law, then such former law is re-

Wright (Ohio), 74; Leighton v. Walker 9 N. H. 59; Flaherty v. Thomas, 12 Allen, 428; Blackwell v. State, 45 Ark. 90.

¹ State v. Alexander, 14 Rich. 247; Blackwell v. State, 45 Ark. 90. See Coghill v. State, 37 Ind. 111.

² Commonwealth v. Gardner, 11 Gray, 438.

³ State v. Alexander, 14 Rich. 247; State v. Benjamin, 2 Oregon, 125; Bennett v. State, 2 Yerg. 472; Rex v. Downs, 3 T. R. 569; Pons v. State, 49 Miss. 1.

⁴ Coghill v. State, 37 Ind. 111. A statute imposing a penalty on the sale of fireworks without special

license is not repugnant to and therefore not repealed by a subsequent act imposing taxes for revenue purposes on the manufacturers and vendors of fireworks. Homer v. Commonwealth, 106 Pa. St. 221; S. C. 51 Am. R. 521; Youngblood v. Sexton, 32 Mich. 406, 425. See State v. Duncan, 16 Lea, 79.

⁵ R. v. Davis, 1 Leach, 271; People v. Tisdale, 57 Cal. 104; Mongeon v. People, 55 N. Y. 613; Hayes v. State, 55 Ind. 99; Michell v. Brown, 1 E. & E. 267; Sherman v. State, 17 Fla. 888.

⁶ Davies v. Harvey, L. R. 9 Q. B. 433; The Industry, 1 Gall. 114.

pealed by implication.¹ The effect would probably be that of revision and repeal, though no new offenses were added; it is enough that the new statute embraces all the provisions of previous statutes on the same subject, which are intended to have force.² The revision of criminal laws or new legislation which manifestly is intended to furnish the only rule that shall govern has the same effect as like legislation has on other subjects.³ In each case it is a question of legislative intent. The question ever is, Did the legislature intend to repeal the former law, or was the new law intended to be merely cumulative?⁴ In *Re Baker*,⁵ Bramwell, B., said: "When a statute directs something to be done in a certain event, and another law is made which appoints something else to be done, not contradictory but more comprehensive, and including the former, I cannot help thinking that the first act is gone."

Where, however, the new statute contains no reference for repeal or otherwise to existing statutes, and defines an offense made punishable by a prior law, and imposes a new punishment, it will not repeal such prior law as to existing cases; for, as the new law will only operate prospectively, there is as to offenses already committed no conflict. The prior law will operate as to all offenses against it committed up to the time that the new law goes into effect, and the trial may be had and judgment pronounced afterwards.⁶ The same rule would govern where a cumulative penalty is prescribed.⁷

¹ *Norris v. Crocker*, 13 How. 429; *Dowdell v. State*, 58 Ind. 333; *Johns v. State*, 78 id. 332; *Michell v. Brown*, 1 E. & E. 267.

² *Commonwealth v. Kelliher*, 12 Allen, 480. See *Nusser v. Commonwealth*, 25 Pa. St. 126. A statute fixed a tax on the exercise of a certain privilege and a penalty for exercising it without a license; a subsequent act changed the tax and provided a remedy for its collection, but was silent as to the penalty; held, that there was no such incompatibility as to cause a repeal. *Cate v. State*, 3 Sneed, 120.

³ *United States v. Tynen*, 11 Wall. 88; *State v. Watts*, 23 Ark. 304.

⁴ *Sifred v. Commonwealth*, 104 Pa. St. 179; *United States v. Case of Pencils*, 1 Paine, 400; *Osborn, Ex parte*, 24 Ark. 479; *Coats v. Hill*, 41 id. 149.

⁵ 2 H. & N. 219.

⁶ *Mongeon v. People*, 55 N. Y. 613; *People v. Hobson*, 48 Mich. 27; *Pitman v. Commonwealth*, 2 Rob. (Va.) 813; *Mitchell v. Duncan*, 7 Fla. 13; *Miles v. State*, 40 Ala. 39; *Commonwealth v. Pegram*, 1 Leigh, 569; *Commonwealth v. Wyatt*, 6 Rand. 694. See *Rex v. McKenzie*, R. & R. C. C. 429.

⁷ *Shoemaker v. State*, 20 N. J. L. 153.

A statute providing for or defining an offense created by a previous statute, and providing a materially different punishment, repeals the former act.¹ If the punishment prescribed by statute for larceny of any sum above \$50 be imprisonment in the states prison not exceeding five years, and subsequently the legislature enact a severer punishment for larceny of an amount exceeding \$2,000, the law is not thereby changed as to larcenies of amounts below the latter sum.² The repugnance extends no further, and is the limit of repeal, by implication.³ So where a statute imposed a certain fine and a *minimum* term of imprisonment, it was held not repealed by a subsequent statute which gave the court a discretion on proof to mitigate this punishment. The court say: "It does not change any previously prescribed penalty, nor does it substitute a new or different kind of punishment in the place of that which the former statutes had affixed to certain classes of offenses. The effect of the statute was merely to vest in the court a discretion by the exercise of which they were authorized to mitigate the sentence to which the offender was liable, by dispensing with a portion of the prescribed punishment. The extent of the repeal of previous statutes is then only this: That, in a certain class of cases, instead of a fixed or inflexible rule of punishment which could not be modified or varied, the court has authority to substitute a milder sentence. Clearly such a statute is not a violation of any right or privilege of an accused party, nor does it render the class of offenses to which it relates, and which were committed prior to its enactment, dispunishable. It does not inflict any greater punishment than was before prescribed; it is not, therefore, *ex post facto*; it only authorizes a mitigation of a pen-

¹State v. Smith, 44 Tex. 443; Gorman v. Hammond, 28 Ga. 85; State v. Horsey, 14 Ind. 185; State v. Pierce, 14 Ind. 302; Mullen v. People, 31 Ill. 444; Michell v. Brown, 1 E. & E. 267; Robinson v. Emerson, 4 H. & C. 355; Cole v. Coulton, 2 E. & E. 695; Henderson v. Sherborne, 2 M. & W. 236; Att'y-Gen'l v. Lockwood, 9 M. & W. 391.

²State v. Grady, 34 Conn. 118; State v. Miller, 58 Ind. 399.

³By a statute the punishment for stealing a cow was a fine of ten pounds, or, if the defendant is unable to pay, then whipping; held, that the punishment, after whipping was abolished, was the fine. State v. Hamblin, 4 Rich. (N. S.) 1.

alty; it is therefore an act of clemency which violates no right, but grants a privilege to a convicted party.”¹

§ 144. It has been held that a subsequent act may provide an alternative punishment in mitigation of that previously prescribed without being *ex post facto*.² A statute imposing for an offense the penalty of imprisonment in the house of correction in the county where the offense was committed was held not repealed by a subsequent statute providing that the court in its discretion may commit the person under sentence to the house of correction in any county in the state in the same manner as he might be to the county where the court is holden, and that all inconsistent statutes are repealed.³ The court said: “The change is not in the nature of the penalty or its degree, but only in the locality where it may be inflicted. The essential rights of a person convicted are not materially affected, nor is the punishment aggravated by an imprisonment in one county rather than another. There would be great force in the argument [that there is an implied repeal] if the new statute had authorized the imprisonment to be inflicted in a penal institution designed or appropriated for the punishment of offenses of a higher or more aggravated nature than those punishable in the house of correction, although the term of imprisonment had remained unchanged. . . . But under the statutes of this commonwealth the several houses of correction in the different counties of the commonwealth are places designated and used for the punishment of offenses of the same grade and degree; they are all subject to the same rule of government; the persons committed to them are under substantially the same discipline, and are entitled to the same rights and privileges. In legal contemplation, a commitment to a house of correction in one county for a specific term cannot be regarded as a higher or lesser punishment than a commitment to a house of correction in another county for the same period of time. The essential elements of the penalty are

¹ *Dolan v. Thomas*, 12 Allen, 421; *Dall*, 386; *Walker v. State*, 7 Tex. Commonwealth v. Wyman, 12 Cush. App. 245.

237; *Commonwealth v. Gardner*, 11 ² *Turner v. State*, 40 Ala. 21; *Greer v. State*, 22 Tex. 588. But see *post*, § 480.

Kenney, 14 id. 1; *Calder v. Bull*, 3

³ *Carter v. Burt*, 12 Allen, 424.

the same in either case." A change of procedure sometimes has been emphasized as aiding the inference of repeal.¹ Where a statute prohibited an act under a penalty to be enforced by indictment, and a subsequent statute gave a *qui tam* action for such penalty, the latter was held merely cumulative, and did not repeal the remedy given by the former act.²

§ 145. Statutes granting larger or different power or right.—A new statute which affirmatively grants a larger jurisdiction or power, or right, repeals any prior statute by which a power, jurisdiction or right less ample or absolute had been granted.³ If the exercise of a power granted by a legislative act may include going beyond limits fixed by a prior statute, such limitation is impliedly removed, at least so far as it conflicts with the doing of that which is subsequently authorized. Thus, a power given to a municipal corporation to create a debt and provide for its payment empowered it to provide for the payment by taxation according to the exigency of the contract, though taxation for that purpose would exceed a limitation in the general law in force as to the annual rate of taxation.⁴ An English statute authorized the removal of poor persons likely to become chargeable. The power was given to two justices, one to be of the *quorum*. A later statute recited that act and repealed the provision for removal on the probability of their becoming chargeable, and enacted that a removal might be made of such persons after they had become chargeable to the parish, by two justices of the peace, without mention of the *quorum*. It was held that the requirement that one of the justices be of the *quorum*, contained in the previous act, was repealed by implication.⁵ Where the later statute merely extends the power or right to new subjects, though without mentioning the limitations applicable to the subjects to which the early law referred, they may, by construction, be

¹ *Michell v. Brown*, 1 E. & E. 267; *Jersey City v. Jersey City, etc.* R. R. Nusser v. Commonwealth, 25 Pa. St. 126. Co. 20 N. J. Eq. 360; *Commissioners of Knox Co. v. McComb*, 19 Ohio St. 320; *McRoberts v. Washburne*, 10 Minn. 23.

² *Bush v. Republic*, 1 Tex. 455.

³ *Farley v. De Waters*, 2 Daly, 192; *Regina v. Harden*, 2 Ellis & B. 188; *Schneider v. Staples*, 66 Wis. 167; *Board of Commissioners v. Potts*, Sheriff, 10 Ind. 286; *Mayor, etc. of*

⁴ *Commonwealth v. Commissioners of Allegheny Co.* 40 Pa. St. 348.

⁵ *Regina v. Llangian*, 4 B. & S. 249.

held to attach to the new subjects, when found consonant to the manifest intention of the legislature, or when such construction accords with its uniform policy.¹ By the Revised Statutes of New York,² an incorporated academy could take and hold by gift, grant or devise real and personal property, the clear yearly income or revenue of which did not exceed the value of \$4,000. By subsequent acts trusts were authorized to be created by grants, devises and bequests of property to any incorporated college or other literary incorporated institution for specific purposes of support of liberal education. By the terms of these acts no limit in amount or value of property which can thus be given in trust is prescribed. The court say: "But these statutes are in no sense repugnant to the general law of the state, limiting and restricting the amount and value of property which can be taken and held by literary and educational corporations, and the general laws are in harmony with the general policy of the state, which has been uniform and consistent so far as such policy is indicated by legislation in relation to gifts in mortmain and the power of corporations to take and hold property. Special trusts were authorized to be created by the acts of 1840 and 1841, in furtherance of the general objects of the institutions named; but such trusts can be created and full effect given to the acts within the limits imposed by the general laws upon the power of the corporations to acquire and hold property. The general laws of restraint and those particular acts permitting special trusts may stand together. . . . There being no express repeal of the general provision of the law, or repudiation of the uniform policy of the state, the intent of the legislature to do either cannot be implied. Unlimited trusts of this character might become an unmitigated evil, and no contingent good could compensate for the actual evil attendant upon withdrawing property from general use and placing it in dead hands. Judges have given the widest possible scope to statutes in restraint of the disposal of property in mortmain, and have been astute in their arguments for the application of such statutes to cases as they arose."³ The courts ought not to

¹ Chamberlain v. Chamberlain, 43 N. Y. 424.

² Per Gibson, Ch. J. Hillyard v. Miller, 10 Pa. St. 326.

³ 1 R. S. 462, § 42.

impute an intent to the legislature not clearly expressed, in direct hostility to the traditions and policy of the past. The institute can 'take and hold' property within the limits prescribed, but can neither take nor hold in excess of that limit; effect will not be given to a transgressive bequest in excess of the amount authorized."

A local act directed the trustees of a turnpike to keep their accounts and proceedings in books to which all persons should have access. A subsequent general turnpike act recites the importance of a uniform system to be adhered to in the laws relating to turnpikes, and enacted that former laws should continue in force, except as they were thereby varied or repealed; that the trustees should keep their accounts in a book to be open to the inspection of the trustees and creditors of the tolls, and that the book of their proceedings should be open to the inspection of the trustees. It was held that the provision in the local act giving a right of access to all persons was repealed.¹ Thus it will be seen that the grant by the legislature of a power or right which is inconsistent with one already possessed will repeal or modify it.² It is different and inconsistent when its exercise is made to depend on different conditions, or it is conditioned on different things.³ So, conferring a new right will displace and repeal one previously granted, where their co-existence would be inconvenient, or it otherwise is justly inferable that the legislature intended a repeal.⁴ It will, however, be deemed cumulative if there are no negative words and no positive repugnance.⁵

§ 146. Repeal by radical change of leading part or system.—An intention to repeal certain statutory provisions may be inferred from radical changes or abolition of the leading parts of the statute to which they were conditions or ancillary. The 7 Geo. I., chapter 21, prohibited bottomry loans by Englishmen to foreigners on foreign ships engaged in the

¹ *Rex v. Northleach & Witney Road*, 5 B. & Ad. 978.

² *Korah v. Ottawa*, 32 Ill. 121; *Gibbons v. Brittenum*, 56 Miss. 232; *Farley v. De Waters*, 2 Daly, 192.

³ *Gwinner v. Lehigh, etc. R. R. Co.* 55 Pa. St. 126.

⁴ *Steward v. Greaves*, 10 M. & W. 711; *O'Flaherty v. McDowell*, 6 H. L. Cas. 142; *Davison v. Farmer*, 6 Ex. 242, 256; *Chapman v. Milvain*, 5 Ex. 61.

⁵ *Gohen v. Texas Pac. R. R. Co.* 2 Woods, 346.

Indian trade. This restriction was held silently repealed by the subsequent enactments which put an end to the monopoly of the East India Company and threw its trade open to foreign as well as to British ships.¹ The common law and statutory estate by the curtesy is held abolished by the statutes which assure to married women the possession and control of their separate property with the rents, issues and profits, and confer power of disposition by deed or will.² So those statutes giving married women capacity of suing and being sued without the husband being joined repeal by implication the statutes which suspend the statute of limitations for coverture as a disability.³

In *Emerson v. Clayton* ⁴ the court say: "By this statute a married woman must, since its enactment, be considered a *feme sole* in regard to her estate of every sort owned by her before marriage, or which she may acquire during coverture, in good faith, from any person not her husband, by descent, devise or otherwise, together with the rents, issues, increase and profits thereof. . . . They designed to make and did make a radical and thorough change in the condition of a *feme covert*. She is *unmarried*, so far as her property is concerned, and can deal with it as she pleases."

Though such acts do not purport to repeal the exemption of married women from the operation of limitation laws, they manifestly produce that result by a reasonable construction of the language used in connection with the scope, purpose and object of the statute.⁵

§ 147. Inserting or not a clause for repeal of inconsistent legislation.— Affirmative statutes which contain no reference

¹ *The India*, Brown. & L. 221.

² *Tong v. Marvin*, 15 Mich. 60; *Billings v. Baker*, 28 Barb. 343.

³ *Hayward v. Gunn*, 82 Ill. 385; *Castner v. Walrod*, 83 id. 171; *Enos v. Buckley*, 94 id. 458; *Geisen v. Heiderich*, 104 id. 537; *Brown v. Cousens*, 51 Me. 301; *Cameron v. Smith*, 50 Cal. 303; *Ong v. Sumner*, 1 Cincin. Sup. Ct. 424; *Ball v. Bullard*, 52 Barb. 141. The exemption of married women in New York from the operation of the statute was re-enacted in

the code after the passage of the act enabling married women to sue. See *Clark v. McCann*, 18 Hun, 13; *Dunham v. Sage*, 52 N. Y. 229; *Acker v. Acker*, 81 N. Y. 143; *Clarke v. Gibbons*, 83 id. 107.

⁴ 32 Ill. 493.

⁵ *Castner v. Walrod*, *supra*; *Kibbe v. Ditto*, 93 U. S. 674. See *Hershy v. Latham*, 42 Ark. 305; *State v. Troutman*, 72 N. C. 551; *Briggs v. Smith*, 83 id. 306.

to existing statutes, either to amend or repeal them, import that the law-maker has no conscious purpose to affect them, unless by congruous addition. On the other hand, when there is inserted in a statute a provision declaring a repeal of all inconsistent acts and parts of acts, there is an assumption that the new rule to some extent is repugnant to some law enacted before. There is a repeal to the extent of any repugnancy in either case, but no farther. The latter is sometimes classed with express repeals.¹ It is to be supposed that courts will be less inclined against recognizing repugnancy in applying such statutes, while, in dealing with those of the other class, they will, as principle and authority requires, be astute to find some reasonable mode of reconciling them with prior statutes, so as to avoid a repeal by implication.² An act in general terms repealing all conflicting provisions of previous acts, it is said, will have the effect to repeal all acts identical with any of those expressly repealed.³ The specification of certain sections of an act as repealed is deemed equivalent to a declaration that the remaining sections shall continue in force; that a clear repugnancy will be necessary to further extend the repeal.⁴

The re-enactment of some of the sections of one act, in a subsequent one providing for a different scheme, is not a repeal by implication of these sections in the first act; nor does a provision in the second act suspending the operation of the similar sections in that act have the effect to suspend the operation of those in the first act.⁵ So a statute which refers to and adopts the provisions of another statute is not repealed by the subsequent repeal of the original statute adopted.⁶ A

¹ Bish. W. Laws, § 112a; *State v. Kelley*, 34 N. J. L. 75, 77; *Commonwealth v. Churchill*, 2 Met. 118.

² *Rex v. Northleach & Witney Road*, 5 B. & Ad. 978.

³ *State v. Barrow*, 30 La. Ann. Pt. I, 657. In *Mahoney v. Wright*, 10 Irish C. L. (N. S.) 420, Lefroy, C. J., said: "It is settled by authority that the recital of an intention merely, in a subsequent statute, to repeal a former specific statute, will not operate by

implication to repeal the former statute, and that, in order to effect such a repeal, there must be a clause of repeal in the repealing statute."

⁴ *Crosby v. Patch*, 18 Cal. 438; *State v. Morrow*, 26 Mo. 131. See *Burnham v. Onderdonk*, 41 N. Y. 425.

⁵ *Powers v. Shepard*, 48 N. Y. 540.

⁶ *Sika v. Chicago, etc.* R. R. Co. 21 Wis. 370; *Schwenke v. Union Depot & R. R. Co.* 7 Colo. 512; *Regina v. Stock*, 3 Nev. & Perry, 420.

statute providing for submitting the question of the removal of a county seat to a popular vote at the April election was held not affected by a statute which discontinued such elections or postponed them until October. These statutes are not laws on the same subject. The former should be construed as fixing the time for taking the vote, and would not be changed if the April elections for election of officers were abolished.¹ A statute providing a remedy for an illegal tax should not be deemed embraced in a general repeal of all laws relating to assessments in an act prescribing and regulating the method of assessing taxes.² A general clause in an act otherwise unconstitutional, repealing all acts and parts of acts contravening its provisions, will have no effect; for, being void, no acts or parts of acts could contravene its provisions.³ Nor will an unconstitutional amendment impliedly repeal the original act by reason of conflict.⁴

§ 148. Reconciliation of affirmative statutes.—The cases are very numerous in which an important question is decided upon the general principle that a statute without negative words will not repeal existing statutes, unless there is an unavoidable repugnancy. A reference to a multitude of such cases has been given in a note to another section.⁵ It is not an exhaustive list, but is full enough for practical purposes. It is now proposed to analyze a few well-considered cases to illustrate the practical operation of the principle requiring the reconciliation, if possible, of statutes, where there is a question of inconsistency between them.

In *McCool v. Smith* ⁶ a plaintiff claiming title by descent from an illegitimate child brought ejectment, having, as the law then stood, no title. Pending the action a retrospective amendatory act was passed giving effect to an existing act from an earlier date and thereby covering the date of the descent in question, conferring the right to inherit on such children "the same as if such act had been in force at the time of such death." This amendatory statute was held not to repeal, as to such cases, the common-law rule, and a state

¹ *Cole v. Supervisors*, 11 Iowa, 552.

⁴ *Ex parte Davis*, 21 Fed. Rep. 396.

² *Shear v. Commissioners*, 14 Fla. 146.

⁵ *Ante*, § 135.

⁶ 1 Black, 459.

³ *Ante*, § 137.

statute declaratory of it, requiring a plaintiff to have title at the commencement of his action. The general rule being that repeals by implication are not favored, there will be no such repeal if it be possible to reconcile the two acts. The court, by Swayne, J., said: "It *is possible* to reconcile the two acts. It may well be that the legislature intended to vest the title retrospectively for the purpose of giving effect to *mesne* conveyances and preventing frauds, without intending also to throw the burden of the costs of an action of ejectment, then pending, upon a defendant who, as the law and facts were at the commencement of the action, must have been the successful party. A stronger case than this must be presented to induce us to sanction such a result by our judgment. If the plaintiff can recover, it must be in an action brought after the 16th of February, 1857. He cannot recover upon a title acquired since the commencement of the suit."

In a curative act it was provided that when an instrument made in good faith and on a valuable consideration, and intended to operate as a conveyance, is placed on record in the county where the lands lie, and the paper has a defect in some statutory requisites in the acknowledgment or certificate of acknowledgment, the record shall operate as legal notice of all the rights secured by the instrument. Six years afterwards the legislature enacted an amendment to the statutes relative to deeds by adding a section prohibiting the recording of such defective conveyances. This was held not a repeal of the curative act. "Repeals by implication," say the court, "are not favored, and there is certainly much room for both of these statutes to operate without conflict. Both are designed to guard and secure rights; not to impair or destroy them. And the grounds of policy for the [curative statute], as one to operate in future, were as evident [when the other was subsequently passed]; and when the legislature required registers to abstain from recording defective papers, they were well aware that such papers after all would sometimes get on record, and that important interests might be sacrificed unless some effect should be given to such records. Accepting this as a true and practical view of the matter, they allowed the [curative act] to remain and endeavored by [the other act] to

lessen the occasions for its application.”¹ A Mississippi act passed in 1852 appropriated a fund derived from a certain source, then in the state treasury, to the several counties to be expended for a specified purpose. A portion of this appropriated fund was still in the treasury in 1857, and was largely increased by accretions subsequently to the appropriation. The legislature, by an amendment passed the last mentioned year, not referring to the other nor specially to the money appropriated by it, directed a different use of the moneys then in the treasury. It was held possible to reconcile these acts. The portion of the fund which was in the treasury in 1852 was held still appropriated and subject to the act of that year, and that act not repealed; that the subsequent act related only to the residue; that thus the acts could stand together.²

§ 149. A statute which denied to a married female the right to dispose of land by will is not impliedly repealed by a subsequent statute which made it lawful for her to receive by gift, grant, devise or bequest, and to hold to her sole and separate use as if she were a single female, real and personal property, and the rents, issues and profits thereof, and assuring the same against her husband's disposal and his debts. The language of the statute gave her only the right to receive and hold—a mere *jus tenendi*, not *disponendi*.³ Two acts were passed at one session of the legislature; the first one taking effect imposed a license tax for the state \$300, and for the county \$400, upon every vendor of spirituous, vinous or malt liquors, doing business for one year or less, and provided that any person who should engage in the sale thereof without having paid this tax should, on conviction, be fined in double the amount of the license. The other act was to regulate for police purposes the same traffic; it prescribed a penalty of not less than two hundred nor more than five hundred dollars for clandestine sales. It was held that there was no repeal. The last act was intended to punish for occasional sales of liquor by unauthorized persons having no bar-rooms or regular places of business, and whose sales would be no particular detriment

¹ Brown v. McCormick, 28 Mich. 215.

² McAfee v. Southern R. R. Co. 36 Miss. 669.

³ Naylor v. Field, 29 N. J. L. 287.

to the revenue; the other act applied to those who engaged in selling as a business.¹

§ 150. By statute as well as by the common law in Indiana prior to 1881 a husband and wife, upon a deed made to both, became neither joint tenants nor tenants in common, but were seized of the entirety, so that on the death of either the survivor took the whole; and during their lives neither could convey without the consent of the other, nor could any part of the land be taken on execution for the separate debt of either. This doctrine was not abolished or repealed by implication by the act passed in 1881, providing that "A married woman may take, acquire and hold property, real or personal, by conveyance, gift, devise or descent, or by purchase with her separate means or money; and the same, together with the rents, issues, income and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were unmarried." It was held that these laws could stand together. A married woman may well have all the personal rights conferred by the act of 1881 as to her separate property, without any interference or collision with the statutes as to entireties. When husband and wife take by entireties neither of them holds any of the property separately.²

A statute fixing the annual salary of a public office at a sum certain, without limitation as to time, is not abrogated or suspended by subsequent enactments which merely appropriate a less amount for the services of that office for particular fiscal years, and which contain no words that expressly or by clear implication modify or repeal the previous law.³ Two acts were passed at the same session, and by their terms to take effect on the same day; one provided for the organization of towns whenever a majority of the legal voters of any congressional township containing twenty-five legal voters should

¹ Blackwell v. State, 45 Ark. 90.

² Carver v. Smith, 90 Ind. 222; S. C. 46 Am. Rep. 210. An act provided for extending the regular term of the court so long as might be necessary to finish the business pending therein; held not repealed by a later

act containing the same provision, with some unimportant additions as to matters of detail, and a further provision authorizing special terms also. Cordell v. State, 22 Ind. 1.

³ United States v. Langston, 118 U. S. 389.

petition; the other was a provision that no town shall be vacated, nor any town with an area of thirty-six sections or less be divided or have any part stricken therefrom, without first submitting the question to the electors of the town. It was held that they could stand together; the former conferred a power in general terms and the latter imposed a limitation.¹

§ 151. Three successive acts of limitation were passed; each provided a bar to an action of *assumpsit* if not commenced within six years after the cause of action accrued. The second in terms repealed the first. The third was put in force without any repealing clause. A right of action run three years under the first, and three years under the second, and the action was brought after the third had been enacted; it was held that the action was barred. There was no repeal, for the acts were not inconsistent.² It is deemed that there is less probability that repugnant acts will be passed at the same session than at different sessions of the legislature.³ At the same session of the legislature two acts were passed relative to the place where actions against corporations might be brought. The act first passed provided that such actions might be brought in any county where the cause of action or a part thereof accrued, or in any county where the corporation had an agency or representative or in which was its principal office. The second act gave a right in terms to bring an action in any county in which the cause of action or a part thereof arose — it contained no repealing clause. It was held not to repeal the former.⁴

Before the new constitution of Ohio took effect, the legislature of that state passed a law authorizing towns and counties, the people assenting, to subscribe for stock in railroad corporations. A clause in the constitution declares that "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 or corporation." It was held that this clause did not repeal the previous law.⁵ A

¹Supervisors v. Board of Commissioners, 12 Minn. 403.

²McLaughlin v. Hoover, 1 Oregon, 81.

³Houston, etc. R. R. Co. v. Ford, 53 Tex. 364.

⁴Houston, etc. R. R. Co. v. Ford, 53 Tex. 364.

⁵Cass v. Dillon, 2 Ohio St. 607; State ex rel. v. Dudley, 1 Ohio St. 437; Van Hagan, Ex parte, 25 id. 426; Elizabethtown, etc. R. R. Co. v

statute which does not take away any right, or impose any substantially new duty, but regulates with additional requirements a duty imposed by a previous statute, is not to be deemed inconsistent with the previous act.¹ A subsequent statute which institutes new methods of proceeding does not, without negative words, repeal a former statute relative to procedure.² The statute authorizing a proceeding to contest the validity of a will "by petition to the court of common pleas" does not repeal the provisions of the former statute authorizing a proceeding by bill in chancery.³ A statute which authorizes a certain oath to be taken before a particular officer is not repealed by a statute which extends the power to administer oaths to a class of officers.⁴ If two statutes can be read together without contradiction, or repugnancy, or absurdity or unreasonableness, they should be read together, and both will have effect.⁵

§ 152. It is not enough to justify the inference of repeal that the later law is different; it must be contrary to the prior law.⁶ It is not sufficient that the subsequent statute covers some or even all the cases provided for by the former, for it may be merely affirmative, accumulative or auxiliary; there must be positive repugnancy; and even then the old law is repealed by implication only to the extent of the repugnancy.⁷ If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced and made to operate in harmony and without absurdity, both will be upheld, and the later one will not be regarded as repealing the others by construction or intendment.⁸ As laws are pre-

Elizabethtown, 12 Bush, 233; Coats v. Hill, 41 Ark. 149; Stephens v. Ballou, 27 Kan. 504.

¹Staats v. Hudson River R. R. Co. 4 Abb. App. Dec. 287.

²Sharp v. Warren, 6 Price, 131; Mitchell v. Duncan, 7 Fla. 13.

³Raudebaugh v. Shelley, 6 Ohio St. 307.

⁴Ruckman v. Ransom, 35 N. J. L. 565.

⁵Regina v. Mews, 6 Q. B. Div. 47; S. C. L. R. 8 App. Cas. 339, reversing the ruling below; Smith v. Speed, 50

Ala. 276; Enloe v. Reike, 56 id. 500; Wagner v. Stoll, 2 Rich. (N. S.) 539; Robb v. Gurney, id. 559.

⁶Nixon v. Piffet, 16 La. Ann. 379; Kesler v. Smith, 66 N. C. 154; Landis v. Landis, 39 N. J. L. 274.

⁷Wood v. United States, 16 Pet. 342, 363; Coats v. Hill, 41 Ark. 149; Connors v. Carp River Iron Co. 54 Mich. 168; People v. Supervisors, 67 N. Y. 109.

⁸Elizabethtown, etc. R. R. Co. v. Elizabethtown, 12 Bush, 233; Higgins v. State, 64 Md. 419, 423; McCool

sumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable.¹ In the endeavor to harmonize statutes, seemingly incompatible, to avoid repeal by implication, a court will reject absurdity as not enacted, and accept with favorable consideration what is reasonable and convenient. In cases of doubt, repeal of a statute or of the common law may be deemed intended in favor of convenience.² An argument based on inconvenience is forcible in law;³ no less so is one to avoid what is unjust or unreasonable.⁴ Like considerations of what is convenient, just or reasonable, when they can be invoked against the implication of repeal, will be still more potent. The act being silent as to repeal and affirmative, it will not be held to abrogate any prior law which can reasonably and justly operate without antagonism.⁵

§ 153. The presumption is stronger against implied repeals where provisions supposed to conflict are in the same act or were passed at nearly the same time. In the first case it would manifestly be an inadvertence, for it is not supposable that the legislature would deliberately pass an act with conflicting intentions; in the other case the presumption rests on the improbability of a change of intention, or, if such change has occurred, that the legislature would express it in a different act without an express repeal of the first.⁶ Where a stat-

v. Smith, 1 Black, 459; Cass v. Dillon, 2 Ohio St. 607; Howard Association's Appeal, 70 Pa. St. 344.

¹ Bowen v. Lease, 5 Ill. 221, 226.

² Steward v. Greaves, 10 M. & W. 711; Davison v. Farmer, 6 Ex. 242, 256.

³ Co. Litt. 97a.

⁴ Rex v. Whiteley, 3 H. & N. 143; Johnson v. Bush, 3 Barb. Ch. 207, 238. See Harris v. Jenns, 9 C. B. (N. S.) 152.

⁵ *Ante*, § 129; McNeely v. Woodruff, 13 N. J. L. 352, 356, 357; Evergreens, Matter of, 47 N. Y. 216, 221; Chamberlain v. Chamberlain, 43 id. 424, 438;

State v. Stinson, 17 Me. 154; Smith v. People, 47 N. Y. 330; Commercial Bank v. Chambers, 8 S. & M. 9, 46.

⁶ Houston, etc. R. R. Co. v. Ford, 53 Tex. 364; S. C. 2 Am. & Eng. R. R. Cas. 514; Eckloff v. Dist. of Columbia, 4 Mackay, 572; Peyton v. Moseley, 3 T. B. Mon. 77; Gibbons v. Brittenum, 56 Miss. 232; State ex rel. Kellogg v. Treasurer, 41 Mo. 16; State v. Clark, 54 id. 216; Nazareth L. B. I. v. Commonwealth, 14 B. Mon. 266; State v. Rackley, 2 Blackf. 249; Smith v. People, 47 N. Y. 330; Dawson v. Horan, 51 Barb. 459;

ute expresses first a general intent, and afterwards an inconsistent particular intent, the latter will be taken as an exception from the former and both will stand.¹

§ 154. **Repeal by revision.**—Revision of statutes implies a re-examination of them. The word is applied to a restatement of the law in a corrected or improved form. The restatement may be with or without material change. A revision is intended to take the place of the law as previously formulated. By adopting it the legislature say the same thing, in effect, as when a particular section is amended by the words “so as to read as follows.” The revision is a substitute; it displaces and repeals the former law as it stood relating to the subjects within its purview. Whatever of the old law is restated in the revision is continued in operation as it may operate in the connection in which it is re-enacted.

In *Bartlet v. King*,² Dewey, J., said: “A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must on principles of law, as well as in reason and common sense, operate to repeal the former.”³

Though a subsequent statute be not repugnant in all its provisions to a former, yet if it was clearly intended to prescribe the only rule which should govern, it repeals the former statute.⁴ Without express words of repeal a previous statute will

Sanders v. State, 77 Ind. 227; *Beals v. Hale*, 4 How. 37; *Supervisors v. Board of Commissioners*, 12 Minn. 403.

¹ *Stockett v. Bird*, 18 Md. 484; *De Winton v. Mayor*, 26 Beav. 533.

² 12 Mass. 545.

³ *Rogers v. Watrous*, 8 Tex. 62; *King v. Cornell*, 106 U. S. 395; *Excelsior Petroleum Co. v. Embury*, 67 Barb. 261; *Ellis v. Paige*, 1 Pick. 45; *Berkshire v. Miss. etc. R'y Co.* 28 Mo. App. 225; *Lyon v. Smith*, 11 Barb. 124; *Smith v. Nobles Co.* 37 Minn. 535.

⁴ *Rogers v. Watrous*, *supra*; *Industrial School District v. Whitehead*, 13 N. J. Eq. 290; *Bryan v. Sundberg*, 5

Tex. 418; *Mulligan v. Cavanagh*, 46 N. J. L. 45, 49; *Murdock v. Memphis*, 20 Wall. 617; *State v. Stoll*, 17 Wall. 425; *United States v. Tynen*, 11 Wall. 88; *Board of Commissioners v. Potts*, 10 Ind. 286; *State v. Wilson*, 43 N. H. 419; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Farr v. Brackett*, 30 Vt. 344; *Tracy v. Tuffly*, 134 U. S. 206; *Giddings v. Cox*, 31 Vt. 607; *State v. Kelley*, 34 N. J. L. 75; *Pingree v. Snell*, 42 Me. 53; *Fayette County v. Faires*, 44 Tex. 514; *Sacramento v. Bird*, 15 Cal. 294; *State v. Conkling*, 19 Cal. 501; *Dexter & Limerick P. R. Co. v. Allen*, 16 Barb. 15; *Bracken v. Smith*, 39 N. J. Eq. 169; *Andrews v. People*, 75 Ill. 605; *Daviess v. Fair-*

he held to be modified by a subsequent one, if the latter was plainly intended to cover the subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern.¹ Where a provision is amended by the form, "to read as follows," the intention is manifest to make the provision following a substitute for the old provision and to operate exclusively in its place.² Does a revision import that it shall displace the last previous form; that it is evidently intended as a substitute for it; that it is intended to prescribe the only rule to govern? In other words, will a revision repeal by implication previous statutes on the same subject, though there be no repugnance? The authorities seem to answer emphatically, Yes. The reasonable inference from a revision is that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject-matter in force at the same time, and that the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law.³

bairn, 3 How. 636; Red Rock v. Henry, 106 U. S. 596; People v. Brooklyn, 69 N. Y. 605; Cook County Nat. Bank v. United States, 107 U. S. 445.

¹ Tracy v. Tuffly, 134 U. S. 206.

² United States v. Barr, 4 Sawy. 254; United States v. Tynen, 11 Wall. 95; Knox v. Baldwin, 80 N. Y. 610; Goodno v. Oshkosh, 31 Wis. 127; State v. Ingersoll, 17 id. 631; State v. Beswick, 13 R. I. 211.

³ Commonwealth v. Kelliher, 12 Allen, 480; Pratt v. Street Commissioners, 139 Mass. 559, 563; Knight v. Aroostook R. R. 67 Me. 291; Towle v. Marrett, 3 Greenlf. 22; Commonwealth v. Cooley, 10 Pick. 37; Ogbourne v. Ogbourne's Adm'r, 60 Ala. 616; Roche v. Jersey City, 40 N. J. L. 257; Scott v. Simons, 70 Ala. 352; Goodenow v. Buttrick, 7 Mass. 140; Stirman v. State, 21 Tex. 734; Ashley, Appellant, 4 Pick. 21, 23; Smith v. Hickman's Heirs, Cooke (Tenn.), 336; Mayor, etc. v. Groshon, 80 Md. 436;

Burlander v. Railway Co. 26 Wis. 76; Simmons v. Bradley, 27 id. 689; Moore v. Railroad Co. 34 id. 173; Gilbank v. Stephenson, 30 id. 157; Oleson v. Railway Co. 36 id. 383; State v. Campbell, 44 id. 529; Davis v. Carew, 1 Rich. 275; Gibbons v. Brittenum, 50 Miss. 232; Pana v. Bowler, 107 U. S. 529; Cook County Nat. Bank v. United States, id. 445; Commonwealth v. Watts, 84 Ky. 537; Harold v. State, 16 Tex. App. 157; Tafoya v. Garcia, 1 New Mex. 486; Lawson v. De Bolt, 78 Ind. 563; State v. Studt, 31 Kan. 245; Werborn v. Austin, 77 Ala. 381; Sawyers v. Baker, 72 id. 49; Carmichael v. Hays, 66 id. 543; Hatchett v. Billingslea, 65 id. 16; Furman v. Nichol, 3 Cold. 439; Mayor v. Dearmon, 2 Sneed, 120; United States v. Claflin, 97 U. S. 546; Commonwealth v. Cromley, 1 Ashm. 179; Heckmann v. Pinkney, 81 N. Y. 211; State v. Whitworth, 8 Port. 434; Wood v. State, 47 Ark. 488; Stebbins v. State, 22 Tex. App. 82; Smith

§ 155. A revising statute embracing antecedent general laws on various subjects and reducing them to one system and one text repeals all prior statutes upon the same subjects not included in the body of the revision and not exempted by an express clause.¹ Where one act is framed from another, some parts taken and others omitted; or where there are two acts on the same subject, and a later embraces all the provisions of the first and also new provisions, the later act operates, without any repealing clause, as a repeal of the first.² But the object of the old and the new acts must be the same.³ The fact of revision raises a presumption of a complete code, or a complete treatment of the subjects embraced in it.⁴ Where the revising act, however, prescribes its operation or effect upon a previous statute, it will have no other.⁵ Thus, if it contains an express repeal of all inconsistent acts and parts of acts, there is an implication that if there are parts of former acts not embraced in the new act and not inconsistent they are not repealed.⁶

§ 156. The important question in these cases is whether a later act is intended by the legislature to be a revision of the law relating to the subjects within its purview. It cannot be so intended unless it is a complete substitute for the previous

v. State, 1 Stew. 506; United States v. Clay Co. Sup'rs v. Chickasaw Co. Sup'rs, 64 Miss. 534; Stebbins v. Cheeseman, 3 Sawy. 424; State v. Seaborn, 4 Dev. 305; Montel & Co. v. State, 22 Tex. App. 32; State v. Courtney, 73 Iowa, 619.

Dugan v. Gittings, 3 Gill, 138; Gorham v. Luckett, 6 B. Mon. 154; Smith v. State, 14 Mo. 147; Ellis v. Paige, 1 Pick. 43; Bryan v. Sundberg, 5 Tex. 418; State v. Rogers, 10 Nev. 319; Leighton v. Walker, 9 N. H. 59; Schneider v. Staples, 66 Wis. 167; Shannon v. People, 5 Mich. 71, 85; Broadbudd v. Broadbudd, 10 Bush, 299; Commonwealth v. Mason, 82 Ky. 256; Myers v. Marshall Co. 55 Miss. 344; Swann v. Buck, 40 Miss. 278; People v. Carr, 36 Hun, 488; Culver v. Third National Bank, 64 Ill. 528; Thorpe v. Schooling, 7 Nev. 15.

¹ State v. Judge, 37 La. Ann. 578; Ellis v. Paige, 1 Pick. 43; United States v. Tynen, 11 Wall. 88; Mears v. Stewart, 31 Ark. 17.

² United States v. Claflin, 97 U. S. 546; Matter of Commissioners of Central Park, 50 N. Y. 493, 497.

³ Broadbudd v. Broadbudd, 10 Bush, 299; Commonwealth v. Mason, 82 Ky. 256.

⁴ Patterson v. Tatum, 3 Sawy. 164; Pursell v. N. Y. Life Ins. Co. 42 N. Y. Super. Ct. 383.

⁵ Lewis v. Stout, 22 Wis. 234; State v. Pollard, 6 R. I. 290; Gaston v. Merriam, 33 Minn. 271.

⁶ State v. Judge, 37 La. Ann. 578;

law and contains the only rule or all the legislation which is intended to have force with regard to those subjects. An act which professes to be a revision, and has such scope of subject-matter that its title and profession are not illusory, should obviously so operate.¹ So where there are two statutes on the same subject, passed at different dates, and it is plain from the frame-work and substance of the last that it was intended to cover the whole subject, and to be a complete and perfect system or provision in itself, the last must be held to be a legislative declaration that whatever is embraced in it shall prevail and whatever is excluded is discarded and repealed.² Though a revision operates to repeal the laws revised whether repugnant or not, those portions that are re-enacted are continuations.³ The revision is, however, a re-enactment, and to be alone consulted to ascertain the law when its meaning is plain; but when there is irreconcilable conflict of one part with another, the part last enacted in the original form will govern.⁴ And when it becomes necessary to construe language used in the revision which leaves a substantial doubt of its meaning, the original statutes may be resorted to for ascertaining that meaning.⁵ In such case the title of the original act may be considered, especially where such act is passed in a state whose constitution requires the subject to be there expressed.⁶ In Louisiana it seems to be settled that the re-enactment into a code of the general provisions of prior laws

¹ *United States v. Bowen*, 100 U. S. 508; *Arthur v. Dodge*, 101 id. 34; *Myer v. Car Co.* 102 id. 1; *United States v. Lacher*, 134 U. S. 624; *Vietor v. Arthur*, 104 id. 498; *Pratt v. Street Commissioners*, 139 Mass. 559, 563; *Broadbuss v. Broadbuss*, 10 Bush, 299; *Commonwealth v. Mason*, 82 Ky. 256; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54. *Citizens' Mut. B. Asso.* 61 Ala. 232.

² *Bracken v. Smith*, 39 N. J. Eq. 169; *Murdock v. Memphis*, 20 Wall. 617; *Heckmann v. Pinkney*, 81 N. Y. 211; *Johnston's Estate*, 33 Pa. St. 511; *Herron v. Carson*, 26 W. Va. 62; *Rhoads v. Hoernerstown Building, etc. Asso.* 82 Pa. St. 180; *Cahall v. Wright v. Oakley*, 5 Met. 406; *Steamship Co. v. Joliffe*, 2 Wall. 450, 458; *Mitchell v. Halsey*, 15 Wend. 241; *Douglas v. Douglas*, 5 Hun, 140; *Matter of Southworth*, id. 55; *Stafford v. His Creditors*, 11 La. Ann. 470; *State ex rel. v. Wiltz*, id. 439.

³ *Winn v. Jones*, 6 Leigh, 74; *Blackford v. Hurst*, 26 Gratt. 206; *Hurley v. Town of Texas*, 20 Wis. 634.

⁴ *United States v. Bowen*, 100 U. S. 508; *United States v. Hirsch*, id. 33; *Vietor v. Arthur*, 104 U. S. 498; *Myer v. Car Co.* 102 U. S. 1; *United States v. Lacher*, 134 id. 624.

⁵ *Myer v. Car Co.* 102 U. S. 1.

does not repeal exceptions to which those general provisions were subject.¹

§ 157. **General laws will not impliedly repeal those which are special or local.**—A general law prescribing a rule universal as to a subject properly includes that entire subject and operates over every part of the state. The common law adapts itself to varying conditions by its flexible principles; but statutes are made to apply to given conditions by classifications, provisos, exceptions and limitations. A general law may thus be prevented from operating upon every subject, and from taking effect in every place. The purpose of a general act relative to a given subject may harmonize with a different purpose on that subject in a particular locality, or under special conditions, or as it affects a particular interest or a particular person or class; it may harmonize in the sense that both purposes may be effectuated. The purpose of the general law may be carried out except as to the particulars in which a different intention is manifested. It is a principle that a general statute without negative words will not repeal by implication from their repugnancy the provisions of a former one which is special or local, unless there is something in the general law or in the course of legislation upon its subject-matter that makes it manifest that the legislature contemplated and intended a repeal.²

¹ *Miller v. Mercier*, 3 Martin (N. S.), 236; S. C. 15 Am. Dec. 156.

² *Dwarris on St.* 332; *People v. Quigg*, 59 N. Y. 83; *Anderson v. Hill*, 42 N. J. L. 351; *Crane v. Reeder*, 22 Mich. 322, 334; *Robbins v. State*, 8 Ohio St. 131, 191; *Deters v. Renick*, 37 Mo. 597; *State v. Branin*, 23 N. J. L. 484; *Sheridan v. Stevenson*, 44 id. 371; *State v. Fiala*, 47 Mo. 320; *State v. DeBar*, 58 id. 395; *State v. Fitzporter*, 17 Mo. App. 271, 274; *Commonwealth v. Cotton*, 14 Phila. 667; *Mahony v. Wright*, 10 Ir. C. L. (N. S.) 420; *Savannah v. Kelly*, 108 U. S. 184; *Smith, Ex parte*, 40 Cal. 419; *State v. Belvidere*, 25 N. J. L. 563; *Jefferson Co. v. Reitz*, 56 Pa. St. 44; *People v. Palmer*, 52 N. Y. 83; *Haywood v. Mayor*, 12 Ga. 404; *Kankakee Co. v. Ætna Life Ins. Co.* 106 U. S. 668; *State v. Mills*, 34 N. J. L. 177; *Vail v. Easton, etc.* R. R. Co. 44 id. 237; *Schwenke v. Union Depot & R. R. Co.* 7 Colo. 512; *Pacific R. R. Co. v. Cass County*, 53 Mo. 17; *Queen v. Champneys*, L. R. 6 C. P. 384; *Tierney v. Dodge*, 9 Minn. 166; *Dyer v. Covington Township*, 28 Pa. St. 186; *State v. Severance*, 55 Mo. 378, 386; *Conley v. Supervisors*, 2 W. Va. 416; *State v. Stoll*, 17 Wall. 425; *Providence v. Union R. R. Co.* 12 R. I. 473; *Daviess v. Fairbairn*, 3 How. 636; *Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 397; *Shelton v. Baldwin*, 26 Miss. 439; *Chesapeake & Ohio R. R. Co. v. Hoad*, 16 W. Va. 276; *Movius v. Arthur*, 95

When the legislator frames a statute in general terms or treats a subject in a general manner, it is not reasonable to suppose that he intends to abrogate particular legislation to the details of which he had previously given his attention, applicable only to a part of the same subject, unless the general act shows a plain intention to do so.¹

§ 158. The special act must conflict, so far as it operates to the extent of its lesser scope, with the general act; otherwise there would generally be no question of repeal; it expresses a particular intent incompatible, *pro tanto*, with the intent of the general law. The general law can have full effect beyond the scope of the special law, and, by allowing the latter to operate according to its special aim, the two acts can stand together. Unless there is plain indication of an intent that the general act shall repeal the other, it will continue to have effect, and the general words with which it conflicts will be restrained and modified accordingly.²

A special act granted to a cemetery association capacity to acquire lands in a village named for a public purpose; by the terms of the act the land so acquired was not liable to be taken for road purposes. An act was subsequently passed conferring general power to lay out and vacate roads and streets in cities and villages within their corporate limits. It was held that the two acts might stand together. Under the

U. S. 144; Mayor v. Minor, 70 Ga. 191; Crow Dog, Ex parte, 109 U. S. 556; Conservators of River Thames v. Hall, L. R. 3 C. P. 415; Thorpe v. Adams, L. R. 6 C. P. 125; Cass County v. Gillett, 100 U. S. 585; Omit v. Commonwealth, 21 Pa. St. 426; Wood v. Election Com'rs, 58 Cal. 561; McKenna v. Edmundstone, 91 N. Y. 231; State v. Sturgess, 10 Oregon, 58; Harrisburg v. Sheck, 104 Pa. St. 53; Dick's Appeal, 106 Pa. St. 589; Schmidt, Ex parte, 24 S. C. 363; People v. Supervisors, 40 Hun, 353; Rounds v. Waymart, 81 Pa. St. 395; Covington v. East St. Louis, 78 Ill. 548; McVey v. McVey, 51 Mo. 406; Commonwealth v. Cain, 14 Bush, 525; Adams Exp. Co. v. Owensboro, 85 Ky. 265; Malloy v. Commonwealth, 115 Pa. St. 25. See Red Rock v. Henry, 106 U. S. 596.

¹ Crow Dog, Ex parte, 109 U. S. 556; Dwarris on St. 532; Sedgw. St. & Const. L. 98; State v. Judge of St. Louis P. Ct. 38 Mo. 529; Brown v. County Commissioners, 21 Pa. St. 37; State v. Treasurer, 41 Mo. 16, 24; Fosdick v. Perrysburg, 14 Ohio St. 472; Robbins v. State, 8 id. 131, 191; Williams v. Pritchard, 4 T. R. 2; Fitzgerald v. Champneys, 30 L. J. Ch. 782, S. C. 2 Johns. & H. 31.

² Dwarris on St. 765; Stockett v. Bird, 18 Md. 484; Crane v. Reeder, 22 Mich. 322, 334; Fosdick v. Perrysburg, 14 Ohio St. 472; Williams v. Pritchard, 4 T. R. 2.

general law all roads and streets in the village are under its control except the lands of the association, and as to these the association has the exclusive control.¹ Where there are in one act or several contemporaneously passed, specific provisions relating to a particular subject, they will govern in respect to that subject as against general provisions contained in the same acts.²

It seems to be immaterial which statute is first enacted. If the special statute is later the enactment operates necessarily to restrict the effect of the general act from which it differs.³

§ 159. These interpretations harmonize with the rule that when a general intention is expressed, and also a particular intention, which is incompatible with the general one, the particular intention shall be considered an exception to the general one.⁴ There is no rule of law which prohibits the repeal of a special act by a general one, nor is there any principle forbidding such repeal without the use of words declarative of that intent. The question is always one of intention, and the purpose to abrogate the particular enactment by a later general statute is sufficiently manifested when the provisions

¹ Village of Hyde Park v. Cemetery Asso. 119 Ill. 141.

² Felt v. Felt, 19 Wis. 193, 196; State v. Goetze, 22 id. 363; Crane v. Reeder, 22 Mich. 322. In Nusser v. Commonwealth, 25 Pa. St. 126, the question was whether an act imposing a fine of \$50 for selling liquors on Sunday within the county of Allegheny, and authorizing a summary conviction before a single justice of the peace, was repealed by a later statute imposing the same penalty for the same offense committed anywhere in the state, and prescribing a mode of procedure by indictment and jury trial. It was held to have the effect of repeal. The court say: "Where the prior enactment is local and the new one general in its operation, the maxim [that a repugnant statute is a repeal of all subsequent provisions in a prior] applies with undiminished force, because the whole

includes the several parts, and all local laws establishing one rule for one portion of the community, and a different one for the remaining portion, are inconvenient and of doubtful propriety, except where they relate to matters which are local in their nature, and are enacted by the proper municipal authorities of the territories over which they are designed to operate."

³ McGavick v. State, 34 N. J. L. 509; Smith, Ex parte, 40 Cal. 419; Galway Presentments, Ex parte, 9 W. R. C. L. 114 Q. B.; The Mayor v. The Macon, etc. R. R. Co 7 Ga. 221; Townsend v. Little, 109 U. S. 504; Blain v. Bailey, 25 Ind. 165.

⁴ Dwarris on St. 765; Stockett v. Bird, 18 Md. 484, 489; Churchill v. Crease, 5 Bing. 180; Pilkington v. Cooke, 16 M. & W. 615; Taylor v. Oldham, 4 Ch. Div. 395.

of both cannot stand together. A special and local law provided that certain property should be subject to taxation; a subsequent general one that all such property should be exempt, and repealed all local or special acts inconsistent with its provisions. It was held that the special act was repealed.¹

Where all acts must be general by the constitution, and such an act is passed and it repeals all inconsistent legislation, it will have the effect to repeal all special acts which are in conflict with it. A law applying to some townships and excepting others is not a general law. The intention to except from such a law those which have special laws will not be imputed to the legislature when such exception would render the law unconstitutional, and it is framed broad enough to embrace the entire class to which it relates.² Special or local laws will be repealed by general laws when the intention to do so is manifest, as where the latter are intended to establish uniform rules for the whole state.³ A general act prescribing a mode of punishment for a specific offense throughout the state will repeal an act limited to a single county prescribing a different punishment.⁴ A general statute for the suppression of prostitution is inconsistent with a local statute authorizing a regulation of it.⁵ A local or special law which adopts, by reference, provisions relating to procedure from an existing general statute, is not necessarily abrogated or affected by the subsequent repeal of the act containing the adopted provisions.⁶

§ 160. The later law, which is potent to repeal.—If a conflict exists between two statutes or provisions, the earlier in enactment or position is repealed by the later. *Leges posterioris priores contrarias abrogant.* Where there is an irreconcilable conflict between different sections or parts of the same statute the last words stand, and those which are in con-

¹ New Brunswick v. Williamson, 44 N. J. L. 165; Pausch v. Guerrard, 67 Ga. 319; Mechanics' & Traders' Bank v. Bridges, 30 N. J. L. 112; State v. Miller, id. 368; Great Central Gas Cons. Co. v. Clarke, 13 Com. B. (N. S.) 838; Bramston v. Colchester, 6 E. & B. 246; Evansville v. Bayard, 39 Ind. 450; Willing v. Bozman, 52 Md. 44.

² Hoetzel v. East Orange, 50 N. J. L. 354; Bowyer v. Camden, id. 87.

³ State v. Percy, 44 Mo. 159; People v. Miner, 47 Ill. 33.

⁴ Nusser v. Commonwealth, 25 Pa. St. 126; Keller v. Commonwealth, 71 id. 413.

⁵ State v. Lewis, 5 Mo. App. 465.

⁶ Schwenke v. The Union Depot & R. R. Co. 7 Colo. 512.

flict with them, so far as there is a conflict, are repealed;¹ that is, the part of a statute later in position in the same act or section is deemed later in time, and prevails over repugnant parts occurring before, though enacted and to take effect at the same time.² This rule is applicable where no reasonable construction will harmonize the parts. It is presumed that each part of a statute is intended to co-act with every other part; that no part is intended to antagonize the general purpose of the enactment. To ascertain the legislative intent every part of an act, and other acts *in pari materia*, are to be considered. One part of an act may restrict another part — an early section a later, and *vice versa*; but if one part is so out of line with other parts and the general purpose of the act that it can only operate by wholly neutralizing some other part, then the latter provision is supreme as expressing the latest will of the law-maker. Hence, it is a rule that where the proviso of an act is directly repugnant to the purview the latter is repealed by it.³ Statutes speak from the time they take effect, and from that time they have posteriority.⁴ If passed to take effect at a future day, they are to be construed as if passed on that day and ordered to take immediate effect.⁵ Where two acts come into operation on the same day, and are repugnant, the one last approved repeals the other,⁶ unless a different intention is expressed,⁷ or it may be ascertained upon testimony.⁸

¹ *Albertson v. State*, 9 Neb. 429.

⁶ *Rex v. Middlesex*, 2 B. & Ad. 818.

² *Bac. Abr. tit. Statutes, D.*; *State v. Davis*, 70 Md. 237; *Harrington v. Rochester*, 10 Wend. 550; *Branagan v. Dulaney*, 8 Colo. 408; *Powers v. Barney*, 5 Blatchf. 202; *Southwark Bank v. Commonwealth*, 26 Pa. St. 446, 449; *Elliott v. Lochnane*, 1 Kan. 135; *Gibbons v. Brittenum*, 56 Miss. 232. See *Thomas v. Collins*, 58 Mich. 64.

⁷ *The Southwark Bank v. Commonwealth*, 26 Pa. St. 446. In this case it appeared that the legislature repealed a part of a bill pending before the governor, and he approved the repealing statute. *Held*, that he had no power to reinstate the repealed provision by subsequently signing the act in which it was contained. The relative time of approval of acts bearing the same date may be inferred from the numerical order of the acts as published. *Straus v. Heiss*, 48 Md. 292; *Metropolitan Board of Health v. Schmades*, 10 Abb. Pr. (N. S.) 205. See *Thomas v. Collins*, 58 Mich. 64.

³ *Att'y-General v. Chelsea Water Works Co.*, Fitzgib. 195; *Farmers' Bank v. Hale*, 59 N. Y. 53.

⁴ *Ante*, § 107.

⁵ *Rice v. Ruddiman*, 10 Mich. 125; *Harrington v. Harrington's Est.* 53 Vt. 649; *Metropolitan Bd. of Health v. Schmades*, 10 Abb. Pr. (N. S.) 205.

⁸ *Straus v. Heiss*, *supra*; *Gardner v. Collector*, 6 Wall. 499. In *Mead v.*

§ 161. Where two statutes *in pari materia*, originally enacted at different periods of time, are subsequently incorporated in a revision and re-enacted in substantially the same language, with the design to accomplish the purpose they were originally intended to produce, the times when they first took effect will be ascertained by the courts, and effect will be given to that which was the latest declaration of the will of the legislature, if they are not harmonious.¹ An existing statute is not to be considered as original because it is embodied in a revision, and therefore is not to be construed on the theory that none of its provisions had been in effect prior thereto. The appearance of such a statute in the form and body of a revision has no other effect than to continue it in force.²

§ 162. **Effect of repeal.**—The general rule is that when an act of the legislature is repealed without a saving clause, it is considered, except as to transactions past and closed, as though it had never existed.³ This is not true in an absolute sense, nor without exception, unless it is provided that the repealed statute cannot be revived by the repeal of the repealing statute. A repealed law is indefinitely suspended while the repealing statute is in force. When that statute is repealed its repealing force is spent, and the one which is repealed thereupon comes again into operation.⁴ This revival would not ensue if

Bagnall, 15 Wis. 156, it was held that when the legislative intent is to be inferred from the priority of one act to another, regard must be had to the dates of approval of the acts and not to their dates of publication. The court say; "It is true that general laws must be published before they can take effect, but that does not make the printer a part of the law-making power, nor enable him, by delaying the publication of one law longer than that of another which was passed at the same time, to change the relations of the two upon the point of priority."

¹ Winn v. Jones, 6 Leigh, 74; Blackford v. Hurst, 26 Gratt. 206; Hurley v. Town of Texas, 20 Wis. 638; United States v. Bowen, 100 U. S. 508; Vietor

v. Arthur, 104 U. S. 498; Mobile Savings Bank v. Patty, 16 Fed. Rep. 751.

² City of St. Louis v. Alexander, 23 Mo. 509; City of Cape Girardeau v. Riley, 52 id. 428; State ex rel. Att'y-Gen'l v. Heidorn, 74 id. 410. See *ante*, § 134.

³ Curran v. Owens, 15 W. Va. 208; Surtees v. Ellison, 9 B. & C. 750; Butler v. Palmer, 1 Hill, 324; Alabama Med. College v. Muldon, 46 Ala. 603; Musgrove v. Vicksburg, etc. R. R. Co. 50 Miss. 677; McQuilken v. Doe ex dem. Stoddard, 8 Blackf. 581; Hunt v. Jennings, 5 id. 195; Potter's Dwaris, 160.

⁴ *Post*, § 163; Bac. Abr. tit. Statute, D.; Phillips v. Hopwood, 10 B. & C. 39; Brinkley v. Swicegood, 65 N. C. 626; Smith v. Hoyt, 14 Wis. 252.

the repeal had the effect of absolute extinguishment.¹ In the interpretation of statutes, clauses which have been repealed may still be considered in construing the provisions that remain in force.² Where a doubt exists as to the meaning of a statute, the pre-existing law, and the reason and purpose of the new enactment, are considerations of great weight.³ It is more accurate to say that after it is repealed it is, as regards its operative effect, considered as if it had never existed, except as to matters and transactions past and closed.⁴ The repeal of an exception extends the purview.⁵

§ 163. Rights depending on a statute and still inchoate, not perfected by final judgment or reduced to possession, are lost by repeal or expiration of the statute.⁶ This rule applies to mechanics' liens given by statute where the requisite proceedings to fix the lien have not been completed at the date of the repeal.⁷ An assessment of taxes on corporate stock was made under a statute which was subsequently repealed. The collection of the taxes was regulated by another law. The repeal of the statute under which the assessment had been made was held not to affect it. The assessment was closed and ended, and therefore not subject to the rule applicable to

¹ Home Ins. Co. v. Taxing Dist. 4 Lea, 644.

² Bank for Savings v. The Collector, 3 Wall. 495; Crow Dog, Ex parte, 109 U. S. 556; Bates v. Clark, 95 U. S. 204; Attorney-General v. Lamplough, L. R. 3 Ex. D. 223; Commonwealth v. Bailey, 13 Allen, 541; Flanders v. Merri-mack, 48 Wis. 567.

³ Smythe v. Fiske, 23 Wall. 374, 380; Heydon's Case, 3 Rep. 7b.

⁴ Attorney-General v. Lamplough, *supra*.

⁵ Smith v. Hoyt, 14 Wis. 252; Goodno v. Oshkosh, 31 id. 127; Bank for Savings v. The Collector, 3 Wall. 495.

⁶ Bechtol v. Cobaugh, 10 S. & R. 121; Van Inwagen v. Chicago, 61 Ill. 31; Town of Belvidere v. Warren R. R. Co. 34 N. J. L. 193; S. C. 35 id. 587; Musgrove v. Vicksburg, etc. R. R.

Co. 50 Miss. 677; People v. Livingston, 6 Wend. 526; Tivey v. People, 8 Mich. 128; Knox v. Baldwin, 80 N. Y. 610; Hampton v. Commonwealth, 19 Pa. St. 329; State v. Baldwin, 45 Conn. 134; Bay City, etc. R. R. Co. v. Austin, 21 Mich. 390; Bennet v. Hargus, 1 Neb. 419; Williams v. Middlesex, 4 Met. 76; Oriental Bank v. Freese, 18 Me. 109; Bailey v. Mason, 4 Minn. 546; The Schooner Rachel v. United States, 6 Cr. 329; Coffin v. Rich, 45 Me. 507; Gregory v. German Bank, 3 Colo. 332; S. C. 25 Am. Rep. 760; Gaul v. Brown, 53 Me. 496; Curtis v. Leavitt, 15 N. Y. 152. See Restall v. London, etc. R'y Co. L. R. 3 Ex. 141, which is dissented from in Butcher v. Henderson, L. R. 3 Q. B. 335. See, also, Morgan v. Thorne, 7 M. & W. 400.

⁷ Bailey v. Mason, 4 Minn. 546.

pending proceedings when the law under which they were commenced has been repealed.¹ There was a sentence of condemnation of a vessel for trading contrary to a temporary act of congress; the vessel had been sold and the proceeds paid over to the government while the law was in force. Pending an appeal from the sentence the act expired. It was held that the sentence could not, under such circumstances, be affirmed after the expiration of the law, and restitution was ordered.² An informer who commences a *qui tam* action under a penal statute does not thereby acquire a vested right to the forfeiture; his claim to the penalty is inchoate, and cannot be fixed except by judgment. The repeal of the statute before judgment prevents the imperfect right from being consummated. It matters not whether the whole penalty when received is given to the public or to the informer, or is divided between them.³

§ 164. When a right has arisen on a contract, or a transaction in the nature of a contract authorized by a statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it or an action for its enforcement. It has become a vested right which stands independently of the statute.⁴ A contractor for grading streets was authorized by the existing law to sue delinquent abutters for unpaid assessments. This right of action was held a part of the contract and not taken away by repeal of the law creating it.⁵ Causes of action barred by the statute of limitations are not revived by a repeal of the statute.⁶ The repeal of a statute giving a lien for advances of money for certain purposes will not affect the lien as to such advances as were made prior thereto.⁷ Rights that pass and become vested under the existing law are supposed to be beyond the control of the state through its legis-

¹ Town of Belvidere v. Warren R. R. Co. 34 N. J. L. 193.

² The Schooner Rachel v. United States, 6 Cr. 329; Yeaton v. United States, 5 id. 281.

³ Bank of St. Marys v. State, 12 Ga. 475.

⁴ Pacific Mail Steamship Co. v. Joliffe, 2 Wall. 450.

⁵ Creighton v. Pragg, 21 Cal. 115.

⁶ Cassity v. Storms, 1 Bush, 452
Right v. Martin, 11 Ind. 123; Cooley's Const. L. *365.

⁷ Commissioners v. Northern Bank, 1 Met. (Ky.) 174.

lature.¹ A mere change of the law does not divest or impair rights of property acquired previously, even though the legislature intended the new law so to operate.² A law can be repealed by the law-giver; 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. This is a principle of general jurisprudence; but a right to be within its protection must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.³ If, before rights become vested in particular individuals, the convenience of the state induces amendment or repeal of the laws, these individuals have no cause to complain.⁴ The legislature, unrestrained by any constitutional provision, may grant an exclusive franchise,⁵ but the grant will be strictly construed and must be clearly expressed.⁶ It is competent for the legislature, after granting to one person or a corporation a franchise which affects the rights of the public, to grant a similar franchise to another person or corporation, though the use of the latter should impair or even destroy the value of the first franchise; and this grant does not depend on a reservation of the power in the original grant.⁷ Nothing but plain English words will

¹ *Rice v. R. R. Co.* 1 Black, 358; *Mitchell v. Doggett*, 1 Fla. 356; *Naught v. Oneal*, 1 Ill. 36; *James v. Dubois*, 16 N. J. L. 285; *Den v. Robinson*, 5 id. 689; *McMechen v. Mayor*, etc. 2 H. & J. 41; *Davis v. Minor*, 1 How. (Miss.) 183; *Taylor v. Rushing*, 2 Stew. (Ala.) 160; *Graham, Ex parte*, 13 Rich. 277.

² *Rock Hill College v. Jones*, 47 Md. 1, 17.

³ *Id.*; *Cooley*, Const. Lim. 359; *Merrill v. Sherburne*, 1 N. H. 213; *Wilderman v. Baltimore*, 8 Md. 551; *State v. Warren*, 28 id. 338; *Worthen v. Ratcliffe*, 42 Ark. 330; *James v. Du-*

bois, 16 N. J. L. 285; *Graham v. Chicago*, etc. R. R. Co. 53 Wis. 473; *Grey v. Mobile Trade Co.* 55 Ala. 387; *Streubel v. Milwaukee*, etc. R. R. Co. 12 Wis. 67; *Aspinwall v. Daviess Co.* 22 How. 364; *Bennet v. Hargus*, 1 Neb. 419; *Kent's Com.* 455; 2 Story on Const. § 1399. See *Wolfe v. Henderson*, 28 Ark. 304.

⁴ *Merrill v. Sherburne*, 1 N. H. 213.

⁵ *Slaughter-House Cases*, 16 Wall. 36.

⁶ *Id.*

⁷ *The Charles River Bridge v. The Warren Bridge*, 11 Pet. 420; *Mohawk Bridge Co. v. Utica*, etc. R. R. Co. 6

grant an exclusive franchise, and thus create a monopoly.¹ The repeal of a statute after judgment will not defeat an appeal previously taken.² And if the statute be essential to that judgment, its repeal or expiration after the appeal will necessitate a reversal of the judgment.³

A statutory right is to be distinguished from the remedy for its enforcement. But after the right has vested it cannot be taken away by new legislation directly against the right nor indirectly by taking away the remedy.⁴ The remedy may be changed.⁵ And of this nature are statutes changing the rules of evidence⁶ or the competency of witnesses.⁷ New statutes may be valid which take away defenses based on irregularities and informalities,⁸ by validating contracts executed without compliance with a statute,⁹ or in violation of some statutory prohibition.¹⁰ When a remedy upon a contract

Paige, 554; Oswego Bridge Co. v. Fish, 1 Barb. Ch. 547; Fort Plain Bridge Co. v. Smith, 30 N. Y. 44.

¹ Pennsylvania R. R. Co. v. Canal Commissioners, 21 Pa. St. 22; Richmond R. R. Co. v. Louisa R. R. Co. 13 How. 71; Chenango Bridge Co. v. Binghamton Bridge Co. 27 N. Y. 87.

² Backes v. Dant, 55 Ind. 181.

³ The Schooner Rachel v. United States, 6 Cr. 329; Yeaton v. United States, 5 id. 281.

⁴ Cooley's Const. Lim. *361; Lessey v. Phipps, 49 Miss. 790.

⁵ The Hickory Tree Road, 43 Pa. St. 139; Farmer v. People, 77 Ill. 322; Knoup v. Piqua Bank, 1 Ohio St. 603; Danforth v. Smith, 23 Vt. 247; Cooley's Const. Lim. *287, 361, 362; Colby v. Dennis, 36 Me. 9, 13; Musgrove v. Vicksburg, etc. R. R. Co. 50 Miss. 677; Dean v. Mellard, 15 C. B. (N. S.) 19; Linton v. Blakeney, etc. Society, 3 H. & C. 853; Templeton v. Horne, 82 Ill. 491; Harris v. Townshend, 56 Vt. 716; Mechanics' and Farmers' B'k, 31 Conn. 63; Treasurer v. Wygall, 46 Tex. 447; Stocking v. Hunt, 3 Denio, 274; Supervisors v. Briggs, id. 173; Matter of Palmer, 40 N. Y. 561; Dis-

mukes v. Stokes, 41 Miss. 431; Mastronada v. State, 60 Miss. 86. See Newsum v. Greenwood, 4 Oregon, 119.

⁶ Herbert v. Easton, 43 Ala. 547; Stephenson v. Osborne, 41 Miss. 119; Journeay v. Gibson, 56 Pa. St. 57, 60; Fogg v. Holcomb, 64 Iowa, 621.

⁷ Laughlin v. Commonwealth, 13 Bush, 261.

⁸ Cooley's Const. Lim. *371 et seq.

⁹ Dulany's Lessee v. Tilghman, 6 G. & J. 461; Andrews v. Russell, 7 Blackf. 474; Parmelee v. Lawrence, 48 Ill. 331; Webber v. Howe, 36 Mich. 150; Journeay v. Gibson, 56 Pa. St. 57; Carpenter v. Pennsylvania, 17 How. 456; Estate of Sticknoth, 7 Nev. 223; Dentzel v. Waldie, 30 Cal. 138.

¹⁰ Gibson v. Hibbard, 13 Mich. 215; Ewell v. Daggs, 108 U. S. 143; Syracuse Bank v. Davis, 16 Barb. 188; Harris v. Rutledge, 19 Iowa, 388; State v. Norwood, 12 Md. 195; State v. Newark, 25 N. J. L. 399; Lewis v. McElvain, 16 Ohio, 347; Savings Bank v. Allen, 28 Conn. 97; Cooley's Const. Lim. *374 et seq. See New York, etc. R. R. Co. v. Van Horn, 57 N. Y. 473.

not unlawful is prohibited, a repeal of the statute will restore the remedy.¹ An act which forbids a corporation to set up the defense of usury repeals as to such corporation the laws against usury, and a repeal of such laws will cut off the defense of usury upon contracts previously made.² If there has been a change or alteration or repeal of the law applicable to the rights of the parties, after the rendition of the original judgment, and pending an appeal, the case must be heard and decided in the appellate court, according to the existing law.³

§ 165. Powers derived wholly from a statute are extinguished by its repeal. All acts done under a statute whilst it was in force are good; but if a proceeding is in progress, *in fieri*, when the statute is repealed, and the powers it confers cease, it fails, for it cannot be pursued.⁴ Where a jurisdiction

¹ Johnson v. Meeker, 1 Wis. 436.

² Ewell v. Daggs, 108 U. S. 143.

³ Musgrove v. Vicksburg, etc. R. R. Co. 50 Miss. 677; Lewis v. Foster, 1 N. H. 61; Speckert v. Louisville, 78 Ky. 287; State v. Daley, 29 Conn. 272; Atwell v. Grant, 11 Md. 104; Keller v. State, 12 id. 325; Price v. Nesbitt, 29 id. 263; Mayor of Annapolis v. State, 30 id. 112; Wade v. St. Mary's School, 43 id. 178; Hartung v. People, 22 N. Y. 95; United States v. The Peggy, 1 Cr. 103; Sheppard v. State, 1 Tex. App. 522.

⁴ Bac. Abr. tit. Statute, D.; Road in Hatfield Township, 4 Yeates, 392; Veats v. Danbury, 37 Conn. 412; Stoever v. Immell, 1 Watts, 258; Commonwealth v. Beatty, id. 382; Gilleland v. Schuyler, 9 Kan. 569; Church v. Rhodes, 6 How. Pr. 281; Smith v. Arapahoe Dist. Ct. 4 Colo. 235; State v. Brookover, 22 W. Va. 214; New London Northern R. R. Co. v. Boston, etc. R. R. Co. 102 Mass. 389; Springfield v. Commissioners, 6 Pick. 501; McRee v. M'Lemore, 8 Heisk. 440. See Downs v. Town of Huntington, 35 Conn. 588; Macnawhoc Plantation v. Thompson, 36 Me. 365; Illinois, etc. Canal v. Chicago, 14 Ill. 334; Uwchlan Township

Road, 30 Pa. St. 156; Hunt v. Jennings, 5 Blackf. 195; Williams v. Middlesex, 4 Met. 76; Stephenson v. Doe, 8 Blackf. 508; James v. Dubois, 16 N. J. L. 285; Petition of Fenelon, 7 Pa. St. 173; South Carolina v. Gailard, 101 U. S. 433; Hampton v. Commonwealth, 19 Pa. St. 329; Commonwealth v. Standard Oil Co. 101 Pa. St. 119; Holmes v. French, 68 Me. 525; Warne v. Beresford, 2 M. & W. 848; Bucher v. Henderson, L. R. 3 Q. B. 335; Todd v. Landry, 5 Martin, 459; S. C. 12 Am. Dec. 479.

The city of Evansville passed an ordinance for the improvement of streets pursuant to a power given in the charter. It was held that the subsequent repeal of the section conferring the power did not affect the ordinance. Chamberlain v. Evansville, 77 Ind. 542; Dashiell v. Baltimore, 45 Md. 615. In March, 1875, a trader committed an act of bankruptcy, upon which a commission might have issued under the statutes then in force. On May 1st these statutes were repealed. On May 2d the repealing act was repealed and the former acts thereby revived. In July a commission of bankruptcy issued. Held, it

conferred by statute is prohibited by a subsequent statute, or the law conferring it is repealed, the jurisdiction ceases and causes pending at the time fail, and no costs are recoverable by either party unless saved by provisions of the repealing law.¹ If pursued the proceedings will be void,² but they may subsequently be validated in certain cases, as when intended to establish a public rather than a private charge or liability.³ Jurisdiction may be taken away by repeal of the statutes conferring it by necessary implication as well as by express words.⁴ An application was made to the court of quarter sessions for the discharge of a prisoner under an insolvent debtor act, and every requisite was complied with by the debtor; but the court voluntarily, and without his application, adjourned the matter to a subsequent day, before which the act was repealed. On motion for a *mandamus* to the sessions to proceed to discharge him the court of king's bench refused to grant it, as no act of jurisdiction could be done by the sessions after the repeal of the statute, though the proceeding had begun before.⁵

was supported by the act of bankruptcy in March. Lord Tenterden: "We find certain statutes in force in March, 1825, when the act of bankruptcy was committed, and we find the same statutes in force in July when the commission issued. It appears to me that the case is not affected by anything that passed in the interval. The 5 Geo. IV., ch. 98, having been repealed, is to be considered, as far as this question is concerned, as if it had never existed." *Phillips v. Hopwood*, 10 B. & C. 39.

¹ *Hollingsworth v. Virginia*, 3 Dall. 378; *Merchants' Ins. Co. v. Ritchie*, 5 Wall. 541; *United States v. Boisdore*, 8 How. 113; *Grant v. Grant*, 12 S. C. 29; S. C. 32 Am. Rep. 506; *McNulty v. Batty*, 10 How. 72; *Ex parte McCardle*, 7 Wall. 506; *Assessors v. Osbornes*, 9 id. 567; *United States v. Tynen*, 11 id. 88; *Baltimore, etc. R. R. Co. v. Grant*, 98 U. S. 398; *Rice v. Wright*, 46 Miss. 679; *Lamb v. Schotler*, 54 Cal. 319; *Smith v. Arapahoe*

Dist. Ct. 4 Colo. 235; *Wade v. St. Mary's Industrial School*, 43 Md. 178; *Saco v. Gurney*, 34 Me. 14; *Miller's Case*, 1 W. Black, 451; *Yeaton v. United States*, 5 Cr. 281; *Springfield v. Commissioners of H.* 6 Pick. 501; *Commonwealth v. Marshall*, 11 id. 350; *Commonwealth v. Kimball*, 21 Pick. 373; *Thayer v. Seavey*, 11 Me. 284; *Cummings v. Chandler*, 26 Me. 453.

² *North Canal Street*, 10 Watts, 351; *Church v. Rhodes*, 6 How. Pr. 281; *Morgan v. Thorne*, 7 M. & W. 400; *Petition v. Fenelon*, 7 Pa. St. 173; *Bank of Hamilton v. Dudley*, 2 Pet. 492.

³ *In re Pennsylvania Hall*, 5 Pa. St. 204. See *Cooley's Const. Lim.* *371; *Plantation No. 9 v. Bean*, 36 Me. 359.

⁴ *Cates v. Knight*, 3 T. R. 442; *Crisp v. Bunbury*, 8 Bing. 394; *New London N. R. R. Co. v. Boston, etc. R. R. Co.* 102 Mass. 386.

⁵ *Rex v. Justices of London*, 3 Burr. 1456; *Miller's Case*, 1 W. Black. 451.

§ 166. **Effect of repeal of a penal statute.**—The repeal or expiration of a statute imposing a penalty or forfeiture will prevent any prosecution, trial or judgment for any offense committed against it while it was in force, unless the contrary is provided in the same or some other existing statute.¹ Where a penal statute is so modified as to exempt a class from its operation, violations by such exempted class before such modification took effect cannot be prosecuted afterwards.² If a penal statute is repealed pending an appeal and before the final action of the appellate court, it will prevent an affirmance of a conviction, and the prosecution must be dismissed or the judgment reversed.³ A final judgment before repeal is not affected by it.⁴ The repeal operates as a pardon of all

¹ *Yeaton v. United States*, 5 Cr. 281; *Commonwealth v. Marshall*, 11 Pick. 350; *Commonwealth v. Pattee*, 12 Cush. 501; *Heald v. State*, 36 Me. 62; *Mayers v. State*, 7 Ark. 68; *Roberts v. State*, 2 Overt. 423; *Bennett v. State*, 2 Yerg. 472; *Brothers v. State*, 2 Cold. 201; *Higginbotham v. State*, 19 Fla. 557; *Leftwiche's Case*, 5 Rand. 657; *Scutt's Case*, 2 Va. Cas. 54; *Bank of St. Mary's v. State*, 12 Ga. 475; *State v. Nutt*, Phil. L. 20; *Carlisle v. State*, 42 Ala. 523; *Governor v. Howard*, 1 Murphy, 465; *State v. Banks*, 12 Rich. 609; *Commonwealth v. Cain*, 14 Bush, 525; *State v. Addington*, 2 Bailey, 516; *United States v. Finlay*, 1 Abb. (U. S.) 364; *The Irresistible*, 7 Wheat. 551; *Duane's Case*, 1 Binn. 601; *Bay City*, etc. R. R. Co. v. *Austin*, 21 Mich. 390; *United States v. Six Fermenting Tubs*, 1 Abb. (U. S.) 268; *Mastronada v. State*, 60 Miss. 86; *Mayor, etc. v. State*, 30 Md. 112; *Commonwealth v. Welch*, 2 Dana, 330; *Harrison v. Allen*, Wythe (Va.), 291; *Stoeve v. Immell*, 1 Watts, 258.

² *Commonwealth v. Welch*, 2 Dana, 330.

³ *State v. King*, 12 La. Ann. 593; *Mouras v. The A. C. Brewer*, 17 id. 82; *Keller v. State*, 12 Md. 322; *Lewis v. Foster*, 1 N. H. 61; *Speckert v.*

Louisville, 78 Ky. 287; *Commonwealth v. Sherman*, 85 id. 686.

⁴ *People v. Hobson*, 48 Mich. 27; *State v. Addington*, 2 Bailey, 516. See *Aaron v. State*, 40 Ala. 307; *Rex v. Davis*, 1 Leach, C. C. 271; *Rex v. Heath*, 2 East. P. C. 609; *Rex v. McKenzie, R. & R. C. C.* 429; *Leschi v. Territory*, 1 Wash. T'y, 13; *Saco v. Gurney*, 34 Me. 14; *Gaul v. Brown*, 53 Me. 496; *Welch v. Wadsworth*, 30 Conn. 149; *Heald v. State*, 36 Me. 62; *Broughton v. Branch Bank*, 17 Ala. 828; *Taylor v. State*, 7 Blackf. 93; *State v. Loyd*, 2 Ind. 659; *Thompson v. Bassett*, 5 id. 535; *State v. O'Conner*, 13 La. Ann. 486; *State v. Cress*, 4 Jones (N. C.), 421; *State v. Van Stralen*, 45 Wis. 437; *State v. Campbell*, 44 id. 529; *State v. Ingersoll*, 17 Wis. 631; *Fisher v. N. Y. etc. R. R. Co.* 46 N. Y. 644; *Calkins v. State*, 14 Ohio St. 222; *Wood v. Kennedy*, 19 Ind. 68; *State v. Fletcher*, 1 R. I. 193; *Greer v. State*, 22 Tex. 588; *Town of Belvidere v. Warren R. R. Co.*, 34 N. J. L. 193; *S. C. in error*, 35 id. 584; *Snell v. Campbell*, 24 Fed. Rep. 880; *Mulkey v. State*, 16 Tex. App. 53; *State v. Long*, 78 N. C. 571; *Hubbard v. State*, 2 Tex. App. 506; *Montgomery v. State*, id. 618; *Rood v. Chicago*, etc. R'y Co. 43 Wis. 146; *State v.*

offenses against it¹ and a bar to any subsequent prosecution.² There can be no legal conviction for an offense unless the act be contrary to law at the time it is committed; nor can there be judgment unless the law is in force at the time of the indictment and judgment.³

Where a statute imposes a penalty for an injurious act done to the rights of others, such penalty to be recovered by the party aggrieved; it is in the nature of a satisfaction to him, as well as a punishment of the offender. In such a case, the plaintiff is said to have acquired a vested right to the penalty as soon as the offense is committed, and a general repeal of the statute after action accrued does not affect that right.⁴ An ordinance passed pursuant to a power in a city charter is not invalidated by repeal of the provision granting the power.⁵ While a convict in the state prison was liable to additional punishment under a statute in force at the time of sentence and commitment, in consequence of having been twice convicted and sentenced to confinement, a statute was passed so modifying the previous statute that a convict would be liable to additional punishment only in case he had been twice discharged from imprisonment. Before the prisoner was released from confinement under his second sentence the modifying statute was repealed. It was held that such statute operated to suspend, so long as it remained in force, but not to discharge, the prisoner's liability to additional punishment.⁶

§ 167. **Saving clauses.**—The effect of repeal upon inchoate rights, upon offenses and upon incomplete proceedings may

Gumber, 37 Wis. 298; Union Iron Co. v. Pierce, 4 Biss. 327; State v. Brewer, 22 La. Ann. 273.

¹ Wharton v. State, 5 Cold. 1.

² Howard v. State, 5 Ind. 183; Griffin v. State, 39 Ala. 541; Genkinger v. Commonwealth, 32 Pa. St. 99; Wall v. State, 18 Tex. 682.

³ Commonwealth v. Marshall, 11 Pick. 350; Commonwealth v. McDonough, 13 Allen, 581; Commonwealth v. Kimball, 21 Pick. 373; Hartung v. People, 22 N. Y. 95; Pitman v. Commonwealth, 2 Rob. (Va.) 813; State v. Daley, 29 Conn. 272.

⁴ President, etc. of L. v. Harrison, 9 B. & C. 524; Company of Cutlers v. Ruslin, Skinner, 363; Palmer v. Conly, 4 Denio, 374; S. C. 2 N. Y. 182; Thompson v. Howe, 46 Barb. 287; Harris v. Townshend, 56 Vt. 716; Graham v. Chicago, etc. R. R. Co. 53 Wis. 473; Grey v. Mobile Trade Co. 55 Ala. 387. See Union Iron Co. v. Pierce, 4 Biss. 327; Bay City, etc. R. Co. v. Austin, 21 Mich. 390.

⁵ Chamberlain v. Evansville, 77 Ind. 542.

⁶ Commonwealth v. Getchell, 16 Pick. 452. See Commonwealth v. Mott, 21 Pick. 492.

be avoided by a saving clause providing that it shall not affect such rights, prosecutions for such offenses, or such proceedings,¹ or by a general statute for that purpose. Such general statutes have been enacted in nearly all of the states as well as by congress.² The provision in the Iowa statute may be regarded as a typical one of this sort:³ "The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under and by virtue of the statute repealed." A tax voted and levied was held to be saved by that provision, though the statute under which the tax was so levied was repealed before the collection of the tax.⁴ Such a general provision has the same effect as a saving clause in the repealing statute.⁵ A saving clause is intended to save something which would otherwise be lost.⁶ An act granting review after judgment was repealed "saving all actions pending;" this saving was held to mean a saving of something out of that which was repealed, and therefore to save pending petitions for review.⁷ It may em-

¹ *People v. Gill*, 7 Cal. 356.

² See *United States v. Reisinger*, 128 U. S. 398.

³ *Iowa Code* (1888), § 49, par. 1.

⁴ *Tobin v. Hartshorn*, 69 Iowa, 648.

⁵ *Cedar Rapids, etc. R'y Co. v. Carroll Co.* 41 Iowa, 153; *Dillon v. Linder*, 36 Wis. 344; *Burlington v. Burlington, etc. R'y Co.* 41 Iowa, 134; *Bartruff v. Remy*, 15 id. 257; *Chicago, etc. R. R. Co. v. Hartshorn*, 30 Fed. Rep. 541; *United States v. Barr*, 4 Sawy. 254; *Garland v. Hickey*, 75 Wis. 178; *Harris v. Townshend*, 56 Vt. 716; *Jones v. State*, 1 Iowa, 395; *Volmer v. State*, 34 Ark. 487; *Sanders v. State*, 77 Ind. 227; *Tempe v. State*, 40 Ala. 350; *State v. Ross*, 49 Mo. 416; *Treat v. Strickland*, 23 Me. 234; *Hine v. Pomeroy*, 39 Vt. 211; *State v. Boyle*, 10 Kan. 113; *State v. Crawford*, 11 id. 32; *Ballin v. Ferst*, 55 Ga. 546; *McCuen v. State*, 19 Ark. 634; *People v. Sloan*, 2 Utah, 326; *McCalment v. State*, 77 Ind. 250; *Fowle v. Kirk-*

land, 18 Pick. 299; *Barton v. Gadsden*, 79 Ala. 495; *Grace v. Donovan*, 12 Minn. 580; *Pacific, etc. Tel. Co. v. Commonwealth*, 66 Pa. St. 70; *Mon-geon v. People*, 55 N. Y. 613.

⁶ *Colby v. Dennis*, 36 Me. 9, 12.

⁷ *Id.* When a real action was commenced a statute was in force which provided that if either of the demandants should die during the pendency of a real action his death should be suggested on the record, and that the survivor might amend his declaration by describing his interest in the premises and proceed in the cause to final judgment. During the pendency of the action the statutes were revised so as to repeal that provision, but the revision contained these saving clauses: That all real actions which shall be pending "shall proceed and be conducted to final judgment, or other final disposal, in like manner as if this chapter had never been enacted;" in an-

brace an inchoate right as well as the remedy for its enforcement when it matures.¹ A saving, that actions pending at the time of the repeal or passage of an act shall not be affected thereby, does not include proceedings in insolvency,² nor a petition pending before county commissioners for the location of a highway.³ A municipal appropriation within the restrictions of the charter, when made, is not affected by a subsequent statute so changing the limit that such appropriation would exceed it, where the new statute contains a provision that "nothing in this act shall in any measure affect or impair any proceeding had and done under the acts to which this is an amendment, or any rights or privileges acquired under said acts."⁴

A revenue act provided that lands sold for the non-payment of taxes could be redeemed within a certain time upon the payment of a fixed penalty. The act was repealed by a subsequent one, changing the time of redemption and the amount of the penalty, but providing that the former act should remain in force for the collection of taxes levied thereunder. It was held that an act in force for the purpose of collection was in force for the purpose of redemption.⁵ The lien of a judgment in respect to duration was held saved by the words "no rights vested or liabilities incurred at that time shall be lost or discharged." The judgment lien is incident to a judgment, a liability incurred, and therefore saved from the effect of the

other section a saving to all persons, of "all actions and causes of action which shall have accrued in virtue of or founded on any of said repealed acts, in the same manner as if such acts had never been repealed." It was contended that that action did not accrue in virtue of the repealed act, nor was founded on it. Shepley, J., said: "When the language is considered in connection with [the other saving clause] and with the recollection that the general purpose of the revision was to embody in a more systematic form the existing laws, with certain modifications and new provisions, without destroying existing rights, there can be little doubt that it was

the intention of the legislature to preserve not only actions which, technically and properly speaking, accrued or had been founded on the statute, but those also which were preserved and secured to a party by the repealed act." *Treat v. Strickland*, 23 Me. 234.

¹ *Cochran v. Taylor*, 13 Ohio St. 382.

² *Belfast v. Fogler*, 71 Me. 403.

³ *Webster v. County Commissioners*, 63 Me. 27; *Downs v. Town of Huntington*, 35 Conn. 588.

⁴ *Beatty, Auditor, v. People*, 6 Colo. 538.

⁵ *Wolfe v. Henderson*, 28 Ark. 304.

repealing statute.¹ A saving of pending prosecutions does not include a case where the prosecution has closed and sentence has been pronounced;² nor cases commenced afterwards.³ Under a saving of pending prosecutions and offenses theretofore committed, an indictment filed after the repeal took effect was sustained.⁴ Such a provision in a repealing act relates solely to the acts repealed by it,⁵ unless a different intention is deducible from the language of the saving clause. A provision in the repealing law to the effect "that no remedy to which a creditor is entitled under the provisions of the laws heretofore in force shall be impaired by this act" does not apply to creditors suing for breaches of the bond occurring since the enactment of the repealing statute.⁶ The effect of the repeal of a statute and its re-enactment in the same words by a statute which takes effect at the same time with the repealing act is to continue such statute in uninterrupted operation.⁷ The rule is the same as to criminal offenses.⁸

§ 168. **Revival by repeal of repealing statute.**—The common-law rule is well settled that the simple repeal, suspension or expiration of a repealing statute revives the repealed statute, whether such repeal was express or only by implication.⁹

¹ *Dearborn v. Patton*, 3 Oregon, Barb. 456; *Wheeler v. Roberts*, 7 Cow. 420.

² *Aaron v. State*, 40 Ala. 307. See *Luke v. Calhoun Co.* 56 Ala. 415.

³ *Knox v. Baldwin*, 80 N. Y. 610.

⁴ *Sanders v. State*, 77 Ind. 227.

⁵ *Mongeon v. People*, 55 N. Y. 613.

⁶ *Collins v. Warren*, 63 Tex. 311.

⁷ *Laude v. Chicago, etc. R. R. Co.* 33 Wis. 640; *Middleton v. N. J. etc. R. R. Co.* 26 N. J. Eq. 269; *Dashiell v. Mayor, etc.* 45 Md. 615; *Capron v. Strout*, 11 Nev. 304; *United Hebrew B. Asso. v. Benshimol*, 130 Mass. 325; *Knoup v. Bank*, 1 Ohio St. 603; *Coffin v. Rich*, 45 Me. 507; *Smith v. Estes*, 46 Me. 158.

⁸ *State v. Gumber*, 37 Wis. 298; *State v. Wish*, 15 Neb. 448; *ante*, § 134; *McMullen v. Guest*, 6 Tex. 278; *Hirschburg v. People*, 6 Colo. 145.

⁹ *Gale v. Mead*, 4 Hill, 109; *Brown v. Barry*, 3 Dall. 365; *People v. Davis*, 61

Barb. 456; *Wheeler v. Roberts*, 7 Cow. 536; *Van Denburgh v. President, etc.* 66 N. Y. 1; *Van Valkenburgh v. Torrey*, 7 Cow. 252; *People v. Trustees*, 26 Hun, 488; *Commonwealth v. Churchill*, 2 Met. 118; *Hastings v. Aiken*, 1 Gray, 163; *McMillan v. Bellows*, 37 Hun, 214; *Doe v. Naylor*, 2 Blackf. 32; *Harris v. Supervisors*, 33 Hun, 279; *Zimmerman v. Perkiomen, etc. Co.* 81* Pa. St. 96. It has been held that a statute repealed by two acts is not revived by repeal of one of them. *Dyer v. State*, Meigs, 237; *Teter v. Clayton*, 71 Ind. 237; *Poor Directors v. R. R. Co.* 7 Watts & S. 236; *Zimmerman v. Perkiomen*, 81* Pa. St. 96; *Longlois v. Longlois*, 48 Ind. 60; *Waugh v. Riley*, 68 id. 482; *Niblack, Adm'r, v. Goodman*, 67 id. 174; *Brinkley v. Swicegood*, 65 N. C. 626; *Harrison v. Walker*, 1 Ga. 32; *People v. Wintermute*, 1 Dak. 63;

But it is otherwise, it seems, where the constitution provides that no law shall be revived unless the new act contains the law revived.¹ To repeal a statute will revive the common law.² When a statute restraining a man's natural rights, or his use of his property, is repealed, he is restored to those rights, as before the law was passed.³ This rule of revival was held to apply to the vote of a tax by taxable inhabitants. This vote was restored to effect by repealing a rescinding vote.⁴ Where a statute professes to repeal absolutely a prior law and substitutes other provisions on the same subject which are limited to continue only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the legislature to that effect is expressed.⁵ The legislature may make the revival of an act depend upon a future event to be made known by executive proclamation.⁶ Where an act is revived by a subsequent law the legislature must be understood to give it, from the time of its revival, precisely that force and effect which it had at the moment when it expired.⁷ Incomplete proceedings which were arrested and rendered void by repeal of the statute under which they were instituted will not be restored to life by a revival thereof.⁸ A forfeiture for a prohibited act was given by statute to any one who should sue for it. Afterwards the exclusive right to sue for it was given to overseers of the poor. The repeal of this act was held to operate only prospectively and gave no right to any other than the overseers for forfeitures incurred during the operation of the second act.⁹

Where the repeal of a repealing statute is for the purpose

Janes v. Buzzard, Hempst. 259; *Witkouski v. Witkouski*, 16 La. Ann. 232; *Tallamon v. Cardenas*, 14 id. 509; *Weakley v. Pearce*, 5 Heisk. 401; *Hightower v. Wells*, 6 Yerg. 249. See *Southwark Bank v. Commonwealth*, 26 Pa. St. 446.

¹ *Renter v. Bauer*, 3 Kan. 505.

² *Mathewson v. Phoenix Iron Foundry*, 20 Fed. Rep. 281; *State v. Rollins*, 8 N. H. 550; *Gray v. Obear*, 54 Ga. 231; *Lowenberg v. People*, 27 N. Y. 336. See *Boismare v. His Creditors*, 8 La. 315.

³ *James v. Dubois*, 16 N. J. L. 285.

⁴ *Gale v. Mead*, 4 Hill, 109.

⁵ *Warren v. Windle*, 3 East, 205.

⁶ *Cargo of Brig Aurora v. United States*, 7 Cr. 382.

⁷ *Id.* See *Shipman v. Henbest*, 4 T. R. 109; *Winter v. Dickerson*, 42 Ala. 92.

⁸ *Commonwealth v. Leech*, 24 Pa. St. 55.

⁹ *Van Valkenburgh v. Torrey*, 7 Cow. 252.

of substituting other provisions in its place, the implication of an intention to revive the repealed statute cannot arise, and especially if the substituted provision is repugnant to the original provision, or is not properly cumulative to it.¹ So the repeal of a statute which was a revision of and a substitute for a former act to the same effect which was therefore repealed cannot be deemed to revive the previous act; for this would be plainly contrary to the intention of the legislature.² And where a statutory provision has been repealed without change in the amendatory act and the latter is afterwards repealed, the original provision is repealed also.³ Statutes have been very generally adopted in the states abolishing the rule of implied revival as a consequence of the repeal of the repealing statute.⁴

In *State v. Slaughter*⁵ the court construed the effect of a general provision that "where any law repealing any former law, clause or provision shall itself be repealed, it shall not be considered to revive such former law, clause or provision, unless it be expressly otherwise provided." It was held that if the section of the marriage act under consideration repealed or superseded the common law on the subject of incestuous marriages, its repeal would not revive the common law. Where revival requires re-enactment, a legislative declaration that an act mentioned shall not repeal the provision will not suffice.⁶ Where a general act applicable to all the counties of the state is repealed as to a particular county, and a still later act amends a section so partially repealed, the amendment will not be deemed to affect the excluded county.⁷

¹ *Commonwealth v. Churchill*, 2 *ple v. Supervisors*, 67 N. Y. 109; *Harris v. Supervisors*, 33 Hun, 279.
Met. 118; *Bouton v. Royce*, 10 *Phila.* 559; *Warren v. Windle*, 3 *East*, 205.

² *Butler v. Russel*, 3 *Cliff.* 251.

³ *Moody v. Seaman*, 46 *Mich.* 74;
Goodno v. Oshkosh, 31 *Wis.* 127; *Peo-*

⁴ See *Milne v. Huber*, 3 *McLean*, 212.

⁵ 70 *Mo.* 484.

⁶ *State v. Conkling*, 19 *Cal.* 501.

⁷ *People v. Tyler*, 36 *Cal.* 522.

CHAPTER IX.

STATUTES VOID IN PART.

§ 169. Statutes may be void in part and valid in part.	§ 176. Where void part inducement to residue.
171. Requisite separableness of void part.	178. Valid part must be complete and accord with legislative intent.
174. Main purpose being unconstitutional, whole act void.	

§ 169. Statutes may be void in part and good in part.—
In this country legislative bodies have not an unlimited power of legislation. Constitutions exist which contain the supreme law. Statutes which contravene their provisions are void. Courts have power, and they are charged with the judicial duty, to support the constitutions under which they act against legislative encroachments. They will declare void acts which conflict with paramount laws.¹ Where a part only of a statute is unconstitutional, and therefore void, the remainder may still have effect under certain conditions. The court is not warranted in declaring the whole statute void unless all the provisions are connected in subject-matter, depend on each other, were designed to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the legislature would have passed one without the other. The constitutional and unconstitutional provisions may even be expressed in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point or test is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance.²

¹Scudder v. Trenton Delaware Falls Co. 1 N. J. Eq. 694; State v. N. H. 35; Pierce v. Kimball, 9 Me. 59; Parkhurst, 9 N. J. L. 427; Bank of Goshen v. Stonington, 4 Conn. 225; Hamilton v. Dudley's Lessee, 2 Pet. 492; Hill v. Sunderland, 3 Vt. 507; Holden v. James, 11 Mass. 396.
²Commonwealth v. Hitchings, 5

If one provision of an enactment is invalid and the others valid, the latter are not affected by the void provision, unless they are plainly dependent upon each other, and so inseparably connected that they cannot be divided without defeating the object of the statute.¹ And the converse is true. The vicious part must be distinct and separable, and, when stricken out, enough must remain to be a complete act, capable of being carried into effect, and sufficient to accomplish the object of the law as passed, in accordance with the intention of the legislature. It should be confined to the same limits and still subject to the intended qualifications.²

Gray, 482; Mobile, etc. R. R. Co. v. State, 29 Ala. 573; South & North Ala. R. R. Co. v. Morris, 65 Ala. 193; State v. Brown, 19 Fla. 563; Morrison v. State, 40 Ark. 448; State v. Wilson, 12 Lea, 246; Tillman v. Cocke, 9 Baxt. 429; Johnson v. Winslow, 63 N. C. 532; Harlan v. Sigler, Morris, 39; State v. Marsh, 37 Ark. 356; State v. Kantler, 33 Minn. 69; S. C. 6 Am. & Eng. Corp. Cas. 169; American Print Works v. Lawrence, 23 N. J. L. 590; Lea v. Bumm, 83 Pa. St. 237; Bittle v. Stuart, 34 Ark. 224; National Bank v. Barber, 24 Kan. 534; Darragh v. McKim, 2 Hun, 337; Berry v. R. R. Co. 41 Md. 446; Fleischner v. Chadwick, 5 Oregon, 152; Village of Deposit v. Vail, 5 Hun, 310; State v. Clarke, 54 Mo. 17; Turner v. Board of Commissioners, 27 Kan. 314; State v. Wheeler, 25 Conn. 290; People ex rel. v. Kenney, 96 N. Y. 294; Duryee v. Mayor, etc. id. 477; Matter of Met. Gas Light Co. 85 id. 527; Matter of Sackett, etc. Streets, 74 id. 95; Matter of Ryers, 72 id. 1; Tiernan v. Rincker, 102 U. S. 123; Powell v. State, 69 Ala. 10; State ex rel. v. Tuttle, 53 Wis. 45; State v. Newton, 59 Ind. 173; Tripp v. Overocker, 7 Colo. 72; Gunnison Co. Com. v. Owen, id. 467; People v. Jobs, id. 475; People v. Hall, 8 id. 485; Cole v. Commissioners, 78 Me. 532; Re Groff, 21 Neb. 647; Frazer, Ex parte, 54 Cal. 94. In Curtis v. Leavitt, 15 N. Y. 96, Comstock, J., said: "A doctrine which is expressed in the words 'void in part, void *in toto*,' has often found its way into books and judicial opinions as descriptive of the effect which a statute may have upon deeds and other instruments which have in them some forbidden vice. There is, however, no such general principle of law as the maxim would seem to indicate. On the contrary, the general rule is that if the good be mixed with the bad it shall nevertheless stand, provided a separation can be made. The exceptions are, first, where a statute by its express terms declares the whole deed or contract void on account of some provision which is unlawful; and second, where there is some all-pervading vice, such as fraud, for example, which is condemned by the common law, and avoids all parts of the transaction because all are alike infected."

¹ Duryee v. Mayor, etc. 96 N. Y. 477; Re Groff, 21 Neb. 647.

² Meshmeier v. State, 11 Ind. 485; Burkholtz v. State, 16 Lea, 71; Bittle v. Stuart, 34 Ark. 224; Allen v. Louisiana, 103 U. S. 80; People v. Porter, 90 N. Y. 68.

§ 170. It may be laid down generally as a sound proposition that one part of a statute cannot be declared void and leave any other part in force, unless the statute is so composite, consisting of such separable parts, that, when the void part is eliminated, another living, tangible part remains, capable by its own terms of being carried into effect, consistently with the intent of the legislature which enacted it in connection with the void part. If it is obvious that the legislature did not intend that any part should have effect unless the whole, including the part held void, should operate, then holding a part void invalidates the entire statute. If a statute attempts to accomplish two or more objects, or to deal with two or more independent subjects, and the provisions as to one are void, it may still be in every respect complete and valid as to any other.¹ Illustrations of this proposition are furnished by numerous cases where acts are violative of the constitutional injunction that an act shall relate to but one subject, which shall be stated in the title. If the act embraces more than one subject, and one is stated in the title, it is valid as to that subject if complete in itself, but void as to any other. The elimination of the latter leaves a constitutional act, where there is no interdependence between the subjects.² If the matter of the act foreign to the subject stated in the title is divisible from that which is clearly within the title, and the latter can stand and have effect without the former, then only so much of the act as is not embraced in the title is void.³

¹ *People v. Cooper*, 83 Ill. 585; *Towles, Ex parte*, 48 Tex. 413; *State v. Clinton*, 28 La. Ann. 201; *Wells, Ex parte*, 21 Fla. 280; *Hinze v. People*, 92 Ill. 406; *Lombard v. Antioch College*, 60 Wis. 459; *Sparrow v. Commissioner of Land Office*, 56 Mich. 567; *People v. Luby*, id. 551.

² *People v. Hall*, 8 Colo. 485; *State v. Hurds*, 19 Neb. 317; *Whited v. Lewis*, 25 La. Ann. 568; *Gibson v. Belcher*, 1 Bush, 145; *Jones v. Thompson*, 12 id. 394; *Fuqua v. Mullen*, 13 Bush, 467; *Harris v. Supervisors*, 33 Hun, 279; *Mississippi, etc. Co. v. Prince*, 34 Minn. 79; *Municipality No. 3 v. Michoud*, 6 La. Ann. 605;

State v. Exnicios, 33 id. 253; *State v. Crowley*, 33 La. Ann. 782; *State v. Dalon*, 35 La. Ann. 1141; *Dorsey's Appeal*, 72 Pa. St. 192; *Thomason, Ex parte*, 16 Neb. 238; *Davis v. State*, 7 Md. 151.

³ *Unity v. Burrage*, 103 U. S. 447; *Moore, Ex parte*, 62 Ala. 471; *Walker v. State*, 49 id. 329; *Lowndes County v. Hunter*, 49 id. 507; *Shields v. Bennett*, 8 W. Va. 74; *Matter of Sackett*, 74 N. Y. 95; *Mewherter v. Price*, 11 Ind. 199; *Bucky v. Willard*, 16 Fla. 330; *State v. Wilson*, 7 Ind. 516; *Packet Co. v. Keokuk*, 95 U. S. 80; *Matter of De Vaucene*, 31 How. Pr. 341; *Harris v. Supervisors*, 33 Hun,

A corporate charter is not entirely vitiated because it provides unconstitutionally for the exercise of the power of eminent domain for certain purposes,¹ or unconstitutionally restricts the right to vote for officers.² Parts relating to mere detail incident to the main purpose of an act may be stricken out without prejudice to the remainder of it, which contains valid provisions amply sufficient to enable the corporation to fully perform all its functions, unless vital to the main purpose as means or as compensation.³ Where a new offense is created and procedure for punishment provided, if the latter is invalid, and there are general laws under which prosecutions for such an offense could be conducted, the invalidity of the part relating to the procedure will not affect the part creating the offense.⁴ An act redistricting a county for supervisors was held valid, though it unconstitutionally provided that incumbents should hold over beyond their election terms until they could be immediately succeeded by supervisors elected under the act.⁵ The powers of a judicial officer are so separable and independent that a grant of them may be void as to one part or subject and good as to others.⁶ An act providing for impounding cattle taken *damage feasant*, and for detention of them until costs and damages are paid, may be sustained, though it include a void provision for a summary sale of such

279; *Rader v. Township of Union*, 39 N. J. L. 509; *Colwell v. Chamberlin*, 43 id. 387; *Matter of Van Antwerp*, 56 N. Y. 261; *People ex rel. v. Briggs*, 50 id. 553; *Fleischner v. Chadwick*, 5 Oreg. 152; *Matter of Paul*, 94 N. Y. 497; *Dewhurst v. City of Allegheny*, 95 Pa. St. 437; *Allegheny Co. Home's Case*, 77 Pa. St. 77; *Lea v. Bumm*, 83 Pa. St. 237; *Town of Fishkill v. Fishkill*, etc. Plk. R. Co. 22 Barb. 634; *State v. Clarke*, 54 Mo. 17; *Savannah*, etc. R'y Co. v. Geiger, 21 Fla. 669; *Callaghan v. Chipman*, 59 Mich. 610; *State v. Persinger*, 76 Mo. 346; *Stiefel v. Maryland Institute*, 61 Md. 144; *Wynkoop v. Cooch*, 89 Pa. St. 450.

¹ *Morgan v. Monmouth Plank R. Co.* 26 N. J. L. 99; *Matter of Village of Middleton*, 82 N. Y. 196.

² *State ex rel. v. Tuttle*, 53 Wis. 45; *People ex rel. v. Kenney*, 96 N. Y. 294.

³ *Id.*; *Phillips v. Mayor*, etc. 1 Hilt. 483; *State v. Elizabeth*, 40 N. J. L. 278; *Wakeley v. Mohr*, 15 Wis. 609; *State v. Rosenstock*, 11 Nev. 128; *Robinson v. Bidwell*, 22 Cal. 379; *Board of Com. v. Silvers*, 22 Ind. 491; *Turner v. Board of Commissioners*, 27 Kan. 314; *Matter, etc. of Village of Middleton*, 82 N. Y. 196; *Gordon v. Cornes*, 47 id. 617. See *post*, § 171.

⁴ *State v. Newton*, 59 Ind. 173.

⁵ *Christy v. Board of Supervisors*, 39 Cal. 3.

⁶ *Mayor, etc. v. Dechert*, 82 Md. 369; *Reid v. Morton*, 119 Ill. 118.

cattle.¹ A statute which prohibits traffic in intoxicating liquors, provides penalties therefor, and also forfeiture of liquors kept for sale, and the vessels in which the same are kept, is not an entirety. The forfeiture clause may be held unconstitutional, and the remainder nevertheless be sustained.²

§ 171. **The requisite separableness of the void part.**—To prevent the void part of a statute from vitiating other portions it must be possible to separate them. This separation would generally be easy where there is inserted in an act otherwise constitutional a distinct provision which can have no operation or effect, according to its terms, but such as is in violation of the constitution. Such a provision would be absolutely void, and it is difficult to conceive how it could be so blended with other and constitutional provisions as not to be capable of literal separation and exclusion; it may, however, be so related to other provisions as to infect them by dependence, but the actual separation of the vicious part would be practicable. Such separation is practically difficult when a provision is general, and a part of its applications or effects would be violative of the constitution and a part not so, and both equally within the terms, scope and apparent intent of the law-makers.³ Such provisions may be held valid so far as they can operate in harmony with the constitution, and by construction limited to such an effect. They will be held void for any purpose beyond that limit. Statutes of a civil nature are severable when all their terms may have effect to some extent; and upon a defined principle may be so limited and all effect beyond constitutional barriers prevented. The legislature of Iowa gave a city power to establish and create wharves and fix the rates of landing and wharfage of all boats, etc., moored at or landing at the wharves. Under this power the city council passed an ordinance ordaining that all the grounds then lying, or which might thereafter be made, between Water street in the city and the middle channel of the Mississippi river, should be declared a wharf. The ordinance provided for a wharfage fee for use of any part of said wharf or Water

¹ *Rood v. McCargar*, 49 Cal. 117; ³ *Western Union Tel. Co. v. State*,
Wilcox v. Hemming, 58 Wis. 144, 159. 62 Tex. 630.

² *State v. Wheeler*, 25 Conn. 290;
Fisher v. McGirr, 1 Gray, 1.

street. Part of it was actual wharf made at considerable expense and a part was the unimproved bank. As to the latter the ordinance requiring wharfage was supposed to be void. Though that part was not distinguishable in the text of the ordinance, it was held severable; that it was valid so far as to authorize its enforcement for collecting wharfage for use of the actual wharves, a right and power then alone in question.¹

In *Railroad Companies v. Schutte*² the court said the striking out of the void part is not necessarily "by erasing words, but it may be by disregarding the unconstitutional provision, and reading the statute as though that provision was not there." It is a general rule of construction to give such effect, if possible, to a statute that it shall work no breach of public faith, nor violate the constitution.³

§ 172. But the rule is more stringent in regard to criminal statutes. As said by Johnson, J., in *Wynehamer v. People*:⁴ "Laws in relation to civil rights are sometimes held to be unconstitutional, in so far as they affect the rights of certain persons, and valid in respect to others. This is done mainly upon the ground that the courts will not construe them to relate to such cases as the legislature had not power to act upon. To statutes creating criminal offenses, such a rule of construction ought not to be applied, and I cannot find any trace of its ever having been applied. It is of the highest importance to the administration of criminal justice that acts creating crimes should be certain in their terms and plain in their application; and it would be in no small degree unseemly that

¹ *Packet Co. v. Keokuk*, 95 U. S. 80; *Freight Tax Case*, 15 Wall. 232. A statute of Pennsylvania required every railroad, steamboat, canal, slackwater navigation company, and all other companies doing business within that state, and upon whose works freight might be transported, whether by the company or by individuals, to pay certain taxes. This act applied to domestic as well as interstate transportation, and as to the latter it was void, though that part was not distinguishable in the terms. It was not directly declared that the

part of the act which related to transportation wholly within the state was valid, but it is to be inferred that the court did not deem the act wholly void. *Supervisors v. Stanley*, 105 U. S. 305, 313, 314; *Austin v. The Aldermen*, 7 Wall. 694; *Bull v. Rowe*, 13 S. C. 355; *McCready v. Sexton*, 29 Iowa, 356; *Hiss v. Baltimore*, etc. R. R. Co. 52 Md. 242; *Franklin v. Westfall*, 27 Kan. 614.

² 103 U. S. 118, 142.

³ *United States v. Central Pac. R. R. Co.* 118 U. S. 235.

⁴ 13 N. Y. 378, 427.

courts should be called upon, in administering the criminal law, to adjudge an act creating offenses at one time valid, and at another time void. It must, I think, stand as it has been enacted, or not stand at all." A law void as to certain property (intoxicating liquors) already possessed at the passage of the law, but which would be valid if confined to such property subsequently acquired, is wholly void, being general so as to include both in penal destruction of value.¹ Where the constitution fixed the limit of punishment by fine imposed by a justice of the peace at §3, and the legislature provided for a fine not exceeding \$20 in such cases, the statute was held valid to the constitutional limit of §3, and void beyond that sum.² The excess was easily ascertained, and divisible from the amount authorized. And though the void part could not be literally stricken out without changing the letter of the statute, it could be excluded with no less certainty and precision.

§ 173. In *United States v. Reese*,³ it was held that the power of congress to legislate at all upon the subject of voting at state elections rests upon the fifteenth amendment to the federal constitution, and can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified elector at such election is because of his race, color or previous condition of servitude. A congressional enactment not confined in its operation to unlawful discrimination on account of race, color or previous condition of servitude transcends the constitutional limit, and is unauthorized. Waite, C. J., said: "We are therefore directly called upon to decide whether a penal statute enacted by congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are

¹ 13 N. Y. 378, 425.

³ 92 U. S. 214.

² *Clark v. Ellis*, 2 Blackf. 8.

in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. . . . To limit this statute in the manner now asked would be to make a new law, not to enforce an old one. That is no part of our duty." This view has been repeatedly approved in subsequent cases.¹

¹ *United States v. Harris*, 106 U. S. 629; *Trade-mark Cases*, 100 U. S. 82; *Va. Coupon Cases*, 114 id. 305. In *Baldwin v. Franks*, 120 U. S. 678, the plaintiff had been in custody on a charge of violating an act of congress which provided for punishment of those who "in any state or territory conspire, . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws." Sec. 5519, R. S. U. S. Waite, C. J., said: "In *United States v. Harris*, *supra*, it was decided that this section was unconstitutional as a provision for the punishment of conspiracies of the character therein mentioned within a state. It is now said, however, that in that case the conspiracy charged was by persons in a state against a citizen of the United States and of the state, to deprive him of the protection he was entitled to under the laws of that state, no special rights or privileges arising under

the constitution, laws or treaties of the United States being involved; and it is argued that although the section be invalid so far as such an offense is concerned, it is good for the punishment of those who conspire to deprive aliens of the right guaranteed to them in a state by the treaties of the United States. In support of this argument reliance is had on the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional will be rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a state, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable so that it can be enforced

To be separable for the purpose of sustaining the remainder of the act, such remainder must be complete in itself and sufficient to accomplish the legislative intent without aid from the void part.¹

§ 174. **The main purpose being unconstitutional the whole act void.**—Where all the provisions of an act are connected as parts of a single scheme, the incidental provisions must fall with the failure of the main purpose.² That which is merely auxiliary to the main design must fall with the principal to which it is merely an incident.³ If only one object is aimed at, and that is unconstitutional, and all the provisions are contributory to that object, and were enacted solely for that reason, the whole act is void.⁴ An act provided for a new police district, and police justice, with exclusive jurisdiction not only of new offenses created by the same act, but of matters previously cognizable by other courts. As the creation of the new district and court were essential to accomplish the purpose of the act, and that part of it being held unconstitutional, the whole act was void.⁵ Where the entire scheme must fail because of a want of power to enact it, there can be no possible good in upholding an isolated provision which it

in a territory, though not in a state, is quite another question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens; those who conspire to deprive one of his rights under the laws of a state and those who conspire to deprive him of his rights under the constitution, laws or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

¹ *Allen v. Louisiana*, 103 U. S. 80; *People v. Porter*, 90 N. Y. 68; *Hinze v. People*, 92 Ill. 406; *Towles, Ex parte*, 48 Tex. 413; *Bittle v. Stuart*, 34 Ark. 224; *Black v. Trower*, 79 Va. 123; *State v. Duke*, 42 Tex. 455.

² *Jones v. Jones*, 104 N. Y. 234; *Black v. Trower*, 79 Va. 123.

³ *Virginia Coupon Cases*, 114 U. S. 270, 304.

⁴ *Darby v. Wilmington*, 76 N. C. 133; *Eckhart v. State*, 5 W. Va. 515.

⁵ *People v. Porter*, 90 N. Y. 68; *Reed v. Omnibus R. R. Co.* 33 Cal. 212; *Kelley v. State*, 6 Ohio St. 269; *Sumter Co. v. Gainesville Nat. Bank*, 62 Ala. 464; *State v. Chamberlin*, 37 N. J. L. 388; *Lathrop v. Mills*, 19 Cal. 513; *Dells v. Kennedy*, 49 Wis. 555; *Slinger v. Henneman*, 38 id. 504.

was, perhaps, competent for the law-giver to enact, but which is unreasonable and unjust if left to stand alone.¹

§ 175. A law is entire where each part has a general influence over the rest, and all are intended to operate together for one purpose. In such case the invalidity of that purpose will affect the whole act.² Nevertheless, if only one incidental provision is invalid, that may not render the whole act void. It is not entire in that sense.³ Where a repeal of prior laws is inserted in an act in order to the unobstructed operation of such act, and it is held unconstitutional, the incidental provision for the repeal of prior laws will fall with it.⁴ An act was passed to dissolve municipal corporations and provided the manner in which they might re-incorporate. The latter was the object of the enactment, and that being held unconstitutional the former was also invalid.⁵ In such cases the object of the legislature is frustrated; when the void part is eliminated, there is not a complete act remaining expressive of the intent of the legislature and sufficient to carry it into effect.⁶

§ 176. **Where the void part is inducement to or consideration of residue of act.**—A leading case on this subject is *Warren v. Mayor, etc.*⁷ In that case was involved the validity of a statute for the annexation of the city of Charlestown to the city of Boston. There were provisions intended to secure to the inhabitants of Charlestown certain constitutional rights of representation in the legislature until the time when they could enjoy them within the city of Boston. Some years must elapse before that time. The provisions to secure such rights during the interval were held unconstitutional, and therefore that the whole act was void. Shaw, C. J., said: "If [the parts of the act] are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue

¹ *Fant v. Gibbs*, 54 Miss. 396, 411.

State v. Commissioners, 38 N. J. L.

² *Second Municipality v. Morgan*, 1 La. Ann. 111; *Powell v. State*, 69 Ala. 10; *Towles, Ex parte*, 48 Tex. 413; *Neely v. State*, 4 Baxt. 174.

320; *Childs v. Shower*, 18 Iowa, 261. See *ante*, §§ 135, 146.

³ *State v. Stark*, 18 Fla. 255; *Quinlon v. Rogers*, 12 Mich. 168.

⁴ *Ante*, § 179.

⁵ *Towles, Ex parte*, 48 Tex. 413.

⁶ *Quinlon v. Rogers*, 12 Mich. 168;

⁷ 2 Gray, 84.

independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional and connected must fall with them." "The object of the act is the annexation; the merger of one municipality, and the enlargement of the other. This must necessarily affect the municipal and political rights of the inhabitants of both, guarantied as they are by the constitution. The legislature manifestly felt it to be their duty, in accomplishing this object, to make provision for the preservation of these constitutional rights; if this object is not effectually accomplished, we have no ground on which to infer that the legislature would have sanctioned such annexation and its consequences. The various provisions of the act, therefore, all providing for the consequences of such annexation, more or less immediate or remote, are connected and dependent; the different provisions of the act look to one object and its incidents, and are so connected with each other that, if its essential provisions are repugnant to the constitution, the entire act must be deemed unconstitutional and void." The doctrine of this case has been generally approved and acted upon.¹

§ 177. An act created an office and defined the powers and duties as well as fixed the compensation of the incumbent. The part which defined the powers and duties violated a constitutional rule of uniformity and was held void; this part being inducement to the residue fixing the compensation, the latter was held void also.² So where a statute annexed to a city certain lands lying outside of its limits, but contained a proviso that the lands so annexed should be taxed at a different and less rate than other lands in the city, and this proviso was unconstitutional, the principle under consideration was held applicable, and the act was inoperative.³ Where, however, a statute gave authority to municipalities competitively to make proposals to procure the location therein of a normal

¹ Commonwealth v. Hitchings, 5 Gray, 492; Jones v. Robbins, 8 Gray, 329, 339; State ex rel. v. Commissioners, etc. 5 Ohio St. 497; State v. Sinks, 42 Ohio St. 345; Central Branch Union P. R. Co. v. Atchison, etc. R. R. Co. 28 Kan. 453; S. C. 10 Am. & Eng. R. R. Cas. 528; Rood v. McCar-

gar, 49 Cal. 117; State v. Stark, 18 Fla. 255; Sparhawk v. Sparhawk, 116 Mass. 315, 320; People v. Cooper, 83 Ill. 585; Hinze v. People, 92 Ill. 406.

² State ex rel. v. Dousman, 28 Wis. R. Co. 28 Kan. 453; S. C. 10 Am. & Eng. R. R. Cas. 528; Rood v. McCar-

³ Slauson v. Racine, 13 Wis. 398.

school, and gave power of local taxation to carry accepted proposals into effect, the latter provision was not affected by the unconstitutionality of the appropriation made in the act, for support of such schools. The court held that by establishing the schools and inducing contributions from others, the legislature assumed the duty of supporting them; the particular provision which it has attempted to make for that purpose being objectionable, it must be assumed that the legislature will regard it as their duty to provide a substitute.¹

§ 178. The valid part must be complete and accord with legislative intent.—One part of a statute may be distinct in the text and literally separable from the rest, and yet be indissolubly connected with it in the legislative intent. The mere fact that the one part standing alone would be within the scope of the legislative power does not necessarily prove that it can be upheld when coupled with other matter. The court in *Meshmeier v. State*² uttered sound logic and sound law: “It would seem that the provisions of the statute held to be constitutional, should be substantially the same when considered by themselves as when taken in connection with the other parts of the statute held to be unconstitutional; or, in other words, where that part of a statute which is unconstitutional so limits and qualifies the remaining portion that the latter, when stripped of such unconstitutional provisions, is essentially different, in its effect and operation, from what it would be were the whole law valid, it would seem that the whole law should fall. The remaining portion of the statute, when thus stripped of its limitations and qualifications, cannot have the force of law, because it is not an expression of the legislative will. The legislature pass an entire statute, on the supposition, of course, that it is all valid and to take effect. The courts find some of its essential elements in conflict with the constitution; strip it of those elements, and leave the remaining portion mutilated and transformed into a different thing from what it was when it left the hands of the legislature. The statute thus emasculated is not the creature of the legislature; and it would be an act of legislation on the part of the court to put it in force.”

¹ *Gordon v. Cornes*, 47 N. Y. 608.

² 11 Ind. 482, 485.

§ 179. If, by striking out a void exception, proviso or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part.

An act of a general nature which the constitution required to have a uniform operation throughout the state excepted certain counties from its operation. This rendered the whole act void. After striking out the exception, if the general words gave the act operation in the excepted counties, such effect would be directly contrary to the expressed intent of the law-maker.¹ A like principle is declared in the case of *Sprague v. Thompson*.² The states were authorized by an act of congress to make regulations relative to pilots in bays, inlets, rivers, harbors and ports of the United States, but they were expressly prohibited from making any discriminations in the rate of pilotage between vessels sailing between the ports of different states, and existing regulations making such discriminations were annulled and abrogated. A statute of Georgia excepted coasters in that state and coasters between the ports of that state and those of South Carolina and Florida. The exception was held a discrimination within the prohibition, and the court said if the exception only is affected the legislature of Georgia is made to enact what confessedly it never meant, by giving the statute an operation beyond the limits specified by the legislature. The exception, therefore, could not be rejected and the remainder held valid; the whole was treated as annulled and abrogated.

§ 180. A provision which states a contingency on which the act is or is not to take effect, whether it be the result of a popular vote or some other, is not independent and separable; for the intent of the law-maker is therein expressly declared, and the statute cannot on principle take effect contrary to that intent though it be expressed in a section wholly unconstitutional.³

¹ *Kelley v. State*, 6 Ohio St. 269; *Thorne v. Cramer*, 15 Barb. 112; *State ex rel. v. Supervisors*, 62 Wis. 376, 379. See *State v. Hanger*, 5 Ark. 507; *Meshmeier v. State*, 11 Ind. 483; *Lathrop v. Mills*, 19 Cal. 513. See

² 118 U. S. 90.

³ *Barto v. Himrod*, 8 N. Y. 483; *Copeland*, 3 R. I. 33.

If the parts of a statute are so connected as to warrant the conclusion that the legislature intended them as a whole, and would not have enacted the part held valid alone, when a part is unconstitutional, they are not separable; if one part is void the whole is void.¹ This conclusion should be based upon a consideration of the act and a comparison of its effects with and without the void part, by considering the connection and relative operation of the valid and invalid provisions.² Where two provisions of a statute are so dependent upon one another that one cannot stand alone without a manifest perversion of the legislative intent, and the other is void, the whole act is void.³

¹ Eckhart v. State, 5 W. Va. 515; Childs v. Shower, 18 Iowa, 261; La- Warren v. Mayor, etc. 2 Gray, 84; throp v. Mills, 19 Cal. 513; Central Br. State v. Sinks, 42 Ohio St. 345; People Union Pac. R. R. Co. v. Atchison, etc. ex rel. v. Cooper, 83 Ill. 595; Hinze v. R. R. Co. 28 Kan. 453; S. C. 10 Am. & People, 92 id. 406, 424; State v. Pugh, Eng. R. R. Cas. 528; Moore v. New 43 Ohio St. 98; Rader v. Township Orleans, 32 La. Ann. 726; Robinson v. Union, 39 N. J. L. 509; Flanagan v. Bidwell, 22 Cal. 379. v. Plainfield, 44 id. 118, 124; State v. ² Robinson v. Bidwell, *supra*; Sum- Commissioners, 38 id. 320; Western ter Co. v. Gainesville Nat. Bank, 62 Union Tel. Co. v. State, 62 Tex. 630; Ala. 464. S. C. 13 Am. & Eng. Corp. C. 396; ³ Burkholz v. State, 16 Lea, 71.

CHAPTER X.

JUDICIAL NOTICE AND PROOF OF STATUTES, AND THEIR AUTHORITY EXPOSITION.

<p>§ 181. Judicial notice of statutes.</p> <p>185. State statutes in federal courts.</p> <p>188. Foreign statutes, how proved.</p>	<p>§ 192. Functions of court and jury in respect of foreign laws proved.</p> <p>193. Private statutes.</p>
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§ 181. **Judicial notice of statutes.**— Courts of justice take official notice of public statutes and the general jurisprudence of the state under whose authority they act. They judicially know the origin and history of that jurisprudence, and all the facts which affect its derivation, validity, commencement and operation.¹ A state court will take notice of the federal constitution and amendments to it² and the public acts of congress.³ The courts of a state carved out of the territory of another take judicial notice of the statutes of the old state in force up to the time of the separation.⁴ The states formed from territory ceded by Spain will take notice of the Spanish law existing prior to the cession affecting rights and titles then in being.⁵

¹ *People v. Mahaney*, 13 Mich. 481; *Neeves v. Burrage*, 14 Ad. & El. (N. S.) Town of South Ottawa v. Perkins, 94 U. S. 260; *Post v. Supervisors*, 105 id. 504.
² *Graves v. Keaton*, 3 Cold. 8.
³ *Dickenson v. Breeden*, 30 Ill. 279; *Gooding v. Morgan*, 70 id. 275; *Papin v. Ryan*, 32 Mo. 21; *Kessel v. Albetis*, 56 Barb. 362; *Semple v. Hagar*, 27 Cal. 163; *Rice's Succession*, 21 La. Ann. 614; *Morris v. Davidson*, 49 Ga. 361; *Flanigen v. Washington Ins. Co.* 7 Pa. St. 306; *Bayly v. Chubb*, 16 Gratt. 284.
⁴ *Delano v. Jopling*, 1 Litt. 417; *Berluchaux v. Berluchaux*, 7 La. 539.
⁵ *United States v. Turner*, 11 How. 663, 668; *United States v. King*, 7 id. 883; *United States v. Philadelphia*

§ 182. The courts will inform themselves of facts which may affect a statute; for example, the precise time when it was approved, to determine its existence, commencement or any other fact for like purpose.¹ They will take notice of the terms in which an act was passed, though they differ from those of the officially published statutes.² No issue by pleading can be made by the parties involving such facts to be tried by evidence.³ The judges make the proper inquiry to inform themselves in the best way they can. An eminent jurist says: "An act of parliament, made within the time of memory, loses not its being so because not extant of record, especially if it be a general act of parliament. For of the general acts of parliament the courts of common law are to take notice without pleading them. And such acts shall never be put to be tried by the record upon an issue of *nul tiel record*, but shall be tried by the court, who, if there be any difficulty or uncertainty touching it, or the right of pleading it, are to use for their information ancient copies, transcripts, books, pleadings and memorials to inform themselves, but not to admit the same to be put in issue by a plea of *nul tiel record*. For, as shall be shown hereafter, there are many old statutes which are admitted and obtain as such, though there be no record at this day extant thereof; nor yet any other written evidence of the same, but which is in a manner only traditional, as namely, ancient and modern books of pleading and the common received opinion and reputation and approbation of the judges learned in the law."⁴

§ 183. In this country the inquiry may have more range; the existence or validity of statutes, under constitutions, will depend on a grèater variety of facts open to investigation. While the constitution or a statute may provide what shall be

11 id. 609; *Arguello v. United States*, 18 id. 550; *Fremont v. United States*, 17 id. 542; *Chouteau v. Pierre*, 9 Mo. 3; *Ott v. Soulard*, id. 581; *Doe v. Es-lava*, 11 Ala. 1028.

¹ *Gardner v. The Collector*, 6 Wall. 499; *Louisville v. Savings Bank*, 104 U. S. 469; *Cargo of Brig Aurora v. United States*, 7 Cranch, 382; *Lapeyre v. United States*, 17 Wall. 191; *Ken-*

nedy v. Palmer, 6 Gray, 316; *Burgess v. Salmon*, 97 U. S. 381; *ante*, § 110.

² *Gardner v. The Collector*, *supra*: *Purdy v. People*, 4 Hill, 384; *De Bow v. People*, 1 Denio, 14; *State v. Platt*, 2 S. C. 150; *Brady v. West*, 50 Miss. 63.

³ *Town of South Ottawa v. Perkins*, 94 U. S. 260.

⁴ *Hale's His. Com. L.* 14, 16.

conclusive evidence,¹ the inquiry is not generally so restricted, and the general principle governs that record or constitutional evidence must be adduced to impeach a statute the record of which is fair on its face.² Where the purpose is not to invalidate the statute, but to give it effect, to ascertain the fact on which the taking effect depends, or to ascertain the time more precisely than appears by the record, any source of information which is capable of conveying to the judicial mind a clear and satisfactory answer is available.³ Extraneous facts relating to the subject of a statute fair on its face, or the procedure to enact it, will not be considered for the purpose of overturning it for some infraction of the constitution, unless a statute or the constitution itself has provided for such proof.⁴ In the absence of such provisions, a court cannot resort to the legislative rolls and journals for the purpose of examining as to whether the bill as passed is the same as the bill certified;⁵ nor for the purpose of determining whether the statute passed in conformity with the rules adopted by the legislature for its own government.⁶ It cannot resort to extrinsic evidence to show that the certified and published law actually passed.⁷

§ 184. The written law of a state embraces as well the statutes in force at the time of its organization, and not in conflict with its constitution, as those subsequently enacted.⁸ The laws of England, written and unwritten, or, as it has been other-

¹ *Town of South Ottawa v. Perkins*, 94 U. S. 260.

² *English v. Oliver*, 28 Ark. 317; *Worthen v. Badgett*, 32 id. 496; *State v. Swift*, 10 Nev. 176; *State v. Hastings*, 24 Minn. 78; *Larrison v. Peoria*, etc. R. R. Co. 77 Ill. 11; *Pangborn v. Young*, 32 N. J. L. 29; *Legg v. Mayor*, etc. 42 Md. 203, 224; *State v. County of Dorsey*, 28 Ark. 378; *Wall, Ex parte*, 48 Cal. 279; *Happel v. Brethauer*, 70 Ill. 166; *Rumsey v. People*, 19 N. Y. 48; *De Camp v. Eveland*, 19 Barb. 88; *Lanning v. Carpenter*, 20 N. Y. 447; *Duncombe v. Prindle*, 12 Iowa, 1; *Lusher v. Scites*, 4 W. Va. 11. See *Bradley v. Commissioners*, 2 Humph. 428; *Ford v. Farmer*, 9 id. 152.

³ *Wells v. Bright*, 4 Dev. & Batt. L.

173; *Louisville v. Savings Bank*, 104 U. S. 469; *Gardner v. The Collector*, 6 Wall. 499.

⁴ *Ante*, § 28; *Matter of Church*, 28 Hun, 476; *Matter of New York Elevated R. R. Co.* 70 N. Y. 327, 351; *South Ottawa v. Perkins*, 94 U. S. 260.

⁵ *Pangborn v. Young*, 32 N. J. L. 29; *Sherman v. Story*, 30 Cal. 253; *Coleman v. Dobbins*, 8 Ind. 156; *Grob v. Cushman*, 45 Ill. 119; *Green v. Welles*, 32 Miss. 650; 1 Whart. on Ev. § 290.

⁶ *Id.*

⁷ *Mayor, etc. v. Harwood*, 32 Md. 471.

⁸ *American Ins. Co. v. Canter*, 1 Pet. 511; *Brice v. State*, 2 Overt. 254; *Egnew v. Cochrane*, 2 Head, 320; *Lee v. King*, 21 Tex. 577.

wise expressed, the common law and all the statutes of parliament in aid of the common law, in force at the time of the emigration to this country, were brought hither by the emigrants who first settled the original colonies, as a birthright, so far as those laws were suitable to the circumstances and conditions which existed in the new country.¹ To them they were unwritten laws. Subsequent acts of parliament did not affect the colonies unless named or the acts related to the prerogatives of the crown.²

In states formed from colonies settled by Englishmen, and in those which are shown to have adopted the common law by statute or constitution, it will be presumed to continue as a system of jurisprudence. And recognizing its existence in another state, the court will take notice of its principles,³ but not of any peculiarities, exceptional in the foreign state and divergent from the law of the court. On principle, the courts

¹ 2 P. Wms. 75; *Blankard v. Galdy*, 2 Salk. 411; *Scott v. Lunt's Adm'r*, 7 Pet. 603; *Commonwealth v. Knowlton*, 2 Mass. 534; *O'Ferrall v. Simplot*, 4 Iowa, 400; *Dodge v. Williams*, 46 Wis. 92; *Gardner v. Cole*, 21 Iowa, 205; *Williams v. Williams*, 8 N. Y. 541; *Calloway v. Willie's Lessee*, 2 Yerg. 1; *Clawson v. Primrose*, 4 Del. Ch. 643, 652; *Stump v. Napier*, 2 Yerg. 35; *Carter v. Balfour*, 19 Ala. 814; *Horton v. Sledge*, 29 id. 478; *Nelson v. McCrary*, 60 id. 301; *McCorry v. King*, 3 Humph. 267; *Webster v. Morris*, 66 Wis. 366; *Coburn v. Harvey*, 18 id. 147; *Sackett v. Sackett*, 8 Pick. 309; *Bruce v. Wood*, 1 Met. 542; *Commonwealth v. Churchill*, 2 id. 123; *Stout v. Keyes*, 2 Doug. (Mich.) 184; *Powell v. Brandon*, 24 Miss. 363; *Jacob v. State*, 3 Humph. 493; *Griffith v. Beasley*, 10 Yerg. 434; *Drew v. Wakefield*, 54 Me. 291; *Pemble v. Clifford*, 2 McCord, 31; *Gough v. Pratt*, 9 Md. 526; *Canal Com'rs v. People*, 5 Wend. 445; *Fowler v. Stoneum*, 11 Tex. 478; *Boehm v. Engle*, 1 Dall. 15; *Ayres v. Methodist Ch. etc.*

3 Sa. df. 368; *Attorney-Gen. v. Stewart*, 2 Meriv. 162; *Van Ness v. Pacard*, 2 Pet. 137; *Tappan v. Campbell*, 9 Yerg. 436; *Cathcart v. Robinson*, 5 Pet. 280.

² *Matthews v. Ansley*, 31 Ala. 20; *Carter v. Balfour*, 19 id. 829; *McKineron v. Bliss*, 31 Barb. 180; *Sackett v. Sackett*, 8 Pick. 309; *Commonwealth v. Knowlton*, 2 Mass. 534; *Porter's Lessee v. Cocke, Peck*, 30; *Preston v. Surgoine*, id. 80; *Chapron v. Cassaday*, 3 Humph. 661; *Rolfe v. McComb*, 2 Head, 558; *Smith v. Mitchell, Rice*, 316; *Stokes v. Macken*, 62 Barb. 145.

³ *Cressey v. Tatom*, 9 Or. 542; *Goodwin v. Morris*, id. 322; *Norris v. Harris*, 15 Cal. 226; *Wallace v. Burden*, 17 Tex. 467; *Vardeman v. Lawson*, id. 10; *Holmes v. Broughton*, 10 Wend. 75; 1 Whart. on Ev. § 314; *McDeed v. McDeed*, 67 Ill. 545; *Kingsley v. Kingsley*, 20 id. 203; *Abel v. Douglass*, 4 Denio, 305; *Andrews v. Hoxie*, 5 Tex. 171; *Titus v. Scantling*, 4 Blackf. 89; *Smith v. Bartram*, 11 Ohio St. 691.

of one state cannot presume the existence of any other law in another state. The circumstance that a written law modifying or supplementing the common law has been enacted in the state where the court sits is no evidence that a like statute has been passed in another state.¹ It has, however, often been decided that where a case or defense depends on the law of another state, and that law has not been proved, the court will presume it to be the same as that which is in force in its own jurisdiction.² If this were the common law the presumption would be natural, logical, legal,³ but the cases are not so confined; the presumption is applied literally and comprehensively.⁴ The result would be the same and its basis would be more satisfactory if the principle were formulated thus: the law

¹ *Kermott v. Ayer*, 11 Mich. 181; *Ellis v. Maxson*, 19 id. 186.

² *Territt v. Woodruff*, 19 Vt. 182; *Pauska v. Daus*, 31 Tex. 67; *McDonald v. Myles*, 12 Sm. & M. 279; *Harris v. Allnutt*, 12 La. 465; *Mason v. Mason's Widow*, id. 589; *Dwight v. Richardson*, 12 Sm. & M. 325; *Bemis v. McKenzie*, 13 Fla. 553; *Holley v. Holley*, Lit. Sel. Cas. 505; *Selking v. Hebel*, 1 Mo. App. 340; *Paget v. Curtis*, 15 La. Ann. 451; *Nalle v. Ventress*, 19 id. 373; *Allen v. Watson*, 2 Hill (S. C.), 319; *Desnoyer v. McDonald*, 4 Minn. 515; *Whidden v. Seelye*, 40 Me. 247; *Thurston v. Percival*, 1 Pick. 415; *Fouke v. Fleming*, 13 Md. 392, 407; *Surlott v. Pratt*, 3 A. K. Marsh. 174; *Thomas v. Beckman*, 1 B. Mon. 29, 34; *Prince v. Lamb*, Breese, 378; *Leavenworth v. Brockway*, 2 Hill, 201; *Crozier v. Hodges*, 3 La. 357; *Hall v. Woodson*, 13 Mo. 462; *Lougee v. Washburn*, 16 N. H. 134; *Stokes v. Macken*, 62 Barb. 145; *Langdon v. Young*, 33 Vt. 136; *Chase v. Ins. Co.* 9 Allen, 311; *Cluff v. Ins. Co.* 13 id. 308; *Conolly v. Riley*, 25 Md. 402; *Green v. Rugely*, 23 Tex. 539; *Hall v. Pillow*, 31 Ark. 32; *Hyd-*

rick v. Burke, 30 id. 124; *Warren v. Lusk*, 16 Mo. 102; *Houghtailing v. Ball*, 19 Mo. 84; *Lucas v. Ladew*, 28 id. 342; *Robinson v. Dauchy*, 3 Barb. 20; *Pomeroy v. Ainsworth*, 22 id. 118; *Huth v. Ins. Co.* 8 Bosw. 538; *Wright v. Delafield*, 23 Barb. 498; *Bradley v. Ins. Co.* 3 Lans. 341; *Savage v. O'Neil*, 44 N. Y. 298; *Smith v. Smith*, 19 Gratt. 545; *Bean v. Briggs*, 4 Iowa, 464; *Crafts v. Clark*, 38 Iowa, 237; *Crake v. Crake*, 18 Ind. 156; *Davis v. Rogers*, 14 Ind. 424; *Crane v. Hardy*, 1 Mich. 56; *Ellis v. Maxson*, 19 id. 186; *Cooper v. Reaney*, 4 Minn. 528; *Brimhall v. Van Campen*, 8 id. 13; *Rape v. Heaton*, 9 Wis. 328; *Walsh v. Dart*, 12 Wis. 635; *State v. Patterson*, 2 Ired. L. 346; *Atkinson v. Atkinson*, 15 La. Ann. 491; *Hickman v. Alpaugh*, 21 Cal. 225; *Hill v. Grigsby*, 32 Cal. 55; *Mostyn v. Fabrigas*, 1 Cowper, 174; *Smith v. Gould*, 4 Moore, P. C. 21; *State v. Cross*, 68 Iowa, 180; *Van Wyck v. Hills*, 4 Rob. 140; *Phila. Bank v. Lambeth*, 4 Rob. 463.

³ See *Diez*, In re, 56 Barb. 591; *Lockwood v. Crawford*, 18 Conn. 361.

⁴ Id.

In *Monroe v. Douglass*,² Foot, J., speaking for the court of appeals, said: "It is a well-settled rule, founded on reason and authority, that the *lex fori*, or, in other words, the laws of the country to whose courts a party appeals for redress, furnish, in all cases, *prima facie*, the rule of decision; and if either party wishes the benefit of a different rule of law, as, for instance, the *lex domicilii*, *lex loci contractus*, or the *lex rei sitæ*, he must aver and prove it."³

¹ See *O'Rourke v. O'Rourke*, 43 Mich. 58; *Martin v. Martin*, 1 Sm. & M. 176; *Bock v. Lauman*, 24 Pa. St. 435; *Peacock v. Banks*, Minor (Ala.), 387; *Williams v. Wade*, 1 Met. 82; *Greenwade v. Greenwade*, 3 Dana, 495; *McDonald v. Myles*, 12 S. & M. 279; *Story's Conf. L.* (7th ed.) § 637a; *Monroe v. Douglass*, 5 N. Y. 447; *Bean v. Briggs*, 4 Iowa, 464; *Sayre v. Wheeler*, 32 Iowa, 559; *Allen v. Watson*, 2 Hill (S. C.), 319; *Woodrow v. O'Conner*, 28 Vt. 776; *Whidden v. Seelye*, 40 Me. 247; *Stokes v. Macken*, 62 Barb. 145; *Bristow v. Sequeville*, 5 Ex. 275, 279; *Lide v. Parker*, 60 Ala. 165.

² 5 N. Y. 447, 452.

³ *Norris v. Harris*, 15 Cal. 254; *Greenwade v. Greenwade*, 3 Dana, 497; *Tarleton v. Briscoe*, 4 Bibb, 73; *Thurston v. Percival*, 1 Pick. 415.

⁴ Sec. 34, Judiciary Act 1789, 1 Stat. at Large, 92; sec. 721, R. S. U. S.

¹ See *O'Rourke v. O'Rourke*, 43 Mich. 58; *Martin v. Martin*, 1 Sm. & M. 176; *Bock v. Lauman*, 24 Pa. St. 435; *Peacock v. Banks, Minor* (Ala.), 387; *Williams v. Wade*, 1 Met. 82; *Greenwade v. Greenwade*, 3 Dana, 495; *McDonald v. Myles*, 12 S. & M. 279; *Story's Conf. L.* (7th ed.) § 637a; *Monroe v. Douglass*, 5 N. Y. 447; *Bean v. Briggs*, 4 Iowa, 464; *Sayre v. Wheeler*, 32 Iowa, 559; *Allen v. Watson*, 2 Hill (S. C.), 319; *Woodrow v. O'Conner*, 28 Vt. 776; *Whidden v. Seelye*, 40 Me. 247; *Stokes v. Macken*, 62 Barb. 145; *Bristow v. Sequeville*, 5 Ex. 275, 279; *Lide v. Parker*, 60 Ala. 165.

² 5 N. Y. 447, 452.

³ *Norris v. Harris*, 15 Cal. 254; *Greenwade v. Greenwade*, 3 Dana, 497; *Tarleton v. Briscoe*, 4 Bibb, 73; *Thurston v. Percival*, 1 Pick. 415.

⁴ Sec. 34, Judiciary Act 1789, 1 Stat. at Large, 92; sec. 721, R. S. U. S.

country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts.¹ The relation in which the circuit courts of the United States stand to the states in which they respectively sit and act is precisely that of their own courts as to the rules of decision.² A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality.³ The law of any state of the Union, whether depending upon statutes or upon opinions, is a matter of which the courts of the United States are bound to take notice without plea or proof.⁴ It thus appears that the courts of the United States have jurisdiction to administer a jurisprudence not wholly nor chiefly within the domain of congress. They administer between the proper parties the jurisprudence of the states. They are governed like the state courts by the valid statutes of the state. Where no federal question is involved, they follow the decisions of the highest court of the state in its construction of its own constitution or other written laws.⁵

¹ *Owings v. Hull*, 9 Pet. 607, 624; *Bennett v. Bennett*, Deady, 309, 311; *Pennington v. Gibson*, 16 How. 65, 81; *Railroad Co. v. Bank of Ashland*, 12 Wall. 229; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227; *Elwood v. Flannigan*, 104 U. S. 568; *Course v. Stead*, 4 Dall. 27, n.; *Cheever v. Wilson*, 9 Wall. 108; *Griffling v. Gibb*, 2 Black, 519; *Jones v. Hayes*, 4 McLean, 521; *Gordon v. Hobart*, 2 Sumner, 401; *Mewster v. Spalding*, 6 McLean, 24; *Smith v. Tallapoosa*, 2 Woods, 574; *Merrill v. Dawson*, *Hempst*, 563; *Woodworth v. Spaffords*, 2 McLean, 168; *Bird v. Commonwealth*, 21 Gratt. 800; *Gormley v. Clark*, 134 U. S. 338; *Case v. Kelly*, 133 id. 21; *Louisville, etc. R. R. Co. v. Mississippi*, id. 587; *Peters v. Bain*, id. 670.

² *Lessee of Livingston v. Moore*, 7 Pet. 469, 542.

³ *McNiell, Ex parte*, 13 Wall. 236, 243; *Clark v. Smith*, 13 Pet. 195; *McNiell v. Holbrook*, 12 Pet. 84; *Partidge v. The Ins. Co.* 15 Wall. 573, 580; *Lorman v. Clarke*, 2 McLean, 568.

⁴ *Lamar v. Micou*, 114 U. S. 218, 223; *Hanley v. Donoghue*, 116 id. 6.

⁵ *Township of Elmwood v. Marcy*, 92 U. S. 289; *Allen v. Massey*, 17 Wall. 354; *Leffingwell v. Warren*, 2 Black, 599; *Townsend v. Todd*, 91 U. S. 452; *Tioga R. R. Co. v. Blossburg, etc. R. R. Co.* 20 Wall. 137; *Harpending v. Dutch Church*, 16 Pet. 493; *Supervisors v. United States*, 18 Wall. 71, 81; *Gut v. State*, 9 id. 35; *Gelpeke v. Dubuque*, 1 id. 175; *Christy v. Pridgeon*, 4 id. 196; *Adams v. Nashville*, 95 U. S. 19; *Peik v. Chicago, etc. R. Co.* 94 id. 164; *Stone v. Wisconsin*, id. 181; *Shelby v. Guy*, 11 Wheat. 361; *Smith v. Kernochen*, 7 How. 198; *De Wolf v. Rabaud*, 1 Pet.

§ 186. Marshall, C. J., has thus defined comprehensively the primary authority to interpret laws: "This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on principles supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the constitution or treaties of the United States."¹

The federal courts will follow the latest settled adjudications.² They are called on to administer the laws of the states, and the states are not politically foreign to each other, though there is no connection between them in legislation; therefore those courts take notice of state laws when they are officially published, and only when they are found in the official statute books of the state.³

479; *King v. Wilson*, 1 Dill. 555; *Union Horse Shoe Works v. Lewis*, 1 Abb. (U. S.) 518; *Coates v. Muse*, 1 Brock. 539; *Newman v. Keffer*, 1 Brunner, Col. Cas. 502. *v. Viles*, 2 id. 675; *McCluney v. Silliman*, 3 id. 270; *United States v. Morrison*, 4 id. 124; *City of Richmond v. Smith*, 15 Wall. 429; *Shelby v. Guy*, 11 Wheat. 367.

¹ *Elmendorf v. Taylor*, 10 Wheat. 152, 159; *Harpending v. Dutch Church*, 16 Pet. 493; *Bell v. Morrison*, 1 Pet. 351; *D'Wolf v. Rabaud*, id. 479; *Beach*

² *Leffingwell v. Warren*, 2 Black, 599; *Gelpcke v. Dubuque*, 1 Wall. 175; *Kountze v. Omaha*, 5 Dill. 443. ³ *Ennis v. Smith*, 14 How. 400, 429.

§ 187. They adopt the local law of real property as ascertained by the decisions of the state courts, whether those decisions are grounded on the interpretation of statutes, or on unwritten law which has become a fixed rule of property in the state.¹ The power of the state to regulate the tenure of real property within her limits and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which testamentary disposition may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. The power of the state in this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the federal government. The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority.²

§ 188. **Foreign statutes, how proved.**—Though statutes have no extraterritorial operation, yet, by comity, foreign laws are recognized everywhere when shown for certain purposes; they materially affect the *status* and rights of persons born, married, divorced or domiciled; of persons who have entered into contracts, or have suffered wrong in the country where they are in force, for various purpose not necessary here to enumerate.³

¹Jackson v. Chew, 12 Wheat. 153, 167; M'Keen v. Delancy's Lessee, 5 Cr. 32; Polk's Lessee v. Wendall, 9 Cr. 98; Thatcher v. Powell, 6 Wheat. 119, 127; Daly v. James, 8 id. 535; Ross v. M'Lung, 6 Pet. 283, 285; Green v. Lessee of Neal, 6 id. 291; Henderson v. Griffin, 5 id. 151; Inglis v. The Trustees, etc. 3 Pet. 99, 127; Davis v. Mason, 1 Pet. 503; Waring v. Jackson, id. 570; Nichols v. Levy, 5 Wall. 433; United States v. Fox, 94 U. S. 315; Van Rensselaer v. Kear-

ney, 11 How. 297; Porterfield v. Clark, 2 How. 76; Barker v. Jackson. 1 Paine, 559; Gormley v. Clark, 134 U. S. 338. See Amy v. Watertown (No. 1), 130 id. 301.

²United States v. Fox, 94 U. S. 315; McCormick v. Sullivan, 10 Wheat. 202.

³Story, Conf. L. §§ 17-38; Beard v. Basye, 7 B. Mon. 144; Whart. Conf. L. ch. V; Heirn v. Bridault, 37 Miss. 209; Edgerly v. Bush, 81 N. Y. 199; Trasher v. Everhart, 3 Gill & J

§ 189. Foreign laws are taken into consideration on the principles of international law. All laws are foreign to every country in which they do not operate of their own vigor; they are foreign to every country or state lying outside of the territorial jurisdiction of the law-maker. The states of the American Union are foreign to each other in their legislation.¹ The principles of international law, however, apply with greater force between the people of the several states than between the subjects of foreign nations.²

The dismemberment or conquest of the enacting state will not render the laws in force foreign after the transfer to a new sovereign or jurisdiction.³

§ 190. Foreign statutes have to be proved as matter of fact.⁴ This follows necessarily from the court not taking judicial notice of them, and from their having effect only by comity on the principles of the common law.⁵ Statutes are records, and by the common law have to be proved as such by an examined and sworn copy, or by exemplification.⁶ The public seal of a state, affixed to the exemplification of a law, proves

234; *Dennick v. Central R. R. Co.* 103 U. S. 11; *Kline v. Baker*, 99 Mass. 253; *Mitchell v. Wells*, 37 Miss. 235.

¹ *Brackett v. Norton*, 4 Conn. 517.

² *Shaw v. Brown*, 35 Miss. 246.

³ *Stokes v. Macken*, 62 Barb. 145; *State v. Patterson*, 2 Ired. L. 346; *Prell v. McDonald*, 7 Kan. 426; *Calkin v. Cocke*, 14 How. 227; *Fremont v. United States*, 17 How. 542, 557; *Brice v. State*, 2 Overt. 254; *Egnew v. Cochrane*, 2 Head, 329; *Doe v. Es-lava*, 11 Ala. 1028; *Cucullu v. Louisiana Ins. Co.* 5 Mart. (N. S.) (La.) 613; *United States v. Turner*, 11 How. 663.

⁴ *McKenzie v. Wardwell*, 61 Me. 136; *Kline v. Baker*, 99 Mass. 253; *Brackett v. Norton*, 4 Conn. 517; *Dyer v. Smith*, 12 id. 384; *Lockwood v. Crawford*, 18 id. 361; *Brush v. Scribner*, 11 id. 407; *Tuten v. Gazan*, 18 Fla. 751; *Consequa v. Willings*, 1 Pet. C. C. 225, 229; *Owen v. Boyle*, 15 Me. 147; *Charlotte v. Chouteau*, 33 Mo. 194; *Diez, In re*, 56 Barb. 591; *Bryant v.*

Kelton, 1 Tex. 434; *Hazelton v. Valentine*, 113 Mass. 472; *Ely v. James*, 123 id. 36; *Trasher v. Everhart*, 3 Gill & J. 234; *Bock v. Lauman*, 24 Pa. St. 435; *Ingraham v. Hart*, 11 Ohio, 255; *Cecil Bank v. Barry*, 20 Md. 287; *Hemphill v. Bank of Ala.* 6 S. & M. 44; *Harris v. White*, 81 N. Y. 532; *Holmes v. Broughton*, 10 Wend. 75.

⁵ *Bock v. Lauman*, 24 Pa. St. 435, 445.

⁶ 1 Whart. Ev. §§ 94, 95, 309; *Story's Conf. L.* § 641; *Bailey v. McDowell*, 2 Harr. 34; *Church v. Hubbard*, 2 Cranch, 237; *Stewart v. Swanzy*, 23 Miss. 502; *Warner v. Commonwealth*, 2 Va. Cas. 95; *Owen v. Boyle*, 15 Me. 147; *Lincoln v. Battelle*, 6 Wend. 475; *Zimmerman v. Helser*, 32 Md. 274; *Ennis v. Smith*, 14 How. 400; 426-429; *Lacon v. Higgins*, 3 Stark. 178; *Jones v. Maffet*, 5 S. & R. 523; *Baltimore, etc. R. R. Co. v. Glenn*, 28 Md. 287.

itself. It is a matter of notoriety, and will be taken notice of as part of the law of nations acknowledged by all.¹

The proof should be made on the trial; foreign statutes cannot be first produced in the appellate court.² Foreign laws which have been promulgated as such by our government,³ or officially procured pursuant to statute for judicial reference or evidentiary purposes,⁴ may be read in evidence without other verification. A printed volume of foreign laws proved by witnesses to contain the statutes of a foreign state or country, or to have received in the home country the sanction of the executive and judicial officers as containing its laws, is admissible.⁵ The proof of foreign laws has been facilitated by statutes in the different states by making publications purporting to be by authority self-proving.⁶ Congress has provided a mode of proof,⁷ and such proof is sufficient though the state statute may require more,⁸ but it is not exclusive of other methods.⁹

In *Taylor v. Bank of Illinois*¹⁰ the court reached the conclusion in which the authorities generally agree: "if certified according to the act of congress they *must* be admitted, and if certified or authenticated according to state provisions they

¹ *Robinson v. Gilman*, 20 Me. 299; 447; *Dalrymple v. Dalrymple*, 2 Hagg. Lincoln v. Battelle, 6 Wend. 475; Consist. R. 81; *Jones v. Maffet*, 5 S. & Norris Peake (ed. 1824 from 5th London ed. 109, 110, note); *Henry v. Adey*, 3 East, 222; *U. S. v. Johns*, 4 Dall. 412, 416.

² *Munroe v. Guillaume*, 3 Keyes, 30; *Belleville S. Bank v. Richardi*, 56 Mich. 453.

³ *Talbot v. Seeman*, 1 Cranch, 88; *Flanigen v. Washington Ins. Co.* 7 Pa. St. 306.

⁴ *Cox v. Robinson*, 2 Stew. & Port. 96; *Biddis v. James*, 6 Binn. 321; *Munroe v. Guillaume*, 3 Keyes, 30.

⁵ *Owen v. Boyle*, 15 Me. 147; *Burton v. Anderson*, 1 Tex. 93; *Lacon v. Higgins*, 3 Stark. 178; *Herschfeld v. Dixel*, 12 Ga. 582; *Emery v. Berry*, 28 N. H. 486; *Foster v. Taylor*, 2 Overt. 190; *Sussex Peerage Case*, 11 Cl. & Fin. 85; *Barrows v. Downs*, 9 R. L.

⁶ *Cummins v. State*, 12 Tex. App. 121; *Ellis v. Wiley*, 17 Tex. 134; *May v. Jameson*, 11 Ark. 368; *Dixon v. Thatcher*, 14 id. 141; *Foster v. Taylor*, 2 Overt. 190; *Allen v. Watson*, 2 Hill (S. C.), 319; *Smoot v. Fitzhugh*, 9 Port. 72; *Clanton v. Barnes*, 50 Ala. 260; *Biddis v. James*, 6 Binn. 321.

⁷ Sec. 905, R. S. U. S.

⁸ *Ansley v. Meikle*, 81 Ind. 260; *Uhler v. Semple*, 20 N. J. Eq. 288.

⁹ *Poindexter v. Barker*, 2 Hayw. 173; *Thompson v. Musser*, 1 Dall. 402; *Hanrick v. Andrews*, 9 Port. 9; *Smoot v. Fitzhugh*, 9 Port. 72; *Wilson v. Smith*, 5 Yerg. 379.

¹⁰ 7 T. B. Mon. 576. But see *State v. Twitty*, 2 Hawkes, 441.

may be admitted without contravening the laws of the Union." The foreign unwritten law, and the construction of statutes, may be proved by parol—by expert witnesses.¹

§ 191. A decision of the highest judicial tribunal of a foreign state construing one of its statutes is to be received elsewhere as an authoritative exposition. Nor is its weight or authority affected by the fact that it was made after the occurrence of the transaction in question, or after the departure from the state of the person affected by it.²

§ 192. **The functions of the court and jury in regard to foreign laws.**—Foreign statutes, though to be proved as facts, do not necessarily require a jury to determine the question of their existence.³ If proved by a sworn copy, doubtless the

¹ Walker v. Forbes, 31 Ala. 9; Dyer v. Smith, 12 Conn. 384; People v. Calder, 30 Mich. 85; People v. Lambert, 5 id. 349; Consolidated, etc. Co. v. Cashow, 41 Md. 59; 1 Whart. on Ev. §§ 305-308; Roberts' Will, Matter of, 8 Paige, 446; Vander Donckt v. Thelluson, 8 C. B. 812; Merrifield v. Robbins, 8 Gray, 150; Woodstock v. Hooker, 6 Conn. 35; Hale v. N. J. St. Nav. Co. 15 id. 539; Emery v. Berry, 28 N. H. 453; Bristow v. Sequeville, 5 Exch. 275; Kenny v. Clarkson, 1 John. 385; Tyler v. Trabue, 8 B. Mon. 306; Baltimore, etc. R. R. Co. v. Glenn, 28 Md. 287; Wilson v. Carson, 12 id. 54.

² Bloodgood v. Grasey, 31 Ala. 575; Elmendorf v. Taylor, 10 Wheat. 152; Shelby v. Guy, 11 id. 367; McRae v. Mattoon, 13 Pick. 53; Sidney v. White, 12 Ala. 728; Raynham v. Canton, 3 Pick. 293; Mutual Ass. Society v. Watts, 1 Wheat. 279; Polk v. Wendal, 9 Cr. 87; Penobscot R. R. v. Bartlett, 12 Gray, 244; Cragin v. Lamkin, 7 Allen, 395; Blanchard v. Russell, 13 Mass. 1; Botanic Med. College v. Atchinson, 41 Miss. 188; Saul v. His Creditors, 5 Martin (N. S.), 569; McKeen v. De Lancy, 5 Cr. 22; Gardner v. Collins, 2 Pet. 85; United States

v. Morrison, 4 Pet. 124; Cathcart v. Robinson, 5 Pet. 264; Green v. Neal, 6 Pet. 291; Walker v. Forbes, 31 Ala. 9; Davidson v. Sharpe, 6 Ired. 14; Inge v. Murphy, 10 Ala. 885; Peake v. Yeldell, 17 Ala. 636; Hanrick v. Andrews, 9 Port. 9; American P. W. v. Lawrence, 23 N. J. L. 590; Johnston v. Bank, 3 Strob. Eq. 263; Powell v. De Blanc, 23 Tex. 66. See Peck v. Pease, 5 McLean, 486; Dwight v. Richardson, 12 S. & M. 325; Humphreyville Cop. Co. v. Sterling, 1 Brun. Col. Cas. 3.

³ Bock v. Lauman, 24 Pa. St. 435. Lowrie, J., said: "Are we excluded from looking at the laws of another state where they have not been found as a matter of fact? We think not. The rule of international law, shortly expressed in the maxim *locus regit actum*, is a part of our law, and it requires us to go abroad for the law by which the efficacy of this contract is to be tested. That rule acquired an increase of sanction by the union of the states; it is involved in the constitutional declaration that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state;" it receives at least a partial expression in the judiciary act of 1789, section

evidence would go to a jury.¹ But if proved by an exemplification, or by reading from a book published by authority, the court would decide not only the admissibility but the effect of the proof.² The home construction of a foreign statute is provable by parol, and if so proved as a fact, is to be found by a jury.³ The published official reports of decisions showing such home construction are held to be admissible evidence.⁴ When the evidence admitted consists entirely of a statute or judicial opinions, the question of construction and effect is for the court alone.⁵ If a foreign statute be proved, but no evidence given of any peculiar home construction, the court will construe it by the settled rules of construction, or as similar statutes of the state where the court sits are construed.⁶

34, declaring that the laws of the several states should be taken as rules of decision in the United States courts in cases where they apply; and many clauses of the constitution cannot have their full effect as laws unless we take judicial notice of the institutions of sister states.

"It is commonly said that foreign law is matter of fact, and so generally it is, but not necessarily to be found by the jury. If a state law comes to us certified under the seal of the state, it comes to us as a fact in the first instance; but then we need no jury to establish its existence and its character. There may very often be cases in which a jury is necessary for this purpose, but our knowledge is not necessarily dependent on their verdict." See *Barkman v. Hopkins*, 6 Eng. (Ark.) 157.

¹ Id.

² Id.; *Willard v. Conduit*, 10 Tex. 213.

³ *Kline v. Baker*, 99 Mass. 253; *Holman v. King*, 7 Met. 384; *Dyer v. Smith*, 12 Conn. 384; *Moore v. Gwynn*, 5 Ired. 187; *Ingraham v. Hart*, 11 Ohio, 255; *Baltimore, etc. R. R. Co. v. Glenn*, 28 Md. 323; *Consolidated, etc. Co. v. Cashow*, 41 id. 60; *Wilson v.*

Carson, 12 id. 54; *Bristow v. Sequeville*, 5 Ex. 275 and note; *Penobscot, etc. R. R. Co. v. Bartlett*, 12 Gray, 244; *Ames v. McCamber*, 124 Mass. 85; *Craigin v. Lamkin*, 7 Allen, 395; *De Sobry v. De Laistre*, 2 Har. & J. 191, 229. See *Gardner v. Lewis*, 7 Gill, 377.

⁴ *Charlotte v. Chouteau*, 33 Mo. 194; *Kingsley v. Kingsley*, 20 Ill. 203; *Kline v. Baker*, 99 Mass. 253; *Andrews v. Hoxie*, 5 Tex. 171; *McDeed v. McDeed*, 67 Ill. 548. *Contra*, *Gardner v. Lewis*, 7 Gill, 377.

⁵ *Kline v. Baker*, 99 Mass. 253; *Ely v. James*, 123 id. 36; *Hale v. New J. St. Nav. Co.* 15 Conn. 539; *Lockwood v. Crawford*, 18 Conn. 361; *Charlotte v. Chouteau*, 33 Mo. 194; *Cecil Bank v. Barry*, 20 Md. 287; *People v. Lambert*, 5 Mich. 349; *Inge v. Murphy*, 10 Ala. 885, 897; *Sidwell v. Evans*, 1 Pen. & W. 383, 388; *De Sobry v. De Laistre*, 2 Har. & J. 191; *Ennis v. Smith*, 14 How. 400; *Church v. Hubbard*, 2 Cranch, 187; *Di Sora v. Phillips*, 10 H. L. Cas. 624; *Bremer v. Freeman*, 10 Moore, P. C. 306; *Owen v. Boyle*, 15 Me. 147; *Warnick v. Grosholz*, 3 Grant's Cases, 234.

⁶ *Smith v. Bartram*, 11 Ohio St. 690.

§ 193. **Private statutes.**— A general or public statute is a universal rule that regards the whole community; is of public concern; the courts take judicial notice of it. On the other hand, private statutes operate only on particular persons and private concerns; the courts do not take notice of them without proof; when relied on they have to be pleaded and proved.¹ Acts may be local and special, immediately designed to affect only a part of the territory or people under the jurisdiction of the law-making power, and temporary in duration, and yet be public because being intended for a public object.² Thus, acts for the establishment of a local government, a village or city, being for public purposes;³ or fixing or amending the boundaries of a city or county;⁴ establishing or changing the county seat;⁵ to organize corporations for canals, railroads or turnpikes, when they contain provisions affecting the general public;⁶ or authorizing particular municipalities to contribute aid for such enterprises,⁷—are, in this country, public acts. Here the tendency has been to enlarge the limits of public statutes, and to bring within them all enactments of a general character, or which in any way affect the community at large.⁸

¹ 1 Black. Com. 86; *People v. Wright*, 70 Ill. 388; *State v. Chambers*, 93 N. C. 600; *Meshke v. Van Doren*, 16 Wis. 319.

² *Unity v. Burrage*, 103 U. S. 447; *Allen v. Hirsch*, 8 Oregon, 412; *Burnham v. Acton*, 35 How. Pr. 48; 1 *Kent's Com.* 459; *City of Covington v. Voskotter*, 80 Ky. 219.

³ *People v. Wright*, 70 Ill. 388; *Clark v. Janesville*, 10 Wis. 136; *Mason v. Mulholn*, 6 Dana, 140; *Pierce v. Kimball*, 9 Me. 54, 56; *Halbert v. Skyles*, 1 A. K. Marsh. 369; *Van Swartow v. Commonwealth*, 24 Pa. St. 131; *Burnham v. Webster*, 5 Mass. 266; *Ellis v. Commissioners*, 2 Gray, 378; *Burhop v. Milwaukee*, 21 Wis. 257. See *King v. Burrage*, 3 P. Wms. 496; *Gorham v. Springfield*, 21 Me. 58; *Prell v. McDonald*, 7 Kan. 426.

⁴ *Commonwealth v. Springfield*, 7 Mass. 12; *Stephenson v. Doe*, 8 Blackf.

508; *New Portland v. New Vineyard*, 16 Me. 69; *West v. Blake*, 4 Blackf. 234; *State v. Jackson*, 39 Me. 291; *Ross v. Reddick*, 2 Ill. 73.

⁵ *State ex rel. v. Lean*, 9 Wis. 279.

⁶ *Jenkins v. Union Turnpike Co.* 1 Cal. Cases, 86; *Proprietors of Fryburg Canal v. Frye*, 5 Me. 38; *Att'y-General v. Erie*, etc. R. R. Co. 55 Mich. 21.

⁷ *Unity v. Burrage*, 103 U. S. 447. See *Clark v. Janesville*, 10 Wis. 136.

⁸ *Unity v. Burrage*, 103 U. S. 447; *Boyle*, in re, 9 Wis. 264; *Yellow R. Improv't Co. v. Arnold*, 46 Wis. 214; *State v. Chambers*, 93 N. C. 600; *Price v. White*, 27 Mo. 275; *Bretz v. Mayor*, etc. 6 Rob. 325; *McLain v. Mayor*, etc. 3 Daly, 32; *West v. Blake*, 4 Blackf. 234; *Bevens v. Baxter*, 23 Ark. 287; *State v. Judges*, 21 Ohio St. 1; *Kerrigan v. Force*, 9 Hun, 185; *Wright v. Hawkins*, 28 Tex. 452.

An act authorizing a named person to construct a dam of a particular description for the purpose of improving the navigation of a river is a public statute.¹ Acts for the incorporation of banks have been held public by reason of provisions affecting the general public,² and other corporations.³ A penal act is public;⁴ and the defining of an offense in an act otherwise private renders it a public act.⁵ An act authorizing a foreign private corporation to do business, and providing that it shall have an office and place of business in the state where the law is passed, and that such corporation may then sue and be sued like a domestic corporation, is a public act.⁶ The distinction between public and private acts defined in the common law of England by Blackstone is not quite the distinction recognized in this country. Here acts may be public though they are local and special, when they concern the public generally, though more particularly a local community or only a class of the general public—where they concern the class in distinction from the individual.⁷ Where a statute of a private nature is declared to be a public act, it will be treated as such and need not be pleaded nor proved.⁸ A statute amendatory of a public law is public.⁹

§ 194. A private statute is one confined to a special case.¹⁰ An act “to enable the Bishop of Canton to make a lease to A. B.” for an exceptional period is a fair example of a private statute.¹¹ A statute enabling the local authorities of a particu-

¹ *Calking v. Baldwin*, 4 Wend. 667.

⁶ *Fall Brook Coal Co. v. Lynch*, 47

² *Smith v. Strong*, 2 Hill, 241; How. Pr. 520.

Louisiana State Bank v. Flood, 3 Mart. (N. S.) 341; *Bank of Commonwealth v. Spilman*, 3 Dana, 150; *Young v. Bank of Alexandria*, 4 Cr. 384; *Bank of Utica v. Smedes*, 3 Cow. 684; *Bank of Newberry v. Railroad Co.* 9 Rich. 495.

⁷ *Commonwealth v. Worcester*, 3 Pick. 473; *Wales v. Belcher*, id. 508; *Bish. W. L. § 42c*; *Wheeler v. Philadelphia*, 77 Pa. St. 338.

³ *Portsmouth Livery Co. v. Watson*, 10 Mass. 91.

⁸ *Brookville Ins. Co. v. Records*, 5 Blackf. 170; *Beaty v. Knowler*, 4 Pet. 152; *Covington Drawbridge Co. v. Shepherd*, 20 How. 232; *Bacon's Abr. Statute, F.* See *Edinburgh R. R. v. Wauchope*, 8 Cl. & F. 710; *Rogers' Case*, 2 Greenlf. 303.

⁴ *Burnham v. Acton*, 35 How. Pr. 48.

⁵ *Bacon's Abr. tit. Statutes, F.*; *Heridia v. Ayers*, 12 Pick. 344; *Burnham v. Webster*, 5 Mass. 266; *Young v. Bank of Alexandria*, 4 Cr. 384; *Rogers' Case*, 2 Greenlf. 303; *Rex v. Buggs, Skin.* 428.

⁹ *Unity v. Burrage*, 103 U. S. 447; *State v. Welch*, 21 Minn. 22.

¹⁰ *Whart. Com. on Am. Law, §§ 13, 598.*

¹¹ 1 Black. Com. 86.

lar city or county to raise money by tax for the payment of certain claims against it,¹ or relieving a particular married woman by name of the disabilities of coverture;² acts authorizing the sale of property of minors and other persons under disability,³ are private. Acts for the mere creation of a private corporation are of this character.⁴

The recital of facts in a private statute is strong evidence against those who obtained the act,⁵ but is not evidence against strangers,⁶ nor are such statutes binding on strangers.⁷ They may be avoided for fraud.⁸ An act may be in part

¹ *Bretz v. Mayor, etc.* 3 Abb. Pr. (N. S.) 478. See *Sherman Co. v. Simons*, 109 U. S. 735.

² *Ashford v. Watkins*, 70 Ala. 156.

³ *Rice v. Parkman*, 16 Mass. 326; *Moore v. Maxwell*, 18 Ark. 469; *Stanley v. Colt*, 5 Wall. 119; *McComb v. Gilkey*, 29 Miss. 146; *Wilkinson v. Leland*, 2 Pet. 657; *Lessee of Dulany v. Tilghman*, 6 Gill & J. 461; *Croxall v. Shererd*, 5 Wall. 268; *Jackson v. Catlin*, 2 John. 248; *Munford v. Pearce*, 70 Ala. 452; *Carroll v. Lessee of Olmsted*, 16 Ohio, 251; *Stewart v. Griffith*, 33 Mo. 13; *Estep v. Hutchinson*, 14 S. & R. 435; *Davison v. Johonnot*, 7 Met. 388; *Boon v. Bowers*, 30 Miss. 246; *Williamson v. Suydam*, 6 Wall. 723; *Lobrano v. Nelligan*, 9 id. 295; *Brevoort v. Grace*, 53 N. Y. 245; *Leggett v. Hunter*, 19 id. 445; *Tharp v. Fleming*, 1 Houston, 580; *Perry v. Newsom*, 1 Ired. Eq. 28; *Todd v. Flournoy's Heirs*, 56 Ala. 99; *Pickett v. Pipkin*, 64 id. 520; *Tindal v. Drake*, 60 id. 170. See *Watson v. Oates*, 58 Ala. 647; *Heirs of Holman v. Bank of Norfolk*, 12 Ala. 369.

⁴ *Burhop v. Milwaukee*, 21 Wis. 257; *Perry v. New Orleans R. R. Co.* 55 Ala. 413; *Conley v. Columbus, etc. R. R. Co.* 44 Tex. 579; *Montgomery v. Plank R. Co.* 31 Ala. 76; *Drake v. Flewellen*, 33 id. 106; *Clarion Bank v. Gruber*, 87 Pa. St. 468; *Timlow v. Railroad Co.* 90 id. 284; *Perdicaris v. Bridge Co.*

29 N. J. L. 367; *Butler v. Robinson*, 75 Mo. 192; *Mandere v. Bonsignore*, 28 La. Ann. 415; *Carrow v. Bridge Co. Phill. L. (N. C.)* 118.

⁵ *May's Heirs v. Frazee*, 4 Litt. 392; *Elmendorff v. Carmichael*, 3 id. 472; *Powers v. Bergen*, 6 N. Y. 358; *Campbell's Case*, 2 Bland's Ch. 209.

⁶ *Id.*

⁷ *Earl of Shrewsbury v. Scott*, 6 C. B. (N. S.) 1, 157, 184; *Crittenden v. Wilson*, 2 Cow. 165; 2 Kent's Com. 466; *Jackson v. Catlin*, 2 John. 248; S. C. 8 id. 520; *McKinnon v. Bliss*, 21 N. Y. 206; *Lucy v. Levington*, 1 Vent. 175; *Jones v. Tatham*, 20 Pa. St. 398.

⁸ *Campbell's Case*, 2 Bland's Ch. 209; *Penn v. Baltimore*, 1 Ves. Sr. 454; *Partridge v. Dorsey*, 3 Har. & J. 307, note; *Commonwealth v. Breed*, 4 Pick. 460. *Bland, Chan.*, in *Campbell's Case*, said: "A private act of parliament, although strictly and literally followed, as regards the authority and jurisdiction conferred (*Ex parte King*, 2 Bro. C. C. 158; *Ex parte Bolton School*, 2 Bro. C. C. 662 2; *Madd. Chan.* 719), is in many respects considered and construed as a mere legal conveyance; in general binding only on those who are parties to it; that is, those who petition for it or are named in the act itself and those claiming under them. The Case of the Chancellor of Oxford, 10

public and in part private.¹ The courts do not take judicial notice of private statutes.² They have to be proved in the usual manner.³ But in England by virtue of a statute, and in some of the states of the Union, all acts are public, and the courts take notice of them.⁴ And under the prevalent constitutional prohibition of special and local legislation, the distinction between public and private acts has lost much of its importance.

Coke, 57; Hasketh v. Lee, 2 Saund. 84; Boulton v. Bull, 2 H. Bl. 499; Perchard v. Heywood, 8 T. R. 472; Wallwyn v. Lee, 9 Ves. 25; Bullock v. Fladgate, 1 Ves. & Bea. 471; Vauxhall Bridge Co. v. Earl Spencer, 2 Mad. 356; S. C. 4 Cond. Ch. 28; Edwards v. Grand Junction R. R. Co. 10 id. 85; Moore v. Usher, id. 107; 2 Black. Com. 344; Cru. Dig. tit. 33. It is never permitted to affect strangers or to defeat the rights of *bona fide* purchasers for a valuable consideration; because, as to strangers, a private act is considered only in the light of a private conveyance. Pomfret v. Windsor, 2 Ves. 480."

¹ Dwarris on St. 354; People v. Supervisors, 43 N. Y. 10.

² 1 Black. Com. 86.

³ Leland v. Wilkinson, 6 Pet. 317.

⁴ 13 and 14 Vic. c. 21.

PART SECOND.

STATUTORY CONSTRUCTION.

CHAPTER XI.

CLASSIFICATION AND DESCRIPTION OF STATUTES.

§ 195. The names applied to statutes.	§ 205. Preceptive, prohibitive and permissive statutes.
196. Ancient statutes of England.	206. Prospective and retroactive statutes.
197. Federal, state, territorial and colonial statutes.	207. Remedial statutes.
198. Public and private statutes.	208. Penal statutes.
200. Declaratory statutes.	
202. Affirmative and negative statutes.	

§ 195. **The names of statutes.**—In the preceding pages we have discussed the general nature, enactment, duration and proof of statutes and cognate topics. We have now to discuss the principles by which is determined their meaning and effect. These principles are adapted to the peculiar nature of the statute; therefore, a chapter explaining the different kinds of statutes, with the names by which they are designated, will naturally precede the exposition of the principles which diversify and make up the law of hermeneutics. Some of these statutes have already been defined, but it will be useful to present them with others in one comprehensive view. They bear names significant of their origin, form or intrinsic nature. Many by name and operation are in dual contrast or contradiction. English statutes, in part entering into our jurisprudence and in part foreign, are distinguished as *ancient* and *modern*. In our system we have federal, state, colonial and territorial statutes. A generical classification of all statutes is as public or private. The former are divided into species of *general* and *local* or *special* statutes. General statutes are further divided by other distinctions. In respect to duration they

are *temporary* or *perpetual*; in respect to their force with reference to the date of taking effect, *prospective* or *retroactive*; as to the nature of their operation, *declaratory*, *permissive*, *prohibitive*, *preceptive*, *remedial*, *directory*, *mandatory*, or *repealing statutes*; as to form, *affirmative* or *negative*. Another large and important class of public statutes is designated as *penal*.

§ 196. **Ancient statutes of England.**—The statutes termed ancient are those adopted in Latin and French prior to the reign of Edward III., which commenced in 1327.¹ Since that time they are contradistinguished as *nova statuta*, and since the accession of Richard III., 1483, the statutes have been first printed in English, and entirely so since the time of Henry VII.² Until late in the reign of Edward III., oral proceedings in the courts were conducted in the French language, “a tongue much unknown in the realm,” and the pleadings and record in Latin. In the thirty-sixth year of his reign the proceedings were required to be conducted in English, and by the same statute the pleadings and record continued in Latin.

Formerly the judges formulated the statutes from the petition of the commons and the king's answer.³ All those passed at one session of parliament were strung together, making so many *capitula* or chapters of one statute; to which was usually prefixed a memorandum of the time and place of the meeting of parliament, and the occasion for calling it.⁴ On account of the generality or brevity of ancient statutes, a very liberal and latitudinarian construction was practiced and held to be justifiable,⁵ not admitted of new or modern statutes.⁶ Hence, there is a wide distinction between the construction of ancient and modern statutes. This consideration should detract from the force of rules of interpretation which originated in reasons peculiar to the administration of ancient statutes, and originat-

¹ Dwarrris, 2d ed. 460.

⁴ Dwarrris, 460.

² Id.

⁵ 2 Inst. 401; *Gwynne v. Burnell*, 6

³ *Mills v. Wilkins*, 6 Mod. 62; *Att'y-Gen'l v. Weymouth*, 1 Amb. 22; *Rex v. Williams*, 1 W. Bl. 93; *Morant v. Taylor*, 1 Ex. D. 194; *Shrewsbury v. Scott*, 6 C. B. (N. S.) 1; *Jeffreys v. Boosey*, 4 H. L. 982; *Chance v. Adams*, 1 Lord Raym. 77; *Hadden v. Collector*, 5 Wall. 110; *Bac. Abr. Court of Parliament*, E.

Bing. N. C. 561; *Wilson v. Knubley*, 7 East, 128; *McWilliam v. Adams*, 1 Macq. H. L. Cas. 120; *Montrose Peerage*, id. 401.

⁶ *Miller v. Salomons*, 7 Ex. 475; *Bradley v. Clark*, 5 T. R. 201; *Bradford v. Treasurer, Peck*, 425; *Jones v. Kearns*, Mart. & Y. 241; *Waller v. Harris*, 20 Wend. 555, 561.

ing in the forms of legislation then in vogue and now obsolete, or displaced by others radically different. These ancient statutes are a part of our common law.¹

§ 197. Federal, state, territorial and colonial statutes.—The valid acts of congress are those which it enacts in the exercise of the delegated powers enumerated in the federal constitution.² They have force and are binding throughout the Union and the federal domain, or in such lesser part of it as the act professes to operate in. On such subjects the federal laws are supreme—they are domestic; all courts take notice of them.³ Treaties are also a part of the law.⁴ The federal courts are organized for the enforcement of those laws; they reach in their operation the entire nation, and they are binding on the states and all their departments. The states have supreme power within their limits for local government, except as this power is restrained by the concession of the federal powers in the constitution of the United States. With this limitation, for the purpose of local government, the states are supreme and independent.⁵ The law-making powers of state legislatures are plenary, subject only to the restrictions of the federal and state constitutions. Colonial statutes are those in force in the colonies prior to their becoming states. Those laws which were suited to their new condition, politically and otherwise, continued to form part of the jurisprudence of the succeeding states until altered by later statutes.⁶ Territorial statutes are those enacted by territorial legislatures, pursuant to the authority of an act of congress.⁷

§ 198. Public and private statutes.—Blackstone defines a public act as a universal rule that regards the whole commu-

¹ *Ante*, § 15.

² *McCulloch v. Maryland*, 4 Wheat. 316; *United States v. Fisher*, 2 Cr. 358; *Calder v. Bull*, 3 Dall. 386; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Gilman v. Philadelphia*, 3 Wall. 713; *Padelford v. Mayor, etc.* 14 Ga. 438.

³ *Ex parte Siebold*, 100 U. S. 371; *Cook v. Moffat*, 5 How. 295; *United States v. Rathbone*, 2 Paine, 578; *Dodge v. Woolsey*, 18 How. 341.

⁴ *Const. art. VI, 2*; *United States*

v. Schooner Peggy, 1 Cr. 103; *Foster v. Neilson*, 2 Pet. 253.

⁵ *Carpenter v. Pennsylvania*, 17 How. 456; *Prigg v. Pennsylvania*, 16 Pet. 539; *New York v. Miln*, 11 id. 102; *Strader v. Graham*, 10 How. 82; *Sears v. Cottrell*, 5 Mich. 251; *Turner v. Board of Commissioners*, 27 Kan. 639.

⁶ *Ante*, § 19.

⁷ *National Bank v. Yankton Co.* 101 U. S. 129; *ante*, § 23; 2 *Story on Const.* § 1325.

nity, of which the courts are bound to take judicial notice; private acts are those which concern only a particular species, thing or person, and of these the courts are not bound to take notice; they must be pleaded.¹ Dwarris thus defines these statutes in contradistinction: "Public acts relate to the public at large, and private acts concern the particular interest or benefit of certain individuals or particular classes of men." A public act need not be a universal rule, in the sense that it must purport to apply to the whole territory or the entire people subject to the legislative jurisdiction. It may be applicable to only the smallest political division, or to a small class of the people, and still be a public statute. If it concern the public, and not merely a private interest, it is a public statute, though local or special.² A public statute affects the public at large, either throughout the entire state or within the limits of a particular locality where the act operates; and a private statute relates to or affects a particular person, by name, or so that certain individuals or classes of persons are interested in a manner peculiar to themselves, and not in common with the entire community.³ The distinction by the English common law is not very plainly marked. The American cases, however, show a manifest divergence, by enlarging the class of public statutes.⁴ In a public act there may be a private clause.⁵ So, in a private act, there may be a provision of a public nature;⁶ and thus a statute may be public in one part and private in another. A public statute is local when it relates to a particular place or locality, or does not extend to all places which would classify with that to which the act is confined.⁷ It is special not only when it is local, but also

¹ 1 Black. Com. 86; *Prigge v. Adams*, Skin. 350.

² *Ante*, § 203; *Clark v. Janesville*, 10 Wis. 136; *State v. Baltimore*, 29 Md. 516; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Brooks v. Hyde*, 37 Cal. 366; *Cox v. State*, 8 Tex. App. 254, 287.

³ *State v. Chambers*, 93 N. C. 600; *People v. Wright*, 70 Ill. 388; *Montague v. State*, 54 Md. 481; *State v. Helmes*, 3 N. J. L. *1050.

⁴ *Ante*, § 203; *Unity v. Burrage*,

103 U. S. 447; *Stephens Co. v. R. R. Co.* 33 N. J. L. 229; *State v. Bergen*, 34 N. J. L. 438; *Winooski v. Gokey*, 49 Vt. 282.

⁵ *Potter's Dwarris*, 53.

⁶ *Rex v. Bugg*, Skin. 428; *Allentown v. Hower*, 93 Pa. St. 332, 336; *People v. Supervisors of Chautauqua Co.* 43 N. Y. 10; *Bretz v. New York*, 4 Abb. Pr. (N. S.) 258; *McLain v. New York*, 3 Daly, 32; *Heridia v. Ayres*, 12 Pick. 334.

⁷ *People v. Harper*, 91 Ill. 357; *State*

when it is confined in its subject to less than a class of persons or things.¹ These distinctions have been treated more at large in another place, to which the reader is referred.²

§ 199. Public and private statutes are construed upon different considerations. In a late case Lord Esher, M. R., said: "In the case of a public act, you construe it keeping in view the fact that it must be taken to have been passed for the public advantage, and you apply certain fixed canons to its construction. In the case of a private act which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in their favor, because the persons who obtain a private act ought to take care that it is so worded that that which they desire to obtain is plainly stated in it; but when the construction is perfectly clear, there is no difference between the modes of construing a private act and a public act."³ However difficult the construction of a private act may be, when once the court has arrived at the true construction, after having subjected it to the strictest criticism, the consequences are precisely the same as in the case of a public act.⁴

§ 200. **Declaratory statutes.**—A declaratory act was originally one declaratory of the common law; such statutes were made, says Mr. Dwaris, when an 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.⁵ Such statutes are to be

- v. Judges, 21 Ohio St. 1; People v. Hills, 35 N. Y. 449, 451; Gaskin v. Meek, 42 id. 186; People v. O'Brien, 38 id. 193, 195; Kerrigan v. Force, 68 id. 381; Fire Department of Troy v. Bacon, 2 Abb. App. 127; People v. Allen, 1 Lans. 248; Healey v. Dudley, 5 Lans. 115; Burnham v. Acton, 4 Abb. Pr. (N. S.) 1; Levy v. State, 6 Ind. 281; Pierce v. Kimball, 9 Greenlf. 54; Bevens v. Baxter, 23 Ark. 387; West v. Blake, 4 Blackf. 234; Re Wakker, 1 Edm. Sel. Cas. 575; McLain v. New York, 3 Daly, 32. See Yellow R. Imp. Co. v. Arnold, 46 Wis. 214, 222; Orr v. Rhine, 45 Tex. 343; People v. Davis, 61 Barb. 456; Bretz v. New York, 6 Robt. 325; Meshke v. Van Doren, 16 Wis. 319; Price v. White, 27 Mo. 275.
- ¹ *Ante*, § 193. See Wheeler v. Philadelphia, 77 Pa. St. 338.
- ² *Ante*, § 193.
- ³ Altrincham Union v. Cheshire Lines Committee, L. R. 15 Q. B. Div. 597, 603.
- ⁴ *Id.*; Perry v. Newsom, 1 Ired. Eq. 28; Bartlett v. Morris, 9 Port. 266; Union Pac. R. R. Co. v. United States, 10 Ct. of Cl. 559 (affirmed 91 U. S. 72).
- ⁵ Dwar. on St. 475, 477. See Moog v. Randolph, 77 Ala. 597.

construed, if possible, according to the common law.¹ They are expressed affirmatively or in negative terms. A statute made in the affirmative, without any negative expressed or implied, does not take away the common law. It follows that it does not affect any prescriptions or customs clashing with it which were before allowed; in other words, the common law continues to be construed as it was before the recognition by parliament.² A statute declaratory of the common law should not retroact upon past controversies, or reverse decisions which the courts in the exercise of their undoubted authority have made. This would be the exercise of judicial power, which, if tolerated, might constitute the legislature a court of review in all cases where disappointed partisans could obtain a hearing after being dissatisfied with the rulings of the court.³

§ 201. A declaratory statute is sometimes intended to declare the meaning of an existing statute. Such statutes are akin to interpretation clauses,—they are futile and inoperative in legislation when designed to affect rights retrospectively; but will operate prospectively.⁴ A declaration in an act of the legislature as to what they intended in a preceding act does not make the law retrospectively what is so declared to be intended, if the previous act will not bear that interpretation; though such declared intention will be effective in the future.⁵ Such statutes will be construed, if possible, as intended only to lay down a rule for future cases.⁶

¹ *People v. Butler*, 16 John. 203; *Hewey v. Nourse*, 54 Me. 256; *Freeman v. People*, 4 Denio, 9, 20; *Baker v. Baker*, 13 Cal. 87; *Commonwealth v. Humphries*, 7 Mass. 242.

² *Dwar. on St.*; 2 Inst. 200.

³ *Cooley, Const. Lim.* 94; *Salters v. Tobias*, 3 Paige, 338; *People v. Supervisors*, 16 N. Y. 424. A mandate of the legislature to the judiciary, directing what construction shall be placed on existing statutes, is an assumption of judicial power, and unconstitutional. *Governor v. Porter*, 5 *Humph.* 165.

⁴ *Postmaster-General v. Early*, 12 *Wheat.* 148; *Governor v. Porter*, 5 *Humph.* 165; *Greenough v. Green-*

ough, 11 Pa. St. 489; *Reiser v. Tell Association*, 39 id. 137; *Kupfert v. Building Asso.* 30 Pa. St. 465; *Lincoln, etc. Asso. v. Graham*, 7 Neb. 173; *Moser v. White*, 29 Mich. 59; *People v. Supervisors*, 16 N. Y. 424; *Ogden v. Blackledge*, 2 *Cranch*, 272; *Dash v. Van Kleeck*, 7 John. 477; *Young v. Beardsley*, 11 Paige, 93; *Ashley, Appellant*, 4 *Pick.* 23. See *Reis v. Graff*, 51 Cal. 86.

⁵ *Bassett v. United States*, 2 Ct. of Cl. 448.

⁶ *Todd v. Clapp*, 118 Mass. 495; *Shallow v. Salem*, 136 id. 136; *McNichol v. United States, etc. Agency*, 74 Mo. 457; *Bernier v. Becker*, 37 Ohio St. 72; *Linn v. Scott*, 3 *Tex.* 67; *Citi-*

§ 202. **Affirmative and negative statutes.**—An *affirmative* statute is one which is enacted in affirmative terms. A *negative* statute is one expressed in negative terms. These statutes have very different effects; the former is generally cumulative, the other displaces existing rules. An affirmative statute does not take away the common law in relation to the same matter.¹ An affirmative provision without any negative expressed or implied makes no alteration in any common-law rule in regard to the same subject-matter. A statute authorizing a tenant in fee to lease for twenty-one years did not affect his common-law right to lease for a longer period.² An act authorizing a particular court to try a certain offense does not conflict with an earlier act giving power to another to try the same offense.³ So a statute imposing a liability on certain persons to repair a road was held not inconsistent with the common-law duty of the parish to make such repairs, and therefore did not impliedly exonerate the parish.⁴ Where an affirmative statute provides a new remedy for an existing right not inconsistent with the common-law remedy, the latter is not abolished; the new remedy is cumulative, and the party possessing the right may pursue either at his election.⁵ The

zens' *Gas Light Co. v. Alden*, 44 N. J. L. 648; *Lambertson v. Hogan*, 2 Pa. St. 22; *Journey v. Gibson*, 56 id. 57, 61; *James v. Rowland*, 52 Md. 462; *Les Bois v. Bramell*, 4 How. 449; *Bassett v. United States*, 2 Ct. of Cl. 448.

¹ Co. Litt. 115a; *Jackson v. Bradt*, 2 Caines, 169; *Bruce v. Schuyler*, 9 Ill. 221; *Attorney-General v. Brown*, 1 Wis. 513; *Mullen v. People*, 31 Ill. 444; *Nixon v. Piffet*, 16 La. Ann. 379; *State v. Macon Co. Ct.* 41 Mo. 453; *Planters' Bank v. State*, 6 Sm. & M. 628; *White v. Johnson*, 23 Miss. 68; *DePauw v. New Albany*, 22 Ind. 204; *Blain v. Bailey*, 25 id. 165; *McLaughlin v. Hoover*, 1 Oregon, 31; *Brown v. Miller*, 4 J. J. Marsh. 474; *Lillard v. McGee*, 4 Bibb, 165; *South's Heirs v. Hoy*, 3 Bibb, 522.

² Dwar. on St. 475.

³ Co. Litt. 115a.

⁴ *Rex v. St. George's Hanover*

Square, 3 Camp. 222. See *Gibson v. Preston*, L. R. 5 Q. B. 219.

⁵ *Caswell v. Worth*, 5 E. & B. 849; *Waldo v. Bell*, 13 La. Ann. 329; *Rau-debaugh v. Shelley*, 6 Ohio St. 307; *O'Flaherty v. McDowell*, 6 H. L. Cas. 142; *Livingston v. Van Ingen*, 9 John. 507; *Crittenden v. Wilson*, 5 Cowen, 165; *Stafford v. Ingersol*, 3 Hill, 38; *Heath, Ex parte*, id. 42; *Kelly v. Union Township*, 5 Watts & S. 536; *Renwick v. Morris*, 3 Hill, 621; *Barden v. Crocker*, 10 Pick. 383; *Mitchell v. Duncan*, 7 Fla. 13; *State v. Berry*, 12 Iowa, 58; *Wilson v. Shorick*, 21 id. 332; *Coxe v. Robbins*, 4 Halst. 384; *Mayor, etc. v. Howard*, 6 Har. & J. 383; *Bearcamp River Co. v. Woodman*, 2 Greenlf. 404; *Booker v. McRoberts*, 1 Call, 243; *Almy v. Harris*, 5 John. 175; *Farmers' Turnpike v. Coventry*, 10 id. 389; *Fryeburg Canal v. Frye*, 5 Greenl. 38; *Wetmore v.*

same rule applies as between successive statutory remedies or successive statutes creating rights, and against implied repeal.¹ An affirmative statute giving a new right does not of itself and necessarily destroy a previously existing right, created by another statute to which it does not refer, but will do so if it appears to have been the intention of the legislature that the two rights should not exist together.² Although a statute provides that a certain thing shall prove a certain fact, this does not render other proof incompetent unless it is explicitly so provided.³ The absence from the code of a principle which has been part of the jurisprudence does not impair its authority.⁴

§ 203. A *negative* statute is one expressed in negative terms. And here the rule prevails that if a subsequent statute, contrary to a former, has negative words, it shall be a repeal of the former; and a negative statute, it is said too, so binds the common law that a man cannot afterwards have recourse to the latter.⁵ Of this form and nature is this provision generally found in the statute of limitations: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this statute, unless the same is contained in some writing signed by the party to be charged thereby." Negative words make a statute imperative.⁶

§ 204. An *affirmative* statute may imply a negative. 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 al-*

Tracy, 14 Wend. 250; United States v. Wyngall, 5 Hill. 16; Constantine v. Van Winkle, 6 id. 177; Leland v. Tousey, id. 328.

¹ Gohen v. R. R. Co. 2 Woods, 346; Cont. Election of Barber, In re, 86 Pa. St. 392.

² O'Flaherty v. McDowell, 6 H. L. Cas. 142; Steward v. Greaves, 10 M. & W. 712.

³ Bethlehem v. Watertown, 51 Conn. 490.

⁴ Martin v. Jennings, 10 La. Ann. 553.

⁵ 2 Inst. 388.

⁶ Bladen v. Philadelphia, 60 Pa. St. 464; State v. Smith, 67 Me. 328; Hurford v. Omaha, 4 Neb. 336; People v. Allen, 6 Wend. 486; Liverpool Borough Bank v. Turner, 2 De G. F. & J. 502; Rex v. Newcomb, 4 T. R. 368; Howard v. Rodington, L. R. 2 P. Div. 203, 211; Williams v. Swansea Canal Nav. Co. L. R. 3 Ex. 158.

terius. 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.¹ If a thing is limited to be done in a particular form or manner it excludes every other mode, and affirmative expressions introducing a new rule imply a negative.² Affirmative words which are imperative, and therefore mandatory, imply a negative of anything contrary or alternative to the direction so given.³ Where an act requires that a juror shall have twenty pounds a year, and a later act that he shall have twenty marks, the latter implies an abrogation of the former, otherwise it would have no effect.⁴ There is an implied negative in statutes which are intended to prescribe the only rule to be observed; they repeal all acts which provide a different rule.⁵ Where a statute creates a right, and also provides the remedy, the latter is exclusive; it implies a negation of any other.⁶ So

¹ Sedgw. Const. St. & Const. L. 30.

² District Township, etc. v. Du-
buque, 7 Iowa, 262; Smith v. Stevens,
10 Wall. 321; Uncas National Bank
v. Rith, 23 Wis. 339; New Haven
v. Whitney, 36 Conn. 373; Wallace
v. Holmes, 9 Blatchf. 65; Burgoyne v.
Supervisors, 5 Cal. 22; Watkins v.
Wassell, 20 Ark. 410; Perkins v.
Thornburgh, 10 Cal. 189.

³ Davison v. Gill, 1 East, 64; Bryan
v. Sundberg, 5 Tex. 418.

⁴ Rex v. Worcestershire, 5 M. & S.
457; Curtis v. Gill, 34 Conn. 49; Gor-
ham v. Luckett, 6 B. Mon. 146; 1
Black. Com. 89.

⁵ People v. Burt, 43 Cal. 561; Daviess
v. Fairbairn, 3 How. 636; Industrial
School Dist. v. Whitehead, 13 N. J. Eq.
290; Roche v. Mayor, etc. 40 N. J. L.
257; Swann v. Buck, 40 Miss. 268;
Riggs v. Brewer, 64 Ala. 282; Daw v.
Metropolitan Board, 12 C. B. (N. S.)
161; Re Spring Street, 112 Pa. St. 258;
Re Alley in Kutztown, 2 Woodw.
Dec. (Pa.) 373; Sacramento v. Bird,
15 Cal. 294; State v. Conkling, 19 id.
501.

⁶ Lang v. Scott, 1 Blackf. 405;

Smith v. Lockwood, 13 Barb. 209;
Almy v. Harris, 5 John. 175; Dudley
v. Mayhew, 3 Comst. 9; Thurston v.
Prentiss, 1 Mich. 193; State v. Cor-
win, 4 Mo. 609; Bailey v. Bryan, 3
Jones (N. C.), 357; Ham v. Steam-
boat Hamburg, 2 Iowa, 460; Con-
well v. Hagerstown Canal, 2 Ind. 588;
Victory v. Fitzpatrick, 8 Ind. 281;
McCormack v. Terre Haute, etc. R. R.
9 id. 283; Camden v. Allen, 2 Dutch.
398; West v. Downman, L. R. 14 Ch.
Div. 111; Colley v. London, etc. Co.
L. R. 5 Ex. Div. 277; Brain v. Thomas,
50 L. J. Q. B. Div. 663; Bonham v. Bd.
of Education, 4 Dill. 156. There are
three classes of cases in which stat-
utes deal with liabilities: 1. Where a
liability existed at common law, and
was only re-enacted by the statute
with a special form of remedy; in
such cases the plaintiff has his elec-
tion unless the statute contains words
necessarily excluding the common-
law remedy. 2. Where a statute has
created a liability but given no rem-
edy, there a party may adopt an action
of debt or other remedy at common
law to enforce it. Wood v. Bank, 9

where the same statute creates an offense, prescribes the penalty and mode of procedure, only what the statute thus ordains is permissible.¹

§ 205. Preceptive, prohibitive and permissive statutes.—

When a statute commands certain actions, and regulates the forms and acts which ought to accompany them, it is called a *preceptive* statute.² A *prohibitive* statute is one that forbids all actions which disturb the public repose, and injury to the rights of others, or crimes and misdemeanors, or when it forbids certain acts in relation to the transmission of estates or the capacity of persons or other objects.³ A *permissive* statute is one which allows certain actions or things to be done without commanding them; as, for example, when it allows persons of a certain description, or, indeed, any person, to make a will,⁴ to pre-empt lands, to vote, or to form corporations. Of this nature is a statute which permits a candidate at an election at the polling place or canvass, or that a clergyman accused of an ecclesiastical offense may attend the proceedings of the commission appointed to inquire into the accusation.⁵ Such statutes confer a privilege or license which the donee may exercise or not at pleasure, having only his own convenience or interest to consult.⁶

§ 206. Prospective and retrospective statutes.— A *prospective* statute is one which regulates the future.⁷ It operates upon acts done and transactions occurring after it takes effect.

A *retrospective* statute, on the other hand, operates upon a subject already existing or an act done. Certain statutes of this nature are unjust, and, says Chancellor Kent, "are very

Cow. 194; Cole v. Thayer, 8 Cow. 249; Stradling v. Morgan, 1 Plowd. 206; Gallatian v. Cunningham, 8 Cow. 364; Slade v. Drake, Hobart, 295; Bish. W. L. § 250.

3. When the statute creates a liability not existing at common law and gives a particular remedy; here the party must adopt the form of remedy given by the statute. Vallance v. Falle, L. R. 13 Q. B. Div. 109; Bailey v. Bailey, L. R. 13 Q. B. Div. 859; O'Flaherty v. McDowell, 6 H. L. Cas. 142; Steward v. Greaves, 10 M. & W. 711.

¹ Bashaw v. State, 1 Yerg. 177, 185;

² 1 Bouv. Inst. 48.

³ 1 Bouv. Inst. 48.

⁴ Potter's Dwar. 74.

⁵ Endl. on St. Int. § 310.

⁶ Id. See Nicholl v. Allen, 1 B. & S. 934; Brockbank v. Whitehaven R. Co. 7 H. & N. 834; Rockwell v. Clark, 44 Conn. 534.

⁷ Bouv. Inst. 49.

generally considered as founded on unconstitutional principles, and consequently inoperative and void."¹ Of this obnoxious character are those affecting and changing vested rights;² one which takes away or impairs any vested right 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.³ This restriction, as already shown, is applicable to interpretation and declaratory laws.⁴

Ex post facto laws, and those impairing the obligation of contracts, are expressly forbidden by the federal and by state constitutions. The constitutions of some states expressly prohibit retrospective laws generally.⁵ To avoid injustice and unconstitutionality, it is always laid down as a rule of construction that a statute is to be taken or construed as prospective, unless its language is inconsistent with that interpretation.⁶

¹ 1 Kent's Com. 455.

² Id.; Ogden v. Blackledge, 2 Cr. 272; Brunswick v. Litchfield, 2 Greenl. 28; Osborne v. Huger, 1 Bay, 179; Bedford v. Shilling, 4 S. & R. 401; Eakin v. Raub, 12 id. 363; Society for Propagating the Gospel v. New Haven, 8 Wheat. 493; Wilkinson v. Leland, 2 Pet. 657.

³ Society v. Wheeler, 2 Gall. 105; Merrill v. Sherburne, 1 N. H. 199; Lewis v. Brackenridge, 1 Blackf. 220; Boyce v. Holmes, 2 Ala. 54; Jones v. Wootten, 1 Harr. (Del.) 77; Williamson v. Field, 2 Sandf. Ch. 533; Forsyth v. Marbury, R. M. Charl. 333; Dash v. Van Kleeck, 7 John. 477; People v. Platt, 17 id. 195; Houston v. Boyle, 10 Ired. 496; Cook v. Mutual Ins. Co. 53 Ala. 37; Dubois v. McLean, 4 McLean, 486; State v. Doherty, 60 Me. 504; Union Iron Co. v. Pierce, 4 Biss. 327; Hoagland v. Sacramento, 52 Cal. 142; Gunn v. Barry, 15 Wall. 610; Ahl v. Rhoads, 84 Pa. St. 319; Hart v. State, 40 Ala. 32; Lambertson v. Hogan, 2 Pa. St. 22; Douglass v. Pike, 101 U. S. 677; Strong v. Dennis, 13 Ind. 514; Logan v. Wal-

ton, 12 id. 639; Strong v. Clem, id. 37; Dequindre v. Williams, 31 id. 444; Finn v. Haynes, 37 Mich. 63; Jordan v. Wimer, 45 Iowa, 65.

⁴ *Ante*, § 200; 2 Kent's Com. 23, 24; McManning v. Farrar, 46 Mo. 376.

⁵ Rich v. Flanders, 39 N. H. 304; De Cordova v. Galveston, 4 Tex. 470; Goshorn v. Purcell, 11 Ohio St. 641.

⁶ 1 Kent's Com. 455, note; Bartruff v. Remey, 15 Iowa, 257; McEwen v. Den, 24 How. 242; Quackenbush v. Danks, 1 Denio, 128; S. C. 3 Denio, 594; Van Fleet v. Van Fleet, 49 Mich. 610; 1 N. Y. 129; Atkinson v. Dunlap, 50 Me. 111; North Bridgewater Bank v. Copeland, 7 Allen, 139; Harvey v. Tyler, 2 Wall. 328, 347; Richardson v. Cook, 37 Vt. 599; Plumb v. Sawyer, 21 Conn. 351; Taylor v. Keeler, 30 Conn. 324; Torrey v. Corliss, 33 Me. 333; Hopkins v. Jones, 22 Ind. 310; Seamans v. Carter, 15 Wis. 548; Boston, etc. R. R. Co. v. Cilley, 44 N. H. 578; Hannum v. Bank of Tennessee, 1 Cold. 398; Saunders v. Carroll, 12 La. Ann. 793; State v. Brad-

All retrospective statutes, however, are not unjust or unconstitutional. A large class of remedial and curative statutes have been enacted with beneficent effect. They are liberally construed to carry out the intention of the legislature, in view of the intrinsic merit of the particular case and on a broad, fostering consideration of the general interest.¹ Statutes relating to remedies and forms of procedure generally apply to rights already accrued, to cases ripe for action, and actions, pending;² but subject to the principle that the

ford, 36 Ga. 422; *Whitman v. Hapgood*, 10 Mass. 437; *Somerset v. Dighton*, 12 id. 383; *Gardner v. Lucas*, L. R. 3 App. Cas. 582, 600-603; *Moon v. Durden*, 2 Ex. 22; *Regina v. Ipswich Union*, 2 Q. B. Div. 269; *Suche*, In re, 1 Ch. Div. 48, 50; *Martin v. State*, 22 Tex. 214; *Reis v. Graff*, 51 Cal. 86; *People v. O'Neil*, id. 91; *People v. Kinsman*, id. 92; *People v. McCain*, id. 360; *Matter of Prot. Epis. School*, 58 Barb. 161; *Brown v. Wilcox*, 14 Sm. & M. 127; *Bond v. Munro*, 28 Ga. 597; *Hopkins v. Jones*, 22 Ind. 310; *Aurora*, etc. *Turnpike v. Holthouse*, 7 id. 59; *Frank v. San Francisco*, 21 Cal. 668; *Thorne v. Same*, 4 id. 127; *State v. Atwood*, 11 Wis. 422; *Edmonds v. Lawley*, 6 M. & W. 285; *Abington v. Duxbury*, 105 Mass. 287; *Reynolds v. State*, 1 Ga. 222; *Briggs v. Hubbard*, 19 Vt. 86; *Amsbry v. Hinds*, 48 N. Y. 57; *Head v. Ward*, 1 J. J. Marsh. 280; *Regina v. Mallow Union*, 12 Ir. C. L. (N. S.) 35; *People v. Peacock*, 98 Ill. 172; *Medford v. Learned*, 16 Mass. 215; *Young v. Hughes*, 4 H. & N. 76; *Williams v. Smith*, 4 H. & N. 559; *Jarvis v. Jarvis*, 3 Edw. Ch. 462; *Finney v. Ackerman*, 21 Wis. 268; *Dewart v. Purdy*, 29 Pa. St. 113; *Taylor v. Mitchell*, 57 Pa. St. 209; *State v. Auditor*, 41 Mo. 25; *Van Rensselaer v. Livingston*, 12 Wend. 490; *Ely v. Holton*, 15 N. Y. 595; *Western Union Railroad v. Fulton*, 64 Ill. 271; *Gerry v. Stone-*

ham, 1 Allen, 319; *State v. Scudder*, 32 N. J. L. 203; *Bay v. Gage*, 36 Barb. 447; *United States v. Starr*, Hempst. 469; *Hepburn v. Griswold*, 8 Wall. 603; *Williams v. Johnson*, Adm'x, 20 Md. 500; *Parsons v. Paine*, 26 Ark. 124.

¹ *Sturgis v. Hull*, 48 Vt. 302; *State v. Smith*, 38 Conn. 397; *Ballard v. Ward*, 89 Pa. St. 358; *Austin v. Stevens*, 24 Mo. 520; *Baldwin v. New-ark*, 38 N. J. L. 158; *Cook v. Sexton*, 79 N. C. 305; *State v. Wilmington*, etc. R. R. Co. 74 id. 143; *State v. Wolfarth*, 42 Conn. 155; *Bronson v. Newberry*, 2 Doug. (Mich.) 38; *Reed v. Rawson*, 2 Litt. 189; *Miller v. Moore*, 1 E. D. Smith, 739; *Wilder v. Lumpkin*, 4 Ga. 208; *Perry v. Commonwealth*, 3 Gratt. 632; *Smith v. Kibbee*, 9 Ohio St. 563; *Bensley v. Ellis*, 39 Cal. 309; *Miller v. Miller*, 16 Mass. 59; *Annable v. Patch*, 3 Pick. 360; *Johnson v. Johnson*, 26 Ind. 441; *Regina v. Vine*, L. R. 10 Q. B. 195; *Miller v. Graham*, 17 Ohio St. 1; *Riggins v. State*, 4 Kan. 173; *Tilton v. Swift*, 40 Iowa, 78.

² *Sampeyreac v. United States*, 7 Pet. 222; *Blair v. Cary*, 9 Wis. 543; *Henschall v. Schmidt*, 50 Mo. 454; *Rivers v. Cole*, 38 Iowa, 677; *Hoa v. Lefranc*, 18 La. Ann. 393; *Mercer v. State*, 17 Ga. 146; *Donner v. Palmer*, 23 Cal. 40; *Walston v. Commonwealth*, 16 B. Mon. 15; *Burch v. Newbury*, 10 N. Y. 374; *Morse v.*

right is not thereby destroyed or seriously impaired.¹ The legislature is not restrained from all legislation which may prejudicially affect private interests not protected by the constitution.² In a later chapter this subject will be treated more at length.³

§ 207. **Remedial statutes.**—Remedial statutes are such as the name implies, embracing a great variety in detail; those enacted to afford a remedy, or to improve and facilitate remedies existing for the enforcement of rights and the redress of

Goold, 11 id. 281; Van Rensselaer v. Snyder, 13 id. 299; Jacquins v. Commonwealth, 9 Cush. 279; McNamara v. Minn. Cent. R'y Co. 12 Minn. 388; Brock v. Parker, 5 Ind. 538; Indianapolis v. Imberry, 17 id. 175; Commonwealth v. Bradley, 16 Gray, 241; Van Rensselaer v. Ball, 19 N. Y. 100; Horner v. Lyman, 2 Abb. App. Dec. 399.

¹ Kimbray v. Draper, L. R. 3 Q. B. 160; Wright v. Hale, 6 H. & N. 227; Mann v. McAtee, 37 Cal. 11; State v. Smith, 38 Conn. 397; Doolubdass v. Ramloll, 7 Moore, P. C. 239; Bradford v. Barclay, 42 Ala. 375; Reid v. State, 20 Ga. 681; Templeton v. Horne, 82 Ill. 491; United States v. Gilmore, 8 Wall. 330; Mabry v. Baxter, 11 Heisk. 682; Rutherford v. Greene, 2 Wheat. 196; Green v. Biddle, 8 id. 92; Cambridge v. Boston, 130 Mass. 357; Berley v. Rampacher, 5 Duer, 183; Kelsey v. Kendall, 48 Vt. 24; Dequindre v. Williams, 31 Ind. 444; State v. Berry, 25 Mo. 355; Union Iron Co. v. Pierce, 4 Biss. 327; Governor v. Porter, 5 Humph. 165; People v. Supervisors, 16 N. Y. 424; Simco v. State, 8 Tex. App. 406; Haley v. Philadelphia, 68 Pa. St. 45; Edwards v. Williamson, 70 Ala. 145; Merwin v. Ballard, 66 N. C. 398; Nelson v. McCrary, 60 Ala. 310; Lee v. Cook, 1 Wyo. Ter. 413; Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 id. 608; Ewing's

Case, 5 Gratt. 701; Von Hoffman v. Quincy, 4 Wall. 552; White v. Hart, 13 id. 646; Walker v. Whitehead, 16 id. 314; Pollard, Ex parte, 40 Ala. 77. See Chaney v. State, 31 Ala. 342; Steamboat Farmer v. McCraw, id. 659; Uwchlan Township Road, 30 Pa. St. 156.

² See Charles River Bridge v. Warren Bridge, 11 Pet. 539; Commonwealth v. Logan, 12 Gray, 136; Harris v. Glenn, 56 Ga. 94; Regina v. Vine, L. R. 10 Q. B. 195; State v. Scudder, 32 N. J. L. 203; Wilder v. Me. Cent. R. 65 Me. 332; Bank of Toledo v. Bond, 1 Ohio St. 622; Gorman v. Pacific R. R. 26 Mo. 441; Barton v. Morris, 15 Ohio, 408; Hagerstown v. Sehner, 37 Md. 180; Sedgwick v. Bunker, 16 Kan. 498; Tilton v. Swift, 40 Iowa, 78; Hess v. Johnson, 3 W. Va. 645; Stokes v. Rodman, 5 R. I. 405; Stine v. Bennett, 13 Minn. 153; Kunkle v. Franklin, id. 127; Comer v. Folsom, id. 219; Wilson v. Buckman, id. 441; State v. Newark, 3 Dutch. 185; Calder v. Bull, 3 Dall. 386; Sparks v. Clapper, 30 Ind. 204; Coffin v. State, 7 id. 157; Noel v. Ewing, 9 id. 37; People v. Frisbie, 26 Cal. 135; Rottenberry v. Pipes, 53 Ala. 447; Ware v. Owens, 42 id. 212; Bachman v. Chrisman, 23 Pa. St. 102; Norfolk v. Chamberlaine, 29 Gratt. 534; Languille v. State, 4 Tex. App. 312.

³ Post, ch. 17.

injuries; and also those intended for the correction of defects, mistakes and omissions in the civil institutions and administrative polity of the state. It is a rule that remedial statutes are to be liberally construed to suppress the evil and advance the remedy.¹ But other rules also apply, even to particular provisions of such statutes which come within the general notion of remedial laws, and qualify and abridge the application of the rule of liberal construction, as will be seen hereafter. As, for example, statutes in derogation of the common law;² or for taking private property for public use;³ statutes granting power,⁴ or authorizing summary proceedings for obtaining judgment, as by motion,⁵ writs of attachment,⁶ and those providing for any novel proceeding or remedy.⁷

¹ *Heydon's Case*, 3 Rep. 76; *Turtle v. Hartwell*, 6 T. R. 429; *Vigo's Case*, 21 Wall. 648; *Davenport v. Barnes*, 2 N. J. L. 211; *Franklin v. Franklin*, 1 Md. Ch. 342; *Twycross v. Grant*, 2 C. P. D. 530; *Cullerton v. Mead*, 22 Cal. 95; *Hudler v. Golden*, 36 N. Y. 446; *Fuller v. Rood*, 3 Hill, 258; *Smith v. Moffat*, 1 Barb. 65; *McCormick v. Alexander*, 2 Ohio, 284; *Lessee of Burgett v. Burgett*, 1 id. 219; *Wilber v. Paine*, id. 17; *Fox v. New Orleans*, 12 La. Ann. 154; *Fox v. Sloo*, 10 id. 11; *Schuylkill Nav. Co. v. Loose*, 19 Pa. St. 15; *Quinn v. Fidelity, etc. Asso.* 100 id. 382; *Bolton v. King*, 105 id. 78; *Hassenplug's Appeal*, 106 id. 527; *Poor District v. Poor District*, 109 id. 579; *Tuskaloosa Bridge v. Jemison*, 33 Ala. 476; *Marshall v. Vultee*, 1 E. D. Smith, 294; *Mayor, etc. v. Lord*, 17 Wend. 285; *Jones v. Collins*, 16 Wis. 594; *Pearson v. Lovejoy*, 53 Barb. 407; *Jackson v. Warren*, 32 Ill. 331; *Smith v. Stevens*, 82 id. 554; *Chicago, etc. R. R. Co. v. Dunn*, 52 id. 260; *Converse v. Burrows*, 2 Minn. 229; *Wolcott v. Pond*, 19 Conn. 597; *New Orleans v. St. Romes*, 9 La. Ann. 573; *First School Dist. v. Ufford*, 52 Conn. 44; *Mitchell v. Mitchell*, 1 Gill, 66.

² *Burnside v. Whitney*, 21 N. Y. 148; *Smith v. Randall*, 3 Hill, 495; *People v. Hulse*, id. 309; *Brown v. Fittfield*, 4 Mich. 322; *Hollenback v. Fleming*, 6 Hill, 307; *Dwelly v. Dwelly*, 46 Me. 377; *Harrison v. Leach*, 4 W. Va. 383; *Gibson v. Commonwealth*, 87 Pa. St. 253; *Wilson v. Arnold*, 5 Mich. 98; *Fessenden v. Hill*, 6 id. 242; *Galpin v. Abbott*, id. 17; *Hollman v. Bennett*, 44 Miss. 322; *Thompson v. Clay*, 60 Mich. 62.

³ *Powers' Appeal*, 29 Mich. 504; *Sharp v. Speir*, 4 Hill, 76; *Sharp v. Johnson*, 4 id. 92; *Gilmer v. Lime Point*, 19 Cal. 47.

⁴ *Best v. Gholson*, 89 Ill. 465; *Banks v. Darden*, 18 Ga. 318; *Chicago, etc. R. R. Co. v. Smith*, 78 Ill. 96; *Morris Aqueduct v. Jones*, 36 N. J. L. 206; *Matthews v. Skinker*, 62 Mo. 329; *People v. Supervisors*, 6 Hun, 304; *Ryan v. State*, 32 Tex. 280.

⁵ *Hearn v. Ewin*, 3 Cold. 399.

⁶ *McQueen v. Middletown, etc. Co.* 16 John. 5; *Edwards v. Davis*, id. 281.

⁷ See *Hubbell v. Denison*, 20 Wend. 181; *Waller v. Harris*, id. 555; *Cole v. Perry*, 8 Cow. 214; *Townsend v. Chase*, 1 id. 115; *Sacia v. De Graaf*, id. 356; *Jackson v. Hobby*, 20 John. 361; *Hale v. Angel*, id. 342; *Under-*

§ 208. **Penal statutes.**—Such statutes are often treated as contradistinguished from remedial statutes. They are not, however, in full and direct contrast. Penal statutes are those by which punishments are imposed for transgressions of the law. They are construed strictly, and more or less so according to the severity of the penalty.¹ When a law imposes a punishment which acts upon the offender alone, and not as a reparation to the party injured, and where it is entirely within the discretion of the law-giver, it will not be presumed that he intended it should extend further than is expressed; and humanity would require that it should be so limited in the construction.² The general purpose or aim of a statute may be remedial; as where they provide punitive compensation to the injured party.³ But the provisions that enforce the wrong for which a penalty is provided, and those which define the punishment, are penal in their character and are construed accordingly.⁴ A statute may be remedial in one part and penal in another.⁵

wood v. Irving, 3 Cow. 59; Jackson v. Shepherd, 6 id. 444; Smith v. Mumford, 9 id. 29; Bank v. Ibbotson, 5 Hill, 461; Hoffman v. Dunlop, 1 Barb. 185; People v. Recorder, 6 Hill, 429; Smith v. Argall, id. 479; Huntington v. Forkson, id. 149; Sherwood v. Reade, 7 id. 431; Doughty v. Hope, 1 N. Y. 79; Danks v. Quackenbush, id. 129; Dudley v. Mayhew, 3 N. Y. 9; Powell v. Tuttle, id. 396; Humphrey v. Chamberlain, 11 id. 274; Clarkson v. R. R. Co. 12 id. 304; Wait v. Van Allen, 22 id. 319; Willard v. Fralick, 31 Mich. 431; Colgate v. Penn. Co. 102 N. Y. 127.

¹ Hall v. State, 20 Ohio, 7; Van Rennselaer v. Sheriff, 1 Cow. 443; Seaving v. Brinkerhoff, 5 John. Ch. 329; Van Valkenburgh v. Torrey, 7 Cow. 252; Andrews v. United States, 2 Story, 202; Carpenter v. People, 8 Barb. 603; State v. Solomons, 3 Hill (S. C.) 96; United States v. Ramsay, Hempst. 481; United States v. Starr, Hempst. 469; United States v. Ragsdale, id. 497; Commonwealth v. Mar-

tin, 17 Mass. 359; Commonwealth v. Keniston, 5 Pick. 420; Gibson v. State, 38 Ga. 571; State v. Upchurch, 9 Ired. 454; Reed v. Davis, 8 Pick. 514; Warner v. Commonwealth, 1 Pa. St. 154; Lair v. Killmer, 1 Dutch. 522; State v. Whetstone, 13 La. Ann. 376; Gunter v. Leckey, 30 Ala. 591; United States v. Wiltberger, 5 Wheat. 76; Randolph v. State, 9 Tex. 521; Strong v. Stebbins, 5 Cow. 210.

² State v. Stephenson, 2 Bailey, 334.

³ Reed v. Northfield, 13 Pick. 94, 100; Stanley v. Wharton, 9 Price, 301; Palmer v. York Bank, 18 Me. 166; Bayard v. Smith, 17 Wend. 88; Frohock v. Pattee, 38 Me. 103; Sloan v. Johnson, 14 S. & M. 47; Foote v. Vanzandt, 34 Miss. 40.

⁴ Bay City, etc. R. R. Co. v. Austin, 21 Mich. 390; Smith v. Causey, 22 Ala. 568; Cohn v. Neeves, 40 Wis. 393; Le Forest v. Tolman, 117 Mass. 109; Swift v. Applebone, 23 Mich. 252.

⁵ Wynne v. Middleton, 1 Wils. 126; Raynard v. Chase, 1 Burr. 2, 6.

And the same statute may be remedial for certain purposes, and liberally construed therefor, and at the same time be of such a nature, and operate with such harshness upon a class of offenders subject to it, that they are entitled to invoke the rule of strict construction.¹ All of the provisions of criminal statutes are not construed strictly; they are construed strictly against the accused, and favorably and equitably for him.²

§ 209. **Repealing statutes.**—These are revocations of former statutory enactments.³ A repeal may be in express words or by implication; as where a subsequent statute conflicting with it is enacted. This subject has been fully treated in a previous chapter.⁴

¹ *Hathaway v. Johnson*, 55 N. Y. 93. *States v. New Bedford Bridge*, 1

² 1 Hawk. P. C., Curwood's ed. 90; *Wood. & M.* 401.

Myers v. State, 1 Conn. 502; *Warrington v. Furber*, 8 East, 242, 245; *United*

³ *Dwarr.* 478.

⁴ *Ante*, ch. 8.

CHAPTER XII.

PARTS OF A STATUTE AND THEIR RELATIONS.

§ 210. The title.	§ 217. Partial conflict resolved into an exception.
212. The preamble.	218. Words expounded to accord with intent.
214. The enacting style.	220. Effect of total conflict.
215. The purview.	232. Punctuation.
216. Exceptions, provisos, interpretation, repealing and saving clauses.	234. Headings and marginal notes.

§ 210. **The title.**—The English courts have always held the title to be no part of the act; it is said to be no more so than the title of a book is part of the book.¹ In strictness, Lord Coke said, it ought not to be taken into consideration at all.² It was generally framed by the clerk of the branch of parliament where the act originated, and was intended only as a convenient means of reference.³ The same declaration, that the title is no part of the act, has been frequently made by judges in this country.⁴ But in modern practice the title is adopted by the legislature, more thoroughly read than the act itself, and in many states is the subject of constitutional regulation. It is not an enacting part, but is in some sort a part of the act, though only a formal part.⁵ By the common law it could not control the plain words of a statute; it was resorted to only in cases of doubt for such aid as it could afford

¹ *Mills v. Wilkins*, 6 Mod. 62; *Sal-keld v. Johnson*, 2 Ex. 256, 283; *Rex v. Williams*, 1 W. Bl. 93; *Attorney-General v. Weymouth*, 1 Amb. 20; *Chance v. Adams*, 1 Lord Raym. 77; *Jefferys v. Boosey*, 4 H. L. 982; *Rawley v. Rawley*, 1 Q. B. D. 466; *Bentley v. Rotherham*, 4 Ch. D. 588; *Morant v. Taylor*, 1 Ex. D. 194; *Hunter v. Nockolds*, 1 McN. & Gord. 651.

² *Attorney-General v. Weymouth*, 1 Amb. 20; *Powtler's Case*, 11 Coke, 33.

³ *Hadden v. The Collector*, 5 Wall. 107, 110; *Plummer v. People*, 74 Ill. 361.

⁴ *Bradford v. Jones*, 1 Md. 351, 370; *Commonwealth v. Shifer*, 53 Pa. St. 71; *Plummer v. People*, 74 Ill. 361, 363; *Cohen v. Barrett*, 5 Cal. 195; *State v. Stephenson*, 2 Bailey, (S. C.) 334.

⁵ *Hadden v. The Collector*, 5 Wall. 107, 110; *Burgett v. Burgett*, 2 Ohio, 219, 221; *Plummer v. People*, 74 Ill. 361; *Ogden v. Strong*, 2 Paine, 584.

in removing ambiguities.¹ Acts may be identified by the title.² An act may have effect as to persons and subjects broader than the title where the words are plain, and where there is no constitutional barrier.³ But if the meaning is doubtful, the title if expressive may have the effect to resolve the doubts by extension of the purview,⁴ or by restraining it,⁵ or to correct an obvious error;⁶ for in ascertaining the intention nothing is to be rejected from which aid can be derived; therefore, the title of an act may claim a degree of notice, and is entitled to its share of consideration.⁷ Where the text of the statute is plain and unambiguous, the title cannot have the effect to modify it.⁸

§ 211. The constitutional provision that no law shall embrace more than one subject, and requiring that to be expressed in the title, has given the title of legislative acts more importance.⁹ It is not, however, required or intended that the title shall contain a full index to all the contents of the law;

¹ *United States v. Fisher*, 2 Cr. 358; *Ogden v. Strong*, 2 Paine, 584; *United States v. Palmer*, 3 Wheat. 610; *People v. Davenport*, 91 N. Y. 574; *People v. O'Brien*, 111 id. 1; S. C. 7 Am. St. R. 684; *Hines v. R. R. Co.* 95 N. C. 434; *Commonwealth v. Gaines*, 2 Va. Cas. 172; *Davidson v. Clayland*, 1 Har. & J. 546; *Canal Co. v. R. R. Co.* 4 Gill & J. 1; *Kent v. Somervell*, 7 Gill & J. 265; *Lucas v. McBlair*, 12 id. 1; *Eastman v. McAlpin*, 1 Ga. 157; *State v. Cazeau*, 8 La. Ann. 109; *Cohen v. Barrett*, 5 Cal. 195; *State v. Stephenson*, 2 Bailey, 334; *Burgett v. Burgett*, 2 Ohio, 219; *Bartlett v. Morris*, 9 Port. 266; *Ins. Co. v. Stokes*, 9 Phila. 80; *Cochran v. Library Co.* 6 id. 492; *Baillie's Case*, 1 Leach's Cas. 396; *Crespigny v. Wittenoom*, 4 T. R. 793; *Taylor v. Newman*, 4 B. & S. 89; *Coomber v. Berks*, L. R. 9 Q. B. Div. 33; *Johnson v. Upham*, 2 E. & E. 250; *Shaw v. Rudder*, 9 Irish C. L. (N. S.) 219; *Reg. v. Mallow Union*, 12 id. 35; *Free v. Burgoyne*, 5 B. & C. 400; *Allkins v. Jupe*, 2 C. P. D. 375; *Heard v. Baskerville*, Hob. 232; *Wood v. Row-*

cliffe, 6 Hare, 191. The title of a city ordinance being inessential cannot control the tenor of the enactment. *Hershoff v. Treasurer*, etc. 45 N. J. L. 288.

² *Reg. v. Wilcock*, 7 Q. B. 317; *Boothroyd*, In re. 15 M. & W. 1.

³ *United States v. Fisher*, 2 Cr. 358; *Powlter's Case*, 11 Coke, 33.

⁴ *Deddrick v. Wood*, 15 Pa. St. 9; *Ins. Co. v. Stokes*, 9 Phila. 80.

⁵ *Cochran v. The Library Co.* 6 Phila. 492; *Yeager v. Weaver*, 64 Pa. St. 425; *United States v. Palmer*, 3 Wheat. 610, 631; *State v. Stephenson*, 2 Bailey, 334; *Field v. Gooding*, 106 Mass. 310; *Brett v. Brett*, 3 Addams, 219.

⁶ *Wilson v. Spaulding*, 19 Fed. Rep. 304.

⁷ *United States v. Fisher*, *supra*; *Deddrick v. Wood*, *supra*.

⁸ *Boston Min. Co.*, In re, 51 Cal. 624; *Commonwealth v. Slifer*, 53 Pa. St. 71.

⁹ *Boston Min. Co.*, In re, 51 Cal. 624; *Cooley*, C. L. p. 172.

it is permitted to be general in its terms, and therefore it will seldom occur that it will afford a clue to the intention when the text of the statute is uncertain. But the title of an act is now so associated with it in the process of legislation that when, in performing its constitutional functions, it affords means of determining the legislative intent, in cases of doubt its help cannot be rejected for being extrinsic and extra-legislative.¹ The language of an act should be construed in view of its title and its lawful purposes; broad language should be confined to lawful objects.² The subject or object expressed in the title fixes a limit to the scope of the act, and provisions not germane but foreign to such subject will be excluded as unconstitutional and void.³

§ 212. **The preamble.**—The preamble in a statute is a prefatory statement or explanation. It purports usually to state the reason or occasion for making the law to which it is prefixed. It accompanies the bill through the process of enactment, and thus emanates from the law-maker. It is not part of the law, in a legislative sense, and hence can never enlarge the scope of a statute; it cannot of itself confer any power. Its true office is to expound powers conferred, not substantially to create them.⁴ But it is a guide of some importance to the intention of the legislature. It is “a good means,” says Lord Coke, “to find out the meaning of the statute, and is a true key to open the understanding thereof.”⁵ This affirms that it has very considerable value in interpreting the statute, but it does not define precisely its force for that purpose. Lord Tenterden thus expressed himself on the same subject: “In construing acts of parliament we are to look not only to

¹ *People v. Wood*, 71 N. Y. 371, 374; *necticut, etc. Ins. Co. v. Albert*, 39 Hadden v. The Collector, 5 Wall. Mo. 181; *Battle v. Shivers*, 39 Ga. 405; 107; *People v. Molyneux*, 40 N. Y. Nazro v. Merchants' M. Ins. Co. 14 113; S. C. 53 Barb. 9; *Bishop v. Wis. 295; Dodd v. State*, 18 Ind. 56; Barton, 2 Hun. 436; *People v. Davenport*, 91 N. Y. 574; *Wilson v. Spaulding*, 19 Fed. Rep. 304; *Torreyson v. Board of Examiners*, 7 Nev. 19; *Smith v. State*, 28 Ind. 321; *Garrigus v. Board of Com'rs*, 39 Ind. 66; *Hines v. Railroad Co.* 95 N. C. 434; *Commonwealth v. Slifer*, 53 Pa. St. 71; *Bradford v. Jones*, 1 Md. 370; *Con-*

Allor v. Wayne Co. Auditors, 48 Mich. 76, 97; *Singer M. Co. v. Graham*, 8 Oregon, 17.

³ *Ante*, § 102.

⁴ *Story, Com. on Const.* § 459; *Wilson v. Knubley*, 7 East, 128.

⁵ *Co. Litt.* 79a; *Plowd.* 369.

the language of the preamble, or of any particular clause, but at the language of the whole act; and if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the act, and upon a view of the whole act we can collect from the more large and extensive expressions used in other parts the real intention of the legislature, it is our duty to give effect to the large expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause."¹ He seems to place the preamble on an equal footing with any particular clause of the act itself; leaving it to be inferred that it is to be considered within the rule requiring every part of an act to be considered in determining its meaning.

The established doctrine seems to be that if, on reading the enacting part, there is no ambiguity or doubt as to its scope or meaning, there can be no recourse to either the title or preamble in search of a different meaning. "This is the case where the words are plain without any scruple, and absolute without any saving."² And then the preamble cannot restrain or extend the import of the enacting clause.³ The preamble cannot be permitted to introduce doubt or uncertainty where otherwise it would not exist.⁴ An act cannot be declared unconstitutional for matter contained in the preamble, the text of the statute itself being free from constitutional objection.⁵ When the legislature passes an act within its powers, a statement of its reasons in the preamble will not affect the validity of the act.⁶ But where there is uncertainty, ambiguity or doubt on the language of the statute itself, the preamble may aid as far as it can to ascertain the legislative intent.⁷ Where

¹ *Bywater v. Brandling*, 7 B. & C. 443. H. L. Cas. 358; *Clark v. Bynum*, 3 McCord, 298; *Covington v. McNickle*, 18 B. Mon. 262; *Rex v. St. Peter & St. Paul in B.* 1 Bott, 443.

² *Co. Inst.* 533.

³ *Colehan v. Cooke*, Willes, 395; *Holbrook v. Holbrook*, 1 Pick. 248; *Jackson v. Gilchrist*, 15 John. 89; *Emanuel v. Constable*, 3 Russ. 436; *Taylor v. Oldham Corporation*, L. R. 4 Ch. Div. 395; *Bentley v. Rotherham L. Board*, id. 588; *Crespigny v. Witte- noom*, 4 T. R. 790; *Lees v. Summers- gill*, 17 Ves. 508; *Mason v. Armitage*, 13 id. 36; *Copland v. Davies*, L. R. 5

⁴ *James v. Du Bois*, 16 N. J. L. 285; *Bac. Abr. tit. Statutes*, L, 7.

⁵ *Sutherland v. De Leon*, 1 Tex. 250.

⁶ *Lothrop v. Stedman*, 42 Conn. 583.

⁷ *County of York v. Crafton*, 100 Pa. St. 619; *Yazoo R. R. Co. v. Thomas*, 132 U. S. 174; *Beard v. Rowan*, 9 Pet. 301, 317; *Jackson v. Gilchrist*, 15 John. 89; *Constantine v. Van Winkle*,

there is such generality in the text of the statute as renders it ambiguous as to scope, the preamble may be referred to to determine whether such general language is to have the most extensive or only a restricted operation; for the purpose of the preamble is to state the reason and object of the law.¹ The preamble may explain an equivocal expression used in the enacting part, but it can never control its obvious meaning, nor supply matter not within the spirit and meaning of the statute itself.² It may, in this sense, be referred to in the construction of a statute to which it was prefixed after its enactment without it.³ The generality of the enacting part must be such as to amount to ambiguity, or be such as to suggest a doubt, to justify restraining it for matter in the preamble.⁴ The very subject-matter, without a preamble, may have the effect to limit general language.⁵

§ 213. The legislature cannot bind itself by a preamble, nor even by a statute, so as to impair its continuing power to legislate; hence, one provision of an act will prevail against another which is inconsistent and precedes it in the same act; *a fortiori* against a conflicting declaration in the preamble. The conflict between two provisions of the act must be obvious and inveterate to justify the conclusion that the latter repeals the earlier.⁶ The conflict of a provision in the act itself with the preamble will not signify, unless there is some obscurity or doubt as to the scope or meaning of the former, read alone. A clear and explicit enactment is not cut down by a more limited preamble or recital,⁷ even though the enacting clause is in

6 Hill, 177, 184; Brett v. Brett, 3 Addams, 210; Deldrick v. Wood, 15 Pa. St. 9; Bywater v. Brandling, 7 B. & C. 643; Kearns v. Cordwainers' Co. 6 C. B. (N. S.) 388; State v. Cazeau, 8 La. Ann. 109; United States v. Webster, Davies, 38; Blue v. McDuffie, Busbee L. (N. C.) 131; Nash v. Allen, 4 Q. B. 784; Crowder v. Stewart, L. R. 16 Ch. Div. 370.

¹ United States v. Webster, Davies, 38.

² Clark v. Bynum, 3 McCord, 298; Copeman v. Gallant, 1 P. Wms. 314.

³ Goldsmid v. Hampton, 5 C. B. (N. S.) 94.

⁴ Trueman vs. Lambert, 4 M. & S. 238; Hughes v. Done, 1 Q. B. 301.

⁵ Salkeld v. Johnston, 1 Hare, 196; Henderson v. Bise, 3 Starkie, 158; Elsworth v. Cole, 2 M. & W. 31.

⁶ *Ante*, § 148.

⁷ Hughes v. Chester, etc. Ry. Co. 1 Drew. & Sm. 524; Kearns v. Cordwainers' Co. 6 C. B. (N. S.) 388-408; Greig v. Bendeno, El. Bl. & El. 133; Barton v. Hannant, 3 B. & S. 16; Jackson v. Gilchrist, 15 John. 89; Treasurers v. Lang, 2 Bailey, 430.

general words and the preamble particular.¹ Strong words in the enacting part of a statute may extend it beyond the preamble.² Though the preamble is generally a key to the statute, yet it does not always open all parts of it. Sometimes the legislature, having a particular mischief in view, to prevent which was the first and immediate object of the statute, recites that in the preamble, and then goes on in the body of the act to provide a remedy for general mischiefs of the same nature but of different species, not expressed in the preamble nor perhaps then in contemplation.³

¹Bac. Abr. tit. Statutes, L; *Treasurers v. Lang*, *supra*.

²*Pattison v. Banks*, 2 Cowper, 543; *Rex v. Marks*, 3 East, 160.

³*Mace v. Cammel*, Loft. 782; *Holbrook v. Holbrook*, 1 Pick. 248; *Colehan v. Cooke*, Willes, 395. In *State v. Cazeau*, 8 La. Ann. 109, the court say: "The title of the law is: 'An act to authorize equitable assignees to sue in their own names;' and the words of the preamble are, 'whereas equitable assignees have frequently sustained injuries and loss by the death of assignors, or legal plaintiff,' which are supposed to have the effect to restrict the broad words of the enacting clause, and to confine them to the case of an assignee whose assignor has died without making an executor, and on whose estate there is no administration. It is admitted that where the words of the enacting clause are of double meaning, and the mind is at a loss to discover their true construction, and determine what it is that they embrace, it seizes upon anything from which assistance can be derived, and in that effort looks to the title or preamble (if there be one), or to both, in search of the aid it requires; by which many a key is sometimes found, to open the door to the intention of the legislature, that otherwise would be locked up in obscurity. In such a case and for

that purpose, the preamble, or the title, has a claim to consideration. But its office is auxiliary only, and stops there; and neither to be invoked for the purpose of restricting and controlling plain and unambiguous words in the enacting clause or body of the law. A preamble, it must be admitted, sometimes mistakes, or does not fully state, the whole object of the legislature; and where the words in the body of the law, taken in their plain obvious and natural sense as there found, embrace a subject not stated in the preamble, the preamble is not to control, and narrow them down to its own restricted limits; but if looked to at all, it is to be considered as not stating the entire object of the legislature. Though where the words used in the body of the law are in themselves ambiguous, and require the aid of the preamble to give them application, it may for that purpose be resorted to.

"In this case the words of the title are co-extensive with the words of the enacting clause, and although the preamble recites that equitable assignees have frequently sustained injuries and loss by the death of the assignor, or legal plaintiff, yet it does not declare that case to be the only subject intended to be legislated upon. And the words of the enacting clause, 'any assignee or assignees,' plainly

Though the preamble of one act may appear to be directed against a particular evil, and though another act may be passed to aid its application, the provisions of the second act are not necessarily to be confined to the special purpose which seemed to be the particular object which the first had in view. Its own words must be considered as explaining and defining its objects and its meaning.¹ It has been stated to be a general rule that the preamble may extend, but cannot restrain, the effect of the enacting clause.² In a late English case it was held: "We are to give effect to the preamble to this extent, namely, that it shows us what the legislature was intending; and if the words of the enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one showing an intention of the legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent only is the preamble material."³ We ought not to restrict a section in an act by the preamble where the section is not inconsistent with the spirit of the act.⁴ While an enactment is conclusive as to the facts it states against those who are within its operation, though not as to such as are not within its enacting part,⁵ a mere recital in a statute, either of fact or of law, is not conclusive. A court is at liberty to decide the

and clearly embracing, according to their natural and ordinary meaning, any assignee, whether the assignor be dead, with or without an executor, or administration upon his estate, they are not to be restricted to the recital in the preamble. But effect is to be given to the plain words of the legislature expressed in the enacting clause, as embracing not merely the subject of the recital in the preamble, but extending beyond the recital, and embracing every other case comprehended within their clear meaning, without resorting to the preamble, for the purpose of restricting or controlling them; no explanation of their meaning or application being required by any ambiguity in the body of the law. And particularly

when it is not perceived that any mischief can be done, by giving effect to the words in the body of the law, according to their natural plain meaning and import." See *Mayor, etc. v. Moore*, 6 Harris & J. 375; *Kent v. Somervell*, 7 Gill & J. 265.

¹ *Copland v. Davies*, L. R. 5 H. L. Cas. 358.

² *Kearns v. Cordwainers' Co.* 6 C. B. (N. S.) 388.

³ Per Lord Blackburn, *West Ham Overseers v. Iles*, L. R. 8 App. Cas. 386.

⁴ *Sutton v. Sutton*, L. R. 22 Ch. Div. 511.

⁵ See *Edinburgh, etc. R. R. Co. v. Linlithgow*, 3 Macq. H. L. Cas. 704; *Perry v. Newsom*, 1 Ired. Eq. 28; 3 Atk. 304; Cowp. 698.

law differently, and to inquire independently as to the truth of the recited facts.¹

§ 214. **The enacting style.**— This part of a statute has been discussed in a previous section with reference to its materiality to the validity of an act.² It indicates from what authority the law emanates, and hence its jurisdiction; but that is always recognized and the law identified as passed by a determinate legislative body constitutionally created to legislate for the territory or country where such law is supposed to operate, before any question of interpretation arises. The reference in the style to the enacting power is only useful as an announcement of the authority which commands in the act. When interpretation begins, that legislative jurisdiction is always taken for granted and in view, subject to the limitations imposed by the paramount law.

§ 215. **The purview; one part to be construed by another.**— The enacting part of a law is comprehensively termed its purview. It has been defined to be that part of an act of the legislature which begins with the words "Be it enacted," etc., and ends with the repealing clause.³ It is not unfrequently used, however, to indicate the providing part only, and, therefore, excluding exceptions, provisos and saving clauses; it is used to refer to such providing part in distinction from such restrictive clauses.⁴ It is to be presumed that all the

¹ *Regina v. Haughton*, 1 El. & Bl. 501; *Board of Com'rs v. State*, 9 Gill, 379-400; *State v. Reed*, 4 H. & McH. 10; *Duncombe v. Prindle*, 12 Iowa, 1. See *Rex v. Sutton*, 4 M. & S. 532. An inquiry by the legislature into the affairs of a corporation with reference to a repeal of its charter is not a judicial act. *Lothrop v. Stedman*, 42 Conn. 583. A party is not estopped to deny facts recited in an act of the legislature. So far as the facts recited are concerned it is no law, and the court is not bound to take judicial cognizance of it. The investigation of facts belongs to the judicial department. The court: "The legislature has no power to legislate the truth of facts. Whether facts upon

which rights depend are true or false is an inquiry for the courts to make under legal forms; it belongs to the judicial department of the government." *Dougherty v. Bethune*, 7 Ga. 90; *Thornton v. Lane*, 11 Ga. 459. See *People v. Tyler*, 7 Mich. 161; *People v. Lawrence*, 36 Barb. 177.

² *Ante*, § 65.

³ *Bouv. Law Dic. tit. Purview*; *Bish. W. L.* § 52.

⁴ *The San Pedro*, 2 Wheat. 132. *Dwarris* says: "The parts of statutes are — in a popular, though not legal sense — the title, the preamble, the purview or body of the act, clauses, provisos, exceptions." *Dwar. Stat* (2d ed.) 500.

subsidiary provisions of an act harmonize with each other, and with the purpose of the law; if the act is intended to embrace several objects, that they do not conflict. Therefore it is an elementary rule of construction that all the parts of an act relating to the same subject should be considered together, and not each by itself.¹ By such a reading and consideration of a statute its object or general intent is sought for, and the consistent auxiliary effect of each individual part. Flexible language which may be used in a restricted or extensive sense will be construed to make it consistent with the purpose of the act and the intended modes of its operation as indicated by such general intent, survey and comparison — *ex antecedentibus et consequentibus fit optima interpretatio*.² The order in which provisions occur in a statute is immaterial where the meaning is plain and there is not a total conflict. A later

¹ Co. Litt. 381a; Little Rock, etc. Pick. 235; Commonwealth v. Cambridge, 20 id. 267; San Francisco v. Wilson v. Biscoe, 11 Ark. 44; Strode Hazen, 5 Cal. 169; Taylor v. Palmer v. Stafford Justices, 1 Brock. 162; Ellison v. Mobile, etc. R. R. Co. 36 Miss. 572; Swann v. Buck, 40 id. 304; City Bank v. Huie, 1 Rob. 236; United States v. Hawkins, 4 Mart. (N. S.) 317; Mayor v. Howard, 6 Har. & J. 388; Harrell v. Harrell, 8 Fla. 46; State v. Atkins, 35 Ga. 315; Potter v. Safford, 50 Mich. 46; Reithmiller v. People, 44 id. 280, 284; Van Fleet v. Van Fleet, 49 id. 610; People v. Burns, 5 id. 114; Harrison, Ex parte, 4 Cow. 63; Kelley's Heirs v. McGuire, 15 Ark. 555; Pennington v. Cox, 2 Cranch, 83; Rice v. Railroad Co. 1 Black, 358; Atkins v. Disintegrating Co. 18 Wall. 272; Wilkinson v. Leland, 2 Pet. 627; Mason v. Finch, 3 Ill. 223; Belleville R. R. Co. v. Gregory, 15 id. 20; Burke v. Monroe Co. 77 id. 610; Thompson v. Bulson, 78 id. 277; Williams v. People, 17 Ill. App. 274; United States v. Bassett, 2 Story, 380; Ogden v. Strong, 2 Paine, 584; Holbrook v. Holbrook, 1 Pick. 248; Commonwealth v. Alger, 7 Cush. 53; Mendon v. Worcester, 10

Pick. 235; Commonwealth v. Cambridge, 20 id. 267; San Francisco v. Hazen, 5 Cal. 169; Taylor v. Palmer, 31 id. 240; Gates v. Salmon, 35 id. 576; Davey v. Burlington, etc. R. R. Co. 31 Iowa, 553; Berry v. Clary, 77 Me. 482; Brooks v. Commissioners, 31 Ala. 227; State v. Mayor, etc. 35 N. J. L. 197; Canal Co. v. Railroad Co. 4 Gill & J. 1; Magruder v. Carroll, 4 Md. 335; Alexander v. Worthington, 5 id. 471; Parkinson v. State, 14 Md. 184; Stockett v. Bird, 18 id. 484; Commonwealth v. Duane, 1 Binn. 601; Commonwealth v. Conyngham, 66 Pa. St. 99; Holl v. Deshler, 71 id. 299; Catlin v. Hull, 21 Vt. 152; Ryegate v. Wardsboro, 30 id. 746; Maple Lake v. Wright Co. 12 Minn. 403; Gas Co. v. Wheeling, 8 W. Va. 320; Scott v. State, 22 Ark. 369; Torrance v. McDougald, 12 Ga. 526; Covington v. McNickle, 18 B. Mon. 269; Rugles v. Washington Co. 3 Mo. 496; State v. Weigel, 48 id. 29; Green v. Cheek, 5 Ind. 105; Crone v. State, 49 id. 538.

² Holl v. Deshler, 71 Pa. St. 299; Rogers v. Rogers, 3 Wend. 503, 528.

clause or provision may qualify an earlier one, and the converse is equally true.¹

§ 216. Exceptions, provisos, interpretation, repealing and saving clauses are often introduced to restrict or qualify the effect of general language, remove possible obscurities that might otherwise exist, and render the law more precise. These will be presently considered. But one provision may be qualified by another, though it does not profess to have that effect. Words expressive of a particular intent incompatible with other words expressive of a general intent will be construed to make an exception, so that all parts of the act may have effect.² The context may thus serve to engraft an exception by implication to dispose of an apparent conflict; to restrict general words, to limit them to the subject-matter of the act, or to expand words beyond their natural import if taken alone. A few cases will be given to illustrate these points.

§ 217. **Partial conflict resolved into an exception.**—The law will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it.³ But, in the nature of things, contradictions cannot stand together.⁴ Where there is an act or provision which is general, and applicable actually or potentially to a multitude of subjects, and there is also another act or provision which is particular and applicable to one of these subjects, and inconsistent with the general act, they are not necessarily so inconsistent that both cannot stand, though contained in the same act, or though the general law were an independent enactment.⁵ The general act would operate according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act.⁶ That would be deemed an exception, unless the terms of the later general law manifested an intention to exclude the exception. If the general and

¹ *Gibbons v. Brittenum*, 56 Miss. 239; *Endlich*, §§ 38, 182.

² *Churchill v. Crease*, 5 Bing. 177, 180; *Stockett v. Bird*, 18 Md. 484.

³ *Lyn v. Wyn, Bridg.* 122.

⁴ *Re Hickory Tree Road*, 43 Pa. St. 139, 143.

⁵ *Ante*, § 157.

⁶ *Crane v. Reeder*, 22 Mich. 322; *Felt*

v. Felt, 19 Wis. 193; *State v. Goetze*, 22 id. 363; *Elton v. Geissert*, 10 Phila. 330; *Long v. Culp*, 14 Kan. 412; *Warren v. Shuman*, 5 Tex. 441; *Pretty v. Solly*, 26 Beav. 606; *Taylor v. Oldham Corporation*, L. R. 4 Ch. Div. 395; *Gregory's Case*, 6 Rep. 19b; *Foster's Case*, 11 Rep. 58b.

special provisions are in the same act, or passed on the same day in separate acts, or at the same session of the legislature, the presumption is stronger that both are intended to operate. In adjusting the general provisions in a general act to the particular provisions of the special act, considerations of reason and justice, and the universal analogy of such provisions in similar acts, are proper to be borne in mind, and ought to have much weight and force.¹ A local act provided that the auditor of a particular county should receive an annual salary of \$700 in full for his official services. On the following day a general act was passed imposing additional duties on auditors; and it provided a compensation by a percentage on certain funds. It was held that these were to be construed as one act, and that the first act exclusively controlled as to the particular county.² A general act made the term of revenue commissioners four years; by another act, passed the same day, the charter of a particular city was amended so as to make the official term of its revenue commissioners two years; it was held that this amendment made a special exception to the general rule.³ If an act in one section authorizes a corporation to sell a particular piece of land, and in another prohibits it from selling any land, the first section is not repealed, but will be treated as creating an exception.⁴ An absolute direction in one section to set off for a widow and children the decedent's homestead, free from all his debts, though absolute in terms, was held qualified by a subsequent section, which in terms embraced such homestead, subjecting it to debts contracted prior to the passage of the act.⁵

§ 218. Words expanded or limited to accord with intent.

It is indispensable to a correct understanding of a statute to inquire first what is the subject of it, what object is intended to be accomplished by it.⁶ When the subject-matter is once clearly ascertained and its general intent, a key is found to all

¹ Metropolitan District Ry. Co. v. v. Mayor of Brecon, 28 L. J. Ch. 600; Sharpe, L. R. 5 App. Cas. 431. 26 Bevan, 533.

² La Grange v. Cutler, 6 Ind. 354; ⁵ Simonds v. Powers, 28 Vt. 354.

St. Martin v. New Orleans, 14 La. Ann. 113. ⁶ Olive v. Walton, 33 Miss. 114; Green v. Weller, 32 Miss. 650; Burr

³ Branham v. Long, 78 Va. 352; v. Dana, 22 Cal. 11; Woodruff v. State v. Trenton, 38 N. J. L. 64. State, 3 Ark. 285; Wassell v. Tunnah,

⁴ Per Romilly, M. R., in De Winton 25 id. 101; Green v. State, 59 Md. 123.

its intricacies;—general words may be restrained to it, and those of narrower import may be expanded to embrace it to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered or supplied so as to obviate any repugnancy or inconsistency with such intention.¹ Thus in the construction of a temporary appropriation act the presumption is that any special provisions of a general character therein contained are intended to be restricted in their operation to the subject-matter of the act, and not permanent regulations, unless the intention of making them so is clearly expressed.² In an act giving to pilots a lien upon vessels, though the statute was general, it was held not intended to apply to men-of-war of the United States, because the remedy provided could not be applied.³ General words may be cut down when a certain application of them would antagonize a settled policy of the state.⁴ The provision in a general repealing act that “no offense committed or penalty incurred previous to the time when any statutory provision shall be repealed shall be affected by such repeal,” was construed as relating solely to laws repealed by that act.⁵ In the *Eureka Case*,⁶ Mr. Justice Field said: “Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature. The inquiry, where any uncertainty exists, always is as to what the legislature intended, and when that is ascertained it controls. In a recent case before the supreme court of the United States, singing birds were held not to be live animals within the meaning of a revenue act of congress.⁷ And in a previous case, arising upon

¹ *Quin v. O’Keeffe*, 10 Ir. C. L. (N. S.) 393; *Nuth v. Tamplin*, L. R. 8 Q. B. Div. 253; *Wainwright, In re*, 1 Phil. 258; *Brinsfield v. Carter*, 2 Ga. 150; *Blanchard v. Sprague*, 3 Sumn. 279; *Cope v. Doherty*, 2 De G. & J. 614; *Shoemaker v. Lansing*, 17 Wend. 327; *People v. Commissioners*, 3 Hill, 601; *Bishop v. Barton*, 2 Hun, 436; *Matthews v. Commonwealth*, 18 Gratt. 989; *Taylor v. McGill*, 6 Lea, 294; *Milburn v. State*, 1 Md. 17; *State v.*

King, 44 Mo. 283; *Wheeler v. McCormick*, 8 Blatchf. 267; *Att’y-Gen’l v. Kwok-A-Sing*, L. R. 5 P. C. 179.

² *United States v. Jarvis, Davies*, 274; *Minis v. United States*, 15 Pet. 445.

³ *Ayers v. Knox*, 7 Mass. 806; *Mayor, etc. v. Root*, 8 Md. 95.

⁴ *Greenhow v. James*, 80 Va. 636.

⁵ *Mongeon v. People*, 55 N. Y. 613.

⁶ *Sawyer*, 302, 317.

⁷ *Reiche v. Smythe*, 13 Wall. 162.

the construction of the Oregon donation act of congress, the term, a single man, was held to include in its meaning an unmarried woman.”¹ In the dower act of the 3 and 4 Will IV., chapter 105, the word land, defined to include manors, messuages and all other hereditaments both corporeal and incorporeal, except such as are not liable to dower, was held not to include copyhold lands, because it provides that the widow shall not be entitled to dower when *the deed* by which the land was conveyed to her husband contains a declaration to that effect. That provision showed that only land so transferable was in contemplation of the legislature.² An act for raising state taxes provided for a certain tax on railroads on the basis of passengers, and that they should not be assessed with any tax on their lands, buildings or improvements. This exemption was confined to taxes of the kinds provided for in the act, and it was held it did not conflict with another act providing for municipal taxation.³ In determining the scope of general provisions there is a leaning to prevent absurdity, for it cannot be deemed intended; ⁴ also injustice, for like reason.⁵

¹ *Silver v. Ladd*, 7 Wall. 219.

² *Smith v. Adams*, 5 De G. M. & G. 719.

³ *Orange, etc. R. R. Co. v. Alexandria*, 17 Gratt. 176.

⁴ *State v. Clark*, 5 Dutcher, 96; *Commonwealth v. Loring*, 8 Pick. 370; *Bailey v. Commonwealth*, 11 Bush, 688; *Henry v. Tilson*, 17 Vt. 479; *Plumstead Board of Works v. Spackman*, L. R. 13 Q. B. Div. 878.

⁵ *Murray v. Gibson*, 15 How. (U. S.) 421; *Robinson v. Varnell*, 16 Tex. 382; *Meade v. Deputy Marshal*, 1 Brock. 324; *Commonwealth v. Slack*, 19 Pick. 304. In *Commercial Bank v. Foster*, 5 La. Ann. 516, the provision of a bank charter that if the bank should suspend or refuse payment, the holder should be entitled to interest from the time of the suspension until payment, did not apply after resumption; that interest would then cease. The object of the statute was then answered, and the penalty

could only be exacted for the time the bank was in default. A statute of Mississippi declares that the statute of limitation shall not apply to notes, bills or evidences of debt issued by any bank or moneyed corporation. The court: “While the general rule is that statutes of limitation do not apply to bank-bills, because they are by the consent of mankind and course of business considered as money, and that their date is no evidence of the time when they were issued, as they are being continually returned and issued by the banks, yet if such bills have ceased to circulate as currency, and have ceased to be taken in and reissued by the banks, they no longer have that distinctive character from other contracts which excepts them from the operation of the statutes of limitation. *Butts v. Vicksburg, etc. R. R. Co.* 63 Miss. 462; 2 Danl. on Neg. Inst. § 1684; *Kimbrow v. Bank of Fulton*,

§ 219. Not only may the meaning of words be restricted by the subject-matter of an act or to avoid repugnance with other parts, but for like reasons they may be expanded. The application of the words of a single provision may be enlarged or restrained to bring the operation of the act within the intention of the legislature, when violence will not be done by such interpretation to the language of the statute.¹ The propriety and necessity of thus construing words are most obvious and imperative when the purpose is to harmonize one part of an act with another in accord with its general intent. The statute itself furnishes the best means of its own exposition; and if the intent of the act can be clearly ascertained from a reading of its provisions, and all its parts may be brought into harmony therewith, that intent will prevail without resorting to other aids for construction.² The intention of an act will prevail over the literal sense of its terms.³ So general words in one part may be controlled and restrained by particular words in another, taken as expressing the same intention with more precision.⁴ The true meaning of any clause or provision is that which best accords with the subject and general purpose of the act and every other part. The word notice was held to mean a written notice because certain provisions required it to be *served* or left in a particular manner.⁵ Where

49 Ga. 419." *Clark's Succession*, 11 La. Ann. 124; *United States v. Kirby*, 7 Wall. 482; *Reiche v. Smythe*, 13 Wall. 162; *Ellis, Ex parte*, 11 Cal. 222; *McLelland v. Shaw*, 15 Tex. 319.

¹ *Maxwell v. Collins*, 8 Ind. 38, 40; *Quin v. O'Keeffe*, 10 Ir. C. L. (N. S.) 393; *Wainwright*, in re, 1 Phil. 258; *Brinsfield v. Carter*, 2 Ga. 150; *Cope v. Doherty*, 2 De G. & J. 614; *Collins v. Welch*, L. R. 5 C. P. Div. 29; *Richards v. McBride*, L. R. 8 Q. B. Div. 119; *Metropolitan B'd of Works v. Steed*, id. 445; *Sams v. King*, 18 Fla. 557.

² *Green v. Weller*, 32 Miss. 650; *Smith v. Bell*, 10 M. & W. 378; *Stephenson v. Higginson*, 3 H. L. Cas. 638; *Sussex Peerage*, 11 Cl. & F. 85; *Cearfoss v. State*, 42 Md. 406;

Scaggs v. Baltimore, etc. R. R. Co. 10 Md. 268; *Beal v. Harwood*, 2 Har. & J. 167; *Holl v. Deshler*, 71 Pa. St. 299; *Rogers v. Rogers*, 3 Wend. 503, 526; *Learned v. Corley*, 43 Miss. 687; *Reynolds v. Holland*, 35 Ark. 56.

³ *Id.*

⁴ *Simonds v. Powers*, 28 Vt. 354; *Long v. Culp*, 14 Kan. 412; *Electro M. etc. v. Van Auken*, 9 Colo. 204; *Covington v. McNickle*, 18 B. Mon. 262; *Maple Lake v. Wright Co.* 12 Minn. 403; *Rex v. Midland Ry. Co.* L. R. 10 Q. B. 389; *Fredericks v. Howie*, 1 H. & C. 381; *Re Hermance*, 71 N. Y. 481; *Spackman's Case*, 1 Macn. & G. 170; *Foster v. Blount*, 18 Ala. 687; *Woodworth v. State*, 26 Ohio St. 196.

⁵ *Moyle v. Jenkins*, 51 L. J. Q. B.

general and particular words occur, having reference to the subject of the act or some feature of it, the intention is the guide as deduced from a consideration of all its parts and the system of which it forms a part. Subsidiary provisions are not always co-extensive with those which define or indicate its full purpose. In *Bank of United States v. McKenzie*,¹ the question was whether corporations as plaintiffs were within the fourth section of the act of limitations of the state of Virginia; the proviso suspending its operation as to certain classes of persons in certain conditions being inapplicable; they were not liable to any of the disabilities which were enumerated in the twelfth section, not even that of being beyond seas. Section 4 was held applicable, and Marshall, C. J., said, speaking of the words of section 4: "They do not take into view the character of the plaintiff but of the action. In construing this section it is entirely unimportant by whom the suit is brought. The action is clearly barred by the length of time, whoever may be the plaintiff. The plain words of the statute are decisive. Nor does any reason or justice or policy exist which should take a corporation out of these words. The legislature could have no motive for limiting the time within which a suit should be brought by an individual which does not apply with exact force to a suit brought by a corporation. We find no words in the exception indicating an intention to make it co-extensive with the enacting clause, or to limit the general provision of the enacting clause to such general classes of persons as may comprehend individuals for whom justice would require the saving of rights which are found in the twelfth section. An exception is not co-extensive with the provision from which it forms the exception; and if a corporation cannot be brought within any of the savings of the statute, the inference is not that the corporation is withdrawn from the enacting clause, but that the legislature did not think it a being whose right to sue required a prolongation beyond the legal time given for suitors generally." It is here intended only to illustrate the flexibility of words as they are treated for the purpose of harmonizing one part of an act

112; *Wilson v. Nightingale*, 8 Q. B. works, 7 B. & C. 314; *Williams v. McDonal*, 3 Pin. (Wis.) 331.

¹2 Brock. 393.

with another and with its general purpose. Like considerations will require a statute to be construed as a whole with reference to the entire system of which it forms a part.¹ The inquiry to ascertain the intention of an act with reference to other legislation, and, when dubious, to extraneous facts and the general canons of construction, are discussed further on.

§ 220. Effect of total conflict between two parts of an act.—Where one part of an act is in conflict with another, and they cannot be brought into harmony by any rule of construction; where they are of equal scope, and there is a point-blank repugnancy, so that if one operates at all it will necessarily antagonize any effect of the other, what is the consequence? Both are void, by one neutralizing the other, on the ground that the legislature *uno flatu* have enacted a contradiction; or one, for being earlier or later in position, must be deemed to render the other nugatory, or repeal it. There are several direct adjudications that the provision which is latest in position repeals the other.² Being later in position, the

¹ McDougald v. Dougherty, 14 Ga. 674.

² Packer v. Sunbury, etc. R. R. Co. 19 Pa. St. 211; Ryan v. State, 5 Neb. 276, 282; Gibbons v. Brittenum, 56 Miss. 232; Harrington v. Rochester, 10 Wend. 547, 553; Commercial Bank v. Chambers, 8 Sm. & M. 9; Brown v. County Commissioners, 21 Pa. St. 37, 43; Quick v. Whitewater Township, 7 Ind. 570; Albertson v. State, 9 Neb. 429; Sams v. King, 18 Fla. 557; Branagan v. Dulaney, 8 Colo. 408; Gee v. Thompson, 11 La. Ann. 657; Peet v. Nalle, 30 id. Pt. II., 949; Hamilton v. Buxton, 6 Ark. 24; *ante*, § 170. Farmers' Bank v. Hale, 59 N. Y. 53, upon this subject, is an interesting case. In 1870 the legislature enacted a statute which was held by a majority of the court to be self-contradictory. The first section prescribed the rate of interest that banking associations, organized under the laws of the state, might contract for and take; and provided that the penalty for usury

should be forfeiture of twice the amount of the interest paid, substantially re-enacting the regulations and penalties prescribed in the national bank act. The next section is: "It is hereby declared that the true intent and meaning of this act is to place the banking associations, organized and doing business [under the laws of this state], on an equality, in the particulars in this act referred to, with the national banks organized under the act of congress. And all acts and parts of acts inconsistent with the provisions hereof are hereby repealed." In 1872 the court had held that the national bank act, in these particulars, did not operate in that state, and that the general laws of the state, prescribing a loss of the debt as a penalty for usury, applied to those banks. First Nat. Bk. of Whitehall v. Lamb, 50 N. Y. 95. It was therefore held in the case under review that the second section declared an intent directly opposed to

prevailing provision is deemed a later expression of the legislative will. This rule and the reason for it have been criticised,¹ because all the provisions of an act being adopted at the same time, there is no priority in point of time on account of their relative positions in the statute. This is strictly true; but, in the reading of a bill, matter near the close may be presumed to receive the last consideration, and, if assented to, is a later conclusion. Slight circumstances preponderate when a question is at equipoise. It receives some support from the analogous rule applicable in the construction of wills,² but it is not even as to that subject carried to its full logical extent; for if one fund is bequeathed severally to two persons, they will both take by equal shares.³

§ 221. By a singular caprice of the law a saving clause totally repugnant to the purview is rejected, while a proviso directly repugnant to the main body of the act repeals the purview, as it is said to speak the last intention of the makers.⁴ In the case of private writings other than wills, as deeds or other instruments *inter vivos*, the earlier repugnant part prevails,⁵ and the same seems to be the rule in legislative grants.⁶ Analogies, therefore, fail to furnish any consistent rule, and that which is sanctioned by adjudications is perhaps wise, since some rule should exist for such rare cases; it is a practicable solution, and there is a spice of reasoning to support it.

Such a contradiction will not be recognized so as to give arbitrary repealing effect to a provision later in position where

the express provisions of the first section. Church, C. J., said: "When different constructions may be put upon an act, one of which will accomplish the purpose of the legislature and the other render it nugatory, the former should be adopted; but when the provisions of an act are such that to make it operative would violate the declared meaning of the legislature, courts should be astute in construing it inoperative." The second section was treated as in the nature of a proviso, and controlling the previous provisions.

¹ Bish. W. L. §§ 63-65.

² 1 Redf. on Wills, 443, 451; 2 Par. on Cont. *513.

³ Ridout v. Pain, 3 Atk. 493; McGuire v. Evans, 5 Ired. Eq. 269; Jones' Appeal, 3 Grant, 169.

⁴ Attorney-General v. Chelsea Water Works Co., Fitzgibbons, 195; Rex v. Justices, 2 B. & Ad. 818.

⁵ 2 Par. on Cont. *513; Co. Litt. 112; Furnivall v. Coombes, 5 M. & G. 736.

⁶ Fore v. Williams, 35 Miss. 533. See Dugan v. Bridge Co. 27 Pa. St. 303; Mason v. Boom Co. 3 Wall. Jr. 252; Matter of Second Ave. Church, 66 N. Y. 395.

it is of dubious import, but only where the contradiction is clear and explicit.¹ The rule may be reversed and effect given to the clause or provision standing first in the act when it is more in accord with the general purpose of the act, construed in the light and with the aid of all other statutes *in pari materia*.² "The true principle undoubtedly is that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause and proviso, taken and construed together, is to prevail. If the principal object of the act can be accomplished and stand under the restriction of the saving clause or proviso, the same is not to be held void for repugnancy."³

§ 222. **Provisos, exceptions and saving clauses.**—It has not been an unfrequent mode of legislation to frame an act with general language in the enacting clause, and to restrict its operation by a proviso. It is often found difficult to limit the language in the enacting clause so as to admit every exception or limitation designed to be introduced into the section in its finished state.⁴ Provisos and exceptions are similar; intended to restrain the enacting clause; to except something which would otherwise be within it, or in some manner to modify it.⁵ A proviso is something engrafted upon a preceding enactment, and is legitimately used for the purpose of taking special cases out of a general class, or to guard against misinterpretation.⁶ The general intent will be controlled by the particular intent subsequently expressed.⁷ Where a stat-

¹ *State v. Williams*, 8 Ind. 191; *rey*, L. R. 5 Q. B. Div. 170; *McRae v. Mason v. Boom Co.* 3 Wall. Jr. 252. *Holcomb*, 46 Ark. 306; *Stowell v.*

² *Sams v. King*, 18 Fla. 557; *Kan. Zouch*, 1 Plowd. 361.

Pac. Ry. Co. v. Wyandotte, 16 Kan. 587; *Folmer's Appeal*, 87 Pa. St. 133; *Renner v. Bennett*, 21 Ohio St. 431. ⁶ *Savings Bank v. United States*, 19 Wall. 227; *Minis v. United States*, 15 Pet. 445; *Bank for Savings v. The Collector*, 3 Wall. 495; *Pott. Dwar.* 118; *Boon v. Juliet*, 2 Ill. 258.

³ 1 Kent's Com. 463, note b.

⁴ *Savings Institution v. Makin*, 23 Me. 360. ⁷ *Ihmson v. Monongahela Nav. Co.* 32 Pa. St. 152; *State v. Goetze*, 22 Wis. 363; *Gregory's Case*, 6 Co. 19b;

⁵ *Wayman v. Southard*, 10 Wheat. 1; *Pearce v. Bank of Mobile*, 33 Ala. 693; *Rawls v. Kennedy*, 23 id. 240; *Vorhees v. Bank of United States*, 10 Pet. 449; *Mullins v. Treasurer of Sur-* *Foster's Case*, 11 Co. 56b; *Rex v. Taunton St. James*, 9 B. & C. 831, 836; *Minis v. United States*, 15 Pet. 445.

ute forbids the doing of an act except upon a condition precedent, as obtaining a license, and it is impossible to perform the condition, as if the act provides that no license shall be granted, the condition is valid and the prohibition absolute.¹ A proviso is so identified with the text of a statute which it qualifies that if such enacting part is repealed by a subsequent statute repugnant to it, the proviso will fall also.² The effect of an exception which is a part of the enacting clause and is of general application is simply to restrict it as to the matter excepted. It operates for this purpose co-extensively with the matter which precedes. Hence in actions based on the statute the pleadings must negative the exception.³ It is not universally so extensive as the provision which it qualifies, as to subject-matter, for its purpose may be, and usually is, to reduce the subject-matter by withdrawing a part from the operation of the general words, or to give them a qualified operation merely as to the matter of the exception.⁴ Where there is a prohibition, grant or regulation in general words, and a saving of particular things, there is a strong implication that what is excepted would have been within the purview if it had not been excepted; and thus the purview may be made more comprehensive than it would otherwise have been.⁵ Thus, if there be a grant of all trees on a piece of land, which, if nothing more had been said, would only have embraced forest trees, but there is an exception of apple trees, other fruit trees, as peach and pear trees, will pass.⁶ But it is a matter of common experience that savings and exceptions are often introduced from abundant and even excessive caution. And it would sometimes pervert the intention of the author of the writing, if every other thing of the same general tenor as that excepted should be regarded as embraced in the general words. The rule, therefore, should be so defined as to avoid this perversion, and be limited to the cases where it is equivocal upon the general

¹ *State v. Douglass*, 5 Sneed, 608.

² *Church v. Stadler*, 16 Ind. 463.

³ *Vavasour v. Ormrod*, 6 B. & C. 430; *People v. Berberich*, 11 How.

Pr. 333; *Spieres v. Parker*, 1 T. R. 141; *Hoffman v. Peters*, 51 N. J. L. 244;

Blasdel v. State, 5 Tex. App. 263.

⁴ *Bank of U. S. v. McKenzie*, 2 Brock. 393.

⁵ *Gibbons v. Ogden*, 9 Wheat. 191; *Brown v. Maryland*, 12 id. 438; *United States v. Gilmore*, 8 Wall. 330.

⁶ *Vin. Abr. Grants*, H. 13, p. 61.

language whether a particular thing is embraced; then the exception of another thing of a similar kind will show that the first was intended to be included.¹

§ 223. The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it unless it clearly appears to have been intended to apply to some other matter.² It is to be construed in connection with the section of which it forms a part, and it is substantially an exception.³ If it be a proviso to a particular section, it does not apply to others unless plainly intended.⁴ It should be construed with reference to the immediately preceding parts of the clause to which it is attached.⁵ In other words, the proviso will be so restricted in the absence of anything in its terms, or the subject it deals with, evincing an intention to give it a broader effect.⁶ It is not an arbitrary rule to be enforced at all events, but is based on the presumption that the meaning of the law-maker is thereby reached.⁷ If irrelevant to the enacting part and meaningless with reference thereto, it has been rejected.⁸ And it was remarked in argument in *Ihmsen v. Monongahela Navigation Co.*:⁹ "If it was not intended to restrain the general clause it was a nullity." This is taking a proviso very strictly. The intention of the law-maker, if plainly expressed, must have the force of law, though it may be in the form of a proviso; the intention expressed is paramount to form.¹⁰ The form, however, is in-

¹ *Tinkham v. Tapscott*, 17 N. Y. 152.

² *Pearce v. Bank of Mobile*, 33 Ala. 693; *Bank for Savings v. The Collector*, 3 Wall. 495; *Savings Bank v. United States*, 19 Wall. 227.

³ *Id.*

⁴ *Callaway v. Harding*, 23 Gratt. 547.

⁵ *Partington, Ex parte*, 6 Q. B. 649, 653; *Spring v. Collector*, 78 Ill. 101; *Rex v. Newark-upon-Trent*, 3 B. & C. 71; *Leligh Co. v. Meyer*, 102 Pa. St. 479; *Cushing v. Worrick*, 9 Gray, 382. See *United States v. Babbit*, 1 Black, 55; *Mechanics', etc. Bank's Appeal*, 31 Conn. 63; *Rogers v. Vass*, 6 Iowa, 405.

⁶ *United States v. Babbit*, 1 Black, 55.

⁷ *Friedman v. Sullivan*, 48 Ark. 213. See cases in last note.

⁸ *Mullins v. Treasurer of Surrey, L. R.* 5 Q. B. Div. 170.

⁹ 32 Pa. St. 153.

¹⁰ *State v. Eskridge*, 1 Swan, 413; *Beaumont v. Irwin*, 2 Sneed, 291, 302. See *Foster v. Pritchard*, 2 H. & N. 151; *Gibbons v. Ogden*, 9 Wheat. 191; *Farmers' Bank v. Hale*, 59 N. Y. 53; *Chapin v. Crusen*, 31 Wis. 209; *McDermut v. Lorillard*, 1 Edw. Ch. 273, 276; *State v. Harkness*, 1 Brev. 276; *Ayers v. Knox*, 7 Mass. 306; *State v. King*, 44 Mo. 283; *Smith v. People*, 47 N. Y. 330; *Castner v. Wal-*

fluent in the inquiry for the intent. The proper function of a proviso being to limit the language of the legislature, it will not be deemed intended from doubtful words to enlarge or extend the act or the provision on which it is engrafted.¹ Where it follows and restricts an enacting clause generally in its scope and language, it is to be strictly construed and limited to objects fairly within its terms.² To a statute allowing receivers of public moneys one per cent. on the money received, as a compensation for clerk hire, receiving, safe keeping and transmitting such money, was added this proviso: "that the whole amount which any receiver of public moneys shall receive under the provisions of this act shall not exceed, for any one year, the sum of \$3,000." Applying a strict construction, it was held that this proviso limited the amount which each individual receiver was annually entitled to, and not the amount payable annually to the incumbents of the office, whether one or more. Story, J., said he was led to the general rule of law which has always prevailed and become consecrated as almost a maxim in the interpretation of statutes, that when the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is strictly construed, and takes no case out of the enacting clause which does not fall fully within its terms." It should be within its letter and purpose.³ The general law of Illinois making exemption of certain amounts of personal property from execution in favor of debtors was qualified by a provision that "no personal property shall be exempted . . . when the debt or judgment is for the wages of any laborer or servant." The court said "it would seem that the same policy which dictates a liberal construction of the statute in furtherance of its general beneficial purpose would necessitate a restricted construction of an exception by which its operation is limited and abridged;" but, independent of that consideration, the court held that provisos

rod, 83 Ill. 171, 179; Carroll v. State, 50 Cal. 420; Butts v. Railroad Co. 63
58 Ala. 396; Commissioners v. Keith. Miss. 462; McRae v. Holcomb, 46 Ark.
2 Pa. St. 218. 306; Looker v. Davis, 47 Mo. 140;

¹ Re Webb, 24 How. Pr. 247.

² Bragg v. Clark, 50 Ala. 363; Epps
v. Epps, 17 Ill. App. 196; Roberts v. Southgate v. Goldthwaite, 1 Bailey,
Yarboro, 41 Tex. 449; Willingham v. 367.

³ United States v. Dickson, 15 Pet.
Smith, 48 Ga. 580; Blood v. Fairbanks, 141.

should be strictly construed, and accordingly it should be confined to those popularly known as laborers and servants, and did not include book-keepers, managers and other like employees, engaged for skill and knowledge.¹ The erection of certain dams being authorized, the act provided for compensation for any damages, direct or consequential, which might be occasioned to private property by the dams. A more specific provision in the same section was that the company authorized to maintain the dams should be liable for all consequential damages resulting to the owner or owners of real property situate upon either side of the improvement. The court remarked that "there was no necessity for a proviso unless to restrain terms so general as to embrace injuries to every species of property, wherever situated, that might sustain damages in consequence of the dams."²

§ 224. The adjudications are instructive upon the exceptions to general statutes, extensively adopted, abolishing objections to the competency of witnesses. Where the general affirmative provision admits a witness, he can only be excluded where he is plainly included in the terms of the exception.³ The objection of being a party or interested being removed, an exception excluding a party in actions by or against the executor or administrator of the opposite party will not apply to a suit by a surviving partner.⁴

¹ *Epps v. Epps*, 17 Ill. App. 196.

² *Ihmsen v. Monongahela Nav. Co.* 32 Pa. St. 153.

³ *Roberts v. Yarboro*, 41 Tex. 449; *Bragg v. Clark*, 50 Ala. 363; *Blood v. Fairbanks*, 50 Cal. 420; *McRae v. Holcomb*, 46 Ark. 306; *Looker v. Davis*, 47 Mo. 140.

⁴ *Bragg v. Clark*, 50 Ala. 363; *Roberts v. Yarboro*, 41 Tex. 449; *Bird v. Jones*, 37 Ark. 195; *Nolen v. Harden*, 43 id. 307; *Wassell v. Armstrong*, 35 id. 247. In *Potter v. National Bank*, 102 U. S. 163, Harlan, J., referring to section 858 of the Revised Statutes of the United States, said: "The first clause of that section shows that there was in the mind of congress two classes of witnesses,— those who

were parties to the issue, that is, parties to the record; and those interested in the issue to be tried, that is, those who, although not parties to the record, held such relations to the issue that they would lose or gain by the direct legal operation and effect of the judgment. A witness may be interested in the issue without being a party thereto—a distinction which seems to have been recognized in all the statutes to which reference has been made. But whether a party to or only interested in the issue, the witness is not excluded in the courts of the United States upon either ground, except that in actions in which the judgment may be rendered for or against an executor, adminis-

§ 225. A saving clause is, like a proviso, an exemption of a special thing out of the general things mentioned in the statute.¹ Its name implies such exemption to preserve from loss or destruction, and such is its use. It is generally employed to restrict repealing acts; to continue repealed acts in force as to existing powers, inchoate rights, penalties incurred, and pending proceedings, depending on the repealed statute.² An absolute repeal puts an end to such rights, powers and proceedings, and discharges such penalties.³ To preserve them to any extent or for any purpose requires a special provision in the repealing act or existing statute having a saving effect. When such saving is included in the repealing statute it usually follows the repealing clause. The same reasons which exist for a strict construction of a proviso apply to a saving clause where there is an express repeal, and the saving clause is intended to restrict it. The special intent in the saving clause prevails over the general intent in the repeal; but the repugnance will be reduced to a minimum in civil cases by construction of the former. The saving clause, however, is to have a reasonable construction to carry out the just and obvious purpose of the law-maker.⁴ In an act repealing a temporary

trator or guardian, no party to the action can testify against the other as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify by the court. The proviso of section 858 excludes only one of the classes described in the first clause,—those who are technically parties to the issue to be tried,—and we are not at liberty to suppose that congress intended the word ‘party,’ as used in that proviso, to include both those who, according to the established rules of pleading and evidence, are parties to the issue, and those who, not being parties, have an interest in the result of that issue.”

¹ Dwar. Stat. (2d ed.) 513.

² Commonwealth v. Marshall, 11 Pick. 350; Taylor v. State, 7 Blackf. 93; The Irresistible, 7 Wheat. 551;

Governor v. Howard, 1 Murphy (N. C.), 465; Commonwealth v. Kimball, 21 Pick. 373; Smith v. Banker, 3 How. Pr. 142; United States v. Helen, 6 Cranch, 203; People v. Gill, 7 Cal. 356; Commonwealth v. Bennett, 108 Mass. 30; Rex v. Justices, 3 Burr. 1456; Cochran v. Taylor, 13 Ohio St. 382; United States v. Kohnstamm, 5 Blatchf. 222; Commonwealth v. Edwards, 4 Gray, 1; Files v. Fuller, 44 Ark. 273; Gilleland v. Schuyler, 9 Kan. 569; Beatty v. People, 6 Colo. 538; Harris v. Townshend, 56 Vt. 716.

³ Ante, §§ 162-166; and see Bish. W. L. §§ 163, 168, 176, 177, 180.

⁴ Toutill v. Douglas, 33 L. J. Q. B. 66; Linton v. Blakeney Joint Co-op. Society, 3 H. & C. 853; State v. Douglass, 33 N. J. L. 363; State v. Kelley, 31 N. J. L. 75; McGavisk v. State, id. 509; State v. Trenton, 38 id. 64; Com-

statute, a saving will only restrict the repeal so that persons who had offended against the act repealed can be prosecuted, convicted and punished as though there were no repeal. The mere saving does not create any power to punish, but only to preserve that which before existed.¹ A territorial act of 1839 in Iowa defined the crime of murder and prescribed the penalty. An act of 1843 repealed that of 1839, with a proviso that any person who had committed any crime punishable by it should be prosecuted and punished according to it, the same as if the repealing act had not been passed. The code of 1851 repealed all prior acts with the saving that crimes committed under any act repealed by it should not be affected by it. It was held that there was thereafter no law in force for punishing the offense of murder committed in 1840; that the code of 1851 only repealed the act of 1843, and did not repeal the act of 1839, for it had been repealed before; hence the saving in the code authorized no punishment for crimes committed against the act of 1839.²

In *Downs v. The Town of Huntington*,³ the court said it would give a saving clause a very liberal construction to save a meritorious verdict which depended on a statute, and had not been reported when the repeal of the statute took effect. "A suit or proceeding" in a saving clause has been held to in-

monwealth v. Pointer, 5 Bush, 301; *Titcomb v. Insurance Co.* 8 Mass. 328; *Isham v. Bennington Iron Co.* 19 Vt. 230.

¹ *The Irresistible*, 7 Wheat. 551.

² *Jones v. State*, 1 Iowa, 395, *Wright, C. J.*, thus expressed his dissent: "I admit that but for the saving clause contained in section 48 of the act of 1843, there would have remained no power to punish for this offense. The provision there made as to past offenses, however, I think, was substantially to that extent a re-enactment of the law of 1839. Thus, up to the adoption of the code, it is conceded that this offense could have been punished. I ask by what authority, and why? Clearly, be-

cause it was in violation of the law of 1839, which, as to past offenses, was expressly continued in force. For such offenses it was just as much the law of the land as was the law of 1843 for all subsequent offenses. Our courts, in the administration of it, and in punishing offenses committed thereunder, must necessarily have so treated it. . . . The power to prosecute, convict and punish offenders against the act repealed, remains as perfect as if the repealing act had never been passed. There was no power to punish created by the repealing act of 1843, but an express preservation of a power that before existed."

³ 35 Conn. 588.

clude an execution, because it is the final step in a suit.¹ An appropriation by a city council to meet the current expenses of the city was held to be "a proceeding" within the saving of a subsequent amendment of the charter, taking effect before the appropriation was expended, fixing a limit transcended by that appropriation.² But in *Gordon v. The State*,³ the court in expounding the general provision that "the repeal of a statute does not . . . affect any . . . *proceeding* commenced under and by virtue of the statute repealed," held that the word *proceeding* is a technical word; that therefore the holding of an election for permanently locating a county seat was not a proceeding within that provision. A statute authorized a release to the widow by the state of lands escheated from the deceased husband in consequence of his death without heirs capable of inheriting. A saving clause provided that nothing therein contained "shall affect any right which any other person may lawfully have to said property." One having no lawful right thereto could not invoke the aid of that provision to protect a possession wrongfully acquired.⁴ The provision in a general repealing act that "no offense committed or penalty incurred previous to the time when any statutory provision shall be repealed shall be affected by such repeal," was held to have reference solely to the laws repealed by the act, and to have no reference to future legislation.⁵

§ 226. The legislature have the power to pass a general saving statute which shall have the force and effect to save rights and remedies, except where the repealing statute itself shows that it was not the intention of the legislature that such rights and remedies should be saved.⁶ Though one legislature cannot bind future legislatures, and each can make its laws prevail against any that exist, and its intention in that regard

¹ *Dobbins v. First Nat. Bank*, 112 Ill. 553.

² *Beatty v. People*, 6 Colo. 538.

³ 4 Kan. 489.

⁴ *White v. White*, 2 Met. (Ky.) 185.

⁵ *Mongeon v. People*, 55 N. Y. 613.

⁶ *Willets v. Jeffries*, 5 Kan. 473; *Gilleland v. Schuyler*, 9 id. 569; *State v. Crawford*, 11 id. 32; *State v. Boyle*,

10 id. 113; *Grace v. Donovan*, 12 Minn. 580; *Wilson v. Herbert*, 41 N.

J. L. 454; *Brisbin v. Farmer*, 16

Minn. 215; *Sanders v. State*, 77 Ind.

227; *State v. Shaffer*, 21 Iowa, 486;

State v. Ross, 49 Mo. 416; *Tipton v.*

Carrigan, 10 Ill. App. 318; *Farmer v. People*, 77 Ill. 322.

will be law,¹ yet, as all legislatures are presumed to proceed with a knowledge of existing laws, they may properly be deemed to legislate with general provisions of such a nature in view. When a repeal is enacted accompanied by no provision specially for existing rights which would be affected by it, it should be assumed that they are to have, and were intended to have, such protection as other statutes will give them. In such cases the repealing act is to be considered as limited in its effect and operation in the same manner and to the same extent as if it contained the saving provided by the general law.² Thus, where a general provision existed that the repeal of an act shall not affect "a right accruing, accrued, acquired or established," the subsequent repeal of an act allowing damages for injuries on the highway did not affect an existing cause of action.³ Such a saving has reference to rights, not to procedure. Forms and proceedings are not contemplated further than they may be necessary to the preservation of rights.⁴

§ 227. In penal acts provisos or exemptions in favor of the accused are liberally construed on the same considerations that penal laws are strictly construed. As stated by Mr. Bishop, the doctrine is: "That in favor of the accused person criminal statutes may be either, according to the form of the provision, contracted or expanded by interpretation in their meanings, so as to exempt from punishment those who are not within their spirit and purpose, while at the same time . . . they can never be expanded against the accused so as to bring

¹ *Townsend v. Little*, 109 U. S. 504.

² *Lakeman v. Moore*, 32 N. H. 410, 413. In *Files v. Fuller*, 44 Ark. 273, the court thus remark upon such a general provision: "This statute has very little importance save in hermeneutics, and has been rarely invoked; for no legislature has power to prescribe to the courts rules of interpretation, or to fix for future legislatures any limits of power as to the effect of their action. Any subsequent legislature might make its repealing action operate in pending suits as effectually as if no such statute ex-

isted, and the courts are quite free to consider what the subsequent legislature did in fact intend, or had power to do. Still it has kept its place on the statute books, and it is persuasive at least that subsequent legislatures meant to keep in harmony with it, and in their legislation supposed it would go without saying, that, when a repeal was made, all rights in suits pending under the old statute would be preserved."

³ *Harris v. Townshend*, 56 Vt. 716.

⁴ *Brotherton v. Brotherton*, 41 Iowa, 112.

within their penalties any person who is not within their letter.”¹ A statute creating an offense was repealed with this saving clause: that nothing contained in the repealing act “shall affect any prosecution now pending or which may be hereafter commenced for any public offense heretofore committed,” etc. Prior to the repeal a prisoner had been convicted under the statute and sentenced to be executed, but the execution did not take place at the time appointed. In such cases, by the general law, the convict might be brought before the court at any subsequent time to be resentenced, and then before resentencing the court is to make inquiry whether any legal reason exists against it. It was held that a repeal of the statute defining the offense was a legal reason, and not within the saving.² Some additional cases bearing upon the subject of saving in penal statutes are collected in a note below.³

§ 228. The effect of a total conflict between different parts of the same act has been discussed.⁴ Apparently this rule applies to a proviso;⁵ but it has been held not to apply to a saving clause.⁶ Chancellor Kent says the reason of the distinction is not very apparent, and that it is difficult to see why the act should be destroyed by the one and not by the other.⁷ Text-writers must take the law as they find it; so must the courts; but where an unmeaning distinction has found its way into the law for reasons which may have existed and have ceased, then the distinction ought to cease. *Cessante ratione legis, cessat et ipsa lex*. It is obviously to be the aim in the construction of the purview and saving clause not to frustrate and destroy either but to give them severally effect.⁸

§ 229. **Interpretation clauses.**—The legislature cannot authoritatively declare what the law is or has been; that is a

¹ Bish. W. L. § 230.

² Aaron v. State, 40 Ala. 307.

³ Sanders v. State, 77 Ind. 227; People v. Gill, 7 Cal. 356; Reg. v. Smith, 1 L. & C. 131; Commonwealth v. Standard Oil Co. 101 Pa. St. 119; Heward v. State, 13 Sm. & M. 261; Dull v. People, 4 Denio, 91; Sneed v. Commonwealth. 6 Dana, 338.

⁴ Ante, § 811.

⁵ Townsend v. Brown, 24 N. J. L. 80; 5 Hill, 225, note a; White v. Rail-

road Co. 7 Heisk. 518; Attorney-General v. The Chelsea Water-works, Fitzgib. 195. See Jackson v. Moye, 33 Ga. 296.

⁶ Walsingham's Case, 2 Plowd. 565; Wood's Case, 1 Co. 40a, 47a; 1 Kent, Com. 462; Mitford v. Elliott, 8 Taunt. 13, 18.

⁷ 1 Kent, Com. 463; Bish. W. L. § 65.

⁸ Scott v. State, 22 Ark. 369.

judicial function and appertains to the courts.¹ The legislature has exclusively the power to make laws, and thus declare what the law shall be.² A legislative construction of a statute is entitled to consideration, and will often have much weight.³ In cases of doubt and uncertainty the solemn declaration of the legislative branch of the government, or practical construction by the executive department, gives a certain sanction, and will be influential with the courts.⁴ So the meaning of particular words in a recent statute will have weight; and their meaning may be inferred from earlier statutes in which the same words or language has been used, where the intent was more obvious or had been judicially established. The words of a statute, if of common use, are to be taken in their natural, plain, obvious and ordinary signification; but if a contemporaneous construction by the legislature of the same words can be discovered, it is high evidence of the sense intended.⁵ Where the law-maker declares its own intention in the enactment of a particular law, or defines the sense of the words it employs in a statute, it not only exercises its legislative power, but exercises it with a plausible aim; for it professes to furnish aid to a correct understanding of its intention, and thus to facilitate the primary judicial inquiry in the exposition of the law after it is finished, promulgated, and has gone into practical operation.

¹ Ogden v. Blackledge, 2 Cranch, 1 Heisk. 208; 272; Duncan v. State, 7 Humph. 148; Dunlap v. Crawford, 2 McCord Eq. Gough v. Pratt, 9 Md. 526; Ashley's 171; Pike v. Megoun, 44 Mo. 491. Case, 4 Pick. 23; Watson v. Hoge, 7 See Aikin v. Western R. R. Co. 20 Yerg. 344; Wayman v. Southard, 10 N. Y. 370; Prentiss v. Danaher. 20 Wheat. 1; Governor v. Porter, 5 Wis. 311; State v. Oskins, 28 Ind. Humph. 165; Bingham v. Supervisors, 8 Minn. 441; Tilford v. Ramsey, 43 Mo. 410; People v. Supervisors, 16 N. Y. 431; Dash v. Van Kleeck, 7 John. 477. See Young v. Beardsley, 11 Paige, 93; Jackson v. Phelps, 3 Cames, 62; Jones v. Wootten, 1 Harr. (Del.) 77; Field v. People, 2 Scam. 79; Cotton v. Brien, 6 Rob. (La.) 115.

² Id.

³ Philadelphia, etc. R. R. Co. v. Catawissa R. R. Co. 53 Pa. St. 20;

Hart v. Reynolds, 1 Heisk. 208; 272; Duncan v. State, 7 Humph. 148; Dunlap v. Crawford, 2 McCord Eq. Gough v. Pratt, 9 Md. 526; Ashley's 171; Pike v. Megoun, 44 Mo. 491. Case, 4 Pick. 23; Watson v. Hoge, 7 See Aikin v. Western R. R. Co. 20 Yerg. 344; Wayman v. Southard, 10 N. Y. 370; Prentiss v. Danaher. 20 Wheat. 1; Governor v. Porter, 5 Wis. 311; State v. Oskins, 28 Ind. Humph. 165; Bingham v. Supervisors, 8 Minn. 441; Tilford v. Ramsey, 43 Mo. 410; People v. Supervisors, 16 N. Y. 431; Dash v. Van Kleeck, 7 John. 477. See Young v. Beardsley, 11 Paige, 93; Jackson v. Phelps, 3 Cames, 62; Jones v. Wootten, 1 Harr. (Del.) 77; Field v. People, 2 Scam. 79; Cotton v. Brien, 6 Rob. (La.) 115.

⁴ Mathews v. Shores, 24 Ill. 27; Union Ins. Co. v. Hoge, 21 How. 35; Solomon v. Commissioners, 41 Ga. 157; Wright v. Forrester, 65 Wis. 341, 348; Gough v. Dorsey, 27 id. 119; Harrington v. Smith, 28 id. 43; State v. Timme, 54 id. 318, 340; Dean v. Borchsenius, 30 id. 236; *post*, §§ 320, 631.

⁵ Philadelphia, etc. R. R. Co. v. Catawissa R. R. Co. 53 Pa. St. 20. See United States v. Gilmore, 8 Wall. 330.

§ 230. Such provisions have been the subject of judicial comment and criticism. Lord Denman said: "We cannot refrain from expressing a serious doubt whether interpretation clauses 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."¹

In *Williams v. Pritchard*,² 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 when the intention of the legislature was apparent that such subsequent statute should not have such an operation there, even though the words of such statute, taken strictly and grammatically, would repeal a former act, the courts of law, judging for the benefit of the subject, have held that they ought not to have such a construction." Blackburn, J., in *Lindsay v. Cundy*,³ said, parenthetically, that such clauses are a modern innovation, and frequently do a great deal of harm, because they give a non-natural sense to words which are afterwards used in a natural sense, without noticing the distinction. In that case it was held not necessary to follow the statutory definition in every instance where the word occurred; that the statute could be satisfied by applying it to the word where there was nothing in the context to interpret it otherwise. This seems to be the effect of *Queen v. Pearce*,⁴ where the court said of such a clause that it "should control where the words occur without being accompanied by any others tending to show their meaning; or to interpret words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain."⁵

¹ *Regina v. Justices*, 7 Ad. & E. 480.

² 4 T. R. 2, 4.

³ L. R. 1 Q. B. Div. 358.

⁴ L. R. 5 Q. B. Div. 386.

⁵ In *Nutter v. Accrington Local Board*, L. R. 4 Q. B. Div. 375, an act was in question in which it was provided that the word "street" should apply to and include any highway (not

being a turnpike road), and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, etc. It was considered by Cotton, L. J., as enlarging and not restrictive; that it did not provide that it should not include a turnpike road. Bramwell, L. J., concurring in the view taken by Lord Justice Cotton,

§ 231. Statutory provisions are made in various forms to have effect specially in the interpretation of the law. They are distinguishable, and all are not construed and applied in the same manner. There is a manifest difference between definitive or interpretation clauses which are special, and those which are general; the former always having the most controlling effect where it is obvious that the legislature, without misconception of the effect of other legislation, have precisely in view the particular words or provisions to which the clause in question ostensibly applies. A legislative enactment based on a misconception of the law does not *per se* change the law so as to make it accord with the misconception.¹ A provision which is special by pointing to a particular act and declaring for what definite purpose it was enacted, or defining certain words or phrases, has the fullest effect. It is a part of the law and must be construed and applied accordingly, and the act will have a construction, and the words and phrases a meaning, in harmony with the defining provisions, even though otherwise they would have a different effect.²

On the other hand, general statutory definitions and rules of interpretation will apply when the statute in question is not plain, or, in other words, does not define and interpret itself.³ Where positive provisions are at variance with the definitions which it contains, the latter, it seems, must be considered as modified by the clear intent of the former on the principle

said: "There is one interpretation clause which says: 'Words importing the singular number shall include the plural number, and that words importing the plural number shall include the singular number.' And, if that clause is to be taken in an exclusive sense, the words in the singular number would never mean the singular, and the words in the plural number would never mean the plural. It is thus, clearly, an additional interpretation. I read the words here [repeating the interpretation clause]. Then it is said that this is a street. And so it is. But it is also a turnpike road. The arguments upon the

interpretation clause are equally good for either party."

¹ Byrd v. State, 57 Miss. 243; Davis v. Delpit, 25 id. 445; Farmers' Bank v. Hale, 59 N. Y. 53.

² Herold v. State, 21 Neb. 50; Smith v. State, 28 Ind. 321; State v. Adams, 51 N. H. 568; State v. Canterbury, 28 id. 195; Philadelphia, etc. R. R. Co. v. Catawissa R. R. Co. 53 Pa. St. 20; State v. S. & S. Orphan Home, 37 Ohio St. 275; Hanks v. People, 106 Ill. 628; Byrd v. State, 57 Miss. 243; Nelson v. Kerr, 2 T. & C. 299.

³ Queen v. Pearce, L. R. 5 Q. B. 386; Midland R'y Co. v. Ambergate, etc. R'y Co. 10 Hare, 359.

that the special controls the general.¹ Such clauses are 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.² Such definitions can, in the nature of things, have no effect except in the construction of the statutes themselves. The meaning of language depends on popular usage, and cannot, unless in a very slight degree, be affected by legislation.³ It was enacted that in construing statutes the words "spirituous liquors" should be taken to include intoxicating liquors, and all mixed liquors any part of which is spirituous or intoxicating. Under an indictment charging the selling of spirituous liquors, it was held error to admit proof of selling any liquor which was not such in fact, independently of the statutory definition; that the statute furnished a guide for the construction of the statute, not the indictment.⁴

§ 232. **Punctuation.**— When statutes were enacted without punctuation, it was a necessary conclusion that the punctuation subsequently inserted was no part of the law. That was often declared,⁵ and has been declared since the practice has changed and punctuated bills are enacted.⁶ So, when bills are not printed and furnished in their perfected form to members of the legislative body, and they are heard read, so that the ear and not the eye takes cognizance of them,⁷ the punctuation, whether inserted or not, does not receive the attention of individual legislators. It may be assumed that the principal points are observed in the reading. The questions in court relating to punctuation or affecting construction have generally arisen on the presence, omission or misplacing of commas.

In *Ewing v. Burnet*⁸ the court say: "Punctuation is a most fallible standard by which to interpret a writing. It may be

¹ *Egerton v. Third Municipality*, 1 La. Ann. 435; *Farmers' Bank v. Hale*, 59 N. Y. 53. note; *Dwarris on St.* (2d ed.) 601; 3 Dane's Abr. 558.

² *Regina v. Justices*, 7 Ad. & E. 480. ⁶ *Hammock v. Loan & Trust Co.* 105 U. S. 77; *Cushing v. Worrick*, 9 Gray, 382; *Albright v. Payne*, 43 Ohio St. 8. See *Commonwealth v. Neitzel v. Concordia*, 14 Kans. 446.

³ *State v. Canterbury*, 28 N. H. 228; ⁷ *Bish. W. L.* § 78. ⁴ *State v. Adams*, 51 N. H. 568; *Shopp*, 1 Woodw. Dec. 123. *Jones v. Surprise*, 4 New Eng. Rep. 292; 64 N. H. 243. ⁵ 11 Pet. 41.

⁸ *Barrington on St.* (5th ed.) 439,

resorted to when all other means fail; but the court will first take the instrument by the four corners in order to ascertain its true meaning. If that is apparent on judicially inspecting it, the punctuation will not be suffered to change it."¹

Where effect may be given to all the words of a statute by transposing a comma, the alternative being the disregard of a material and significant word, or grossly straining and perverting it, the former course is to be adopted.² Courts, in the construction of statutes, for the purpose of arriving at or maintaining the real meaning and intention of the law-maker, will disregard the punctuation, or repunctuate.³ When the intent is uncertain, punctuation may afford some indication of it,⁴ and even decide it.⁵ The punctuation of the original act as passed by the legislature governs instead of the punctuation of the printed copy.⁶

§ 233. **Headings and marginal notes.**—In England marginal notes are not regarded as part of the law for the same reason that applies to the title and punctuation.⁷ Added to a section in the copy printed by the queen's printer, they form no part of the statute itself, and are not binding as an explanation, or as a construction of the section.⁸ Headings which were arranged in the bill and adopted with it, it was held, might be referred to to determine the sense of any doubtful expression.⁹

¹ Albright v. Payne, 43 Ohio St. 8; 366; Matter of Olmstead, 17 Abb. Shriedley v. State, 23 Ohio St. 130; New Cas. 320.

Hamilton v. Steamer R. B. Hamilton, ⁴ United States v. Three R. R. Cos. 16 id. 428; Allen v. Russell, 39 id. 336; 1 Abb. (U. S.) 196.

Morrill v. State, 38 Wis. 434; Commonwealth v. Shopp, 1 Woodw. Dec. ⁵ Squires' Case, 12 Abb. Pr. 38; Cummings v. Akron Cement Co. 6 ⁶ Blatchf. 509.

² Commonwealth v. Shopp, *supra*.

⁶ McPhail v. Gerry, 55 Vt. 174.

³ Hamilton v. Str. R. B. Hamilton, *supra*; Martin v. Gleason, 139 Mass. 183; Hammock v. Loan & Trust Co. 105 U. S. 77; United States v. Isham, 17 Wall. 496; Gyger's Estate, 65 Pa. St. 311; Randolph v. Bayne, 44 Cal.

⁷ Claydon v. Green, L. R. 3 C. P. 521; Venour v. Sellon, L. R. 2 Ch. Div. 523; Sutton v. Sutton, L. R. 23 Ch. Div. 511.

⁸ Claydon v. Green, *supra*.

⁹ Hammersmith, etc. R'y Co. v. Brand, L. R. 4 H. L. Cas. 171.

CHAPTER XIII.

INTERPRETATION AND CONSTRUCTION.

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| <p>§ 234. The intent of a statute is the law.</p> <p>235. Its ascertainment the object of interpretation.</p> <p>236. Interpretation and construction compared.</p> <p>237. Intent first to be sought in language of statute itself.</p> <p>238. If intent plainly expressed it is to be followed without further inquiry.</p> <p>239. The intention to be ascertained from entire statute.</p> <p>240. General intent of statute key to meaning of the parts.</p> <p>245. The flexibility of words and clauses to harmonize with the general intent.</p> <p>246. Literal sense of words not controlling.</p> <p>247. Interpretation of words and phrases.</p> <p>248. They should be construed as they are generally understood.</p> <p>249. How general words construed.</p> <p>250. Words having popular and technical meaning.</p> <p>253. Common-law words.</p> <p>255. Statutory use of words.</p> | <p>§ 256. Change of phraseology of statute.</p> <p>257. Statutes adopted by general reference.</p> <p>258. Interpretation with reference to grammatical sense.</p> <p>260. Correction of mistakes.</p> <p>262. Context and associated words.</p> <p>267. Relative and qualifying words.</p> <p>268. General words following particular.</p> <p>282. <i>Reddendo singula singulis</i>.</p> <p>283. Interpretation affected by other statutes.</p> <p>286. Construction of statutes in <i>pari materia</i>.</p> <p>289. Interpretation with reference to common law.</p> <p>292. Extraneous aids to construction.</p> <p>293. Judicial knowledge.</p> <p>307. Contemporaneous construction.</p> <p>308. General usage.</p> <p>313. <i>Stare decisis</i>.</p> <p>321. Effects and consequences.</p> <p>325. <i>Expressio unius est exclusio alterius</i>.</p> <p>330. Presumptions.</p> <p>334. Implications and incidents.</p> |
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§ 234. The intent of a statute is the law.—If a statute is valid it is to have effect according to the purpose and intent of the law-maker. The intent is the vital part, the essence of the law.¹ This is the intention embodied and expressed in

¹ Phillips v. Pope's Heirs, 10 B. Mon. 172; Winslow v. Kimball, 25 Me. 493; Leoni v. Taylor, 20 Mich. 148; Mason v. Rogers, 4 Litt. 377; Stevens v. Fassett, 27 Me. 266; Reynolds v. Holland, 35 Ark. 56; Ogden v. Strong, 2 Paine, 584; Milburn v. State, 1 Md. 17; Green v. State, 59 id. 123; Watson v.

the statute. A legislative intention to be efficient as law must be set forth in a statute; it is therefore a written law.¹ How the intention is to be ascertained is only answered by the principles and rules of exposition. If a statute is plain, certain and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless.² And where the intention of a statute has been ascertained by the application of the rules of interpretation, they have served their purpose, for all such rules are intended to reach that intent.³

The sole authority of the legislature to make laws is the foundation of the principle that courts of justice are bound to give effect to its intention. When that is plain and palpable they must follow it implicitly. The rules of construction with which the books abound apply only where the words used are of doubtful import; they are only so many lights to assist the courts in arriving with more accuracy at the true interpretation of the intention. This is true whether the statute be public or private, general or special, remedial or penal.⁴ These rules are a part of the law of the land equally with the statutes themselves, and not much less important. The function of such interpretation unrestrained by settled rules would in-

Hoge, 7 Yerg. 344; Canal Co. v. R. R. Co. 4 Gill & J. 1; Jackson v. Collins, 3 Cow. 89; Jackson v. Thurman, 6 John. 322; Crocker v. Crane, 21 Wend. 211; Murray v. R. R. Co. 4 Keyes, 274; McNery v. Galveston, 58 Tex. 334; Atkins v. Disintegrating Co. 18 Wall. 272, 301; United States v. Rhodes, 1 Abb. (U. S.) at p. 36; Eyston v. Studd, 2 Plowd. 465; Palms v. Shawano Co. 61 Wis. 211.

¹ Barker v. Esty, 19 Vt. 131, 138; Watson v. Hoge, 7 Yerg. 344; Swift v. Luce, 27 Me. 285.

² United States v. Hartwell, 6 Wall. 395; Ogden v. Strong, 2 Paine, 584; United States v. Wiltberger, 5 Wheat. 95; Denton v. Reading, 22 La. Ann. 607; Fitzpatrick v. Gebhart, 7 Kan. 35; McCluskey v. Cromwell, 11 N. Y. 601; People v. Schoonmaker, 63

Barb. 44; Pillow v. Bushnell, 5 Barb. 156; Coffin v. Rich, 45 Me. 507; Sneed v. Commonwealth, 6 Dana, 339; Cearfoss v. State, 42 Md. 406; Beall v. Harwood, 2 Har. & J. 167; Koch v. Bridges, 54 Miss. 247; Learned v. Corley, 43 Miss. 689; Ruggles v. Illinois, 108 U. S. 526; Sussex Peerage, 11 Cl. & Fin. 143; Water Commissioners v. Brewster, 42 N. J. L. 125; Rudderow v. State, 31 id. 512; Vattel, b. 2, sec. 363; Rex v. Hodnett, 1 T. R. 96.

³ Parsons v. Circuit Judge, 37 Mich. 287; New Orleans, etc. R. R. Co. v. Hemphill, 35 Miss. 17; Ezekiel v. Dixon, 3 Ga. 151; Russell v. Farquhar, 55 Tex. 359; McCluskey v. Cromwell, 11 N. Y. 601.

⁴ State v. Stephenson, 2 Bailey, 334.

introduce great uncertainty, and would involve a power virtually legislative.¹ When a doubt arises upon the construction of the words it is the duty of the court to remove the doubt by deciding it; and when the court has given its decision, the point can no longer be considered doubtful.²

§ 235. To find out the intent the object of all interpretation.—It is the intent of the law that is to be ascertained, and the courts do not substitute their views of what is just or expedient.³ Courts are not at liberty to speculate upon the intentions of the legislature where the words are clear, and to construe an act upon their own notions of what ought to have been enacted.⁴ The wisdom of a statute is not a judicial question;⁵ nor can courts correct what they may deem excesses or omissions in legislation, or relieve against the occasionally harsh operation of statutory provisions without danger of doing more mischief than good.⁶

§ 236. Interpretation and construction compared.—Dr. Lieber defines *interpretation* as “the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey.”⁷ He uses this word in a sense distinct from *construction*.⁸ These words, however, are very generally used interchangeably and as practically synonymous. The literal interpretation of a statute is finding out its true sense according to Dr. Lieber’s defi-

¹ *Spencer v. State*, 5 Ind. 45. See Whart. Com. on Am. Law, §§ 330, 604.

² *Bell v. Holthy*, L. R. 15 Eq. 178.

³ *Hadden v. Collector*, 5 Wall. 107; *State v. Clarke*, 54 Mo. 17, 36; *Jewell v. Weed*, 18 Minn. 272; *Municipal Building Society v. Kent*, L. R. 9 App. Cas. 273; *Douglass v. Chosen Freeholders*, 38 N. J. L. 212, 216; *Fordyce v. Bridges*, 1 H. L. Cas. 1.

⁴ *York, etc. Ry Co. v. The Queen*, 1 E. & B. 858, 864.

⁵ *Id.*; *Reithmiller v. People*, 44 Mich. 280; *Sheley v. Detroit*, 45 id. 431.

⁶ *Bronson, J., in Waller v. Harris*, 20 Wend. 562; *State v. Heman*, 70 Mo. 441.

⁷ *Hermeneutics*, p. 11.

⁸ He says: “Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text. Conclusions which are in the spirit though not in the letter of the text.” *Hermeneutics*, 44. And again he says: “In the most general adaptation of the term, construction signifies the representing of an entire whole from given elements by just conclusions. Thus, it is said, a few actions may sometimes suffice to construe the whole character of a man.” *Id.* 49.

nition — by making the statute its own expositor. If the true sense can thus be discovered, there is no resort to construction.¹ The certainty of the law is next in importance to its justice. And if the legislature has expressed its intention in the law itself, with certainty, it is not admissible to depart from that intention on any extraneous consideration or theory of construction.² Very strong expressions have been used by the courts to emphasize the principle that they are to derive their knowledge of the legislative intention from the words or language of the statute itself which the legislature has used to express it, if a knowledge of it can be so derived.³

§ 237. **Intent first to be sought in language of statute itself.**— “It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power, and seek for that intent in every legitimate way. But . . . first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation.”⁴ The statute itself furnishes the best

¹ *Cearfoss v. State*, 42 Md. 403, 406.

² *Id.*; *Johnson v. Railroad Co.* 49 N. Y. 455; *Alexander v. Worthington*, 5 Md. 471; *United States v. Ragsdale*, *Hempst.* 497.

³ *Denn v. Reid*, 10 Pet. 524; *Watson v. Hoge*, 7 Yerg. 344; *McCluskey v. Cromwell*, 11 N. Y. 601; *Coffin v. Rich*, 45 Me. 507; *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224; *Bennett v. Worthington*, 24 Ark. 487; *Gardner v. Collins*, 2 Pet. 93; *Bradford v. Treasurer, Peck (Tenn.)*, 425; *Warburton v. Loveland*, 2 Dow & Cl. 489; *Sturges v. Crowninshield*, 4 Wheat. 202; *Denton v. Reading*, 22 La. Ann. 607; *State v. Wiltz*, 11 La. Ann. 439; *Kinderley v. Jervis*, 25 L. J. Ch. 541; *New Orleans, etc. R. R. Co. v. Hemphill*, 35 Miss. 17; *Ezekiel v. Dixon*, 3 Ga. 152; *State v. Buckman*, 18 Fla. 267; *Hindmarsh v. Charlton*, 8 H. L. Cas. 166; *Jennings*

v. Love, 24 Miss. 249; *Tynan v. Walker*, 35 Cal. 634; *Virginia City, etc. R. R. Co. v. Lyon County*, 6 Nev. 68; *Scaggs v. Baltimore, etc. R. R. Co.* 10 Md. 268; *Trapnall, Ex parte*, 6 Ark. 9; *Countess of Rothes v. Kirkcaldy Water Works, L. R.* 7 App. Cas. 702; *Abbott v. Middleton*, 7 H. L. 68; *The Sussex Peerage*, 11 Cl. & Fin. 85, 143; *Myers v. Perigal*, 2 D. Mac. & G. 619. ⁴ *McCluskey v. Cromwell*, 11 N. Y. 601; *Clark v. Mayor, etc.* 29 Md. 283; *People v. Schoonmaker*, 63 Barb. 44, 47; *Benton v. Wickwire*, 54 N. Y. 226, 228; *Bonds v. Greer*, 56 Miss. 710; *Schlegel v. Am. Beer, etc. Co.* 12 Abb. New Cas. 280; *S. C.* 64 How. Pr. 196; *People v. Supervisors*, 13 Abb. New Cas. 421; *Fitzpatrick v. Gebhart*, 7 Kan. 35; *Fordyce v. Bridges*, 1 H. L. Cas. 1; *Logan v. Courtown*, 13 Beav. 23; *Schooner Pauline's Cargo v. United States*, 7 Cranch, 152; *Notley*

means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction.¹

In *Alexander v. Worthington*,² the Maryland court of appeals have lucidly expressed this sound doctrine on the point under consideration: "The language of a statute is its most natural expositor; and where its language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations. The construction is to be on the entire statute; and where one part is susceptible indifferently of two constructions, and the language of another part is clear and definite, and is consistent with one of the two constructions of which the former part of the statute is susceptible, and is opposed to the other construction, then we are to adopt that construction which will render all clauses of the statute harmonious, rather than that other construction which will make one part contradictory to another. Where the letter of the statute is inconsistent with itself, we may eviscerate an intent by considering the mischief existing and the remedy proposed to be introduced. . . . We are not at liberty to imagine an intent and bind the letter of the act to that intent; much less can we indulge in the license of striking out and inserting, and remodeling, with the view of making the letter express an intent which the statute in its native form does not evidence. Every construction, therefore, is vicious which requires great changes in the letter of the statute, and, of the several constructions, that is to be preferred which introduces the most general and uniform remedy."

The legislature must be understood to mean what it has plainly expressed, and this excludes construction.³ The legislative intent being plainly expressed, so that the act read by

v. Buck, 8 B. & C. 164; *Rex v. Poor* United States *v. Fisher*, 2 Cranch, Law Commissioner, 6 A. & E. 17; 358; *The Sussex Peerage*, 11 Cl. & Att'y-Gen'l *v. Sillem*, 2 H. & C. 508. Fin. 143; *Koch v. Bridges*, 45 Miss.

¹ *Green v. Weller*, 32 Miss. 650. 247; *United States v. Hartwell*, 6

² 5 Md. 485. Wall. 395; *State v. Buckman*, 18 Fla.

³ *Rex v. Banbury*, 1 A. & E. 142; 267; *Ogden v. Strong*, 2 Paine, 584; *Case v. Wildridge*, 4 Ind. 51; *Johnson v. Railroad Co.* 49 N. Y. 455, 462; *Denn v. Reid*, 10 Pet. 524.

itself, or in connection with other statutes pertaining to the same subject, is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms.¹ Cases cannot be included or excluded merely because there is intrinsically no reason against it.² Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity.³ If a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage.⁴ Courts have, then, no power to set it aside, or evade its operation by forced and unreasonable construction. If it has been passed improvidently, the responsibility is with the legislature and not with the courts.⁵ Whether the law be expressed in general or limited terms, the legislature should be held to mean what they have plainly expressed, and consequently no room is left for construction; but if, from a view of the whole law, or from other laws *in pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that, in fact, is the will of the legislature.⁶

¹ *Rosenplaenter v. Roessle*, 54 N. Y. 262; *Woodbury v. Berry*, 18 Ohio St. 456, 462; *Miller v. Salomons*, 7 Ex. 560; *Green v. Check*, 5 Ind. 105; *Douglass v. Chosen Freeholders*, 38 N. J. L. 214; *Story on Const.* § 426.

² *Denn v. Reid*, 10 Pet. 524; *Pike v. Hoare*, 2 Eden, 184; *Ogden v. Strong*, 2 Paine, 584.

³ *Smith v. State*, 66 Md. 215; *Woodbury v. Berry*, 18 Ohio St. 456; *Bradbury v. Wagenhorst*, 54 Pa. St. 182; *St. Louis, etc. R. R. Co. v. Clark*, 53 Mo. 214; *Notley v. Buck*, 8 B. & C. 164.

⁴ *Flint, etc. Co. v. Woodhull*, 25 Mich. 99; *People v. Briggs*, 50 N. Y. 553; *Collin v. Knoblock*, 25 La. Ann. 263;

Jewell v. Weed, 18 Minn. 272; *Lower Chatham, In re*, 35 N. J. L. 497.

⁵ *Leonard v. Wiseman*, 31 Md. 201; *State v. Vicksburg, etc. R. R. Co.* 51 Miss. 361; *Rohrbacher v. City of Jackson*, id. 735; *Winter v. Jones*, 10 Ga. 190; *Douglass v. Chosen Freeholders*, 38 N. J. L. 214; *Ornamental Woodwork Co. v. Brown*, 2 H. & C. 63; *Mirehouse v. Rennell*, 1 Cl. & Fin. 546; *May v. Great W. R'y Co.* L. R. 7 Q. B. 377; *Rex v. Poor Law Commissioners*, 6 Ad. & E. 7.

⁶ *United States v. Fisher*, 2 Cr. 358; *Farrell Foundry v. Dart*, 26 Conn. 376, 382; *Sneed v. Commonwealth*, 6 Dana, 338; *Abley v. Dale*, 11 C. B. 378; *Miller v. Salomons*, 7 Ex. 475.

§ 238. If intent plainly expressed it is to be followed without further inquiry.—When the meaning of a statute is clear, and its provisions are susceptible of but one interpretation, that sense must be accepted as the law; its consequences, if evil, can only be avoided by a change of the law itself, to be effected by the legislature and not by judicial construction.¹ But an interpretation of a statute which must lead to consequences which are mischievous and absurd is inadmissible if the statute is susceptible of another interpretation by which such consequences can be avoided.² For this purpose all parts of a statute are to be read and compared. Still, when the words of a provision are plainly expressive of an intent not rendered dubious by the context, no interpretation can be permitted to thwart that intent; the interpretation must declare it, and it must be carried into effect as the sense of the law.³

In the case of *Sturges v. Crowninshield*⁴ the court say: “Although the spirit of the instrument, especially of the constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempt from its operation. Where words conflict with each other, where the different clauses of the instrument bear upon each other, and would be inconsistent unless the natural and common import of the words be varied,

¹ *Bosley v. Mattingly*, 14 B. Mon. 89; *United States v. Ragsdale*, Hempst. 497; *Bartlett v. Morris*, 9 Porter, 266; *Att’y-Gen’l v. Sillem*, 2 H. & C. 510; *Kinderley v. Jervis*, 25 L. J. Ch. 541; *Arthur v. Morrison*, 96 U. S. 108.

² *Caledonian R’y Co. v. North British R’y Co.* L. R. 6 App. Cas. 122; *State v. Wiltz*, 11 La. Ann. 439; *Ellis, Ex parte*, 11 Cal. 222; *Ryegate v. Wardsboro*, 30 Vt. 746; *Walton, Ex parte*, L. R. 17 Ch. Div. 746; *Gover’s Case*, L. R. 1 Ch. Div. 198; *Wear River Commissioners v. Adamson*, L. R. 1 Q. B. Div. 549; *Vicar, etc. of St. Sepulchre’s*, *Ex parte*, 33 L. J. Ch. 373; *Alvord v. Lent*, 23 Mich. 372.

³ *Douglass v. Chosen Freeholders*, 38 N. J. L. 214; *Bradbury v. Wagenhorst*, 54 Pa. St. 182; *Howard Association’s Appeal*, 70 id. 344; *Johnson v. R. R. Co.* 49 N. Y. 455; *People v. Schoonmaker*, 63 Barb. 49; *United States v. Ragsdale*, Hempst. 497; *United States v. Warner*, 4 McLean, 463; *Farrell Foundry v. Dart*, 26 Conn. 376; *State v. Washoe Co.* 6 Nev. 104; *Bartlett v. Morris*, 9 Port. 266; *Fitzpatrick v. Gebhart*, 7 Kan. 35; *Miller v. Salomons*, 7 Ex. 475; *Abley v. Dale*, 11 C. B. 378; *Gwynne v. Burnell*, 6 Bing. N. C. 559.

⁴ *Wheat*. 202.

construction becomes necessary; and to depart from the obvious meaning of words is justifiable. Yet, in no 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."

One who contends that a section of an act must not be read literally must be able to show one of two things: either that there is some other section which cuts down or expands its meaning, or else that the section itself is repugnant to the general purview.¹ The question for the courts is, what did the legislature really intend to direct; and this intention must be sought in the whole of the act, taken together, and other acts *in pari materia*. If the language be plain, unambiguous and uncontrollable by other parts of the act, or other acts or laws upon the same subject, the courts cannot give it a different meaning to subserve public policy or to maintain its constitutionality. The limited meaning of words will be disregarded when it is obvious from the act itself that the use of the word was a clerical error, and that the legislature intended it in a different sense from its common meaning.² Where that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity, of the result is out of place. It is not the province of the courts to supervise legislation and keep it within the bounds of propriety and common sense.³

¹ Nuth v. Tamplin, L. R. 8 Q. B. Div. 253. Rex v. Banbury, 1 Ad. & E. 142; British Farmers', etc. Co., Re, 48 L. J. Ch. 56; Ornamental P. Woodwork Co. v. Brown, 2 H. & C. 63; Mirehouse v. Rennell, 1 Cl. & Fin. 546; Biffin v. Yorke, 5 Man. & Gr. 437; Rex v. Poor Law Commissioner, 6 Ad. & E. 7; May v. Great W. Ry Co. L. R. 7 Q. B. 377; Clark v. Railroad Co. 81 Me. 477.

² Reynolds v. Holland, 35 Ark. 56; Haney v. State, 34 Ark. 263.

³ Douglass v. Chosen Freeholders, 38 N. J. L. 214; Hyatt v. Taylor, 42 N. Y. 258, 262; Rosenplaenter v. Roesle, 54 id. 262; Bosley v. Mattingly, 14 B. Mon. 89; Abley v. Dale, 11 C. B. 391; Gwynne v. Burnell, 6 Bing. N. C. 559; Miller v. Salomons, 7 Ex. 475;

§ 239. **The intention is to be ascertained by considering the entire statute.**—The practical inquiry is usually what a particular provision, clause or word means. To answer it one must proceed as he would with any other composition—construe it with reference to the leading idea or purpose of the whole instrument. The whole and every part must be considered. The general intent should be kept in view in determining the scope and meaning of any part.¹ This survey and comparison are necessary to ascertain the purpose of the act and to make all the parts harmonious. They are to be brought into accord if practicable, and thus, if possible, give a sensible and intelligible effect to each in furtherance of the general design.² A statute should be so construed as a whole, and its several parts, as most reasonably to accomplish the legislative purpose.³ If practicable, effect must be given to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature.⁴ It is said to be the most natural exposition of a statute to construe one part by another, for that expresses the meaning of the makers;

¹ *Georgia v. Atkins*, 1 Abb. (U. S.) 22; *Thompson v. Bulson*, 78 Ill. 277; *State v. Atkins*, 35 Ga. 319; *Harrison, Ex parte*, 4 Cow. 63; *Strode v. Stafford Justices*, 1 Brock. 162; *Martin v. Hunter's Lessee*, 1 Wheat. 326; *People v. Stevens*, 13 Wend. 341; *People v. Morris*, id. 325; *Hopkins v. Haywood*, id. 265; *Little Rock, etc. R. R. Co. v. Howell*, 31 Ark. 119; *Swartwout v. Railroad Co.* 24 Mich. 389; *City v. Schellinger*, 15 Phila. 50; *Regina v. Mallow Union*, 12 Ir. C. L. (N. S.) 35; *Nuth v. Tamplin*, L. R. 8 Q. B. Div. 253; *Ellison v. Mobile, etc. R. R. Co.* 36 Miss. 572; *Bishop v. Barton*, 2 Hun. 436; *Shoemaker v. Lansing*, 17 Wend. 327; *People v. Commissioners*, 3 Hill. 601; *Parkinson v. State*, 14 Md. 184; *Chesapeake & O. Canal Co. v. Railroad Co.* 4 Gill & J. 1; *Magruder v. Carroll*, 4 Md. 335; *Attorney-General v. Detroit, etc. Co.* 2 Mich. 138; *Ryegate v. Wardsboro*, 30 Vt. 746; *State v. Weigel*, 48 Mo. 29; *Nichols v. Wells, Sneed (Ky.)*, 255; *State v. Mayor*, 35 N. J. L. 196; *San Francisco v. Hazen*, 5 Cal. 169; *Taylor v. Palmer*, 31 id. 240; *Gates v. Salmon*, 35 id. 576; *Ogden v. Strong*, 2 Paine, 584; *Wilson v. Biscoe*, 11 Ark. 44; *Lion Ins. Asso. v. Tucker*, L. R. 12 Q. B. Div. 180; *Cope v. Doherty*, 2 De G. & J. 614; *Jefferys v. Boosey*, 4 H. L. 815; *Cearfoss v. State*, 42 Md. 406; *Commonwealth v. Duane*, 1 Binn. 601; *Commonwealth v. Alger*, 7 Cush. 53, 89.

² *Ogden v. Strong*, 2 Paine, 584; *Clementson v. Mason*, L. R. 10 C. P. 209. In construing the provisions of the Louisiana code the French text is to be looked to in clearing up obscurities and ambiguities in the English text. *Viterbo v. Friedlander*, 120 U. S. 707.

³ *Green v. State*, 59 Md. 123.

⁴ *Matter of N. Y. & Brooklyn Bridge*, 72 N. Y. 527, 530.

this exposition is *ex verceribus actus*.¹ The words and meaning of one part may lead to and furnish an explanation of the sense of another.² "To discover," says Pollock, C. B., "the true construction of any particular clause of a statute, the first thing to be attended to, no doubt, is the actual language of the clause itself, as introduced by the preamble; second, the words or expressions which obviously are by design omitted; third, the connection of the clause with other clauses in the same statute, and the conclusions which, on comparison with other clauses, may reasonably and obviously be drawn. . . . If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted, the act must be construed accordingly, and ought to be so construed as to make it a consistent whole. If, after all, it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail."³

§ 240. General intent of statute key to meaning of the parts.—The presumption is that the law-maker has a definite purpose in every enactment, and has adapted and formulated the subsidiary provisions in harmony with that purpose; that these are needful to accomplish it; and that, if they have the intended effect, they will, at least, conduce to effectuate it. That purpose is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms.⁴ This intention affords a key to the sense and scope of minor provisions.⁵ From this assumption proceeds the general rule that the

¹ Co. Litt. 381a.

² Mayor v. Howard, 6 Har. & J. 388; Martin v. O'Brien, 34 Miss. 21; City of San Diego v. Granniss, 77 Cal. 511.

³ Attorney-General v. Sillem, 2 H. & C. 515.

⁴ Orange, etc. R. R. Co. v. Alexandria, 17 Gratt. 176; Jackson v. Bradt, 2 Cai. 303; Bryant. In re, Deady, 118; McCool v. Smith, 1 Black, 459; Rex v. Cornforth, 2 Str. 1162; Foster v. Collner, 107 Pa. St. 305; State v. Mann, 21 Wis. 684; Rice v. Railroad Co. 1 Black, 358, 377; Chapman v.

Miller, 128 Mass. 269; Eshleman's Appeal, 74 Pa. St. 42, 46; Bailey v. Commonwealth, 11 Bush, 688; Converse v. United States, 21 How. 463; Custin v. City of Viroqua, 67 Wis. 314.

⁵ Burr v. Dana, 22 Cal. 11; Burke v. Monroe Co. 77 Ill. 610; Commonwealth v. Council of Montrose, 52 Pa. St. 391; Maxwell v. Collins, 8 Ind. 38; Rex v. Inhabitants, 1 T. R. 96; McCool v. Smith, 1 Black, 459; Lee v. Barkhampsted, 46 Conn. 213; Haentze v. Howe, 28 Wis. 293; Berry v. Clary, 77 Me. 482; Ingraham v. Speed, 30 Miss. 410; Colbran v. Barnes, 11 C. B.

cardinal purpose or intent of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. They are to be brought into harmony, if possible, and so construed that no clause, sentence or word shall be void, superfluous or insignificant.¹ But where a word in a statute would make the clause in which it occurs unintelligible, the word may be eliminated and the clause read without it.² It would be mischievous to attempt to wrest such words from their proper and legal meaning merely because they are superfluous.³

§ 241. The intention of the whole act will control interpretation of the parts.— Words and clauses in different parts of a statute must be read in a sense which harmonizes with

(N. S.) 244; *Edwards v. Dick*, 4 B. & Ald. 212; *McIntyre v. Ingraham*, 35 Miss. 25; *State v. Judge*, 12 La. Ann. 777; *Brewer v. Blougher*, 14 Pet. 198; *State v. Mayor*, 35 N. J. L. 196; *Opinion of Justices*, 7 Mass. 523; *Catlin v. Hull*, 21 Vt. 152; *Ruggles v. Washington Co.* 3 Mo. 496; *Monck v. Hilton*, 2 Ex. Div. 268; *Barber v. Waite*, 1 Ad. & E. 514; *Helm v. Chapman*, 66 Cal. 291; *Somerset v. Dighton*, 12 Mass. 382; *Whitney v. Whitney*, 14 Mass. 88, 92; *United States v. Saunders*, 22 Wall. 492; *Negro Bell v. Jones*, 10 Md. 322; *Brown v. G. W. R. Co.* 9 Q. B. Div. 750; *Hill*, Ex parte, 6 Ch. Div. 63; *Jones v. Water Com'rs*, 34 Mich. 273; *Smith v. Philadelphia*, 81 Pa. St. 38; *Girard, etc. Co. v. Philadelphia*, 88 id. 393; *United States v. Jarvis, Davies*, 274; *Lion Ins. Asso. v. Tucker*, 12 Q. B. Div. 186; *Commercial Bank v. Foster*, 5 La. Ann. 516; *New Orleans v. Salamander Ins. Co.* 25 La. Ann. 650; *Bear Brothers v. Marx*, 63 Tex. 298; *Wassell v. Tunnah*, 25 Ark. 101; *Jefferys v. Boosey*, 4 H. L. Cas. 815; *Tonnele v. Hall*, 4 N. Y. 140; *Big Black Creek, etc. Co. v. Commonwealth*, 94 Pa. St. 450; *Ruggles v. Illinois*, 109 U. S. 526; *Lake v. Caddo Parish*, 37 La. Ann. 788; *Crawfordsville, etc. Co. v.*

Fletcher, 104 Ind. 97; *Keith v. Quinney*, 1 Oregon, 364.

¹ *Mayor v. Howard*, 6 H. & J. 383; *Martin v. O'Brien*, 34 Miss. 21; *United States v. Hawkins*, 4 Martin (N. S.), 317; *City Bank v. Huie*, 1 Rob. (La.) 236; *People v. Burns*, 5 Mich. 114; *Potter v. Safford*, 50 id. 46; *Reithmiller v. People*, 44 id. 280, 284; *Brooks v. Mobile School Commissioners*, 31 Ala. 227; *Kelly's Heirs v. McGuire*, 15 Ark. 555; *Dunlap, Ex parte*, 71 Ala. 93; *Attorney-General v. Detroit, etc. R. R. Co.* 2 Mich. 138; *Aldridge v. Mardoff*, 32 Tex. 204; *Green v. Cheek*, 5 Ind. 105; *Wilson v. Biscoe*, 11 Ark. 44; *Gates v. Salmon*, 35 Cal. 576; *State v. Turnpike Co.* 16 Ohio St. 308, 320; *Cearfoss v. State*, 42 Md. 406; *Brooks v. Hicks*, 20 Tex. 666; *Wilkinson v. Leland*, 2 Pet. 627, 662; *Taylor v. Palmer*, 31 Cal. 240; *Howard v. Mansfield*, 30 Wis. 75; *State ex rel. v. Commissioners, etc.* 34 Id. 162; *Commonwealth v. Intoxicating Liquors*, 108 Mass. 19; *Whipple v. Judge*, 26 Mich. 343.

² *Stone v. Yeovil*, L. R. 1 C. P. Div. 691.

³ *Hough v. Windus*, L. R. 12 Q. B. Div. 229.

the subject-matter and general purpose of the statute. No clearer statement has been or can be made of the law as to the dominating influence of the intention of a statute in the construction of all its parts than that which is found in Kent's Commentaries: "In the exposition of a statute the intention of the law-maker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion."¹ If upon examination the general meaning and object of the statute be found inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to that purpose. But to warrant the change of the sense, according to the natural reading, to accommodate it to the broader or narrower import of the act, the intention of the legislature must be clear and manifest.² The application of particular provisions is not to be extended beyond the general scope of a statute, unless such extension is manifestly designed. Legislatures, like courts, must be considered as using expressions concerning the thing they have in hand; and it would not be a fair method of interpretation to apply their words to subjects not within their consideration, and which, if thought of, would have been more particularly and carefully disposed of.³ The mere literal construction ought not to prevail if it is opposed to the intention of the legislature apparent from the statute; and if the words are suffi-

¹ 1 Kent's Com. 461; Jennings v. Love, 24 Miss. 249; Harrison, Ex parte, 4 Cow. 63; People v. Utica Ins. Co. 15 John. 353; Strode v. Stafford Justices, 1 Brock. 162; State v. Clarks-ville, etc. Co. 2 Sneed, 88; Swann v. Buck, 40 Miss. 268; Learned v. Corley, 43 id. 688; Little Rock, etc. R. Co. v. Howell, 31 Ark. 119; Matthews v. Commonwealth, 18 Gratt. 989; Swartwout v. Railroad Co. 24 Mich. 389; Russell v. Farquhar, 55 Tex. 359; Ezekiel v. Dixon, 3 Ga. 153;

City v. Schellinger, 15 Phila. 50; Commercial Bank v. Foster, 5 La. Ann. 516; Kelly's Heirs v. McGuire, 15 Ark. 555; Cearfoss v. State, 42 Md. 406; Brooks v. Hicks, 20 Tex. 666; Wilkinson v. Leland, 2 Pet. 627, 662; Taylor v. Palmer, 31 Cal. 240; Commonwealth v. Conyngham, 66 Pa. St. 99.

² Holbrook v. Holbrook, 1 Pick. 248.

³ Estate of Ticknor, 13 Mich. 44.

ciently flexible to admit of some other construction by which that intention can be better effected, the law requires that construction to be adopted.¹ The intention of an act involves a consideration of its subject-matter, and the change in, or an addition to, the law which it proposes; hence the supreme importance of the rule that a statute should be construed with reference to its general purpose and aim. "Where the words," says Lush, J., "employed by the legislature do not directly apply to the particular case, we must consider the object of the act."²

§ 242. *Illustrations.*— Words of absolute repeal have been held to be qualified by the intention manifested in other parts of the same act.³ One section of a statute provided that if a plaintiff recovered a sum "not exceeding" five pounds he should recover no costs; in another section, that if he recovered "less than" that sum, and the judge certified, he should recover costs. To make the statute fully answer the obvious intention to give a plaintiff costs, by certificate of the judge, for any recovery below the amount which would carry costs without a certificate, or where he recovered exactly five pounds, the latter provision was construed by reading "less than" as equivalent to "not exceeding."⁴ By the effect of comparison with the context birds were held not to be live animals.⁵ In another case a minor, with living parents, was held to be an orphan for like reason.⁶ In a Wisconsin statute the word "jury" was construed to refer to "one or more credible and disinterested persons," sworn by an officer executing a writ of replevin, to testify as to the value of the property.⁷ A statute which authorized a town to pay "all loans made in good faith" was held to authorize the payment of sums voluntarily advanced by individuals for the benefit of the town.⁸ By considering the mischief intended to be remedied by an act providing that "if any person shall take from any field not belonging to such per-

¹ *Caledonian R'y Co. v. North British R'y Co.* L. R. 6 App. Cas. 122; *Freme v. Clement*, 44 L. T. (N. S.) 399; L. R. 18 Ch. Div. 499; *Walton, Ex parte*, L. R. 17 Ch. Div. 746; *United States v. Bassett*, 2 Story, 399.

² *Williams v. Ellis*, L. R. 5 Q. B. Div. at p. 176.

³ *Smith v. People*, 47 N. Y. 330.

⁴ *Garby v. Harris*, 7 Ex. 591.

⁵ *Reiche v. Smythe*, 13 Wall. 162.

⁶ *Ragland v. The Justices, etc.* 10 Ga. 65, 71.

⁷ *Williams v. McDonal*, 3 Pin. 331.

⁸ *Weister v. Hade*, 52 Pa. St. 474.

son any cotton, corn, rice, or other grain, fraudulently, with the intent secretly to convert the same to the use of such person," he should be guilty of "larceny," it was held that the terms "cotton, corn, rice," etc., embrace those articles in every possible form and variety in which they can exist in a field; that they include them in a growing and unripe state.¹ An act was passed incorporating a company to construct a road from a designated point in the city of Baltimore, in a direct line, about due north, to another point named, but it was forbidden to lay out and extend the road through the buildings, yards, or orchards, of any farm without the consent of the owner. It was held that the act was passed for the public convenience and benefit; that the prohibitory restriction should be construed as requiring and authorizing a deviation or change in the location of the road at such points from the prescribed route, to prevent a *cesser* of the corporate franchise in case the consent of the owner could not be obtained.²

§ 243. A bankruptcy act provided that all the property acquired by the bankrupt "during the continuance" of the bankruptcy should be divisible among his creditors. It provided, also, that he might obtain his discharge not only at the close but during the continuance of his bankruptcy. By considering the various provisions, it was construed that the former provision should be read in substance as meaning that the future property which was to be divisible was that acquired either during the continuance of the bankruptcy or before the earlier discharge of the bankrupt.³ James, L. J., said: "It is a cardinal principle in the interpretation of a statute, that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other."⁴ An act to prevent injury from "furiously driving any sort of carriage" was held to include a bicycle.⁵ A statute required notice to a surveyor, or some municipal officer, for a period not less than twenty-four hours prior to an accident, to render a town liable for an injury from a defect in a highway. This requirement was literally absolute by the terms of the statute; but it was held

¹ *State v. Stephenson*, 2 Bailey, 334.

⁴ *Id.*

² *Charles St. Ave. Co. v. Merryman*, 10 Md. 536.

⁵ *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228.

³ *Ebbs v. Boulnois*, L. R. 10 Ch. 479.

that where the defect was caused by the surveyor while acting as agent of the town, such notice was not necessary; for the purpose of the act did not require notice to an officer of his own act. Under such circumstances, when the reason of the law ceases, the law ceases.¹ A statute in general terms made it a punishable offense for any person to carry or transport from place to place the carcass or hide of any of the animals forbidden to be killed within certain periods. By construction, it was held inapplicable to the carrying of the hide of an animal during that period if it had been killed while it was lawful to kill it. It was held proper to decide in contravention of the terms of a statute when necessary to reach its spirit and obvious intent.² A statutory requirement to give notice to an officer, before suit brought, "for anything done, or intended to be done," under the authority of the act, was held to apply to a non-feasance for things omitted to be done.³ The charter of a cemetery company provided that a certain number of acres of land "shall be forever appropriated and set apart as a cemetery, which, so long as used as such, shall not be liable to any tax or public imposition whatever." This was held not to apply to a tax levied for paving a street in front of the property; the intent was to exempt the property from all taxes or impositions for purposes of revenue, but not to relieve it from such charges as are inseparably incident to its location in regard to other property.⁴

§ 244. A statute of Missouri provides that life assurance companies should not commence or continue to do business until, besides complying with certain regulations touching their capital, they shall each have at least \$100,000 of capital paid in and invested in the stocks or bonds of the state of Missouri, or in treasury notes or stocks of the United States, or in notes or bonds secured by mortgages or deeds of trust on unincumbered real estate worth at least double the amount loaned thereon, etc. This provision was construed to require "the mortgages or deeds of trust" to be taken on real estate

¹ Holmes v. Paris, 75 Me. 559.

449; Wilson v. Hifax, L. R. 3 Ex.

² Allen v. Young, 76 Me. 80; Commonwealth v. Hall, 128 Mass. 410.

114; Davis v. Curling, 8 Q. B. 286.

³ Poulsum v. Thirst, L. R. 2 C. P.

⁴ Mayor, etc. v. Green Mount Cemetery, 7 Md. 517. See Olive Cemetery Co. v. Philadelphia, 93 Pa. St. 129.

situate in Missouri. The statute in its letter was silent on this point, but it was plainly perceivable that its object was to afford ample protection and indemnity to the policyholder; and in order to give effect to that intention, the court announce and proceed upon this principle: that when it is plainly perceivable that a particular intention, though not precisely expressed, must have been in the mind of the legislature, that intention will be enforced and carried out and made to control the strict letter.¹ Though a statute gives inaccurate names to things, if the court can discern its meaning, it will so expound it as to give force to the intention of the legislature; thus, it seems a statutory requirement of the "great seal of Great Britain (used improperly, since the old great seal was, soon after the union with Ireland, destroyed in the presence of the lord chancellor) is substantially satisfied by the use of the great seal of the United Kingdom."²

§ 245. **The flexibility of words and clauses to harmonize with general intent.**—The natural import of words is their literal sense; but this may be greatly varied to give effect to the fundamental purpose of a statute.³ The general object of a statute was to restore uniformity in taxation in counties and cities; to effect this, existing laws relating to incorporated towns and cities had to be repealed, that the provisions of the act applicable in terms to both might have effect. There was a repealing clause in the act that "all laws requiring *any city* to support and provide for its paupers, etc., are hereby repealed." One question which came before the court was whether the clause included laws so providing for *incorporated towns*; the decision was in the affirmative. The court followed the rule laid down in *Mason v. Finch*,⁴ that, "in construing statutes, courts look at the language of the whole act, and if they find, in any particular clause, an expression not so large and extensive in its import as those used in other parts of the statute, if, upon a view of the whole act, they can collect from the more large and extensive expressions used in the other parts the real intention of the legislature, it is their duty to

¹ *State v. King*, 44 Mo. 283.

Burke v. Monroe Co. 77 Ill. 610; *Mason*

² *Dwarris on St.* 614; *Rex v. Bullock*, 1 Taunt. 80.

v. Finch, 2 Scam. 223.

⁴ *Supra*.

³ *McIntyre v. Ingraham*, 35 Miss. 25;

give effect to the larger expression." The court say: "Even if the word city was not sufficiently comprehensive to embrace incorporated towns, yet under the rule announced in the case [referred to], it cannot be doubted that the larger and more extensive signification was intended by the use of the word city."¹ The converse is illustrated by the example of a statute which required a *notice* to be *given*, under which undoubtedly either a written or verbal notice would suffice.² But as a subsequent section required the notice to be served on a person, or *left* with him, thus employing words implying a written notice, the notice to be given was construed to mean a notice in writing.³ The seemingly incongruous provisions must be so construed as to harmonize with the general intent manifested in the whole enactment.⁴

§ 246. **The literal sense not controlling.**—The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention.⁵ General words or clauses may be restricted to effectuate the intention or to harmonize them with other expressed provisions.⁶ Where general language construed in a broad sense would lead to absurdity it may be restrained.⁷ The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they

¹ *Burke v. Monroe County*, *supra*.

² *Vinton v. Builders', etc. Asso.* 109 Ind. 351.

³ *Wilson v. Nightingale*, 8 Q. B. 1034; *Moyle v. Jenkins*, 51 L. J. Q. B. 112; L. R. 8 Q. B. Div. 116.

⁴ *Commonwealth v. Conyngham*, 66 Pa. St. 99; *Wilkinson v. Leland*, 2 Pet. 627, 662.

⁵ *Caledonian R'y Co. v. North British R'y Co.* L. R. 6 App. Cas. 114; *Freme v. Clement*, 44 L. T. (N. S.) 399; L. R. 18 Ch. Div. 499. See *Holyland v. Lewin*, 26 id. 266; *Walton, Ex parte*, L. R. 17 Ch. Div. 756; *United States v. Bassett*, 2 Story, 389.

⁶ *Commercial Bank v. Foster*, 5

La. Ann. 516; *Barker v. Esty*, 19 Vt. 131, 139; *Simonds v. Powers*, 28 id. 354; *Phillips v. State*, 15 Ga. 518; *Thompson v. Farrer*, 9 Q. B. Div. 372; *State v. Weigel*, 48 Mo. 29; *Clementson v. Mason*, L. R. 10 C. P. 209; *Covington v. McNickle*, 18 B. Mon. 262; *Atkins v. Disintegrating Co.* 18 Wall. 272, 302; *Smith v. Adams*, 5 De Gex, M. & G. 712; *Dano v. Railroad Co.* 27 Ark. 564; *Powdrell v. Jones*, 2 Smale & G. 407; *Olive v. Walton*, 33 Miss. 114; *Williams v. McDonal*, 3 Pin. 331; *Ayers v. Knox*, 7 Mass. 306; *City of San Diego v. Granniss*, 77 Cal. 511.

⁷ *People v. Davenport*, 91 N. Y. 574.

were intended to be used as they are found in the act. The sense in which they were intended to be used furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning is to be given according to the intention thus indicated.¹ In an act providing for raising state taxes, railroads were taxed on the basis of passenger traffic, and it was provided that every railroad paying such tax should not be assessed "with any tax on its lands, buildings or equipments." This exemption was confined to taxes of the kind provided for in the act, and was held not to conflict with another act for a municipal tax.² A public board, in terms authorized to adjust *all* claims against their respective counties, were held not empowered to adjust their own; the general power was construed to refer to claims presented to them and not to make them judges in their own cases.³ When the intent is plain, words and even parts of sentences may be transposed to carry it into effect.⁴ Restrictive clauses significant of the intent in certain provisions may be supplied by intendment in others.⁵ General words do not always extend to every case which literally falls within them.⁶ When the intention can be collected from the statute itself, words may be modified, altered or supplied so as to obviate any repugnance or inconsistency with such intention.⁷ The context is not allowed to change the effect of a section or word where it appears to be the intention that it should be literally construed; in other words, if the true meaning of a word or phrase is apparent from the section in which it occurs, it is not admissible to go outside of it for an interpretation.⁸

¹ McIntyre v. Ingraham, 35 Miss. 25, citing Mitchell v. Mitchell, 5 Madd. 72; Hotham v. Sutton, 15 Ves. 320; Stuart v. Earl of Bute, 3 id. 212. See also City of San Diego v. Grannis, 77 Cal. 511.

² Orange, etc. R. R. Co. v. Alexandria, 17 Gratt. 176; Beawfage's Case, 10 Coke, 99b.

³ Kennedy v. Gies, 25 Mich. 83.

⁴ Cunningham v. State, 2 Speers, 246; State v. Turnpike Co. 16 Ohio St. 308. See Doe v. Considine, 6 Wall. 458.

⁵ Bode v. State, 7 Gill, 328.

⁶ Jefferys v. Boosey, 4 H. L. 815.

⁷ Quin v. O'Keeffe, 10 Ir. C. L. (N. S.) 393; Brinsfield v. Carter, 2 Ga. 150; Wainwright, In re, 1 Phil. 258; Rice v. Railroad Co. 1 Black, 358; Walton, Ex parte, L. R. 17 Ch. Div. 746.

⁸ Spencer v. Metropolitan Board, L. R. 22 Ch. Div. 162; Egerton v. Third Municipality, 1 La. Ann. 435; Depas v. Riez, 2 id. 30; Warehouse Co. v. Lewis, 56 Ala. 514; Blackwood v. Queen, T. R. 8 App. Cas. 96; Pitte v. Shipley, 46 Cal. 154.

Illustrations could be multiplied indefinitely, but the foregoing will suffice. The curious reader will find a variety of new applications of the same principle in the cases cited below.¹ This mode of construction by reference to the subject-matter and purpose of a statute is applicable to all statutes civil and criminal. If there is an express declaration of the intent and meaning of the statute by the provisions contained in it, all other parts of the act are controlled in construction to serve that intent.²

§ 247. Interpretation of words and phrases.—Primarily—that is, in the absence of anything in the context to the contrary—common or popular words are to be understood in a popular sense: common-law words according to their sense in the common law; and technical words, pertaining to any science, art or trade, in a technical sense.³ It is a familiar rule

- ¹ *Milburn v. State*, 1 Md. 17; *State v. King*, 44 Mo. 283; *Crocker v. Crane*, 21 Wend. 211; *Oates v. National Bank*, 100 U. S. 239; *Attorney-General v. Kwok-A-Sing*, L. R. 5 P. C. 179; *Brown v. Hamlett*, 8 Lea, 732; *Brown v. Barry*, 3 Dall. 365; *Minor v. Mechanics' B'k*, 1 Pet. 46; *Binney v. Canal Co.* 8 id. 201; *Kennedy v. Kennedy*, 2 Ala. 571; *Thompson v. State*, 20 id. 54; *Sprowl v. Lawrence*, 33 id. 674; *Big Black Creek, etc. Co. v. Commonwealth*, 94 Pa. St. 450; *Smith v. Randall*, 6 Cal. 47; *Ex parte Ellis*, 11 id. 222; *Simonds v. Powers*, 28 Vt. 354; *Burr v. Dana*, 22 Cal. 11; *Bell v. New York*, 105 N. Y. 139; *State v. Poydras*, 9 La. Ann. 165; *Allen v. Parish*, 3 Ohio, 198; *Keith v. Quinney*, 1 Or. 364; *Reynolds v. Holland*, 35 Ark. 56; *Coffin v. Rich*, 45 Me. 507; *Murray v. R. R. Co.* 4 Keyes, 274; *Jackson v. Collins*, 3 Cow. 89; *Holmes v. Paris*, 75 Me. 559; *Matthews v. Commonwealth*, 18 Gratt. 989; *Cearfoss v. State*, 42 Md. 406; *Learned v. Corley*, 43 Miss. 687; *Moyce v. Newington*, 4 Q. B. Div. 32; *Walton, Ex parte*, L. R. 17 Ch. Div. 756; *Caledonian R'y Co. v. North B. R'y Co.* L. R. 6 App. Cas. 122; *Russell v. Farquhar*, 55 Tex. 355; *Gravett v. State*, 74 Ga. 191; *Somerset v. Dighton*, 12 Mass. 382; *Holbrook v. Holbrook*, 1 Pick. 248; *Miller v. Salouons*, 7 Ex. 475; *Attorney-General v. Lockwood*, 9 M. & W. 398; *Becke v. Smith*, 2 M. & W. 195; *Wright v. Williams*, 1 id. 99; *Hollingworth v. Palmer*, 4 Ex. 267; *Reg. v. Spratley*, 6 E. & B. 363; *Crespigny v. Wittenoom*, 4 T. R. 790; *Brewer v. Blougher*, 14 Pet. 178; *Atkins v. Disintegrating Co.* 18 Wall. 272; *Maxwell v. Collins*, 8 Ind. 38; *Larzelere v. Haubert*, 109 Pa. St. 515; *Sheetz v. Hanbest*, 81 id. 100; *Wiener v. Davis*, 18 id. 331; *Jackson v. Bradt*, 2 Cal. 169; *Packer v. Noble*, 103 Pa. St. 188; *Swift v. Tyson*, 16 Pet. 1; *Wheeler v. McCormick*, 8 Blatchf. 267.
- ² *Farmers' Bank v. Hale*, 59 N. Y. 53.
- ³ *Cull v. Austin*, L. R. 7 C. P. 234; *Lion Ins. Asso. v. Tucker*, L. R. 12 Q. B. D. 186; *Schrieffer v. Wood*, 5 Blatchf. 215; *Green v. Weller*, 33 Miss. 650; *Wetumpka v. Winter*, 29 Ala. 651; *Quigley v. Gorham*, 5 Cal.

of construction, alike dictated by authority and common sense, that common words are to be extended to all the objects which, in their usual acceptance, they describe or denote; and that technical terms are to be allowed their technical meaning and effect, unless in either case the context indicates that such construction would frustrate the real intention of the maker.¹ They should be construed according to the intent of the legislature which passed the act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the legislature.² The court is at liberty to regard the state of the law at the time, and the facts which the preamble or recitals of the act prove to have been the existing circumstances at the time of its preparation.³ They should be construed with reference to their generally accepted meaning at the time of the passage of the act, and if re-enacted will be deemed to be adopted in their original sense.⁴

§ 248. Words and phrases should be construed as they are generally understood.—In the construction of statutes a word which has two significations should ordinarily receive

418; *Gross v. Fowler*, 21 Cal. 392; 196; *Adams v. Turrentine*, 8 Ired. L. Evans v. Stevens 4 T. R. 463; *Clark* 147; *Apple v. Apple*, 1 Head, 348; v. *Utica*, 18 Barb. 451; *Morrall v. Sutton*, 1 Phil. 533; *Cruger v. Cruger*, 5 Barb. 225; *Jesson v. Wright*, 2 Bligh, 2; *Doe v. Harvey*, 4 B. & C. 610; *Abbott v. Middleton*, 7 H. L. 68; *State v. Clarksville, etc.* Co. 2 Sneed, 88; *Palmer v. State*, 7 Cold. 82; *Engelking v. Von Wamel*, 26 Tex. 469; *Saltoun v. Advocate-General*, 3 Macq. 659; *Queen v. Castro*, L. R. 9 Q. B. 360; *Parkinson v. State*, 14 Md. 184; *Martin v. Hunter*, 1 Wheat. 326; *Georgia v. Atkins*, 1 Abb. (U. S.) 22; *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338; *McCool v. Smith*, 1 Black. 459; *The Kate Heron*, 6 Sawyer, 106; *United States v. Jones*, 3 Wash. 209; *United States v. Magill*, 1 Wash. 463; 4 Dall. 426; *Vincent, Ex parte*, 26 Ala. 145; *Allen's Appeal*, 99 Pa. St.

De Veaux v. De Veaux, 1 Strob. Eq. 283; *Hall, Ex parte*, 1 Pick. 261; *State v. Smith*, 5 Humph. 894; *Brocket v. R. R. Co.* 14 Pa. St. 241; *State v. Mayor, etc.* 35 N. J. L. 196.

² *Sussex Peerage*, 11 Cl. & Fin. 85; *Hyde v. Hyde*, L. R. 1 P. & D. 134.

³ *Attorney-General v. Powis, Kay*, 186.

⁴ *Dawson v. Dawson*, 23 Mo. App. 169; *St. Cross v. Howard*, 6 T. R. 338; *Smith v. Lindo*, 27 L. J. C. P. 200; 4 C. B. (N. S.) 395; *Wilson v. Knubley*, 7 East, 136; *Montrose Peerage*, 1 Macq. 406; *Aerated Bread Co. v. Gregg*, L. R. 8 Q. B. 355.

that meaning which is generally given to it in the community; but when this construction would contravene the manifest intention of the legislature, we must depart from this rule and give effect to the intention. A vehicle with four wheels drawn by oxen, suited to the ordinary purposes of husbandry, and employed in the same uses to which carts, in the common acceptance of the term, are appropriated, is protected from levy and sale by the statute which exempts "one horse or ox-cart" from execution.¹ The words of a statute are to be read in their ordinary sense unless so construing them will lead to some incongruity or manifest absurdity.²

§ 249. How general words construed.—General words should receive a general construction unless there is something in the statute to restrain them.³ When from the provisions of a statute it is clear that a restraint must be put upon the ordinary and literal signification of some word or expression, and it is uncertain from anything to be found in the act itself or in the circumstances judicially cognizable under which the provision was inserted, what the exact character and extent of that restriction is, it is the duty of the court to put no greater restriction than the nature of the provision and the subject-matter to which it relates necessarily impose.⁴

§ 250. Words having popular and technical meaning.—Where a word having a technical as well as a popular meaning is used in the constitution or a statute the courts will accord to it its popular signification, unless the very nature of the subject indicates, or the context suggests, that it is used in its technical sense. Therefore the requirement that all bills shall be *read* on three several days is taken to mean actual readings.⁵ It would seem that popular words are to be construed in their strict and primary acceptance, unless it appears from the context that they were used in a different sense, or in their strict sense are incapable of being carried into effect.⁶

¹ *Favers v. Glass*, 22 Ala. 621.

⁵ *Weill v. Kenfield*, 54 Cal. 111;

² *Collins v. Welch*, L. R. 5 C. P. Div. 27; *State v. Deshler*, 25 N. J. L. 177, 183.

People v. Tighe, 5 Hun, 25; *Opinion of Justices*, 7 Mass. 523.

³ *Jones v. Jones*, 18 Me. 308, 313.

⁶ *Mallan v. May*, 13 M. & W. 511, 517.

⁴ *Sullivan v. Mitcalfe*, L. R. 5 C. P. Div. 455.

§ 251. A statute requiring that "all words and phrases shall be construed and understood according to the common and approved usage of language," etc., is only declaratory of a part of the common law on the subject, and will not preclude the operation of other common-law rules. The latter are of equal dignity and importance, and may be invoked to give effect to the legislative intent. A general statute prohibiting the carrying of concealed weapons was qualified by a provision authorizing it when the person has reasonable grounds to believe his person, or the person of some of his family, is in *immediate* danger from violence or crime. As the literal sense of the word immediate would defeat the legislative purpose and render the privilege granted worthless, it was deemed inadvertently used, or used in some other than its ordinary sense; it was held that the provision authorized the carrying of such weapons when there was believed to be immediate danger of violence or crime at the hands of another, whenever that person is present, or "whenever or wherever he has reasonable ground to apprehend that he will encounter such person and be exposed to the apprehended danger."¹ Words in common use, and not technically employed, in a statute which is intended to be understood and practiced upon by the people, should be construed according to their popular meaning; that such was the intention of the legislature is the only intendment that ought to be adopted.²

§ 252. The popular use of "or" and "and" is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context.³

¹ Bailey v. Commonwealth, 11 Bush, 688.

² Strong v. Birchard, 5 Conn. 357, 361; Avery v. Pixley, 4 Mass. 460; Robinson v. Varnell, 16 Tex. 382.

³ Metropolitan Board of Works v. Steed, L. R. 8 Q. B. Div. 447; Douglass v. Eyre, Gilpin, 148; State v. Myers, 10 Iowa, 448; State v. Brandt,

41 id. 593; State v. Smith, 46 id. 670; People v. Sweetser, 1 Dak. 295; State v. Custer, 65 N. C. 339; Barker v. Esty, 19 Vt. 131; Sparrow v. Davidson College, 77 N. C. 35; Rigoney v. Neiman, 73 Pa. St. 330; Commonwealth v. Griffin, 105 Mass. 185; Foster v. Commonwealth, 8 W. & S. 77; Winterfield v. Stauss, 24 Wis.

§ 253. Words having a special sense in the common law.—

Where a statute uses a word, which is well known and has a definite sense at common law or in the written law, without defining it, it will be restricted to that sense, unless it appears that it was not so intended.¹ If the word *heir* is used it is to be so interpreted, and must be taken to mean one capable of in-

394, 406; *State v. Mitchell*, 5 Ired. L. 350; *State v. Miles*, 2 Nott & McCord, 1; *State v. McCoy*, 2 Speers, 711; *Green v. Wood*, 7 Q. B. 178; *Fowler v. Padget*, 7 T. R. 509; *Townsend v. Read*, 10 C. B. (N. S.) 308; *Waterhouse v. Keen*, 4 B. & C. 200; *Newland v. Marsh*, 19 Ill. 370; *Rolland v. Commonwealth*, 82 Pa. St. 306; *Blemer v. People*, 76 Ill. 265; *State v. Pool*, 74 N. C. 402; *Murray v. Keyes*, 35 Pa. St. 384, 391; *Union Ins. Co. v. United States*, 6 Wall. 759; *Bollin v. Shiner*, 12 Pa. St. 205; *McConky v. Superior Court of Alameda Co.* 56 Cal. 83; *United States v. Ten Cases of Shawls*, 2 Paine, 162.

¹*Buckner v. Real Estate Bank*, 5 Ark. 536; *Rives v. Guthrie*, 1 Jones' L. 88; *McCool v. Smith*, 1 Black, 459; *Hillhouse v. Chester*, 3 Day, 166; *State v. Engle*, 21 N. J. L. 347; *Allen's Appeal*, 99 Pa. St. 196; *Brocket v. Ohio*, etc. R. R. Co. 14 id. 241, 243; *Adams v. Turrentine*, 8 Ired. L. 147; *The Kate Heron*, 6 Sawyer, 106; *Apple v. Apple*, 1 Head, 348; *State v. Mace*, 5 Md. 337; *United States v. Magill*, 1 Wash. 463.

A *claim* is, in a juridical sense, "a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty." *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters, 539, 615.

In the same case Mr. Justice Story says: "A more limited, but at the same time an equally expressive, definition was given by Lord Dyer, as cited in *Stowell v. Zouch*, *Plowden*,

359, that "a claim is a challenge by a man of the propriety or ownership of a thing which he has in possession, but which is wrongfully detained from him."

"In its ordinary sense," said Scott, J., "a *claim* imports the assertion, demand or challenge of something as a right, or it means the thing thus demanded or challenged. The word, as here used, is by implication limited to claims against the state, and of a pecuniary character. The inhibition is against the *payment of any money on any claim*, etc. Claims for the payment of money may be preferred against the state on various grounds. They may be either of a legal or of an equitable character. They may purport to arise under existing laws, or to originate in circumstances which are supposed to cast upon the state a duty, either of perfect or imperfect obligation, to provide for their payment. All such demands against the state for the payment of money, whatever be their character or origin, are, we think, *claims* within the meaning of the constitution." *Fordyce v. Godman, Auditor*, 20 Ohio St. 1, 14.

The word *wilful* when used in a statute creating a criminal offense implies the doing of the act purposely and deliberately in violation of law. *State v. Whitener*, 93 N. C. 590; *State v. Smith*, 52 Wis. 134; *State v. Preston*, 34 id. 675.

Distance on a river within which no other bridge may be built, held to be measured by the course of the river. *McLeod v. Burroughs*, 9 Ga. 213.

heriting.¹ The word month in England is usually construed to mean a lunar month.² This rule was followed in New York.³ But the word month is not a technical word, and courts generally lean toward that construction of it, as of other popular words, which every one not a lawyer would put upon it.⁴

In *Eshleman's Appeal*⁵ the court say: "Both in England and America it has been held that the word 'child' may apply to and include 'grandchild.' The English statute of 22 and 23 Car. II., ch. 10, . . . relating to distribution, . . . provides that if a child shall be advanced; yet it is there held to extend to a grandchild, the father being dead.⁶ Grandchildren and great-grandchildren are all children and come within that term for certain purposes.⁷ It is allowed by all that if no children are in being, grandchildren come in under the word children and may be thereby described.⁸ So grandchildren may take under the description of children in a will.⁹ In a trust for children it was held grandchildren were entitled to participate."¹⁰

§ 254. Words in common use, and also having a technical sense, will, in acts intended for general operation and not dealing specially with the subject to which such words in their technical sense apply, be understood primarily in their popular sense, unless they are defined in the act or a contrary intention is otherwise manifest.¹¹ Such words, however, will be understood in a technical sense when the act treats of the subject in relation to which such words are technically em-

¹ *State v. Engle*, 21 N. J. L. 347.

Cal. 392; *Mitchell v. Woodson*, 37

² *Rex v. Peckham*, Carth. 406;

Miss. 567.

Lacon v. Hooper, 6 T. R. 224, 226;

³ 74 Pa. St. 42, 46.

Castle v. Burditt, 3 id. 623; *Rex v.*

⁶ 1 Eq. Ab. 381, B. pl. 6; 382, B. pl. 8, 9, 10, 11.

Adderley, 2 Doug. 462; *Catesby's*

⁷ *Wyth v. Blackman*, 1 Ves. Sr. 197.

Case, 6 Coke, 62; 2 Black. Com. 141.

⁸ *Crooke v. Brookling*, 2 Vern. 107;

³ *Loring v. Halling*, 15 John. 119;

Wythe v. Thurston, 2 Ambler, 555.

Parsons v. Chamberlin, 4 Wend. 512.

⁹ *Royle v. Hamilton*, 4 Ves. 437.

See *Rives v. Guthrie*, 1 Jones' L. 88.

⁴ *Avery v. Pixley*, 4 Mass. 460;

¹⁰ *Crawhall's Trust*, In re, 8 De G.

Churchill v. Merchants' Bank, 19 Pick.

Macn. & Gord. 480. See *Burgess v. Hargrove*, 64 Tex. 110.

532; *Commonwealth v. Chambre*, 4

¹¹ *Cummings v. Coleman*, 7 Rich.

Dall, 143; *Kimball v. Lamson*, 2 Vt.

138; *Commonwealth v. Shortridge*,

Eq. 509; S. C. 62 Am. Dec. 402;

8 J. J. Marsh. 638; *Williamson v. Far-*

Schriefer v. Wood, 5 Blatchf. 215;

row, 1 Bailey, 611; *Moore v. Houston*,

Green v. Weller, 32 Miss. 650; *Park-*

8 Serg. & R. 169; *Gross v. Fowler*, 21

inson v. State, 14 Md. 184.

ployed. Thus they are deemed technically used in legislation relating to courts and legal process. Thus, for example, the word "party" has a technical significance.¹ So have the words "action," "suit"² and "final judgment."³ But by the cardinal rule that the intention of the law-makers is the essence of the law, when a technical word is obviously intended to have a broader than its strict technical sense, it will receive that interpretation. In *McBride's Appeal*⁴ the word "actions" in the provision in question was held to embrace "all civil proceedings of whatever kind," as well as actions technically so called.⁵ Technical words are sometimes used in statutes in a popular sense.⁶ In a penal statute, where it is sought to depart from the ordinary meaning of the words used, the intention of the legislature that these words should be used in a larger or more popular sense must clearly appear.⁷ Prohibitory statutes must not be interpreted on a principle of leniency; if anything done is substantially that which is prohibited, the thing is void, not because of its tendency, but because it is, within the true construction of the statute, the thing prohibited.⁸ If a word is technical and used in a technical or conventional sense, it is to be construed accordingly; but its interpretation may then involve an inquiry into its technical meaning as matter of fact. Such laws are intended for practical application to men engaged in avocations in which the words have acquired a special meaning by usage. Such statutes are to be construed according to the conventional understanding of the terms used.⁹

¹ *Merchants' Bank v. Cook*, 4 Pick. 405.

² *Belfast v. Fogler*, 71 Me. 403; *Parsons v. Bedford*, 8 Pet. 433; *Holmes v. Jennison*, 14 id. 540, 546; *Calderwood v. Est. of Calderwood*, 38 Vt. 171.

³ *Snell v. Bridgewater, etc. Co.* 24 Pick. 296, 299; *Weston v. Charleston*, 2 Pet. 464; *Holmes v. Jennison*, 14 id. 540, 562.

⁴ 72 Pa. St. 480. See *People v. May*, 3 Mich. 598.

⁵ See *Coatsworth v. Barr*, 11 Mich. 199; *George v. Board of Education*, 33 Ga. 344; *King v. Pease*, 4 B. & Ad. 30; *State v. Clarksville & R. Turnpike Co.* 2 Sneed, 88.

⁶ *People v. Tighe*, 5 Hun, 25, 27.

⁷ *Stephenson v. Higginson*, 3 H. L. Cas. 638.

⁸ *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338.

⁹ *Elliott v. Swartwout*, 10 Pet. 137; *Two Hundred Chests of Tea*, 9 Wheat. 430; *United States v. Sarchet, Gilpin*, 273; *United States v. 112 Casks of Sugar*, 8 Pet. 277; *Curtis v. Martin*, 3 How. 106; *Lawrence v. Allen*, 7 How. 785; *People v. Hulse*, 3 Hill, 309; *Lee v. Lincoln*, 1 Story, 610; *Att'y-Gen'l v. Bailey*, 1 Ex. 281; *State v. Gupton*, 8 Ired. 271; *United States v. Breed*, 1 Sumn. 159; *Morse v. State*, 6 Conn. 9; *Whart. Com. on Am. L.*

"Acts of this nature," says Story, J.,¹ "are to be interpreted not according to the abstract propriety of the 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, 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 commercial law the legislature used the word in the foreign sense. And so in reference to what rule ought to prevail where the article is known by one name among merchants and by another name among manufacturers or the community at large, interpreting the legislative meaning in the traffic act. Congress, under such circumstances, may, perhaps, be fairly presumed to use it in the more general and the more usual sense rather than in that which belongs to a single class of citizens."

§ 255. **Statutory use of words.**—A word repeatedly used in a statute will bear the same meaning throughout the statute, unless a different intention appears.² The intention is obvious to use the word *marry* in a different sense from that implied in the word *married* in the provision fixing a penalty against a person who "being married" should "marry" again.³ Where words have been long used in a technical sense and have been judicially construed to have a certain meaning, and have been adopted by the legislature as having a certain meaning prior to a particular statute in which they are used, the rule of construction requires that the words used in such stat-

§ 604; *The Dunelm*, L. R. 9 P. Div. 171; *Roosevelt v. Maxwell*, 3 Blatchf. 391; "Gin," *Webb v. Knight*, 2 Q. B. Div. 530; *Arthur v. Morrison*, 96 U. S. 108; *United States v. Clement*, Crabbe, 499; *Commonwealth v. Giltinan*, 64 Pa. St. 100; *Reg. v. Wood*, L. Rep. 4 Q. B. 559; *Aerated Bread Co. v. Gregg*, L. R. 8 Q. B. 355.

¹ *United States v. Breed*, 1 Sumn. 159.

² *Rhodes v. Weldey*, 46 Ohio St. 234; *Pitte v. Shipley*, 46 Cal. 154, 160; *Reg. v. Poor Law Commissioners*, 6 Ad. & E. 68; *Courtauld v. Legh*, L. R. 4 Ex. 126; *Smith v. Brown*, L. R. 6 Q. B. 729; *Re Kirkstall Brewery*, 5 Ch. Div. 535. See *County Seat Linn Co.* 15 Kan. 500.

³ *Reg. v. Allen*, L. R. 1 C. C. 367.

ute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words.¹ And if the legislature use words which have received a judicial interpretation they are presumed to be used in that sense, unless the contrary intent can be gathered from the statute.² But where the same language is not preserved, but is substantially varied, it shows a different intention.³ And so the context may show that the same word used repeatedly in the same act is not used in the same sense.⁴

§ 256. **Change of phraseology of statute.**—"It has been a general rule," says Blackburn, J., "for drawing legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning; and it would be as well if those who are engaged in the preparation of acts of parliament would bear in mind that that is the real principle of construction."⁵ Whether the change be by omission, addition or substitution of words, the principle applies.⁶ Every change of phraseology, however, does not indicate a change of substance and intent. The change may be made to

¹ *Ruckmaboye v. Lulloobhoy Matichand*, 8 Moore, P. C. 4; *United States v. Gilmore*, 8 Wall. 330; *The Abbotsford*, 98 U. S. 440; *Wallace v. Taliaferro*, 2 Call (Va.), 389; 6 Bac. Abr. 379; *Campbell, Ex parte*, L. R. 5 Ch. 703; *State v. Brewer*, 22 La. Ann. 273; *United States v. Wilson*, Baldw. 78, 95; *McKee v. McKee*, 17 Md. 352; *Woolsey v. Cade*, 54 Ala. 378; *County Seat of Linn Co.* 15 Kan. 500; *Williams v. Lear*, L. R. 7 Q. B. 285.

² *McKee v. McKee*, 17 Md. 352; *Huddleston v. Askey*, 56 Ala. 218; *Posey v. Pressley*, 60 id. 243; *Dawson v. Dawson*, 23 Mo. App. 169.

³ *Rutland v. Mendon*, 1 Pick. 154, 156; *Wills v. Russell*, 100 U. S. 621; *Rich v. Keyser*, 54 Pa. St. 86, 89; *Buck v. Spofford*, 31 Me. 34; *Pingree v. Snell*, 42 Me. 53; *Poe v. State*, 85 Tenn. 495; *Broadbudd v. Broadbudd*, 10 Bush, 299; *Eliot v. Himrod*, 108

Pa. St. 569, 573; *State v. Clark*, 57 Mo. 25; *Reg. v. Pratt*, 4 E. & B. 860. See *Coxson v. Doland*, 2 Daly, 66; *State v. Smith*, 46 Iowa, 670; *Winterfield v. Stauss*, 24 Wis. 394; *Lehman, Durr & Co. v. Robinson*, 59 Ala. 219; *Burgess v. Hargrove*, 64 Tex. 110.

⁴ *McMicken v. Commonwealth*, 58 Pa. St. 213.

⁵ *Hadley v. Perks*, L. R. 1 Q. B. 457; *Dickenson v. Fletcher*, L. R. 9 C. P. 8; *Casement v. Fulton*, 5 Moore's P. C. 141.

⁶ *Lawrence v. King*, L. R. 3 Q. B. 345; *Reg. v. Bullock*, L. R. 1 C. C. 117; *Eliot v. Himrod*, 108 Pa. St. 569, 573; *Reg. v. Price*, L. R. 6 Q. B. 411; *West v. Francis*, 5 B. & Ald. 737; *Reg. v. Ing-ham*, 5 B. & S. 257; *Bond v. Rosling*, 1 id. 371; *Parker v. Taswell*, 2 DeG. & J. 559; *Tidey v. Mollett*, 16 C. B. (N. S.) 298.

express more clearly the same intent or merely to improve the diction.¹ The change is often found to be the result of carelessness or slovenliness of the draftsman.² The changes of phraseology may result from the act being the production of many minds, and from being compiled from different sources.³ Hence the presumption of a change of intention from a change of language is of no great weight, and must mainly depend on the intrinsic difference as resulting from the modification.⁴ A mere change in the words of a revision will not be deemed a change in the law unless it appears that such was the intention. The intent to change the law must be evident and certain; there must be such substantial change as to import such intention, or it must otherwise be manifest from other guides of interpretation, or the difference of phraseology will not be deemed expressive of a different intention.⁵ Revisions naturally involve some modifications of expression to bring the laws into system and uniformity.

In the interpretation of re-enacted statutes the court will follow the construction which they received when previously

¹ *Hadley v. Perks*, L. R. 1 Q. B. 457; *Re Wright*, L. R. 3 Ch. Div. 78; *Reg. v. Frost*, 9 C. & P. 127.

² *Re Wood*, L. R. 7 Ch. 306; *Reg. v. Buttle*, L. R. 1 C. C. 250.

³ *Endlich on St.* § 378.

⁴ See *Hudston v. Midland R. Co.* L. R. 4 Q. B. 366; *Rolle v. Whyte*, L. R. 3 Q. B. 305; *Sherborn v. Wells*, 3 B. & S. 784; *Bosley v. Davies*, 1 Q. B. Div. 84; *Skinner v. Usher*, L. R. 7 Q. B. 423; *Curtis v. Embery*, L. R. 7 Ex. 369; *Reg. v. South Weald*, 5 B. & S. 891; *Jarman, Ex parte*, 4 Ch. Div. 835; *Haldane v. Beauclerk*, 3 Ex. 658; *Montague v. Smith*, 17 Q. B. 688; *Cates v. Knight*, 3 T. R. 442; *Murray v. Keyes*, 35 Pa. St. 384, 390; *Rich v. Keyser*, 54 id. 86; *Reg. v. Pratt*, 4 E. & B. 860; *Read v. Edwards*, 17 C. B. (N. S.) 245.

⁵ *Landford v. Dunklin*, 71 Ala. 594; *Dudley, Adm'r, v. Steele*, id. 423; *Re Brown*, 21 Wend. 316; *Yates' Case*, 4 John. 318; *Domick v. Michael*, 4

Sandf. 374; *Theriat v. Hart*, 2 Hill, 380; *People v. Deming*, 1 Hilt. 271; *Coxson v. Doland*, 2 Daly, 66; *Croswell v. Crane*, 7 Barb. 191; *Hoffman v. Delihanty*, 13 Abb. Pr. 388; *Douglas v. Douglas*, 5 Hun, 140; *Parramore v. Taylor*, 11 Gratt. 220, 242; *Hughes v. Farrar*, 45 Me. 72; *Trigg v. State*, 49 Tex. 645; *Overfield v. Sutton*, 1 Metc. (Ky), 621; *Allen v. Ramsey*, id. 635; *Duramus v. Harrison*, 26 Ala. 326; *Anthony v. State*, 29 Ala. 27; *McNamara v. R. R. Co.* 12 Minn. 388; *Gaston v. Merriam*, 33 id. 271; *Glass v. State*, 30 Ala. 529; *Burnham v. Stevens*, 33 N. H. 249; *Bradley v. State*, 69 Ala. 318; *Chambers v. Carson*, 2 Whart. 9; *Commonwealth v. Rainey*, 4 W. & S. 186; *Smith v. Smith*, 19 Wis. 522; *Conger v. Barker*, 11 Ohio St. 1; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Ennis v. Crump*, 6 Tex. 34; *McMicken v. Commonwealth*, 58 Pa. St. 213; *Smith v. Mitchell, Rice* (S. C.), 315.

in force. The legislature will be presumed to know the effect which such statutes originally had, and by re-enactment to intend that they should again have the same effect.¹ So statutes originally enacted in another state, when adopted, are deemed to be taken with the settled construction given them in the state from which they are copied.²

§ 257. Other statutes adopted by general reference.—

When so adopted, only such portion is in force as relates to the particular subject of the adopting act.³ Such adoption does not include subsequent additions or modifications of the statute so taken unless it does so by express intent.⁴ Nor will the repeal of the statute so adopted affect its operation as part of the statute adopting it.⁵ The effect may be thus comprehensively stated: Where a statute is incorporated in another, the effect is the same as if the provisions of the former were re-enacted in the latter, for all the purposes of the latter statute; and the repeal of the former statute does not repeal its provisions so far as they have been incorporated in an act which is not repealed, where the adoption was for the purpose of providing for a subject-matter not within the original stat-

¹ *O'Byrnes v. State*, 51 Ala. 25; *Roundtree, Ex parte*, id. 42; *Posey v. Pressley*, 60 id. 243; *State v. Brewer*, 22 La. Ann. 274; *Huddleston v. Askey*, 56 Ala. 218; *McKee v. McKee*, 17 Md. 352; *Jenkins v. Ewin*, 8 Heisk. 456; *Morrison v. Stevenson*, 69 Ala. 448; *Matthews, Ex parte*, 52 id. 51; *Woolsey v. Cade*, 54 id. 378; *Harrington v. Smith*, 28 Wis. 43.

² *Morgan v. Davenport*, 60 Tex. 230; *Munson v. Hallowell*, 26 Tex. 475; *Trigg v. State*, 49 id. 645; *Snoddy v. Cage*, 5 id. 106; *Brothers v. Mundell*, 60 id. 240; *Hess v. Pegg*, 7 Nev. 23; *Carney v. Hampton*, 3 T. B. Mon. 231; *Botanico-Med. College v. Atchison*, 41 Miss. 188; *Jessup v. Carnegie*, 80 N. Y. 441; *Leonard v. Columbia N. Co.* 84 N. Y. 48; *Marqueze v. Caldwell*, 48 Miss. 23; *Ingraham v. Regan*, 23 id. 213; *Parramore v. Taylor*, 11 Gratt. 242; *People v. Irvin*, 21 Wend. 128; *Kirkpatrick v. Gibson*, 2 Brock. 388; *Harrison v. Sager*, 27 Mich. 476; *Daniels v. Clegg*, 28 id. 32; *Greiner v. Klein*, id. 17; *Attorney-General v. Brunst*, 3 Wis. 787; *Pike's Estate*, 45 id. 391.

³ *Jones v. Dexter*, 8 Fla. 270; *Matthews v. Sands*, 29 Ala. 136.

⁴ *Darmstaetter v. Moloney*, 45 Mich. 621; *Schlaudecker v. Marshall*, 72 Pa. St. 200; *United States v. Paul*, 6 Pet. 141; *Kendall v. United States*, 12 id. 524; *Nunes v. Wellisch*, 12 Bush, 363; *In re Comm'rs of Lunatic Asylums*, 8 Irish Rep., Eq. series, 366; *Knapp v. Brooklyn*, 97 N. Y. 520; *Re Main St.* 98 id. 454; *State v. Davis*, 22 La. Ann. 77. See *Allen, Ball & Co. v. Mayor*, 9 Ga. 286.

⁵ *Clarke v. Bradlaugh*, L. R. 8 Q. B. Div. 69.

ute.¹ "It is a sound rule of construction," said Lord Denman, C. J., . . . "applicable to modern as well as ancient statutes, perhaps even more so from necessity in consequence of the looseness of expression which now prevails, that 'in construction of general references in acts of parliament, such reference must be made as will stand with reason and right.'" ² In deciding whether words of reference are to be understood in the largest or in the narrowest sense, whether they extend to the whole or to a part only of any act, the court considers the subject-matter of the section in which such words are found, and contrasts it with that of the preceding sections.³ Thus, where a section which dealt with a new subject used the words "nothing hereinbefore contained," it was held that the reference was confined to matters contained in that section and did not extend to earlier portions of the act.⁴

§ 258. **Interpretation with reference to grammatical sense.**—Statutes as well as other writings are to be read and understood primarily according to their grammatical sense, unless it is apparent that the author intended something different. In other words, it is presumed that the writer intended to be understood according to the grammatical purport of the language he has employed to express his meaning.⁵ This presumption gives way when it appears from a perusal of the context or the whole statute that the legislature did not grammatically express its intention.⁶ It is only one rule of interpretation to follow the grammatical sense when it does not appear to conflict with the true intent.⁷ A statute entitled a man to be registered as a voter who, on or before a certain date, has paid "all poor rates that have become payable by

¹In re Comm'rs of Lunatic Asylums, M. & W. 191; Everett v. Wells, 2 8 Irish Rep., Eq. series, 366; Reg. v. Stock, 8 Ad. & E. 405.

²Reg. v. Badcock, 6 Q. B. 787, at p. 797.

³Wilb. on St. 187.

⁴Id.; In re Cambrian Ry Co.'s Scheme, L. R. 3 Ch. 278.

⁵Dame's Appeal, 62 Pa. St. 417, 422; Macdougall v. Paterson, 11 C. B. 755, 769; Warburton v. Loveland, 1 Hudson & Brooke, 648; Becke v. Smith, 2

Man. & Gr. 269; Richards v. McBride, L. R. 8 Q. B. Div. 119; Smith v. Bell, 10 M. & W. 378; Cull v. Austin, L. R. 7 C. P. 234; Att'y-Gen'l v. Lockwood, 9 M. & W. 398; Waugh v. Middleton, 8 Ex. 356; Christophersen v. Lotings, 33 L. J. C. P. 123; 15 C. B. (N.S.) 809. ⁶George v. Board of Education, 33 Ga. 344.

⁷Fisher v. Connard, 100 Pa. St. 63, 69.

him up to another earlier day." It appeared that the person in question had paid all the rates of the current year, but had been excused, on account of poverty, from paying a rate that had been payable in the preceding year. The argument against his right to be registered, based on the strict grammatical sense, was adopted. "No doubt," said Willes, J., "the general rule is that the language of an act is to be read according to its ordinary grammatical construction, unless so reading it would entail some absurdity, repugnance or injustice. . . . But I utterly repudiate the notion that it is competent to a judge to modify the language of an act in order to bring it in accordance with his views of what is right or reasonable."¹ Jarvis, C. J., says that it is the golden rule of construction "to give to words used by the legislature their plain and natural meaning, unless it is manifest from the general scope and intention of the statute that injustice and absurdity would result from so construing them."² Burton, J., in *Warburton v. Loveland*,³ probably states the principle correctly and comprehensively with the accepted qualifications: "I apprehend it is a rule in the construction of statutes that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to or inconsistent with any expressed intention, or any declared purpose of the statute; or if it would involve any absurdity, repugnance or inconsistency in its different provisions, the grammatical sense must then be modified, extended or abridged, so far as to avoid such inconvenience, but no farther."⁴

§ 259. It is better always to adhere to a plain, common-sense interpretation of the words of a statute than to apply to them a refined and technical grammatical construction.⁵ It is not always safe to assume that the draftsman of an act understood the rules of grammar.⁶ Neither bad grammar nor bad language will vitiate a statute.⁷ The act of 24 and 25 Vict.,

¹ *Abel v. Lee*, L. R. 6 C. P. 371; *Hardc. on St.* 31. See *People v. Hill*, 3 Utah, 334.

² *Mattison v. Hart*, 14 C. B. 385.

³ 1 *Hudson & Brooke*, 648.

⁴ *Becke v. Smith*, 2 M. & W. 191; *King v. Pease*, 4 B. & Ad. 30, 40; *Ey-king v. Studd*, 2 Plow. 463.

⁵ *Gyger's Estate*, 65 Pa. St. 311; *Williams v. Evans*, L. R. 1 Ex. Div. 277; *Miller v. Salomons*, 7 Ex. 553.

⁶ *Fisher v. Connard*, 100 Pa. St. 63, 69.

⁷ *Kelly v. McGuire*, 15 Ark. 555.

ch. 109, secs. 24 and 25, enacts that "Any person acting in contravention of this section shall forfeit all fish taken by him, *and any net used by him in taking the same.*" In a case in which no fish had been caught the grammatical sense was insisted upon as the true sense, and that there was no forfeiture of the net; but the court construed the words, "used by them in taking the same," to mean "used for the purpose of taking the same."¹ A relative word will not be read as representing the last antecedent exclusively, where the sense of the context and clear intention of the law-maker requires it to represent several or one more remote.² The grammatical rule, which is also the legal rule, in construing statutes, was held to be that, where general words occur at the end of a sentence, they refer to and qualify the whole; while, if they are in the middle of a sentence, and sensibly apply to a particular branch of it, they are not to be extended to that which follows.³ The words "whilst on duty" fixed the scope and operation of all the clauses of the following provision: "No person holding office under this act shall be liable to military or jury duty, *nor* to arrest upon civil process, or to service of subpoenas from civil courts whilst actually on duty;"⁴ and the same effect was given to it after amendment by substituting *or for nor* where italicised.⁵ An act expressed in words of the future tense may still show an intent to have a present effect. Thus, an act declaring "that twenty-five thousand acres of land shall be allowed for and given to Major-General Nathaniel Greene" was held to be an absolute donation, to be consummated by the allotment provided for therein. "Given when?" says Chief Justice Marshall, interrogatively. "The answer is unavoidable: when they shall be allotted. Given how? Not by any future act; for it is not the practice of legislation to enact that a law shall be passed by some future legislature; but given by force of this act."⁶

¹ *Ruther v. Harris*, L. R. 1 Ex. Div. 97.

² *Fisher v. Connard*, *supra*; *Gyger's Estate*, 65 Pa. St. 311; *State v. Jernigan*, 3 Murph. 18; *Simpson v. Robert*, 35 Ga. 180.

³ *Rex v. Inhabitants of Shipton*, 8 B. & C. 94; *Dwar.* on St. 703.

⁴ *Hart v. Kennedy*, 14 Abb. Pr. 432; on appeal, 15 id. 290.

⁵ *Coxson v. Doland*, 2 Daly, 66.

⁶ *Rutherford v. Green's Heirs*, 2 Wheat. 196, 198. See *Ludington v. United States*, 15 Ct. of Cl. 453; *Mayesville, etc. R. R. Co. v. Herrick*, 13 Bush, 122, 125.

§ 260. Mistakes may be corrected by aid of the context.—

Legislative enactments are not any more than any other writings to be defeated on account of mistakes, errors or omissions, provided the intention of the legislature can be collected from the whole statute; and the title and preamble may be referred to for this purpose.¹ Where a law possessing all the requisites of a valid statute is passed, containing clear requirements capable of being carried into effect, in connection with other statutes on the same subject, a mistaken reference to them will not defeat the will of the legislature and render it void. Thus, where an act purporting to be an amendment of another act describes it truly except that it incorrectly states the date, the erroneous statement will be treated as surplusage or corrected by construction.² So references to other sections or statutes incorrectly made will be corrected where the context or other particulars identifies the statute or provision intended and enables the court to follow the reference with certainty.³ Where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied.⁴ This is but making the strict letter of the statute yield to the obvious

¹ *Nazro v. Merchants' Mut. Ins. Co.* 14 Wis. 295; *State v. McCracken*, 42 Tex. 383.

² *Madison, etc. P. R. Co. v. Reynolds*, 3 Wis. 287; *School Directors v. School Directors*, 73 Ill. 249; *State v. McCracken*, 42 Tex. 383; *Pue v. Hetzell*, 16 Md. 539; *Poock v. Lafayette Bdg. Asso.* 71 Ind. 357. See *Blake v. Brackett*, 47 Me. 28; *Watervliet T. Co. v. McKean*, 6 Hill, 616. See, also, *Hicks v. Jamison*, 10 Mo. App. 35.

³ *Commonwealth v. Marshall*, 69 Pa. St. 332; *Shrewsbury v. Boylston*, 1 Pick. 105; *Bradbury v. Wagenhorst*, 54 Pa. St. 180, 183; *People v. King*, 28 Cal. 265, 273; *People v. Hill*, 3 Utah, 334; *Custin v. City of Viroqua*, 67 Wis. 314; *Murray v. Hobson*, 10 Colo. 66; *Winona v. Whipple*, 24 Minn. 61; *People v. Clute*, 50 N. Y. 451.

⁴ *Quin v. O'Keeffe*, 10 Ir. C. L. (N.S.) 393; *People v. Hoffman*, 97 Ill. 234; *State v. Brandt*, 41 Iowa, 593; *Hedley, Ex parte*, 31 Cal. 108; *People v. Sweetser*, 1 Dak. 295; *Peck v. Weddell*, 17 Ohio St. 271; *Pahus v. Shawano Co.* 61 Wis. 211; *Donohue v. Ladd*, 31 Minn. 244; *State v. Pool*, 74 N. C. 402; *Haney v. State*, 34 Ark. 263; *Turner v. State*, 40 Ala. 21; *Vance v. Gray*, 9 Bush, 656; *Rolland v. Commonwealth*, 82 Pa. St. 306, 326; *Blemer v. People*, 76 Ill. 265; *Fowler v. Padget*, 7 T. R. 509; *Rex v. Mortlake*, 6 East, 397; *Graham v. Charlotte, etc. R. R. Co.* 64 N. C. 631; *Commonwealth v. Harris*, 13 Allen, 534; *Foster v. Commonwealth*, 8 Watts & S. 77; *Waugh v. Middleton*, 8 Ex. 352; *Waterford v. Hensley, Mart. & Yerg.* (Tenn.) 275. See *Angele de Sentamanat v. Soule*, 33 La. Ann. 609.

intent. So words which are meaningless or inconsistent with the intention otherwise plainly expressed in an act have sometimes been rejected as redundant or surplusage.¹ If a condition or qualifying clause has been misplaced, so that in the connection where it is inserted it is absurd or nonsensical, the court will apply it to its proper subject and give it effect if the statute affords the proper clues, and it can be done in furtherance of its obvious intent.² But where the language read in the order of clauses as passed presents no ambiguity, courts will not attempt to qualify it by any transposition of clauses and from what it can be ingeniously argued was a general intent.³ Where the provisions of a law are inconsistent and contradictory to each other, or the literal construction of a single section would conflict with every other following or preceding it, and with the entire scope and manifest intent of the act, it is certainly the duty of the courts, if it be possible, to harmonize the various provisions with each other; and to effect this, it may be necessary, and is admissible, to depart from the literal construction of one or more sections.⁴

§ 261. To enable the court to insert in a statute omitted words or read it in different words from those found in it, the intent thus to have it read must be plainly deducible from other parts of the statute.⁵ When the descriptive words con-

¹ *United States v. Rossvally*, 8 Ben. 157; *State v. Acuff*, 6 Mo. 54; *United States v. Stern*, 5 Blatch. 512; *Chapman v. State*, 16 Tex. App. 76; *State v. Beasley*, 5 Mo. 91; *State v. Heman*, 70 Mo. 441.

² *State v. Turnpike Co.* 16 Ohio St. 808, 320.

³ *Doe v. Considine*, 6 Wall. 458.

⁴ *State v. Heman*, *supra*.

⁵ *Fairchild v. Masonic Hall Asso.* 71 Mo. 526, 532; *Hicks v. Jamison*, 10 Mo. App. 35; *Douglass v. Eyre*, Gilp. 147; *De Sentamanat v. Soule*, 33 La. Ann. 609; *Reg. v. Phillips*, L. R. 1 Q. B. 648; *Reg. v. Shiles*, 1 Q. B. 919; *Blanchard v. Sprague*, 3 Sumn. 279; *Wright v. Frant*, 4 B. & S. 118; *Lane v. Schomp*, 20 N. J. Eq. 82; *Ford v. Ford*, 143 Mass. 577; *Reg. v. Llan-*

gian, 4 B. & S. 249; *Woodbury v. Berry*, 18 Ohio St. 456; *Wills v. Russell*, 100 U. S. 621.

In *Richards v. McBride*, L. R. 8 Q. B. 119, the question was the meaning of "the day next appointed." It was contended that it meant "the next appointed day." Grove, J.: "No one in construing a statute or any other literary production could put such a construction on the words unless by supposing there was a mistake. But we cannot assume a mistake in an act of parliament. If we did so we should render many acts uncertain by putting different constructions on them according to our individual conjectures. The draftsman of this act may have made a mistake. If so the remedy is for the

stitute the very essence of the act, unless the description is so clear and accurate as to refer to the particular subject intended, and be incapable of being applied to any other, the mistake is fatal.¹ A statute prohibited the sale of liquor "within three miles of Mt. Zion church, in Gaston county." There were two churches of that name in that county, several miles apart. This statute was held ambiguous and therefore inoperative.² It was remarked by the court that it "may not allow conjectural interpretation to usurp the place of judicial exposition. There must be a competent and efficient expression of the legislative will." "Whether a statute be a public or private one," says Chief Justice Ruffin, "if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible."³

§ 262. Effect of context and association of words and phrases.—Not only are words and provisions modified to harmonize with the leading and controlling purpose or intention of an act, but also by comparison of one subordinate part with another; that is to say, the sense of particular words or phrases may be greatly influenced by the context, or their association with other words and clauses. When two or more

legislature to amend it. But we must construe acts of parliament as they are, without regard to consequences, except in those cases where the words are so ambiguous that they may be construed in two senses; and even then we must not regard what happened in parliament, but look to what is within the four corners of the act, and to the grievance intended to be remedied, or, in penal statutes, to the offense intended to be corrected. Taking the words the 'day next appointed' to mean what they say, viz: the day which shall be next appointed, is there anything in the act itself to show that the legislature meant 'the next day appointed?' I find nothing. I even doubt whether,

if there were no words in the act tending strongly the other way, I could pass from the plain grammatical construction of the phrase in question. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must, as Parke, B., said in *Becke v. Smith*, 2 M. & W. 195, advance something which clearly shows that the grammatical construction would be repugnant to the intention of the act or lead to some manifest absurdity."

¹ *Blanchard v. Sprague*, *supra*.

² *State v. Partlow*, 91 N. C. 550; S. C. 49 Am. Rep. 652.

³ *Drake v. Drake*, 4 Dev. 110.

words are grouped together, and have ordinarily a similar meaning, but are not equally comprehensive, they will qualify each other when associated; they may import a conventional sense and have great scope when so used without restriction in the context, and they may be capable of widely different applications when specialized by accompanying provisions expressive of a particular intention or limited application.¹ The expression, for instance, of "places of public resort" assumes a very different meaning when coupled with "roads and streets" from that which it would have if the accompanying expression was "houses."² In an enactment respecting houses "for public refreshment, resort and entertainment," the last word was understood to refer to, not a theatrical or musical or other similar performance, but something contributing to the enjoyment of the "refreshment."³ By an act for clearing, watching and regulating the streets of a township, the commissioners were authorized to ascertain the sum to be raised by rates or assessments on the several inhabitants, and to raise such sums by rate or assessment upon the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses and other buildings, gardens and grounds, and other tenements in the township. It was held that under this act the trunks and pipes, works and other apparatus of a water company, for the supply of the town with water, did not constitute a tenement within the meaning of the act, and therefore the company were not liable to be rated in respect of such property. The word *tenement* was used in other provisions of the act to denote buildings. "These are some of the instances," says Bayley, J., "in which the word *tenement* is used in this act; and from these instances and the object of the act, it may be collected in what sense it uses that word. The omission to use the obvious and general word 'lands,' and yet introducing 'gardens and garden grounds,'

¹ *Bear Brothers v. Marx*, 63 Tex. M. C. 193; *Sewell v. Taylor*, 29 id. 50; 298; *Moeller v. Harvey*, 16 Phila. 66. 7 C. B. (N. S.) 160; *Case v. Storey*,

² *Endlich on St. § 400*, citing for examples, *In re Jones*, 7 Ex. 586; 21 L. J. M. C. 116; *In re Brown*, id. 113, 2 Lowndes, M. & P. 117; *Wilson v. Reg. v. Brown*, 17 Q. B. 833; *Ex parte Halifax*, L. R. 3 Ex. 114.

Freestone, 25 L. J. M. C. 121; *Davys* ³ *Endlich on St. § 400*; *Muir v. v. Douglas*, 4 H. & N. 180; 28 L. J. Keay, L. R. 10 Q. B. 594.

implies that 'lands' in general are not intended to be rated. The object of the act was to give security and accommodation to the residents and to their property. The inhabited houses, therefore, and everything connected with residence or trade, as they have the advantage, were to be liable to the charge. The houses, warehouses, shops and all other buildings were to be rated, because they all had protection. But why were gardens and garden-grounds to be included if lands in general were not? Possibly, because the produce thereof was of value, and was a possible object of depredation, and the general lighting and watching of the town would give so much additional protection to this species of property as might properly make it the subject of charge. Gardens, therefore, and garden-grounds may, on this account, be distinguished from other descriptions of land, and may be subjected to this charge, whilst land in general is exempt. Pasture ground, for instance, stone quarries, and other kinds of real property, though included in the 43d Elizabeth as affording income, and supplying, therefore, the means of contribution, are omitted in this act, because such property derives no equivalent or material protection from it."¹ A statute provided "that every person who shall be brought before any of the said magistrates charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanor." This was held, on account of the associated words and context, to apply only to possession in the streets, and not to possession in a house. "Taken by themselves alone," said Blackburn, J., "the words 'having in his possession,' of course include the case of a person having in his possession at any time, in any manner or in any place. But here we have them in connection with the words, or conveying in any manner anything which may be reasonably suspected of being stolen or obtained. . . . I think the words of the statute sufficiently show that the legislature intended to confer this summary power only in the case where the person was 'having and conveying' in the sense of

¹Reg. v. Manchester, etc. Water-works Co. 1 B. & C. 630.

'having' *ejusdem generis* with 'conveying,' being in the streets or roads with them, or carrying them about."¹

§ 263. The controlling effect in construction of associated words is well illustrated in *Schenley's Appeal*.² The question was the existence of a mechanic's lien on a dwelling-house under a statute providing for a lien on "*improvements*, engines, pumps, machinery, screens and fixtures erected, repaired or put in by mechanics, persons or material-men entering liens thereon." Agnew, J., said: "Though the word '*improvements*' is large enough under ordinary circumstances to include a house or private dwelling, it is manifest, by its connection in this act with the words engines, pumps, etc., and by the two counties to which it was originally made applicable, that the word was not intended to authorize the creation of liens upon ordinary houses and dwellings of tenants independently of the works indicated by the other expressions used in connection with the word improvements."³ In a revenue act it was provided in one section that "every railroad company, steamboat company, canal company and slackwater navigation company, and all other navigation companies doing business in this state, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike, plank-road and bridge companies, . . . shall pay a tax as upon tonnage." The next section provided that, in addition to the taxes provided for as aforesaid, every railroad, canal and transportation company liable to a tax on tonnage under the preceding section shall pay a certain tax on gross receipts. The

¹ *Hadley v. Perks*, L. R. 1 Q. B. 444.

² 70 Pa. St. 98.

³ Where it appeared that an insurance company constituted a person named its agent, and there was no definition of his powers, the word "agent," it was held, should be taken in its general signification, and as embracing all powers which the company might confer on one whom it selected to represent it. He was authorized to act as "agent or surveyor," and the court remarked: "If

it be said that the word 'surveyor' limits and defines 'agent,' we answer, not any more than 'agent' limits and defines 'surveyor;' in other words, either includes the duties and powers of both; the agent is surveyor and the surveyor is agent; one officer is clothed with the powers necessary to fill both offices." *Lycoming F. Ins. Co. v. Woodworth*, 83 Pa. St. 223. See *Central Trust Co. v. Sheffield & B. Coal, etc. Co.* 42 Fed. Rep. 106.

preceding section had not used the phrase "transportation company," but had simply designated some companies by name, and designated others as companies upon whose works freight might be transported as the means of bringing all under a liability for the tonnage carried over their work, whether carriers themselves or not. When the phrase "transportation companies" was used in the subsequent section it was a *nomen collectivum* to embrace all the companies which had been described in the other section, and was intended to include all steamboat, slackwater navigation and other companies "upon whose works freight may be transported."¹

§ 264. Where a statute was indefinite and obscure, the court, in view of all the indications afforded by the context, construed this proviso as applicable only to the tenant: "That no appeal shall lie in the case of rent, but the remedy by replevin shall remain as heretofore."² The literal terms of a statute prohibited any lien as against purchasers and mortgagees by four species of judicial acts and proceedings, viz.: (1) Judgments; (2) recognizances; (3) executions levied on real estate, and (4) writs of *scire facias* to revive or have execution of judgments, unless the same were indexed as prescribed. All of these acts and proceedings were within the function of, and indeed peculiar to, the court of common pleas, and all, save one, were exclusively cognizable and possible in that court. The recognizance was known in the orphans' court, as it was in the criminal court, but the others were not. But the recognizance is also a form of obligation known to the practice of the common pleas, and, therefore, where it is coupled with other acts and proceedings of that court, the whole being subject to a regulation common to all, it is not necessary to infer that it is used in any other than its natural, associated sense. Therefore, it was held that recognizances taken in the orphans' court to operate as liens were not required to be indexed.³ The word "records" may be restrained by the context to mean only those in the office of registers of deeds.⁴ In a marine policy the underwriters insured against the wrongful acts of individuals under the description of "pirates, rogues, thieves," and it also insured against loss by

¹ Commonwealth v. Monongahela Nav. Co. 66 Pa. St. 81.

³ Holman's Appeal, 106 Pa. St. 502.

⁴ Carter v. Peak, 138 Mass. 439.

² Hilke v. Eisenbeis, 104 Pa. St. 514.

arrests, etc., by "all kings, princes and *people*." The word *people* was construed to mean the power of the country.¹

§ 265. A statute of limitations as to a claim to any way or other easement, or to any water-course, or the use of any water, to be enjoyed or derived upon, over or from any "land or water," does not include the servitude of allowing "the streams and currents of air and wind to pass over land to a mill."² It points to a right belonging to an individual in respect of his land, not a class such as freemen or citizens claiming a right in gross wholly irrespective of land.³ It was enacted that "any tenement or part of a tenement occupied as a house for the purpose of trade only, or as a warehouse for the sole purpose of lodging goods, wares or merchandise therein, or as a shop or counting-house, shall be exempt" from certain duties. It was held on the maxim *noscitur a sociis*, that the business of a telegraph company is a trade within the meaning of that statute.⁴ The word "delivery," being associated in a bankrupt act with "gift or transfer," was held to be confined to transactions of the same nature; that to be a delivery it must purport to part with some property or interest in the goods delivered, to amount to an act of bankruptcy.⁵ A carriers' act, providing for mitigation of the responsibility of carriers, contained an enumeration of articles within its provisions, among which were "paintings, engravings, pictures;" and a question arose whether colored imitations of rugs and carpets and working designs, each of them valuable and designed by skilled persons and hand-painted, but having no value as works of art, were included within that provision. It was decided that they were not. The word "paintings," being associated with "engravings and pictures," was to be understood as meaning paintings valuable as works of art. This conclusion was deemed to be in accord with the general or popular meaning of the word.⁶

¹ Nesbitt v. Lushington, 4 T. R. 783.

⁴ Chartered Mercantile Bank, etc. v. Wilson, L. R. 3 Ex. D. 108.

² Webb v. Bird, 10 C. B. (N. S.) 268; S. C. 13 id. 841; Bryant v. Lefever, 4 C. P. Div. 172.

⁵ Cotton v. James, Mood. & Mal. 278; Isitt v. Beeston, L. R. 4 Ex. 159.

⁶ Woodward v. London, etc. R'y

³ Mounsey v. Ismay, 3 H. & C. at p. 497. Co. 3 Ex. D. 121.

§ 266. When two words or expressions are coupled together, one of which generically includes the other, it is obvious that the more general term is used in a meaning excluding the specific one.¹ A revenue act of congress exempted from duty "animals of all kinds; birds, singing, and other, and land and water fowls." A later act levied a duty of twenty per cent. "on all horses, mules, cattle, sheep, hogs and other live animals." It was held that birds were not included in the term "other live animals" as used in the later act.² "This act of 1861," said Mr. Justice Davis, "was in force when the act of 1866 — the act in controversy — was passed, and it will be seen that birds and fowls are not embraced in the term 'animals,' and that they are free from duty, not because they belong to the class of 'living animals of all kinds,' but for the reason that they are especially designated. It is quite manifest that congress, adopting the popular signification of the word 'animals,' applied it to quadrupeds, and placed birds and fowls in a different classification. Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are *in pari materia*; and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the later act, in the absence of anything to show a contrary intention."³

§ 267. **Relative and qualifying words and phrases.**—Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent.⁴ A proviso is construed to apply to the

¹ Endl. § 396; *Rex v. Cowell*, 2 East P. C. 617; *Rex v. Loom*, 1 Moo. C. C. 160; *Dewhurst v. Feilden*, 7 M. & G. 182; *Peto v. West Ham*, 2 E. & E. 144; *Reg. v. Midland R. Co.* 4 E. & B. 958; *Lead Smelting Co. v. Richardson*, 3 Burr. 1341; *Rex v. Sedgley*, 2 B. & Ad. 65; *Rex v. Cunningham*, 5 East, 478; *Morgan v. Crawshaw*, L. R. 5 H. L. 304; *Bourguignon Building*

Asso. v. Commonwealth, 98 Pa. St. 54, 65; *Dick's Appeal*, 106 Pa. St. 589.

² *Reiche v. Smythe*, 13 Wall. 162.

³ *Id.*

⁴ *Fowler v. Tuttle*, 24 N. H. 9; *State v. Brown*, 3 Heisk. 1; *Ellis v. Murray*, 28 Miss. 129; *Cushing v. Worrick*, 9 Gray, 383; *Gyger's Estate*, 65 Pa. St. 311; *Fisher v. Connard*, 100 id. 63; *Staniland v. Hopkins*, 9 M. & W. 178.

provision or clause immediately preceding.¹ Where the by-laws of a society provided first for an annual meeting for the election of officers, and then for a monthly meeting on a specified day "at half-past seven o'clock, P. M.," it was held that the clause specifying the hour of meeting had reference only to the monthly meeting.² The intention is sufficiently obvious in the following provision for the establishment of libraries, without recourse to any rule. It is nevertheless within this principle. It was provided that any town or city might appropriate money for suitable buildings or rooms, and for the foundation of a library a sum not exceeding one dollar for each of the ratable polls in the year next preceding, and, annually thereafter, a sum not exceeding fifty cents for each of its ratable polls. It was held that the power to make the subsequent appropriations, with its limitation, was for the same object as the first, and did not apply to the power to appropriate for buildings or rooms.³ An act provided for the adoption of a statute by cities and towns "at a legal meeting of the city council, or the inhabitants of the town called for that purpose." It was held that "called for that purpose" did not apply to a city council.⁴ This principle is of no great force; it is only operative when there is nothing in the statute indicating that the relative word or qualifying provision is intended to have a different effect. And very slight indication of legislative purpose or a parity of reason, or the natural and common-sense reading of the statute, may overturn it and give it a more comprehensive application.⁵ Thus, as was said by the court in *Great Western Railway Company v. Swindon*,⁶ referring to the phrase "horses, oxen, pigs and sheep, *from whatever country they come*," the last clause would apply alike to all these animals and not alone to sheep. In furtherance of the intention it was held in that case that in the construction of the phrase "messuages, lands, tenements and hereditaments *of any tenure*," the last and qualifying words, "of any tenure," applied to all the preceding words

¹ *Partington, Ex parte*, 6 Q. B. at p. 653; *Spring v. Collector*, 78 Ill. 101; *Lehigh Co. v. Meyer*, 102 Pa. St. 479. See *United States v. Babbitt*, 1 Black, 55; *Re Cambrian Railway Scheme*, L. R. 3 Ch. 278; § 223.

² *State v. Conklin*, 34 Wis. 21.

³ *Dearborn v. Brookline*, 97 Mass.

466.

⁴ *Quinn v. Lowell Electric L. Co.* 140 Mass. 106.

⁵ *Gyger's Estate, supra*; *Fisher v. Connard, supra*.

⁶ L. R. 9 App. Cas. at p. 808.

and not merely to "hereditaments."¹ Qualifying words have been applied to several preceding sections where the nature of the provisions and the obvious sense required it. Thus, where there was a restriction relating to the compensation of certain officers, upon the ground of reason and intention as to all, and the improbability of a contrary design, it was held not limited in its effect to the section where it was inserted, but was an independent proposition applying alike to all officers of the same class.² Where the intention is manifest, a proviso, or qualifying words or clauses found in the middle of a sentence, may be placed at the end;³ or, when inserted in one section, they may be applied to the matter of another section.⁴

§ 268. **When general words follow particular.**—When there are general words following particular and specific words, the former must be confined to things of the same kind.⁵ It was held that a bull was not included under the words "or other cattle" as used in a statute which made it indictable for any person to wantonly or cruelly beat, abuse and ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep or other cattle.⁶ Bayley, J., said: "Horse, mare, gelding, are one class; ox, cow, heifer and steer are another, and in my opinion the bull is not included in this act." Where an act imposed a penalty on any person hauling "any timber or stone or other thing, otherwise than upon wheeled carriages," it was held not to extend to straw, but was confined to things as weighty and as likely to cause injury to roads as timber or stone.⁷ It was provided by the winding-up acts that the court might wind up a company if a special resolution was passed, or the business of the company was not commenced within a year, or the number of members was

¹ See *Eby's Appeal*, 70 Pa. St. 311, 314; *Coxson v. Doland*, 2 Daly, 66; *Hart v. Kennedy*, 15 Abb. Pr. 290.

² *United States v. Babbitt*, 1 Black, 55.

³ *Waters v. Campbell*, 4 Sawyer, 121.

⁴ *State v. Turnpike Co.* 16 Ohio St. 308. See *Matthews v. Commonwealth*, 18 Gratt. 989; *State v. Forney*, 21 Neb. 223, 226.

⁵ *Reg. v. Edmundson*, 28 L. J. M. C. 215; 2 E. & E. 77; *Gunnestad v. Price*, L. R. 10 Ex. 69 (but see *The Alina*, 5 Ex. Div. 227; S. C. 5 Prob. Div. 138; *The Rowa*, 7 id. 247); *Washer v. Elliott*, L. R. 1 C. P. Div. 174; *Foster v. Blount*, 18 Ala. 687.

⁶ *Hill*, Ex parte, 3 C. & P. 225.

⁷ *Radnorshire Co. Road Board v. Evans*, 3 B. & S. 400.

reduced below seven, or the company was unable to pay its debts, or if the court thought it just and equitable that the company should be wound up. It was held that the grounds upon which the court might form its conclusion must be *ejusdem generis* with those already enumerated.¹

§ 269. Landlords were authorized by statute to distrain for rent "all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever, which shall be growing on any part of the estates demised." This did not include trees, shrubs and plants growing in a nursery garden.² The memorandum of a company stated that the company was formed for the purpose, among others, "of carrying on the business of mechanical engineers and general contractors." A question was: What was the scope of the concluding words, "general contractors." Lord Cairns said: "Upon all ordinary principles of construction, these words must be referred to the part of the sentence which immediately precedes them; . . . therefore, . . . the term "general contractors" would be referred to that which goes immediately before, and would indicate the making generally of contracts connected with the business of mechanical engineers. . . . If these words were not to be interpreted as I have suggested, the consequence would be that they would stand absolutely without any limit of any kind."³ An act made a railroad company liable for killing certain enumerated domestic animals, "et cetera." It also excluded from being witnesses employees of the company who might be responsible to it for negligence "by which any *stock* may be injured or killed as contemplated by this act." It was held that the act did not apply to negro slaves.⁴

§ 270. The object of enumeration is to set forth in detail things which are in themselves so distinct that they cannot conveniently be comprehended under one or more general terms; there is believed to be no *a priori* presumption that the things enumerated are all of them of the same kind. When a specific enumeration concludes with a general term

¹ Wilb. on St. 181; Spackman, Ex L. 653. See Great Western R'y Co. parte, 1 Macn. & G. 170; Re Anglo-Greek Steam Co. L. R. 2 Eq. 1. v. Swindon, etc. R'y Co. L. R. 9 Ap. Cas. 787.

² Clark v. Gaskarth, 8 Taunt. 431.

⁴ Scaggs v. Baltimore, etc. R. R.

³ Ashbury Co. v. Riche, L. R. 7 H. Co. 10 Md. 268.

it is held to be limited to things of the same kind.¹ It is restricted to the same genus as the things enumerated.² It was enacted that "no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any labor, business, or work, of their ordinary callings upon the Lord's day." This has been held not to include a farmer,³ or drivers of stage-coaches,⁴ or attorneys.⁵ On the same principle "parochial relief or other alms" means other parochial alms.⁶ "Cities, towns, corporate boroughs and places" do not include places which are not incorporated.⁷ An act empowering justices to determine differences between masters and persons in several employments, and "servants in husbandry, artificers, handicrafters," and finally "all other laborers," does not by these words extend to a domestic servant,⁸ nor to a man employed to take care of goods seized under a writ.⁹ "County, riding or division" means a division analogous to a county or riding.¹⁰

§ 271. A Michigan statute gave "every wife, child, parent, guardian, husband or other person" a right of action against a liquor-seller for injury done to the plaintiff by reason of the intoxication of any person. On the ground and principle under consideration, it was held that the intoxicated person himself was not within the statute.¹¹ Another statute of the same

¹ Countess of Rothes v. Kirkcaldy Water Works Commissioners, L. R. 7 App. Cas. 706.

² Fenwick v. Schmalz, L. R. 3 C. P. 315.

³ Reg. v. Cleworth, 4 B. & S. 927.

⁴ Sandiman v. Breach, 7 B. & C. 96.

⁵ Peate v. Dicken, 1 C. M. & R. 422.

⁶ Reg. v. Lichfield, 2 Q. B. 693.

⁷ Rex v. Wallis, 5 T. R. 375.

⁸ Kitchen v. Shaw, 6 Ad. & E. 729.

⁹ Bramwell v. Penneck, 7 B. & C. 536.

¹⁰ Evans v. Stevens, 4 T. R. 459.

¹¹ Brooks v. Cook, 44 Mich. 617. In Higler v. People, 44 Mich. 299, the statute provided for the punishment of any person who, "with intent to defraud or cheat another, shall designedly, by color of any false token

or writing, or by any other false pretense," obtain signatures to a written instrument. It was held that the statute does not enumerate the false pretense in particular terms, so that the term "any other false pretense" is not limited to a particular kind of pretense, and the rule of construction that general terms must be construed as of the same tenor as preceding particular terms previously enumerated has no application. In construing a common carrier's contract, containing provisions to qualify the carrier's responsibility, which exempted the railroad company from liability for losses and damages "in loading, unloading, conveyance and otherwise," whether arising from negligence, misconduct or otherwise,

state provides that "every person who shall set fire to any building mentioned in the preceding section, or to any other material, with intent to cause such building to be burnt, or shall by any other means attempt to cause any building to be burnt, shall be punished," etc. This provision was held to contemplate the employment of some physical means to constitute a punishable attempt to cause such building to be burnt, and an attempt by mere solicitation is not within the statute; for in construing statutes general terms are subordinated by preceding connected particulars; the rule is especially applicable in the interpretation of statutes defining crimes and regulating their punishment.¹

§ 272. A statute exempted from taxation "every building erected for the use of a college, incorporated academy or *other seminary of learning*." As all those enumerated were corporations, it was held that the general words "or other seminary" required that such institution should also be incorporated in order to have the benefit of the exemption.² A railroad company was authorized by its charter "to purchase, hold and use all such real estate and other property as may be necessary for the construction of its railway and stations, and other accommodations as may be necessary to accomplish the objects of its incorporation." The term "other accommodations" was held not to include an elevator, costing two or three hundred thousand dollars, for storing and handling grain.³ The court say: "It has no direct connection with the road or its operation; yet when shipments of grain are made either to or from it over the company's road, it is very clear the company can handle the grain thus shipped with more ease and greater facility, and hence can by

the court held that general words of exemption, when used after a designation of specific exemptions and risks, will be presumed to include only those of a similar character, unless a different intention is manifest. *Hawkins v. Great W. R. R. Co.* 17 Mich. 57; *American Transportation Co. v. Moore*, 5 Mich. 368.

¹ *McDade v. People*, 29 Mich. 50; citing *American Transportation Co.*

v. Moore, 5 Mich. 368; *Hawkins v. Great W. R. R. Co.* 17 Mich. 57; *Matter of Ticknor's Est.* 13 Mich. 44; *Phillips v. Poland*, L. R. 1. C. P. 204; *Hall v. State*, 20 Ohio, 7; *Daggett v. State*, 4 Conn. 60; *Chegaray v. Mayor*, etc. 13 N. Y. 620; 1 Bish. Cr. L. § 149; *Dwarris*, 621.

² *Chegaray v. Mayor*, etc. 18 N. Y. 220.

³ *Matter of Swigert*, 119 Ill. 83.

means of it do a greater business." In another part of the opinion the court say that "what is included in the expression 'other accommodations' must be of the same class or kind as 'railway and stations;'" that it is a well settled doctrine that in construing statutes, particularly those requiring a strict construction, a general description following a specific enumeration of objects or things will be held to include only such as are of the same kind as those specifically enumerated. "Any works, mines, manufactory or other business where clerks, miners or mechanics are employed" does not include a hotel, for the general words "or other business" refer to some business *ejusdem generis*, as "works, mines, manufactory."¹

§ 273. The words "other persons," following in a statute the words "warehousemen" and "wharfinger," must be understood to refer to other persons *ejusdem generis*, viz., those who are engaged in a like business, or who conduct the business of warehousemen or wharfingers with some other pursuit, such as shipping, grinding or manufacturing.² An act enabling the owner of realty to sustain an action of replevin to recover timber, lumber, coal or other property severed from the realty, notwithstanding the fact that the title to the land may be in dispute, does not apply to growing crops. The words "other property" in that act were held to be intended to include only articles of the same generic character as those enumerated — such as slate, marble, iron ore, zinc ore, and all other forms of minerals and ores, building stone, and fixtures and machinery of every description, which have been permanently affixed to the realty.³ Provision by statute was made for compensation to owners abutting on streets for damage caused by a "change of the grade or lines" thereof, or in case the authorities "in any way alter or enlarge the same." The court, in a case for damages for widening an alley, say of the act: "It speaks of a change of the 'grade or lines' of any street; and, while the succeeding words, 'or in any way alter or enlarge the same,' might seem to apply to widening a street, yet, looking at the manifest object of the act [which was to compensate the owner whose property is not taken, but is in-

¹ Sullivan's Appeal, 77 Pa. St. 107;
Allen's Appeal, 81* Pa. St. 302.

² Bucher v. Commonwealth, 103 Pa. St. 528.

³ Renick v. Boyd, 99 Pa. St. 555.

jured by change of grade], we must read these general words in connection with such object. Tested by this familiar rule, it is manifest the general words referred to are qualified by the preceding special words, and that the act has no application where there is no change of grade."¹ A statute provided that "any married woman whose husband, either from drunkenness, profligacy or any other cause, shall neglect or refuse to provide for her support, . . . shall have the right in her own name to transact business." It was held that the words "any other cause" must be understood to be cause *ejusdem generis*, and that they do not include mere mental or physical incapacity.² So the power given to a board of supervisors to remove an inspector of the house of correction for certain specified causes, "or other cause satisfactory to the board," was held to include, by the effect of the last or general clause, only other *like* causes—that is, causes affecting the officer's fitness for the office.³

§ 274. A power to correct "manifest clerical or other errors in any assessments or returns" was intended simply to permit a correction of manifest and clerical errors; those apparent on the face of the assessments or returns; those of form and not of substance.⁴ The statutes of New York relating to offenses of the nature of burglary enact that the term "building" includes "a railway car, vessel, booth, tent, shop, or other erection or inclosure;" and the general words were construed as limited to the same class of erections or inclosures already specified, and did not include a vault intended and used exclusively for the interment of the dead.⁵ An action was brought to recover certain real property under a legislative act which authorized the people to bring an action to recover "money, funds, credits and property" held by public corporations, and wrongfully converted or disposed of; and it was held that the word "property," although in its widest meaning inclusive of all things that might be owned, yet, when taken in connection with other words used in the statute, and in view of the surrounding circumstances under which the act

¹ Re Brady Street, 99 Pa. St. 591.

⁴ Matter of Hermance, 71 N. Y. 481.

² Edson v. Hayden, 20 Wis. 682;

⁵ People v. Richards, 108 N. Y. 137;

King v. Thompson, 87 Pa. St. 365.

S. C. 11 Cent. Rep. 75.

³ State v. McGarry, 21 Wis. 496.

was passed, was not to be given its usual and enlarged meaning, but was limited to include only property of the same general character as that already mentioned in the statute, which was personal property.¹

§ 275. A late English case involved the construction of an insurance policy. A steamer was insured by a policy on the ship and her machinery, including the donkey-engine. The policy covered perils of the sea, specially naming many, and then continued: "and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of this insurance or any part thereof." For the purposes of navigation the donkey-engine was being used in pumping water into the main boilers, when, owing to a valve being closed which ought to have been kept open, water was forced into and split open the air chamber of the donkey-pump. The closing of the valve was either accidental or due to the negligence of an engineer, and was not due to ordinary wear and tear. It was held that the injury was not covered by the policy, as it was not a peril of the sea; and although it was undoubtedly "a loss or misfortune," yet the specific words of the policy which preceded its general language, it was said, restricted it to the same genus as the specific words.² In the course of his judgment the chancellor, Halsbury, said: "If understood in their widest sense the words are wide enough to include it [the injury]; but two rules of construction, now fairly established as a part of our law, may be considered as limiting these words. One is that words, however general, may be limited with respect to the subject-matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words that precede them." Power was delegated to a city by its charter to license "auctioneers, grocers, merchants, retailers, hotels, . . . hackney carriages, omnibuses, carts, drays, and other vehicles, and all other business, trades, avocations and professions whatever." The profession of law was not specially enumerated in the section, and it was held not included in the grant of the power to tax, because it was not *ejus-*

¹ *People v. N. Y. etc. R. R. Co.* 84 N. Y. 565.

² *Thames, etc. Ins. Co. v. Hamilton,* L. R. 12 App. Cas. 484.

dem generis.¹ An employer was made subject to a penalty if he should deduct directly or indirectly from the wages of any artificer in his employ any part of such wages *for frame rent and standing or other charges*. Where the employer was a hosier manufacturer, and an employee a hand-frame worker, and according to the regulations of the factory the latter was liable to a fine of 8*d.* a day for staying away from work without permission, and had been fined for that cause, and the amount deducted from his wages, it was held not within the statute; "other charges," following immediately after *frame-rent and standing*, were taken to mean other charges *ejusdem generis*.² It was enacted that the business of a blood-boiler, bone-boiler, fell-monger, slaughterer of cattle, horses, or animals of any description, soap-boiler, tallow-melter, tripe-boiler, *or other noxious or offensive business, trade, or manufacture*, shall not be newly established in any building or place, etc.; and on the question whether a brick-maker was within the regulation, Erle, C. J., thus stated and answered it: "Is brick-making of necessity a business of a noxious or offensive nature analogous to those specified at the beginning of the clause? I am of opinion that it is not."³ A statute required a voting paper to contain the name of the street, lane, *or other place*, in which the property for which the voter appears to be rated on the burgess roll is situated. In *Regina v. Spratley*,⁴ Lord Campbell, C. J., said: "Though I think that the 'other place' must be *ejusdem generis* with 'street' and 'lane,' I think that parish may, in some cases, be *ejusdem generis* with street or lane."

§ 276. The words "estate" or "effects," and the like, if used in a clause containing an enumeration of personal estate, will generally be confined to estate or effects *ejusdem generis* with those specified, as being the most natural, when unexplained by the context.⁵ A person employed by a building-owner to erect a building adjoining the house of another is

¹ *St. Louis v. Laughlin*, 49 Mo. 559; *Grumley v. Webb*, 44 Mo. 444; *Stone v. Stone*, 1 R. I. 425; *White v. Ivey*, 34 Ga. 186; *State v. Stoller*, 38 Iowa, 321.

² *Willis v. Thorp*, L. R. 10 Q. B. 383.

³ *Wanstead Board v. Hill*, 13 C. B. (N. S.) 479.

⁴ 6 E. & B. at p. 367.

⁵ *McIntyre v. Ingraham*, 35 Miss. 25; *Rawlings v. Jennings*, 13 Ves. 46; *Stuart v. Earl of Bute*, 3 id. 212; *Hotham v. Sutton*, 15 id. 320.

not an "other person" within the meaning of a statutory regulation which requires a month's notice of action to be given before a writ or process is sued out against "any district surveyor or *other person* for anything done or intended under the provisions of the act."¹ An act for keeping in repair a harbor imposed certain duties enumerated in a schedule annexed on goods exported and imported. In the schedule under the head of "metals," certain specified duties were imposed on "copper, brass, pewter and tin, and on *all other metals not enumerated*." It was held that the latter words did not include gold and silver. The court in part put the decision in *Casher v. Holmes*,² on the ground that the word "metals" in popular language does not include gold and silver, but they are spoken of as *precious metals*. Littledale, J., said: "I have no doubt that those words do not include gold and silver, but refer to metals *ejusdem generis* with others previously mentioned under the head metal; and the metals *ejusdem generis*, and not already enumerated, can only be compound metals, and what were formerly called semi-metals." It was agreed by charter-party to load a ship with coal in regular and customary turn, "except in cases of riots, strikes or any other accidents beyond his [the contractor's] control," which might prevent or delay her loading. It was held that a snow-storm was not an accident within the exception.³

§ 277. There is this further restriction of general words following particular words, that the general words will not include any of a class superior to that to which the particular words belong; a statute treating of deans, prebends *and others having spiritual promotion* was held not to extend to *bishops*, notwithstanding the generality of the latter words; for, if it had been otherwise intended, the superior persons would have been mentioned in the beginning of the sentence, and they cannot be implied.⁴ Where the general words, "all other metals," follow the particular words, "copper, brass, pewter and tin," it was held in the case just referred to that neither gold nor silver was included, they being of a superior kind to

¹ *Williams v. Golding*, L. R. 1 C. P. 69.

² 2 B. & Ad. 592.

³ *Fenwick v. Schmalz*, L. R. 3 C. P. 313.

⁴ *Copland v. Powell*, 1 Bing. 369; *Chapman v. Woodruff*, 34 Ga. 98.

the particular metals enumerated.¹ "Abbots, priors, keepers of hospitals and other religious houses," do not include bishops, as they are superior to abbots.² The statute of 31 Henry VIII., chapter 3, discharged from payment of tithes all lands which came to the crown by dissolution, renouncing, relinquishing, forfeiture, giving up, or by any other means. It had the effect to discharge from tithes land which came to the crown by these or by any other inferior means, but did not discharge therefrom land which came to the crown by an act of parliament, which is the highest manner of conveyance that can be.³ A statute relating to indictments before justices of the peace and "others having power to take indictments" was not understood to apply to the superior courts.⁴ The English statute which forbade salmon fishing in the waters of certain enumerated streams, "and all other waters wherein salmon are taken," was considered as including only rivers inferior to those mentioned, and therefore as not comprising the Thames — *Thamasis nobile illud flumen*.⁵

§ 278. But where the result of thus restricting the general words would be that they would have no effect at all, they must be extended to things superior in quality to those enumerated.⁶ This naturally proceeds from the rule of construction to give effect to all the words of a statute if possible, so that none will be void, superfluous or redundant.⁷ Thus the statute of Marlebridge, 52 Henry III., chapter 19, refers to courts baron or other courts, and it was held that these words extend to the courts of record at Westminster, though the act begins with inferior courts; "for otherwise these general words would be void; for it cannot, according to the general rule, extend to inferior courts, for none be inferior or lower than those that be particularly named."⁸ For the same reason the restriction of general words to things *ejusdem generis* must not be carried to such an excess as to deprive them of all meaning. The enumeration of particular things is sometimes so complete and exhaustive as to leave nothing which can be called

¹ *Casher v. Holmes*, 2 B. & Ad. 592.

² 2 Inst. 457, 478; *Archbishop Canterbury's Case*, 2 Rep. 46a.

³ *Id.*

⁴ *Id.*

⁵ 2 Inst. 478.

⁶ 1 Willb. on St. 184.

⁷ See *ante*, § 240.

⁸ *Id.*; 2 Inst. 137.

ejusdem generis.¹ If the particular words exhaust a whole genus, the general words must refer to some larger genus.² When a statute of limitation enumerated certain periods for bringing actions for inferior estates, and following the enumeration were these words, "or other action for any lands, tenements or hereditaments, or lease for a term of years," and under the general words it was sought to bring an action for a higher estate, it was recognized that as a general rule a statute which treats of things or persons of an inferior degree cannot by any general words be extended to those of a superior degree; yet when all those of an inferior degree are embraced by the express words used, and there are still general words, they must be applied to things of a higher degree than those enumerated, for otherwise there would be nothing for the general words to operate on.³ Therefore these general words were held to include a real action.⁴

§ 279. In cases coming within the reach of the principle just illustrated, general words are read not according to their natural and usual sense, but are restricted to persons and things of the same kind or genus as those just enumerated; they are construed according to the more explicit context. This rule can be used only as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention or of confining the operation of a statute within narrower limits than was intended by the law-maker. It affords a mere suggestion to the judicial mind that where it clearly appears that the law-maker was thinking of a particular class of persons or objects, his words of more general description may not have been intended to embrace any other than those within the class. The suggestion is one of common sense. Other rules of construction are equally potent, especially the primary rule which suggests that the intent of the legislature is to be found in the ordinary meaning of the words of the statute.⁵ The sense in which general words, or any words, are intended to be used, furnishes the rule of interpretation, and this is to

¹ Id. 185.

² Fenwick v. Schmalz, L. R. 3 C. P. at p. 316.

³ Ellis v. Murray, 28 Miss. 129; Dwar. on St. 758.

⁴ Hall v. Byrne, 1 Scam. 140; Woodworth v. Paine's Adm'r, Breese (Ill.), 374.

⁵ Woodworth v. State, 26 Ohio St. 196; Foster v. Blount, 18 Ala. 687.

be collected from the context; and a narrower or more extended meaning will be given, according as the intention is thus indicated.¹ To deny any word or phrase its known and natural meaning in any instance, the court ought to be quite sure that they are following the legislative intention.² Hence, though a general term follows specific words, it will not be re-

¹ McIntyre v. Ingraham, 35 Miss. at p. 52; Michel v. Michel, 5 Madd. 72; Hotham v. Sutton, 15 Ves. 320; Stuart v. Earl of Bute, 3 id. 212.

In Rex v. Shrewsbury, 3 B. & Ad. 216, the question was whether a gas-light company was liable to be rated as occupiers of certain mains, pipes and other apparatus for conveying gas, under a statute which provided: "That the charges and expenses of lighting, paving, cleansing, watering, watching, widening, altering, improving and regulating the said streets, squares, highways, lanes and other public passages of the town of Shrewsbury, . . . shall at all times be borne and defrayed by the tenants or occupiers of all the houses, shops, malt-houses, granaries, warehouses, coach-houses, yards, gardens, garden grounds, stables, cellars, vaults, wharves and other buildings and hereditaments," etc. Meadow and pasture ground was excepted. The company's mains, pipes, etc., were held ratable. Lord Tenterden, C. J., remarked that the word "hereditament" was large enough to include the ground and soil in the several ways, lines and other places in which the pipes and apparatus belonging to this company are fixed, and he said: "But it is contended that the term as here used was to be construed with reference to the words among which it was found, and must be applied to hereditaments of the same kind as those particularly enumerated, such as coach-houses, gardens and so on; and reli-

ance was placed on a case decided not long ago, Rex v. The Proprietors of the Manchester and Salford Water-Works, 1 B. & C. 630, where the word used was 'tenement,' which is also a term of very large import. In that case it was held by the court that the word should be restrained in construction to tenements of the same kind as the particular ones before enumerated; but there is in this act a circumstance which was not found in the other—the exception, namely, that the act shall not extend to meadows and pastures. Now it is certain that meadows and pastures would have fallen within the meaning of the word 'hereditament' if they had not been excepted; it was argued, therefore, that this special exemption of meadows and pastures showed that the other word had been previously used in a larger sense. On the other hand it was contended that these words had been introduced merely *ex majori cautela*. Upon the best consideration we have been able to give this case, we are of opinion that we ought not to consider the exception of meadow and pasture ground as made only for greater caution, but are bound to look upon it as introduced by way of special exception, and so to construe the clause; and, consequently, everything not so specifically excepted must be understood to fall within the general liability."

² Lord Denman, C. J., in Tisdell v. Combs, 7 Ad. & E. at p. 796.

stricted by them when the object of the act and the intention is that the general word shall be understood in its ordinary sense. An instance is furnished by an act in South Carolina which subjected to punishment any person convicted of knowingly and wilfully packing or putting into any bag, bale or bales of cotton, any stone, wood, trash cotton, cotton seed or any matter or thing whatsoever, . . . to the purpose or intent of cheating or defrauding any person, etc. The court held that the expression "any matter or thing whatsoever" was not restricted by the things enumerated. In this case the weight was fraudulently increased by use of water. "Here," say the court, "there is no incongruity between the specifications and the general expression, and it cannot be doubted that it was the intention of the legislature to punish frauds in packing cotton without regard to the character of the material used."¹

§ 280. An act prescribed the fees of county judges and clerks of county courts, and made it an offense for either to receive any other or greater fees from any guardian, executor or administrator *or other person*. In a prosecution against the clerk for excessive fees in a suit, and in answer to the contention that "other person" is only some one who has paid more or greater fees than are allowed by law in some matter relating to the administration of estates, the court, while recognizing the rule for limiting general words to persons and things *ejusdem generis*, said: "This is but a rule of construction by which courts are to ascertain the intention of the legislature, and when that is apparent we are bound by it, and can no more disregard the intention in the exposition of a penal statute than any other."² The court held that the true meaning of the act was to punish, as an offense, the taker of greater than the prescribed fees from any person. A statute enacted that "no house, office, room or other place shall be opened, kept or used" for the purpose of prohibited betting. A question came before the common bench whether betting under a clump of trees in Hyde Park was within the statute.³ It was held to

¹ State v. Holman, 3 McCord, 306;

² Foster v. Blount, 18 Ala. 687.

Randolph v. State, 9 Tex. 521; State

³ Doggett v. Catterns, 17 C. B. (N. S.)

v. Williams, 2 Strob. 474; State v. 669.

Solomon, 33 Ind. 450.

be so. Erle, C. J., said: "The mischief is to my mind precisely the same whether the party stands under the shelter of an oak tree, or of a roof or a covering of canvass; and I think the words are large enough to embrace it. . . . Beyond all doubt the mischief which the statute intended to remedy was that which was known to exist, viz.: the injury resulting to improvident persons by the opening of betting-houses or offices; but I think it was intended to go further and to prohibit the trade of betting wheresoever it might be carried on. If the prohibition had stopped at 'houses, offices and rooms,' certain persons, minded to carry on this traffic, would resort to trees in the park, and the legislature may well have thought that a practice which should be placed under control, and for that purpose inserted the general words." The exchequer chamber reversed this decision on the ground that the "place" should be one capable of having an owner. That court concurred in the view taken by the common pleas so far that the place being an open one, and not a "house," "office" or "room," would not alone prevent it being a "place" within the statute.¹ It was held that a bicycle is not a "carriage" within the meaning of a turnpike act which scheduled animals and vehicles and defined tolls to be paid, and contained this paragraph: "For every carriage of whatever description and for whatever purpose which shall be drawn or impelled, or set or kept in motion, by steam or any other power or agency than being drawn by any horse or horses or other beast or beasts of draught, any sum not exceeding 5s."² A city charter granted authority to impose a license tax upon persons engaged in certain enumerated callings, and "upon any other person or employment which it may deem proper, whether such person or employment be herein specially enumerated or not." And it was held not to empower the city to impose such tax upon a railroad corporation, for it is neither a person nor an employment within the ordinary acceptance of those words. This

¹ 19 C. B. (N. S.) 765; *Haigh v. Corporation of Sheffield*, L. R. 10 Q. B. 102. 275; *Shaw v. Morley*, L. R. 3 Ex. 137; *Bows v. Fenwick*, L. R. 9 C. P. 339; See *Clark v. Hague*, 2 E. & E. 281; *Shillito v. Thompson*, L. R. 1 Q. B. 12. *Morley v. Greenhalgh*, 3 B. & S. 374; *Div. 12.* *Eastwood v. Miller*, L. R. 9 Q. B. 440; ² *Williams v. Ellis*, L. R. 5 Q. B. *Gallaway v. Maries*, L. R. 8 Q. B. Div. 175.

conclusion was aided by the consideration that such corporations are not *ejusdem generis* with the persons and employments specially enumerated. The court say, whilst the obvious import of the general words "is to extend the power of the city to tax other persons and employments than the enumerated classes, regardless of whether they are taxed by the state or not, it cannot be said to necessarily convey the idea that these new taxable subjects shall be different in character or higher in degree."¹ It was also held when a particular class of persons or things is spoken of in a statute, and general words follow, the class first mentioned must be taken to be the most comprehensive and the general words treated as referring to matters *ejusdem generis* with that class; the effect of general words when they follow particular words being then restricted.²

§ 281. Where an act made it penal to convey to a prisoner, in order to facilitate his escape, "any mask, dress or disguise, or any letter, or any other article or thing," the general words were construed without restriction on account of the preceding enumeration, and included a bar.³ A statute enacted that it should be lawful for any two justices upon complaint made upon oath that there was cause to suspect that purloined or embezzled materials, used in certain manufactures, were concealed "in any dwelling-house, out-house, yard, garden, or other place or places," to issue a search-warrant for the search there, with authority to deal with the person in whose house, etc., they were found. It was held⁴ that a warehouse, occupied for business purposes only, and not within the curtilage of, or connected with, any dwelling-house, was "a place" within the meaning of the statute. Erle, J., said the only point here is whether a warehouse is one of those "other

¹ *Lynchburg v. N. & W. R. R. Co.* 80 Va. 237. Where, by statutory definition, the word "person" includes corporation, when applicable according to nature of the subject, a general power to levy tax upon "factors, brokers and vendors of lottery tickets, and upon agents and managers of gift enterprises, and upon all other persons exercising, within the city, any

profession, trade or calling or business of any nature whatever," will authorize the city to tax chartered banks therein to the extent that private bankers are taxed. *Macon v. Macon Savings Bank*, 60 Ga. 133.

² *Lynchburg v. N. & W. R. R. Co.* *supra*.

³ *Reg. v. Payne*, L. R. 1 C. C. 27.

⁴ *Reg. v. Edmundson*, 2 El. & El. 77.

places." In deciding that, we must construe the statute with reference to the object of the legislature in passing it." The statute 15 and 16 Vict., ch. 81, § 2, empowered the justices of the county to appoint a committee of their body for the purpose of preparing a basis or standard for fair and equal county rates, to be founded on the full and fair annual value (interpreted by section 6 to mean the net annual value) of the property ratable to the poor rate, in every parish in the county. Section 5 empowered the committee to order in writing certain specified parish officers and other persons, having the custody or management of any public or parochial rates or valuations of the parishes, to make written returns to the committee of the amount of the full and fair annual value of the property in any parish liable to be assessed toward the county rate; the date of the last valuation for the assessment of such parish; and the name of the surveyor or other person by whom such valuation was made. By section 7 the committee may, by their order in writing, require the "overseers of the poor, constables, the assessors, collectors, *and any other persons whomsoever*, to appear before them," "and to produce all parochial and other rates, assessments, valuations, apportionments, and other documents in their custody or power relating to the value of, or assessments on, all or any of the property within the several parishes, or which may be liable to be assessed toward the county rate; and to be examined under oath" "touching the said rates, assessments, valuations, or apportionments, or the value of property aforesaid." By another section neglect or refusal to comply subjected the delinquent to a penalty. It was held in *Regina v. Doubleday*,¹ that section 7 authorized the committee to call before them all persons whomsoever able to give evidence of, and produce any documents relating to, the subjects mentioned, and did not restrict the committee to ascertaining by the examination of the persons, and the inspection of the documents specified in section 5, the amount at which the property is rated to the poor rate; that, therefore, a person having in his possession private accounts and documents relating to the annual value of collieries and coal mines assessable to the county rates and

¹ 3 EL. & EL. 501.

able to give evidence touching their net annual value incurred the penalty by refusing to obey the order of the committee. The general words were construed according to their ordinary meaning, unrestricted by the particular words which preceded them, because the purpose of the act obviously required it. So an act relating to nuisances, under which an inspector had a visitatorial power, provided a penalty for preventing him "from entering any slaughter-house, shop, building, market or other place" where the things to be inspected were kept. It was held that a yard was "a place" within the meaning of the act. The court, in *Young v. Grattridge*,¹ expressed the opinion that it was not confined to places *ejusdem generis* with those mentioned, where animals, or carcasses, etc., to which the provisions of the act related, might be kept for sale or preparation for sale as food for man; "and I think," said Lush, J., "that there is nothing qualifying the generality of the term 'place,' and that a yard is within the term."

§ 282. *Reddendo singula singulis*.—General words in a legislative act are often, where the sense requires it, and in furtherance of the intention, to be taken distributively, *reddendo singula singulis*. They are thus applied to the subject-matter to which they appear by the context most properly to relate, and to which they are really most applicable. Thus, the words "according to the provisions of said act, and of this act," obviously import that the requisitions of the two acts (that act itself, and another thereinbefore mentioned), in their respective particulars, are to be duly complied with; as if the one under its circumstances requires signature to an instrument only, and the other that it be under hand and seal.² In the construction of the words, "for money or other good consideration paid or given," "paid" is referred to "money" and "given" to "consideration."³ This method of limiting the effect of expressions which are obviously too wide to be construed literally is most frequently adopted when the opening words of a section are general, while the succeeding parts branch out into particular instances.⁴ Where several words

¹ L. R. 4 Q. B. 166.

² Dwarris on St. 613.

³ Dwarris on St. 613; *Rex v. Inhabitants of Stoke Damerel*, 7 B. & C. 570.

⁴ Wilb. on St. 189.

importing power, authority and obligation are found at the commencement of a clause containing several branches, it is not necessary that each of those words should be applied to each of the different branches of the clause; it may be construed *reddendo singula singulis*; the words giving power and authority may be applicable to some branches, those of obligation to others.¹ Where the words were, "the finding of a cow by and on the land," the court said by Patterson, J.: "I think we must say, '*reddendo singula singulis*,' that the finding was to be 'on' the land while there was food on it, and by the owner of the land with hay, at other times."² Words in different parts of a statute must be referred to their proper connections, giving each in its place its proper force.³

§ 283. **Interpretation affected by other statutes.**—All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively and construed together as though they constituted one act.⁴ This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals,

¹ *Rex v. Bristol Dock Co.* 6 B. & C. at pp. 191, 192.

² *Dwarris on St.* 613; *Reg. v. Cumberworth Half*, 5 Q. B. 484, 491.

³ *McIntyre v. Ingraham*, 35 Miss. 25.

⁴ *United States v. Freeman*, 3 How. 556; *State v. Clark*, 54 Mo. 216; *Converse v. United States*, 21 How. 463; *Jacoby v. Shafer*, 105 Pa. St. 610; *Neeld's Road*, 1 Pa. St. 353; *People v. Weston*, 3 Neb. 312; *Manuel v. Manuel*, 13 Ohio St. 458, 465; *Hendrix v. Rieman*, 6 Neb. 516; *State v. Babcock*, 21 Neb. 599; *Davidson v. Carson*, 1 Wash. Ty. 307; *United States v. Harris*, 1 Sumn. 21; *Leroy v. Chabolla*, 2 Abb. (U. S.) 448; *Scott v. Searles*, 1 Sm. & Mar. 590; *White v. Johnson*, 23 Miss. 68; *Hayes v. Hanson*, 12 N. H. 284; *State v. Baltimore, etc.* R. R. Co. 12 Gill & J. 399, 431; *McLaughlin v. Hoover*, 1 Oregon, 31; *McFarland v. Bank of the State*, 4 Ark. 410; *Merrill v. Crossman*, 68

Me. 412; *Phelps v. Rightor*, 9 Rob. (La.) 531; *Earl of Ailsbury v. Pattison*, 1 Doug. 28; *Gayle's Heirs v. Williams' Adm'r*, 7 La. 162; *Perkins v. Perkins*, 62 Barb. 531; *Mayor, etc. v. Howard*, 6 Har. & J. 383; *State v. Mooty*, 3 Hill (S. C.), 187; *Black v. Tricker*, 59 Pa. St. 13; *Green v. Commonwealth*, 12 Allen, 155; *Van Riper v. Essex P. R. Bd.* 38 N. J. L. 23; *Dugan v. Gittings*, 3 Gill, 138; *State v. Mister*, 5 Md. 11; *Mobile, etc. R. R. Co. v. Malone*, 46 Ala. 391; *Crawford v. Tyson*, id. 299; *Griffith v. Carter*, 8 Kan. 565; *Mitchell v. Duncan*, 7 Fla. 13; *Bryan v. Dennis*, 4 id. 445; *Rex v. Palmer*, 1 Leach, C. C. 352; *McWilliam v. Adams*, 1 Macq. H. L. Cas. 120; *Eskridge v. McGruder*, 45 Miss. 294; 6 Bac. Abr. 382, 383; *Mt. Holly Paper Co.'s Appeal*, 99 Pa. St. 513; *Bowles v. Cochran*, 93 N. C. 398; *Whipple v. Judge, etc.* 26 Mich. 345; *Storm v. Cotzhausen*, 38 Wis. 139.

at the same session or on the same day. They are all to be compared, harmonized if possible, and, if not susceptible of a construction which will make all their provisions harmonize, they are made to operate together so far as possible consistently with the evident intent of the latest enactments.

It is to be observed that in the comparison of different statutes passed at the same session or nearly at the same time this circumstance has weight; for it is usually referred to as indicating the prevalence of the same legislative purpose, as rendering it unlikely that any marked contrariety was intended. But whether the prior statute is recent or of long standing it must yield if there is a conflict. But with a view to ascertain the intent of the legislation on a given subject at any time it must all be considered, whether it has continued in force or been modified by successive changes.¹

§ 284. A statute must be construed with reference to the whole system of which it forms a part.² And statutes upon cognate subjects may be referred to, though not strictly *in pari materia*.³ There being a general statute regulating the execution of wills, which did not require subscribing witnesses, a new statute was passed providing for the testamentary disposition of the property of married women; it required that such a will should be executed in the presence of two witnesses. The two acts were construed together. A married woman's will had to be executed according to the general law except in the particular regulated by the later act in respect to witnesses.⁴ The existing requirements of the law relative to auditing accounts for state printing were held not to be repealed or such audit dispensed with by a later act providing for partial payments during the progress of a particular work in terms which implied no such prior audit.⁵ Though a new statute prescribing the steps for taking an appeal is general and makes no exceptions, it will be construed with any existing law covering the same subject and containing an exception, for obvious reasons, in favor of parties who are such

¹ *Id.*

³ *Smith v. People*, 47 N. Y. 330;

² *McDougald v. Dougherty*, 14 Ga. 674; *Noble v. State*, 1 Greene (Iowa), 325; *Hays v. Richardson*, 1 Gill & J. 366.

Whitcomb v. Rood, 20 Vt. 49.

⁴ *Linton's Appeal*, 104 Pa. St. 228.

⁵ *People v. Weston*, 3 Neb. 312.

in a representative capacity.¹ The general terms of a later statute will often be restricted where, by prior laws, subjects naturally falling within such general terms have been classified and made subject to distinct and dissimilar regulations. The later law, not showing any purpose to abolish this classification, will be made to operate on that class alone to which by its terms it is applicable.² A statute authorizing the revival of actions by or against the representative or successor in interest of the party deceased is *in pari materia* with other statutes providing for the appointment of executors and administrators, and also those pointing out how foreign representatives may acquire the right to prosecute actions.³ A statute relating to homestead and exemptions for a family of minor children was held *in pari materia* with laws allowing dower to the widow and minor children.⁴ A statute in relation to attachments against steamboats and other water craft is *in pari materia* with the general attachment law, and they should be construed together.⁵

§ 285. The expression "any person" in a later statute will be construed to harmonize with an earlier one which required for the purpose certain qualifications.⁶ Where two acts had required certain sums to be paid into the state treasury by a city, and gave a court jurisdiction to enforce the payment, and afterwards another act required an additional payment, thereby increasing the aggregate, but was silent as to the mode of enforcing it, it was held that as the later act was merely supplemental to the others, the remedy given by them should be deemed applicable to the latter.⁷ An offense defined in a statute of Massachusetts was punishable by a fine not exceeding \$1,000, or by imprisonment in jail not exceeding one year. A subsequent act conferred on the police court jurisdiction of the offense, which was to be concurrent with that of another court, and provided that when the police court exercised final jurisdiction the punishment should be confined to a fine not

¹ Koontz v. Howsare, 100 Pa. St. 506.

² People v. Molyneux, 40 N. Y. 113; Bishop v. Barton, 2 Hun, 436.

³ Hendrix v. Rieman, 6 Neb. 516.

⁴ Roff v. Johnson, 40 Ga. 555.

⁵ Wallace v. Seales, 36 Miss. 53.

⁶ London Tobacco Pipe Makers v. Woodroffe, 7 B. & C. 838.

⁷ City of Louisville v. Commonwealth, 9 Dana, 70, 75.

exceeding \$100, and imprisonment not exceeding one year. It was held that though the latter act, taken by itself, would seem to authorize both fine and imprisonment, the language being conjunctive, yet when both acts are construed together it is obvious that the latter authorizes a fine and also authorizes imprisonment, but not both in one sentence.¹

§ 286. While it is thus true that statutes relating to the same subject are to be construed together, this rule does not go to the extent of controlling the language of subsequent statutes by any supposed policy of previous statutes, where such language requires such policy to be disregarded.² Where the last statute is complete in itself, and intended to prescribe the only rule to be observed, it will not be modified by the displaced legislation, as laws *in pari materia*.³ Nor is an act *in pari materia* though it may incidentally refer to the same subject, if its scope and aim are distinct and unconnected.⁴ Thus a statute in relation to the confinement of stock to prevent its running on the premises of others was held not *in pari materia* with the provision of the code laying down the rule of diligence to be observed by railroad companies in running their trains, and defining their liabilities in cases where stock is killed.⁵

§ 287. The legislature are presumed to know existing statutes, and the state of the law, relating to the subjects with which they deal. Hence, that they would expressly abrogate any prior statutes which are intended to be repealed by new legislation. Where there is no express repeal none is deemed to be intended, unless there is such an inconsistency as precludes this assumption; then it yields only to the extent of the conflict.⁶ Regard must be had to all the parts of a statute, and to the other concurrent legislation *in pari materia*; and the whole should, if possible, be made to harmonize; and if the

¹ Commonwealth v. Griffin, 105 Mass. 185.

² Goodrich v. Russell, 42 N. Y. 177, 184; State v. Cram, 16 Wis. 343, 347.

³ Sutton v. Hays, 17 Ark. 462; Williams v. Beard, 1 Rich. (N. S.) 309.

⁴ Central R. R. Co. v. Hamilton, 71 Ga. 465; Billingslea v. Baldwin, 23 Md. 85.

⁵ Central R. R. Co. v. Hamilton, *supra*.

⁶ Ante, § 138; White v. Johnson, 23 Miss. 68; State v. Commissioner of R. R. Taxation, 37 N. J. L. 228; Wakefield v. Phelps, 37 N. H. 295; Laughter v. Seela, 59 Tex. 177; Austin v. Gulf, etc. R. R. Co. 45 Tex. 234; Lewis v. Aylott, id. 190.

sense be doubtful, such construction should be given, if it can be, as will not conflict with the general principles of law, which it may be assumed the legislature would not intend to disregard or change.¹ The statute of wills in New York prohibited a devise to a corporation. A subsequent act incorporating an orphan asylum society gave it power to purchase real estate. This act was harmonized with the statute of wills by restricting the right of purchase according to the popular sense of that word. Although technically a title by devise is by purchase, it was deemed more congenial to the spirit of both acts to give the word purchase a restricted meaning in harmony with the prohibition.² Provisions not repealed expressly or by such implication continue to operate, but they may be modified by later legislation, which will have the effect expressly or by like implication of extending or restricting their terms or scope.³

§ 288. Where enactments separately made are read *in pari materia*, they are treated as having formed in the minds of the enacting body parts of a connected whole, though considered by such body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws, and connect them in a symmetrical system.⁴ Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions.⁵

¹ Manuel v. Manuel, 13 Ohio St. 458, 465.

² McCartee v. Orphan Asylum Society, 9 Cow. 437, 506. See Dodge v. Gridley, 10 Ohio, 173.

³ Noble v. State, 1 Greene (Iowa), 325.

⁴ State v. Williams, 13 S. C. 558.

⁵ 1 Kent's Com. 463, 464; State v. Baltimore, etc. R. R. Co. 12 Gill & J. 399, 433; Napier v. Hodges, 31 Tex. 287; Wakefield v. Phelps, 37 N. H. 295; Mayor, etc. v. Howard, 6 Har. & J. 383; Church v. Crocker, 3 Mass. 21;

Thayer v. Dudley, id. 296; Holbrook v. Holbrook, 1 Pick. 254; Mendon v. Worcester, 10 id. 235; Commonwealth v. Martin, 17 Mass. 362; Forqueran v. Donnally, 7 W. Va. 114; Hayes v. Hanson, 12 N. H. 284; Earl of Ailesbury v. Patterson, 1 Doug. 28; Harrison v. Walker, 1 Ga. 32; Coleman v. Davidson Academy, Cooke (Tenn.), 258; State v. Bell, 3 Ired. L. 506; Henry v. Tilson, 17 Vt. 479; Fort v. Burch, 6 Barb. 60; Smith v. Hickman's Heirs, Cooke (Tenn.), 330; Ranoul v. Griffie, 3 Md. 54; McWilliam v.

For the purpose of learning the intention, all statutes relating to the same subject are to be compared, and so far as still in force brought into harmony, if possible, by interpretation, though they may not refer to each other, even after some of them have expired or been repealed.¹ An amendatory act and the act amended are to be construed as one statute, and no portion of either is to be held inoperative if it can be sustained without wresting words from their appropriate meaning.² Where a statute is made in addition to another statute on the same subject, without repealing any part of it, the provisions of both must be construed together.³

§ 289. Interpretation with reference to the common law.—

Statutes are but a small part of our jurisprudence. The principles of the common law pervade and permeate everything which is subject to legal regulation. Such law defines rights and wrongs of every description and the remedies for public and private redress. By its principles statutes are read and construed. They supplement or change it, and it adjusts itself to the modification and operates in conjunction and harmony with them. If words from its vocabulary are employed in them it expounds them. If the statutes are in derogation of it, it yields and bides its time; if they are cumulative, it still continues.⁴ Rules of interpretation and construction are derived from the common law,⁵ and since that law constitutes the foundation and primarily the body and soul of our jurisprudence, every statutory enactment is construed by its light and with reference to its cognate principles.⁶

Adams, 1 Macq. H. L. Cas. 120; Cope-
land, Ex parte, 2 DeG. M. & G. 914.

¹ Id.

² Harrell v. Harrell, 8 Fla. 46;
McFate's Appeal, 105 Pa. St. 323. See
Mitchell v. Duncan, 7 Fla. 13.

³ Pearce v. Atwood, 13 Mass. 324,
844; Reg. v. Tonbridge Overseers, L.
R. 18 Q. B. Div. 342; Van Riper v.
Essex P. R. Board, 38 N. J. L. 23.

⁴ Ryan v. Couch, 66 Ala. 244; Low-
enberg v. People, 27 N. Y. 336; State v.
Pierson, 44 Ark. 265; Holt v. Agnew,
67 Ala. 360. Where a statute pro-
viding a penalty for selling or giving
away intoxicating liquor was silent

as to persons who aid, abet or coun-
sel or procure the selling or giving
away such liquor, the principles of
the common law in respect to ac-
cessories before the fact will sup-
plement the statute. Walton v. State,
62 Ala. 197. A statutory felony has
common-law incidents. Rex v. Sadi-
1 Leach, C. C. 468.

⁵ Rice v. Railroad Co. 1 Black, 358,
374; Charles River Bridge Co. v.
Warren Bridge Co. 11 Pet. 545.

⁶ Edwards v. Gaulding, 38 Miss. 118;
Howe v. Peckham, 6 How. Pr. 229;
Rice v. Railroad Co. 1 Black, 358.

§ 290. It is not presumed that the legislature intended to make any innovation upon the common law further than the necessity of the case required.¹ In other words, statutes in derogation of it, and especially of a common-law right, are strictly construed, and will not be extended by construction beyond their natural meaning.² When by a statute a charge is created on property for the satisfaction of a debt, unless the intention is clearly expressed, or is justly and fairly to be implied, it cannot be intended that such charge has a superiority which the common law does not attach to similar charges, nor especially such superiority as the common law has carefully withheld.³ It will be so construed, if possible, as not to interfere with fundamental rights.⁴ The best construction of a statute is to construe it as near to the rule and reason of the common law as may be, and by the course which that observes in other cases.⁵ Where a statute directs anything to be done generally and does not appoint any special manner, it is to be done according to the course of the common law.⁶

§ 291. In all doubtful matters, and when the statute is in general terms, it is subject to the principles of the common

¹ *Id.*; *Scaife v. Stovall*, 67 Ala. 237; *3 Jones' (N. C.) L.* 357; *Edwards v. Keech v. Baltimore, etc. R. R. Co.* 17 Md. 32; *Hooper v. Mayor, etc.* 12 id. 464; *Davis v. Commonwealth*, 17 Gratt. 617; *Wilbur v. Crane*, 13 Pick. 284; *Glover v. Alcott*, 11 Mich. 470; *Heiskell v. Mayor, etc.* 65 Md. 125; *Dwar. on St.* 695; 1 Kent's Com. 464 and note.

² *Gunter v. Leckey*, 30 Ala. 591; *State v. Whetstone*, 13 La. Ann. 376; *Glover v. Alcott, supra*; *Sibley v. Smith*, 2 Mich. 486; *Sharp v. Speir*, 4 Hill, 76; *Sharp v. Johnson, id.* 92; *Esterley's Appeal*, 54 Pa. St. 192; *Commonwealth v. Knapp*, 9 Pick. 496; *Gibson v. Jenney*, 15 Mass. 205; *Melody v. Reab*, 4 id. 471; *Wilbur v. Crane*, 13 Pick. 284; *Sullivan v. La Crosse, etc. P. Co.* 10 Minn. 386; *Dwelly v. Dwelly*, 46 Me. 377; *Burnside v. Whitney*, 21 N. Y. 148; *Lock v. Miller*, 3 Stew. & Port. 13; *Young v. McKenzie*, 3 Ga. 31; *Bailey v. Bryan*, 3 Jones' (N. C.) L. 357; *Edwards v. Gaulding*, 38 Miss. 118; *Hollman v. Bennett*, 44 Miss. 322; *Warner v. Fowler*, 8 Md. 25; *Brown v. Barry*, 3 Dall. 365; *Shaw v. Railroad Co.* 101 U. S. 557; *Lord v. Parker*, 3 Allen, 127; *State v. Norton*, 23 N. J. L. 33; *Mullin v. McCreary*, 54 Pa. St. 230; *Howey v. Miller*, 67 N. C. 459; *Hearn v. Ewin*, 3 Cold. 399; *Stewart v. Stringer*, 41 Mo. 400; *Rue v. Alter*, 5 Denio, 119; *Miller v. Railroad Co.* 9 How. Pr. 238; *Newell v. Wheeler*, 48 N. Y. 486; *Smith v. Moffat*, 1 Barb. 65; *Graham v. Van Wyck*, 14 id. 531; *Perkins v. Perkins*, 62 id. 531; *Bussing v. Bushnell*, 6 Hill, 382; *Eilers v. Wood*, 64 Wis. 422.

³ *Scaife v. Stovall*, 67 Ala. 237.

⁴ *Bush v. Brainard*, 1 Cow. 78.

⁵ *Bac. Abr. Statutes*, I.; *Stowell v. Zouch*, 1 Plowden, 365; *Miles v. Williams*, 1 P. Wms. 249, 252.

⁶ *Id.*; *Rex v. Simpson*, 1 Str. 45.

law; it is to receive such a construction as is agreeable to that law in cases of the same nature.¹ A statute in affirmance of a rule of the common law will be construed, as to its consequences, in accordance with such law.² So provisions which are intended to remedy defects in the common law must be read and construed in the light of that law. When words of definite signification therein are used in such provisions, and there is no intention manifest that they are to be taken in a different sense, they are to be deemed employed in their known and defined common-law meaning.³

§ 292. Extraneous facts in aid of construction.— Where the meaning of a statute or any statutory provision is not plain, a court is warranted in availing itself of all legitimate aids to ascertain the true intention; and among them are some extraneous facts. The object sought to be accomplished exercises a potent influence in determining the meaning of not only the principal but also the minor provisions of a statute. To ascertain it fully the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment.⁴ If the statute has been in force for a long period it may be useful to know what was the contemporary construction; its practical construction; the sense of the legal profession in regard to it; the course and usages of business which it will affect. It may be necessary to apply the meaning of terms of art which it may contain.⁵ It is appar-

¹ *Greenwood v. Greenwood*, 28 Md. 370; *Arthur v. Bokenham*, 11 Mod. 150; *Miles v. Williams*, 1 P. Wms. 252; *Wallace v. Taliaferro*, 2 Call, 462.

² *Baker v. Baker*, 13 Cal. 87.

³ *Holt v. Agnew*, 67 Ala. 360; *McCool v. Smith*, 1 Black, 459; *Rice v. Railroad Co.* id. 358; *Vincent, Ex parte*, 26 Ala. 145; *United States v. Magill*, 1 Wash. 463; 4 Dall. 426; *Adams v. Turrentine*, 8 Ired. L. 147; *Brockett v. Railroad Co.* 14 Pa. St. 241; *Allen's Appeal*, 99 id. 196; *Apple v. Apple*, 1 Head, 348; *The Kate Heron*, 6 Sawyer, 106; *United States v. Jones*, 3

Wash. 209; *Lewis v. State*, 3 Head, 127; *Hollman v. Bennet*, 41 Miss. 323.

⁴ *Gorham v. Bishop of Exeter*, *Moore's Case of*, 462; *Hawkins v. Gathercole*, 6 De G. M. & G. 1; *Tonlele v. Hall*, 4 N. Y. 146; *Clark v. Janesville*, 10 Wis. 136; *Dodge v. Gardiner*, 31 N. Y. 239; *Big Black Creek, etc. Co. v. Commonwealth*, 94 Pa. St. 450; *Keith v. Quinney*, 1 Oregon, 364; *Ruggles v. Illinois*, 108 U. S. 526.

⁵ It was held in *Rex v. Mashita*, 6 Ad. & E. 153, that the word "inhabitants" in a charter has not in itself any definite legal meaning, but must be explained in each case, extrinsic-

ent, therefore, that the court must bring to its assistance a very considerable amount and variety of extrinsic information, which it is presumed to possess and can resort to at pleasure, as occasion requires, as matters of which it has, in a technical sense, judicial knowledge. Therefore, preliminary to the consideration of some of these collateral aids, it will be pertinent and useful to inquire briefly what facts other than the letter of the law itself are within judicial cognizance.

§ 293. **Judicial knowledge.**—Certain classes of facts are so fixed in their nature and so notorious that courts take notice of them and they are available without proof. They are, first, matters of public law which all are bound to know; second, matters so notorious as to be regarded as universally known; and third, matters peculiarly within the cognizance of the particular court. The courts take notice not only of the existence but the tenor of all public statutes which are laws of the land within their jurisdiction, whether state or national; this knowledge includes their commencement, expiration or repeal,¹ and judicial decisions construing them;² if declared by competent authority unconstitutional, their invalidity is at once to be judicially noticed.³ When one state recognizes acts done in pursuance of the laws of another state, as, for example, in certifying the acknowledgment of the execution of a deed, its courts will take judicial cognizance of those laws so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them.⁴ The federal courts while exercising their original jurisdiction take notice of the statutes of each of the states; and the supreme court, in the exercise of its appellate jurisdiction, does the same.⁵ But the latter court, in

ally, by evidence of usage, or by reference to the context and objects of the charter. See *Smith v. Lindo*, 4 C. B. (N. S.) 395.

¹ *Kessel v. Albetis*, 56 Barb. 362; *Morris v. Davidson*, 49 Ga. 361; *The Scotia*, 14 Wall. 170; *Merrill v. Dawson*, Hempst. 563; *Jasper v. Porter*, 2 McLean, 579; *Jones v. Hays*, 4 id. 521; *Terry v. Merchants' & Planters' Bank*, 66 Ga. 177; *Bird v. Commonwealth*, 21 Gratt. 800; *Mims v. Swartz*, 37 Tex. 13; *Bayly's Adm'r*

v. Chubb, 16 Gratt. 284; *Miller v. McQuerry*, 5 McLean, 469; *United States v. Turner*, 11 How. 663; *Carpenter v. Dexter*, 8 Wall. 513; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747.

² *Hinde v. Vattier*, 5 Pet. 398; *Elmendorf v. Taylor*, 10 Wheat. 152; *Pennington v. Gibson*, 16 How. 65, 81.

³ *Cash v. State*, 10 Humph. 111.

⁴ *Carpenter v. Dexter*, 8 Wall. at p. 531; *Shotwell v. Harrison*, 22 Mich. 410.

⁵ *Course v. Stead*, 4 Dall. 22, 27,

the exercise of such jurisdiction on error to the highest court of a state, administers the law in the same view as the state court and can take no broader judicial notice.¹

§ 294. The requirement to take notice of public laws necessarily includes taking notice of all facts and proceedings which concern their validity and interpretation.² "If the words of a statute are really and fairly doubtful," said Lord Coleridge, C. J., "then, according to well-known legal principles and principles of common sense, historical investigations may be used for the purpose of clearing away the obscurity which the phraseology of the statute creates."³ Whatever is decisive evidence relative to the due enactment of a statute, whether it be only the certificates of the presiding officers, the statute record, or also the journals of the legislative bodies, the courts which must take notice of the laws, and therefore have necessarily to determine which are valid and duly enacted, may consult.⁴ A treaty is the supreme law of the land,

note; *Hinde v. Vattier*, 5 Pet. 398; *Owings v. Hull*, 9 id. 607, 625; *United States v. Turner*, 11 How. 663, 668; *Pennington v. Gibson*, 16 id. 65; *Covington Drawbridge Co. v. Shepherd*, 20 id. 227, 230; *Cheever v. Wilson*, 9 Wall. 108; *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 230; *Lamar v. Micou*, 114 U. S. 218; *Fourth Nat. Bank v. Francklyn*, 120 id. 747, 751; *Hanley v. Donoghue*, 116 id. 1, 6.

¹ *Hanley v. Donoghue*, 116 U. S. 1. In this case the court say that *State of Ohio v. Hinchman*, 27 Pa. St. 479, and *Paine v. Insurance Co.* 11 R. L. 411, were decided on a misapprehension of the functions of that court. See *Butcher v. Bank of Brownsville*, 2 Kan. 70; *Jarvis v. Robinson*, 21 Wis. 523; *Hobbs v. Memphis*, etc. R. R. Co. 9 Heisk. 879; *Baptiste v. De Volunbran*, 5 H. & J. 86, 98; *Bank of U. S. v. Merchants' Bank*, 7 Gill, 415; *Coates v. Mackey*, 56 Md. 416, 419; *Green v. Van Buskirk*, 7 Wall. 139.

² *People v. Mahaney*, 13 Mich. 481; *Coburn v. Dodd*, 14 Ind. 347; *Gardner*

v. The Collector, 6 Wall. 499; *De Bow v. People*, 1 Denio, 9; *Berliner v. Waterloo*, 14 Wis. 378; *People v. Purdy*, 2 Hill, 31; *Board of Supervisors v. Heenan*, 2 Minn. 330.

³ *Regina v. Most*, L. R. 7 Q. B. Div. at p. 251.

⁴ *People v. Mahaney*, 13 Mich. 481; *Legg v. Mayor*, 42 Md. 203; *Berry v. Baltimore, etc. Co.* id. 446; *People v. De Wolf*, 62 Ill. 253; *Board of Supervisors v. Heenan*, 2 Minn. 330; *People v. River Raisin, etc. R. R. Co.* 12 Mich. 389; *People v. Purdy*, 2 Hill, 31; *De Bow v. People*, 1 Denio, 9; *Commercial Bank v. Sparrow*, 2 Denio, 97; *Duncombe v. Prindle*, 12 Iowa, 1; *Green v. Weller*, 32 Miss. 650; *Pangborn v. Young*, 32 N. J. L. 29; *Kilbourn v. Thompson*, 103 U. S. 168; *Pacific R. R. Co. v. The Governor*, 23 Mo. 353; *Opinion of Justices*, 45 N. H. 607; *State v. McLelland*, 18 Neb. 236; *Gardner v. The Collector*, 6 Wall. 499; *Moody v. State*, 48 Ala. 115; *Jones v. Hutchinson*, 43 id. 721; *Southwark Bank v. Commonwealth*, 26 Pa. St. 446.

and as such is within judicial knowledge of the courts;¹ they have even knowledge of such foreign laws as the treaties disclose.²

§ 295. The courts have judicial knowledge of all territorial divisions, corporations and institutions established or recognized by public statutes.³ The orphans' court of Washington county, in the District of Columbia, being created by a public statute of the United States, its seal was judicially recognized by the courts of Maryland.⁴ Courts take notice of the constitution as the fundamental law, and of amendments thereto, and when they take effect.⁵ They take notice of the common law and the conditions of the country which affected its introduction and adoption; also the law of nations,⁶ and the law merchant.⁷ They do not take notice of the written laws of another state or of foreign countries; but the courts of a state take notice of its antecedent laws, whatever their origin; it is so though the state was carved out of an older state or acquired from a foreign power.⁸

§ 296. Courts take judicial notice of customs which are general and universally known, as of the meaning of C. O. D. affixed to packages sent by common carriers, and the practice and responsibilities relative thereto;⁹ the business of mercantile agencies;¹⁰ the commercial usage to observe Sundays and

¹ *Dole v. Wilson*, 16 Minn. 525.

² *Montgomery v. Deeley*, 3 Wis. 709.

³ *Oxford Poor Rate*, 8 E. & B. 184, 211; *Harding v. Strong*, 42 Ill. 148; *Sullivan v. People*, 122 Ill. 385; *State v. Reader*, 60 Iowa, 527; *Luck v. State*, 96 Ind. 16.

⁴ *Mangun v. Webster*, 7 Gill, 78.

⁵ *Graves v. Keaton*, 3 Cold. 8.

⁶ *The Scotia*, 14 Wall. 170. In this case the court say: "Historically, we know that before the close of the year 1864 nearly all the commercial nations of the world had adopted the same [navigation] regulations respecting lights, and that they were recognized as having adopted them."

⁷ *Reed v. Wilson*, 41 N. J. L. 29; *Goldsmith v. Sawyer*, 46 Cal. 209; *Bank of Columbia v. Fitzhugh*, 1 H.

& G. 239; *Wiggins F. Co. v. Chicago & A. R. Co.* 5 Mo. App. 347; *Branch v. Burnley*, 1 Call. 147; *Consequa v. Willings*, 1 Pet. C. C. 225; *Munn v. Burch*, 25 Ill. 35.

⁸ *United States v. Turner*, 11 How. 663; *Chouteau v. Pierre*, 9 Mo. 3; *Ott v. Soulard*, id. 581; *Payne v. Treadwell*, 16 Cal. 220; *Pecquet v. Pecquet*, 17 La. Ann. 204; *Bouldin v. Phelps*, 30 Fed. Rep. 547; *Stevens v. Bomar*, 9 Humph. 546; *Henthorn v. Doe*, 1 Blackf. 157; *Green v. Goodall*, 1 Cold. 404; *Wilson v. Smith*, 5 Yerg. 379; *Delano v. Jopling*, 1 Litt. 117.

⁹ *State v. Intoxicating Liquors*, 73 Me. 278. See *contra*, *McNichol v. Pacific Exp. Co.* 12 Mo. App. 401.

¹⁰ *Holmes v. Harrington*, 20 Mo. App. 661.

holidays.¹ The custom of the road, as to passing by on the right or left;² general and notorious customs of the sea to be observed by vessels.³ Judicial notice is not taken of private statutes,⁴ local customs, by-laws or regulations of corporations, boards and officers.⁵ Municipal ordinances are not judicially noticed except by the courts of the municipality, unless otherwise directed by statute.⁶

§ 297. **Facts relative to foreign states and nations.**— Courts take notice of the existence of foreign nations, their forms of government as recognized by the executive and legislative departments, their emblems of sovereignty, as flags and seals;⁷ the status of the several states of the Union under the constitution; that they have proper judicial tribunals, legislative and executive departments; their great seals, and the general nature of their jurisprudence.⁸

¹ *Sasscer v. Farmers' Bank*, 4 Md. 409.

² *Turley v. Thomas*, 8 C. & P. 103.

³ *The Scotia*, 14 Wall. 170.

⁴ *Workingmen's Bank v. Converse*, 33 La. Ann. 963; *Broad Street Hotel Co. v. Weaver's Administrator*, 57 Ala. 26.

⁵ *Youngs v. Ransom*, 31 Barb. 49; *Cameron v. Blackman*, 39 Mich. 108; *Turner v. Fish*, 28 Miss. 306; *Goldsmith v. Sawyer*, 46 Cal. 209; *Longes v. Kennedy*, 2 Bibb. 607; *Lewis v. McClure*, 8 Oregon, 273; *Seymour v. Marvin*, 11 Barb. 80; *Sullivan v. Hense*, 2 Colo. 424; *Johnson v. Robertson*, 31 Md. 476; *Sarahass v. Armstrong*, 16 Kan. 192; *Palmer v. Aldridge*, 16 Barb. 131; *Hensley v. Tarpey*, 7 Cal. 288; *South & N. Ala. R. R. Co. v. Wood*, 74 Ala. 449; *Johnston v. Wilson*, 29 Gratt. 379.

⁶ *Garvin v. Wells*, 8 Iowa, 286; *Downing v. Miltonvale*, 36 Kans. 740; *Case v. Mayor*, etc. 30 Ala. 538.

⁷ *The Santissima Trinidad*, 7 Wheat. 283; *United States v. Palmer*, 3 id. 634; *Lincoln v. Battelle*, 6 Wend. 475; *Griswold v. Pitcairn*, 2 Conn. 85; *City of Berne v. Bank of Eng-*

land, 9 Ves. 347; *Dolder v. Huntingfield*, 11 id. 283; *Church v. Hubbard*, 2 Cranch, 187.

⁸ *Whart. on Evl.* § 314; *Drake v. Glover*, 30 Ala. 382; *Rape v. Heaton*, 9 Wis. 328; *Ripple v. Ripple*, 1 Rawle, 386; *Whitesides v. Poole*, 9 Rich. 68; *Anderson v. Anderson*, 23 Tex. 639; *Hoyt v. McNeil*, 13 Minn. 390; *De Sobry v. De Laistre*, 2 H. & J. 191; *Irving v. McLean*, 4 Blackf. 52; *Monroe v. Douglass*, 5 N. Y. 447; *Whitford v. Panama R. R. Co.* 23 id. 465; *Carey v. Cincinnati, etc. R. R. Co.* 5 Iowa, 357; *Commonwealth v. Snowden*, 1 Brewst. 218; *Simms v. Southern Exp. Co.* 38 Ga. 129; *Copley v. Sanford*, 2 La. Ann. 335; *Anderson v. Folger*, 11 La. Ann. 269; *Boggs v. Reed*, 5 Mart. 673; *Newton v. Cocke*, 10 Ark. 169; *Thurston v. Percival*, 1 Pick. 415; *Mason v. Wash*, 1 Ill. 16; *Wilson v. Cockrill*, 8 Mo. 1; *Houghtaling v. Ball*, 19 Mo. 84; *Taylor v. Boardman*, 25 Vt. 581; *Miller v. Avery*, 2 Barb. Ch. 582; *Billingsley v. Dean*, 11 Ind. 331; *Champion v. Kille*, 15 N. J. Eq. 476; *Davis v. Bowling*, 19 Mo. 651; *De Celis v. United States*, 13 Ct. Cl. 117; *Williams v.*

§ 298. The court will not hear proof of extrinsic facts known to the legislature or members thereof which are supposed to indicate their intention in passing a law.¹ But circumstances known to all the public, such as what was the law at the time, or what it was supposed to be, are proper to be considered in looking for the intention of the legislature when not explicitly expressed.² The courts take more particular notice of the history of the state in which they sit. "Every judge is bound to know," says Heydenfeldt, J., "the history and leading traits which enter into the history of the country in which he presides. This we have held before, and it is also an admitted doctrine of the common law. We must therefore know that this state has a large territory; that upon its acquisition by the United States, from the sparseness of its population, but a small comparative proportion of its land had been granted to private individuals; that the great bulk of it was land of the government; that but little of it, as yet, has been acquired by individuals by purchase; that our citizens have gone upon the public land continuously, from a period anterior to the organization of the state government to the present time; upon these lands they have dug for gold; excavated mineral rock; constructed ditches, flumes and canals for conducting water; built mills for sawing lumber and grinding corn; established farms for cultivating the earth; made settlements for the grazing of cattle; laid off towns and villages; felled trees; diverted water-courses; and, indeed, have done in the various enterprises of life all that is usual and necessary in a high condition of civilized development. All of these are open and notorious facts, charging with notice of them not only the courts who have to apply the law in reference to them, but also the government of the United States, which claims to be the proprietor of these lands; and the government of the state within whose sovereign jurisdiction they exist."³

The supreme court of the United States took jurisdiction on a writ of error of a suit depending for the amount in con-

State, 67 Ga. 260. It has been held in Texas that the courts of that state do not take judicial notice that the common law is in force in other states. *Bradshaw v. Mayfield*, 18 Tex. 21.

¹ *Delaplane v. Crenshaw*, 15 Gratt. at p. 479.

² *Keyport St. B. Co. v. Farmers' Transportation Co.* 18 N. J. Eq. at p. 24.

³ *Conger v. Weaver*, 6 Cal. 548.

troversy on the value of a mining claim apart from fee-simple rights in the suit by patent. In part the court sustains its jurisdiction on judicial knowledge that, "without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country."¹

The courts take notice of the population of a state according to the results of the official census;² also of the derivation of land titles.³ It was judicially noticed in Arkansas that certain portions of the state were in insurrection and under the control of the United States;⁴ in Tennessee, that the courts in a particular county were closed, civil law suspended, and military law in force during the civil war;⁵ in Texas, that the government of the state was administered by military authority, under the reconstruction acts of congress, and that the military commander's orders had the force of law.⁶ Courts will notice that the Confederate currency was imposed by force, and was at great discount;⁷ the accession of persons to, and the tenure of office under, the constitution and laws;⁸ the geography and topography of the state, and its history to the extent that these facts and transactions are of public and general interest;⁹ of the boundaries of the state, the extent of territorial jurisdiction, its civil divisions created by law, and notorious surveys, streets, areas and lines.¹⁰ So the times prescribed by

¹ *Sparrow v. Strong*, 3 Wall. 97, 104.

² *Worcester Bank v. Cheney*, 94 Ill. 430; *People v. Williams*, 64 Cal. 87.

³ *Henthorn v. Doe*, 1 Blackf. 157; *Smith v. Stevens*, 82 Ill. 554.

⁴ *Rice v. Shook*, 27 Ark. 137.

⁵ *Killebrew v. Murphy*, 3 Heisk. 548.

⁶ *Gates v. Johnson Co.* 36 Tex. 144.

⁷ *Keppel v. Petersburg R. R. Co.* Chase's Dec. 167.

⁸ *State v. Williams*, 5 Wis. 308; *Thompson v. Haskell*, 21 Ill. 215; *Ingram v. State*, 27 Ala. 17; *Ragland v. Wynn*, 37 id. 32; *Alexander v. Burnham*, 18 Wis. 199; *Burnett v. Henderson*, 21 Tex. 588; *Dewees v. Colorado Co.* 32 Tex. 570.

⁹ *Turner v. Patton*, 49 Ala. 406; *Williams v. State*, 64 Ind. 553; *Payne v. Treadwell*, 16 Cal. 220; *McKinnon v. Bliss*, 21 N. Y. 206; *Ferdinand v. State*, 39 Ala. 706; *Lanfear v. Mestier*, 18 La. Ann. 497; *Ashley v. Martin*, 50 Ala. 537; *Taylor v. Graham*, 18 La. Ann. 656; *Andrews v. Knox Co.* 70 Ill. 65; *New Orleans Canal, etc. Co. v. Templeton*, 20 La. Ann. 141; *Burford v. Tucker*, 44 Ala. 89; *United States v. 4000 Am. Gold Coin*, 1 Woolw. 217; *Hart v. State*, 55 Ind. 591; *Monroe Co. Com'rs v. May*, 87 Ind. 562; *Hart v. Bodley*, Hardin, 98.

¹⁰ *Goodwin v. Appleton*, 22 Me. 453; *Gilbert v. Moline Water Power Co.* 19 Iowa, 319; *King v. Kent*, 29 Ala.

law for holding the terms of the various courts in the state will be judicially noticed.¹

§ 299. Courts take notice who are their own officers, and of their signatures;² and who are county officers within their jurisdictions.³ A court will take judicial notice of its own record of proceedings in a particular case before it. Thus, on error in an appellate court to recover a second judgment in a cause in which a former judgment had been reversed, it being assigned for error that it did not appear by the record that at the time of the second trial the cause had been remitted, the court overruled the point by its judicial knowledge of the *remittitur*.⁴ But a court will not take notice, in deciding one case, of what may be contained in the record of another and distinct case, unless proved.⁵ The record in garnishment is so far a part of the record in the cause that it will be judicially noticed therein.⁶

§ 300. **Judicial notice of historical and other facts related to legislation.**—In order to ascertain the purpose or intention, if it is not clearly expressed in a statute, or that such purpose or intention may be carried into effect, the court will take

542; *Brady v. Page*, 59 Cal. 52; *Martin*, 51 Me. 366; *Stoddard v. Carson v. Dalton*, 59 Tex. 500; *People v. Robinson*, 17 Cal. 363; *Central R. R. Co. v. Gamble*, 77 Ga. 584; *Indianapolis, etc. R. R. Co. v. Case*, 15 Ind. 42; *Indianapolis, etc. R. R. Co. v. Stephens*, 28 id. 429; *Fogg v. Holcomb*, 64 Iowa, 621; *Board of Commissioners v. Spitler*, 13 Ind. 235; *Brown v. Elms*, 10 Humph. 135; *Gardner v. Eberhart*, 82 Ill. 316; *Kile v. Yellowhead*, 80 id. 208; *Ham v. Ham*, 39 Me. 263; *Buckinghouse v. Gregg*, 19 Ind. 401; *Atwater v. Schenck*, 9 Wis. 160; *Prieger v. Exchange, etc. Ins. Co.* 6 id. 89; *United States v. Johnson*, 2 Sawyer, 482; *Hill v. Bacon*, 43 Ill. 477; *State v. Ray*, 97 N. C. 510; *Wright v. Hawkins*, 28 Tex. 452; *Wright v. Phillips*, 2 Greene (Ia.), 191; *Ross v. Austill*, 2 Cal. 183; *State v. Tootle*, 2 Harr. 541; *La Grange v. Chapman*, 11 Mich. 499; *Solyer v. Romanet*, 52 Tex. 562; *Martin v.*

Martin, 51 Me. 366; *Stoddard v. Sloan*, 65 Iowa, 630; *Vanderwerker v. People*, 5 Wend. 530.

¹ *Lindsay v. Williams*, 17 Ala. 229; *Morgan v. State*, 12 Ind. 448; *Pugh v. State*, 2 Head, 227; *State v. Hammett*, 7 Ark. 492; *Gilliland v. Sellers*, 2 Ohio St. 223. See *McGinnis v. State*, 24 Ind. 500.

² *Yell v. Lane*, 41 Ark. 53; *Dyer v. Last*, 51 Ill. 179; *Hanmann v. Mink*, 99 Ind. 279; *Buell v. State*, 72 Ind. 523; *People v. Lyman*, 2 Utah, 80.

³ *Wetherbee v. Dunn*, 32 Cal. 106; *Templeton v. Morgan*, 16 La. Ann. 438.

⁴ *Brucker v. State*, 19 Wis. 539, citing *The Santa Maria*, 10 Wheat. 442; *Cash v. State*, 10 Humph. 115. See also *State v. Bowen*, 16 Kan. 475; *National Bank v. Bryant*, 13 Bush, 419.

⁵ *National Bank v. Bryant*, *supra*.

⁶ *Farrar v. Bates*, 55 Tex. 193.

notice of the history of its terms when it was enacted.¹ It is needful in the construction of all instruments to read them in view of all the surrounding facts. To understand their purport and intended application, one should, as far as possible, be placed in a situation to see the subject from the maker's standpoint and study his language with that outlook. Statutes are no exception.² It accords with Lord Coke's rule,³ and a rational sense of what is suitable, to ascertain what were the circumstances with reference to which the words of the statute were used, and what was the object appearing from those circumstances which the legislature had in view.⁴ When occasion arises for resort to such extrinsic facts, a court may obtain information from any authentic source. As was said by Mr. Justice Miller in *Gardner v. The Collector*,⁵ "from any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer," "always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." It has been held in the English courts that when a statute is supposed to have been founded on the report of commissioners appointed by the crown, the report ought not to be referred to in a court of justice as a guide in construing the statute.⁶

¹ *Aldridge v. Williams*, 3 How. 9; *United States v. Union P. R. R. Co.* 91 U. S. 72; *State v. Nicholls*, 30 La. Ann. (Pt. II) 980; *Sheriff v. Caddo Parish*, 37 id. 788; *De Celis v. United States*, 13 Ct. Cl. 117; *Williams v. State*, 67 Ga. 260; *child v. Gwynne*, 16 Abb. Pr. 23; *Gorham v. Bishop of Exeter*, Moore's Case of, 462; *Attorney-General v. Sillem*, 2 H. & C. 531; *Reg. v. Zulueta*, 1 C. & K. 215.

⁵ 6 Wall. at p. 511.

² *Tonnele v. Hall*, 4 N. Y. 140; *McIntyre v. Ingraham*, 35 Miss. 25; *Sheriff v. Parish of Caddo*, 37 La. Ann. 788; *State v. Judge*, 12 id. 777; *Big Black Creek, etc. Co. v. Commonwealth*, 94 Pa. St. 450; *Ruggles v. Illinois*, 108 U. S. 526; *Crawfordsville, etc. Co. v. Fletcher*, 104 Ind. 97.

³ *Heydon's Case*, 3 Rep. 7a; *Case of the Marshalsea*, 10 id. 73a.

⁴ *River Wear Com'rs v. Adamson*, L. R. 1 Q. B. D. 546; 2 App. Cas. 764; *Delaplane v. Crenshaw*, 15 Gratt. 457; *Smith v. Speed*, 50 Ala. 276; *Fair-*

⁶ *Steele v. Midland R. Co.* L. R. 1 Ch. 282; *Martin v. Hemming*, 18 Jur. 1002; 24 L. J. Ex. 5; *Salkeld v. Johnson*, 2 C. B. 756; *Farley v. Bonham*, 2 J. & H. 177; *Matter of Dean of York*, 2 Q. B. 34; *Ewart v. Williams*, 3 Drew. 21, 24; *Bank of Pa. v. Commonwealth*, 19 Pa. St. 144, 156; *Arding v. Bonner*, 2 Jur. (N. S.) 763; *Southwark Bank v. Commonwealth*, 26 Pa. St. 446, 450. See *Fellowes v. Clay*, 4 Q. B. 356; *Edger v. County Commissioners*, 70 Ind. 331; *Blake v. National Banks*, 23 Wall. 307, 321.

But if the reasons and objects of the law are made known by any other document equally authentic and certain, as the report of one of the heads of departments, it may be referred to to aid in the interpretation of doubtful or ambiguous language in the law.¹ It was held in *State v. Cloksey*,² that, in the interpretation of words used in the constitution, the court may derive such aid as may be afforded by looking to the journals of the convention which framed that instrument, to ascertain in what sense such words were used by the convention;³ or journals of the legislature in respect to the history of the enactment.⁴ It is held in Indiana that the journals containing the proceedings in reference to a bill enacted into a statute may be looked to by the courts to ascertain the intention of the legislature in enacting it if it be ambiguous.⁵ In *Blake v. National Banks*,⁶ the journals of congress were referred to, and the court said they were compelled to ascertain the legislative intention in that way.⁷ In Illinois they may be put in evidence, and when offered they prove themselves, and may be consulted to determine whether an act was duly passed.⁸ So in Alabama.⁹ In Kentucky, journals may be proved on an issue by pleading to show that a bill was not duly passed.¹⁰ There has been occasionally judicial reference to declarations of members of legislative bodies, but such aids are but slightly relied upon, and the general current of authority is opposed to any resort to such aids.¹¹

¹ *United States v. Webster, Davies*, 38; *Perkins v. Sewell*, 1 W. Black. 659; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Moody v. State*, 48 Ala. 115; *Clare v. State*, 5 Iowa, 509; *Division of Howard Co.* 15 Kan. 194.

² 5 Sneed, 482.

³ *State v. Douglass*, 5 Sneed, 608. See *Wis. Cent. R. R. Co. v. Taylor Co.* 52 Wis. 37.

⁴ *Hill's Adm'r v. Mitchell*, 5 Ark. 608; *People v. Lyman*, 2 Utah, 30. See *Bank of Penn. v. Commonwealth*, 19 Pa. St. 144; *Southwark Bank v. Commonwealth*, 26 id. 446.

⁵ *Edger v. Board of Commissioners*, 70 Ind. 331; *Wood Mowing, etc. Co. v. Caldwell*, 54 Ind. 276, 279; *Division*

of *Howard Co.* 15 Kan. 194. See *Coleman v. Dobbins*, 8 Ind. 156.

⁶ 23 Wall. 307.

⁷ See *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Hebbert v. Purchas*, L. R. 3 P. C. 648.

⁸ *Grob v. Cushman*, 45 Ill. 119.

⁹ *Moody v. State*, 48 Ala. 115.

¹⁰ *Auditor v. Haycraft*, 14 Bush, 284.

¹¹ *Re Mew*, 31 L. J. Bankruptcy, 89; *Reg. v. Hertford College*, L. R. 3 Q. B. Div. 707; *Att'y-Gen'l v. Sillem*, 2 H. & C. 521; *Cumberland Co. v. Boyd*, 113 Pa. St. 52, 57; *District of Columbia v. Washington Market*, 108 U. S. 243; *United States v. Union Pac. R. R. Co.* 91 id. 72; *Aldridge v. Williams*, 3 How. 9; *Taylor v. Taylor*, 10 Minn. 107;

§ 301. **Judicial knowledge of facts in general.**—What is matter of general knowledge, universally accepted and acted upon, courts will *ex officio* recognize as true. They will avail themselves of it in the exposition of statutes, deliver such facts, when pertinent, to juries, and will not permit them to question their verity. Such facts cannot be precisely defined; their recognition depends on their certainty and notoriety, and the courts, proceeding with their usual care and conservatism, will resolve doubts by rejecting any supposed facts in a particular case.¹ Under such restrictions they judicially recognize whatever has the requisite certainty and notoriety in every field of knowledge, in every walk of practical life. "There are a vast variety of things," said Graves, C. J.,² "which must be regarded as matters of common knowledge; things which every adult person of ordinary experience and intelligence must be presumed to know; things which do not require to be pleaded or to be made the subject of specific proof; and it is not within the province of a court to leave it to a jury to find contrary to this knowledge." It was accordingly held that the question was for the court whether a railroad company was guilty of negligence in leaving a box freight car standing still at a highway crossing as tending to frighten horses of ordinary gentleness.³

Leese v. Clark, 20 Cal. 387; Keyport, etc. Co. v. Trans. Co. 18 N. J. Eq. 13. Judges who have been members of the legislature have sometimes mentioned their knowledge or declarations while acting in that capacity. Moyer v. Gross, 2 P. & W. 171; Re Mew, *supra*; Mounsey v. Ismay, 34 L. J. Ex. 56; 3 H. & C. 486; Hedworth v. Primate, Hard. 318; McMaster v. Lomax, 2 Myl. & K. 32; Hudson v. Tooth, L. R. 3 Q. B. Div. 46; Drummond v. Drummond, L. R. 2 Ch. 45; State v. Nicholls, 30 La. Ann. Pt. II, 980. Statements made in memorials to the legislature concerning the meaning of statutes will not control the court in construing them. Ross v. Supervisors, 12 Wis. 26.

¹ Brown v. Piper, 91 U. S. 37.

² Gilbert v. Flint & C. R. R. Co. 51 Mich. 488.

³Id. In Mr. Metcalfe's very instructive article found in 28 Am. L. Reg. 193, he says at p. 456: "There remains a vast array of facts which can become generally known only through the uniform results of experience in life. From the immense multiplicity of these matters, they may never receive, in the usual form, either historical or scientific indorsement. They lie in the region of traditional or actual knowledge, common to civilization, and may be known as 'a knowledge of men and things.' The rule of their judicial reception is, that 'courts will not pretend to be more ignorant than the rest of mankind.' Such matters can never be given in evidence by

In *Board of Health v. Hill*,¹ Erle, C. J., said: "Every one knows what the trade of a brickmaker is." And the court acted upon general knowledge in determining the character of that trade as to its being a nuisance. In *Holman's Appeal*² the court took judicial notice of the long practical construction of a statute, and of the general understanding of the profession as to its scope and meaning.³ It was judicially known that the tide ebbs and flows to a great height in the River Mersey in England.⁴ In *Jarvis v. Robinson*,⁵ Dixon, C. J., said: "We all know that the circuit courts of the several states are courts of general jurisdiction, as well as we know that courts of justices of the peace are not; and why should judges assume a degree of ignorance on the bench which would be unpardonable in them when off of it." Superior courts know when it has been the immemorial practice of an inferior court of record consisting of several members to recognize one practically as a quorum. Thus an act provided that it should be lawful for the judges of the central criminal court, "or any two or more of them, to inquire of, hear, determine and adjudge the offenses specified." It was ruled that one could hold the court. "From the earliest period," said Cockburn, C. J., "commissions of oyer and terminer have been framed in the same terms as are employed in the statute in question. In these commissions a certain specified number of the persons, some of whom are named, are always constituted a quorum. Yet for centuries the trials of offenses under such commissions upon the circuits of the judges have been held before a single judge, and the proceedings are nevertheless represented on the record as taking place not before one judge, but before the other judges sitting under the commission."⁶

§ 302. A court will take judicial notice of the seasons and of the general course of agriculture, so as to know whether at a particular date the crops of the country would be ma-

means of any spoken or written language, and hence they can leave no impression upon the record of a cause."

¹ 13 C. B. (N. S.) at p. 483.

² 106 Pa. St. 502.

³ *Keyport St. Co. v. Transportation*

Co. 18 N. J. Eq. 13; *Scruggs v. Brackin*, 4 Yerg. 528; *Egnew v. Cochran*, 2 Head, 320.

⁴ *Whitney v. Gauche*, 11 La. Ann. 432.

⁵ 21 Wis. at p. 526.

⁶ *Leverson v. Reg.* L. R. 4 Q. B. 394.

tured so as to be severed.¹ An agreement required a cropper to deliver to his landlord the "small grain in the half bushel as soon as threshed;" and it was argued that, as there was no time specified when it should be threshed, the law would hold that it should be threshed and delivered within a reasonable time; that the court will judicially take notice of the time when such crops matured, on the principle that whatever ought to be generally known within the limits of its jurisdiction, of that the court will judicially take notice. The court answered: We do not think the doctrine of judicial notice has been carried quite to "this extent." The time when wheat, oats and barley matured was stated by the court to vary in different parts of the state, and even in the same locality. "Of facts of unvarying occurrence," say the court, "courts must take judicial notice, but not of the vicissitudes of climate or the seasons."² The court will take notice of the course of the seasons and of husbandry, and that the use of a farm for six months during the cropping season would be worth much more per acre than it would be during the six months including the winter season.³ A court will take notice from the time of a father's death whether at a particular date his children had arrived at majority.⁴ It is on the same principle that mortuary tables are acted upon as embodying the results of general observation.⁵ Courts will take judicial notice of the calendar and on what day of the week a given day of the month falls;⁶ the time when the sun rises at given times.⁷

§ 303. The fact that "brandy is ranked as an intoxicating liquor by writers upon the general subject, and that it is a liquor of that character is generally and commonly known, is one of which the courts will take judicial knowledge."⁸ Everybody knows what gin is; knows not only that it is a

¹ *Floyd v. Ricks*, 14 Ark. 286; *Tomlinson v. Greenfield*, 31 id. 557; *Case v. Serew*, 46 Hun, 57.

² *Dixon v. Niccolls*, 39 Ill. 372. See *Moulton v. Posten*, 52 Wis. 169, 173.

³ *Ross v. Boswell*, 60 Ind. 235.

⁴ *Floyd v. Johnson*, 2 Litt. 109.

⁵ *Goodon v. Tweedy*, 74 Ala. 232.

⁶ *Allman v. Owen*, 31 Ala. 167; *Sprowl v. Lawrence*, 33 id. 674; *Philadelphia, etc. R. R. Co. v. Lehman*, 56 Md. 209; *McIntosh v. Lee*, 57 Iowa, 356; *Curtis v. March*, 4 Jur. (N. S.) 1112.

⁷ *People v. Chee Kee*, 61 Cal. 404.

⁸ *Fenton v. State*, 100 Ind. 598.

liquor, but also that it is intoxicating.¹ The same is held in regard to whisky.² So a court will take judicial notice that "lager beer," commonly used as a beverage, is a malt and an intoxicating liquor.³ That coal oil is inflammable.⁴ Courts judicially know of the navigability of such streams as the Mississippi river; they know this because they form part of the geography of the country, and their navigability is known as forming part of the common public history;⁵ they know that a "gift enterprise" in common parlance is understood to be substantially a scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who have taken shares in it.⁶

§ 304. Courts will take notice of whatever is generally known within the limits of their jurisdiction. A patent was held void on its face for want of novelty.⁷ To require proof of every fact, as that Calais is beyond the jurisdiction of the courts of England, would be utterly and absolutely absurd.⁸ In a libel case in which the libel was that the friends of the plaintiff had "realized the fable of the frozen snake," the court took judicial notice that the knowledge of that fable existed generally in society.⁹ Conventional expressions conveying a particular idea may become so current that a court would take judicial notice of their popular meaning. In an action by a clergyman for libel, the court took judicial notice of the meaning of the words: "Then there was that Iowa Beecher business which beat him out of a station at Grass Lake."¹⁰

§ 305. The courts will judicially notice the art of photography, the mechanical and chemical processes employed, the scientific principles on which they are based, and their results.¹¹ But it has been held that courts will not take judicial notice of philosophic or scientific facts and principles which are not

¹ Commonwealth v. Peckham, 2 Gray, 514.

² Carmon v. State, 18 Ind. 450; Eagan v. State, 53 Ind. 162; Schlicht v. State, 56 id. 173.

³ Watson v. State, 55 Ala. 158; State v. Goyette, 11 R. I. 592; Briffitt v. State, 58 Wis. 39; Kerkow v. Bauer, 15 Neb. 150; Killip v. McKay, 13 N. Y. St. Rep. 5.

⁴ State v. Hayes, 78 Mo. 307.

⁵ Neaderhouser v. State, 28 Ind. 257; Siegbert v. Stiles, 39 Wis. 533.

⁶ Lohman v. State, 81 Ind. 15.

⁷ Brown v. Piper, 91 U. S. 37.

⁸ Gres. Eq. Ev. 294.

⁹ Hoare v. Silverlock, 12 Q. B. 624.

¹⁰ Bailey v. Kalamazoo Pub. Co. 40 Mich. 251.

¹¹ Luke v. Calhoun Co. 52 Ala. 115.

generally known.¹ Facts stated even in standard publications, such as encyclopedias and dictionaries, will not be judicially noticed unless they are of such universal notoriety as to be a part of the common knowledge of all persons.² Courts cannot take notice of minor geographical and other like facts, unless historically or traditionally well and generally known.³

§ 306. Courts will take judicial notice that the business of a barber on Sunday is not a work of necessity;⁴ the peculiar nature of lotteries and how they are generally managed;⁵ what a billiard table is.⁶ They will take notice of the character of the circulating medium, and the meaning of popular language relating to it;⁷ the different classes of notes and bills in circulation as money at a particular time;⁸ the gen-

¹ *Ausman v. Veal*, 10 Ind. 355; *St. Louis G. L. Co. v. American F. Ins. Co.* 33 Mo. App. 348. See *Spensley v. Lancashire Ins. Co.* 54 Wis. 433.

² *Kaolatype Engraving Co. v. Hoke*, 30 Fed. Rep. 444.

³ *Buffalo, etc. Co. v. N. Y. etc. R. R. Co.* 10 Abb. N. C. 107. *Chan. Bland in Patterson v. McCausland*, 3 Bland's Ch. at p. 71, said: "The law respects the regular course of nature in every way; and, consequently, in all cases in so far as the course of nature is known, all such facts, as well in regard to the revolution of the seasons, as to animals and vegetables; as to the mating of birds, and their co-operation in rearing their young, the blooming time of roses, and the like, are received as being in themselves entirely trustworthy, or as facts from which inferences as to the truth of other facts may be safely drawn. Co. Litt. 40, 92, 197; 1 Stark. Ev. 472, note; *Case of Swans*, 7 Co. 82. In questions of bastardy, the time of access being proved, the known term of gestation, reckoning from the time of birth, is always received as a most satisfactory kind of presumptive evidence. Co. Litt. 123b, note; *Rex v. Luffe*, 8 East, 193. So too, in all the various questions in relation to the

right of property connected with the continuance of life, facts so far as they are known, in regard to the probability, the expectation, and the average duration of human life, have always been in like manner admitted as evidence, or as a ground from which presumptive evidence of the existence of other facts may be fairly deduced. And there can be no doubt that the regular and known course of nature in the formation of vegetables may be as safely relied on as direct, or as presumptive evidence, as in that of animals. The only point of difficulty as to both being the establishment of the truth of that which is alleged to be the uniform and regular course of nature." But it was held that, in the absence of evidence that the number of concentric layers in the trunk of a tree correspond with the years of its age, the hypothesis that the formation of each one of such concentric layers is evidence of the lapse of a year cannot be judicially received.

⁴ *State v. Frederick*, 45 Ark. 347.

⁵ *Salomon v. State*, 28 Ala. 83.

⁶ *State v. Price*, 12 G. & J. 260.

⁷ *Lampton v. Haggard*, 3 T. B. Mon. 149.

⁸ *Hart v. State*, 55 Ind. 599.

eral facts connected with the emission, use and circulation of the Confederate currency;¹ the changes in the course of business in the country and of new processes to facilitate trade² and communication;³ that a railroad superintendent has authority to receive or refuse cord-wood;⁴ the customary price of ordinary labor;⁵ the meaning of common and generally known abbreviations of proper names and of other things;⁶ that Free Masonry is a charitable institution;⁷ of the usual duration of a voyage across the Atlantic;⁸ the ordinary incidents of railway travel;⁹ that the language of all countries is subject to fluctuation;¹⁰ the distance between well-known cities of the United States and the speed of railway travel between them.¹¹ There is considerable diversity of opinion in dealing with the multifarious facts for which judicial notice has been claimed, but these contrarieties have arisen in the application of conceded principles, and when compared will be found to merely illustrate different degrees of caution and conservatism.¹²

¹ *Simmons v. Trumbo*, 9 W. Va. 358.

² *Wiggins Ferry Co. v. Chicago, etc. R. R. Co.* 5 Mo. App. 347.

³ *Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 32.

⁴ *Sacalaris v. Eureka, etc. R. R. Co.* 18 Nev. 155.

⁵ *Bell v. Barnet*, 2 J. J. Marsh. 516.

⁶ *Moseley v. Mastin*, 37 Ala. 216; *Stephen v. State*, 11 Ga. 225; *Weaver v. McElhenon*, 13 Mo. 89.

⁷ *Burdine v. Grand Lodge*, 37 Ala. 478.

⁸ *Openheim v. Wolf*, 3 Sandf. Ch. 571.

⁹ *Downey v. Hendrie*, 46 Mich. 498.

¹⁰ *Vanada v. Hopkins*, 1 J. J. Marsh. 285.

¹¹ *Pearce v. Langfit*, 101 Pa. St. 507; *Rice v. Montgomery*, 4 Biss. 75.

¹² *Goodwin v. Appleton*, 22 Me. 453; *Penn. Co. v. Frana*, 13 Ill. App. 91; *Johnson v. Common Council*, 16 Ind. 227; *Buckinghouse v. Gregg*, 19 id. 401; *Porter v. Waring*, 69 N. Y. 250; *Allen v. Scharringhausen*, 8 Mo. App. 229; *Rice v. Montgomery*, 4 Biss.

75; *State v. Russell*, 17 Mo. App. 16; *Wilcox v. Jackson*, 109 Ill. 261; *Bishop v. Jones*, 28 Tex. 294; *Bradford v. Floyd*, 80 Mo. 207; *State v. Wise*, 7 Ind. 645; *Ward v. Henry*, 19 Wis. 76; *State v. Bruner*, 17 Mo. App. 274; *Stanberry v. Nelson*, *Wright (Ohio)*, 766; *Mosley v. Vt. Mut. F. Ins. Co.* 55 Vt. 142; *Ellis v. Park*, 8 Tex. 205; *Russell v. Martin*, 15 id. 238; *Seymour v. Marvin*, 11 Barb. 80; *Modawell v. Holmes*, 40 Ala. 391; *Cicero, etc. Co. v. Craighead*, 28 Ind. 274; *Riggin v. Collier*, 6 Mo. 568; *Whitlock v. Castro*, 22 Tex. 108; *Woodward v. Chicago, etc. R. R. Co.* 21 Wis. 309; *Longes v. Kennedy*, 2 Bibb. 607; *McDonald v. Kirby*, 3 Heisk. 607; *Cutter v. Caruthers*, 48 Cal. 178; *State v. Cleveland*, 80 Mo. 108; *Market Bank v. Pacific Bank*, 27 Hun. 465; *Johnson v. Robertson*, 31 Md. 476; *Grider v. Tally*, 77 Ala. 422; *Kelley v. Story*, 6 Heisk. 202; *Temple v. State*, 15 Tex. App. 304; *Bennett v. North British Ins. Co.* 8 Daly. 471; *Feemster v. Ringo*, 5 T. B. Mon. 336; *South & N. A. R. R. Co. v. Wood*, 74 Ala. 449;

§ 307. **Contemporaneous construction.**—The aid of contemporaneous construction is invoked where the language of a statute is of doubtful import and cannot be made plain by the help of any other part of the same statute, nor by the assistance of any act *in pari materia* which may be read with it, nor of the course of the common law up to the time of its enactment. Under such circumstances the court may consider what was the construction put upon the act when it first came into operation.¹ Where this has been given by enactment it is conclusive.² A contemporaneous construction is that which it receives soon after its enactment. This after the lapse of time, without change of that construction by legislation or judicial decision, has been declared to be generally the best construction. It gives the sense of the community as to the terms made use of by the legislature. If there is ambiguity in the language, the understanding of the application of it when the statute first goes 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.³ Where the statute is doubtful, a construction long acted upon by the inferior courts will generally be adopted and followed by the superior tribunals,⁴ and

Esterbrook Mfg. Co. v. Ahern, 30 N. J. Eq. 341; Shropshire v. State, 12 Ark. 190.

¹ Willb. on St. 142; 2 Inst. 11, 136; 1 Kent, Com. 465; Fermoy Peerage Claim, 5 H. L. Cas. at p. 747; Morgan v. Crawshay, L. R. 5 H. L. at p. 315; Attorney-General v. Primate, 1 Jebb. & Symes, at p. 317.

² Philadelphia & Erie R. R. Co. v. Catawissa R. R. Co. 53 Pa. St. 20, 61.

³ Packard v. Richardson, 17 Mass. 143; 2 Inst. 181; People v. Loewenthal, 93 Ill. 191; Opinion of Justices, 126 Mass. 551; Hahn v. United States, 107 U. S. 402; Commonwealth v. Parker, 2 Pick. 550, 556; Scruggs v. Brackin, 4 Yerg. 528; Egnew v. Cochrane, 2 Head, 320; Cohens v. Virginia, 6 Wheat. 264; Reg. v. Frost, 9 C. & P. 129; Sheppard v. Gosnold,

Vaughan, 169; Mansell v. Reg. 8 E. & B. at p. 111; Gorham v. Bishop of Exeter, 15 Q. B. 69; Booth v. Ibbotson, 1 Y. & J. 360; Nelson v. Allen, 1 Yerg. 360, 376, 377; Harrison v. Willis, 7 Heisk. 35; Simpson v. Willard, 14 S. C. 191; Martin v. Hunter, 1 Wheat. 351; Wanet v. Corbet, 13 Ga. 441; Howell v. State, 71 id. 224; State v. Mayhew, 2 Gill, 487; Garland v. Carlisle, 2 Cr. & M. at p. 39; United States v. Ship Recorder, 1 Blatchf. 218, 223; Wincham v. Chetwynd, 1 Burr. at p. 419; Wilton v. Chambers, 7 Ad. & El. at p. 532; Bank of England v. Anderson, 3 Bing. N. C. 666; Hamilton v. McNeil, 13 Gratt. 394; 4 Bac. Abr. 648; Dean v. Borchsenius, 30 Wis. 236; People v. May, 3 Mich. 598.

⁴ Plummer v. Plummer, 37 Miss. 185.

especially as to rights which have accrued under it.¹ If the decisions are conflicting it cannot be said there is a contemporary exposition, and the court must look to the words of the statute and interpret them by its own unfettered judgment.² A construction of a constitution, if nearly contemporaneous with its adoption, and followed and acquiesced in for a long period of years afterwards, is never to be lightly disregarded, and is often conclusive.³

§ 308. **General usage.**— If the words of a statute be doubtful a general usage may explain it, but it must be universal.⁴ A practice in a part of the state inconsistent with the letter and spirit of a statute cannot repeal it nor control its construction.⁵ A universal law cannot receive different interpretations in different localities;⁶ but when a statute is applicable to one place only, doubtful words in it may be construed by the usage in that place.⁷ Long usage is of no avail against a plain statute;⁸ it can be binding only as the interpreter of a doubtful law, and as affording a contemporary exposition.⁹ Where a statute, expressive as to some points, is silent as to others, usage may supply the defect, if not inconsistent with anything which it expresses.¹⁰

§ 309. A practical construction, of long standing, by those for whom the law was enacted, will not be lightly questioned, especially in matters of form, though it will not be allowed to defeat the manifest purpose of the statute.¹¹ This was held to

¹ *Plummer v. Plummer*, 37 Miss. 185.

² *Rex v. Leek Wootton*, 16 East, at p. 122.

³ *Opinion of Justices*, 126 Mass. 551; 1 Kent's Com. 465 and note; *Story on Const.* § 408; *Cooley, Const. Lim.* 69; *Surgett v. Lapice*, 8 How. 48, 68; *Commonwealth v. Lockwood*, 109 Mass. 322, 339; *Commonwealth v. Costley*, 118 Mass. 1, 36; *Stuart v. Laird*, 1 Cranch, 299; *McCulloch v. Maryland*, 4 Wheat. 316, 401; *Portland Bank v. Apthorp*, 12 Mass. 252, 257; *Holmes v. Hunt*, 122 Mass. 505, 516.

⁴ *Rex v. Hogg*, 1 T. R. 721; *Dyer v. Best*, L. R. 1 Ex. 152; *Earl of Waterford's Peerage*, 6 Cl. & Fin. at p. 173;

Bank of Ireland v. Evans's Charities, 5 H. L. Cas. 405; *Bailey v. Rolfe*, 16 N. H. 247; *Chesnut v. Shane*, 16 Ohio, 590.

⁵ *State v. Mayhew*, 2 Gill, 487.

⁶ *St. Paul v. Lewis*, 4 Watts, 402; *Ham v. Sawyer*, 38 Me. 37; *Evans v. Myers*, 25 Pa. St. 114.

⁷ *Frazier v. Warfield*, 13 Md. 279.

⁸ *Goldsborough v. United States*, Taney's Dec. 80.

⁹ *Att'y-Gen'l v. Bank*, 5 Ired. Eq. 71; *Gwyn v. Hardwicke*, 1 H. & N. 53; *Pochin v. Duncombe*, 1 H. & N. 856.

¹⁰ *Dunbar v. Roxburghe*, 3 Cl. & Fin. 335.

¹¹ *Westbrook v. Miller*, 56 Mich. 148.

aid the presumption that the principal was under disability when a deputy officer acts, having authority to act only when the principal is unable to act.¹ The practical construction given by the interior department of the general government, in reliance upon the uniform opinions of the attorney-general's office, of a statute granting lands, should be followed by the state authorities until reversed by the federal courts.² Where a statute concerning the administration of tax-collectors' oaths has been uniformly construed in a certain way by the state and county authorities, and the construction has become a rule of property, many titles depending upon it, the maxim *communis error facit jus* may be invoked if the statute is doubtful.³ The practical construction given to a doubtful statute by the public officers of the state, and acted upon by the people thereof, is to be considered; it is, perhaps, decisive in case of doubt.⁴ This is similar in effect to a course of judicial decisions. The legislature is presumed to be cognizant of such construction, and after long continuance, without any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction.⁵ Contemporary construction, and official usage for a long period, by the persons charged with the administration of the law, are among the legitimate aids in the interpretation of statutes.⁶

§ 310. When a judicial interpretation has once been put upon a clause, expressed in a vague manner by the legislature, and difficult to be understood, that ought of itself to be a suffi-

¹ Continental Imp. Co. v. Phelps, 47 Mich. 299; Clark v. Mowyer, 5 id. 462; Cameron v. Merchants' etc. Bank, 37 id. 240; Employers' L. Co. v. Commissioner of Ins. 64 id. 614.

² Johnson v. Ballou, 28 Mich. 379.

³ Malonny v. Mahar, 1 Mich. 26.

⁴ Solomon v. Com'rs, 41 Ga. 157; People v. May, 3 Mich. 598; Kiersted v. State, 1 G. & J. 231; United States v. Gilmore, 8 Wall. 330; Union Ins. Co. v. Hoge, 21 How. 35; Mathews v. Shores, 24 Ill. 27; Chesnut v. Shane, 16 Ohio, 599, 607; Scanlan v. Childs, 33 Wis. 663; Goddard v. Gloninger, 5 Watts, 209; United States v.

Lytle, 5 McLean, 9; Hahn v. United States, 14 Ct. Cl. 305; Swift Courtney, etc. Co. v. United States, 14 Ct. Cl. 481; Edwards v. Darby, 12 Wheat. 206; Stuart v. Laird, 1 Cranch, 299; United States v. Bank, 6 Pet. 29; United States v. Moore, 95 U. S. 760; Brown v. United States, 113 U. S. 568; The Laura, 114 U. S. 411; Wright v. Forrestal, 65 Wis. 341, 348.

⁵ The Anna, L. R. 1 P. Div. 259.

⁶ Wetmore v. State, 55 Ala. 198; Nelson v. Allen, 1 Yerg. 376; Tipton v. Davis, 5 Hayw. 278; People v. Dayton, 55 N. Y. 377.

cient authority for adopting the same construction.¹ Buller, J., said: "We find one solemn determination of these doubtful expressions in the statute, and as that construction has since prevailed, there is no reason why we should now put another construction on the act on account of any supposed change of convenience."² This rule of construction will hold good even if the court be of opinion that the practical construction is erroneous; so that if the matter were *res integra* the court would adopt a different construction.³ Lord Cairns said: "I think that with regard to statutes . . . it is desirable not so much that the principle of the decision should be capable at all times of justification, as that the law should be settled, and should, when once settled, be maintained without any danger of vacillation or uncertainty."⁴ Judicial usage and practice will have weight,⁵ and when continued for a long time will be sustained though carried beyond the fair purport of the statute.⁶

§ 311. The uniform legislative interpretation of doubtful constitutional provisions, running through many years, and a similar construction of statutes, has great weight.⁷ The contemporary and subsequent action of the legislature in reference to the subject-matter has been accepted as control-

¹ Williams v. Newton, 14 M. & W. at p. 757.

² Rex v. Younger, 5 T. R. at p. 452. See Ellis v. Owens, 10 M. & W. at p. 521; Rex v. Great Driffield Inhabitants, 8 B. & C. at p. 690.

³ State v. Chase, 5 H. & J. 303.

⁴ Commissioners v. Harrison, L. R. 7 H. L. 9; McKeen v. Delancy, 5 Cranch, 22; Migneault v. Malo, L. R. 4 P. C. 136; Kernion v. Hills, 1 La. Ann. 419; Janvrin v. De la Mare, 14 Moore's P. C. 334; Kitchen v. Bartsch, 7 East, 53; Lord Advocate v. Sinclair, L. R. 1 Scotch App. 178; Jewison v. Dyson, 9 M. & W. 540; Nicol v. Paul, L. R. 1 Scotch App. 131; Evanturel v. Evanturel, L. R. 2 P. C. 462.

⁵ McKeen v. Delancy, 5 Cranch, 22; Bailey v. Rolfe, 16 N. H. 247; Packard v. Richardson, 17 Mass. 122, 144;

Morrison v. Barksdale, Harper, 101; Att'y-Gen'l v. Bank of Cape Fear, 5 Ired. Eq. 71; Rogers v. Goodwin, 3 Mass. 475; Wetmore v. State, 55 Ala. 198; Plummer v. Plummer, 37 Miss. 185; Kernion v. Hills, 1 La. Ann. 419; Leigh v. Kent, 3 T. R. at p. 364.

⁶ Pease v. Peck, 18 How. 595; Reg. v. Scaife, 17 Q. B. 238; Smith v. Tilly, 1 Keble, 712; Leverson v. Reg. L. R. 4 Q. B. 394; Clow v. Harper, L. R. 3 Ex. Div. 198; The Anna, L. R. 1 P. Div. 259; Reg. v. Cutbush, L. R. 2 Q. B. 379; Migneault v. Malo, L. R. 4 P. C. 123, 136.

⁷ Hardy, Ex parte, 68 Ala. 303; Attorney-General v. Preston, 56 Mich. 181; Commonwealth v. Miller, 5 Dana, 320; Moog v. Randolph, 77 Ala. 597; Selma, etc. R. R. Co., Ex parte, 45 id. 696.

ling evidence of the intention of a particular act.¹ Legislative construction of old laws has no judicial force; whether right or wrong the courts must determine the proper interpretation from the statutes themselves.² A practical construction of a statute of doubtful meaning, long continued and acquiesced in, and which has operated as a rule of property, and under which many important rights have accrued, will seldom be disturbed.³ "We cannot," say the court in an early case, "shake a principle which 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 [practice] is now supported is that long-continued usage furnishes a contemporaneous construction, which must prevail over the mere technical import of the words."⁴ In construing statutes applicable to public corporations, courts will attach no slight weight to the uniform practice under them, if the practice has continued for a considerable length of time.⁵ Municipal practice under indefinite provisions of a charter that official terms should expire on the last day of March was applied in the construction of a statute giving one appointed a two-years' term.⁶

¹ Doggett v. Walter, 15 Fla. 355; Bigelow v. Forrest, 9 Wall. 339.

² Drain Com'r v. Baxter, 57 Mich. 127.

³ Rogers v. Goodwin, 2 Mass. 477; Stuart v. Laird, 1 Cranch, 299; Matter of the Will of Warfield, 22 Cal. 71; People v. Loewenthal, 93 Ill. 191; Brown v. State, 5 Colo. 496; Plummer v. Plummer, 37 Miss. 185; Nelson v. Allen, 1 Yerg. 360; Morgan v. Crawshaw, L. R. 5 H. L. 304, 320; State v. Chase, 5 H. & J. 303; State v. Severance, 49 Mo. 401. In Steiner v. Cox, 4 Pa. St. 13, Gibson, C. J., had to deal with the effect of a redemption from a tax sale permitted by an officer after the statutory period had elapsed. It had been permitted in pursuance of a practice which prevailed "to an almost unlimited extent." He said: "It will

be necessary to distinguish between redemption by permission and a right to redeem, for the one may be good independent of the other." He reached the conclusion that the owner may not redeem by right, but may by permission, if not done by collusion. "The evidence to show the universality of redemptions by permission was properly received; not, as was alleged, to prove a custom superior to the statutes, but to found an interpretation of them on the basis of the argument *ab inconvenienti*. It was evidence to the court, not to the jury."

⁴ Rogers v. Goodwin, 2 Mass. 476.

⁵ Sherwin v. Bugbee, 16 Vt. 444; State v. Severance, 49 Mo. 401; State v. Cook, 20 Ohio St. 252.

⁶ French v. Cowan, 4 New Eng. Rep. 682; 79 Me. 426.

§ 312. An important consideration affecting the weight of contemporary judicial construction is the length of time it has continued. It is adopted, and derives great force from being adopted, soon after the enactment of the law. It may be, and is presumed, that the legislative sense of its policy, and of its true scope and meaning, permeates the judiciary and controls its exposition. Having received at that time a construction which is for the time settled, accepted, and thereafter followed or acted upon, it has the sanction of the authority appointed to expound the law, and under circumstances peculiarly favorable for reaching just and correct conclusions; when reached, they are, moreover, within the strongest reasons on which is founded the maxim of *stare decisis*. Such a construction is publicly given, and the subsequent silence of the legislature is strong evidence of acquiescence, though not conclusive.¹ But in respect to a practical construction and usage not having judicial sanction, long duration is of their very essence. They are but interpreters of an obscure law,² and to have weight should prevail for a long period, and their observance be uniform and notorious. Long periods have been mentioned as requisite or desirable in the English cases, varying from forty to five hundred years;³ shorter periods in this country suffice.⁴ This difference may come from the legislation in America being comparatively modern. A local or special act, however, may be acted upon and practically construed by parties for whose purposes it was enacted, so as to induce an adoption of their construction without reference to the time occupied in such practical construction. Thus, where a city pursuant to due authority passed an ordinance for the subscription of stock and the issue of bonds in aid of a railroad, and this had been acted upon, the court said there had been a contemporary construction "placed upon an ordinance by the parties themselves, and on which they have acted, and upon which large and important interests have

¹ *State v. Bosworth*, 13 Vt. 402; *Fin. at p. 354*; *Gorham v. Exeter*, 15 Clinton v. Englebrecht, 13 Wall. 434; *Q. B. 52, 69*; *Fermoy Peerage Claim*, *Mayor of Baltimore v. State*, 15 Md. 5 H. L. Cas. 729, 785.

876; *Ferris v. Higley*, 20 Wall. 375.

⁴ *Pease v. Peck*, 18 How. 595; *Clark v. Dotter*, 54 Pa. St. 215, 216; *United*

³ *Mansell v. Reg.* 8 E. & B. 54, 72, *States v. Ship Recorder*, 1 Blatchf. 111; *Dunbar v. Roxburghe*, 3 Cl. & 218, 223.

vested. Although this would not be controlling, if the language was clearly the other way, yet in doubtful cases it is entitled to, and should receive, weight.”¹ Lord Eldon, in *Attorney-General v. Forster*,² said: “According to Lord Hardwicke, usage would interpret the deed against the effect of any exposition upon the mere terms of the deed itself, if there was nothing else to resort to.”

§ 313. *Stare decisis*.—The certainty and stability of the law are among its chief excellencies. By following this legal injunction the common law has become a symmetrical system; the same authoritative rule applied to statutory construction gives a wholesome precision to dubious generalities, and otherwise removes doubts which arise upon obscure provisions, and has a salutary tendency to give confidence to those who must act upon statutes, but cannot settle their meaning. The rule of *stare decisis* is the authority of judicial decisions as precedents in subsequent litigations. When a point has been once settled by decision, it forms a precedent which is not afterwards to be departed from.³ Such precedents must from the nature of our legal system be the same to the science of the law as a convincing series of experiments is to any other branch of inductive philosophy. They are, on being promulgated, immediately relied upon, according to their character, either as confirming an old or forming a new principle of action, which, perhaps, is at once applied to thousands of cases. These are continually multiplying. Numerous and valuable rights, offensive and defensive, may be claimed under them. The court almost always, in deciding any question, creates a moral power above itself; and when the decision construes a statute, it is legally bound for certain purposes to follow it as a decree emanating from a paramount authority, according to its various applications in and out of the immediate case.⁴ “The doctrine is not founded upon a mere rule of practice, changeable at the pleasure of the courts, but upon the solid basis of justice, and vitally and essentially affects the rights and interests of defendants.”⁵ It is a rule applicable to all questions of law, whether declaring a principle of the common law or the con-

¹ *State v. Severance*, 49 Mo. 401.

² 10 Ves. at p. 338.

³ Abb. L. Dic. 497.

⁴ *Bates v. Relyea*, 23 Wend. 340, 341.

⁵ *Shields v. Perkins*, 2 Bibb, 230.

struction of a statute. A deliberate decision on a point of law given in a case becomes authority in other like cases; it is then the highest evidence of what the law is applicable to the subject; it should be followed unless reversed by a superior court or changed by the legislature,¹ unless the law was manifestly misunderstood or misapplied in the case decided; and even then, after long adherence to that error, it may become fixed and incapable of judicial correction. If it were otherwise, the public would suffer great inconvenience. It is only by the notoriety and stability of legal principles and rules as they are defined, declared and illustrated in judicial precedents that all human affairs may be regulated by one standard; that professional men can give safe advice to those who consult them; that people in general can venture with confidence to buy and trust, and to deal with each other.²

§ 314. There is a distinction in the application of this rule between questions which concern practice, or those rules of conduct which have a mere present importance, and those which affect the validity and control the construction of contracts, or are rules of property. As to the former, legal precedents are followed unless they are manifestly wrong.³ As to the latter, they are followed with more persistency.⁴ The importance, in a general sense, of stable laws induces a conservative opposition to vacillation in even the methods of administering justice, and has made the rule of *stare decisis* universally applicable; in some cases imperative, in others at least a precept.

¹ *Lemp v. Hastings*, 4 Greene (La.), 283; *New Orleans v. Poutz*, 14 La. 448; *Emerson v. Atwater*, 7 Mich. 23. Ann. 853; *Romaine v. Kinshiner*, 2

² 1 Kent's Com. 476.

³ *Duff v. Fisher*, 15 Cal. 375, 381; *Commonwealth v. Miller*, 5 Dana, 320; *State v. Thompson*, 10 La. Ann. 122; *Reg. v. Chantrell*, L. R. 10 Q. B. 587; *Waldo v. Bell*, 13 La. Ann. 329; *Davidson v. Allen*, 36 Miss. 419; *State v. Wapello Co.* 13 Iowa, 388; *Green v. Neal*, 6 Pet. 291; *Sydnor v. Gascoigne*, 11 Tex. 455; *Borden v. State*, 11 Ark. 519; *Greencastle Southern T. Co. v. State*, 28 Ind. 382; *Succession of Lauve*, 6 La. Ann. 529; *Seale v. Mitchell*, 5 Cal. 403; *Wolf v. Lowry*, 10 La. Ann. 272; *People v. Cicott*, 16 Mich.

283; *New Orleans v. Poutz*, 14 La. Ann. 853; *Romaine v. Kinshiner*, 2 Hilt. 519.

⁴ 1 Kent, 475, 476; 27 Am. Dec. 632; *In re Warfield*, 22 Cal. 51; *Panaud v. Jones*, 1 id. 488; *Rogers v. Goodwin*, 2 Mass. 477; *Aicard v. Daly*, 7 La. Ann. 612; *Farmer's Heirs v. Fletcher*, 11 id. 142; *Van Loon v. Lyon*, 4 Daly, 149; *Day v. Munson*, 14 Ohio St. 488; *Reed v. Ownby*, 44 Mo. 204; *Hihn v. Courtis*, 31 Cal. 402; *Meriam v. Harsen*, 2 Barb. Ch. 270; *Pioche v. Paul*, 22 Cal. 110; *Fisher v. Horicon I. Co.* 10 Wis. 355; *Van Winkle v. Constantine*, 10 N. Y. 425.

"Where a question has been well considered," says Harris, J., "and deliberately determined, whatever might have been the views of the court before which the question is again brought, had it been *res nova*, it is not at liberty to disturb or unsettle such decision unless impelled by the most cogent reasons. 'I cannot legislate,' said Lord Kenyon, 'but by my industry I can discover what my predecessors have done, and I will tread in their footsteps.'"¹

§ 315. Where a rule of property has been established it is deemed better to let it stand, although subsequent experience may show it to be erroneous. It can only be changed by a new act without unsettling titles.² The supreme court of Indiana said: "There are some questions in law, the final settlement of which is vastly more important than how they are settled; and among these are rules of property long recognized and acted upon, and under which rights have vested. A decision cannot be changed without producing confusion in titles, as the ruling would necessarily relate back to the time when the law came in force. If a canon of descent, for instance, as settled by the determination of the court of last resort, is unjust, or even distasteful, the legislature can change it by a new statute, without interfering with vested rights."³ It was objected in a case that a judicial sale had been ordered on a petition which did not show the jurisdictional facts.⁴ But upon the same principles involved in the objection two former cases had decided in effect that such omission was a mere irregularity; it was deemed a rule of property, and ought not to be disturbed. The legislature had passed a special act authorizing a guardian named to sell the lands of his ward, and the question of the validity of that sale was afterwards solemnly adjudicated and sustained. After a period of eleven years the court said of that decision, "every consideration of policy admonishes us, even if we believed that there was room to doubt as to the correctness of the decision in that case, not

¹ Baker v. Lorillard, 4 N. Y. 261.

St. 13; Boon v. Bowers, 30 Miss. 246;

² York's Appeal, 17 W. N. C. 33; S. C.

Seale v. Mitchell, 5 Cal. 401.

110 Pa. St. 69; Hering v. Chambers,

³ Rockhill v. Nelson, 24 Ind. 422;

103 Pa. St. 172, 176; Tuttle v. Griffin,

Ewing v. Ewing, id. 470.

64 Iowa, 455; Baue v. Wick, 6 Ohio

⁴ Field's Heirs v. Goldsby, 28 Ala. 218.

to enter upon a review of it nor to disturb it at this late day. All questions which have an important bearing upon titles to property, and which have, as in this instance, been once carefully considered and solemnly settled by the court, ought not to be treated as open for future investigation, unless it shall appear that the evil resulting from the principle established must be productive of greater mischief to the community than can possibly ensue from disregarding the previous adjudications upon the subject.¹

§ 316. No absolute rule can be given as to when *stare decisis* is imperative, so much depends on the particular case in which it may be invoked. For it must be confessed that hasty and ill-considered decisions are sometimes made, and even of such a nature as to become rules of property; decisions so obviously against law that they ought, in vindication of the law, to be overruled, and in a multitude of instances have been.² When this has occurred, however, there has been a thoughtful comparison of the consequences; and when such adjudications have been departed from, it has been because the benefits of adherence to the law are anticipated to be more than sufficient to counterbalance the hardship to those who will be disappointed by annulling the aberrant case or cases.³ Courts are not required, in the exercise of their wide judicial discretion, to overturn principles which have been considered and acted upon as correct, and thereby disturb contracts and property, and involve everything in inexplicable confusion, simply because some abstract principle of law has been incorrectly established in the outset.⁴ The maxim of *stare decisis* is one of great importance in the administration of justice, and ought not to be departed from for slight or trivial causes; yet this rule has never been carried so far as to preclude courts from investigating former decisions when the question has not undergone repeated examination and become well settled.⁵

§ 317. "The two grounds of justification," says Mr. Wells, "in departing from even a single decision which has become a

¹ *Boon v. Bowers*, 30 Miss. 246; *Neal*, 6 Pet. 291; *Hall v. Newcomb*, S. C. 64 Am. Dec. 159. *3 Hill*, 233; S. C. 7 id. 416.

² *Chesnut v. Shane*, 16 Ohio, 599; ³ *Id.*; *Grubbs v. State*, 24 Ind. 295.

S. C. 47 Am. Dec. 387; *Hickman v.* ⁴ *Welch v. Sullivan*, 8 Cal. 188.

Gaither, 2 Yerg. 200. See *Green v.* ⁵ *Bowers v. Green*, 1 Scam. 42.

general rule of property within a certain line of dealing, are (1) the necessity of preventing further injustice; (2) the necessity of vindicating clear and obvious principles of law. When these do not exist, a proposition for change cannot be entertained."¹ If infinite mischief would ensue should the court, in the construction of a statute, adopt a different rule from that which has been long established in the state, it will yield the construction which it would otherwise put on the words of the statute to that interpretation which has been universally received and long acted upon.² This maxim has been applied to decisions construing constitutions as well as other written laws. The following excerpt from a dissenting opinion of Paine, J., in a Wisconsin case, explains very clearly, in accordance with the general course of authority, the considerations which weigh to induce a greater or less persistent adherence to previous adjudications:

"The following positions are fairly to be derived from the authorities, and are clearly supported by reason: That the maxim *stare decisis* has greater or less force according to the nature of the question decided; that there are many questions upon which there is no objection to a change of decision other than grows out of those general considerations which favor certainty and stability in the law. There are questions where the decisions did not constitute a business rule, and where a change would invalidate no business transactions conducted upon the faith of the first adjudication. As an illustration take a case involving personal liberty: A party restrained of his liberty claims to be discharged under some constitutional provision; the court erroneously decides against him; the same question arises again. To change such a decision would destroy no rights acquired in the past; it would only give better protection in the future. The maxim in such a case would be entitled to but very little weight, and mere regard for stability ought not to be allowed to prevent a more perfect administration of justice. But where a decision relates to certain modes of doing business, which business enters largely into the daily transactions of the people of a state, and a

¹ Wells on Stare Decisis, § 598.

Cranch, 32; Giblin v. Jordan, 6 Cal.

² Van Loon v. Lyon, 4 Daly, 149; 416.

McKeen v. Delancy's Lessee, 5

change of decision must necessarily invalidate everything done in the mode prescribed by the first, then, when a decision has been once made and acted on for any considerable length of time, the maxim becomes imperative, and no court is at liberty to change. Take a case involving the validity of certain modes of executing deeds or wills. A decision is made, and the people act upon it for years, executing all such instruments in the manner prescribed. After that some one raises the question again and contends that the first decision is erroneous. Admit it to have been so; would the court be justified in overruling it? Every man, whether lawyer or layman, would answer no. It is true that as to such questions it was more a matter of indifference how they were first decided, than as to one like the present involving a constitutional principle designed to secure so just an end as equality of taxation. And I admit that this fact makes some distinction between the cases, and might justify a struggle to regain the lost ground of constitutional justice, even at the expense of some inconvenience and hardship. But it is equally as true in this case as in those supposed that the decision constituted a business rule, involving the validity of the entire revenue transactions of the state, and of all the thousands of private contracts growing out of them, and having been acquiesced in and acted on for such length of time, the error had passed beyond the reach of judicial remedy. No case can be found where any court ever changed a decision once made, conceding that the change must have such an effect. On the contrary, there are many cases which would almost sustain the proposition that the practical construction of mere administrative officers, which has been acquiesced in for a long time, without any judicial decision whatever, should, in such cases, be followed, though in conflict with the constitution. I think that doctrine has been carried too far; but where there has been a judicial decision, the reason upon which it is based then becomes unanswerable. It is said that in looking at the consequences of a change to see whether we are at liberty to make it, we are setting aside the constitution, upon grounds of policy. . . . The maxim *stare decisis*, it is true, rests upon grounds of policy. But it is equally as true that the constitution itself intended that that maxim should exist in the judicial system which it established, and

should be applied to decisions relating to its own construction, as well as to those relating to any other legal questions.”¹

§ 318. What decisions involve a rule upon which continuing rights will accrue, and needing adherence to them for the protection of such rights, is determined from the nature of the principle decided. An adjudication of a nature to be a rule of property will be presumed after the lapse of time to have been acted upon, so that rights have actually vested under it and are dependent upon it. To presume otherwise is to assume that the law is idle and vain, not practical.² The decisions to be upheld as precedents embrace not only the point necessarily involved in them and decided by them, but also the principles which subsequent cases declare to be decided by them.³ “Courts seldom undertake in any case to pass upon the validity of legislation where the question is not made by the parties; their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then, they will construe the acts presented for consideration, define their meaning, and enforce their provisions. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court upon the constitutionality of the acts, because that point might have been raised and determined in the first instance.”⁴

§ 319. A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of those rights. To divest them by a change of the construction is to legislate retroactively.⁵ The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded so as to affect the obligations of exist-

¹ *Kneeland v. Milwaukee*, 15 Wis. 454. See *Willis v. Owen*, 43 Tex. 48;

Louisville, etc. R. R. Co. v. County Court, 1 Sneed, 668.

² *Davidson v. Allen*, 36 Miss. 419.

³ *Wells on Stare Decisis*, § 601; *Matheson v. Hearin*, 29 Ala. 210.

⁴ *Boyd v. Alabama*, 94 U. S. 645, 648.

⁵ *Rowan v. Runnels*, 5 How. 134; *Douglass v. Pike Co.* 101 U. S. 677, 686; *Ohio Life Ins. & Tr. Co. v. Debolt*, 16 How. 416; *Supervisors v. United States*, 18 Wall. 71; *Fairfield v. County of Gallatin*, 100 U. S. 47.

ing contracts made on the faith of the earlier adjudications. "The sound and true rule is," says Taney, C. J., "that if the contract when made was valid by the laws of the state, as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state or decision of its courts altering the construction of the law."¹ "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same, in its effect on contracts, as an amendment of the law by means of a legislative enactment."²

§ 320. The maxim of *stare decisis* applies only to decisions on points arising and decided in causes; it has been held not to extend to reasoning, illustrations and references in opinions. The precedent includes the conclusions only upon questions which the case contained, and which were decided.³ "The members of a court," says Downey, C. J., "often agree in a decision, but differ decidedly as to the reasons or principles by which their minds have been led to a common conclusion. It is therefore the conclusion only, and not the process by which it has been reached, which is the decision of the court, and which has the force of precedent in other cases. The reasoning adopted, the analogies and illustrations presented in real or supposed cases, in an opinion, may be used as argument in other cases, but not as authority. In these the whole court may concur, or they may not. So of the principle concurred in, and laid down as governing the point in judgment, so far as it goes or seems to go beyond the case under consideration."⁴ The precedent must include necessarily the logic and reasoning of a syllogistic legal proposition of which the judgment is the conclusion.⁵ If the major premise, which is the law of the case, may be stated in several forms, and is stated differently by different members of the

¹ Ohio L. Ins. & Tr. Co. v. Debolt, 16 How. 416, 432.

² Douglass v. Pike Co. 101 U. S. 677, 687; Tayloe v. Thomson, 5 Pet. 378; Geddes v. Brown, 5 Phila. 180.

³ Lucas v. Commissioners, 44 Ind. 541.

⁴ Lucas v. Commissioners, 44 Ind. 524; Louisville, etc. R. R. Co. v. County Court, 1 Sneed, 637; Carroll v. Carroll, 16 How. 275.

⁵ 3 Black. Com. 396; Lamphear v. Buckingham, 33 Conn. 237.

court who join in the conclusion, this diversity will impair the force of the precedent. A judicial decision is to be regarded as conclusive, not only of the point presented in argument and expressly decided, but of every other proposition necessarily involved in reaching the conclusion expressed.¹ An opinion of the supreme court is the law of the case in which it is pronounced on a new trial, and in that court on a second review.²

§ 321. **Effects and consequences.**—In the construction of statutes, where the language is obscure or ambiguous, or for any reason its precise intent is not plain and cannot be made so by the context or other statutes *in pari materia*, the effects and consequences enter with more or less force into consideration; nor are they entirely ignored in the reading of any statute. But when the terms of a statute are plain, unambiguous and explicit, the courts are not at liberty to go outside of the language to search for a meaning which it does not reasonably bear.³ When there is no express repeal none is presumed to be intended; and the effect of a new statute in conjunction with other statutes, with reference to established institutions, systems and policies, is always in view.⁴ It is pre-

¹ *Bloodgood v. Grasey*, 31 Ala. 575, 587. In this case Walker, J., said: "It was contended in the discussion of this case that the only point decided, or in the mind of the court, was that made in argument. The result of that position would be to take from judicial decisions, where there was no opinion, the authority of an adjudication upon all propositions which were too plain or too well recognized by the bench and bar to be questioned; and thus the universal and undisputed sanction of a legal principle would become a barrier to proof by judicial decisions of its existence. It better accords with reason to regard a judicial tribunal as asserting, and intending to assert, every proposition which is indispensable to the conclusion expressed, and neces-

sarily involved in it; at least, when the contrary does not appear."

² *Dewey v. Gray*, 2 Cal. 374; *Pane v. Wick*, 6 Ohio St. 13; *Gray v. Gray*, 34 Ga. 499; *Thomason v. Dill*, 34 Ala. 175; *Stein v. Ashby*, 30 id. 363; *Huffman v. State*, id. 532; *Pearson v. Darrington*, 32 id. 227; *Stacy v. Vermont*, etc. R. R. Co. 32 Vt. 551; *Parker v. Pomeroy*, 2 Wis. 112.

³ *United States v. The Sadie*, 41 Fed. Rep. 396.

⁴ *Greenhow v. James*, 80 Va. 636; *Baxter v. Tripp*, 12 R. I. 310; *Grenada Co. Supervisors v. Brogden*, 112 U. S. 261; *Att'y-Gen'l v. Smith*, 31 Mich. 359; *Blackwood v. Van Vleit*, 30 id. 118; *Rowley v. Stray*, 32 id. 70; *Burnham v. Onderdonk*, 41 N. Y. 425; *Fort v. Burch*, 6 Barb. 60; *Minet v. Leman*, 20 Beav. 269; *Lindsey v. Rottaken*, 32 Ark. 619.

sumed that there is no intention to affect them any further than the plain terms of the new statute require.

Although the word "citizen," used in its most common and comprehensive sense, includes women, yet an act providing for the admission of a citizen of proper residence, age and character to practice as an attorney has been held not to include women, because such construction would be a departure from the antecedent policy of the legislature, and introduce a fundamental change in long-established principles.¹ Courts will be very reluctant to overturn them, or essentially modify them by extending the operation of a dubious statute.

§ 322. "In the consideration of the provisions of any statute, they ought to receive such a reasonable construction, if the words and subject-matter will admit of it, as that the existing rights of the public, or of individuals, be not infringed."² Considerations of what is reasonable,³ convenient,⁴ or causes

¹ Robinson's Case, 131 Mass. 376; Bradwell's Case, 55 Ill. 535; Goodell's Case, 39 Wis. 232; Bradwell v. State, 16 Wall. 130. See Opinion of Justices, 136 Mass. 578.

² Wales v. Stetson, 2 Mass. 146.

³ Haney v. State, 34 Ark. 263; State v. De Gress, 53 Tex. 387; Quin v. O'Keefe, 10 Ir. C. L. (N. S.) 411; Church v. Crocker, 3 Mass. 17, 21; Commonwealth v. Cambridge, 20 Pick. 267, 272; Goddard v. Boston, id. 407; Commonwealth v. Bailly, 13 Allen, 541, 545; Paddock v. Cameron, 8 Cow. 212; Van Rensselaer v. Sheriff, 1 id. 443, 456; Kephart v. Farmers', etc. Bank, 4 Mich. 602; Green v. Graves, 1 Doug. (Mich.) 351; Dixon v. Caledonian R'y Co. L. R. 5 App. Cas. 827; Glenn v. Lopez, 1 Harper, 105; Neenan v. Smith, 50 Mo. 525. A statute will not be construed to require a vain thing. Butler v. Rochester, 4 Hun. 321. When it requires notice, it will require a reasonable notice. Burden v. Stein, 25 Ala. 455. On general words reasonable limitations will be imposed. Martin v. Robinson, 67 Tex. 368, 379; McFar-

land v. Stone, 17 Vt. 173; Ricard v. Williams, 7 Wheat. 59, 115. A reasonable time has no determinate number of days or months, as applied to every case, but must be determined in each case upon all the elements of it which affect that question. Thompson v. Strickland, 52 Miss. 574.

⁴ Putnam v. Longley, 11 Pick. 489; In re Alma Spinning Co., L. R. 16 Ch. Div. 686; Shute v. Wade, 5 Yerg. 8; Horne v. Railroad Co. 1 Cold. 72, 78; Van Rensselaer v. Sheriff, 1 Cow. 443, 457. C., a German, came to this country with a woman whom he held out as his wife, with whom he lived many years as such, and by whom he had several children. He afterwards abandoned her and went away. After he had been gone eight or nine years, she, not having heard of him, and supposing him to be dead, married another man by whom she had children. After the death of this man C. returned. On the settlement of his estate a question of the legitimacy of the children of the second marriage was raised in Brower v. Bowers, 1 Abb. App. Dec. 214. Harris, J.,

hardship and injustice,¹ have a potent influence in many cases. It is always assumed that the legislature aims to promote convenience, to enact only what is reasonable and just. Therefore, when any suggested construction necessarily involves a flagrant departure from this aim, it will not be adopted if any other is possible by which such pernicious consequences can be avoided.²

A statute declaring in full force all ordinances of a city or other corporation in operation at its date does not embrace one which has been pronounced judicially to be inoperative.³ An act validating certain sales made by persons in a fiduciary capacity, in the event of any irregularity or defect existing in the judicial appointment or qualification of such trustee, cures

said: "I am inclined to think that the fact that they came from Germany, professing to be husband and wife, that they lived together in that relation for several years, and had children who were acknowledged as the issue of such a marriage, is sufficient evidence of a marriage in fact, even though it may have the effect to invalidate a subsequent marriage. A very considerable portion of the population of our country is made up of European emigrants. Of these a large proportion are married when they arrive here; and even when marriages are celebrated here, so migratory are the habits of the American people that in many cases it would be no easy thing to prove a marriage by those who witnessed the ceremony. It is well remarked by Tilghman, C. J., in *Chambers v. Dickson*, 2 Serg. & R. 475, that, in establishing rules of evidence, arguments from inconvenience have just weight. And we must pay great attention to the situation of our own country, which is not in all instances adapted to regulations that are very proper in other countries."

¹ *Plumstead Board of Works v. Spackman*, L. R. 13 Q. B. Div. 878;

Lombard v. Trustees, etc. 73 Ga. 322; *Collins v. Carman*, 5 Md. 503.

² *Metropolitan Asylum Dist. v. Hill*, L. R. 6 Ap. Cas. 208; *Richards v. Dagget*, 4 Mass. 537; *State v. Wiltz*, 11 La. Ann. 439; *Bell v. Jones*, 10 Md. 322; *Robinson v. Varnell*, 16 Tex. 382; *Ham v. McClaws*, 1 Bay, 92; *United States v. Hunter*, Pet. C. C. 10; *Flint R. St. Co. v. Foster*, 5 Ga. 201; *McLelland v. Shaw*, 15 Tex. 319; *Reg. v. Mallow Union*, 12 Ir. C. L. (N. S.) 35; *River Wear Com'rs v. Adamson*, L. R. 2 Ap. Cas. 743; *Mersey Steel & Ir. Co. v. Naylor*, L. R. 9 Q. B. Div. 648; *Sturges v. Crowninshield*, 4 Wheat. 202; *Plumstead Board of Works v. Spackman*, L. R. 13 Q. B. Div. 878; *Mayor, etc. v. Moore*, 6 H. & J. 381; *Buckner v. Real Estate Bank*, 5 Ark. 536; *Thayer v. Dudley*, 3 Mass. 296; *Holbrook v. Holbrook*, 1 Pick. 248, 254; *Mendon v. County of Worcester*, 10 Pick. 235; *Eaton v. Green*, 22 id. 526, 532; *Holbrook v. Bliss*, 9 Allen, 69, 75; *Commonwealth v. Munson*, 127 Mass. 459; *Kerlin v. Bull*, 1 Dall. (Pa.) 175, 178; *Jersey Co. v. Davison*, 29 N. J. L. 415.

³ *Allen v. Savannah*, 9 Ga. 286; *Bridge v. Branch*, L. R. 1 C. P. Div. 633.

only such defects as occur in proceedings of courts which have jurisdiction of the subject-matter. It does not validate a sale made by a trustee who was irregularly and defectively appointed or qualified by a court which had no jurisdiction to make such appointment.¹ A statute authorizing an officer to convey to the state certain lands held by a county by virtue of tax deeds issued upon sales for delinquent taxes theretofore made, was held not to apply to lands of which the tax deeds were void upon their face.² This conclusion was adhered to, though it was shown that there were no lands to which the statute could apply.³

§ 323. A construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither, or not in so great a degree, unless the terms of the instrument absolutely require such preference. Of two constructions, either of which is warranted by the words of the amendment of a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended.⁴ A statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention.⁵

§ 324. Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice; to favor public convenience, and to oppose all prejudice to public interests.⁶ The considerations of evil

¹ Halderman v. Young, 107 Pa. St. 324.

² Easley v. Whipple, 57 Wis. 485; Haseltine v. Hewitt, 61 id. 121.

³ Id.

⁴ Griffin's Case, Chase's Dec. 364.

⁵ Walton, Ex parte, L. R. 17 Ch. Div. 746.

⁶ Van Fleet v. Van Fleet, 49 Mich. 610; Neenan v. Smith, 50 Mo. 525; People v. Burns, 5 Mich. 114; Jersey Co. v. Davison, 29 N. J. L. 415; Opinion of Justices, 7 Mass. 523; Kerlin v. Bull, 1 Dall. (Pa.) 175; Stewart v. Keemle, 4 S. & R. 72; McCloskey v.

McConnell, 9 Watts, 17; Welch v. Kline, 57 Pa. St. 428; Sinnott v. Whitechapel, 3 C. B. (N. S.) 674; Patten v. Rhymer, 3 E. & E. 1; Whistler v. Forster, 14 C. B. (N. S.) 248; Stone v. Yeovil, L. R. 1 C. P. Div. 691; Austin v. Bunyard, 6 B. & S. 687; Gatty v. Fry, L. R. 2 Ex. Div. 265; Gibson v. Jenney, 15 Mass. 205; Smith v. People, 47 N. Y. 330; Bulkley v. Eckert, 3 Pa. St. 368; Gore v. Brazier, 3 Mass. 523; Wassell v. Tunnah, 25 Ark. 101; Duquesne Savings Bank's Appeal, 96 Pa. St. 298; Kelly T. v. Union T. 5 Watts & S. 535; Nicholas v. Phelps, 15 Pa.

and hardship may properly exert an influence in giving a construction to a statute when its language is ambiguous or uncertain and doubtful, but not when it is plain and explicit.¹ The same may be said of the consideration of convenience, and in fact of any consequences. If the intention is expressed so plainly as to exclude all controversy, and is one not controlled or affected by any provision of the constitution, it is the law, and courts have no concern with the effects and consequences; their simple duty is to execute it.² The argument of inconvenience is very strong when the statute is ambiguous and fairly open to two constructions. Then the argument of inconvenience, like the argument of absurdity, may be used with great force; but when the construction is clear beyond controversy, it is no answer to say that there are some consequences which will cause inconvenience which were probably not contemplated by the framers.³ The master of the rolls said: "With regard to inconvenience I think that is a most dangerous doctrine. I agree if the inconvenience is not only great but what I may call absurd inconvenience, by reading an act in its ordinary sense, whereas if you read it in a manner in which it is capable of being read, though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning."⁴ The same has been said of listening to hardship.⁵ Such arguments are applicable only to considerations of convenience and hardship which generally spring from a particular construction, not such as may occur

St. 36; *Mayor, etc. v. Root*, 8 Md. 95; *Learned v. Corley*, 43 Miss. 687. See *Pittsburg, etc. R. R. Co. v. S. W. Pa.*

R'y Co. 77 Pa. St. 173; *Samuels v. Commonwealth*, 10 Bush, 491; *Coy v. Coy*, 15 Minn. 119; *Swift's Appeal*, 111 Pa. St. 516; *S. C. 2 Cent. Rep.* 311; *Rex v. Dorsetshire*, 15 East, 200; *Rex v. Yorkshire*, 1 Doug. 192; *In re Wainwright*, 1 Phil. 258; *Quin v. O'Keefe*, 10 Ir. C. L. (N. S.) 411, 412.

¹ *Collins v. Carman*, 5 Md. 503; *Johnson v. R. R. Co.* 49 N. Y. 456. ² *Blake v. Heyward*, Bailey Eq. 208; *Learned v. Corley*, 43 Miss. 687. See *Dudley v. Reynolds*, 1 Kan. 285. ³ *In re Alma Spinning Co.*, L. R. 16 Ch. Div. 686. ⁴ *Reg. v. Tonbridge Overseers*, L. R. 13 Q. B. Div. 342; *Rex v. Poor Law Com'rs*, 6 Ad. & E. 1, 7. See *Rex v. Ramsgate*, 6 B. & C. 712, 715; *Rex v. Barham*, 8 B. & C. 99; *Lamond v. Eiffe*, 3 Q. B. 910; *Everett v. Wells*, 2 Scott, N. R. 531; *Newell v. People*, 7 N. Y. 97; *Bidwell v. Whitaker*, 1 Mich. 469, 479. ⁵ *Munro v. Butt*, 8 E. & B. 754.

¹ *Collins v. Carman*, 5 Md. 503; *Johnson v. R. R. Co.* 49 N. Y. 456.

² *Blake v. Heyward*, Bailey Eq. 208;

³ *In re Alma Spinning Co.*, L. R. 16 Ch. Div. 686.

⁵ *Munro v. Butt*, 8 E. & B. 754.

in an individual or exceptional case.¹ An act should be so construed as to bring it, if possible, within the legislative authority;² to limit its general words to the subject-matter or object of the act; as including, justifying or requiring lawful acts and regular proceedings.

§ 325. *Expressio unius est exclusio alterius*.— This maxim, like all rules of construction, is applicable under certain conditions to determine the intention of the law-maker when it is not otherwise manifest. Under these conditions it leads to safe and satisfactory conclusions; but otherwise the expression of one or more things is not a negation or exclusion of other things. What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provisions in the particular act. The maxim is applicable to a statutory provision which grants originally a power or right. In such cases the power or right originates with the statute, and exists only to the extent plainly granted; the right while inchoate, and the power so far as not exercised, cease, if the statute be repealed, and if the statute provides the mode in which they shall be exercised, that mode must be pursued and no other. This conclusion is almost self-evident; for since the statute creates and regulates, there is no ground for claiming or proceeding except according to it.³ In other words, 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.⁴ “The rule is certain,” said Lord Mansfield, “that where a statute creates a new offense, by prohibiting and making unlawful anything which was lawful

¹ Endl. on St. § 263.

² *Farnum v. Blackstone Canal Corp.* 1 Sumn. 46; *Sage v. Brooklyn*, 89 N. Y. 189; *People v. McClave*, 99 N. Y. 83.

³ *Guerard v. Polhill*, R. M. Charl. 237; *post*, §§ 240, 327.

⁴ 1 Com. Dig. 44-48; *Foster's Case*, 11 Rep. 56b, 64; 9 Bac. Abr. 259, 260; *Rex v. Robinson*, 2 Burr. 803; *Bailey v. Bryan*, 3 Jones (N. C.), 357; *Lang v. Scott*, 1 Blackf. 405; *Camden v. Allen*, 26 N. J. L. 398; *Almy v. Harris*, 5 John. 175; *Gedney v. Tewks-*

bury, 3 Mass. 307; *Smith v. Drew*, 5 id. 514; *Dudley v. Mayhew*, 3 N. Y. 9; *Wiley v. Yale*, 1 Met. 553; *Crosby v. Bennett*, 7 id. 17; *Smith v. Lockwood*, 13 Barb. 209; *Thurston v. Prentiss*, 1 Mich. 193; *Conwell v. Hagerstown Canal Co.* 2 Ind. 588; *McCormack v. Terre Haute, etc. R. R. Co.* 9 Ind. 283; *Countess of Rothes v. Kirkcaldy Water-works Com'rs*, L. R. 7 Ap. Cas. 706; *New Haven v. Whitney*, 36 Conn. 373; *Smith v. Stevens*, 10 Wall. 321; *Dist. Tp. of Dubuque v. Dubuque*, 7 Iowa, 262.

before, and appoints a specific remedy against such new offense (not antecedently unlawful), by a particular sanction and particular method of proceeding, that particular method must be pursued and no other."¹ Where a statute authorizes a public work, and points out a mode in which parties injured thereby may obtain compensation, that remedy is exclusive;² and the scope of the remedy or points of compensation are confined to the statutory limits.³ In Arkansas the whole subject of interest, so far as regards contracts for the payment of money, express or implied, was regulated by statute, and it was held these provisions excluded its allowance in other cases than those enumerated.⁴ A statute prohibited the sale without license of certain specified liquors, and this specification excluded all others from the prohibition, so that they were unaffected by the requirement to obtain license.⁵ When a statute, defining an offense, designates one class of persons as subject to its penalties, all other persons are deemed to be exempted.⁶ As a general rule the exclusion of one subject or thing in a statute is the inclusion of all other things. Therefore the exclusion of the power of the court to impose a fine of less than \$100, by implication gives the power to impose a fine of more than that sum.⁷ A grant contained several restrictions; a subsequent statute repeated the grant in general terms and repealed all inconsistent acts, with a saving clause including one of the restrictions; it was held that all the other restrictions were repealed.⁸ A general statute provided a gen-

¹Rex v. Robinson, 2 Burr. at p. 803; Castle's Case, Cro. Jac. 644; Cas. 706.

Stephens v. Watson, 1 Salk. 45; ⁴Watkins v. Wassell, 20 Ark. 410, 420.

W. Saund. 135, note 4; id. 250, note 3; State v. Loftin, 2 Dev. & Bat. 31; ⁵Feldman v. Morrison, 1 Ill. App. 460.

State v. Corwin, 4 Mo. 609; Camden v. Allen, 26 N. J. L. 398; Smith v. Lockwood, 13 Barb. 209; New Albany, etc. R. R. Co. v. Connelly, 7 Ind. 32; Victory v. Fitzpatrick, 8 id. 281; United States v. Dickey, Morris (Iowa), 412. ⁶Howell v. Stewart, 54 Mo. 400; Jaques v. Golightly, 2 W. Bl. 1073; State v. Jaeger, 63 Mo. 403, 409.

⁷Hankins v. People, 106 Ill. 628; Drake v. State, 5 Tex. App. 649; Chiles v. State, 2 id. 37. See Stimpson v. Pond, 2 Curtis, 502.

⁸Calving v. Baldwin, 4 Wend. 667. ⁵McRoberts v. Washburne, 10 Minn.

³Countess of Rothes v. Kirkcaldy 23.

eral saving of rights, penalties and duties. An independent statute provided penalties for selling intoxicating liquors. This act was subsequently repealed with a special saving of pending actions. This saving was held to be governed by the maxim under consideration. Doubtless an absolute repeal without any express saving would have let in the general saving, but the repeal being qualified by a provision in the repealing act, which was narrower than the general saving, and which could have no effect unless it was an exclusive effect, it showed the intention of the legislature to exclude any other saving.¹ It is moreover within this cognate principle, that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it.² Accordingly where a legislative act contained two sets of provisions, one giving specific and precise directions to do a particular thing, and the other in general terms prohibiting certain acts, which would, in the general sense of the words used, include the particular act before authorized, then the general clause does not control or affect the specific enactment.³ Every part of a statute must be viewed in connection with the whole, so as to make all its parts harmonize, if practicable, and give a sensible and intelligent effect to each. It is not presumed that the legislature intended any part of a statute to be without meaning.⁴ An act which extended *one* of the previous penal regulations for the government of moneyed corporations to the free banks, making it a misdemeanor for them to issue bills or notes on time or interest, was in truth a legislative assertion, binding on the judiciary, that such regulation did not previously apply, and that none, except the particular one so expressly selected, should thereafter apply, to the free banks.⁵

§ 326. Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. Such affirmative legislation, and any other which introduces a new rule, imply

¹ State v. Showers, 34 Kan. 269.

² Felt v. Felt, 19 Wis. 196.

³ State v. Trenton, 38 N. J. L. 64.

⁴ Id.; McCartee v. Orphan Asylum,

⁹ Cow. 437; *ante*, § 249.

⁵ Curtis v. Leavitt, 17 Barb. 309.

a negative.¹ It was required by a statute that "all sales by any sheriff or other officer, by virtue of any execution or other process, shall be made at the court-house of the county, except when personal property too cumbersome to be removed shall be levied on, . . . and, also, except where cattle, hogs, sheep or stock, other than horses and mules, are levied on." These exceptions were held to exclude others, and therefore to render the statute imperative and mandatory.² A provision in a statute that a failure to give a specified notice shall not invalidate an election does not, however, imply that all the other requirements must be complied with as mandatory conditions.³

§ 327. Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others; there is then a natural inference that its application is not intended to be general.⁴ Thus, where a statute enumerates the cases in which a married woman may sue, she is limited to those cases.⁵ An act providing for levying the poor rate specified coal mines only, and it was therefore held that no other mines were ratable.⁶ An act allowed a house and land to be joined together for the purpose of conferring a qualification; it was held that two different buildings could not be joined for the same purpose.⁷ The enumeration of powers granted to national banks in the eighth section of the national bank act is exclusive; being granted the power to loan money on *personal* security, such banks are precluded from loaning on real estate mortgages; and mortgages to such banks to secure prior loans being expressly permitted, it was held that none given to secure future loans are valid.⁸ When a statute specifies the effects of a certain provision, courts will presume that all the effects intended by the law-maker are stated.⁹ Where an act

¹Smith v. Stevens, 10 Wall. 821; New Haven v. Whitney, 36 Conn. 373; District Tp of Dubuque v. Dubuque, 7 Iowa, 262; Childs v. Smith, 55 Barb. 45; Rogers v. Kennard, 54 Tex. 30; Rich v. Rayle, 2 Humph. 404. See Intoxicating Liquor Cases, 25 Kan. 751.

²Koch v. Bridges, 45 Miss. 247.

³Taylor v. Taylor, 10 Minn. 107.

⁴Wilb. on St. 190.

⁵Miller v. Miller, 44 Pa. St. 170, 172.

⁶Reg. v. Seale, 5 E. & B. 1.

⁷Dewhurst v. Feilden, 7 M. & G. 182.

⁸Fowler v. Scully, 72 Pa. St. 456, 461. This construction is not disapproved, but only the government can raise the objection to the practice of the bank. Nat. Bank v. Matthews, 98 U. S. 621; Nat. Bank v. Whitney, 103 id. 99.

⁹Perkins v. Thornburgh, 10 Cal. 189, 191.

expressly repeals a specified portion of another act, it follows that, in the judgment of the legislature, no further repeal was necessary.¹ The repeal of one clause of a section raises a clear implication that nothing else was intended.² This application of the rule is not very important, for an implied repeal may result from an irreconcilable contradiction, or from other evidence of an intent to extend the repeal or a saving from a general repeal.³ When a revisory act prescribes its operation upon a previous act, it will have no other effect.⁴ A court of a justice of the peace, or other magistrate having only such jurisdiction as is granted by statute, and whose procedure is regulated thereby, has only such jurisdiction as is granted expressly or by necessary implication.⁵ And those particulars of procedure which the statutes regulate are to be substantially followed, and no others are essential.⁶ The appellate jurisdiction of the federal supreme court is conferred by the constitution "with such exceptions and under such regulations as congress may make;" therefore, acts of congress affirming such jurisdiction have always been construed as excepting from it all cases not expressly described and provided for. Hence, when congress enacts that that court shall have appellate jurisdiction over final decisions of the circuit courts in certain cases, the act is held to operate as a negative or exception of such jurisdiction in other cases; and the repeal of the act necessarily negatives jurisdiction under it of those cases also.⁷

§ 328. An express exception, exemption or saving excludes others.⁸ Where a general rule has been established by statute with exceptions the court will not curtail the former nor add to the latter by implication.⁹ Exceptions strengthen the

¹ *Pursell v. New York Life Ins. etc.* Co. 42 N. Y. Super. Ct. 383, 397.

² *State v. Morrow*, 26 Mo. 131, 141; *Crosby v. Patch*, 18 Cal. 438.

³ *Burnham v. Onderdonk*, 41 N. Y. 425.

⁴ *Patterson v. Tatum*, 3 Sawyer, 164.

⁵ *Wight v. Warner*, 1 Doug. (Mich.) 384; *Beach v. Botsford*, id. 199; *Clark v. Holmes*, id. 390; *Reynolds v. Orvis*, 7 Cow. 269.

⁶ *Ham v. Steamboat Hamburg*, 2 Iowa, 460; *Seavern v. State*, 6 Ohio St. 288.

⁷ *McCardle, Ex parte*, 7 Wall. 506. See *Yerger, Ex parte*, 8 id. 85.

⁸ See *Reg. v. Mallow Union*, 12 Ir. C. L. (N. S.) 40.

⁹ *Roberts v. Yarboro*, 41 Tex. 452; *Wallace v. Stevens*, 74 id. 559.

force of a general law, and enumeration weakens it as to things not expressed.¹ Power of eminent domain was granted to a railroad company to enter on land and appropriate as much of it, "except timber," as might be necessary for its purposes. "Why an exception," asked Gibson, C. J., "if the word land was not supposed to embrace everything else?" The expression of one thing is the exclusion of another; and consequently no further exception was intended."² A statute declared that "all offices, posts of profit, professions, trades and occupations, except the occupation of farmers," "shall be valued and assessed and subject to taxation;" it was held that the exception of farmers excluded any other, and that the calling of a minister of the gospel was a "profession" and taxable.³ Certain exemptions from distress for taxes being expressed in a statute, by fair implication all other property is liable.⁴ When by a declaratory provision the legislature enact that a thing may be done which before that time was lawful, and adds a proviso that nothing therein shall be so construed as to permit some matter embraced in the general provision to be done, this is an implied prohibition of such act, though before that time it was lawful.⁵

§ 329. The maxim does not apply to a statute the language of which may fairly comprehend many different cases, in which some only are expressly mentioned by way of example merely, and not as excluding others of a similar nature. So where the words used by the legislature are general and the statute is only declaratory of the common law, it will extend to other persons and things besides those actually named.⁶ If there is some special reason for mentioning one, and none for mentioning a second which is otherwise within the statute, the absence of any mention of the latter will not exclude it.⁷ The specification in the statute that either of certain acts shall be taken as an appearance does not exclude other methods of appearing which have that effect on general principles of the

¹Page v. Allen, 58 Pa. St. 338; ⁴Sherwin v. Bugbee, 16 Vt. 439, Countess of Rothes v. Kirkcaldy 445.

Water-works Com'rs, L. R. 7 Ap. 706.

⁵State v. Eskridge, 1 Swan, 413.

²Brocket v. Ohio, etc. R. R. Co. 14 Pa. St. 241, 243.

⁶Broom's Max. 664; Scaggs v. Baltimore, etc. R. R. Co. 10 Md. 268.

³Miller v. Kirkpatrick, 29 Pa. St. 226, 229.

⁷Brown v. Buzan, 24 Ind. 194.

common law.¹ The mention of one thing is not exclusive when the context shows a different intention.² The enactment of a law does not raise a presumption that it did not exist before.³ If it be an explicit provision on a given subject it does not of itself prove that the law was different before; it may have been made in affirmance of the existing law and to remove doubts.⁴

§ 330. **Presumptions.**—A legal presumption is sometimes conclusive; then no argument or consideration can be adduced to overturn it. Other presumptions are rebuttable, and good only until overthrown. A presumption therefore rests upon a matter treated as absolutely true by expedient assumption, or as probably true. The former is taken to be true because there is the highest and best evidence of it, and it is for the public convenience and security that its verity should be absolutely assumed. Other matters are presumptively true, but open to question; so that whoever claims contrary to it has the burden of argument, as against a presumption of fact he would have the burden of proof. A statute properly authenticated in the proper office is conclusively presumed to be duly enacted,⁵ except where by the fundamental law a question may be raised on extraneous evidence;⁶ that it is enacted from good motives, and no issue to the contrary is permitted.⁷ No issue of fact will be tried as to the motives of legislators voting for a law, nor to impeach it on the grounds of fraud or corruption, either at the suit of a private person or the state.⁸ Nor

¹Curtis v. McCullough, 3 Nev. 202.

²Mayor v. Davis, 6 Watts & S. 269, 278-9.

³Nunnally v. White, 3 Met. (Ky.) 584.

⁴Montville v. Haughton, 7 Conn. 543.

⁵Kilgore v. Magee, 85 Pa. St. 401; Gildewell v. Martin, 11 S. W. Rep. 882; 51 Ark. 559; State v. Algood, 10 S. W. Rep. 310; 87 Tenn. 163; Territory v. O'Connor, 41 N. W. Rep. 746; State v. Robertson, 41 Kan. 200; S. C. 21 Pac. Rep. 382; People v. Dunr, 80 Cal. 211.

⁶Ante, §§ 28-41; People v. McElroy, 40 N. W. Rep. 750.

⁷Wright v. Defrees, 8 Ind. 298;

People v. Shepard, 36 N. Y. 285; Newman, Ex parte, 9 Cal. 502.

⁸McCulloch v. State, 11 Ind. 424, 430-1; Fletcher v. Peck, 6 Cr. 87; Ex parte McCardle, 7 Wall. 506; Flint, etc. Co. v. Woodhull, 25 Mich. 99; Kountze v. Omaha, 5 Dill. 443; State v. Hays, 49 Mo. 604; People v. Bigler, 5 Cal. 23; Ex parte Newman, 9 id. 502; Harpending v. Haight, 39 id. 189; Slack v. Jacob, 8 W. Va. 612; Mayor, etc. v. State, 15 Md. 376; Johnson v. Higgins, 3 Metc. (Ky.) 566; People v. Draper, 15 N. Y. 532; State v. Fagan, 22 La. Ann. 545; State v. Cordoza, 5 S. C. 297; Hum-

is the policy, moral justice or expediency of a statute to be considered by the judiciary in determining its validity.¹

§ 331. It is not to be presumed that the legislature have assumed the existence of a fact upon which an act of legislation is based, without evidence. On the contrary, courts are bound to presume that they acted upon good and sufficient evidence, and that presumption is conclusive on the question of the validity of the act. It was so held on an objection to the validity of an act organizing a new county, that it did not contain the population required by the constitution.² It is presumed, as well on the ground of good faith as on the ground that the legislature would not do a vain thing, that it intends its acts and every part of them to be valid and capable of being carried into effect. If a statute, however, is unconstitutional it is void, and the courts have power to treat it as a nullity, and will do so, or such parts as are in contravention of the fundamental law.³ But until it is shown to be plainly and manifestly in conflict with the constitution the presumption of its validity will hold good; all doubts will be resolved in its favor. Every presumption is in favor of the validity of legislative acts, and they are to be upheld unless there is a substantial departure from the organic law.⁴ Where there is

boldt Co. v. Churchill Co. 6 Nev. 30; *Doyle v. Continental Ins. Co.* 94 U. S. 535; *Wright v. Defrees*, 8 Ind. 298; *Sunbury, etc. R. Co. v. Cooper*, 38 Pa. St. 278.

¹ *Brewer v. Blougher*, 14 Pet. 198. See *Richardson v. Crandall*, 48 N. Y. 356.

² *De Camp v. Eveland*, 19 Barb. 81; *Farmers', etc. Co. v. Chicago, etc. R. Co.* 39 Fed. Rep. 143.

³ *Winter v. Jones*, 10 Ga. 190.

⁴ *People v. Briggs*, 50 N. Y. 553; *Winter v. Montgomery*, 65 Ala. 403; *Slack v. Jacob*, 8 W. Va. 626; *Galveston, etc. R. R. Co. v. Gross*, 47 Tex. 428; *State v. Sorrells*, 15 Ark. 664; *Griffin, In re*, 25 Tex. (Supl't) 623; *Commissioners v. Ballard*, 69 N. C. 18; *Edwards v. Williamson*, 70 Ala. 145; *Quartebaum v. State*, 79 id. 1; *South*

& North Ala. R. R. Co. v. Morris, 65 Ala. 193; *People v. Bull*, 46 N. Y. 68; *Sadler v. Langham*, 34 Ala. 311; *State v. Dombaugh*, 20 Ohio St. 173; *Zeigler v. South, etc. R. R. Co.* 58 Ala. 594; *Commonwealth v. Hitchings*, 5 Gray, 485; *Newsom v. Cocke*, 44 Miss. 352; *People v. Comstock*, 78 N. Y. 356; *Louisville, etc. R. R. Co. v. County Ct.* 1 Sneed, 637; *S. C.* 62 Am. Dec. 424; *Cline v. Greenwood*, 10 Oregon, 230; *Opinion of Justices*, 22 Pick. at p. 573; *Bailey v. Commonwealth*, 11 Bush, at p. 691; *Cutts v. Hardee*, 38 Ga. 350; *People v. San Francisco, etc. R. R. Co.* 35 Cal. 606; *Commissioners v. Silvers*, 22 Ind. 491; *Morrison v. Springer*, 15 Iowa, 304; *Hartford Bridge Co. v. Union Ferry Co.* 29 Conn. 210; *Inkster v. Carver*, 16 Mich. 484; *State v. Cooper*, 5 Blackf. 258; *Santo v.*

not in the law an express limitation to the power to do a certain thing, an inference cannot be made or sustained which will defeat the object of the law.¹ "Before determining," said Lumpkin, J., "that the constitution has been plainly and palpably infringed, incautiously or otherwise, by a co-ordinate branch of the government, the best energies of our minds should be employed in putting such construction upon it as to uphold it, if possible, and carry it into effect, *ut res magis valeat quam pereat.*"²

§ 332. It is a cardinal rule that all statutes are to be so construed as to sustain rather than ignore or defeat them; to give them operation, if the language will permit, instead of treating them as meaningless: *ut res magis valeat, quam pereat.*³ Whenever an act can be so construed and applied as to avoid conflict with the constitution, and give it the force of law, this will be done.⁴ Where one construction will make a statute void for conflict with the constitution, and another would render it valid, the latter will be adopted though the former at first view is otherwise the more natural interpretation of the language.⁵ Every intendment should be made to favor the constitutionality of a statute. A provision as to officers' fees

State, 2 Iowa, 165; State v. Robinson, 1 Kan. 17; Brown v. Buzan, 24 Ind. 194; Tyler v. People, 8 Mich. 320; Mayor, etc. v. State, 15 Md. 376; Rich v. Flanders, 39 N. H. 304; Speer v. School Directors, 50 Pa. St. 150; Neal v. Roberts, 1 Dev. & Batt. L. 81; Deering v. York, etc. R. R. Co. 31 Me. 172.

¹ Cook v. Com'rs, 6 McLean, 112.

² Winter v. Jones, 10 Ga. 190.

³ Howard Association's Appeal, 70 Pa. St. 344.

⁴ Newland v. Marsh, 19 Ill. 376; Roosevelt v. Godard, 52 Barb. 533; Colwell v. May, etc. Co. 19 N. J. Eq. 245.

⁵ Slack v. Jacobs, 8 W. Va. 612; Newland v. Marsh, 19 Ill. 384; Bridges v. Shallcross, 6 W. Va. 574; Marshall v. Grimes, 41 Miss. 27; Eyre v. Jacob, 14 Gratt. 422; Commonwealth v. Gaines, 2 Va. Cas. 172; Bull v. Rowe,

13 S. C. 355; Tabor v. Cook, 15 Mich. 322; Grand River B. Co. v. Jarvis, 30 Mich. 308; Robinson v. State, 15 Tex. 311; Roosevelt v. Godard, 52 Barb. 533; Ogden v. Saunders, 12 Wheat. 270; Speer v. School Directors, 50 Pa. St. 150; Brown v. Buzan, 24 Ind. 194; State v. Intoxicating Liquors, 19 Atl. Rep. 913; New Orleans v. Salamander Ins. Co. 25 La. Ann. 650; State v. Fields, 2 Bailey, 554; Winter v. Jones, 10 Ga. 190; Read v. Levy, 30 Tex. 738. A law passed when it conflicted with the constitution in force, but in anticipation of the adoption of a new constitution which had been prepared and was awaiting the vote for its adoption. It, being in accord with the new constitution which was subsequently adopted, was held valid. Galveston, etc. R. R. Co. v. Gross, 47 Tex. 428.

should be construed as applying only to future officers rather than that the act should be set aside as infringing a prohibition of any law increasing fees of officers during their term of office.¹ When the language of a statute is clear and unambiguous a meaning different from that which the words plainly imply cannot be judicially sanctioned. Even when a court is convinced, from considerations outside of the language of the statute, that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity.² The correct rule of construction undoubtedly is, that where a law is clearly expressed the court should adhere to the literal expression without regard to consequences; then every construction derived from a consideration of its reason and spirit should be discarded.³ It is nevertheless presumed that the legislature do not intend absurdity, inconvenience or injustice. While courts are not at liberty to set aside a statutory provision on this presumption, where the intention is plain and unmistakable, they will presume, when the words are not precise and clear, that some exception or qualification was intended to avoid such consequences; and such construction will be adopted as appears most reasonable and best suited to accomplish the objects of the statute.⁴

§ 333. It is presumed that the legislature is acquainted with the law; that it has a knowledge of the state of it upon the subjects upon which it legislates;⁵ that it is informed of previous legislation⁶ and the construction it has received.⁷ It necessarily results from the rules of construction with reference

¹ *Kerrigan v. Force*, 68 N. Y. 381.

² *Smith v. State*, 66 Md. 215; *Woodbury v. Berry*, 18 Ohio St. 456; *Bradbury v. Wagenhorst*, 54 Pa. St. 180.

³ *Bennett v. Worthington*, 24 Ark. 487; *Sneed v. Commonwealth*, 6 Dana, 338.

⁴ *Commonwealth v. Kimball*, 24 Pick. 366, 370; *Perry County v. Jefferson Co.* 94 Ill. 214, 220; *United States v. Kirby*, 7 Wall. 486; *Oates v. National Bank*, 100 U. S. 239; *Foley v. Bourq*, 10 La. Ann. 129; *Gilkey v.*

Cook, 60 Wis. 133; *Philadelphia v. Ridge Ave. R'y Co.* 102 Pa. St. 190, 196.

⁵ *Reg. v. Watford*, 9 Q. B. at p. 635; *Jones v. Brown*, 2 Ex. 332; *Phelan v. Johnson*, 7 Ir. L. at p. 535.

⁶ *Bradbury v. Wagenhorst*, 54 Pa. St. 180, 182; *Tuxbury's Appeal*, 67 Me. 267; *Howard Association's Appeal*, 70 Pa. St. 344.

⁷ *O'Byrnes v. State*, 51 Ala. 25, 27; *Banks, Ex parte*, 28 id. 28; *Bloodgood v. Grasey*, 31 id. 575.

to the common law that the legislature is presumed to be familiar with it.¹ It has been held that the legislature is presumed to know the existence of the difference between the practice in bankruptcy and the practice in chancery; that the onus is clearly thrown on those who assert the contrary.² It has been suggested that this is more an expedient conclusion than a presumption of fact.³ A judicial construction of a statute of long standing has force as a precedent from the presumption that the legislature is aware of it, and its silence a tacit admission that such construction is correct.⁴ The reenactment of a statute after a judicial construction of its meaning is to be regarded as a legislative adoption of the statute as thus construed.⁵ So, where the terms of a statute which has received a judicial construction are used in a later statute, whether passed by the legislature of the same state or country, or by that of another, that construction is to be given to the later statute;⁶ for if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effectuate that intention.⁷

It is presumed that the legislature does not intend to make any change in the existing law beyond what is expressly declared.⁸ Hence repeals by implication are recognized only when there is an unavoidable contradiction.⁹ And for a like reason statutes in derogation of the common law are strictly

¹ See *Jones v. Dexter*, 8 Fla. 276, 286.

² *Kellock's Case*, L. R. 3 Ch. at pp. 781, 782.

³ *Wilb. on St.* 13.

⁴ *Phelan v. Johnson*, *supra*.

⁵ *Cota v. Ross*, 66 Me. 161; *Tuxbury's Appeal*, 67 Me. 267.

⁶ *Commonwealth v. Hartnett*, 3 Gray, 450.

⁷ *Id.*; 6 Dane Abr. 613; *Kirkpatrick v. Gibson's Ex'r*, 2 Brock. 388; *Pennock v. Dialogue*, 2 Pet. 18; *Adams v. Field*, 21 Vt. 266; *Whitcomb v. Rood*, 20 id. 52; *Rutland v. Mendon*, 1 Pick. 154; *Myrick v. Hasey*, 27 Me. 17; *The Abbotsford*, 98 U. S. 440;

O'Byrnes v. State, 51 Ala. 25; *Tomson v. Ward*, 1 N. H. 9; *Mooers v. Bunker*, 29 N. H. 420; *Frink v. Pond*, 46 id. 125; *Hakes v. Peck*, 30 How. Pr. 104; *Bank of Mobile v. Meagher*, 33 Ala. 622; *Re Murphy*, 23 N. J. L. 180; *Matthews, Ex parte*, 52 Ala. 51; *Knight v. Freeholders of Ocean Co.* 10 Cent. Rep. 653; 49 N. J. L. 485; *State v. Swope*, 7 Ind. 91; *La Selle v. Whitfield*, 12 La. Ann. 81; *Gould v. Wise*, 18 Nev. 253; *McKenzie v. State*, 11 Ark. 594.

⁸ *Graham v. Van Wyck*, 14 Barb. 531.

⁹ *Ante*, § 138.

construed unless controlled by some other rule of construction.¹ It is presumed, in the construction of general words or dubious provisions, that there is no intention to depart from any established policy of the law;² to innovate upon fundamental principles;³ nor to oust the jurisdiction of the superior courts,⁴ or establish new jurisdictions, especially exclusive jurisdictions.⁵ There is also a presumption against any intention to surrender public rights,⁶ or to affect the government.⁷ The legislature is presumed to intend, except as the statute otherwise provides, that enactments be construed by the common law, and enforced according to its procedure.⁸ When courts are empowered to render judgments or give relief in a particular class of cases as they shall deem just, or according to their discretion, this power is expounded and limited by the principles of the common law; it is legal justice they are to administer, a legal discretion they are to exercise;⁹ so when any special duties are imposed or new jurisdiction granted. "Wherever such discretionary authority," said Woodward, P. J., "is conferred upon them in reference to subjects outside of their peculiar duties, it is always presumed by the legisla-

¹ *Post*, § 400.

² *Minet v. Leman*, 20 Beav. at p. 278. See *Overseers v. Smith*, 2 S. & R. 363; *Small v. Small*, 18 Atl. Rep. 497.

³ *Ante*, § 395.

⁴ *Post*, § 400.

⁵ *Hersom's Case*, 39 Me. 476; *Custer Co. v. Yellowstone Co.* 6 Mont. 39; *Pitman v. Flint*, 10 Pick. 504.

⁶ *State v. Kinne*, 41 N. H. 238; *Jersey City v. Hudson*, 13 N. J. Eq. 420; *Harrison v. Young*, 9 Ga. 359; *Bennett v. The Auditor*, 2 W. Va. 441.

⁷ *Willion v. Berkley*, 1 Plowd. 236; *Attorney-General v. Donaldson*, 10 M. & W. 117; *Huggins v. Bambridge*, Willes, 241; *Alexander v. State*, 56 Ga. 478; *Rex v. Wright*, 1 Ad. & El. 437; *United States v. Greene*, 4 Mason, 427; *United States v. Hewes*, Crabbe, 807; *United States v. Hoar*, 2 Mason, 811; *Jones v. Tatham*, 20 Pa. St. 398;

Cole v. White Co. 32 Ark. 45; *Stoughton v. Baker*, 4 Mass. 522; *State v. Milburn*, 9 Gill, 105; *Martin v. State*, 24 Tex. 61; *State v. Garland*, 7 Ired. L. 48; *State v. Kinne*, 41 N. H. 238; *Green v. United States*, 9 Wall. 655.

⁸ *Booth v. Kitchen*, 7 Hun, 260, 264; *Colburn v. Swett*, 1 Met. 232; *Elder v. Bemis*, 2 id. 599; *State v. Fletcher*, 5 N. H. 257; *Gearhart v. Dixon*, 1 Pa. St. 224; *State v. Parker*, 91 N. C. 650; *Graffins v. Commonwealth*, 3 Pen. & W. 502; *Edge v. Commonwealth*, 7 Pa. St. 275; *Phillips v. Commonwealth*, 44 id. 197; *Commonwealth v. Reiter*, 78 id. 161; *Oakland T'p v. Martin*, 104 id. 303; *Wood Mowing M. Co. v. Caldwell*, 54 Ind. 270, 276.

⁹ *Ex parte Barnett*, L. R. 4 Ch. 351; *Stevens v. Ross*, 1 Cal. 94; *Lash v. Von Neida*, 109 Pa. St. 207; *Doherty v. Allman*, L. R. 3 App. Cas. 709, 728.

ture that it will be exercised in accordance with judicial usages, and upon uniform and established rules. The safety of the community, as well as the usefulness and independence of the judiciary, absolutely demands that *all* the duties of the court shall be defined either by statute or by practice."¹ And when a discretionary power is granted to an officer or special tribunal, it is intended and presumed to be a reasonable discretion. As Lord Denman said, "not a wild but a sound discretion, and to be confined within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself."²

§ 334. **Implications and incidents.**—Statutes are not, and cannot be, framed to express in words their entire meaning. They are framed like other compositions to be interpreted by the common learning of those to whom they are addressed; especially by the common law, in which it becomes at once enveloped, and which interprets its implications and defines its incidental consequences. That which is implied in a statute is as much a part of it as what is expressed.³ In case of a newly created felony it must necessarily possess all the incidents which appertain to felony by the rules and principles of the common law; therefore, by necessary implication, all the procurers and abettors of it are principals or accessories, upon the same circumstances which will make such in a felony by the common law.⁴ The same peremptory challenges are allowed.⁵ Where a common-law offense has been adopted by statute it is adopted with all its common-law elements, and in an indictment for such an offense all the common-law requirements must be observed.⁶ A statute of New York legalized all marriages where one or both of the parties were slaves and declared their issue legitimate. By a proviso it was not to

¹ Re Report of County Auditors, 1 Woodw. (Pa.) 270, 272. See Seely v. State, 11 Ohio, 501; 12 id. 496.

² Wilson v. Rastall, 4 T. R. 757; Andrews v. King, 77 Me. 321; Ham v. Board of Police, 142 Mass. 90; Reg. v. Sykes, L. R. 1 Q. B. Div. 52; Smith, Ex parte, 3 id. 574.

³ Hanchett v. Weber, 17 Ill. App. 114, 117; Koning v. Bayard, 2 Paine, 251;

Haight v. Holley, 3 Wend. 258; Rogers v. Kneeland, 10 Wend. 218; Fox v. Phelps, 20 Wend. 447; United States v. Babbitt, 1 Black, 55, 61.

⁴ Coalheavers' Case, 1 Leach, C. C. 64, 66.

⁵ Gray v. Reg. 11 Cl. & Fin. 427, 460.

⁶ State v. Absence, 4 Porter, 297.

operate as an emancipation. The rule was recognized that when both the parents were slaves the children would follow the condition of the mother, and it was held that *a fortiori* it ought to be so where the mother is *free* and the father a *slave*. It was held that the general law of *baron and feme* did not apply; by such a marriage a *free* wife was not subject to the custody and control of a *slave* husband; the husband was not emancipated nor the wife enslaved by such a marriage; that the condition of the children of such a marriage followed the condition of the mother.¹ A statute gave a right of action on the sheriff's official bond to any person aggrieved by his misconduct or that of his deputy. The requisite proof being made, the law which furnished this remedy supplies the necessary privity by giving the right of action.²

§ 335. The law annexes by implication the incident to all public laws that they be noticed *ex officio* by the courts.³ But private statutes will not be so taken notice of;⁴ statutes applying to private rights do not affect the crown or government.⁵ Where a statute, with a view of affording protection to the public, imposes a penalty for doing an act, it thereby prohibits it and renders it illegal.⁶ Thus, a statute which imposes a penalty on a person who exercises or occupies himself as a surgeon without being licensed, is a prohibition of such practice, as it disables the person not admitted to recover for services as a surgeon.⁷

§ 336. Every contract made for or about any matter or thing which is prohibited or made unlawful by statute is void, though the statute does not mention that it shall be so, but

¹ Overseers, etc. v. Overseers, etc. 20 John. 1, 3.

² Governor v. Roby, 34 Ga. 176.

³ *Ante*, §§ 191, 293; 2 Kent's Com. 460.

⁴ *Id.*; Dwarries, 471.

⁵ United States v. Hewes, Crabbe, 307; Jones v. Tatham, 20 Pa. St. 398; Divine v. Harvie, 7 T. B. Mon. 443. The state is bound by public laws for the promotion of learning, the advancement of religion, and the support of the poor, although not ex-

pressly named. Bac. Abr. Stat. I. C.; Gladney v. Deavors, 11 Ga. 79.

⁶ D'Allex v. Jones, 2 Jur. (N. S.) 979; Bartlet v. Viner, Skin. 322; O'Brien v. Dillon, 9 Ir. C. L. (N. S.) 318; Stephens v. Robinson, 2 Cromp. & J. 209; Cope v. Rowlands, 2 M. & W. 149.

⁷ D'Allex v. Jones, 2 Jur. (N. S.) 979; Niemeyer v. Wright, 75 Va. 239; Bensley v. Bignold, 5 B. & Ald. 335; The Pioneer, Deady, 72; Holt v. Green, 73 Pa. St. 198; Taylor v. Crowland Gas. Co. 10 Ex. 293.

only inflicts a penalty upon the offender.¹ Obedience to the laws is enforced by declaring illegal contracts void; by refusing to aid either party in the enforcement of them.² When a statute is for revenue purposes, or is a regulation of a traffic or business, and not to prohibit it altogether, whether a contract which violates the statute shall be treated as wholly void will depend on the intention expressed in the particular statute. Unless the contrary intention is manifest the contract will be valid.³ All cases to which a statute cannot constitutionally apply will be excepted by necessary implication, however absolute and express the provision may be.⁴ A necessary implication means not natural necessity, but so strong a probability of an intention that one contrary to that

¹ O'Brien v. Dillon, *supra*; Grif-fith v. Wells, 3 Denio, 226; Bach v. Smith, 2 Wash. Ty. 145; Bancroft v. Dumas, 21 Vt. 456; Boutwell v. Foster, 24 Vt. 485; Hook v. Gray, 6 Barb. 398; Gray v. Hook, 4 N. Y. 449; Tylee v. Yates, 3 Barb. 222; Barton v. Port J. etc. Plk. R. Co. 17 Barb. 397; Pennington v. Townsend, 7 Wend. 276; Nellis v. Clark, 4 Hill, 424; De Begnis v. Armistead, 10 Bing. 107; Cope v. Rowlands, 2 M. & W. 149; Springfield Bank v. Merrick, 14 Mass. 322; Hallett v. Novion, 14 John. 273; Seidenbender v. Charles, 4 S. & R. 159.

² Armstrong v. Toler, 11 Wheat. 258; Bloom v. Richards, 2 Ohio St. 387; Steers v. Lashley, 6 T. R. 61; Cannan v. Bryce, 3 B. & Ald. 179; Aubert v. Maze, 2 B. & P. 371; Ætna Ins. Co. v. Harvey, 11 Wis. 394; Williams v. Cheney, 3 Gray, 215; Jones v. Smith, *id.* 500; Towle v. Larrabee, 26 Me. 464; Pattee v. Greely, 13 Met. 284; Lovejoy v. Whipple, 18 Vt. 379; O'Donnell v. Sweeney, 5 Ala. 467; Fennell v. Ridler, 5 B. & C. 406. But see Columbus Ins. Co. v. Walsh, 18 Mo. 229; Clark v. Middleton, 19 *id.* 53.

³ Harris v. Runnells, 12 How. 79;

Tyson v. Thomas, McClel. & Y. 119; Law v. Hodson, 11 East, 300; Brooklyn L. Ins. Co. v. Bledsoe, 52 Ala. 538; Cundell v. Dawson, 4 C. B. 376; Little v. Poole, 9 B. & C. 192; Niemeyer v. Wright, 75 Va. 239; Conley v. Sims, 71 Ga. 161; Johnson v. Hudson, 11 East, 180; Brown v. Duncan, 10 B. & C. 93; King v. Birmingham, 8 B. & C. 29; Milford v. Worcester, 7 Mass. 48; Parton v. Hervey, 1 Gray, 119; Bly v. National Bank, 79 Pa. St. 453; Swan v. Blair, 3 Cl. & F. at p. 632; Vining v. Bricker, 14 Ohio St. 331; Pangborn v. Westlake, 36 Iowa, 546; Bemis v. Becker, 1 Kan. 226; Lindsey v. Rutherford, 17 B. Mon. 245; Strong v. Darling, 9 Ohio, 201; Pratt v. Short, 79 N. Y. 437; Bailey v. Harris, 12 Q. B. 905; Watrous v. Blair, 32 Iowa, 58; Fergusson v. Norman, 5 Bing. N. C. 76; Fowler v. Scully, 72 Pa. St. 456; Foster v. Oxford, etc. R. R. Co. 13 C. B. 200; Chouteau v. Allen, 70 Mo. 290; Howell v. Stewart, 54 *id.* 400; Babcock v. Goodrich, 47 Cal. 488; United States v. Martin, 94 U. S. 400; O'Hare v. National Bank, 77 Pa. St. 96.

⁴ Opinion of Justices, 41 N. H. 553.

which is imputed to the party using the language cannot be supposed.¹

§ 337. Wherever the provision of a statute is general everything which is necessary to make such provision effectual is supplied by the common law² and by implication. A grant of lands from the sovereign authority of a state to individuals to be possessed and enjoyed by them in a corporate capacity confers a right to hold in that character.³ A legislative grant made to an alien by necessary implication confers the right to receive and enjoy without prejudice on account of alienage.⁴ Trustees, under an act of parliament for dividing and inclosing a common, being intended to continue and hold permanently, were thereby constituted a corporation by implication.⁵ A right to recover expenses incurred for the public good, under certain conditions, was granted by statute to the "local authority" authorized to act in the execution of the statute; it was held the action for that purpose might be prosecuted by that collective statutory designation, though not made a corporation.⁶

§ 338. A statute of Michigan "relative to the rights of married women," in brief and comprehensive words, gave to the wife the full and absolute control of her real and personal estate, with power to contract, sell, transfer, mortgage, convey, devise and bequeath the same, in the same manner, and with the like effect, as if she were unmarried. This statute had the effect to abolish or abrogate the prospective estate by the curtesy.⁷ A statute declaring that property which accrues to a married woman shall be "owned and enjoyed" as her separate property will authorize her, if the property be merchandise, to trade. It is the nature of merchandise to be sold and exchanged. When, therefore, the statute authorizes married women to own, use and enjoy such property, it legalizes trade by them — makes them merchants.⁸ So she is liable for repairs

¹ *Wilkinson v. Adam*, 1 Ves. & B. 466; *State v. Union Bank*, 9 Yerg. 164.

² 6 Bac. Abr. 369; *Booth v. Kitchen*, 7 Hun, 260, 264; *Livingston v. Harris*, 11 Wend. 329, 340.

³ *North Hempstead v. Hempstead*, 2 Wend. 109; *Goodell v. Jackson*, 20 John. 706.

⁴ *Goodell v. Jackson*, *supra*; *Jackson v. Lurvey*, 5 Cow. 397.

⁵ *Newport M. Trustees, Ex parte*, 16 Sim. 346.

⁶ *Mills v. Scott*, L. R. 8 Q. B. 496.

⁷ *Tong v. Marvin*, 15 Mich. 80.

⁸ *Wieman v. Anderson*, 42 Pa. St. 811, 317.

to her separate estate, made at her request and necessary for its preservation and enjoyment.¹ The statute provides that any married woman might convey real estate "in the same manner, and with the like effect, as if she were unmarried." This implied a repeal as to married women and their separate estates of the general statute requiring a private examination apart from their husbands upon their acknowledgment of the execution of conveyances.² A power given to a married woman to carry on a trade or business on her separate account includes the power to borrow money, and to purchase on credit property, real or personal, necessary or convenient, for the purpose of commencing, as well as the power to create debts in the prosecution of the trade or business after it has been established.³ Where a married woman who has a separate estate and carries on business in relation thereto, keeping a bank account in her own name, draws a check upon such account payable at a future day, on which she borrows money, the law presumes, in the absence of evidence to the contrary, that such money was borrowed for the benefit of her separate estate, and holds her liable therefor.⁴

§ 339. A statute of New York gave an appeal to "every person who shall think himself aggrieved by any judgment or order of any justice or justices," etc. Where a defendant, served with a summons which was to show cause, failed to appear and judgment went against him by default, it was treated as equivalent to a judgment by confession, and therefore he was not entitled to consider himself aggrieved and to appeal.⁵ An association was granted the privilege of constructing the Albany basin, and it was made a condition that they should erect the necessary bridges for the public accommodation. The grant was construed to imply an obligation to keep the bridges in repair.⁶ A statute providing for par-

¹ Lippincott v. Hopkins, 57 Pa. St. 328; Lippincott v. Leeds, 77 id. 420. Zurn v. Noedel, 113 Pa. St. 336; Bovard v. Kettering, 101 id. 181;

² Blood v. Humphrey, 17 Barb. 669; Morrison v. Thistle, 67 Mo. 596. Andrews v. Shaffer, 12 How. Pr. 441; ⁴ Nash v. Mitchell, 8 Hun. 471. Yale v. Dederer, 18 N. Y. 271; Wiles v. Peck, 26 id. 47; Richardson v. Pulver, 63 Barb. 67. ⁵ Adams v. Oaks, 20 John. 282; Adams v. Foster, id. 452. See Schuster v. Supervisors, 27 Minn. 253; Vander-

³ Frecking v. Rolland, 53 N. Y. 422; Chapman v. Foster, 6 Allen, 136. See ⁶ People v. Cooper, 6 Hill, 516. stolph v. Boylan, 50 Mich. 330.

tition and requiring the plaintiff in his complaint to give a statement of all the rights and titles of the parties, directed service on all the parties concerned, and the guardians of such as were minors. As it was deemed that minors were not competent to make a statement of the rights and titles of the parties, it was held that the statute did not apply where all the owners were minors.¹

§ 340. It is a principle or truism that for every wrong there is afforded by the law an appropriate remedy. Upon every statute made for the redress of any injury, mischief or grievance, an action lies by the party aggrieved, either by the express words of the statute or by implication.² In other words, if a statute which creates a right does not indicate expressly the remedy, one is implied, and resort may be had to the common law, or the general method of obtaining relief which has displaced or supplemented the common law.³ A statute provided a penalty for the commission of a fraud, which was "to be sued for in any court of competent jurisdiction for the benefit of the person or persons, etc., upon whom such fraud shall be committed." It was implied the suit should be brought in the name of the defrauded party.⁴

§ 341. Whenever a power is given by statute, everything necessary to make it effectual or requisite to attain the end is implied.⁵ It is a well established principle that statutes containing grants of power are to be construed so as to include the authority to do all things necessary to accomplish the object of the grant.⁶ The grant of an express power carries with it by necessary implication every other power necessary and proper to the execution of the power expressly

¹ Gallatian v. Cunningham, 8 Cow. 361.

² Van Hook v. Whitlock, 2 Edw. 304, 311; Bullard v. Bell, 1 Mason, 290. To give a reasonable effect to the word "from" in reference to the subject-matter, it was held proper to consider the extrinsic situation, and if the object of the act could not otherwise be accomplished it should be construed as inclusive. Smith v. Helmer, 7 Barb. 416.

³ Winn v. Ficklen, 54 Ga. 529. See *post*, § 399.

⁴ Thompson v. Howe 46 Barb. 287.

⁵ 1 Kent's Com. 464; Stief v. Hart, 1 N. Y. 20, per Jewett, C. J.; Mitchell v. Maxwell, 2 Fla. 594; Re Neagle, 39 Fed. Rep. 833; S. C. 135 U. S. 1; Commonwealth v. Conyngham, 66 Pa. St. 99; Witherspoon v. Dunlap, 1 McCord, 546.

⁶ People v. Eddy, 57 Barb. 593; Mayor, etc. v. Sands, 105 N. Y. 210, 218.

granted.¹ Where the law commands anything to be done it authorizes the performance of whatever may be necessary for executing its commands.² When a justice of the peace is required to issue a warrant for the collection of costs made on a hearing before him, it is implied that he has power to decide on the amount.³ When an existing jurisdiction is enlarged so as to include new cases, it is not necessary to declare that the old provisions shall apply to the new cases. If, for example, the jurisdiction of justices of the peace should be extended to actions of slander, the existing provisions for a review by *certiorari* and appeal would apply to cases coming under the en-

¹ 1 Kent's Com. 404. The constitution of New York declares "no private or local bill which may be passed shall embrace more than one subject, and that shall be expressed in the title." The validity of an act "to amend the several acts in relation to the city of Rochester" was questioned on the ground of embracing a multiplicity of subjects. The principal point relied upon was that the authority conferred upon the water commissioners, by one section of the act, to contract with the trustees of villages through which the water to the city might be conducted to supply such villages with water, and authorizing the trustees to levy the annual expense with their annual tax, was, one or both of them, an independent subject not embraced in the title. "It is not denied," said Church, C. J., "that provisions for furnishing the city with a supply of water relate to the legitimate functions of a city government, and are properly included in such a bill as this. That object, it seems, was secured by an independent bill to which these provisions are amendments. The purpose of both is to furnish the city with water for the extinguishing of fires and other public uses, and also to furnish the inhabitants of the city with pure water for domestic

purposes. The latter may be regarded as a means or instrumentality of accomplishing the former. To secure this object it is assumed to be necessary for the city authorities to go beyond the limits of the city to procure the necessary supply, and, in doing so, they must come in contact and deal with private or other interests in no way connected with the city. They must take private property, pass over and use public highways, streets, and, perhaps, railroads. The authority to secure the right, although it may involve details in no other way connected with the city, and may affect other persons or corporations and their property, does not constitute it an independent subject. The power to supply villages with water by contract is incidental to the main purpose, and may serve as a means of attaining it. The authority conferred upon the trustees to levy the tax was indispensable to render the contract effectual. The power to sell involves the power to buy and pay for, and taxation was the only mode which could be adopted for that purpose." *People v. Briggs*, 50 N. Y. 553. See *Odell v. De Witt*, 53 N. Y. 643.

² *Foliamb's Case*, 5 Coke, 116.

³ *Voorhees v. Martin*, 12 Barb. 508.

larged as well as arising under the former jurisdiction of the court.¹ It is an established rule that where an action founded upon one statute is given by a subsequent statute in a new case, everything annexed to the action by the first statute is likewise given.² The power to grant temporary alimony is incidental to the divorce jurisdiction.³ If an act merely directs a particular measure to be taken, it must be understood as referring its execution to the proper existing agents, and to annex, by implication, all the ordinary means for carrying the measure into effect.⁴ Where an inferior court is empowered to grant an injunction, it has power to enforce its observance by punishing disobedience; such power being essential to afford relief by injunction.⁵ A statute authorizing a magistrate to examine such witnesses as might be brought before him authorizes him to issue subpoenas for them, and to compel their attendance by the usual process of the court.⁶

§ 342. Where the statutory judicial jurisdiction in a case of contested election is specially confined to certain specified courts and is not a method of redress in every case in which an alleged illegal election has occurred, it can only be exercised with reference to the grounds of contest enumerated in the act; otherwise jurisdiction would have been given in general terms.⁷ Where the jurisdiction given is general it includes authority to decide all matters and questions involved in the contest. "It may determine which contestant is elected, or if, from fraud or any other circumstances, it be of opinion that there has been no legal election, it may so adjudge, and declare that the office in question is vacant."⁸ Courts having inherently the power of revising the proceedings of all inferior jurisdictions, may in the exercise of that power correct er-

¹ *People v. Commissioners*, 8 Hill, 599. *Matter of Oath Before Justices*, 12 Coke, 130.

² *Baltimore, etc. R. R. Co. v. Wilson*, 2 W. Va. 528, 556.

³ *Goss v. Goss*, 29 Ga. 109; *McGee v. McGee*, 10 id. 477.

⁴ *United States v. Wyngall*, 5 Hill, 16.

⁵ *Martin, Ex parte*, L. R. 4 Q. B. Div. 212.

⁶ *People v. Hicks*, 15 Barb. 160;

⁷ *Ellingham v. Mount*, 43 N. J. L. 470. See *Anderson v. Levely*, 58 Md. 192.

⁸ *Anderson v. Levely*, *supra*; *Handy v. Hopkins*, 59 Md. 157. See *People v. Chapin*, 105 N. Y. 309, as to a general power given to the comptroller to cancel tax sales and refund the money to the purchaser.

rors on the face of their proceedings, but not rejudge their judgments on the merits. This correctional power extends no further than to keep such inferior tribunals within the limits of their jurisdiction and to compel them to exercise it with regularity.¹ A statute conferred jurisdiction upon the supreme court to review the report of commissioners of estimate and assessment for opening a street. It was held that the power was conferred to be exercised by it as a court, and not as a tribunal of inferior jurisdiction created by statute, or by its justices or commissioners appointed by the legislature. Gardner, J.: "The powers incident to its general jurisdiction, so far as applicable, at once attached to the new subject. In administering this law, as every other, the court could require the services of its officers, punish for contempt, issue attachments, use the buildings appropriated to the ordinary business of the court, and set aside the proceedings on sufficient cause."² Where the judgment of an appellate court on *certiorari* is made final by statute, this finality extends to the award of costs on the *certiorari*, and execution for the same in the case removed.³ If the law give a discretion to do or not to do a particular thing in the trial of a cause in court, without specifying by whom it is to be exercised, the judge, who is the expounder of the law and the controller of power, is, by general intendment, the depository of that discretion.⁴ Courts of record have inherent power to make orders or general rules not contravening the law to regulate their proceedings in the exercise of their jurisdiction; and this power may be granted them by statutes which vest in them a new jurisdiction.⁵ It is not competent for the superior courts to make a rule restricting

¹ Carpenter's Case, 14 Pa. St. 486.

² Matter of Canal and Walker Sts. 12 N. Y. 406.

³ Palmer v. Lacock, 107 Pa. St. 346; Silvergood v. Storrick, 1 Watts, 532.

⁴ Caldwell v. State, 34 Ga. 18, 19.

⁵ Anderson v. Leveley, 58 Md. 192; Fullerton v. Bank of U. S. 1 Pet. 604; Brooks v. Boswell, 34 Mo. 474; Boas v. Nagle, 3 S. & R. 253; Snyder v. Bauchman, 8 id. 336; Deming v. Foster, 42 N. H. 165; Suckley v. Rotchford, 12 Gratt. 60; Barry v. Ran-

dolph, 3 Binn. 277; Walker v. Ducros, 18 La. Ann. 703; Vanatta v. Anderson, 3 Bin. 417; People v. McClellan, 31 Cal. 101; Kennedy v. Cunningham, 2 Met. (Ky.) 538; David v. Ætna Ins. Co. 9 Iowa, 45; People v. Chew, 6 Cal. 636; Lynch v. State, 9 Ind. 541; Sellars v. Carpenter, 27 Me. 497; Vail v. McKernan, 21 Ind. 421; Gist v. Drakely, 2 Gill, 330; Seymour v. Phillips, etc. Co. 7 Biss. 460; Texas Land Co. v. Williams, 48 Tex. 602.

the discretion of the trial court on matters as to which that discretion at common law is unlimited, as in the recall of a witness.¹ The authority to punish for contempt is granted as a necessary incident to every tribunal exercising jurisdiction as a court.² If a statute assumes jurisdiction to exist and regulates its exercise it will confer it.³

§ 343. When a statute gives a right or imposes a duty, it also confers by implication the power necessary to make the right available or to discharge the duty; hence the acts which directed that the board of police should take deeds of trust on real estate from the borrowers from the common school fund entitled them to make the right available by purchasing the land when sold for the payment of the debt due the school fund and to resell the same for the collection of the debt.⁴ Where a power is granted and the mode of its exercise not prescribed, it will be implied that it is nevertheless to be exercised.⁵ By a declaratory provision the legislature enacted that a thing might be done which before that time was unlawful, and added a proviso that nothing therein contained should be so construed as to permit some matter embraced in the general provision to be done; this was held as an implied prohibition of the excepted act, though before that time it was lawful.⁶ The power given to a sheriff to sell on execution the interest of a pledgor in goods pledged incidentally or by implication authorized him to take the goods out of the hands of the pledgee.⁷ The legislature increased the salaries of certain judicial officers of a municipal corporation, which salaries were a charge on such corporation. Though there was no present fund to pay the same, the liability existing, there was held to be an implied power to create one, and that the city is subject in the ordinary modes of having legal liabilities enforced.⁸ Power given to a municipal corporation to receive

¹ De Lorme v. Pease, 19 Ga. 220.

² United States v. New Bedford Bridge, 1 Woodb. & M. 401; State v. Morrill, 16 Ark. 384; Mariner v. Dyer, 2 Me. 165; Yates v. Lansing, 9 John. 395; Randall v. Pryor, 4 Ohio, 424; Gates v. McDaniel, 3 Port. 356; Lining v. Bentham, 2 Bay, 1; Albright v.

Lapp, 26 Pa. St. 99; Perry v. Mitchell, 5 Denio, 537.

³ State v. Miller, 23 Wis. 634.

⁴ Gaines v. Faris, 39 Miss. 403.

⁵ People v. Eddy, 57 Barb. 593.

⁶ State v. Eskridge, 1 Swan, 413.

⁷ Stieff v. Hart, 1 N. Y. 20.

⁸ Green v. Mayor, etc. 2 Hilt, 203, 310.

a grant of lands for the purpose of laying or widening streets includes in it the power to remove buildings.¹

§ 344. When the legislature gives power to a public body to do anything of a public character, the legislature means also to give to such body all rights without which the power would become wholly unavailable, although such meaning cannot be implied in relation to circumstances arising accidentally only. In the power to lay sewers is implied the right as against the land-owner of subjacent support.² When a municipality is created to further certain objects of general concern, and there is given to it general powers to be used to that end, the legislature must be held to have intended to confer all power at any time needful thereto. From the general power to take lands to further the public health results the power, whenever it is necessary so to do, to take lands held and used for other prior public purposes.³ The creation of a municipal corporation includes a grant of a new power to make by-laws or ordinances for the government of the inhabitants, and to enforce them.⁴ The power to make an addition to a public building is included in the grant of power to erect and repair such building. A construction cannot be given to the laws conferring power to levy a tax for the "erection of public buildings," which would limit the exercise of the power to the erection of new houses, when the object of the law could even be attained at less expense by an addition to a public house already built.⁵ A railroad company was granted by statute a right to cross another railway by a bridge to be erected for that purpose; under this grant it was held that the grantee had the right for that purpose to place temporary scaffolding on the property of the other party, and to do all other acts necessary for the enjoyment of the principal right of crossing.⁶ Power to sue for debts due to the estate is implied in the authority given to administrators *ad colligendum*, "to secure and collect the said property [i. e., of the estate], whether it be goods, chattels, debts or credits, etc.; it was held amply suffi-

¹ Patchin v. Brooklyn, 2 Wend. 377.

² In re Corporation of Dudley, L. R. 8 Q. B. Div. 93.

³ Matter of the City of Buffalo, 63 N. Y. 167, 172.

⁴ State v. Young, 3 Kan. 445.

⁵ Brown v. Graham, 58 Tex. 254.

⁶ Clarence R'y Co. v. Great North of Eng. etc. R'y Co. 13 M. & W. 706, 721.

cient to authorize the bringing of suits if necessary for the purpose of executing the power.¹ Overseers of the poor of a town, being public agents and trustees of it in respect to the power, have necessarily, without express authority from the legislature, a capacity to sue commensurate with the public trusts and duties.²

§ 345. If a corporation is organized for a business which implies the necessity to raise money, the capacity to make notes and securities usual in such cases will be implied. Every corporation is by implication possessed of the power to employ the appropriate means to accomplish its chartered purpose.³ A municipal corporation may exercise, as incident to the purpose of its creation, such powers as will enable it fully to discharge the duties devolving on it.⁴ It has the power, and it results from its corporate existence as a town, to erect a building suitable for the accommodation of officers and records, and for the preservation of its necessary property.⁵ The right to erect such a structure is incidental to the powers expressly granted, or essential to carry out the objects of the corporation.⁶ Where the charter of a corporation authorizes it to purchase land for a specified purpose, in the absence of evidence it will be presumed that any land purchased by it was acquired for the purpose authorized by the charter.⁷ If the taking effect of a statute depends on subsequent acts of executive officers, directed by the enactment to be done, it will be presumed that such acts when due have been performed.⁸ There is a like implication wherever any fact must precede an enactment.⁹ Where legislation depends on facts to be ascertained by the legislature, the declaration of such facts in the act is taken as conclusive. Thus, where the legislature determines that a public improvement will be a benefit to the adjacent property, and that the expenses of making the same shall be paid

¹ *Ventress v. Smith*, 10 Pet. 161.

² *Overseers of Pittstown v. Overseers of Pittsburgh*, 18 John. 407, 418.

³ 1 Moraw. on Corp. § 350; *Williamsport v. Commonwealth*, 84 Pa. St. 487; *Slark v. Highgate Archway Co.* 5 Taunt. 792; *Broughton v. Manchester Water Works Co.* 3 B. & Ald. 1, 12.

⁴ *Van Sicklen v. Burlington*, 27 Vt. 70, 76.

⁵ *Clarke v. Brookfield*, 81 Mo. 503, 511.

⁶ *State v. Haynes*, 72 Mo. 377.

⁷ *Mallett v. Simpson*, 94 N. C. 37.

⁸ *Stine v. Bennett*, 13 Minn. 153; *State v. Dunning*, 9 Ind. 20.

⁹ *State v. Noyes*, 47 Me. 189.

by the owners of such property, the courts have nothing to do with the correctness or incorrectness of the determination, but must assume the fact to be as the legislature assumes or declares it.¹ Where the constitution provides that legislative acts shall not take effect until a future day, unless, for some emergency, the legislature deems it necessary to provide otherwise, if an act contains a provision that it go into effect immediately, it will be implied that in the judgment of the legislature there was an emergency; and if the circumstance that an emergency exists is stated in the act, when such statement is required, it will be assumed by the courts that it is sufficient.² Special acts of incorporation for constructing railroads, or probably any special act, will be valid notwithstanding the constitutional provision requiring general laws for such purposes, if in the judgment of the legislature the object in view cannot be attained under general laws. Such a determination is implied from the act being passed.³

¹ *People v. Lawrence*, 36 Barb. 177.

² *Johnson v. Joliet, etc. R. R. Co.* 23

³ *Gentile v. State*, 29 Ind. 409.

Ill. 202.

CHAPTER XIV.

STRICT CONSTRUCTION.

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| <p>§ 346. Literal and strict construction compared.</p> <p>349. Strict construction of penal statutes.</p> <p>356. Not construed so strictly as to defeat intention.</p> <p>358. What statutes are penal.</p> <p>361. Revenue laws.</p> <p>362. Statutes which impose burden of taxation.</p> <p>365. Statutes delegating the taxing power.</p> <p>366. Statutes against common right.</p> <p>368. Statutes of limitations.</p> <p>369. Limitations as to new trials and appeals.</p> | <p>§ 370. Statutes interfering with legitimate industries, etc.</p> <p>371. Statutes creating liability for death by negligence.</p> <p>373. Civil damage acts.</p> <p>378. Statutes for exercise of eminent domain.</p> <p>381. Statutes granting power.</p> <p>386. Jurisdiction of courts.</p> <p>389. Grants of titles and franchises.</p> <p>398. Statutory rights.</p> <p>400. Statutes in derogation of the common law.</p> <p>402. Interpretation clauses.</p> <p>407. Statutes affecting statutory policy.</p> |
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§ 346. **Literal interpretation and strict construction compared.**—Statutes are seldom written in such precise and categorical terms as to point out inclusively and exclusively all their intended applications. General and more or less flexible language is used. It is construed with reference to the subject of the act, its purpose; and popular words are read and understood according to their common acceptance.¹ And if technical words are used they are construed according to their technical sense.² There are many statutes of divers kinds which are strictly construed. And there is a great variety of other statutes which are remedial in their nature and are liberally construed. The statutes which are thus classified for strict or liberal construction include a large part of the legis-

¹ *De Veaux v. De Veaux*, 1 Strohn. Eq. 283; *ante*, §§ 250–256.

² *Weill v. Kenfield*, 54 Cal. 111; *Opinion of Justices*, 7 Mass. 523; *McCool v. Smith*, 1 Black, 459; *Buck-*

ner v. Real Estate Bank, 5 Ark. 536; *Merchants' Bank v. Cook*, 4 Pick. 405; *United States v. Breed*, 1 Sumn. 159; *Elliott v. Swartwout*, 10 Pet. 137.

lation of every state. The same language may have a broader scope and effect for remedial purposes than under the restraining influence of considerations which induce strict construction. In the case of *Bones v. Booth*¹ construction was given to the phrase "a single sitting" of a loser at play. The statute gave him a right for a limited time to recover his losses above 10ℓ. at "a single sitting;" and gave an informer, afterwards, the right to recover them and treble value besides. As to the loser the statute was held remedial, and the losses, those of a single sitting, though suspended for dinner; but as to the informer's right, the statute was penal, and the suspension for dinner broke the continuity of the sitting.

§ 347. Strict construction is not a precise but a relative expression; it varies in degree of strictness according to the character of the law under construction. The construction will be more or less strict according to the gravity of the consequences flowing from the operation of the statute or its infraction; if penal, the severity of the penalty;² if in derogation of common right, or capable of being employed oppressively, the extent and nature of the innovation and the consequences; and in any case, according to the combined effect and the reciprocal influence of all relevant principles of interpretation.³ A remedial statute, not clear as to any proposed application, admits of resort to many rules of construction to determine what the courts are authorized to assume is the meaning and intention of the law-maker.⁴ But a statute which must, on account of its subject or nature, be construed strictly, as the phrase is, must be read without expansion beyond its letter, without recourse to any such rules; it is to be confined to such subjects or applications as are obviously within its terms and purpose. In other words, a strict construction is a close and conservative adherence to the literal or textual interpretation.⁵

¹ 2 W. Black. 1226.

² *Commonwealth v. Fisher*, 17 Mass. 46, 49; *Taylor v. United States*, 2 How. 197, 210.

³ See *Chapin v. Persse & Brooks Paper Works*, 30 Conn. 461.

⁴ *Post*, §§ 419-444.

⁵ *Austin v. State*, 71 Ga. 595; *Bettis*

v. Taylor, 8 Port. 564; *Jordt v. State*, 31 Tex. 571; *Andrews v. United States*, 2 Story, 203; *United States v. Bassett*, id. 389; *State v. Graham*, 38 Ark. 519; *Watervliet T. Co. v. McKean*, 6 Hill, 616; *Melody v. Reab*, 4 Mass. 473; *Schooner Enterprise*, 1 Paine, 32.

§ 348. The rule of strict construction is not violated by permitting the words of a statute to have their full meaning. The letter of remedial statutes may be extended to include cases clearly within the mischief they were intended to remedy, unless such construction does violence to the language used; but consideration of the old law, the mischief, and the remedy, are not enough to bring cases out of the terms within the purview of a penal statute. They must be expressly included in the words of the statute. This is all the difference between a liberal and a strict construction of a statute. A case may come within one unless the language excludes it, while it is excluded by the other unless the language includes it.¹ In *Attorney-General v. Sillem*, Pollock, C. B., said: "We cannot and ought not to deal with it as a crime, unless it is plainly and without doubt included in the language used by the legislature."² In another case³ he said: "Although the common distinction taken between penal acts and remedial acts, that the former are to be construed strictly and the others are to be construed liberally, is not a distinction, perhaps, that ought to be erased from the mind of a judge," yet the distinction now means little more than "that penal statutes, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment, the court 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, or forced consideration or equitable interpretation, to exonerate parties plainly within their scope."⁴ Strict construction is not the exact converse of liberal construction, for it does not consist in giving words the narrowest meaning of which they are susceptible.⁵ And a late writer adds: What is meant by it is that acts of this kind—those which are to be strictly construed—are not to be regarded as including anything which is not within their letter as well as their spirit, which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended by the legislature.⁶

¹ *State v. Powers*, 36 Conn. 77.

& C. 531; *Foley v. Fletcher*, 28 L. J.

² 2 H. & C. 431, 514.

Ex. 106; 3 H. & N. 769.

³ *Nicholson v. Fields*, 31 L. J. Ex. 235; 7 H. & N. 810, 817.

⁵ *United States v. Winn*, 3 Sumn. 209.

⁴ *Attorney-General v. Sillem*, 2 H.

⁶ *Wilberforce*, St. L. 246; *Britt v.*

§ 349. **Strict construction of penal statutes.**—The penal law is intended to regulate the conduct of people of all grades of intelligence within the scope of responsibility. It is therefore essential to its justice and humanity that it be expressed in language which they can easily comprehend; that it be held obligatory only in the sense in which all can and will understand it. And this consideration presses with increasing weight according to the severity of the penalty.¹ Hence every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation;² and every provision intended for the benefit of the accused, for the same humane reason, receives the most favorable construction.³ “The rule that penal laws are to be construed strictly is perhaps not much less old than construction

Robinson, L. R. 5 C. P. 513, 514; East India Interest, 3 Bing. 196; Partington v. Attorney-General, L. R. 4 H. L. 122. In Nicholson v. Fields, 7 H. & N. 817, Pollock, C. B., said: “I admit that the common distinction between penal and remedial acts, viz., that the one is to be construed strictly, the other liberally, ought not to be erased from the mind of a judge; yet whatever be the act, be it penal, and certainly if remedial, we ought always to look for its true construction. In that respect there ought to be no distinction between a penal and a remedial statute. If the remedial statute does not extend to the particular matter under consideration, we have no power to legislate so as to extend it. Undoubtedly we are thus far bound to a strict construction in a penal statute, that if there be a fair and reasonable doubt, we must act as in revenue cases, where the rule is, that the subject is not to be taxed without clear words for that purpose.”

¹ Bish. Writ. L. §§ 193, 159; Commonwealth v. Fisher, 17 Mass. 49; Commonwealth v. Snelling, 4 Binn. 879; United States v. Moulton, 5 Mason, 537; State v. Wilcox, 3 Yerg.

278; Schooner Enterprise, 1 Paine, 32; Randolph v. State, 9 Tex. 521; Chicago, etc. R. R. Co. v. People, 67 Ill. 11.

² Id.

³ Commonwealth v. Keniston, 5 Pick. 420; United States v. Ragsdale, Hempst. 497; Heward v. State, 13 Sm. & M. 261; Sneed v. Commonwealth, 6 Dana, 338; Dull v. People, 4 Denio, 91. Spencer, J., said in Sickles v. Sharp, 13 John. 497: “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 as to some persons, provided it is beneficial generally, may be equitably construed.” State v. Canton, 43 Mo. 48, 52. Forfeitures are not favored, and courts incline against them. Where a statute may be construed so as to give a penalty, and also so as to withhold the penalty, it will be given the latter construction. Renfroe v. Colquitt, 74 Ga. 619.

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 law-maker must govern in the 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.¹ 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 very 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 and mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because of equal atrocity, or of a kindred character, with those which are enumerated."²

§ 350. A penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within

¹ *Walton v. State*, 62 Ala. 197; *Huffman v. State*, 29 id. 40; *Crosby v. Hawthorn*, 25 id. 221; *Holland v. State*, 34 Ga. 455; *Keller v. State*, 11 Md. 525; *United States v. Athens Armory*, 35 Ga. 344; *American Fur Co. v. United States*, 2 Pet. 367; *The Schooner Harriet*, 1 Story, 251; *The Schooner Industry*, 1 Gall. 114.

² *United States v. Wiltberger*, 5 Wheat. 76, 95. See *Jenkinson v. Thomas*, 4 T. R. 665; *Rex v. Handy*, 6 id. 286; *Warne v. Varley*, id. 443; *Martin v. Ford*, 5 id. 101; *Fletcher v. Lord Sondes*, 3 Bing. 580; *Hintermister v. First Nat. Bank*, 64 N. Y. 212; *United States v. Huggett*, 40 Fed. Rep. 636.

the letter, though within the reason and policy, of the law.¹ Although a case may be within the mischief intended to be remedied by a penal act, that fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language.² And as a general rule where a penalty is affixed by a statute to an act or omission, such penalty is the only punishment or loss incurred by the guilty party.³ To constitute the offense the act must be both within the letter and spirit of the statute defining it.⁴ Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms.⁵ Where an act prohibited the sale of intoxicating liquors in the vicinity of certain manufacturing establishments in three named counties, it was held to have application only to such establishments as were then in being.⁶ It is a principle in the construction of statutes that the legislature does not intend the infliction of punishment, or to interfere with the liberty or rights of the citizen, or to grant exceptional powers, privileges or exemptions by doubtful language; but will in such cases express itself clearly, and intends no more than it so expresses.⁷ Abbott, J., said: "It would be extremely wrong that a man should, by a long train of conclusions, be reasoned into a penalty when the express words of the act of parliament do not authorize it."⁸ This strictness does not exclude accessories before the fact, though not

¹ *Id.*; *State v. Lovell*, 23 Iowa, 304; *People v. Peacock*, 98 Ill. 172; *Lair v. Killmer*, 25 N. J. L. 522; *Merrill v. Melchior*, 30 Miss. 516; *Foot v. Vanzandt*, 34 *id.* 40; *Andrews v. United States*, 2 Story, 202; *Shaw v. Clark*, 49 Mich. 384; *Hall v. State*, 20 Ohio, 7, 16; *Van Buren v. Wylie*, 56 Mich. 501; *Graff v. Evans*, L. R. 8 Q. B. Div. 377; *Haynie v. State*, 32 Miss. 400.

² *United States v. Sheldon*, 2 Wheat. 119.

³ *In re International Patent P. etc. Co.* 37 L. T. (N. S.) 351; L. R. 6 Ch. Div. 556.

⁴ *Lair v. Killmer*, *supra*; *Britt v.*

Robinson, L. R. 5 C. P. at pp. 513, 514; *Dewey v. Goodenough*, 56 Barb. 54; *East India Interest*, 3 Bing. at p. 196.

⁵ *People v. Peacock*, *supra*; *Hall v. State*, 20 Ohio, 8; *Grooms v. Hannon*, 59 Ala. 510; *Southwestern R. R. Co. v. Cohen*, 49 Ga. 627; *United States v. Winn*, 3 Sumn. 209; *The Schooner Harriet*, 1 Story, 251; *State v. Graham*, 38 Ark. 519; *Foster v. Rhoads*, 19 John. 191.

⁶ *Hall v. State*, 20 Ohio, 8; *United States v. Paul*, 6 Pet. 141.

⁷ 4 Inst. 332.

⁸ *Rex v. Bond*, 1 B. & Ald. at p. 392.

named in the statute.¹ Nor does it preclude the application of common sense to the terms made use of in the statute to avoid an absurdity which the legislature ought not to be presumed to have intended.² Though a statute may be of a class which must be construed strictly, it is nevertheless to be so construed as to effect the intention of the legislature. Effect is to be given to the plain meaning of the language, and strict construction is to be applied only where the effect is reasonably open to question.³ The rule that penal statutes are to be construed strictly is not violated by allowing their words to have their full meaning, or even the more extended of two meanings, where such construction better harmonizes with the context.⁴

§ 351. A few cases will be given illustrative of the principle of strict construction: Driving cattle was held not within the true meaning of an act prohibiting their transportation.⁵ A statute which provides a penalty for resisting an officer "in serving or attempting to execute any legal writ, rule, order or process whatever," does not embrace the case of resisting an officer who was attempting to arrest, without any warrant, writ or process of any kind, a person who was breaking the public peace.⁶ A penalty provided against a mortgagee for failing to discharge a paid mortgage cannot be extended to the assignee of a mortgage.⁷ When either of two constructions can be given to a statute and one of them involves a forfeiture the other is to be preferred.⁸ In a penal act the word "and" cannot be read as "or."⁹ The expression "this act" cannot be taken to include another act *in pari materia*.¹⁰ The words "domestic distilled spirits" in an inspection law containing a penalty or forfeiture were construed to mean spirits distilled within the state, and this as matter of law, not to be

¹ Walton v. State, 62 Ala. 197.

² Commonwealth v. Loring, 8 Pick. 373; House v. House, 5 Har. & J. 125; Smith v. State, 17 Tex. 191.

³ Wilson v. Wentworth, 25 N. H. 247.

⁴ United States v. Hartwell, 6 Wall. 385.

⁵ United States v. Sheldon, 2 Wheat. 119.

⁶ State v. Lovell, 23 Iowa, 304.

⁷ Grooms v. Hannon, 59 Ala. 510.

⁸ Vatel's 20th Rule of Construction; Farmers', etc. Nat. Bank v. Dearing, 91 U. S. 29, 35; Renfroe v. Colquitt, 74 Ga. 619.

⁹ United States v. Ten Cases of Shawls, 2 Paine, 162.

¹⁰ Rex v. Trustees, etc. 5 Ad. & E. 563.

modified by any proof of usage giving it a broader scope. It was held also not to include spirits rectified there but manufactured in another state.¹ A statute prescribing a penalty for "any officer taking greater or other fees" than are expressed in the fee-bill was held not applicable to any person out of office for services while in office.² The word "sale" in a penal statute does not include an *exchange*.³ A statute making punishable "the offense of insurrection or an attempt at insurrection" does not by these words apply to an attempt to incite insurrection.⁴ In the construction of an act imposing penalties upon gambling, it was held that half-pennies tossed up at a game called toss did not come within the words "instruments of gaming;"⁵ that deposit of half a sovereign as a bet on a dog race was not "betting with a coin as an instrument of gaming at a game of chance."⁶ A statute forbade an alderman to be clerk to the justices in any borough, and forbade the clerk to the justices in any borough to be directly or indirectly interested in any prosecution. A penalty by the same section was imposed on any person, being an alderman, who should act as clerk to the justices of a borough or should otherwise offend in the premises. The defendant was clerk to the justices, and had done the prohibited act; he had been interested in a prosecution; but it was held that the penalty clause only applied to those who are in the offices there specified, among which the clerk to the justices was not included. The court adhered to the grammatical construction. Coleridge, J., said: "There are two distinct prohibitory provisos, and it is quite obvious that the intention was to annex the penalty to the violation of each. But this cannot be done if a grammatical construction be given to the words used. The only way in which it can be done is by inserting . . . the words 'any person who' before 'shall otherwise offend.' But I never heard that it was allowable to insert words for the purpose of extending a penal clause."⁷

¹ Commonwealth v. Giltinan, 64 Pa. St. 100.

² Gallagher v. Neal, 3 P. & W. 183.

³ Gunter v. Leckey, 30 Ala. 591.

⁴ Gibson v. State, 38 Ga. 571.

⁵ Watson v. Martin, 34 L. J. M. C. 50.

⁶ Hirst v. Molesbury, L. R. 6 Q. B. 130.

⁷ Coe v. Lawrance, 1 E. & B. 516.

§ 352. A statute provided that "all notes or conveyances whatever, in which the consideration shall be for any money or goods won by playing at cards, dice, or any other game whatever, or by betting on the sides or hands of such as are gaming, or by any betting or gaming whatever, shall be void and of no effect."¹ . . . In *Shaw v. Clark*² the question was whether a deal in "options" was within the statute. The court by Cooley, J., said: "In common speech gaming is applied to play with stakes at cards, dice or other contrivance, to see which shall be the winner and which the loser. A contract for the purchase of options is not gaming within this meaning of the term. In form it is the purchase and sale of a commodity to be delivered at a future day, and it only resembles gaming in that the parties take a chance of gain or loss without intending that the sale which they nominally make shall ever become a legitimate business transaction. Betting in common speech means the putting of a certain sum of money or other valuable thing at stake on the happening or not happening of some uncertain event. A purchase of options is not betting in this sense, though it resembles it in the fact that risks are taken on uncertain events, and that the tendency to those engaged in it is demoralizing. The statute in terms forbids betting and gaming, and it contains penal provisions for the punishment of those who engage in them; but penal statutes are not enlarged by intendment, and acts not expressly forbidden by them cannot be reached merely because of their resemblance, or because they may be equally and in the same way demoralizing and injurious."³ Those who contend that a penalty may be inflicted must show that the words of the act distinctly express that under the circumstances it has been incurred. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty.⁴

§ 353. There is a like close interpretation whether, as in the preceding instances, the provision relates to the elements of the offense, or concerns the penalty or the procedure.⁵ Where

¹ Sec. 1996, Comp. Laws of Mich.

² 49 Mich. 384.

³ See *Smith v. State*, 17 Tex. 191; *State v. Rorie*, 23 Ark. 726.

⁴ *Brett, J., in Dickenson v. Fletcher*,

L. R. 9 C. P. 7; *The Gauntlet*, L. R. 4 P. C. 191.

⁵ *Rex v. Hymen*, 7 T. R. 536; *Walwin v. Smith*, 1 Salk. 177; *Partridge v. Naylor*, Cro. Eliz. 480; *Commonwealth v. Keniston*, 5 Pick. 420.

the penalty for a certain offense was that the convict should lose his right hand, he could not be adjudged to lose his left hand, the right hand having before been cut off.¹ An act was silent on the place of imprisonment, and as between different places at which, under proper conditions, imprisonment could be adjudged, it was held that it must be at the place which will be the lesser punishment rather than the severer — with those convicted of misdemeanors, rather than with those convicted of higher crimes.² Nor can a statute be extended beyond its grammatical sense or natural meaning on any plea of the failure of justice.³ If the statute is ambiguous, the construction adopted should be that most favorable to the accused.⁴ Courts are authorized to inquire into and carry out the manifest intention of the legislature; but if there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of a court not to inflict the penalty.⁵

¹ *Dwarris*, 634.

² *Horner v. State*, 1 Oregon, 267.

³ *Remington v. State*, 1 Oregon, 281.

⁴ *The Schooner Enterprise*, 1 Paine, 32; *Commonwealth v. Martin*, 17 Mass. 359.

⁵ In *Schooner Enterprise*, 1 Paine, 32, *Livingston, J.*, said: "The act, and particularly that part of it under which a forfeiture is claimed, is highly penal, and must therefore be construed as such laws always have been and ever should be. 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 which are specially and clearly described and provided for. A court is not, therefore, . . . precluded from inquiring into the intention of the legislature. However clearly a law may 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 existence 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 when he labors under the same uncertainty as to the meaning of the legislature." *Wright v. Bolles Woodenware Co.* 50 Wis. 167; *United States v. One Hundred Bar-*

§ 354. A penal statute should be construed to carry out the obvious intention of the legislature, and be confined to that. Every case must come not only within its letter but within its spirit and purpose; but it should be given a rational construction. There must generally be such an act or omission as implies an actual and conscious infraction of duty. A law which condemns to capital punishment one who strikes his father would not be held applicable to one who has shaken and struck his father to arouse him from a lethargic stupor.¹ Where the master of a steamboat was subjected to a penalty for failing to deliver any letter which should be left "in his care or within his power," it was held that there must be knowledge of this fact, and mere possession by the clerk of the boat was not enough.² If notice is required to impose a duty, the neglect of which is punishable, it must be actual notice, and personally served.³ Although to an absolute and sweeping prohibition of the sale of intoxicating liquors, the courts may not imply an exception when sold as a prescription for medicine;⁴ it was said by the court in one case:⁵ "We are not to be supposed as intimating that physicians and druggists would be prohibited under such a statute . . . from the *bona fide* use of spirituous liquors in the necessary compounding of medicines manufactured, mixed or sold by them. This would not be within the evils intended to be remedied by such prohibitory enactments, nor even within the strict letter of the statute."

§ 355. In the very recent case of *Regina v. Tolson*⁶ is, from the standpoint of English decisions, a very exhaustive and instructive discussion of the principle or maxim, *actus non facit reum, nisi mens sit rea*. The statute of 24 and 25 Vict. ch. 100, sec. 57, provides in these words: "Whoever, being married, shall marry any other person during the life of the former husband or wife, shall be guilty of felony, punishable with penal

rels of Spirits, 2 Abb. (U. S.) 305; *United States v. Fifty-six Barrels of Whisky*, 1 id. 93; *United States v. Garrelson*, 42 Fed. Rep. 22.

¹ Smith's Com. § 448.

² *United States v. Beaty, Hempst.* 487.

³ *St. Louis v. Goebel*, 32 Mo. 295.

⁴ *Commonwealth v. Kimball*, 24 Pick. 366; *State v. Brown*, 31 Me. 522; *Woods v. State*, 36 Ark. 36; 38 Am. R. 22; *Carson v. State*, 69 Ala. 235.

⁵ *Carson v. State, supra*.

⁶ L. R. 23 Q. B. Div. 168 (1889); S. C. 40 Alb. L. J. 250.

servitude for not more than seven years, or imprisonment with or without hard labor for not more than two years," with a proviso that "nothing in this act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time." The husband of the defendant deserted her the year following their marriage. She and her father subsequently made inquiries about him, and learned from his brother and from general report that he had been lost at sea. She married again five years after his desertion, and the question was considered whether a belief in good faith and on reasonable grounds that her husband was dead would be a good defense against the charge of bigamy in contracting the second marriage. It was decided in the affirmative. Wills, J., said: "There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past. It is, however, undoubtedly a principle of English criminal law, that, ordinarily speaking, a crime is not committed if the mind of the person doing the act in question be innocent. 'It is a principle of natural justice and of our law,' says Lord Kenyon, C. J., 'that *actus non facit reum, nisi mens sit rea*. The intent and act must both concur to constitute the crime.'¹ The guilty intent is not necessarily that of intending the very act or thing done, and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed."²

¹ Fowler v. Padget, 7 T. R. 509, 514.

² Wills, J., said, in continuing his opinion: "Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a

subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. By-laws are con-

Cave, J., said in the same case: "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense. This doctrine is embodied in the somewhat uncouth maxim, '*actus non facit reum, nisi mens sit rea.*' Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. . . . So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication."¹

stantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health or convenience, and such by-laws are enforced by the sanction of penalties, and the breach of them constitutes an offense and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the by-laws that the person committing it had *bona fide* made an accidental miscalculation or an erroneous measurement. The acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, that if he fails to do so he does it as his peril.

"Whether an enactment is to be construed in this sense, or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable." Citing and comparing *Reg. v. Sleep*, L. & C. 44; 30 L. J. (M. C.) 170; *Hearne*

v. Garton, 2 E. & E. 66; *Taylor v. Newman*, 4 B. & S. 89; *Watkins v. Major*, L. R. 10 C. P. 662; *Reg. v. Bishop*, 5 Q. B. Div. 259; *Bowman v. Blyth*, 7 E. & B. 26, 43; *Foster's Crown Law* (3d ed.) App. 439, 440; *Rex v. Banks*, 1 Esp. 144; *Fowler v. Padget*, 7 T. R. 509; *Reg. v. Willmet*, 3 Cox C. C. 281; *Reg. v. Cohen*, 8 id. 41; *Reg. v. O'Brien*, 15 L. T. (N. S.) 419; *Reg. v. Turner*, 9 Cox C. C. 145; *Reg. v. Horton*, 11 id. 670; *Reg. v. Gibbons*, 12 id. 237; *Reg. v. Prince*, L. R. 2 C. C. R. 154; *Reg. v. Bennett*, 14 Cox C. C. 45; *Reg. v. Moore*, 13 id. 544.

¹ In *Reg. v. Tolson*, *supra*, *Stephen, J.*, said: "The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition. Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were. The mental element of most crimes is marked by one

A statute which gave treble damages for conversion of logs or lumber in certain cases, though broad enough to cover any conversion, was restrictively interpreted in pursuance of

of the words 'maliciously,' 'fraudulently,' 'negligently,' or 'knowingly;' but it is the general, I might, I think, say the invariable, practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion, are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined. . . .

"With regard to knowledge of fact, the law, perhaps, is not quite so clear, but it may, I think, be maintained, that in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity. To take an extreme illustration, can any one doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime, in a state of somnambulism, be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. A multitude of illustrations might be given. I will mention one or two glaring ones. *Levet's Case*, 1 Hale, 474, decides that a man who, making a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar to be, killed a person who was not a burglar, was held not to be a felon, though he might be (it was not decided that he was) guilty of killing *per infortunium*, or possibly *se defendendo*, which then involved certain forfeitures. In other words, he was in the same situation, as far as regarded the homicide, as if he had killed a burglar. In the decision of the judges in *Macnaghten's Case*, 10 C. & F. 200, it is stated that if, under an insane de-

lusion, one man killed another, and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused. This could hardly be if the same were not law as to a sane mistake. A *bona fide* claim of right excuses larceny, and many of the offenses against the malicious mischief act. Apart, indeed, from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offense. I am unable to suggest any real exception to this rule, nor has one ever been suggested to me. A very learned person suggested to me the following case: A constable, reasonably believing a man to have committed a murder, is justified in killing him to prevent his escape; but if he had not been a constable he would not have been so justified, but would have been guilty of manslaughter. This is quite true, but the mistake in the second case would be not only a mistake of fact, but a mistake of law on the part of the homicide in supposing that he, a private person, was justified in using as much violence as a public officer, whose duty is to arrest, if possible, a person reasonably suspected of murder. The supposed homicide would be in the same position as if his mistake of fact had been true; that is, he would be guilty, not of murder, but of manslaughter." See *State v. Bartlett*, 30 Me. 132; *The Brig William Gray*, 1 Paine, 16; *United States v. Pearce*, 2 McLean, 14; 1 Bish. C. L. §§ 226, 227.

the assumed intention of the legislature to punish only wilful wrong-doing. It was held that "the evidence must satisfy the jury that the conversion was not only against the consent of the plaintiff, but was attended by circumstances of bad faith and intentional wrong in order to bring it within the penal provision."¹ A statute² imposed a penalty on any person who should take, kill or have in his possession any partridges between the 1st of February and the 1st of September. It was held that a person having partridges in his possession between those two dates was not liable to the penalty if the partridges had been killed before the earliest day named, as otherwise a man might be liable to a penalty if he lawfully killed a partridge on the last moment of February 1, but had it in his possession on the first moment of February 2.³ So where penalties were imposed upon bakers who used certain ingredients in bread,⁴ upon persons sending dangerous goods by railway,⁵ or being in possession of stores which bore the admiralty mark,⁶ it was held that knowledge was essential to constitute any of these offenses.⁷ A statute imposed a penalty on any voter receiving a reward "to give his vote" at an election. It was held that this penalty was not incurred by one who received a reward after he had voted.⁸ A statute providing that a seaman should forfeit his wages by deserting his ship was held not to apply to one who was treated with such cruelty as justified him in refusing to remain on board.⁹

§ 356. Courts will not by strict construction defeat the intention of the law-maker.—Where the intent is plain it will be carried into effect. It will not be evaded or defeated on the principle of strict construction. The principle will be adhered to that the case must be brought within the letter and spirit of the enactment, but the intent of a criminal statute may be

¹ *Cohn v. Neeves*, 40 Wis. 393; *Wallace v. Finch*, 24 Mich. 255; *State v. Baker*, 47 Miss. 95; *Mahoon v. Greenfield*, 52 id. 434.

² 2 Geo. III., ch. 19, as amended by 39 Geo. III., ch. 34.

³ *Simpson v. Unwin*, 3 B. & Ad. 134; *Wilb. on St.* 253.

⁴ *Core v. James*, L. R. 7 Q. B. 135.

⁵ *Hearne v. Garton*, 2 E. & E. 66.

⁶ *Rex v. Sleep*, L. & C. 44. Compare *Lee v. Simpson*, 3 C. B. 871; *Rex v. Woodrow*, 15 M. & W. 404; *Reg. v. Harvey*, L. R. 1 C. C. 284; *Reg. v. Dean*, 12 M. & W. 39.

⁷ *Wilb. on St.* 254.

⁸ *Huntingtower v. Gardiner*, 1 B. & C. 297.

⁹ *Edward v. Trevellick*, 4 E. & B. 59.

ascertained from a consideration of all its provisions, and that intent will be carried into effect. Such statutes will not be construed so strictly as to defeat the obvious intention.¹ The principle of strict construction does not allow a court to make that an offense which is not such by legislative enactment; but this does not exclude the application of common sense to the terms made use of in an act in order to avoid an absurdity which the legislature ought not to be presumed to have intended.² This was said of a statute providing for the punishment of any person who should knowingly and wilfully receive, conceal or dispose of any human body or the remains thereof, which shall have been dug up, removed or carried away, etc., "not being authorized by the selectmen of any town in this commonwealth." The court said: "Taken strictly without reference to the 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 to 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." It was held that "any town" had reference to the town within which the offense was committed. In the confiscation act of congress of 1861 property used in aiding or promoting the rebellion was declared lawful subject of prize and capture wherever found.³ In *United States v. Athens Armory*⁴ the court say: "Limit the term 'prize' or 'capture' as here employed to a strict technical import and the statute fails of its object and becomes an absurdity." Therefore, having in view that the purpose of the act was to make it "one of the means to suppress the rebellion," these words were held not to limit the operation of the act to property taken at sea.⁵ A camp-

¹ *Ante*, § 349.

⁴ 2 Abb. (U. S.) 129, 135.

² *Commonwealth v. Loring*, 8 Pick. 373.

⁵ *United States v. Athens Armory*, 35 Ga. 344.

³ 12 U. S. Stats. at L. p. 319.

meeting or a temporary encampment by a denomination of Christians for the purpose of religious exercises is "a place set apart for the worship of Almighty God" within the intent of an act prohibiting the retailing of spirituous liquors within a certain distance of such a place.¹ "Trade" has been held to include "cod-fishery."² To persuade a slave to leave was held "to aid him to depart."³ A vessel was held "at sea" when she was without the limits of any port or harbor on the sea coast.⁴ But under a statute which provides a penalty "if any person shall wilfully or maliciously kill, maim, beat or wound any horses, cattle, goats, sheep or swine, or shall wilfully injure or destroy any other property of another," a dog was held not included in the denomination of "other property."⁵ It was inferred from the use of the words "injure or destroy" with reference to the property designated by the phrase "any other property," that this latter expression was intended to include only inanimate property to which the terms "kill," "maim," "wound," etc., could not properly be applied. It was also said: "Nor do they [dogs] come within either class or description of the animals which are mentioned. They are not regarded by law as being of the same intrinsic value as property as the animals enumerated, and cannot, we think, be brought within the prohibition under the general expression 'any other property' by intendment."

§ 357. Under a statute prohibiting any man marrying "his brother's wife," marrying his brother's *widow* is an offense.⁶ An act changing the venue of prosecutions for offenses committed on board any vessel "navigating" any river within the state was held applicable to a vessel so engaged, though at anchor at the time the offense was committed.⁷ "Where words are general," said Story, J., "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, when the mischief to be redressed by the statute is equally applicable to all of them. And where

¹ State v. Hall, 2 Bailey, 151.

² State v. Marshall, 13 Tex. 55.

³ The Schooner Nymph, 1 Sumn. 516.

⁴ Commonwealth v. Perryman, 2 Leigh, 717.

⁵ Crosby v. Hawthorn, 25 Ala. 221.

⁷ People v. Hulse, 3 Hill, 309.

⁶ The Schooner Harriet, 1 Story, 251.

a word is used in the 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 equal 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."¹ A statute made robbery a capital offense, when the robber is, "at the time of committing such assault, armed with a dangerous weapon, with intent to kill or maim the person so assaulted and robbed." To the contention that, to constitute the crime of robbery a capital offense within this statute, it must be proved that there was an absolute intent to kill or maim the party robbed, whether the robbery could be accomplished without killing or maiming or not, the court said: "If a statute, creating or increasing a 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 privilege of the 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." It was held to be sufficient that the party be armed with a dangerous weapon with intent to kill or maim the party assaulted by him, in case such killing or maiming be necessary to his purpose of robbing, and that he have the power of executing such intent.² Where for a specified offense the statute provides that the person convicted shall be fined not less than \$100, the construction is not to be so strict as to hold that a fine is not authorized above that sum. The court in such a case held that the exclusion of one subject or thing is the inclusion of all other things. "When the legislature," say the court, "in this case, excluded the power of the court to impose a fine of less than \$100, it, by

¹ *United States v. Winn*, 3 Sumn. 209.

² *Commonwealth v. Martin*, 17 Mass. 359.

implication, authorized the exercise of power to impose a fine for more than that sum. It fixed the minimum, but fixed no maximum."¹

§ 358. What statutes are penal.— Among penal laws which must be strictly construed, those most obviously included are all such acts as in terms impose a fine or corporal punishment under sentence in state prosecutions, or forfeitures to the state as a punitive consequence of violating laws made for preservation of the peace and good order of society. But these are not the only penal laws which have to be so construed. There are to be included under that denomination also all acts which impose by way of punishment any pecuniary mulct or damages beyond compensation for the benefit of the injured party, or recoverable by an informer, or which, for like purpose, impose any special burden, or take away or impair any privilege or right.²

An act which made a tender of bills emitted by the continental congress a bar to any future demand of a debt was held highly penal, and not to be extended beyond the strict import of its language.³ A law prohibited the circulation or passing of "tickets" under penalty. The court held that did not apply to a man giving a due-bill or other written evidence of a debt. "A penal statute," say the court, "taking away or abridging the right of individuals to give or receive a written acknowledgment of a debt due, or a promise to pay a debt, in money or goods, ought to be very plain and explicit in its terms; and a party seeking to recover the penalty ought to show a case clearly and distinctly within the provisions of the statute."⁴ A statute which subjects a mortgagee to a penalty for refusal to discharge a mortgage will be construed strictly;

¹ *Hankins v. People*, 106 Ill. 628.

² *Allen v. Stevens*, 29 N. J. L. 509; *Cole v. Groves*, 134 Mass. 471; *Camden, etc. R. R. Co. v. Briggs*, 22 N. J. L. 623; *Read v. Stewart*, 129 Mass. 407; *Breitung v. Lindauer*, 37 Mich. 217; *Cumberland, etc. Canal v. Hitchings*, 57 Me. 146; *Reed v. Northfield*, 13 Pick. 96; *Palmer v. York Bank*, 18 Me. 166; *Bayard v. Smith*, 17 Wend. 88; *Bay City, etc. R. R. Co. v.*

Austin, 21 Mich. 390; *Henderson v. Sherborne*, 2 M. & W. 236; *Merchants' Bank v. Bliss*, 13 Abb. Pr. 225; *Titusville's Appeal*, 108 Pa. St. 600; *Marston v. Tryon*, id. 270.

³ *Shotwell's Ex'r v. Denman*, 1 N. J. L. 174; *Suffolk Bank v. Worcester Bank*, 5 Pick. 106.

⁴ *Allaire v. Howell Works Co.* 14 N. J. L. 21, 23.

the requirement is dependent upon a full performance of the conditions of the instrument.¹ It will not be applied to the assignee of a mortgage.² A similar rule of strict construction has been applied to an act imposing a penalty for delinquency in discharging a satisfied judgment.³ An act gave treble damages for waste committed on land pending a suit for its recovery. It was held highly penal, and therefore to be limited in its application to the object the legislature had in view; it was necessary to aver a case within its terms.⁴ An act giving the party injured an action to recover a penalty imposed on a public officer for taking excessive fees was held a penal one, and, being construed strictly, was inapplicable to one who took the illegal fees after the expiration of his term for services performed while in office.⁵

§ 359. Statutes which provide a penalty recoverable by the party aggrieved are remedial as well as penal. Hence two diverse principles have some application: that of requiring strict construction on account of the penalty, and that of liberal construction to prevent the mischief and advance the remedy. Where a penalty, like double damages or any other form of pecuniary mulct recoverable by the party injured, is the only remedial instrumentality, the act as to that party is remedial only in the same sense that all punitive laws are so—for the benefit of the public at large. The courts look with no favor upon the penalty, but incline against it.⁶ They will only permit it to be recovered upon a case which falls both within the letter and spirit of the act.⁷ They will not permit a recovery of it in a case not within the letter, merely because it is not excluded by it and is within the mischief intended to be corrected. In *Sickles v. Sharp*⁸ the court say: "The rule that penal statutes are to be strictly construed, 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

¹ *Stone v. Lannon*, 6 Wis. 497.

⁵ *Aechternacht v. Watmough*, 8

² *Grooms v. Hannon*, 59 Ala. 510.

Watts & S. 162.

³ *Marston v. Tryon*, 108 Pa. St. 270.

⁶ *Renfroe v. Colquitt*, 74 Ga. 618;

⁴ *Reed v. Davis*, 8 Pick. 514. See *Bay City, etc. R. R. Co. v. Austin*, 21 Mich. 390.

Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29.

⁷ *Ante*, § 348.

⁸ 13 John. 497.

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.*" The italicised sentence is too general; if applied in its full scope it would leave nothing for strict construction. The penalty was recovered in that case for an act held to be within the strict letter.

§ 360. In *Farmers' & Mechanics' National Bank v. Dearing*,¹ it was said by the court that the thirtieth section of the national bank act "is remedial as well as penal, and is to be liberally construed to effect the object congress had in view in enacting it." Usury had been taken by a bank doing business in New York, and a forfeiture of the whole debt had been adjudged in accordance with the local law. This was held erroneous; section 30 prescribes the exclusive and uniform penalty—that is, the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon, when the rate knowingly received, reserved and charged by a national bank is in excess of that allowed by that section. The court emphasized the rule of strict construction, and the whole judicial argument is toward a milder view of the law than that taken by the state court, whose decision was reversed.

The true sense in which the section in question was remedial and to be liberally construed was probably declared in *Ordway v. Central National Bank of Baltimore*.² An action was brought in the state court for the forfeiture declared by that section. The question was whether it was recoverable in that court. Recovery there was sustained. The court by Alvey, J., say: "The cause of action is a forfeiture or penalty of a civil nature, for the exacting and taking of usurious interest upon money loaned, and the remedy given by the statute is by a private civil action of debt to the party grieved. The government or the public is not concerned with it. It is, therefore, a private right pursued by a private civil action. And it has been decided that the section upon which the action is founded is *remedial* as well as penal, and is to be liberally construed to effect the object which congress had in view in enacting it."³ The liberality of construction relates to the

¹ 91 U. S. 29, 35.

² 47 Md. 217.

³ Citing *Farmers', etc. Nat. Bank v. Dearing*, *supra*.

remedy and not to the provision giving the penalty.¹ Park, J., in *Gorton v. Champneys*,² speaking of a statute, said: "It is a law to prevent and suppress frauds; and it is a clear and fundamental rule in construing statutes against frauds, that they are to be liberally and beneficially expounded; and in our best text-book this position is to be found: that where the statute acts against the offender and inflicts a penalty, it is then to be construed strictly; but where it acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally."³ There is, therefore, a class of statutes which is in part remedial and to be liberally construed, to advance the remedy, and in part penal, and to that extent, as it operates against the offender, to be construed like other penal laws, strictly. The liberal construction allowed to advance the remedy is well illustrated by the case of *Frohock v. Pattee*.⁴ A statute provided that "any person who shall knowingly aid or assist any debtor or prisoner in any fraudulent concealment or transfer of his property to secure the same from creditors, etc., shall be answerable in a special action on the case to any creditor who may sue for the same in double the amount of the property so fraudulently transferred; not, however, exceeding double the amount of such creditors' just debt or demand." It appeared that a creditor had brought a suit and recovered on this provision. The question was whether, in the absence of an issue in regard to the amount of that recovery, it was a bar to the present suit, as would be its effect if it were treated as a penal statute proper. It was held not to be such a statute, and therefore the former judgment in favor of one creditor only barred another to the extent of the recovery towards twice the value of the property fraudulently conveyed. Such actions are not criminal actions and are not governed by the same rules. A decision for a defendant is not an acquittal which is final within the protection of the constitutional provision against being put twice in jeopardy.

¹ See *Abbott v. Wood*, 22 Me. 541.

² 1 Bing. 287, 300.

³ See *Hahn v. Salmon*, 20 Fed. Rep. 801; *Cumming v. Fryer*, Dudley, 182;

Smith v. Moffat, 1 Barb. 65; *Sharp v. Mayor*, etc. 31 id. 577; *White v.*

Steam Tug, 6 Cal. 462; *Ellis v. Whitlock*, 10 Mo. 781; *Hyde v. Cogan*, 2

Doug. 699, 706; *Abbott v. Wood*, 22 Me. 541.

⁴ 38 Me. 103.

A defeated plaintiff may move for a new trial as in other civil cases.¹ Where a statute gives penal damages to the injured party they are part of his indemnity.² And where the common-law action for the injury survives and is therefore assignable, the penal damages given by statute are also assignable.³

§ 361. **Revenue laws.**— There are many cases in the federal courts in which it has been declared that the revenue laws are not to be regarded as penal in the sense that requires them to be strictly construed in favor of the defendant, though they impose penalties and forfeitures. They have even been declared remedial in character, as intended to prevent fraud, suppress public wrong and to promote the public good.⁴ These declarations tend to establish an exceptional and arbitrary rule in this class of cases, at war with elementary principles universally recognized in other cases. Other penal laws are made to punish and prevent frauds, as, for example, statutes providing a punishment for obtaining money or goods under false pretenses. All penal laws are intended to promote the public good. Strict construction is based on humane considerations which are applicable with more or less force in all cases where a statute provides for punishment. These considerations are as pertinent to acts which are supposed to be infractions of a revenue law as to other criminal acts; as pertinent when the government is the sufferer as when a private citizen is injured; as well when the offense is odious fraud as when it is atrocious violence. These declarations, so frequently made in revenue cases, have not been practically followed by any notable departures from the strict rule. And they have generally been qualified by the enunciation of the sound principle applicable to all penal provisions that they are to be construed ac-

¹ *Stanley v. Wharton*, 9 Price, 301. *Tons of Coal*, 6 Biss. 379; *United*

² *Reed v. Northfield*, 13 Pick. 94. *States v. Cases of Cloths*, Crabbé,

³ *Gray v. Bennett*, 3 Metc. 522; 356; *United States v. Barrels of High*
Brandon v. Pate, 2 H. Black. 308; *Wines*, 7 Blatch. 459; *United States*
Brandon v. Sands, 2 Ves. Jr. 514. *v. Olney*, 1 Abb. (U. S.) 275; *United*

⁴ *Wood v. United States*, 16 Pet. 305; *United States v. Hodson*, 10 Wall.
342; *Taylor v. United States*, 3 How. 395; *United States v. Breed*, 1 Sumn.
197; *Cliquot's Champagne*, 3 Wall. 159; *United States v. One Hundred*
114; *Twenty-eight Cases*, In re, 2 Ben. 63; *United States v. Willetts*,
and *Twenty-nine Packages*, 2 Am. L.
5 Ben. 220; *United States v. Three* Reg. (N. S.) 419.

cording to the true intent and meaning of their terms, and when the legislative intention is thus ascertained, that and that only is to be the guide in interpreting them.¹ No case has arisen in which a penalty or forfeiture has been sustained for being within the supposed intention of the statute when not within its terms.

It was declared in *United States v. Wigglesworth*,² that statutes levying taxes or duties on subjects or citizens are to be construed most strongly against the government, and in favor of the subjects or citizens, and their provisions are not to be extended by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy.³ Blackstone laid down the rule that penal statutes must be construed strictly. Then he proceeds to say: "Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule;

¹ *Taylor v. United States*, 3 How. 197; *United States v. Breed*, 1 Sumn. 159; *United States v. Distilled Spirits*, 10 Blatchf. 428, 433.

² 2 Story, 369.

³ The characterizing of such laws as remedial has not escaped criticism. Mr. Cooley, in his work on Taxation, says: "It seems highly probable that the word *remedial* has been employed by the learned judge in this case [*United States v. Hodson*, *supra*] in a sense differing from that in which it is commonly used in the law. A remedial law, as the term is generally employed, is something quite different from the revenue laws. An author of accepted authority expresses the ordinary understanding, when he defines a remedial statute to be 'one which supplies such defects and abridges such superfluities of the common law as may have been discovered (1 Black. Com. 86); such as may arise either from the imperfection of all human laws, from change of time and circumstances, from mis-

takes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatever; and this being done either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, has occasioned another subordinate division of remedial acts into *enlarging* and *restraining* statutes. So it seems that a remedial statute may also have its application to and effect upon other existing statutes, and give a party injured a remedy; and for a more general definition, it is a statute giving a party a mode of remedy for a wrong where he had none or a different one before.'" Potter's *Dwarris* on St. 73. He concludes that in applying the word "remedial" to tax laws it was used in some political or special, rather than in the strict legal, sense, and that it was not the intention of the court to overrule the opinion of Mr. Justice Story in *Wigglesworth's* case. *Cooley on Tax*. 204, 205.

most statutes against frauds being penal. But this difference is to be taken: Where the statute acts upon the offender and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally."¹ Revenue laws are intended to raise money for the support of the government. If they contain provisions for penalties and forfeitures these are ancillary to that object; but they are not for that reason to be necessarily construed in point of strictness by the same rule. As penal laws, no reason is perceived why the same rule of strict construction should not be applied to them as to other such laws. Mr. Dwarris remarks that, "By the use of ambiguous clauses in laws of that sort the legislature would be laying a snare for the subject, and a construction which conveys such an imputation ought never to be adopted. Judges, therefore, where clauses are obscure, will lean against forfeitures, leaving it to the legislature to correct the evil, if there be any. With 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, and not liberally, as remedial, laws. In like manner, in the revenue laws, where clauses inflicting pains and penalties are ambiguously or obscurely worded, the interpretation is ever in favor of the subject; 'for the plain reason,' said Heath, J., in *Hubbard v. Johnstone*, 'that the legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed.'"²

§ 362. Statutes which impose burdens — Taxes.— Acts for taxation of persons or property are prominent in this category.

¹ 1 BL. Com. 38.

² 3 Taunt. 177; Dwarris on St. 641. Mr. Cooley thus comments on this point: "In the state revenue laws the penal provisions are few, and by no means severe. In the federal revenue laws some of them are of a severity very seldom to be met with in penal statutes, and only to be justified by the supposed impossibility of collecting the revenue without them. In illustration of what is here said, reference need only to be made to the case of

forfeiture of property for the mere indulgence of a fraudulent intent never carried into effect; a forfeiture, too, which may be visited upon a purchaser who has bought in good faith, and without any suspicion of the intended fraud. *Henderson's Distilled Spirits*, 14 Wall. 44. If such provisions are to be construed liberally, there is no reason why any other penal provisions whatever should not be." Cooley on Taxation, 208.

The power to tax is sovereign, and its exercise needful to supply the government with money necessary for its support. When limited to the accomplishment of this object it is beneficent, but since it is so unlimited in force and so searching in extent that courts recognize no restrictions except such as rest in the discretion of the authority which exercises it; since it reaches to every trade and occupation, to every object of industry, use or enjoyment, to every species of possession, and imposes a burden which in case of failure to discharge it may be followed by summary seizure and sale or confiscation of property; since no attribute of sovereignty is more pervading or affects more constantly and intimately all the relations of life,¹ and involves the power to destroy, and may neutralize the power to foster and create,² statutes enacted in the exercise of the taxing power are construed with some degree of strictness. It is a special authority, and in its exercise the citizen is deprived of his property. However meritorious the purpose for which such a power is granted, the courts will be sedulous in confining it within the boundaries the legislature have thought fit to prescribe.³ The supreme court of New Jersey say: "In laying the burden of taxation upon the citizens of the state, while it must be the object of every just system to equalize this charge by a fair apportionment and levy upon the property of all, it is equally the duty of the courts to see that no one, by mere technicalities which do not affect his substantial rights, shall escape his fair proportion of the public expense and thus impose it upon others. A liberal construction must therefore be given to all tax laws for public purposes, not only that the officers of the government may not be hindered, but also that the rights of all taxpayers may be equally preserved."⁴ "If it be a matter of

¹ Cooley on Const. Lim. 479; Litchfield v. Vernon, 41 N. Y. 123, 140, 143; Henry v. Chester, 15 Vt. 460.

² McCulloch v. Maryland, 4 Wheat. 431.

³ Powell v. Tuttle, 3 N. Y. 396, 401; Sherwood v. Reade, 7 Hill, 431; Striker v. Kelly, 2 Denio, 323.

⁴ State v. Taylor, 35 N. J. L. 184, 190. The language of a distinguished

author is apposite, and expresses the law with felicity and accuracy: "In the construction of the revenue laws special consideration is of course to be had of the purpose for which they are enacted. That purpose is to supply the government with a revenue. But in the proceedings to obtain this it is also intended that no unnecessary injury shall be inflicted upon

real doubt," said Mr. Justice Story, "whether the intention of the act of 1841 was to levy a permanent duty on indigo, that doubt will absolve the importer from paying the duty."¹

In *Gurr v. Scudds*,² Pollock, C. B., says: "If there is any doubt as to the meaning of the stamp act, it ought to be construed in favor of the subject, because a tax cannot be imposed without clear and express words for that purpose." This seems to be the tenor of all the English decisions, that every charge on the subject must be imposed by clear and unambiguous words.³ In a late case before the house of lords⁴ it was said:

the individual taxed. While this is secondary to the main object — the impelling occasion of the law — it is none the less a sacred duty. Care is taken in constitutions to insert provisions to secure the citizen against injustice in taxation, and all legislative action is entitled to the presumption that this has been intended. We are therefore at liberty to suppose that the two main objects had in view in framing the provisions of any tax law were, first, the providing a public revenue, and second, the securing of individuals against extortion and plunder under the cover of the proceedings to collect the revenues. The provisions for these purposes are the important provisions of the law. . . . The question regarding the revenue laws has generally been whether or not they shall be construed strictly. The general rules of interpretation require this in the case of statutes which may divest one of his freehold by proceedings not in the ordinary sense judicial, and to which he is only an enforced party. It is thought to be only reasonable to intend that the legislature, in making provision for such proceedings, would take unusual care to make use of terms which would plainly express its meaning, in order that ministerial officers might not be left in doubt in the exercise of unusual powers, and

that the citizen might know exactly what were his duties and liabilities. A strict construction in such cases is reasonable, because presumptively the legislature has given in plain terms all the power it has intended should be exercised. It has been very generally supposed that the like strict construction was reasonable in the case of tax laws." *Cooley on Taxation*, 199, 200; *Dwarris on Statutes*, 742, 749.

¹ *United States v. Wigglesworth*, 2 Story, 369, 374.

² 11 Ex. 190, 192.

³ *Wroughton v. Turtle*, 11 M. & W. 561, 567; *Williams v. Sangar*, 10 East, 66, 69; *Warrington v. Furber*, 8 id. 242, 245; *Denn v. Diamond*, 4 B. & C. 243; *Doe v. Snaith*, 8 Bing. 146, 152; *Tomkins v. Ashby*, 6 B. & C. 541, 543; *Marquis of Chandos v. Commissioners*, 6 Ex. 464, 479; *Oriental Bank v. Wright*, L. R. 5 App. Cas. 842; *Pryce v. Monmouthshire Canal & Ry. Co.* L. R. 4 App. Cas. 197; *Reg. v. Barclay*, L. R. 8 Q. B. Div. 306; *Daines v. Heath*, 3 C. B. at p. 941; *Gosling v. Veley*, 12 Q. B. at p. 407; *Caswell v. Cook*, 11 C. B. (N. S.) 637; *Burder v. Veley*, 12 Ad. & E. at p. 246; *Att'y-Gen. v. Middleton*, 3 H. & N. at p. 138; *Iles v. West Ham Union*, L. R. 8 Q. B. Div. 69; *In re Micklethwait*, 11 Ex. 452.

⁴ *Partington v. Att'y-Gen.* L. R. 4 H. L. Cas. 122.

"The principle of all fiscal legislation is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case may otherwise appear to be. In other words, if there is admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

§ 363. The American cases generally announce the same rule of construction. Duties, says Mr. Justice Nelson, "are never imposed upon the citizen upon vague or doubtful interpretations."¹ Statutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be strictly construed.² A statute conferring authority to impose taxes must be construed strictly.³ A tax law cannot be extended by construction to things not named or described as the subjects of taxation.⁴ A statute required taxes for school purposes to be levied on all the ratable estate of persons who are residents of the district; it authorized an executor to put the property of the estate in the list in the name of the estate. It was held that the ratable estate of the deceased pending administration might be assessed in the district where the deceased lived and died. The court say: "The greatest and perhaps the only objection that can be urged against this rule is, that we cannot say in strictness that the deceased or his estate is a resident of the district. This objection assumes that the statute is to be strictly construed. But we do not think that the doctrine of strict construction should apply to it. Statutes relating to taxes are not penal statutes,

¹ Powers v. Barney, 5 Blatchf. 202, 203; United States v. Wigglesworth, 2 Story, 369, 373; United States v. Watts, 1 Bond, 580, 583; Vicksburg, etc. R. R. Co. v. State, 62 Miss. 105; Mayor v. Hartridge, 8 Ga. 23; Crosby v. Brown, 60 Barb. 548; Dean v. Charlton, 27 Wis. 522; Shawnee Co. v. Carter, 2 Kan. 115; Bensley v. Mountain Lake Water Co. 13 Cal. 306, 316. ² Sewall v. Jones, 9 Pick. 412, 414. ³ Moseley v. Tift, 4 Fla. 402; Williams v. State, 6 Blackf. 36; Barnes v. Doe, 4 Ind. 132, 133; Smith v. Waters, 25 Ind. 397; Fox's Appeal, 112 Pa. St. 337.

⁴ Boyd v. Hood, 57 Pa. St. 98, 101.

nor are they in derogation of natural rights.”¹ That case seems to have been properly determined, and did not require a denial that tax laws are to be strictly construed. The law expressly allowed the listing of the decedent estate in the name of the deceased person’s estate, and therefore the levy of a tax on such a resident as such an “intangible being” could be. The court was in accord with the general current of authority in concluding that in construing statutes relating to taxes they “ought, where the language will permit, so to construe them as to give effect to the obvious intention and meaning of the legislature, rather than defeat that intention by too strict an adherence to the letter.”² A statute to re-assess a void tax will be construed strictly. Such a statute is in derogation of the rights of the citizen who may be affected by it; it compels him to bear a burden which he would not have to bear but for it. A due regard for individual rights and the plainest principles of justice requires that taxing statutes shall have only the effect which the legislature clearly intended; in construing them all reasonable doubts as to such intent should be resolved in favor of the citizen.³ Every statute in derogation of the rights of property or that takes away the estate of the citizen ought to be construed strictly. It should never have an equitable construction.⁴ Statutes providing for redemption of lands sold for taxes should be construed liberally.⁵

§ 364. Exemption from taxation or other general burden.—Not only is all legislation for taxation, but also for exemption from taxation, or any other common burden or liability, to be strictly construed. The principle is well settled that the power of exemption, as well as the power of taxation, is an essential element of sovereignty, and can only be surrendered or diminished in plain and explicit terms.⁶

¹ *Cornwall, Ex’r, v. Todd*, 38 Conn. 443.

² See 3 *Parsons on Cont.* 287.

³ *Dean v. Charlton*, 27 Wis. 522.

⁴ *Sharp v. Speir*, 4 Hill, 76, 83; *Van-horne’s Lessee v. Dorrance*, 2 Dall. 304; *Sibley v. Smith*, 2 Mich. 486, 490.

⁵ *Alter v. Shepherd*, 27 La. Ann. 207.

⁶ *Probasco Co. v. Moundsville*, 11 W. Va. 501; *McLean County v.*

Bloomington, 106 Ill. 209; S. C. 5 Am. & Eng. Corp. Cas. 535; *Lima v. Cemetery Asso.* 42 Ohio St. 128; S. C. 5 Am. & Eng. Corp. Cas. 547; *Mayor, etc. v. Central R. R. etc. Co.* 50 Ga. 620; *Gale v. Laurie*, 5 B. & C. 156; *Buffalo City Cemetery Co. v. Buffalo*, 46 N. Y. 506; *State v. Bank of Smyrna*, 2 Houst. 99; *Willis v. R. R. Co.* 32 Barb. 398; *Orr v. Baker*, 4 Ind. 86;

Every such immunity must receive a strict construction. Legislation which is claimed to relieve any species of property from its due proportion of the general burdens of government should be so clear that there can be neither reasonable doubt nor controversy about its terms. The language must be such as leaves no room for discussion. Doubts must be resolved against the exemption.¹ If a statute gives authority for a special purpose, and thereby impliedly remits a general duty, this implied remission cannot be prolonged beyond the necessary requirements of the purpose.² A statute exempting a railroad company from liability for accidents to passengers riding on the platform of cars,³ limiting individual liability of partners in limited partnerships,⁴ and according to some cases, and probably contrary to the weight of authority, laws exempting certain property of debtors from execution,⁵ laws providing for stay of proceedings in favor of persons enlisted in the army,⁶ are construed strictly. So are provisions relating to disabilities, saving rights of action, and extending the time for their assertion;⁷ and provisions exonerating ship-

St. Louis, etc. Ry. Co. v. Berry, 41 Ark. 509; *Rue v. Alter*, 5 Denio, 119; *Railway Co. v. Loftin*, 98 U. S. 559; *Cincinnati College v. State*, 19 Ohio, 110; *State v. Mills*, 34 N. J. L. 177; *Gordon's Ex'r v. Mayor, etc.* 5 Gill, 231; *Weston v. Supervisors*, 44 Wis. 242; *State v. McFetridge*, 64 id. 130. Exemption from taxation does not include exemption from local assessments. 5 Am. & Eng. Corp. Cas. 552, note. "An exception as to the exemption is made in favor of sales for non-payment of taxes or assessments, and for a debt or liability incurred for the purchase or improvement of the premises, thus, according to a familiar rule of construction, excluding, by necessary implication, any other exemption; and the language expressly excludes every other known mode of incumbering and conveying the property." *Eldridge v. Pierce*, 90 Ill. 474. Statutes exempting railroad property from taxation are to be liberally con-

strued if a license fee or other equivalent is paid in lieu of taxes levied in the usual way. *Milwaukee, etc. Ry. Co. v. Milwaukee*, 34 Wis. 271.

¹ *Bailey v. Magwire*, 22 Wall. 226; *Vicksburg, etc. Ry. Co. v. Dennis*, 116 U. S. 665; *Yazoo R. R. Co. v. Thomas*, 132 id. 174. See *Gray v. La Fayette Co.* 65 Wis. 567.

² *Williams v. Tripp*, 11 R. I. 447.

³ *Willis v. Railroad Co.* 32 Barb. 398.

⁴ *Andrews v. Schott*, 10 Pa. St. 47; *Vandike v. Roskam*, 67 id. 330; *Maloney v. Bruce*, 94 id. 249; *Eliot v. Himrod*, 108 id. 560.

⁵ *Re Lammer*, 7 Biss. 269; *Rue v. Alter*, 5 Denio, 119; *post*, § 422. See *Carpenter v. Herrington*, 25 Wend. 370; *Kinard v. Moore*, 3 Strobl. 193.

⁶ *Breitenbach v. Bush*, 44 Pa. St. 813.

⁷ *Carlisle v. Stitler*, 1 Pen. & W. 6; *Thompson v. Smith*, 7 Serg. & R. 209;

owners for damages caused their ships through the faults of pilots whom they are compelled to employ.¹

§ 365. **Acts delegating the power of taxation.**— Acts of this class are construed with great strictness. Two concurring principles leading to strict construction apply. Such acts affect arbitrarily private property, and are grants of power. "The power to lay taxes," says the supreme court of Ohio, "is one of the highest attributes of sovereignty. It involves the right to take the private property of the citizen without his consent and without other consideration than the promotion of the public good. Such interference with the natural right of acquisition and enjoyment guarantied by the constitution can only be justified when public necessity clearly demands it. Being a sovereign power, it can only be exercised by the general assembly when delegated by the people in the fundamental law; much less can it be exercised by a municipal corporation without a further unequivocal delegation by the legislative body."² The power can be delegated by the legislature,³ but only in plain and unambiguous words.⁴ Statutes for that purpose will be construed strictly, and they must be closely pursued; a departure in any material part will be fatal.⁵

Rankin v. Tenbrook, 6 Watts, 388; *Marple v. Myers*, 12 Pa. St. 122; *Rider v. Maul*, 46 id. 376.

¹ *The Protector*, 1 W. Rob. 45; *The Diana*, 4 Moore, P. C. 11; *The Iona*, L. R. 1 P. C. 426.

² *Mays v. Cincinnati*, 1 Ohio St. 269, 273; *Bennett v. Birmingham*, 31 Pa. St. 15; *Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 32.

³ *St. Louis v. Laughlin*, 49 Mo. 559; *Davis v. Gaines*, 48 Ark. 370; *Williamson v. New Jersey*, 130 U. S. 189.

⁴ *St. Louis v. Laughlin*, 49 Mo. 559; *Douglass v. Mayor*, etc. 18 Cal. 643; *Harding v. Bader*, 75 Mich. 316; *Matter of 2d Ave. M. E. Church*, 66 N. Y. 395.

⁵ *Judge of Campbell County Court v. Taylor*, 8 Bush, 206; *Sharp v. Johnson*, 4 Hill, 92; *Lake v. Williamsburgh*, 4 Denio, 520; *Hewes v. Reis*, 40

Cal. 255; *Holland v. Mayor*, etc. 11 Md. 186; *Clark v. Washington*, 12 Wheat. 40; *Fowle v. Alexandria*, 3 Pet. 398; *Reed v. Toledo*, 18 Ohio, 161; *Jonas v. Cincinnati*, id. 318; *Mays v. Cincinnati*, 1 Ohio St. 268; *Nichol v. Nashville*, 9 Humph. 252; *Kniper v. Louisville*, 7 Bush, 599; *Broadway Bap. Church v. McAtee*, 8 Bush, 508; *Clark, Dodge & Co. v. Davenport*, 14 Iowa, 494; *United States v. Mayor*, etc. 2 Am. L. Reg. (N. S.) 394 and note; *St. Charles v. Nolle*, 51 Mo. 122, 124; *Bennett v. Birmingham*, 31 Pa. St. 15; *Henry v. Chester*, 15 Vt. 460; *Rex v. Liverpool*, 4 Burr. 2244; *Ryerson v. Laketon*, 52 Mich. 509; *Folkerts v. Power*, 42 Mich. 283; *Houghton County v. Auditor-Gen.* 41 Mich. 28; *Cruger v. Dougherty*, 43 N. Y. 107, 121; *Sharp v. Speir*, 4 Hill, 76, 83; *Beaty v. Knowler*, 4 Pet. 152.

Any doubt or ambiguity arising out of the terms used by the legislature must be resolved in favor of the public.¹ Accordingly it is held that under authority to levy a tax and to sell property for non-payment land cannot be sold for a delinquent assessment.² A power to tax or entirely suppress all petty groceries will not authorize a grant of licenses for retailing.³ A power to tax for repaving streets will not include an original paving.⁴ A charter power to a municipal corporation to tax hacks, drays, etc., within the city does not authorize a tax on outside residents engaged in hauling into and out of the city, and even an express grant of such power to tax would be void as an unconstitutional taking of private property for public use.⁵ Authority to tax "auctioneers, grocers, merchants, retailors, hotels, . . . hackney carriages, omnibuses, carts, drays and other vehicles, and all other business, trades, avocations or professions whatever," held not to include attorneys at law.⁶ Where a special tax is authorized for a specified purpose, and the law is silent as to cost of collection, nothing can be added for compensation of the collector.⁷ It is not in the power of the common council of a city, by ordinance, to include persons as hucksters who do not fall within the ordinary meaning of that term; nor can the power of taxation upon employments, when not conferred by the charter, be resorted to as a means of preventing huckstering.⁸ Where the taxing power was authorized to be exercised after a majority of the legal voters of a county named had voted in favor of a specified proposition, it was held that this was a condition precedent, and that it was not fulfilled by a submission to the voters of such county excepting those in a city therein.⁹

§ 366. **Statutes against common right.**—Statutes against common right are those which operate exceptionally to the

¹ *Id.*; *Minturn v. Larue*, 23 How. 435.

² *Sharp v. Speir*, 4 Hill, 76; *City of Fairfield v. Ratcliff*, 20 Iowa, 396.

³ *Leonard v. Canton*, 35 Miss. 189.

⁴ *Holland v. Mayor, etc.* 11 Md. 186.

⁵ *St. Charles v. Nolle*, 51 Mo. 122, 124; *Bennett v. Birmingham*, 31 Pa. St. 15.

⁶ *St. Louis v. Laughlin*, 49 Mo. 559; *Trustees, etc. v. Osborne*, 9 Ind. 458.

As to application of the doctrine of *ejusdem generis*, see *Littlefield v. Winslow*, 19 Me. 394; *Foster v. Blount*, 18 Ala. 689; *Grumley v. Webb*, 44 Mo. 458; *Sedgw.* 423; *ante*, § 268.

See *State v. Robinson*, 42 Minn. 107.

⁷ *Jonas v. Cincinnati*, 18 Ohio, 318.

⁸ *Mays v. Cincinnati*, 1 Ohio St. 268.

⁹ *Judge of Campbell County Court v. Taylor*, 8 Bush, 206.

prejudice of particular persons; not laws of general application which happen to harshly affect a few individuals on account of their exceptional condition, but laws which do not have such an application; those which operate, when they apply at all, to a few, while the rest of the community are exempt. Such statutes are construed strictly.¹ Of this nature is a statute obliging an attorney, on request or nomination of a court, to take charge of a lawsuit gratuitously.² The act incorporating the Cayuga Bridge Company contained a provision that it should not be lawful for any person or persons to erect any bridge or establish any ferry within three miles of the company's bridge, nor be lawful for any person to cross the lake except in his own boat within that distance without paying toll to the company. The provision was construed strictly and held not to apply to a person who crossed the lake within that distance on the ice.³ The court say statutes cannot take away a common right unless the intention is manifest; and, when not remedial, are not to be extended even by equitable principles.⁴ Towns being under no obligation, except that created by law, to support paupers, a case must be brought strictly within the provisions of the law before the duty arises; and an approximation, however near, will not be sufficient.⁵ Questions of legal settlement depend, therefore, upon a strict and precise application of positive law.⁶ Where the settlement depended by the language of the statute on having an estate the principal of which shall be set at 60% or the income at 3%, in the valuation of estates by assessors, and be assessed for the same for the space of five years successively in the town where a person dwelt, it was not enough that he had an estate of that value not assessed at all.⁷ The right to impress property to be used for the taking care of persons infected with sickness dangerous to public health can only be exercised when expressly granted.⁸

¹ *Flint River Steamboat Co. v. Foster*, 5 Ga. 194; *Mayor, etc. v. Hart-ridge*, 8 id. 23; *Young v. McKenzie*, 3 id. 40; *Marsh v. Nelson*, 101 Pa. St. 51; *Rothgerber v. Dupuy*, 64 Ill. 452; *Walker v. Chicago*, 56 id. 277.

² *Webb v. Baird*, 6 Ind. 13.

³ *Sprague v. Birdsall*, 2 Cow. 419.

⁴ *Coolidge v. Williams*, 4 Mass. 140; *Melody v. Reab*, id. 473.

⁵ *Danvers v. Boston*, 10 Pick. 513.

⁶ *Id.*; *Billerica v. Chelmsford*, 10 Mass. 394.

⁷ *Monson v. Chester*, 22 Pick. 385.

⁸ *Pinkham v. Dorothy*, 55 Me. 135; *Mitchell v. Rockland*, 45 id. 496.

§ 367. Statutes are not unfrequently enacted for police purposes which by their terms must operate to the special prejudice of persons in particular situations, for the common good. In a certain sense these are statutes against common right; and though the power to pass them is unquestionable, they should only operate within their strict letter, interpreted according to their plain intent. For the protection of a harbor the legislature may forbid the removal of stones, gravel or sand from the beach by the owner.¹ Restrictions on the building or repairing of wood structures in the populous part of a city, commonly designated as fire limits, are invasions of private right, and to be strictly confined to their literal import.² Laws in restraint of trade, or the alienation of property,³ or those which abridge the privilege or right of giving evidence,⁴ will be construed strictly. So of a statute requiring of suitors a test oath.⁵ An act placing Indians under certain disabilities in respect to selling or devising their land was held not to be strictly construed, especially if, by such construction, the object of the legislature would be defeated; protective and remedial statutes imposing disabilities upon persons for their benefit ought to receive a liberal construction.⁶

§ 368. Statutes of limitation.—Statutes limiting the right to bring actions to particular periods are restrictive and will not be extended to any other than the cases expressly provided for;⁷ and the exceptions are allowed a liberal effect,⁸ though not so liberal as to embrace cases within the reason when not within the letter of them.⁹ The exception of actions which concern the trade of merchandise between merchants is confined to actions on open and current accounts; it does

¹ Commonwealth v. Tewksbury, 11 Met. 55.

² Stewart v. Commonwealth, 10 Watts, 307; Brady v. Northwestern Ins. Co. 11 Mich. 425, 451; Booth v. State, 4 Conn. 65; Tuttle v. State, id. 68.

³ Richards v. Emswiler, 14 La. Ann. 658; Sewall v. Jones, 9 Pick. 412; Gunter v. Leckey, 30 Ala. 591.

⁴ Smith v. Spooner, 3 Pick. 229; Pelham v. Messenger, 16 La. Ann. 99.

⁵ Harrison v. Leach, 4 W. Va. 383.

⁶ Doe v. Avaline, 8 Ind. 6, and note. See Smith v. Spooner, *supra*.

⁷ Bedell v. Janney, 9 Ill. 193; Delaware, etc. R. R. Co. v. Burson, 61 Pa. St. 369; Pearl v. Conley, 7 Sm. & M. 358; Wood on St. Lim. § 4.

⁸ Roddam v. Morley, 1 De G. & J. 1.

⁹ Sacia v. De Graaf, 1 Cow. 356. See *post*, §§ 424, 425.

not extend to accounts *stated*. It must be a direct concern of trade; liquidated demands, or bills and notes, which are only traced to the trade of merchandise are too remote to come within this description.¹ When the statute contains no exception, as a general rule, the courts will not make any.²

There has been held to be an implied suspension of such statutes during the late civil war as to citizens of different states between which intercourse was interrupted, on the ground of paramount necessity, and limited by such necessity.³ Being statutes of repose, they are not regarded in modern times with disfavor; and are therefore not to be defeated by undue strictness of construction.⁴ Heath, J., said these statutes ought to receive a strict construction.⁵ But this has not been the uniform expression of English judges. Dallas, C. J., said: "I cannot agree in the position that statutes of this description ought to receive a strict construction; on the contrary, I think they ought to receive a beneficial construction with a view to the mischief intended to be remedied."⁶ Like views have been expressed in this country. "The statute of limitations is entitled to the same respect with other statutes and ought not to be explained away."⁷ Such statutes were not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost.⁸ Story, J., in *Bell v. Morrison*,⁹ said: "It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been

¹ *Ramchander v. Hammond*, 2 Charter Oak Ins. Co. 64 Mo. 320; John. 200.

² *Kilpatrick v. Byrne*, 25 Miss. 571; *Sibley*, 53 id. 61; *Coleman v. Holmes*, 44 Ala. 124.

³ *Wall* 158; *Warfield v. Fox*, 53 Pa. St. 382; *The Sam Slick*, 2 Curtis, C. C. 480; *Wells v. Child*, 12 Allen, 333; *Dozier v. Ellis*, 28 Miss. 730; *Favorite v. Booher*, 17 Ohio St. 548; *Pryor v. Ryburn*, 16 Ark. 671; *Howell v. Hair*, 15 Ala. 194; *Baines v. Williams*, 3 Ired. L. 481.

⁴ *Toll v. Wright*, 37 Mich. 93; *Palmer v. Palmer*, 36 id. 487.

⁵ *Roe v. Ferrars*, 2 B. & P. at p. 547.

⁶ *Tolson v. Kaye*, 3 Brod. & B. at p. 222.

⁷ *Clementson v. Williams*, 8 Cranch, 72.

⁸ Id.

⁹ 1 Pet. 351.

³ *Levy v. Stewart*, 11 Wall. 244; *Ross v. Jones*, 22 Wall. 576; *Smith v.*

forgotten, or be incapable of explanation by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts and to suppress those prejudices which may rise up at a distance of time and baffle every honest effort to counteract or overcome them."¹ Such statutes rest upon sound policy and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction to evade their effect.² This class of statutes has a harsh effect on the creditor, which consideration leads to a strict construction; and a debtor who takes advantage of long forbearance to be utterly discharged on his own account has little right to favor; but all persons are not provident enough to have indestructible evidence of all their transactions, and it is for the general good that a period be fixed after which there is an arbitrary exemption from liability. In this sense these statutes are remedial, to afford protection against stale claims, after a period sufficient to the diligent, and when in the majority of instances a defending party would be placed at a disadvantage by reason of the delay.

§ 369. Limitations as to new trials and appeals.— Provisions which limit in point of time the right to move for a new trial, or to take an appeal, are construed with strictness in favor of the party desiring a review, when the time is to be computed from notice of the judgment to be given by the opposite party. The right of appeal is general and positive, and as statutes of limitation are in restraint of that right they are, as already said, to be construed strictly.³ Although it be admitted that notice means knowledge, it by no means follows that knowledge or information of any kind will suffice— notice to limit the right in question must be given. This implies a positive act of the party in whose favor the judgment has been rendered. "It is highly proper," says Savage, C. J., "that such should be the practice. Notice in such a case ought not to depend upon casual information or an advertisement in the newspapers. Such notice certainly cannot be considered notice given by one party to the other. It is clear to my mind

¹ See *Willison v. Watkins*, 3 Pet. 43, 54.

² *McCluny v. Silliman*, 3 Pet. 270; *United States v. Wilder*, 13 Wall. 254.

³ *Pease v. Howard*, 14 John. 479.

that the legislature intended a regular, formal, written notice.”¹ Where an appeal was required to be taken within “thirty days after written notice of the judgment or order shall have been given to the party appealing,” it was held that unless, after the judgment or order and its entry, the party has some written notification thereof by the act of the prevailing party or his attorney, the time to appeal continues without limitation. The party may acquire a knowledge of the order, he may examine it on the files of the court or on its records, or procure a copy of it from the clerk; but as a limitation of the time to appeal, knowledge so acquired will be wholly inoperative.² Such a notice must be given, though the order or judgment appealed from was entered by the appellant himself;³ or though he was in court and heard the judgment pronounced and even asked for a stay of proceedings.⁴ Service of a report containing a recital of the judgment or order will not be sufficient.⁵

§ 370. **Statutes interfering with legitimate industries, etc.**—All statutes for interference with legitimate industries or the ordinary uses of property, or for its removal or destruction for being a nuisance or contributory to public evil, are treated with a conservative regard for the liberty of the citizen in his laudable business, and in the innocent enjoyment of his possessions, and generally the rights of property. Such interferences are cautiously justified on principles of the common law, and only in cases of imperative necessity,⁶ or under valid statutes plainly expressing the intent.⁷

¹ *Jenkins v. Wild*, 14 Wend. 539, 545. *Gray*, 359; *Austin v. Murray*, 16

² *Fry v. Bennett*, 16 How. Pr. 402; *Pick*, 121; *Welch v. Stowell*, 2 Doug. Valton v. National Loan, etc. Co. 19 (Mich.) 332; *Walker v. Board of Public Works*, 16 Ohio, 540; *Wynehamer v. People*, 13 N. Y. 378; *Port Wardens of N. Y. v. Cartwright*, 4

³ *Rankin v. Pine*, 4 Abb. Pr. 309.

⁴ *Biagi v. Howes*, 66 Cal. 469.

⁵ *Matter of N. Y. Cent. etc. R. R. Co.* 60 N. Y. 112.

⁶ *Mayor, etc. of New York v. Lord*, 18 Wend. 128; *Respublica v. Sparhawk*, 1 Dall. 357; *Russell v. Mayor*, etc. 2 Denio, 461, 474.

⁷ *Re Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 id. 377; *Munn v. Illinois*, 94 U. S. 113; *Brigham v. Edmunds*, 7

Sandf. 236; *Stevens v. State*, 2 Ark. 291; *Thorpe v. R. & B. R. R. Co.* 27 Vt. 140; *Miller v. Craig*, 11 N. J. Eq. 175; *Bartemeyer v. Iowa*, 18 Wall. 129, 137; *Mugler v. Kansas*, 123 U. S. 623, 661; *Watertown v. Mayo*, 109 Mass. 315, 319; *Slaughter House Cases*, 16 Wall. 36; *State v. Gilman*, 33 W. Va. 146; 41 Alb. L. J. 24; *Hughes*

§ 371. **Statutes creating liability.**—If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will be strictly construed.¹ A statute, even when it is remedial, must be followed with strictness, where it gives a remedy against a party who would not otherwise be liable.² The courts will not extend or enlarge the liability by construction; they will not go beyond the clearly expressed provisions of the act.³ Statutes which create a liability in favor of “the widow and next of kin” of a person whose death has been caused by negligence are of this class. Actions founded on those statutes must strictly conform to them.⁴ Such an action cannot be given by implication.⁵ The relief or remedy provided is not extended to any other persons than those mentioned in the statute.⁶ When given to a “child,” an illegitimate has been held in England not within the statute, though the case was for negligently causing the mother’s death;⁷ but it has been held otherwise in this country.⁸ These statutes are confined to pecuniary damages, though it has been said that the word “damages” is not taken in a very strict sense.⁹ Every element is excluded which is not in-

v. Chester, etc. Ry. Co. 8 Jur. (N. S.) 221; S. C. 3 De Gex, F. & J. 352; Mayor, etc. v. Davis, 6 W. & S. 269; Commonwealth v. Sylvester, 13 Allen, 247; Shiel v. Mayor, etc. 6 H. & N. 796; Wiener v. Davis, 18 Pa. St. 331; McGlade’s Appeal, 99 Pa. St. 338; Cooley’s Const. Lim. ch. XVI.

¹ Cohn v. Neeves, 40 Wis. 393; Steamboat Ohio v. Stunt, 10 Ohio St. 582; Moyer v. Penn. Slate Co. 71 Pa. St. 293; Lane’s Appeal, 105 id. 49; O’Reilly v. Bard, id. 569; Hollister v. Hollister Bank, 2 Keyes. 245; Matter of Hollister Bank, 27 N. Y. 383.

² Chicago, etc. R. R. Co. v. Sturgis, 44 Mich. 538; Steamboat Ohio v. Stunt, 10 Ohio St. 582.

³ Detroit v. Putnam, 45 Mich. 263; Detroit v. Chaffee, 70 id. 80.

⁴ Telfer v. Northern R. R. Co. 30 N. J. L. 188, 209; Hayes v. Phelan, 4 Hun, 733; Galveston, etc. R. R. Co. v. Le Gierse, 51 Tex. 189.

⁵ Barrett v. Dolan, 130 Mass. 366; S. C. 39 Am. Rep. 456.

⁶ Green v. Hudson R. R. Co. 32 Barb. 25; Warren v. Englehart, 13 Neb. 283; Dickins v. N. Y. Cent. R. Co. 23 N. Y. 159; Woodward v. R’y Co. 23 Wis. 400. See Houston, etc. R’y Co. v. Bradley, 45 Tex. 171.

⁷ Dickinson v. Northeastern R’y Co. 2 H. & C. 735; Blake v. Midland R’y Co. 10 L. & Eq. 437; Gibson v. Midland R’y Co. 15 Am. & Eng. R. R. Cas. 507; 2 Ont. 658. See Gardner v. Heyer, 2 Paige, 11.

⁸ Muhl’s Adm’r v. Mich. Southern R. R. Co. 10 Ohio St. 272.

⁹ Tilley v. Hudson R. R. Co. 24 N. Y. 474; Penn. R. R. Co. v. Keller, 67 Pa. St. 300; Union Pac. R. R. Co. v. Dunden, 34 Am. & Eng. R. R. Cas. 88; S. C. 37 Kan. 1; Carroll v. Mo. Pac. R. R. Co. 26 Am. & Eng. R. R. Cas. 268; S. C. 88 Mo. 239; St. Lawrence, etc. R. R. Co. v. Lett, 26 Am. &

cluded in the meaning expressed by "pecuniary damages."¹ The South Carolina statute does not contain the restrictive word "pecuniary" to limit damages in such cases, and gives a broader scope of recovery.² Though the action is given for the benefit of the widow and next of kin, the statute is not construed so strictly as to be limited to cases where there are both widow and next of kin.³ Nor are the next of kin required to be so nearly related as to create any duty of sustenance, support or education.⁴ Statutes allowing costs, it was ruled at an early day, should be taken strictly, as being a kind of penalty.⁵ This reason is not strictly correct. Costs are compensatory to the prevailing party; they are allowed him to make his remedy more adequate. The liability to pay them is created by statute, because the party so made liable has furnished the occasion for incurring these costs. The obligation extends no further than it is plainly declared by the authority which creates it. The cases are numerous, but they contain very little discussion as to the rule of construction. The allowance of costs turns on the interpretation of the terms of the statutes and the intention deduced therefrom,—they are strictly construed; and neither costs nor salaries can be given

Eng. R. R. Cas. 454; *Telfer v. Northern R. R. Co.* 30 N. J. L. 188; *Little Rock, etc. R. R. Co. v. Barker*, 39 Ark. 491.

¹ *Id.*; *Searles v. Kanawha, etc. R. R. Co.* 37 Am. & Eng. R. R. Cas. 179; S. C. 32 W. Va. 370; *Cleveland, etc. R. R. Co. v. Rowan*, 66 Pa. St. 393, 399; *Penn. R. R. v. Butler*, 57 id. 335, 338; *Mo. Pac. R. R. Co. v. Lee*, 35 Am. & Eng. R. R. Cas. 364; S. C. 70 Tex. 496; *Gulf, etc. R'y Co. v. Levy*, 12 Am. & Eng. R. R. Cas. 90, 93; *Baltimore, etc. R. R. Co. v. Hauer*, id. 149; S. C. 60 Md. 449; *North Chicago Rolling Mills Co. v. Morrissey, Adm'r*, 18 Am. & Eng. R. R. Cas. 47; S. C. 111 Ill. 646; *Bradburn v. Great W. R'y Co. L. R.* 10 Ex. 1; *Catawissa R. R. Co. v. Armstrong*, 52 Pa. St. 282; *Kansas Pac. R. R. Co. v. Lundin*, 3 Colo. 94; *Macon, etc. R. R. Co. v. Johnson*, 38 Ga. 409; *David v. Southwestern R. R. Co.* 41 id. 223; *Baltimore, etc. R. R. Co. v. Kelly*,

24 Md. 271; *Baltimore, etc. R. R. Co. v. Trainor*, 33 id. 542; *Johnson v. Chicago, etc. R. R. Co.* 64 Wis. 425; S. C. 25 Am. & Eng. R. R. Cas. 338.

² *Petrie v. Columbia, etc. R. Co.* 35 Am. & Eng. R. R. Cas. 430; S. C. 29 S. C. 303. See *Beeson v. Green Mountain G. M. Co.* 57 Cal. 20; *Little Rock, etc. R'y Co. v. Barker*, 39 Ark. 491.

³ *McMahon v. Mayor, etc.* 33 N. Y. 642, 647.

⁴ *Tilley v. Hudson R. R. Co.* 24 N. Y. 474; *Galveston, etc. R. R. Co. v. Kutac*, 37 Am. & Eng. R. R. Cas. 470; S. C. 72 Tex. 643; *Petrie v. Columbia, etc. R. R. Co. supra*; *Railroad Co. v. Barron*, 5 Wall. 90; *Baltimore, etc. Co. v. Hauer*, 12 Am. & Eng. R. R. Cas. 149, 155; S. C. 60 Md. 449. See *Pittsburgh, etc. R. R. Co. v. Vining's Adm'r*, 27 Ind. 513.

⁵ *Cone v. Bowles*, 1 Salk. 205.

or increased by construction or in any indirect manner beyond the amount specified by law.¹

§ 372. A statute which declared that "in all actions to recover damages for torts the plaintiff shall recover no more costs than damages, where such damages do not exceed five dollars," was held not to authorize the court in such a case to render judgment against him for the residue of the costs.² Statutes for the discharge of insolvent debtors are in derogation of the rights of the creditor, and should on principle be construed strictly. Lord Holt said: "Let a statute be ever so charitable, if it gives away the property of the subject it ought not to be countenanced."³ So it has been held of exemptions from execution.⁴ There is in the purpose and policy of exemption and homestead statutes considerations which make them remedial, and which neutralize the principle of strict construction.⁵ In a Michigan case it was said that such statutes, being remedial, and resting on a wise policy, should, as far as practicable, be construed beneficially to the debtor.⁶ A statute which subjects one man's property to be affected by, charged or forfeited for the acts of another, on grounds of public policy, should be strictly construed; it cannot be done by implication.⁷ So of a statute which deprives passengers riding on the platform of cars of compensation for injuries.⁸

§ 373. Another notable example of statutory liability is that imposed on vendors of intoxicating liquors for injuries resulting from intoxication,⁹ and on lessors of property occupied for

¹ Walker v. Sheftall, 73 Ga. 806; ³ Calladay v. Pilkington, 12 Mod. 513.

Adams v. Abram, 38 Mich. 302; Van Horne v. Petrie, 2 Cai. 213; Briggs v. Allen, 4 Hill, 538; Farrington v. Renne, 2 Cai. 220; Van Hovenburgh v. Case, 4 Hill, 541; Vielie v. Towers, Colman & Cai. 90; Dockstader v. Sammons, 4 Hill, 546; Clark v. Dewey, 5 Johns. 251. Where the words of a statute prescribing the compensation of a public officer are loose and obscure, and admit of two interpretations, they should be construed in favor of the officer. United States v. Morse, 3 Story, 87.

⁵ Howard v. Williams, 2 Pick. 80, 83.

⁶ Alvord v. Lent, 23 Mich. 369. See *post*, § 422.

⁷ Steamboat Ohio v. Stunt, 10 Ohio St. 582.

⁸ Willis v. Long Island R. R. Co. 32 Barb. 398.

⁹ Bodge v. Hughes, 53 N. H. 614; Brooks v. Cook, 44 Mich. 617; Friend v. Dunks, 37 id. 25; English v. Beard,

² Ivey v. McQueen, 17 Ala. 408.

that traffic.¹ The liability is expressed in very general and absolute terms, and the liberality or conservatism of construction is illustrated in the recognition or rejection of items or classes of damages claimed, within the broad range of the declared liability; in the lax or stringent application of common-law rules to the allowance and estimate of compensation and to the procedure for its recovery.

These acts give certain enumerated persons standing in some relation to the person from whose intoxication or habitual inebriety proceeds injury to means of support or otherwise, a right of action for compensatory damages, and often exemplary damages. The remedial element in this legislation is a potent factor in the interpretation of its general language; consequently the conservative principle of strict construction of a statutory liability has to a great extent received secondary consideration. The courts have aimed to give effect to and carry out the humane and ameliorating policy of these laws; and while they do not transcend their letter, they do not greatly restrict their broad terms. In a case of this nature² the court said: "It cannot be doubted that the statute which we are considering comes within the class of remedial statutes, nor that under the above authorities³ we have ample warrant, were it necessary, for giving it the most liberal construction in the interest of justice and humanity." The Michigan statute enumerates as entitled to sue "every wife, child, parent, guardian, husband or other person." The inebriate himself was held not included, and not entitled to recover for money stolen from him while drunk. He is presumably injured in all cases, and the remedy should not be extended to him unless the intent to do so is unequivocally expressed.⁴ It was held that the general words "or other person," following the enumeration, must be understood to extend according to the general principle to persons of the

51 Ind. 489; *Jackson v. Noble*, 54 Berry, 75 N. Y. 229; *Meyers v. Kirt*, Iowa, 641; *Medbury v. Watson*, 6 Met. 57 Iowa, 421.
246; *Thorpe v. R. & B. R. Co.* 27 Vt. 2 Buckmaster v. McElroy, 20 Neb. 140; *In re Jacobs*, 98 N. Y. 98. 557.

¹ *Bertholf v. O'Reilly*, 74 N. Y. 509; ³ *Sedgwick*, 274; *Dean and Chapter of York v. Middleburgh*, 2 Y. & J. 196.

⁴ *Brooks v. Cook*, 44 Mich. 617.

same general character, sort or kind as those named.¹ From this it might be supposed that the injured person must stand in some relation to the intoxicated person. It had been intimated in a previous case² that strangers are embraced in the same clause with guardians, relatives, husbands and wives. In a very late case³ it was held that these general words were intended to cover all persons injured in person or property by the intoxicated person. As "parent" a mother may sue for damages to her, at least in the absence of evidence that there is a father.⁴ Where the right of recovery is confined to injury to person, property or means of support, as in New York, a father, though one of the persons enumerated to sue, cannot maintain the action if there is no injury to person or property, unless the case shows that he was dependent on the son.⁵ But in Massachusetts, an adult son, not dependent on the father, when he has given notice forbidding sales to the latter, may maintain a suit, for the statute implies that other damages than to person, property or means of support may be recovered. The statute contemplates that the habitual drunkenness of a husband or wife, parent or child, is a substantial injury to those bound together in domestic relations, and gives a right to recover damages in the nature of a penalty not only for injury to the person or property, but for shame and disgrace brought upon them.⁶ An Iowa statute declares a liability for compensation "to any person who may take charge of and provide for such intoxicated person." This provision was held not to include a physician who treated professionally one who was injured while intoxicated.⁷

§ 374. As to injuries for which damages may be recovered there is considerable differences in the statutes, and, as might be expected, noticeable contrariety of decision. It is essential where recoveries are allowed for injuries that there be actual damage. The right of action does not spring from the

¹ Citing *Hawkins v. Great W. R'y Co.* 17 Mich. 57; *McDade v. People*, 29 id. 50.

² *Ganssly v. Perkins*, 30 Mich. 492, 495.

³ *Flower v. Witkovsky*, 69 Mich. 127. 371; *English v. Beard*, 51 Ind. 489.

⁴ *McNeil v. Collinson*, 130 Mass. 167.

⁵ *Stevens v. Cheney*, 36 Hun, 1.

⁶ *Taylor v. Carroll*, 145 Mass. 95.

See *Friend v. Dunks*, 37 Mich. 25.

⁷ *Sansom v. Greenough*, 55 Iowa,

stated relationships alone; and though the statute may in terms authorize, in addition to compensation, exemplary damages, the latter will not be allowed unless there is actual injury.¹ Where the damage alleged is to the person, physical injury must be shown; it is not enough that opprobrious language was used.² And to justify the award of exemplary damages, such circumstances of aggravation must be proven as are on general principles of the common law sufficient to authorize their allowance. They will not be permitted unless the act of giving or selling the intoxicating drinks was wilful, wanton, reckless, or otherwise deserving of punishment beyond what the requirements of compensation would impose.³ In Ohio, however, a different rule has been announced. In that state it has been held that in all actions in which the plaintiff shows a right to recover damages actually sustained, the jury may also assess exemplary damages without proof of actual malice or other special circumstances of aggravation.⁴ Such damages only as are the natural and proximate consequence of the cause mentioned in the statute are allowed. General principles of the common law govern in their ascertainment.⁵ They are not, however, confined to the direct and immediate consequences of intoxication, or the habit of drunkenness. The statutes give damages for injuries resulting therefrom to person, property, means of support, and in some cases there is added, "or otherwise." A natural interpretation necessarily extends the right of recovery to consequential injuries as they affect the subjects mentioned. It is not deemed to be the intention of the statute to narrow damages to injuries from the liquor alone, exclusive of other agency. That would fall short

¹ Ganssly v. Perkins, 30 Mich. 493; Calloway v. Laydon, 47 Iowa, 456.

² Calloway v. Laydon, *supra*.

³ Kadgin v. Miller, 13 Ill. App. 474; Kreiter v. Nichols, 28 Mich. 496; Meidel v. Anthiss, 71 Ill. 241; Hackett v. Smelsley, 77 id. 109; Rawlins v. Vidvard, 34 Hun, 205; Davis v. Standish, 26 id. 608, 616; Neu v. McKechnie, 95 N. Y. 632; Roose v. Perkins, 9 Neb. 304, 315; Bates v. Davis, 76 Ill. 222; Koerner v. Oberly, 56 Ind. 284; Schafer v. Smith, 63 Ind. 226; McCarty

v. Wells, 51 Hun, 171; Ketcham v. Fox, 52 id. 284.

⁴ Schneider v. Hosier, 21 Ohio St. 98.

⁵ Barks v. Woodruff, 12 Ill. App. 96; Tetzner v. Naughton, id. 148; Shugart v. Egan, 83 Ill. 56; Emory v. Addis, 71 id. 273; Hackett v. Smelsley, 77 id. 109; Schmidt v. Mitchell, 84 id. 195; Schroder v. Crawford, 94 id. 357; Mulford v. Clewell, 21 Ohio St. 191; Neu v. McKechnie, 95 N. Y. 632; Friend v. Dunks, 37 Mich. 25; Ganssly v. Perkins, 30 id. 492, 495.

of the remedy intended to be given. These statutes are designed for a practical end, to give a substantial remedy, and should be allowed to have effect according to their natural and obvious meaning.¹ The act of selling or giving away liquor to a drunkard, thereby making him drunk, is made by the legislature identical with creating the state of drunkenness which, in fact, ensues from the drinking. The party who thus furnishes the means of intoxication, and others who, like renters of premises for that use, abet it, are treated as represented causally in that intoxication; that they do by the intoxicated person the injury to person, property and means of support which naturally and proximately results from the intoxication.²

§ 375. But the consequences must spring from the cause mentioned in the statute, not from some other fortuitous circumstance, or the act of another person. A wife cannot maintain an action for damages for an injury received by her from falling on a slippery sidewalk while following her intoxicated husband to see where he obtained liquor.³ Injuries to the person or property of another committed by the intoxicated person, acting on the perverted impulses or frenzies of intoxication, are recoverable.⁴ And so far as the cause mentioned in the statute, intoxication or the habit, impairs the means of support by diminishing the capacity of the intoxicated person to earn money or prudently husband it, or by inducing him to squander it, an action will lie for the loss.⁵ Means of support relate to the future as well as to the present. In maintaining an action for loss of it, it must appear that in consequence of the intoxication or the acts of the intoxicated person the plaintiff's accustomed means of maintenance have been cut off or curtailed, or that he has been reduced to a state of dependence by being deprived of the support which he had before enjoyed.⁶ Where the death of the intoxicated person ensues from the intoxication as proximate cause, it is held in some

¹ *Schroder v. Crawford*, 94 Ill. 357, 361. *Booth*, 57 Mich. 249; *English v. Beard*, 51 Ind. 489; *Dunlap v. Wagner*, 85

² See *Schafer v. State*, 49 Ind. 460. id. 529.

³ *Johnson v. Drummond*, 16 Ill. App. 641. ⁵ Id.

⁴ *King v. Haley*, 86 Ill. 106; *Reed v. Thompson*, 88 id. 245; *Engleken v. Hilger*, 43 Iowa, 563; *Wilson v. Volans v. Owen*, 74 N. Y. 526; *Mulford v. Clewell*, 21 Ohio St. 191; *Warrick v. Rounds*, 17 Neb. 411.

states, and, logically, as it appears to the writer, to produce within the meaning of the statute a total loss of the means of support which would otherwise — that is, in the absence of the wrongful cause — be derivable from him.¹

In *Mead v. Stratton*² the court say: "It is evident that the legislature intended to go in such a case far beyond anything known to the common law, and to provide a remedy for injuries occasioned by one who was instrumental in producing, or who caused, the intoxication. While a statute of this character should not be enlarged, it should be interpreted, where the language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained."

In *Schroder v. Crawford*³ the supreme court of Illinois advance the same view by saying: "It was not the intention that the intoxicating liquor alone, of itself, exclusive of other agency, should do the whole injury. That would fall quite short of the measure of remedy intended to be given. The statute was designed for a practical end, to give a substantial remedy, and should be allowed to have effect according to its natural and obvious meaning. Any fair reading of the enactment must be that in the instances above,⁴ as well as the present, the death would have been in consequence of the intoxication within the undoubted intendment of the statute." In accordance with this construction, wherever death or permanent disability occurs as the natural and proximate result of intoxication, as where the intoxicated person lies down and is frozen to death, or drowned by a freshet, or is run over by a railroad train,⁶ or is permanently injured or killed by other mis-

¹ *Mead v. Stratton*, 87 N. Y. 493; *McCarty v. Wells*, 51 Hun, 171; *Roose Schroder v. Crawford*, 94 Ill. 357; *Hackett v. Smelsley*, 77 id. 109; *Roose v. Perkins*, 9 Neb. 304; *Buckmaster v. McElroy*, 20 id. 557; *Rafferty v. Buckman*, 46 Iowa, 195.

² 87 N. Y. 496.

³ 94 Ill. 361.

⁴ *Emory v. Addis*, 71 Ill. 273; *Hackett v. Smelsley*, 77 id. 109.

⁵ *Hackett v. Smelsley*, 77 Ill. 109; *Buckmaster v. McElroy*, 20 Neb. 557;

McCarty v. Wells, 51 Hun, 171; *Roose v. Perkins*, 9 Neb. 304; S. C. 31 Am. Rep. 409.

⁶ *Rosecrants v. Shoemaker*, 60 Mich. 4; S. C. 26 N. W. Rep. 794; *Emory v. Addis*, 71 Ill. 273. In Indiana the death under such circumstances is held too remote an effect to be charged to the person who unlawfully sold the liquor which caused the intoxication. *Collier v. Early*, 54 Ind. 559. The court say: "The death of Early,

chance or his own act, owing to his helplessness, frenzy or abnormal condition, in a state of intoxication,¹ this consequence is deemed within the statute when the complaint is for an injury to means of support. So where the intoxicated person shot and killed another and was convicted of criminal homicide and imprisoned for life.² But if he provokes a quarrel and is killed therein, his death is but the remote consequence of the intoxication, and there can be no recovery therefor against the vendor of the liquor.³

§ 376. A more conservative view has prevailed in some of the states. In *Davis v. Justice*⁴ the supreme court of Ohio say: "Injuries by any intoxicated person or in consequence of the intoxication, are the terms of the statute; and it is contended that if intoxication causes death, and death causes injury, the latter is within the meaning of the act. On the other hand, it is contended that as the legislature must be presumed to have known the state of the common law, and the extent of the innovation by the act of 1851 [an act requiring compensation for causing death by wrongful act, neglect or default], if a further innovation had been intended, such intention would have been expressed in unmistakable terms. We incline to the latter view. Indeed, when the injury to be compensated consists in the loss of labor, it is at least paradoxical to say that labor which could not be performed during the life of the laborer is included. And again, in construing the words of the statute applicable to the case before us, it might be said that the action can be maintained only for an injury to means of support of the plaintiff *as wife* of the person intoxicated, and not for an injury sustained by her as his widow. She had an interest in his labor and in his capacity to labor, as a means of support, during his life; but after his death this means of support no longer existed, and was not the subject of injury or diminution.

caused by a train of cars, is an effect which is not naturally, necessarily, nor even probably, connected with the fact of unlawfully selling intoxicating liquors to him by the appellant whereby he became drunk." *Krach v. Heilman*, 53 Ind. 517.

¹ *Volans v. Owen*, 74 N. Y. 526;

Blatz v. Rohrbach, 42 Hun. 402; *Davis v. Standish*, 26 Hun. 608; *Campbell v. Schlesinger*, 48 id. 428.

² *Beers v. Walhizer*, 43 Hun. 254.

³ *Shugart v. Egan*, 83 Ill. 56. See *Lueken v. People*, 3 Ill. App. 375; *Swinfin v. Lowry*, 37 Minn. 345.

⁴ 31 Ohio St. 359.

"But to avoid any charge of hypercriticism, we place our decision upon the ground that in view of the previous state of the law, and the mischief sought to be remedied, we can find no expression in the statute that indicates an intention on the part of the legislature to bring the loss of labor caused by the death of the person intoxicated within the meaning of the term 'means of support,' for an injury to which the right of action is given by the statute."¹ The same view prevails in Massachusetts.² In Indiana the loss of "means of support," where death has occurred to a person in a drunken, insensible state in consequence of a train of cars striking him,³ or being crushed or fatally injured by a barrel of salt in the wagon in which he was laid to be carried by a drunken associate,⁴ has been denied, not on the ground of legislative intention excluding the right to recover in case of death, but on the common-law principle that the loss of support is too remote a consequence of the wrongful cause mentioned in the statute. Worden, C. J., said: "We have seen that, if the plaintiff is entitled to recover, it is because she was injured 'in consequence of the intoxication' of the deceased. The immediate cause of the injury to the plaintiff was the death of the deceased. The remote cause may have been his intoxication, which led to his injuries, which injuries, in their turn, led to his death. The plaintiff, therefore, was not immediately injured by the intoxication of the deceased."⁵ In *Collier v. Early*,⁶ Biddle, J., said: "The death had not taken place immediately and directly upon the cause; but it must be effected by a chain of natural effects and causes, unchanged by human action, or the party who committed the first act will not be responsible."⁷ The authority of these utterances has been very much shaken by a later case.⁸ In Michigan, though the statute provides absolutely for an action in favor of any person injured in person, property, means of support or otherwise, it is still an open question, and expressly recognized as such, whether an action will lie against one who lawfully sells to an adult person. All the cases in that state

¹ *Kirchner v. Myers*, 35 Ohio St. 85; S. C. 35 Am. Rep. 598.

² *Barrett v. Dolan*, 130 Mass. 366; S. C. 39 Am. Rep. 456.

³ *Collier v. Early*, 54 Ind. 559.

⁴ *Krach v. Heilman*, 53 Ind. 517.

⁵ *Krach v. Heilman*, *supra*.

⁶ *Supra*.

⁷ *Backes v. Dant*, 55 Ind. 181.

⁸ *Dunlap v. Wagner*, 85 Ind. 529.

have been judicially referred to as cases where the sale was unlawful because in violation of the statute.¹

§ 377. In separate actions against one of the many persons whose sales to a drunkard have contributed to a particular intoxication or to a besotted condition, the measure of the defendant's individual responsibility has sometimes been a subject of consideration. The question has been whether one of a number who has so contributed, by separate and distinct sales, made without concert or agreement with the others, can be held liable for all the damage which has resulted, or for that part only which his own acts have caused. The common-law principle is that one is not liable for the whole damage done by several unless the wrong was done with such concert that all are jointly liable, and they are not jointly liable unless they did the wrongful act jointly, or unless it was done by their preconcert or was subsequently jointly ratified and adopted.² This rule seems to have been relaxed and departed from in *Boyd v. Watt*, to facilitate the remedy.³ The supreme court of Ohio say in that case: "If, as seems to be claimed, a defendant can only be liable, except in cases of conspiracy or agreement, when he is the *sole* cause of the habitual intoxication, and no recovery can be had unless the damages can be separated (an impossibility in most cases of this class), then this part of the statute is virtually a dead-letter. Why should the defendant be exonerated from the injury he has caused by his habitual wrongs for a series of years by showing that others, without his knowledge, have also contributed by like means to this result? He was using adequate means to produce the result, and may therefore fairly be presumed to have intended it. True, he may not have enjoyed a monopoly in the profits accruing, by reason of the competition of others in a common business; but that certainly is no reason why he should not be liable for the injuries he was intentionally engaged in causing. If such is the law,

¹ *Bell v. Zelmer*, 75 Mich. 66. See *provement Co.* 19 Wis. 100; *La France Jewett v. Wanshura*, 43 Iowa, 574; *v. Krayner*, 42 Iowa, 143; *Little Schuylkill Nav. Co. v. Richards*, 57 Pa. Myers v. Conway, 55 Iowa, 166; *St. 142*; *Bard v. Yohn*, 26 Pa. St. 482; *Benham*, 76 id. 17; *Myers v. Kirt*, 68 Iowa, 124; *S. C.* 64 id. 27. *Stone v. Dickinson*, 5 Allen, 59.

² 1 *Suth. on Dam.* 211-216, and cases cited; *Lull v. Fox*, etc. Im-

³ 27 Ohio St. 259.

then he could take advantage of his own wrong by showing that during these four years another or others had contributed." In such a case it is held in Iowa that the wrong is not joint; that several contributing separately cannot be sued together, nor when sued separately the whole damage recovered. Each is liable only for his own act; a recovery against or a release of another is no defense.¹

In *La France v. Krayner*² the court say: "A joint liability arises when an immediate act is done by the co-operation or joint act of two or more persons. Mere successive wrongs, being the independent acts of the persons doing them, will not create a joint liability, although the wrongs may be committed against the same person. There must be concurrent action, co-operation or a consent or approval in the accomplishment by the wrong-doers of the particular wrong, in order to make them jointly liable." But the court was careful to say: "But we are not to be understood as denying a joint liability in cases where the successive sales by several have produced a particular intoxication from which the injury sued for has resulted." Accordingly, in a case which came before it the following year,³ the same court used this language: "If a dozen saloon-keepers should each sell a drink of whisky to a party, from the combined effect of which he should become intoxicated, and should beat another or destroy his property, the law has no means of determining the exact amount of the injury which is chargeable to each. Under such circumstances we have no doubt they are *joint wrong-doers, and that each is liable for the injury done by all*. They could all be sued together, or one, or any number of them, separately. But there could be but one satisfaction for the injury."⁴ But where the statute pro-

¹ *La France v. Krayner*, 42 Iowa, 143; *Flint v. Gauer*, 66 id. 696; *Richmond v. Shickler*, 57 id. 486; *Ennis v. Shiley*, 47 id. 552; *Hitchner v. Ehlers*, 44 id. 40; *Ward v. Thompson*, 48 id. 588; *Engleken v. Webber*, 47 id. 558; *Jewett v. Wanshura*, 43 id. 574; *Woolheather v. Risley*, 38 id. 486; *Jackson v. Noble*, 54 id. 641; *Kearney v. Fitzgerald*, 43 id. 580; *Huggins v. Kavanagh*, 52 id. 368.

² 42 Iowa, 143, 145.

³ *Kearney v. Fitzgerald*, 43 Iowa, 580, 583.

⁴ Under the Nebraska statute it has been held in that state that an action can be maintained by the widow and infant children, jointly or severally, whose husband and father has lost his life in consequence of intoxication, against any and all persons, jointly or severally, who sold, gave

vides for an action and authorizes a recovery against any person who by selling or furnishing the intoxicating drink causes

or furnished any intoxicating liquors which were drank by him on the day or about the time of such intoxication. *Kerkow v. Bauer*, 15 Neb. 150. The following are the important sections of the Nebraska act, in chapter 50, Revised Statutes: "Sec. 11. All persons who shall sell or give away, upon any pretext, malt, spirituous or vinous liquors, or any intoxicating drinks, without having first complied with the provisions of this act, and obtained a license as herein set forth, . . . shall be liable in all respects to the public and to individuals the same as he would have been had he given bonds and obtained license as herein provided.

"Sec. 15. The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic; he shall support all paupers, widows and orphans, and the expenses of all civil and criminal prosecutions growing out of or justly attributable to the traffic in intoxicating drinks, etc.

"Sec. 16. It shall be lawful for any married woman or any other person at her request to institute and maintain in her own name a suit on any such bond for all damages sustained by herself and children on account of such traffic, etc.

"Sec. 18. On the trial of any suit under the provisions hereof, the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary, to sustain the action, to prove that the defendant or defendants sold or gave liquor to the person so intoxicated or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said

acts were committed or said injuries received," etc. As to the scope or facility of redress under this legislation, the court in the case last cited say: "We cannot apply the common-law rules of pleading to this case. While the law provides for licensing the sale of intoxicating liquors, it regards the making of a person intoxicated, or the selling or furnishing a person intoxicating liquors with which he makes himself intoxicated, as a tort or wrong, and holds such person so selling or furnishing responsible for certain of the consequences of such intoxication. And to provide against the difficulty, or rather impossibility, of proving whether it was the first, middle or last drink that caused the intoxication, the statute provides that in such cases 'it shall only be necessary, to sustain the action, to prove that the defendant or defendants sold or gave liquor to the person so intoxicated or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received.' While this statute does not in terms state what it will be necessary to plead or allege in such case, yet when we consider the object and office of pleading, we must regard the provision of the section as applying as well to the pleading as to the proof. If I am correct in this view, then it made no difference that each of the defendants was doing business for and by himself, and sold each his separate glass of liquor to the deceased as his individual act in which the other two defendants had no interest. While the act of each defendant in selling the liquor was his own individual act,

"in whole or in part" the intoxication, habitual or otherwise, there is no apportionment of damages; full recovery is allowed against any one who contributed to the statutory wrong.¹

§ 378. **Public grants of titles and franchises.**—The words of a private grant are taken most strongly against the grantor,² though if the meaning cannot be discovered the instrument is void.³ But this rule is reversed in cases of public grants. They are construed strictly in favor of the government on grounds of public policy.⁴ If the meaning of the words be

yet the law makes them in certain contingencies jointly interested in and responsible for the intoxication caused thereby. And it was only necessary to allege and prove the fact of selling or furnishing intoxicating liquors by the defendants to the deceased on or about the day of his intoxication."

¹ *Neuerberg v. Gault*, 4 Ill. App. 848; *Bryant v. Tidgewill*, 133 Mass. 86; *Werner v. Edmiston*, 24 Kan. 147; *O'Leary v. Frisbey*, 17 Ill. App. 553; *Rantz v. Barnes*, 40 Ohio St. 43; *Aldrich v. Parnell*, 147 Mass. 409. In the Michigan statute this liability is not declared in terms to attach to any person who causes the intoxication "in whole or in part," but the same rule is applied. *Graves, J.*, speaking for the court in *Steele v. Thompson*, 42 Mich. 596, said: "The question is one of construction; and whatever opinion may have been formed in other states of provisions having some resemblance to ours, we must attend to the sense and spirit of our own enactments and judge accordingly. Now the statute we are considering proceeds upon the idea that there has been an injury which the defendant by some of the means indicated has contributed to produce, and that he shall be liable for the whole injury and not merely for such portion as a jury, if able to agree

upon any scale of apportionment, may assign as his actual share or quota. . . . And besides being a natural interpretation, and one which accords with the apparent policy of the legislation, it has the merit of relieving the remedy of much complication and embarrassment." See *Kearney v. Fitzgerald*, 43 Iowa, 580.

² *Co. Lit.* 63a; *Shep. Touch.* 87.

³ *Taylor v. St. Helens*, L. R. 6 Ch. Div. 264.

⁴ *Martin v. Waddell*, 16 Pet. 411; *Mills v. St. Clair Co.* 8 How. 581; *Binghamton Bridge*, 3 Wall. 51; *Green's Estate*, 4 Md. Ch. 349; *United States v. Arredondo*, 6 Pet. 738-9; *State v. Bentley*, 23 N. J. L. 532, 538; *Bridge Co. v. Hoboken, etc.* Co. 13 N. J. Eq. 94; *Commonwealth v. Roxbury*, 9 Gray, 451, 492; *Slidell v. Grandjean*, 111 U. S. 412; *Hannibal, etc. R. R. Co. v. Packet Co.* 125 id. 260, 271; *Currier v. Marietta, etc. R. R. Co.* 11 Ohio St. 228; *Mayor, etc. v. Ohio, etc. R. R. Co.* 26 Pa. St. 355; *Miners' Bank v. United States*, 1 Greene (Iowa), 553; *Mayor, etc. v. Macon, etc. R. R. Co.* 7 Ga. 221; *Talmadge v. Coal, etc. Co.* 3 Head, 337; *Brennan v. Bradshaw*, 53 Tex. 330; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Justices v. Griffin, etc. Plk. R. Co.* 9 Ga. 475; *Bank of Louisiana v. Williams*, 46 Miss. 618; *Gaines v. Coates*, 51 id. 335.

doubtful in a grant designed to be of general benefit to the public, they will be taken most strongly against the grantee and for the government, and therefore should not be extended by implication in favor of the former beyond the natural and obvious meaning of the words employed.¹

Any ambiguity in the terms must operate in favor of the government.² Whatever is not unequivocally granted is taken to be withheld.³ Whether the grant be of property, franchises or privileges, it is construed strictly in favor of the public; nothing passes but what is granted in clear and explicit terms;⁴ but it will be construed reasonably for the purpose the act contemplates.⁵ The object and end of all government is to promote the happiness and prosperity of the people by which it is established; and it cannot be assumed that the government intended to diminish its power of accomplishing the end for which it was created.⁶ It is therefore never implied that it has surrendered, in whole or in part, any of its sovereign power of legislation for the general welfare — of police, of taxation, or of eminent domain.⁷ In its grants of land there is implied no covenant to do or not to do any further act in relation thereto.⁸ So if it grants a public franchise to a corpo-

¹ *Mills v. St. Clair Co.* *supra*.

² *Richmond R. R. Co. v. Louisa R. R. Co.* 13 How. 81; *Grant v. Leach*, 20 La. Ann. 329; *McLeod v. Burroughs*, 9 Ga. 213.

³ *Holyoke Co. v. Lyman*, 15 Wall. 500, 512.

⁴ *Rice v. Railroad Co.* 1 Black, 358, 380; *Ohio Life & Trust Co. v. Debolt*, 16 How. 435; *Commonwealth v. Erie, etc. R. R. Co.* 27 Pa. St. 339; *Stourbridge Canal v. Wheelley*, 2 Barn. & Ad. 792; *Parker v. Great W. R'y Co.* 7 M. & Gr. 253; *Gaines v. Coates*, 51 Miss. 335; *Green's Estate*, 4 Md. Ch. 349; *La Plaisance Bay Harbor Co. v. Monroe, Walk. Ch. (Mich.)* 155; *Townsend v. Brown*, 24 N. J. L. 80; *Morris Canal, etc. Co. v. Central R. R. Co.* 16 N. J. Eq. 419, 436; *Harrison v. Young*, 9 Ga. 359.

⁵ *Newark Plank R. Co. v. Elmer*, 9 N. J. Eq. 754; *Whittaker v. Canal*

Co. 87 Pa. St. 34; *Brocket v. Ohio & P. R. Co.* 14 id. 241. A charter granted by two states to a railroad company is a contract with it and also a compact between the states, and is to be liberally construed. *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325.

⁶ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 447.

⁷ *Id.*; *Providence Bank v. Billings*, 4 Pet. 514; *West River Bridge Co. v. Dix*, 6 How. 528; *Bridge Co. v. Hoboken, etc. Co.* 13 N. J. Eq. 81, 94; *Rice v. R. R. Co.* 1 Black, 358, 380; *Holyoke Co. v. Lyman*, 15 Wall. 500, 512; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.* 7 N. H. 35; *Turnpike Co. v. State*, 3 Wall. 210; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391.

⁸ *Jackson v. Lamphire*, 3 Pet. 289.

ration, as to build and maintain a road or bridge, or to establish a ferry, no contract is implied that it will make no new competing grant.¹

In *Stourbridge Canal v. Wheeley*² the court say: "The canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this: that any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public; and the plaintiffs can claim nothing that is not clearly given to them by the act." "And the doctrine thus laid down," says Taney, C. J., speaking for the court in *Charles River Bridge v. Warren Bridge*,³ "is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants to a very considerable extent in transporting large quantities of coal. The rights of all persons to navigate the canal were expressly secured by the act of parliament, so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute in giving the right to exact the toll had given it for articles which passed 'through any one or more of the locks,' and had said nothing as to toll for navigating one of the levels, the court held that the right to demand toll, in the latter case, could not be implied, and that the company were

¹ *Charles River Bridge v. Warren Bridge*, *supra*; *Lehigh Water Co. v. Easton*, *supra*; *Tuckahoe C. Co. v. T. R. R. Co.* 11 Leigh, 42; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep. 529; *State v. Cincinnati Gas Light Co.* 18 Ohio St. 262; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Norwich Gas Light Co. v. Norwich City Gas Co.* 25 Conn. 18; *Wright v. Nagle*, 101

U. S. 791; *Minturn v. Larue*, 23 How. 435; *Birmingham, etc. St. R'y Co. v. Birmingham St. R'y Co.* 79 Ala. 465; *Brenham v. Brenham Water Co.* 67 Tex. 542; *Grand Rapids Electric Light, etc. Co. v. Grand Rapids, etc. Co.* 33 Fed. Rep. 659.

² 2 Barn. & Ad. 793.

³ 11 Pet. 545.

not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant, if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter." Under a grant to a plank-road company to lay its road on an established highway it is not authorized to take exclusive possession and deprive the public of its use.¹ Authority to incorporate does not include the right to take lands by devise.²

§ 379. These principles have been steadily recognized in the construction of land grants made by the federal government in aid of railroads and other like enterprises.³ These grants are laws as well as contracts, and are to be construed to effectuate the legislative intent, and this must sometimes be deduced from complex provisions. To ascertain such intent the court may look to the condition of the country when the acts were passed as well as to the purpose declared on their face, and read all parts of them together.⁴ Grants of lands on water-courses from the state, with the appurtenances, do not convey the right of public ferry, though the right of private ferry passes with the fee.⁵ A public franchise can be created only by an act of the legislature.⁶ Acts for the incorporation of municipal

¹ *Justices v. Griffin, etc. Plank R. Co.* 9 Ga. 475. 113 U. S. 618; *Jackson, etc. R. R. Co. v. Davison*, 65 Mich. 416; *Nash v. Sullivan*, 29 Minn. 206; *Schulenberg v. Harriman*, 21 Wall. 44; *Missouri, etc. R. R. Co. v. K. P. R. R. Co.* 97 U. S. 491; *St. Paul, etc. R. R. Co. v. Greenhalgh*, 26 Fed. Rep. 563; *Wolcott v. Des Moines Co.* 5 Wall. 681; *Wolsey v. Chapman*, 101 U. S. 755; *Dubuque R. R. Co. v. Des Moines R. R. Co.* 109 U. S. 329; *Kansas Pacific R'y Co. v. Dunmeyer*, 113 id. 629.

² *Jackson v. Hammond*, 2 Cal. Cas. 837; *Corporation v. Scott*, 1 Cal. 544; *Jackson v. Cory*, 8 John. 385.

³ *Leavenworth, etc. R. R. Co. v. United States*, 92 U. S. 733; *Rice v. Railroad*, 1 Black, 358; *Slidell v. Grandjean*, 111 U. S. 412; *Jackson, etc. R. R. Co. v. Davison*, 65 Mich. 416; *St. Paul, etc. R'y Co. v. Phelps*, 26 Fed. Rep. 569; *Swann v. Jenkins*, 82 Ala. 478; *Dubuque, etc. R. R. Co. v. Litchfield*, 23 How. 66; *Nash v. Sullivan*, 29 Minn. 206.

⁴ *Winona, etc. R. R. Co. v. Barney*,

⁵ *Harrison v. Young*, 9 Ga. 359.

⁶ *Clark v. Wilkie*, 4 Strob. 259. See *Wiswall v. Hall*, 3 Paige, 813.

corporations and grants of power therein are to be strictly construed.¹

§ 380. As municipal corporations are vested with a portion of the authority which properly appertains to the sovereign power of the state, they must be confined to those powers which are clearly granted, as it is only by such grants that the government proper can delegate its just authority. Nor, as a general rule, can any evil arise from such construction, since the inhabitants of the corporation are not deprived of that protection which the state extends to her citizens in general. The power of the corporation is merely something added, as to the particular locality, to the general powers of government; or, in other words, it is a special jurisdiction, created for specified purposes, and, like all such jurisdictions, it must be confined to the subjects specially enumerated.² The settled rule of construction of grants by the legislature to corporations, whether public or private, is that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.³

¹ Commissioners v. Andrews, 18 Ohio St. 64; Treadwell v. Commissioners, 11 id. 190.

² Leonard v. Canton, 35 Miss. 189; Mills v. Williams, 11 Ired. L. 558.

³ Minturn v. Larue, 23 How. 435; Dill on Mun. Corp. §§ 22, 55 and notes; Lima v. Cemetery Asso. 5 Am. & Eng. Corp. Cas. 547; S. C. 42 Ohio St. 128; Bridgeport v. R. R. Co. 15 Conn. 475, 501; Dugan v. Bridge Co. 27 Pa. St. 303; Petersburg v. Metzker, 21 Ill. 205; Cleveland, etc. R. R. Co. v. Erie, 27 Pa. St. 380; New London v. Brainard, 22 Conn. 552; Hartford Bridge Co. v. Union Ferry Co. 29 id. 210; Thomson v. Lee Co. 3 Wall. 327; Thomas v. Richmond, 12 id. 349; Bridge Co. v. Hoboken, etc. Co. 13 N. J. Eq. 81; Stetson v. Kempton, 13 Mass. 272; People v. Utica Ins. Co.

15 John. 358; Leonard v. Canton, 35 Miss. 189; Hodges v. Buffalo, 2 Denio, 110; Clark v. Davenport, 14 Iowa, 495; Merriam v. Moody's Ex'rs, 25 id. 163; Lafayette v. Cox, 5 Ind. 38; Smith v. Madison, 7 id. 86; Kyle v. Malin, 8 id. 34, 37; Douglass v. Placerville, 18 Cal. 643; Wallace v. San Jose, 29 id. 180; Argenti v. San Francisco, 16 id. 282; Nichol v. Nashville, 9 Humph. 252; People v. River Raisin, etc. R. R. Co. 12 Mich. 389; Willard v. Newburyport, 12 Pick. 227; Keyes v. Westford, 17 id. 273; Commonwealth v. Turner, 1 Cush. 493; Cooley v. Granville, 10 id. 56; Vincent v. Nantucket, 12 id. 103; Paine v. Spratley, 5 Kan. 525; Trustees, etc. v. McConnel, 12 Ill. 140; Caldwell v. Alton, 33 Ill. 416; De Russell v. Davis, 13 La. Ann. 468; Mays v. Cincinnati, 1 Ohio St. 268; Com-

§ 381. This principle is derived from the nature of corporations, the mode in which they are organized and in which their affairs must be conducted. In aggregate corporations, as a general rule, the act and will of a majority is deemed in law the act and will of the whole — as the act of the corporate body. The consequence is that a minority must be bound, not only without but against their consent. Such an obligation may extend to every onerous duty: to pay money to an unlimited amount, to perform services, to surrender lands, and the like. It is obvious, therefore, that if this liability were to extend to unlimited and indefinite objects, the citizen, by being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is in a steady adherence to the principle stated, namely, that corporations can only exercise their powers over their respective members for the accomplishment of limited and defined objects. And if this principle is important as a general rule of social right and municipal law, it is of the highest importance in those states where corporations have been extended and multiplied so as to embrace almost every object of human concern.¹ The natural construction of a charter creating a corporation is that all the privileges conferred, all the duties declared, and all the burdens imposed, relate to it as a whole, and not to the individuals composing it. And although it may be enacted, it ought to be clearly done, before the corporators, as natural persons, can be affected.²

§ 382. It results from these principles that a corporation cannot be brought into existence except by a statute immediately creating it, or authorizing proceedings for its organization.³ The charter serves a twofold purpose: It operates as a law conferring upon the corporation the right or franchise

missioners v. Mighels, 7 id. 109; restrictions upon the rights of a community, but to promote science and the useful arts, and are to be liberally construed. *Blanchard v. Sprague*, 2 Story, 164.
Gallia Co. v. Holcomb, 7 Ohio, 232; *State v. Mayor*, 5 Port. 279; *City Council v. Plank R. Co.* 31 Ala. 76; *Burnet, Ex parte*, 30 id. 461; *Bangs v. Snow*, 1 Mass. 181; *Le Conteulx v. Buffalo*, 33 N. Y. 333; *Waxahachie v. Brown*, 67 Tex. 519; *Pittsburgh's Appeal*, 115 Pa. St. 4. Patents for inventions are not granted as monopolies or

¹ *Spaulding v. Lowell*, 23 Pick. 71.

² *State v. Bank of Newbern*, 1 Dev. & Bat. Eq. 219.

³ 1 Morawetz on Corp. § 317.

to act in a corporate capacity, and furthermore it contains the terms of the fundamental agreement between the corporators themselves.¹ The powers of a corporation organized under statutes are such, and such only, as the statutes confer. Consistently with the rule applicable to all acts, that what is fairly implied is as much granted as what is expressed, it is true that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others.²

§ 383. No particular form of words is necessary to create a corporation, but the intention to do so must be plainly indicated by the statute. If the purpose be left doubtful, the act will be construed against the claim of the parties setting it up.³ The incorporation may result from necessary implication in the construction of a statute, as well as its purpose and powers. But, while express words of incorporation are not essential to create a corporation, and one may arise without such words out of the general language of a statute, if a corporation is necessary to accomplish the purpose of the act, still where no such necessity exists or such intention is otherwise implied a corporation will not be created by implication.⁴ A general law providing the mode in which private corporations may be organized for business purposes will warrant the organization of a corporation for any purpose which is within the language

¹ Morawetz on Corp. § 316.

² Thomas v. Railroad Co. 101 U. S. 82; Richmond, etc. R. R. Co. v. Louisa R. R. Co. 13 How. 91; Dartmouth College v. Woodward, 4 Wheat. 581, 636; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Perrine v. Chesapeake, etc. Canal Co. 9 How. 172; Bank of United States v. Dandridge, 12 Wheat. 68; Steam Nav. Co. v. Dandridge, 8 Gill & J. 318; Ruggles v. Illinois, 108 U. S. 526; Head v. Providence Ins. Co. 2 Cr. 127; Weckler v. First Nat. Bank, 42 Md. 581; Brady v. Mayor, etc. 20 N. Y. 312; Tyng v. Commercial Warehouse Co. 58 id. 308; Straus v. Eagle Ins. Co. 5 Ohio St. 59; Overmyer v. Williams, 15 Ohio, 31; Vandall v. South T. F.

Dock Co. 40 Cal. 83; Pullan v. Cincinnati, etc. R.R. Co. 4 Biss. 35; Matthews v. Skinker, 62 Mo. 329; State v. Krebs, 64 N. C. 604; New London v. Brainard, 22 Conn. 552; Brooklyn Gravel R. Co. v. Slaughter, 33 Ind. 185; Bellmeyer v. Independent Dist. etc. 44 Iowa, 564; Babcock v. New J. Stockyard Co. 20 N. J. Eq. 296; Ang. & A. on Corp. § 111.

³ Penn. R. R. Co. v. Canal Com'rs, 21 Pa. St. 9. See 1 Waterm. on Corp. § 29.

⁴ Walsh v. Trustees, etc. 96 N. Y. 427; S. C. 6 Am. & Eng. Corp. Cas. 45; Kreiger v. Shelby R. R. Co. 84 Ky. 66; Newport Marsh Trustees, Ex parte, 16 Sim. 346.

and import of the statute, though such particular purpose be one that the legislature could not have foreseen — as where it is to utilize a subsequent invention. Thus, under a general act authorizing the formation of corporations for the purpose “of building and operating telegraph lines or conducting the business of telegraphing in any way,” telephone corporations may be organized and operate, because it is a mode of telegraphing.¹ In this case Cassoday, J., speaking for the court, said: “As for the difference in the mode of communication by means of a telegraphic and a telephonic apparatus, see *Attorney-General v. Edison Telephone Co. of London*.² In that case Mr. Stephen, one of the judges of the exchequer division of the high court of justice, who, unlike most American judges, seems to have sufficient time, not only to satisfy his own curiosity, but the curiosity of all the curious, has given a very lengthy and definitive discussion of that subject. In that case the court conclude that Edison’s telephone was a telegraph, within the meaning of the telegraph acts, although the telephone was not invented nor contemplated when those acts were passed. It is there said, in effect, that the mere ‘fact,’ if it is a fact, that sound itself is transmitted by the telephone, establishes ‘no material distinction between telephonic and telegraphic communication, as the transmission, if it takes place, is performed by a wire acted on by electricity.’ It is there further said that, ‘of course, no one supposes that the legislature intended to refer specifically to telephones many years before they were invented, but it is highly probable that they would, and it seems to us clear that they actually did, use language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence.’ It is upon this theory of progressive construction that the powers conferred upon congress to regulate commerce and to establish post-offices and post-roads have been held not confined to the instrumentalities of commerce or of the postal service known when the constitution was adopted, but keep pace with the progress and development of the country, and adapt themselves to the new discoveries and inventions which have been

¹ *Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 32; S. C. 8 Am. & Eng. Corp. Cas. 538.

² L. R. 6 Q. B. Div. 244.

brought into requisition since the constitution was adopted, and hence include carriage by steamboats and railways, and the transmission of intelligence by telegraph."¹

§ 384. A city having the power to make contracts and to provide itself with water or other necessary thing is not thereby authorized to grant to a company the exclusive right to supply it for a given period.² A statute conferring upon the common council of a city jurisdiction to judge of the election of its own members does not exclude the jurisdiction of the courts in that behalf, unless the grant of power to the council is expressly or by necessary implication exclusive.³ A power conferred by the charter on the common council to provide for lighting the city, and to alter lamp districts, cannot be delegated to a committee for final decision.⁴

§ 385. When a corporation has been organized for a specific purpose it must pursue the mode prescribed for effecting that object and observe prohibitions; but otherwise it may proceed in the customary way, and in its business adopt the same methods to attain its legitimate objects, and deal in precisely the same way, as natural persons may who seek the accomplishment of the like ends.⁵

¹ *Pensacola Telegraph Co. v. W. U. Tel. Co.* 96 U. S. 1. See *State v. Cincinnati*, etc. Co. 18 Ohio St. 262. 66 Tex. 428; *Whyte v. Mayor*, etc. 2 Swan, 364.

² *Brenham v. Brenham Water Co.* 47 Tex. 542; *Lehigh Water Co. v. Easton*, 121 U. S. 388; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep. 529; *State v. Cincinnati Gas L. & C. Co.* 18 Ohio, 262; *Grand Rapids E. L. Co. v. Grand Rapids E. etc. Co.* 33 Fed. Rep. 659; *Gas Co. v. Parkersburg*, 30 W. Va. 435; *Citizens' Gas, etc. Co. v. Elwood*, 114 Ind. 332.

³ *State ex rel. v. Kempf*, 69 Wis. 470, and authorities cited. But see *People v. Metzker*, 47 Cal. 524; *Peabody v. School Com.* 115 Mass. 383; *Commonwealth v. Leech*, 44 Pa. St. 332; *Lamb v. Lynd*, id. 336; *Commonwealth v. Meeser*, id. 341.

⁴ *Minneapolis Gas L. Co. v. Minneapolis*, 36 Minn. 159; *Russell v. Cage*,

⁵ *Barry v. Merchants' Exchange Co.* 1 Sandf. Ch. 289; *Willmarth v. Crawford*, 10 Wend. 342; *Beers v. Phoenix Glass Co.* 14 Barb. 358; *Partridge v. Badger*, 25 id. 146; *Richardson v. Mass. Charitable Asso.* 131 Mass. 174; *State v. Bank of Md.* 6 Gill & J. 205; *Clark v. Farrington*, 11 Wis. 306, 333; *Wendel v. State*, 62 id. 300, 304; *White W. Valley Canal Co. v. Vallette*, 21 How. 414, 424; *Union Bank v. Jacobs*, 6 Humph. 515, 525; *Ohio Life Ins. etc. Co. v. Merchants' Ins. etc. Co.* 11 id. 1, 22; *Mayor, etc. v. Second Ave. R. R. Co.* 32 N. Y. 261; *State v. Washington Social L. Co.* 11 Ohio, 96; *Webster v. People*, 98 Ill. 343; *Bank of Augusta v. Earle*, 13 Pet. 519; *Hayward v. Pilgrim Society*, 21 Pick. 270, 276; *Baird v. Bank of Washington*, 11 Serg. & R. 418;

§ 386. Public rights will not be treated as relinquished or conveyed away by inference or legal construction.¹ Statutes permitting the state to be sued are in derogation of its sovereignty and will be strictly construed.² Where a municipal corporation was granted the privilege "to use the ground or soil under any roads, railroad, highway, street line, alley or court within this state," for conduits to convey water, on condition of restoring the surface to the original condition, it was held that the placing of the pipes pursuant to this grant under a street did not preclude the city authorities from changing the grade of the street, and thereupon compelling the grantee to lower the pipes.³ A public grant of land bordering on tide water will not, without express words, convey the seashore between high and low-water mark.⁴ And where an act extends a municipality over such waters, it will acquire no property in the soil within those limits.⁵ For many purposes connected with civil and criminal proceedings and judicial jurisdiction, the body of a county extends not only over the seashore, but to some distance below the ebb of the tide; and for the like purposes, towns may be considered as having a co-extensive jurisdiction; but this has no bearing upon the question of property. An act of incorporation, therefore, without words of grant of the soil, would vest no part of the property of the government in such town. Nor was the purpose of the organization of such a nature as would require of the government any portion of the public right vested in it for the public use and benefit, and therefore no portion of the *jus publicum* will be presumed to have been granted without express words.⁶ A grant of a right to build a bridge does not confer a right to obstruct navigation.⁷ Nor, under a general power to a munic-

Chester Glass Co. v. Dewey, 16 Mass. 102; Story on Bills, 879; 2 Kent's Com. 239; 1 Moraw. on Corp. § 320; Ang. & A. on Corp. §§ 111, 145; 1 Waterm. on Corp. § 147.

¹ Jersey City v. Hudson, 13 N. J. Eq. 420; Harrison v. Young, 9 Ga. 359; Bennett v. McWhorter, 2 W. Va. 441; People v. Lambier, 5 Denio, 9; Mayor, etc. v. Baltimore, etc. R. R. Co. 6 Gill, 288.

² Raymond v. State, 54 Miss. 562.

³ Jersey City v. Hudson, *supra*.

⁴ Commonwealth v. Roxbury, 9 Gray, 451; East Haven v. Hemingway, 7 Conn. 186; Middletown v. Sage, 8 id. 221; Austin v. Carter, 1 Mass. 230.

⁵ Palmer v. Hicks, 6 John. 133.

⁶ Per Shaw, C. J., in Commonwealth v. Roxbury, 9 Gray, 494.

⁷ Selman v. Wolfe, 27 Tex. 68. See Inhabitants of Charlestown v. County Com'rs, 3 Met. 203.

ipal corporation to lay out highways, can it lay out a highway over a navigable river so that it may be obstructed by a bridge.¹ A statute conferring privileges upon individuals should not be so construed as to work a public mischief. Accordingly where an act of the legislature authorized a proprietor of lands lying on the East river — which is an arm of the sea — to construct wharves and bulkheads in the river in front of his land, and there was at that time a public highway through the land, terminating at the river, he had no right, by filling up the land between the shore and the bulkhead, to obstruct the public right of passage from the land to the water; but the street, by operation of law, extended from the former terminus over the newly-made land to the water.²

§ 387. Statutes for exercise of power of eminent domain.—The right to take private property in any form, without the consent of the owner, is a high prerogative of sovereignty, which no individual or corporation can exercise without an express grant. The power may be delegated but the delegation must plainly appear.³ It is accordingly held that statutes providing for such a taking under the exercise of the power of eminent domain must be strictly construed.⁴ It is a taking

¹ Commonwealth v. Coombs, 2 Mass. 489; Arundel v. McCulloch, 10 id. 70.

² People v. Lambier, 5 Denio, 9. See Galveston v. Menard, 23 Tex. 349.

³ Sharp v. Speir, 4 Hill, 76; Adams v. Saratoga, etc. R. R. Co. 10 N. Y. 328; Gilmer v. Lime Point, 19 Cal. 47, 60; Curran v. Shattuck, 24 id. 427, 432; Cavanagh v. Boston, 139 Mass. 426. In Maryland it is settled that the power to take private property for public use upon making just compensation may be exercised for the benefit of the public, by individuals or by corporations upon whom the legislature has within proper limitations conferred the power so to exercise it. In construing statutes giving powers that are to be applied to great public objects, depending for its exercise upon the officers intrusted with

their execution and in whom it must of necessity vest large discretionary powers, the interpretation should be liberal. Care should be taken on the one hand to secure to the individual whose property is appropriated to the public a just and reasonable compensation, and, on the other, that the objects contemplated by the grant of powers shall not be defeated or embarrassed. Tide Water Canal Co. v. Archer, 9 Gill & J. 479.

⁴ Matter of Water Com'rs of Amsterdam, 96 N. Y. 351; Bensley v. Mountain Lake Water Co. 13 Cal. 306, 315; Gilmer v. Lime Point, *supra*; Curran v. Shattuck, *supra*; Lance's Appeal, 55 Pa. St. 16; Beaty v. Knowler, 4 Pet. 152; Chicago, etc. R. R. Co. v. Wiltse, 116 Ill. 449; Chicago, etc. R. R. Co. v. Chicago, 121 Ill. 176; Illinois Cent. R. R. Co. v. Chicago, etc.

in derogation of private rights. It is in hostility to the ordinary control of the citizen over his estate, and statutes authorizing condemnation are not to be extended by inference or implication.¹ But it is "a right existing at common law, although the manner in which it shall be exercised is prescribed by statute. Therefore it has been held that the same rigid rules ought not to be applied to statutory regulations for the exercise of a pre-existing common-law right as are sometimes applied to similar regulations for the exercise of a right created by statute, and in derogation of the common law."² Upon the application of a railroad company to appropriate lands by the exercise of the right of eminent domain, delegated to it, it is for the court to decide as to the necessity and extent of such appropriation, and the determination of the board of directors of the company is not conclusive upon that question.³ The acquisition of lands for speculation or sale, or to prevent interference by competing lines or methods, or in aid of collateral enterprises remotely connected with the running or operating of the road, although they may increase its revenues and business, are not such purposes as authorize the condemnation of private property.⁴ Where the public use for which condemnation is authorized contemplates an exclusive and perpetual possession, the condemnation and estimate of compensation must be equal thereto; they cannot be restricted to a less use or estate.⁵ In construing acts delegating the power to corporations two rules are universally recognized: first, that the company shall take that which the legislature empowers it to take, and in the state and condition prescribed by the legislature; and second, that all powers of this nature will be strictly construed—what is not expressly given is withheld. The company cannot carve out such an interest in, or incident of, property authorized to be taken as will suit its convenience and condemn that. It must take what the legislature authorizes it to take.⁶ Though it may not carve out a

R. R. Co. 122 id. 473; Fork Ridge Baptist Cemetery Asso. v. Redd, 10 S. E. Rep. 405.

¹ Rensselaer, etc. R. R. Co. v. Davis, 43 N. Y. 137, 146.

² Avery v. Groton, 36 Conn. 304.

³ Id.; Re St. Paul, etc. R'y Co. 34

Minn. 227; Tracy v. Elizabethtown, etc. R. R. Co. 80 Ky. 259.

⁴ Id. See Spring Valley Wat. Works v. San Mateo W. Works, 64 Cal. 123.

⁵ Matter of Water Com'rs of Amsterdam, 96 N. Y. 351.

⁶ De Camp v. Hibernia R. R. Co. 47

less estate than that authorized to be condemned, and condemn it, it may condemn a less estate which actually exists and is outstanding.¹

§ 388. There must be very clear expression of the legislative intent to authorize the taking, by the exercise of the power of eminent domain, of property which has already been devoted to a public use by an earlier exertion of the same power. Mr. Mills says: "To take property already appropriated to another public use, the act of the legislature must show the intent so to do by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting the intent."² There is a broad distinction between acts which subvert or essentially impair a prior franchise or appropriation to a public use and acts which permit a taking for a new public use, not involving an entire deprivation or diversion from the first use, but a joint use, so that after the second taking the same property serves still the original purpose as well as the new,—and the two uses are consistent. Under a general power to lay out and establish a railroad or highway, other railroads or highways may be crossed. In a case where a railroad company sought to condemn land previously appropriated by another railroad, used merely for a crossing, and it was contended that an express statute was required, the court say: "The right which is claimed is merely the privilege to cross the land and track of the plaintiffs. It is not proposed to make any use of their railroad, as such. Their franchises, therefore, are not interfered with." "Under these circumstances," says Beasley, C. J., speaking for the court, "I am wholly at a loss to perceive the force of the present objection. If the legislative grant of the power in question is sufficient to enable the defendants to run their new lines over the lands of individuals, why has it not an equal efficacy with regard to the land of the plaintiffs? Does an incorporated company stand, in this respect, on a higher level than the ordinary land-owner? I am not aware that such a prerogative has ever been claimed.

N. J. L. 43, 50; *Hibernia R. R. Co. v. De Camp*, id. 518, 547; *Jerome v. De Camp*, 68 N. Y. 167.

Ross, 7 John. Ch. 315; *Lyon v. Jerome*, 26 Wend. 485. See *Re Hartford, etc. R. R. Co.* 65 How. Pr. 133.

² Mills on Eminent Domain, § 46.

If claimed, it ought not to be conceded. It may well be that, where the attempt is to sequester a portion of the franchises of a railroad company to the use of a company subsequently incorporated, such sequestration could not be justified, in the absence of a grant of such authority in clear and express terms. Such a right could scarcely be raised by implication. It certainly could not be inferred from a mere authority to acquire, by condemnation, the land requisite for the enterprise."¹ This distinction is clearly recognized. One public use will not be permitted to be subverted or materially impaired by a subsequent grant, unless by express words or necessary implication.²

§ 389. An instance of a plain implication of an intent to invade a prior public use is where there is a grant to build a railroad between terminal points mentioned, and it cannot reasonably be built without appropriating land already devoted to public use.³ In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use

¹ *Morris & Essex R. R. Co. v. Central R. R. Co.* 31 N. J. L. 205, 213; *Boston Water Power Co. v. Boston, etc. R. R. Co.* 23 Pick. 360; *Connecting R'y Co. v. Union R'y Co.* 108 Ill. 265; *Chicago, etc. R'y Co. v. Chicago, etc. R. R. Co.* 112 id. 589; *Bradley v. New York, etc. R. R. Co.* 21 Conn. 305; *Starr v. Camden, etc. R. R. Co.* 24 N. J. L. 592.

² *State, National R'y Co. pros., v. Easton, etc. R. R. Co.* 36 N. J. L. 181; *State, Mayor, etc. Jersey City, pros. v. Montclair R'y Co.* 35 id. 328; *Springfield v. Conn. R. R. Co.* 4 Cush. 63; *Morris, etc. R. R. Co. v. Newark*, 10 N. J. Eq. 352; *New Jersey Southern R. R. Co. v. Long Branch Com'rs*, 39 N. J. L. 28, 33; *Matter of Boston, etc. R. R. Co.* 53 N. Y. 574; *Proprietors of Locks, etc. v. Lowell*, 7 Gray, 223; *Baltimore, etc. Turnpike Co. v. Union R. R. Co.* 35 Md. 224, 231; *Austin v. Carter*, 1 Mass. 231; *Oregon R'y Co. v.*

Portland, 9 Ore. 231; *Housatonic R. R. Co. v. Lee & H. R. R. Co.* 118 Mass. 391; *Arundel v. McCulloch*, 10 Mass. 70; *Worcester, etc. R. R. Co. v. R. R. Com'rs*, 118 id. 561, 567; *Commonwealth v. Stevens*, 10 Pick. 247; *Commonwealth v. Coombs*, 2 Mass. 489; *West Boston Bridge v. County Com'rs*, 10 Pick. 270; *Milwaukee, etc. R. R. Co. v. Fari-bault*, 23 Minn. 167; *Hickok v. Hine*, 23 Ohio St. 523; *Central City Horse R'y Co. v. Fort Clark Horse R'y Co.* 81 Ill. 523; *Charlestown v. County Com'rs*, 3 Met. 202; *Wells v. County Com'rs*, 79 Me. 522, 525; *Kean v. Stetson*, 5 Pick. 492; *Marblehead v. County Com'rs*, 5 Gray, 451; *Illinois Cent. R. R. Co. v. Chicago, etc. R. R. Co.* 122 Ill. 473; *Matter of City of Buffalo*, 68 N. Y. 167.

³ *Providence, etc. R. R. v. Norwich, etc. R. R.* 138 Mass. 277; *Matter of the City of Buffalo*, 68 N. Y. 167.

would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent use. If both uses may not stand together, with some tolerable interference which may be compensated by damages paid; if the latter use, when exercised, must supersede the former, it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use, already in exercise, to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject-matter, so that by reasonable intendment some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner.¹

§ 390. Statutes granting power.—Statutes which impose burdens, or liabilities unknown at common law, are construed strictly in favor of those on whom such burdens are imposed, or in favor of those who are subjected to such liabilities. The principles governing construction of such legislation have been considered in the preceding pages. Power is generally given to some officer to do acts for the enforcement of such duties; then two principles concur to require strict construction; the second is that which applies to all statutory powers. They are construed strictly.² Where a statute provides that a certain person shall execute process, it can be executed by no other person.³ “When a rule is laid down for the government of inferior jurisdictions, we are not at liberty to inquire whether it can safely be departed from; whether the mode

¹ *Matter of the City of Buffalo*, 68 N. Y. 167.

² *Blackwell on Tax Titles*, 33-49; *County of Hardin v. McFarlan*, 82 Ill. 138; *Paine v. Spratley*, 5 Kan. 525; *People v. Supervisors*, 6 Hun, 304; *Wandsworth Board of Works v.*

United Telephone Co. L. R. 13 Q. B. Div. 904; *Rutherford v. Maynes*, 97 Pa. St. 78; *Hollenback v. Fleming*, 6 Hill, 303; *East Union Township v. Ryan*, 86 Pa. St. 459; *Indiana, etc. R'y Co. v. Attica*, 56 Ind. 476.

³ *Reynolds v. Orvis*, 7 Cow. 269.

pursued is equally beneficial to the party as that pointed out by the statute. The answer to arguments of this kind is, that the law has prescribed the manner in which the person . . . may be apprehended."¹ Where any number of persons are appointed to act judicially in a public matter, they must all confer; but a majority may decide.² Power of sale under a mortgage was vested in two commissioners; it was held that it could not be exercised by one — discretion had to be used, and it could not be delegated.³ In levying taxes or selling property for the non-payment thereof, the assessor and collector act under a special and limited authority, conferred by statute, and it must be strictly construed and closely followed.⁴ The principle of strict construction as applied to such statutes is well illustrated by the case of *Sibley v. Smith*.⁵ The court held that the principle that every grant of power carries with it the usual and necessary means for its exercise, and that the power to convey is implied in the authority to sell, cannot be admitted in the construction of statutes which are in derogation of the common law, and the effect of which is to divest the citizen of his real estate. Such statutes, although enacted for the public good, must be strictly construed. Their provisions can be enforced no further than they are clearly expressed.⁶

An act which authorizes a municipal body to open and widen streets according to the procedure therein prescribed,

¹ *Reynolds v. Orvis*, 7 Cow. 269.

² *Rogers, Ex parte*, 7 Cow. 526 and note; *Downer v. Rugar*, 21 Wend. 178.

³ *Powell v. Tuttle*, 3 N. Y. 396.

⁴ *Davis v. Farnes*, 26 Tex. 296; *Fisk v. Varnell*, 39 id. 73; *Hays v. Hunt*, 85 N. C. 303; *Sharp v. Speir*, 4 Hill, 76; *Williams v. Peyton*, 4 Wheat. 77; *Sharp v. Johnson*, 4 Hill, 92; *Croxall v. Shererd*, 5 Wall. 268; *Jackson v. Catlin*, 2 John. 248; *S. C. 3 Am. Dec. 415*; *Commonwealth v. Roxbury*, 9 Gray, 451, 492-494; *Atkins v. Kinnan*, 20 Wend. 241; *Young v. Martin*, 2 Yeates, 312; *Wills v. Auch*, 8 La.

Ann. 19; *Jackson v. Shepard*, 7 Cow. 88; *Jackson, etc. R. R. Co. v. Davison*, 65 Mich. 416; *Brown v. Fowzer*, 114 Pa. St. 446; *Russel v. Transylvania University*, 1 Wheat. 432; *Pensacola v. Louisville, etc. R. R. Co.* 21 Fla. 492; *Des Moines v. Gilchrist*, 67 Iowa, 210; *S. C. 56 Am. Rep. 341*.

⁵ 2 Mich. 486.

⁶ *Paine v. Spratley*, 5 Kan. 525; *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304; *Doe v. Chuun*, 1 Blackf. 336; *Doughty v. Hope*, 1 N. Y. 79; *Powell v. Tuttle*, 3 N. Y. 396; *Striker v. Kelly*, 7 Hill, 9; *S. C. 2 Denio*, 323.

and omits to prescribe a procedure for cases of widening streets, is to that extent inoperative.¹ A power to the freeholders to make prudential rules and regulations for improving their common lands and to impose penalties on offenders, does not authorize them to prescribe a penalty against a stranger for trespass on such lands.² Where a statute provides for a summary foreclosure by advertisement of mortgages containing a power of sale, the proceeding is special and statutory. The statute must be strictly pursued; and there are no presumptions or intendments in favor of the regularity of the proceedings.³ It must at least be substantially complied with.⁴ Every statutory requirement must be conformed to; but these sales are by contract, where the proceeding is authorized by the mortgagor himself to save expense and trouble of proceedings in equity. Therefore all provisions regulating such sales must be reasonably construed.⁵ When the legislature grants power to a township to make donations to railroads and to issue bonds for the same, the grant is not invalid because it fails to provide means for determining the amount and terms of the donation, or the amount of the bonds to be issued, their terms and manner of execution. Such construction should be put on a statute granting a power as may best answer the intention which the makers had in view; and, if possible, it should be so construed that no clause, sentence or word shall be superfluous, void or insignificant.⁶ As a general rule, where power is granted, it implies that any reasonable and proper means may be employed to execute it, unless specific directions are given.⁷ An act conferring powers recited in a former act is to be construed as though the latter were a part of it.⁸ A statute granting powers and referring to another statute for their definition only gives the general, and not the particular, powers conferred by the statute referred to.⁹ Where specific regulations in a general law are

¹ Chaffee's Appeal, 56 Mich. 244.

² Foster v. Rhoads, 19 John. 191.

³ Niles v. Ransford, 1 Mich. 338, 341.

⁴ Grover v. Fox, 36 Mich. 453, 466; Sherwood v. Reade, 7 Hill, 431; Doyle v. Howard, 16 Mich. 261.

⁵ Lee v. Clary, 38 Mich. 223.

⁶ Niantic Savings Bank v. Douglas, 5 Ill. App. 579.

⁷ Du Page County v. Jenks, 65 Ill. 275.

⁸ Turney v. Wilton, 36 Ill. 385.

⁹ Ex parte Greene, 29 Ala. 52; Matthews v. Sands, id. 136.

adopted in a local act by words of general reference, subsequent changes therein are not necessarily adopted also, unless the intent to do so is clear.¹

§ 391. Where special powers are conferred on a court either of otherwise general or limited jurisdiction it is rigorously restricted to those granted, and the grant itself is strictly construed;² the jurisdictional facts must appear on the face of the proceedings.³ The court can take no additional power from its general jurisdiction. In the exercise of such special powers it is precisely limited to those plainly delegated. Nothing is to be presumed which is not expressly given.⁴

§ 392. A statutory remedy or proceeding is confined to the very case provided for and extends to no other. It cannot be enlarged by construction,⁵ nor be made available or valid except on the statutory conditions, that is, by strictly following the directions of the act.⁶

§ 393. A party seeking the benefit of such a statute must bring himself strictly not only within the spirit but its letter; he can take nothing by intendment.⁷ An affidavit for an at-

¹ *Darmstaetter v. Moloney*, 45 Mich. 621.

² *Matter of Beekman Street*, 20 John. 269; *Wight v. Warner*, 1 Doug. (Mich.) 384; *Risewick v. Davis*, 19 Md. 82; *Given v. Simpson*, 5 Me. 303; *Morse v. Presby*, 25 N. H. 302; *Christie v. Unwin*, 3 Perry & Davidson, 208; *Buck v. Dowley*, 16 Gray, 555; *State v. Woodson*, 41 Mo. 227.

³ *Thatcher v. Powell*, 6 Wheat. 119; *Kansas City, etc. R. R. Co. v. Campbell*, 62 Mo. 585; *Shivers v. Wilson*, 5 Har. & John. 130; *Beach v. Botsford*, 1 Doug. (Mich.) 199; *Clark v. Holmes*, id. 390.

⁴ *Geter v. Commissioners*, 1 Bay, 354; *Russell v. Wheeler*, Hempst. 3; *Thatcher v. Powell*, 6 Wheat. 119; *People v. Whitney's Point*, 102 N. Y. 81; *Earthman v. Jones*, 2 Yerg. 484; *Shivers v. Wilson*, 5 Har. & J. 130; *Yerby v. Lackland*, 6 id. 446; *Gallatin v. Cunningham*, 8 Cow. 370; *Foot v. Stevens*, 17 Wend. 488; *Denning v. Corwin*, 11 Wend. 647;

Platt v. Stewart, 10 Mich. 260, 265; *Stafford v. Mayor, etc.* 7 John. 541.

⁵ *Willard v. Fralick*, 31 Mich. 431; *Lombard v. Whiting*, Walker (Miss.), 229; *Keller v. Corpus Christi*, 50 Tex. 614; *Dent v. Ross*, 52 Miss. 188.

⁶ *Boyd v. Lowry*, 53 Miss. 352; *Scogins v. Perry*, 46 Tex. 111; *Robinson v. Schmidt*, 48 id. 13; *Bailey v. Bryan*, 3 Jones' L. 357; *Walker v. Burt*, 57 Ga. 20; *Banks v. Darden*, 18 id. 318; *Monk v. Jenkins*, 2 Hill's Ch. 12; *Bloom v. Burdick*, 1 Hill, 130; *Staples v. Fox*, 45 Miss. 667; *Risewick v. Davis*, 19 Md. 82; *Shivers v. Wilson*, 5 Har. & J. 130; *Yerby v. Lackland*, 6 id. 446; *Ball v. Lastinger*, 71 Ga. 678; *Weller v. Weyand*, 2 Grant's Cas. 103; *Spence v. McGowan*, 53 Tex. 30; *Anness v. Providence*, 13 R. I. 17; *Dibrell v. Dandridge*, 51 Miss. 55; *Lombard v. Whiting*, Walk. (Miss.) 229; *Connell v. Lewis*, id. 251; *Banks v. Cage*, 1 How. (Miss.) 293.

⁷ *Ball v. Lastinger*, 71 Ga. 678. See *St. Paul, etc. R'y Co. v. Phelps*, 26

tachment which failed to state, as the statute required, that the attachment was not sued out for the purpose of injuring the defendant, was held fatally defective.¹ So where the amount claimed is required to be stated to be "due upon contract," the omission to state that the debt is due is fatal.² Hence if the affidavit is sworn to on a previous day, stating the sum due or existence of cause, like absence or concealment of defendant, the statute is not complied with.³ The remedy by attachment is special and extraordinary, and the statutory provisions for it must be strictly construed and cannot have force in cases not plainly within their terms.⁴ An affidavit that the defendant intends to abscond is not a compliance with the requirements of the provisions of a statute, commonly called the stay law, that there should be an affidavit that the defendant was about to abscond.⁵ A statute permitting a second suit in trespass to try title will be strictly construed.⁶ Enactments giving a remedy for judgment by motion against public officers or others, this being a summary proceeding in derogation of the common law, must be taken strictly.⁷ Such acts have no latitude of construction.⁸

§ 394. Where the mode of taking a case to an appellate court is prescribed by statute the same rule is applied.⁹ Statutes authorizing new methods of proof must be followed with strictness.¹⁰ All exceptional methods of obtaining jurisdiction

Fed. Rep. 569; *Swann v. Jenkins*, 82 Ala. 478.

¹ *Burch v. Watts*, 37 Tex. 135.

² *Cross v. McMacken*, 17 Mich. 511; *Whitney v. Brunette*, 15 Wis. 61; *Hawes v. Clement*, 64 id. 152; *Streissguth v. Reigelman*, 71 id. 212.

³ *Drew v. Dequindre*, 2 Dougl. (Mich.) 93; *Wilson v. Arnold*, 5 Mich. 98; *Fessenden v. Hill*, 6 id. 242. Compare *Graham v. Bradbury*, 7 Mo. 281; *Adams v. Lockwood*, 30 Kan. 773; *Foster v. Illinski*, 3 Ill. App. 345.

⁴ *Van Norman v. Circuit Judge*, 45 Mich. 204; *Mathews v. Densmore*, 43 id. 461; *Morrison v. Fake*, 1 Pin. (Wis.) 133; *Whitney v. Brunette*, 15 Wis. 61. But see *Cole v. Aune*, 40 Minn. 80.

⁵ *Guilleaume v. Miller*, 14 Rich. 118. See *Myers v. Farrell*, 47 Miss. 281.

⁶ *Spence v. McGowan*, 53 Tex. 30.

⁷ *Hearn v. Ewin*, 3 Cold. 399; *Wilard v. Fralick*, 31 Mich. 431; *Robinson v. Schmidt*, 48 Tex. 13; *Bailey v. Bryan*, 3 Jones' L. 357; *Banks v. Darden*, 18 Ga. 318; *Scogins v. Perry*, 46 Tex. 111.

⁸ *Rice v. Kirkman*, 3 Humph. 415.

⁹ *Kramer v. Holster*, 55 Miss. 243; *Ricard v. Smith*, 37 id. 644. See *Bank of Monroe v. Widner*, 11 Paige, 529; *Humphrey v. Chamberlain*, 11 N. Y. 274.

¹⁰ *Dyson v. West*, 1 Har. & J. 567; *McWhorter v. Donald*, 39 Miss. 779; *Buford v. Bostick*, 58 Tex. 63; *Dequasei v. Harris*, 16 W. Va. 345.

by courts over persons, natural or artificial, not found within the state, must be confined to the cases and be exercised in the precise way indicated by statute.¹ The jurisdiction and authority in such cases, like all jurisdiction and authority derived from and dependent upon statute, must be taken and accepted with all the limitations and restrictions the act creating it may impose. These restrictions and limitations the courts are bound to observe; they cannot be dispensed with, however much they may appear to embarrass or however unnecessary they may seem to be in the administration of justice in particular cases. The statute is in derogation of the common law, is an essential departure from the form and modes a court ordinarily pursues, and must be strictly construed.²

§ 395. **Jurisdiction of courts.**—Jurisdiction cannot be created nor taken away by implication, except where the implication is necessary from the language and purpose of the statute.³ As in the usual distribution of the fundamental powers of the government to separate departments — legislative, executive and judicial — the grant to each is exclusive,⁴ so in the distribution of the judicial power of the state to certain named courts the grant is exclusive as to the courts mentioned⁵ and as to the powers apportioned to each.⁶ Where

¹ *Hartford Fire Ins. Co. v. Owen*, 30 Mich. 441; *Jordan v. Giblin*, 12 Cal. 100; *Ricketson v. Richardson*, 26 id. 149; *McMinn v. Whelan*, 27 id. 300; *Gray v. Larrimore*, 2 Abb. (U.S.) 542; *Sayre v. Elyton Land Co.* 73 Ala. 85, 98, 99; *Brown v. Tucker*, 7 Colo. 30; S. C. 1 West Coast Rep. 489; *Pollard v. Wegener*, 13 Wis. 569; *Stewart v. Stringer*, 41 Mo. 400; *Scorpion S. M. Co. v. Marsano*, 10 Nev. 370; *Fontaine v. Houston*, 58 Ind. 316; *Bradley v. Jamison*, 46 Iowa, 68.

² *Sayre v. Elyton Land Co.*, *supra*.

³ *Keitler v. State*, 4 Greene (Iowa), 291; *School Inspectors v. People*, 20 Ill. 525; *Pringle v. Carter*, 1 Hill (S. C.), 53; *Thompson v. Cox*, 8 Jones, (N. C.) L. 311; *Ryan v. Commonwealth*, 80 Va. 385; *Beebe v. Scheidt*, 13 Ohio St. 406. See *Caulfield v. Ste-*

vens, 28 Cal. 118; *Mecham v. McKay*, 37 Cal. 154.

⁴ *Cooley*, Const. Lim. 106, 107; *Sill v. Village of Corning*, 15 N. Y. 297; *Kilbourn v. Thompson*, 103 U. S. 168; *People v. Draper*, 15 N. Y. 532, 543, 544.

⁵ *Greenough v. Greenough*, 11 Pa. St. 489; *State v. Maynard*, 14 Ill. 419; *Smith v. Odell*, 1 Pin. (Wis.) 449; *Chandler v. Nash*, 5 Mich. 409; *Gough v. Dorsey*, 27 Wis. 119; *Alexander v. Bennett*, 60 N. Y. 204; *Hughes v. Felton*, 11 Colo. 489. See *Home Ins. Co. v. Northwestern Packet Co.* 32 Iowa, 223.

⁶ *Van Slyke v. Trempealeau*, etc. Ins. Co. 39 Wis. 390; *Byrd v. Brown*, 5 Ark. 709; *Gough v. Dorsey*, *supra*; *Given v. Simpson*, 5 Ma. 303. See *People v. Daniell*, 50 N. Y. 274.

common-law and chancery jurisdiction is conferred on certain courts, and provision is made in the same act for a probate court, the latter will not receive that jurisdiction, but only such as is implied in its name according to the antecedent and contemporary judicial history of the subjects cognizable by courts under that and similar designations.¹

§ 396. When jurisdiction is once granted it will not be deemed taken away by a similar jurisdiction being given to another tribunal. In *Commonwealth v. Hudson* ² the question was whether a grant of a certain jurisdiction to justices of the peace affected that previously existing in the court of common pleas over the same subject. Shaw, C. J., said: "Before this statute the court of common pleas had jurisdiction over this subject-matter. Is that jurisdiction taken away? It is no answer to say that another tribunal has jurisdiction; for that is very common. It is in such case concurrent jurisdiction, whether so called in the statute or not. . . . There must be words of limitation, to take it away, either by using the word 'exclusive,' or by repealing the former act giving jurisdiction, by which it may appear that the legislature meant, not only to confer jurisdiction on justices of the peace, but to take away the other jurisdiction."³ Only express words, or what is equivalent, can take away the jurisdiction of the superior courts.⁴ This principle applies not only to a court's original, but to its appellate, jurisdiction, and its customary modes of exercising them. In *Hartley v. Hooker* ⁵ Lord Mansfield said: "If a new offense is created by statute, and a special juris-

¹ *Ferris v. Higley*, 20 Wall. 375; 351; In re *Creighton*, 12 Neb. 280; *Robinson v. Fair*, 128 U. S. 53; *Zander v. Coe*, 5 Cal. 230; *Appeal of Houghton*, 42 id. 35; *Matter of Will of Bowen*, 34 id. 682, 689; *Rosenberg v. Frank*, 58 id. 387, 402.

² 11 Gray, 64.

³ *Tackett v. Volger*, 85 Mo. 480; *Dick's Appeal*, 106 Pa. St. 589; *Fidelity Trust Co. v. Gill Car Co.* 25 Fed. Rep. 737; *Barnawell v. Threadgill*, 5 Ired. Eq. 83; *Berkowitz v. Lester*, 121 Ill. 999; *Taylor v. Williams*, 78 Va. 422; *Hurth v. Bower*, 30 Hun, 151; *Jenkins v. Crevier*, 50 N. J. L.

⁴ *Rex v. Abbot*, 2 Doug. 553, note; *Cates v. Knight*, 3 T. R. 442; *Shipman v. Henbest*, 4 id. 109; *Albon v. Pyke*, 4 M. & Gr. 424; *Balfour v. Malcolm*, 8 Cl. & Fin. 500; *Jacobs v. Brett*, L. R. 20 Eq. 6; *Rex v. Mayor of London*, 9 B. & C. at p. 27; In re *Twenty-eighth St.* 102 Pa. St. 140; *Crisp v. Bunbury*, 8 Bing. 394; *Reeves v. White*, 17 Q. B. 995; *Richards v. Dyke*, 3 Q. B. 256; *Timms v. Williams*, id. 413.

⁵ 2 Cowp. 523.

diction out of the course of the common law is prescribed, it must be followed. If not strictly pursued, all is a nullity, and *coram non judice*; and objections may be taken in any stage of the cause. In such case there is no occasion to oust the common-law courts, because not being an offense at common law, and punishable only *sub modo*, in the particular manner prescribed, they never could have jurisdiction. But where a new offense is created, and directed to be tried by an inferior court, established according to the course of the common law, such inferior court tries the offense as a common-law court, subject to be removed by writs of error, *habeas corpus*, *certiorari*, and to all the consequences of common-law proceedings. In that case this court cannot be ousted of its jurisdiction without express negative words." It may change the venue.¹ It may summon or complete a jury when the statutory process fails.²

§ 397. The jurisdiction granted by the constitution cannot be abridged or infringed by the legislature, territorially³ nor as to subject-matter.⁴ If it is defined in that instrument the legislature can neither add to nor diminish it; neither can it invest a court whose original jurisdiction is therein defined with additional jurisdiction of that nature, nor deprive it of any part of its appellate jurisdiction so conferred.⁵ The essential qualities of a constitutional court are indestructible and unalterable by the legislature,⁶ though it may regulate the man-

¹ Wilberf. on St. 44; Southampton Bridge Co. v. Local Board of Southampton, 8 E. & B. at p. 804.

² Clawson v. United States, 114 U. S. 477.

³ Dillard v. Noel, 2 Ark. 449; Commonwealth v. Commissioners, etc. 37 Pa. St. 237; Meyer v. Kalkmann, 6 Cal. 582; Landers v. Staten Island R. R. Co. 14 Abb. Pr. (N. S.) 346; Connors v. Gorey, 32 Wis. 518.

⁴ Hicks v. Bell, 3 Cal. 219; Parsons v. Tuolumne Co. W. Co. 5 id. 43; State v. Mace, 5 Md. 337; Chandler v. Nash, 5 Mich. 409; Waldby v. Callendar, 8 id. 430; State v. Northern, etc. R'y Co. 18 Md. 193; Jones v. Smith,

14 Mich. 334; Callanan v. Judd, 23 Wis. 343; Heath v. Kent Circuit Judge, 37 Mich. 372; Averill v. Perrott, 74 Mich. 296; S. C. 41 N. W. Rep. 929. See State v. Jones, 22 Ark. 331. Where an act gave exclusive jurisdiction of all misdemeanors to the county court of Knox county, it was held not to repeal an existing statutory provision authorizing the circuit court to punish when the defendant was acquitted of a felonious charge and convicted of a misdemeanor. Carter v. State, 6 Cold. 537.

⁵ Vail v. Dinning, 44 Mo. 210.

⁶ Harris v. Vanderveer, 21 N. J. Eq. 424.

ner in which it shall be put in action;¹ as by prescribing when appellate jurisdiction shall be exercised on appeal and when on writ of error.² When exclusive, revising or appellate jurisdiction is given by the constitution to the supreme court of a state, a statute cannot authorize a trial court to revise its own judgments at a term subsequent to that at which they were rendered.³ In other words, the legislature cannot give appellate jurisdiction to any other court.⁴

§ 398. **Statutory rights.**—Such rights depend on the statutes creating them, and these are construed strictly.⁵ This principle is illustrated by the cases brought to enforce the statutory right in favor of the widow or next of kin to recover damages resulting from the death of a person caused by negligence.⁶ Statutes made for the accommodation of particular citizens or corporations ought not to be construed to affect the rights or privileges of others unless such construction results from express words or from necessary implication. But every part of a statute must have a reasonable effect.⁷ Statutes authorizing persons to prosecute *in forma pauperis* should be construed strictly as against the applicant.⁸ A statute gave a right to detain trespassing animals until seventy-five cents per day should be paid for their keeping, when they had trespassed upon the inclosure of a party by breaking through a lawful fence; this right being statutory was held *stricti juris*; the injured party could avail himself of it only on the precise statutory condition that the animals had broken through such a fence.⁹ An act authorizing gratuitous credits to be made on a debt owing to the state must be restricted to its obvious and plain intent and be construed most favorably, in case of doubt, for the government.¹⁰

¹ Hornbuckle v. Toombs, 18 Wall. 648. See *Ex parte Candee*, 48 Ala. 386.

² Haight v. Gay, 8 Cal. 297.

³ Byrd v. Brown, 5 Ark. 709.

⁴ Caulfield v. Hudson, 3 Cal. 389; *People v. Peralta*, id. 379; *Deck v. Gherke*, 6 id. 666.

⁵ Pell v. Ulmar, 18 N. Y. 139; *Van Valkenburgh v. Torrey*, 7 Cow. 252; *Hollister v. Hollister Bank*, 2 Keyes, 245; *Beecher v. Baldy*, 7 Mich. 488;

Dyson v. Sheley, 11 id. 527; *Walker v. Chicago*, 56 Ill. 277; *Itawamba v. Candler*, 62 Miss. 193.

⁶ *Ante*, § 371.

⁷ *Coolidge v. Williams*, 4 Mass. 140, 145; *Rothgerber v. Dupuy*, 64 Ill. 452; *Scaggs v. Baltimore, etc. R. R. Co.* 10 Md. 268.

⁸ *Moore v. Cooley*, 2 Hill, 412.

⁹ *Dent v. Ross*, 52 Miss. 183.

¹⁰ *Green's Estate*, 4 Md. Ch. 349.

The mechanics' lien law confers special privileges and rights upon one class of people not enjoyed by others; therefore courts in construing such statutes confine them to their express letter, and require that the case shall be brought clearly within them before relief will be granted. Such laws are not extended by liberal construction to embrace cases not within their language.¹ A statute which gives a judgment creditor a right to have a sheriff who is delinquent in returning an execution amerced for his use, on motion, in the amount of the debt, damage and costs, must be strictly construed. He who would avail himself of such a summary remedy must bring himself within both the letter and spirit of the law.² And where such a statute provides that if he is thus required to pay a judgment it shall vest in him and execution may issue for his use, he must bring himself strictly within the terms of the act by payment of the judgment.³ A statute authorizing the destruction of property to prevent the spread of fire provided a remedy for compensation to the owner. It was held that the remedy could only be asserted in the manner defined therein.⁴ So where a remedy is given in the charter of a company to the land-owner for getting compensation for land taken for the use of the corporation under its charter, he must pursue this remedy, as that given thereby is exclusive of all others.⁵

¹ *Roberts v. Fowler*, 3 E. D. Smith, 632; *Rothgerber v. Dupuy*, 64 Ill. 452; *Chapin v. Persse & Brooks Paper Works*, 30 Conn. 461, 474; *Womelsdorf v. Heifner*, 104 Pa. St. 1; *Scaife v. Stovall*, 67 Ala. 237; *Wagar v. Briscoe*, 38 Mich. 587. Statutes which give a lien for services upon logs and timber are construed liberally in the interest of labor. *Jacubeck v. Hewitt*, 61 Wis. 96; *Kollock v. Parcher*, 25 id. 372; *Hogan v. Cushing*, 49 id. 169. See, as to the rule of construction applied to statutes giving a remedy for enforcing mechanics' liens, *Rude v. Mitchell*, 97 Mo. 365, criticised in 24 Am. L. Rev. 857; *Thomas v. Huesman*, 10 Ohio St. 152; *Keemer*

v. Herr, 98 Pa. St. 6; *Manly v. Downing*, 15 Neb. 637; *Johnson v. Stout*, 42 Minn. 514.

² *Moore v. McClief*, 16 Ohio St. 51, 54; *Duncan v. Drakeley*, 10 Ohio, 47; *Bank of Gallipolis v. Domigan*, 12 Ohio, 220; *Webb v. Anspach*, 3 Ohio St. 522; *Conkling v. Parker*, 10 id. 28; *Langdon v. Summers*, id. 79; *Dibrell v. Dandridge*, 51 Miss. 55.

³ *Staple v. Fox*, 45 Miss. 667.

⁴ *Keller v. Corpus Christi*, 50 Tex. 614.

⁵ *Railroad v. McKaskill*, 94 N. C. 746; *McIntire v. Western N. C. R. R. Co.* 67 N. C. 278; *Johnston v. Rankin*, 70 N. C. 550.

§ 399. When a right is given by statute and a specific remedy provided, or a new power and also the means of executing it are therein granted, the power can be executed and the right vindicated in no other way than that prescribed by the act.¹ This rule does not conflict with the general rule that the jurisdiction of a court is not impaired by statutes conferring upon other tribunals jurisdiction of the same kind and to reach the same redress, unless the statutes expressly take away the former jurisdiction;² nor with the other well-settled rule, that 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 party may sue at the common law as well as upon the statute; for this does not take away the common-law remedy.³ In the cases to which these rules are applied the right existed, and its enforcement lay within the appropriate existing jurisdiction. Statutes affirmative of the right, and prescribing other than the usual remedies for its enforcement, or conferring cognizance of it upon other tribunals, not negating the pre-existing remedies or jurisdiction, in their very nature are merely cumulative, and not exclusive. But when a right is solely and exclusively of legislative creation, when it does not derive existence from the common law or from the principles of equity, jurisdiction may be limited to particular tribunals, and new specific remedies provided for its enforcement. Then the jurisdiction can be exercised and the remedy pursued only as the statute provides.⁴ Where a statute gives a new remedy for a right existing and enforceable either at common law or in equity, and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two.⁵ If a new right is created by statute and it is silent

¹ Sedgw. on Stat. & Const. Law, 343; Janney v. Buell, 55 Ala. 408; Phillips v. Ash, 63 id. 414; Chandler v. Hanna, 73 id. 390; Dudley v. Mayhew, 3 N. Y. 9; Hollister v. Hollister Bank, 2 Keyes, 245.

² Id.; Gittings v. Crawford, Tancy's Dec. 1.

³ Almy v. Harris, 5 John. 175; Sedgw. on Stat. & Const. L. 342.

⁴ Chandler v. Hanna, *supra*; Dudley v. Mayhew, 3 N. Y. 9; Dickinson v. Van Wormer, 39 Mich. 141; Matter of Opening House Ave. 67 Barb. 350.

⁵ Branch Bank v. Tillman, 12 Ala. 214; Greenville, etc. R. R. Co. v. Cathcart, 4 Rich. 89; Stafford v. Ingersol, 3 Hill, 38; Clark v. Brown, 18 Wend. 213; Colden v. Eldred, 15 John. 220; Scidmore v. Smith, 13 id. 322; Thou-

as to the mode of its enforcement, or as to the form of redress in case of invasion, then the proprietor of that right may resort to the common law or the existing general statutory procedure for remedial process.¹ In the absence of statutory regulations of procedure courts will exercise their powers according to the general practice.² When a statute refers generally to powers to enforce obedience, and does not prescribe any procedure, the powers generally referred to would be those of the court in which the proceedings are pending.³

§ 400. **Statutes in derogation of the common law.**—Such statutes as take away a common-law right, remove or add to common-law disabilities, or provide for proceedings unknown or contrary to that law, are construed strictly. The courts cannot properly give force to them beyond what is expressed by their words, or is necessarily implied from what is expressed.⁴ There should doubtless be the same strictness of

venin v. Rodrigues, 24 Tex. 468; Troy, etc. R. R. Co. v. Tibbits, 18 Barb. 297; Renwick v. Morris, 3 Hill, 621; S. C. 7 id. 575; Smith v. Drew, 5 Mass. 514; Waldo v. Bell, 13 La. Ann. 329; Mitchell v. Duncan, 7 Fla. 13; Booker v. McRoberts, 1 Call, 243.

¹ Ewer v. Jones, 2 Salk. 415; Beckford v. Hood, 7 T. R. 620; Donaldson v. Beckett, 2 Bro. P. C. 129; Dudley v. Mayhew, 3 N. Y. 9; Jacob v. United States, 1 Brock. 520; Branch Bank v. Tillman, 12 Ala. 214; Lynes v. State, 5 Port. 236; United States v. Wyngall, 5 Hill, 16; Constantine v. Van Winkle, 6 id. 177; Leland v. Tousey, id. 328; Burnham v. Onderdonk, 41 N. Y. 425; Alma v. Harris, 5 John. 175; Chisholm v. Northern Transportation Co. 61 Barb. 363; Russell v. Irby, 13 Ala. 131.

² Lynes v. State, 5 Port. 236.

³ Green v. Lord Penzance, L. R. 6 App. Cas. 675.

⁴ Smith v. Argall, 6 Hill, 479; Burnham v. Sumner, 50 Miss. 517; Hopkins v. Sandidge, 31 id. 668; Doughty v. Hope, 3 Denio, 594; McMechen v. McMechen, 17 W. Va. 683; Monson

v. Chester, 22 Pick. 385; Scott v. Simons, 70 Ala. 352; Fisher v. Bidwell, 27 Conn. 363; Matter of Fitzgerald, 2 Cai. 318; Dewey v. Goodenough, 56 Barb. 54; Baum v. Mullen, 47 N. Y. 577; McManus v. Gavin, 77 id. 86; People v. Hadden, 3 Denio, 220; Thompson v. Weller, 85 Ill. 197; Corwin v. Merritt, 3 Barb. 341; Edwards v. Gaulding, 38 Miss. 118; People v. Hulse, 3 Hill, 309; Tuttle v. Walton, 1 Ga. 51. A statute of Alabama provides: "A seal is not necessary to convey the legal title to land to enable the grantee to sue at law. And any instrument in writing signed by the grantor, or his agent having written authority, is effectual to transfer the legal title to the grantee, if such was the intention of the grantor to be collected from the entire instrument." In Webb v. Mullins, 78 Ala. 111, it was decided that this statute is remedial and to be liberally construed, "so far as may be necessary to suppress the mischief, and effectuate the purpose and intent of the law-maker; but being in modification of the common law it will not

construction of a statute in derogation of an enforceable equity.¹ Statutes are not to be construed as taking away a common-law right unless the intention is manifest. Accordingly where a particular defense is denied in case of rescous, but to render it available to a plaintiff the precise action mentioned in the statute must have been brought, the deprivation of that defense will not be enforced by an equitable construction in another form of action.² Statutes which make an official deed or certificate evidence in derogation of the common law will be confined in their operation to the cases and the conditions expressly stated in them.³

"At common law a party could not be a witness for himself, to prove any part of the issue, and the statute authorizing it is not to be extended in his behalf beyond what it clearly imports."⁴ Statutes which innovate upon the common law, rules of evidence or competency of witnesses must be strictly construed.⁵ Such innovating statutes may be remedial, and then they must, except as antagonized by other rules of construction, be liberally construed.⁶ Statutes which are claimed to abolish any of the incidents of marriage will be strictly construed.⁷ Statutes increasing the power of married women over

be presumed to modify it farther than is expressly declared; and construction or intendment will not be resorted to for the purpose of extending its operation." It was accordingly held that an instrument of writing in the form of a deed under seal, signed, attested and acknowledged, but containing no words of grant or transfer, could not operate as a conveyance, though a regular *habendum* clause was inserted — "to have and to hold to the said J. M. B., his heirs and assigns forever." A statute legitimating bastards should be liberally construed. *Beall v. Beall*, 8 Ga. 210.

¹ *Baker v. Terrell*, 8 Minn. 195.

² *Gray v. Nations*, 1 Ark. 557; *Melody v. Reab*, 4 Mass. 471; *Jacob v. United States*, 1 Brock. 520.

³ *Doughty v. Hope*, 3 Denio, 594; S. C. 1 N. Y. 79; *Graves v. Otis*, 2

Hill, 466; *Sharp v. Speir*, 4 id. 76; *McWhorter v. Donald*, 39 Miss. 779.

⁴ *Dewey v. Goodenough*, 56 Barb. 54.

⁵ *Smith v. Randall*, 3 Hill, 495; *Dequaisie v. Harris*, 16 W. Va. 345; *Dyson v. West*, 1 Har. & J. 567; *Warner v. Fowler*, 8 Md. 25. See *Cummins v. Garretson*, 15 Ark. 135.

⁶ *Post*, §§ 416, 434.

⁷ *Neelly v. Lancaster*, 47 Ark. 175; S. C. 1 South. Rep. 66; *Harker v. Harker*, 3 Harr. 51; *Glover v. Alcott*, 11 Mich. 470; *Thomson v. Weller*, 85 Ill. 197; *Hays v. Hays*, 5 Rich. 31. In construing the married woman's act, says the high court of errors and appeals of Mississippi, we must look to the true spirit and object of the statute and construe its language with reference to the policy indicated by it. Before the passage of the act, a married woman was incapable of holding to her sepa-

their separate property, being in derogation of the rights of the husband and of the common law, are to be construed strictly.¹ They have not been interpreted to enlarge the capacity of the wife to contract, to hold or administer property, further than the words, fairly and reasonably construed according to their natural import, expressly declare.² They are regarded as remedial in Michigan, and to be liberally construed to effectuate their general purpose. The disabilities are removed only so far as they operate unjustly and oppressively; beyond that they are suffered to remain. Having been removed with the beneficent design to protect the wife in the enjoyment and disposal of her property for the benefit of herself and family, the statutes cannot be extended by construction to cases not embraced by their language nor within this design.³ A statute provided that when a testator devised lands to his wife without declaring such devise to be in lieu of dower, it shall nevertheless so operate, and required her to make her election

rate use property conveyed directly to her in her own name. The primary object of the statute was doubtless to remove that incapacity and to secure to her separate use all property which she might acquire except the same should come from her husband; and hence provision, in the first place, is made enabling her to take by direct conveyance to her. But this is only a mode of accomplishing the end intended, the policy being to secure to the wife a complete title to all such property as might be acquired by her to her sole, separate use for the benefit of herself and her children. This was a new policy in our laws, founded upon enlarged views of protection and justice to the rights of a class of society entitled to the most liberal protection. It was a substantial right which the legislature intended to secure, rather than to prescribe the form necessary to be complied with in order to the enjoyment of the right; and, therefore, the spirit of the statute is to secure to the benefit of the wife

and her children all property which may thereafter be conveyed to her separate use and benefit without regard to the form of the conveyance. *Olive v. Walton*, 33 Miss. 103.

¹ *Compton v. Pierson*, 28 N. J. Eq. 229.

² *Cook v. Meyer*, 73 Ala. 580, 583; *Gibson v. Marquis*, 29 Ala. 668; *Canty v. Sanderford*, 37 id. 91; *Alexander v. Saulsbury*, id. 375; *Warfield v. Ravasies*, 38 id. 518; *Reel v. Overall*, 39 id. 138; *Hatton v. Wier*, 19 id. 127; *Perryman v. Greer*, 39 id. 133; *Cunningham v. Hanney*, 12 Ill. App. 437; *Triplett v. Graham*, 58 Iowa, 135; *Pettit v. Fretz*, 33 Pa. St. 118; *Morgan v. Bolles*, 36 Conn. 175; *Quick v. Miller*, 103 Pa. St. 67; *Weber v. Weber*, 47 Mich. 569; *Longey v. Leach*, 57 Vt. 377; *Dorris v. Erwin*, 101 Pa. St. 239; *Reynolds v. Robinson*, 64 N. Y. 589. See *contra*, *Billings v. Baker*, 28 Barb. 343; *Goss v. Cahill*, 42 id. 310.

³ *De Vries v. Conklin*, 22 Mich. 255.

between them. That statute was designed as a rule of construction of wills, and to determine the intention of the testator where he has not expressed it. Being in derogation of the common-law rights of the widow it should be construed liberally as regards her. Had the testator declared this devise to be in lieu of dower, she would still have been entitled to her election. Should she elect to take the devise, and it wholly fails on account of a defect of title, of which she was ignorant, she could still claim dower.¹ A statute requiring certain liens to be registered cannot be extended to other liens than those specified.² The common-law rights of the subject in respect to the enjoyment of his property are not to be trenched upon by a statute, unless such intention is shown by clear words or necessary implication.³ A statute to compel a party to give evidence against himself will be construed strictly.⁴ So an act which takes away a remedy given by the common law ought never to have an equitable construction.⁵

§ 401. Statutes not remedial, which are in derogation of the common law of England, brought over by the colonists, so far as applicable to the new circumstances and conditions of the people and the country, and so far as not changed by legislation, are the law of the states generally; and courts will construe strictly all acts in modification or derogation thereof, assuming that the legislature has, in the terms used, expressed all the change it intended to make in the old law, and will not by construction or intendment enlarge their operation.⁶ A statute preventing a concurrent action for the recovery of the mortgage debt, pending a foreclosure suit, is in derogation of the common law, and therefore to be strictly construed.⁷ In construing statutes which are not penal nor liable to be used oppressively, the court will not stop at the literal terms nor stand upon form and circumstance, but will

¹ *Thompson v. Egbert*, 17 N. J. L. 459, 466.

² *Tuttle v. Walton*, 1 Ga. 51.

³ *Reg. v. Mallow Union*, 12 Ir. C. L. (N. S.) 35.

⁴ *Broadbent v. State*, 7 Md. 416.

⁵ *Hammond v. Webb*, 10 Mod. 281.

⁶ *Hollman v. Bennett*, 44 Miss. 322; *Thompson v. Weller*, 85 Ill. 197; *Wil-*

son v. Arnold, 5 Mich. 98; *Fessenden v. Hill*, 6 id. 242; *Galpin v. Abbott*, id. 17; *Lee v. Forman*, 3 Met. (Ky.) 114; *Brown v. Fifield*, 4 Mich. 322; *Jackson v. Cairns*, 20 John. 301; *Pendleton v. Bank of Kentucky*, 2 J. J. Marsh. 148.

⁷ *Hays v. Miller*, 1 Wash. T'y, 143.

go to the effect and substance of the matter. Thus, where a law which provided a mode of submitting a cause to arbitration required that each party should choose one arbitrator, and if the arbitrators thus chosen failed to agree an umpire should be chosen by them, and it was objected that the award was not a good statutory award, on the ground that by the terms of the agreement each party appointed an arbitrator, who then appointed a third man, and the cause was tried by all three in the first instance, it was held that the objection went to the form merely, and it was not sustained.¹

§ 402. **Interpretation clause.**— Any provision in a statute which declares its meaning or purpose is authoritative. Whether it relates to the object of a whole act, or of a single section or of a word, it is a declaration having the force of law.² It is binding on the courts, though otherwise they would have understood the language to mean something different.³ Declaratory statutes having reference to other existing acts have the same effect prospectively. Any contemporaneous construction of the same words by the legislature is high evidence of the sense intended.⁴ So far as an act in terms professes to declare the past or present meaning of an existing statute, it is not legislative and not binding on the courts.⁵ It has been said that an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, not so as to disturb the meaning of such as are plain.⁶ It is often inserted for this purpose, or for abundant caution, that there may be no misapprehension, though the interpretation so directed is not different from that which the language

¹ Forshey v. Railroad Co. 16 Tex. 516.

² Jones v. Surprise, 64 N. H. 243; 4 New Eng. Rep. 292; State v. Adams, 51 N. H. 568; State v. Canterbury, 28 id. 195; Herold v. State, 21 Neb. 50.

³ Smith v. State, 28 Ind. 321. After the accounting officers of the federal treasury had put a construction upon certain statutes, another act of the same class was passed and application thereto of that construction was therein prohibited, and following the

spirit of that prohibition the accounting officers refused to apply the disapproved construction to a still later statute of the same class. The supreme court refused to change this ruling. United States v. Gilmore, 8 Wall. 330.

⁴ Philadelphia, etc. R. R. Co. v. Catawissa R. R. Co. 53 Pa. St. 20, 60, 61.

⁵ Ante, §§ 320, 321.

⁶ Reg. v. Pearce, L. R. 5 Q. B. Div. at p. 389.

used would otherwise receive.¹ In such cases this provision leads to no difficulties of construction. When, however, the clause is employed, as it often is, to make particular words mean something different or more than they naturally and ordinarily signify, it should be construed strictly.² An enactment based upon an evident misconception of what the law is will not have the effect, *per se*, of changing the law so as to make it accord with such misconception.³ When a concise term is used which is to include many other subjects besides the actual thing designated by the words, it must always be used with due regard to the true, proper and legitimate construction of the act.⁴

§ 403. In England provisions of this nature have been discussed with marked disfavor;⁵ they embarrass rather than assist the courts in their decisions;⁶ they frequently do a great deal of harm by giving a non-natural sense to words, which are afterwards used in a natural sense without the distinction being noticed.⁷ "It has been very much doubted," says Lord St. Leonards, L. C., "and I concur in that doubt, whether these interpretation clauses, which are of modern origin, have not introduced more mischief than they have avoided; for they have attempted to put a general construc-

¹ Harde. on St. 104; Wilb. on St. 296.

² Allsop v. Day, 7 H. & N. at p. 463; McGowan v. State, 9 Yerg. 184; Jackman v. Dubois, 4 John. 216; Schmidt v. Hoyt, 1 Edw. Ch. 652. In State v. Canterbury, 28 N. H. at p. 228, Bell, J., says: "A small number of definitions were introduced in the Revised Statutes for the sake of brevity and to prevent the recurrence of several terms which, by a forced construction, might be included in a single word; but such definitions can, in the nature of things, have no effect, except in the construction of the statutes themselves. The meaning of language depends on popular usage, which is not and cannot, unless in a very slight degree, be affected by legislation." It was held

that the statutory definitions would govern in the construction of the statute itself, but the same words in an indictment founded on that statute would be construed entirely by the ordinary use of language. See State v. Adams, 51 N. H. 568; People v. Pico, 62 Cal. 50; Foltz v. Hoge, 54 Cal. 28.

³ Davis v. Delpit, 25 Miss. 445; Byrd v. State, 57 id. 243; Van Norman v. Jackson Circuit Judge, 45 Mich. 204.

⁴ Midland R'y Co. v. Ambergate R'y Co. 10 Hare, at pp. 369, 370.

⁵ Wilb. on St. 296, 297.

⁶ Reg. v. Cambridgeshire Justices, 7 Ad. & E. at p. 491.

⁷ Lindsay v. Cundy, L. R. 1 Q. B. Div. 358.

tion on words which do not admit of such a construction in the different senses in which they are introduced in the various parts of an act of parliament.”¹ An interpretation clause is not to receive a rigid construction, 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. It merely declares what persons and things may be comprehended within that term when the circumstances require that they should.²

§ 404. Where the interpretation clause is that a particular word shall include a variety of things not within its general meaning, it is a provision by way of extension, and not a definition by which other things are excluded.³ When the meaning is thus extended the natural and ordinary sense is not taken away.⁴ Blackburn, J., said: “It does not follow because in the interpretation clause they say that the expression ‘new street’ shall include certain other things we are to say it does not include its own natural sense.”⁵ An act provided that the

¹ Dean of Ely v. Bliss, 2 De G. M. & G. at p. 471.

² Reg. v. Cambridgeshire Justices, 7 Ad. & E. 491. A statute provided “that the word felony, when used in this or any other statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished with death, or by imprisonment in the state prison.” “This provision,” says Christiancy, J., “is but a legislative definition of the term felony as used in certain provisions of the statute; and its effect can only be known by reference to those provisions where the term is used. Of itself, without such reference, it has no effect upon any offense whatever. Nor can it be reasonably supposed that it was intended to extend to those provisions of the statute, (of which there are two cases at least in the same revision), which in defining the offense have expressly designated it as a felony, and made it punishable in the state prison; for in such case no such general defi-

nition was required. Nor is there any more reason to infer that, where a particular provision of the same act (for the whole revision was passed as one act) has expressly designated a particular statute offense as a misdemeanor, this definition was intended to convert it into a felony, though the provision defining the offense has made it punishable by imprisonment in the state prison. We must therefore understand this provision as intended to apply only to those provisions where neither the particular offense nor its grade is otherwise indicated than by the use of the term felony, and where, therefore, the definition became necessary, as it was not intended to be used merely in the common-law sense.” Drennan v. People, 10 Mich. 169, 173.

³ Reg. v. Kershaw, 6 E. & B. at p. 1007.

⁴ Pound v. Plumstead, L. R. 7 Q. B. 183.

⁵ Id.

word "ship" shall include "every description of vessel used in navigation not propelled by oars." On the question whether a fishing boat twenty-four feet long, partially decked over, and fitted with two masts and a rudder, and also with four oars, which were sometimes used, was a ship within the meaning of the act, the same learned judge said: "The argument against the proposition that this is a ship is one which I have heard very frequently, viz.: that when an act says that certain words shall include certain things the words must apply exclusively to that which they must include. That is not so. The definition given of a ship is in order that the word 'ship' may have a more extensive meaning, and the words 'not propelled by oars' are not intended to exclude all vessels that are ever propelled by oars."¹

§ 405. These considerations have induced the legislature, in framing interpretation laws, to qualify them so that they are not to be observed and followed if such construction would be inconsistent with its manifest intent. With such modification, the rules of interpretation generally adopted aid not only legislators in drafting statutes, but also the courts in their exposition. Among these rules are the following: Words importing the singular number only may extend to and embrace the plural number, and *vice versa*;² words importing the masculine gender only may extend to and be applied to females as well as males; the word "person" may extend and be applied to bodies politic and corporate as well as to natural persons;³ the word "issue" shall be construed to include all the lawful lineal descendants; land or real estate shall be construed to include land, tenements and real estate and all rights thereto and interests therein; the word "oath" shall include an affirmation; the word "month" or "year" shall be construed to mean a calendar month or year. Such a definition of land and real estate is statutory in Michigan, but the statute in regard to executions required chattels, real or personal, of the debtor to be taken and sold by one ceremony, and his real estate by another. These provisions were deemed to countervail the statutory definition of land and real estate; therefore a sale

¹ Ferguson, Ex parte, L. R. 6 Q. B. 291. See The Gauntlet, L. R. 3 Adm. 381.

² Hogan v. State, 36 Wis. 226, 247.

³ See Tewksbury v. Schulenberg, 41 Wis. 584.

of a leasehold estate as land by the proceedings appropriate to the latter kind of property was held to pass no title.¹ In the General Statutes of Michigan it is provided that "the words 'annual meeting,' when applied to townships, shall be construed to mean the annual meeting required by law to be held in the month of April," and that "the words 'general election' shall be construed to mean the election required by law to be held in the month of November."² In a special statute creating the city of Pontiac it was provided that "nothing in this act shall operate to prevent the holding of the *annual meetings* of the township of Pontiac . . . in said city, as though this act had not passed." It was held that the general election in November for the township could not be held in the city under the saving clause. The latter was strictly construed in harmony with the legislative definition.³ A statute of the same state requires that deeds shall be executed in the presence of two witnesses, "who shall subscribe their names to the same as such."⁴ A question arose whether a deed was executed where a marksman, whose name was written as a subscribing witness by another, had thus witnessed, as one of the subscribing witnesses, he having made his mark in connection with his name. It was held a compliance with the statute, it being prescribed by the defining provisions that "in all cases where the written signature of any person is required by law it shall be in the proper handwriting of such person, or, in case he is unable to write, his proper mark."⁵

§ 406. Retrospective laws.— Such statutes, when not forbidden by the constitution, may be valid, but there is always a strong leaning against giving them a retrospective operation, and this proceeds from the presumption that the legislature does not intend what is unjust. "Those whose duty it is," says Erle, C. J., "to administer the law very properly guard against giving to an act of parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain and unambiguous

¹ Buhl v. Kenyon, 11 Mich. 249. See Westinghausen v. People, 44 id. See Westervelt v. People, 20 Wend. 265.

416.

² 2 How. St. § 5658.

³ 1 How. St. § 2, subd. 4 and 19.

⁴ 1 id. § 2, subd. 17; Brown v. Mc-

⁵ People v. Knight, 13 Mich. 424. Cormick, 28 Mich. 215.

language.”¹ Such laws are looked upon with general disfavor. In *Dash v. Van Kleeck*,² Kent, C. J., said: “There has not been, perhaps, a distinguished jurist or elementary writer, within the last two centuries, who has had occasion to take notice of retrospective laws, either civil or criminal, but has mentioned them with caution, distrust or disapprobation.”

§ 407. Construction of acts affecting previous statutory policy.—It has often been judicially said that the policy of the law is too vague and capricious a consideration to have much weight in the construction of a statute. “What is termed the policy of the government,” says Field, J., “with reference to any particular legislation, is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.”³ It was remarked in *Municipal Building Society v. Kent*,⁴ that “it is never very safe ground in the construction of a statute to give weight to views of its policy which are themselves open to doubt and controversy.” It is not within the province of the courts to judge of the wisdom or expedience of a statute.⁵ With the policy of the law the courts have but little concern in construing an act of the legislature. The intention should be ascertained from its language, if possible, considered in connection with the every-day wants and objects of the people for whose government the same is enacted. That being ascertained and effectuated, the duty of the court is performed, whether the policy thereby subserved be good or bad.⁶ But it happens sometimes that the intention is not clearly expressed or is uncertain. Then the hardship, the injustice, and, in every point of view, the effects and consequences of particular constructions of a statute, will be considered; and the best effect of

¹ *Midland R'y Co. v. Pye*, 10 C. B. (N. S.) 191; *Bay v. Gage*, 36 Barb. 447; *Chew Heong v. United States*, 112 U. S. 536; *Maxwell v. Bay City*, 46 Mich. 278; *post*, § 431.

² 7 John. at p. 506.

³ *Hadden v. The Collector*, 5 Wall. at p. 111.

⁴ L. R. 9 App. Cas. 273.

⁵ *Reithmiller v. People*, 44 Mich. 280; *Sheley v. Detroit*, 45 id. 431; *Lindenmuller v. People*, 21 How. Pr. 156; *People v. Hoym*, 20 id. 76; *People v. Lawrence*, 36 Barb. 177.

⁶ *Pool v. Wedemeyer*, 56 Tex. 287; *Coffin v. Rich*, 45 Me. 507; *Bosley v. Mattingly*, 14 B. Mon. 89; *Baxter v. Tripp*, 12 R. L. 310.

the law, consistent with its language, ascertained in the light of all available aids to a true understanding of its meaning, will be deemed that intended by the legislature.¹ Arguments upon the policy of the law, though undoubtedly admissible, are to be listened to with much caution. The interpreters of the law have not the right to judge of its policy; and when they undertake to find out the policy contemplated by the makers of the law, there is great danger of mistaking their own opinions on that subject for the opinions of those who had alone the right to judge of matters of policy.² But after a statutory system or policy has been long established and is well defined, it will not be lightly presumed to be departed from or abandoned. General language will be restricted to bring the act into harmony with it.³ Equivocal words will not be accepted as implying an intent to depart from a settled statutory policy.⁴ General words are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be put upon them consistently with the intention of preserving the existing policy untouched.⁵

¹ *People v. Canal Com'rs*, 3 Scam. 153; *Collins v. Carman*, 5 Md. 503; *Putnam v. Longley*, 11 Pick. 487; *post*, § 131 *et seq.*

² *Roberts v. Cannon*, 4 Dev. & Bat. L. 267.

³ *Greenhow v. James*, 80 Va. 636.

⁴ *Attorney-General v. Smith*, 31 Mich. 359; *Blackwood v. Van Vliet*, 30 id. 118; *Rowley v. Stray*, 32 id. 70; *Baxter v. Tripp*, 12 R. I. 310; *Grenada Co. v. Brogden*, 112 U. S. 261; *Fort v. Burch*, 6 Barb. 60.

⁵ *Minet v. Leman*, 20 Beav. 269.

CHAPTER XV.

LIBERAL CONSTRUCTION.

§ 408. General explanation of subject.	§ 413. Equitable construction.
409-412. Remedial statutes in the sense of rule that they are liberally construed.	415. Liberal construction.
	431. <i>Causus omissus</i> .

§ 408. **General statement of the subject.**—The law favors a liberal construction of certain statutes to give them the most beneficial operation. When they are liberally construed, the principles which induce strict construction are not lost sight of nor ignored. Liberal construction is given when these principles do not so antagonize it as to make it unjust. Two classes of statutes are liberally construed — remedial statutes, and statutes which concern the public good or the general welfare. What are such statutes, in the sense of being subject to liberal construction? Taken broadly, as thus generally characterized, they would include all legislation. This is not practically the scope of such construction; other principles govern and make the law conservative in the interpretation of statutes and their enforcement in the cases and upon the considerations discussed in the last chapter. Blackstone says that for the purpose of ascertaining the boundaries of right and wrong, and the methods which the law takes to command the one and prohibit the other, it consists of several parts; “one *declaratory*, whereby the rights to be observed and the wrongs to be eschewed are clearly defined and laid down; another *directory*, whereby the subject is instructed and enjoined to observe those rights and abstain from the commission of those wrongs; a third, *remedial*, whereby a method is pointed to recover a man’s rights or redress his private wrongs.”¹ This eminent writer adds that the declaratory and directory parts stand much upon the same footing, and the remedial part so necessary a consequence of those other parts that the laws would be very vague and imperfect without it.²

¹ 1 Cooley’s Black. Com. 55.

² 1 *Id.*

On a subsequent page he says that "statutes also are either declaratory of the common law or remedial of some defects therein;" that "remedial statutes are those which are made to supply such defects and abridge such superfluities in the common law as arise either from the general imperfection of all human laws, from change of time and circumstances, from mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other causes whatever."¹

§ 409. Remedial statutes to be liberally construed.—In the modern sense remedial statutes not only include those which so remedy defects in the common law, but defects in our civil jurisprudence generally, embracing not only the common law, but also the statutory law. They are in a general sense remedial whether they correct defects in the declaratory, directory or remedial parts, as the author just quoted has defined them. There are also the three points mentioned by this author to be considered in the construction of all remedial statutes — the old law, the mischief and the remedy; that is, how the law stood at the making of the act; the mischief for which that law did not adequately provide, and what remedy the legislature has supplied to cure this mischief. And it is the duty of judges so to construe the act as to suppress the mischief and advance the remedy.² This injunction is simply to carry out the intention of the law-maker, which is the cardinal aim with reference to all statutes. The intention in statutes which are for this purpose recognized as remedial or enacted *pro bono publico* is more liberally inferred, and to a greater extent dominates the letter, than is admissible in dealing with those which must be strictly construed.

§ 410. Broad as is the definition of statutes to be liberally construed, none will be excluded from the category except where some other paramount rule governs. Penal statutes, and many others for special reasons, are excluded. The letter of remedial statutes may be extended to include cases clearly within the mischief they were intended to remedy, unless such construction does violence to the language used; but a consideration of the old law, the mischief, and the remedy, is not enough to bring cases within the purview of penal statutes, nor, indeed, any statute which must be strictly con-

¹ Cooley's Black. Com. 86, 87.

² Id.

strued. Cases must be expressly included by the words of these statutes to be governed by them. This is all the difference between a liberal and a strict construction. A case may come within one unless the language excludes it; while it is excluded by the other unless the language includes it.¹ Construction, whether it be liberal or strict, is an inquiry for and determination of the law-makers' intention to give it effect. "As for construing a statute by equity," Lord Mansfield said, "equity is synonymous to the meaning of the legislature."² So conservative, however, is the law as to severe statutes, which, therefore, must be construed strictly, that every case must be brought within both their letter and their spirit.³ A remedial statute must be construed largely and beneficially so as to suppress the mischief and advance the remedy. And if its words are not clear and precise, such construction will be adopted as shall appear the most reasonable and the best suited to accomplish its object; a construction which would lead to an absurdity will be rejected.⁴ And, generally, it may be affirmed that, if a statute may be liberally construed, everything is to be done in advancement of the remedy or the purpose intended that can be done consistently with any construction that can be put upon it.⁵ The substance of the act is principally regarded and the letter is not too closely adhered to.⁶ A remedial statute must be construed, if possible, so as to correct the mischief at which it is aimed;⁷ though, if the language is very explicit, there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.⁸

§ 411. The courts construe remedial statutes most liberally to effectuate the remedy.⁹ This principle operates to exclude

¹ *State v. Powers*, 36 Conn. 77.

⁷ *Fox v. Sloo*, 10 La. Ann. 11; *Fox*

² *Rex v. Williams*, 1 W. Black. 93; *Blakeney v. Blakeney*, 6 Port. 109; *Mayor, etc. v. Root*, 8 Md. 95; *Woodruff v. State*, 3 Ark. 284.

v. New Orleans, 12 id. 154; *Davenport v. Barnes*, 2 N. J. L. 211; *Wilber v. Paine*, 1 Ohio, 117; *Pancoast v. Ruffin*, 1 Ohio, 177; *Lessee of Burgett v. Burgett*, 1 Ohio, 219; *McCormick v. Alexander*, 2 Ohio, 74; *Franklin v. Franklin*, 1 Md. Ch. 342.

³ *Ante*, § 349.

⁴ *Sprowl v. Lawrence*, 33 Ala. 674; *Gilkey v. Cook*, 60 Wis. 133.

⁸ *Denn v. Reid*, 10 Pet. 524; *Guthrie v. Fisk*, 3 B. & C. at p. 182; *Brandling v. Barrington*, 6 B. & C. 475.

⁵ *Atcheson v. Everett*, 1 Cowp. 391; *Johnes v. Johnes*, 3 Dow, 15; *Turtle v. Hartwell*, 6 T. R. 426.

⁶ *Moody v. Threlkeld*, 13 Ga. 55.

⁹ *Id.*

as well as to include cases in furtherance of the law-makers' intention. That which is not in the purpose or meaning, nor within the mischief to be remedied, is not included in the statute, even though it be within the letter.¹ The courts follow the reason and spirit of such statutes till they overtake and destroy the mischief which the legislature intended to suppress.² In doing so they often go quite beyond the letter of the statute.³ What is within the intention is within the statute though not within the letter; and what is within the letter but not within the intention is not within the statute.⁴

§ 412. The intention is not something evinced *dehors* the statute; it is to be learned from it, with those extrinsic aids to a correct interpretation to which resort may be had; and that intention, when satisfactorily ascertained, is the design to which the letter is subordinated. And it is ever to be borne in mind that the intention is to be collected from the words, the context, the subject-matter, the effects and consequences, the spirit and reason of the law, and other acts *in pari materia*.⁵ What is liberal construction can be better understood with these general principles in mind, by study of a multitude of well-considered cases, and by carefully considering the reciprocal influence of the principles which underlie the two modes of construction — strict and liberal. A liberal construction is given to remedial statutes, and statutes generally enacted for the public convenience and for its material welfare, except as modified or neutralized by the conservatism upon which strict construction is founded.

§ 413. **Equitable construction.**— Early acts of parliament were brief and general in their terms. They were made to operate upon a very latitudinarian construction in both civil and criminal cases. The courts proceeded upon what was called the equity of the statute. "Equity," said Lord Coke, "is a construction made by the judges that cases out of the

¹ Taylor v. McGill, 6 Lea, 294.

⁴ Mayor, etc. v. Root, 8 Md. 95;

² Shumate v. Williams, 34 Ga. 251. Chealy v. Brewer, 7 Mass. 259; State

³ Id.; Henderson v. Alexander, 2 v. Boyd, 2 Gill & J. 374; Woodruff Ga. 81; Booth v. Williams, id. 252; v. State, 3 Ark. 285; Brown v. Gates, Howard v. Central Bank, 3 id. 380; 15 W. Va. 131; Eyston v. Studd, Ragland v. Justices, 10 id. 71; Canal 2 Plowd. at p. 464.

Co. v. Railroad Co. 4 Gill & J. 152; ⁵ Woodruff v. State, 3 Ark. 285.

Milburn v. State, 1 Md. 17.

letter of the statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the statute provideth; and the reason thereof is, for that the law-makers could not possibly set down all cases in express terms."¹ While this mode of construing statutes was in vogue, principles and instances illustrative of them were announced which have become embedded in the literature of the law; they still are quoted when courts give a very liberal construction to statutes. These are but relics of ancient hermeneutics which do not survive entire.²

¹ 1 Inst. 24b.

² There is in 2 Plowden, 465, an interesting and instructive review and *resumé* of construction of statutes by equity as practiced in the time of Queen Elizabeth.

The concluding words of the judgment in *Eyston v. Studd* will indicate the nature of that case:

"Wherefore a man ought not to rest upon the letter of an act, nor think that when he has the letter on his side he has the law on his side in all cases. For if a woman is seized of land in fee-simple, and she intends to marry, and before the marriage she enfeoffs the father of him whom she intends to marry, to the intent that after the marriage he shall give the land back again to her and to him whom she intends to marry, with remainder over in tail, and afterwards they intermarry, and then the father gives the land to his said son and to his wife according to the intent, and they have issue, and the husband dies, and she levies a fine to other uses, now the wife is within the words of the statute of 11 Hen. 7, for the land was given to her and to her husband in tail by the ancestor of the husband, and after the death of the husband she has levied a fine to bar the issue; but notwithstanding that she is within the words of the act, yet she is out

of the intent of the act, and therefore the issue shall not enter; for the estate-tail was made by the wife by circumstance, and is derived from her, and the father of the husband had the land to no other intent but to make the estate, and to that intent and purpose he was made use of as an instrument, so that the effect of the whole matter was to make a jointure to the husband out of the land of the wife, which, although within the letter of the act of 11 H. 7, yet it is out of the intent of it, and consequently out of the purview." To this the reporter adds an exhaustive note. He says:

"From this judgment and the cause of it the reader may observe that it is not the words of the law but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz., of body and soul; the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, *quia ratio legis est anima legis*. And the law may be resembled to a nut which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel. And as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law if you rely only upon the letter; and as the fruit and profit of the nut

It is said in Plowden,¹ for which there were many instances, that "where an act is made to remedy any mischief, there in

lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter. And it often happens that when you know the letter you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. And equity, which in Latin is called *equitas*, enlarges or diminishes the letter according to his discretion, which equity is in two ways; the one Aristotle defines thus: *Equitas est correctio legis generatim latae quâ parte deficit*, or as the passage is explained by Peronius: *Equitas est correctio quadam legi adhibita, quia ab ea abest aliquid propter generalem sine exceptione comprehensionem*, both of which definitions come to one and the same thing. And this correction of the general words is much used in the law of England. As when an act of parliament ordains that whosoever does such an act shall be a felon and shall suffer death, yet if a man of unsound mind, or an infant of tender age who has no discretion, does the act, they shall not be felons, nor shall they be put to death. And if a statute be made that all persons who shall receive or give meat or drink or other aid to him that shall do such an act (knowing the same to be done), shall be accessories to the offense, and shall be put to death, yet if a man commits the act, and comes to his own wife, who knowing the same receives him, and gives him meat and drink, she shall not be accessory to his offense, nor a felon; for one that is of unsound mind, an infant, or a wife, were not intended to be included in the gen-

eral words of the law. So that in these cases the general words of the law are corrected and abridged by equity. . . . And the statute of Westminster 1, cap. 4, touching wreck of the sea, ordains 'that when a man, dog, or cat, escape alive out of the ship, such ship or anything within it shall not be adjudged wreck, but the goods shall be saved and kept by view of the sheriff, coroner or king's bailiff, and delivered into the hands of such as are of the town where the goods were found, so that if any sues for the goods, and can prove that they were his, within a year and a day, they shall be restored to him without delay, and if not, they shall remain to the king, and shall be seized by the sheriff, coroner, etc., and be delivered to them of the town, who shall answer before the justices for the wreck which belongs to the king; and where wreck belongs to another than to the king, he shall have it in like manner; and he that does otherwise, and thereof is attainted, shall be awarded to prison, and make fine at the king's will, and shall yield damages also.' Now put the case that the goods in such ship are fresh victuals, as flesh, fresh fish, or apples, or oranges, or such perishable goods as cannot be kept for a year, and the sheriff sells them, and delivers the money arising from the sale of them to the town to answer for it, in this case he has broken the words of the act, and therefore, if we adjudge according to the words, the sheriff should be sent to prison, and be fined at the will of the king, and should pay damages; but, on the other hand, if we follow the sense and meaning of the act, he has done

¹ Hill v. Grange, 1 Plowd. at p. 178.

order to aid things in like degree, one action has been used for another, one thing for another, one place for another, and

well, and shall not be punished, for the meaning of the act is, that such things as could be kept for a year, without spoil or damage, should be kept so long, but if the things are so perishable that they cannot be preserved a whole year, nor perhaps two days, then it was not the intent of the makers of the act that the sheriff should let them fall to decay, but rather that he should immediately make the most of them he could; so that although the sheriff has done contrary to the words of the law by selling the goods within a year, yet he has not broken the law, but has punctually observed it, inasmuch as he has observed the intent and meaning of the makers of the law. . . .

(The reporter states many other instances of implied exceptions from the general words in harmony with the intent, or to exclude cases not within the mischief, and proceeds to give the instances of enlarging the letter.) The other kind of equity differs much from the former, and is in a manner of quite a contrary effect, and may well be thus defined: *Equitas est verborum legis directio efficacius, cum una res fulummodo legis caveatur verbis, ut omnis alia in equali genere eisdem caveatur verbis.* And this definition seems agreeable to that of Bracton, which is thus: *Equitas est rerum convenientia quæ in paribus causis paria desiderat jura, et omnia bene coæquiparet, et decitur equitas quasi æqualitas.* So that when the words of a statute enact one thing, they enact all other things which are in the like degree. As the statute which ordains that in an action of debt against executors he who comes first by distress shall answer, is extended by equity to administra-

tors, and such of them as come first by distress shall answer by the equity of the said statute, *quia sunt in æquali genere.* And the act of 4 H. 4, cap. 8, gives a special assize to him who is disseized and ousted of his land by force, against the disseizor, and enacts that he shall recover against him double damages; and in the book of entries (Rasti), fo. 406, it appears that the plaintiff recovered by judgment double damages in an assize of nuisance for turning a water-course with force, to the nuisance of his mills, wherein it was found for the plaintiff; and yet there he was not ousted of his land, nor did he suffer any disseizin, but only a nuisance to the damage of his freehold, viz., his mills, whereof he continued seized; so that by the equity of the said statute the plaintiff recovered his double damages for the nuisance, because it is in like degree with a disseizin of land.

"And the statute of Gloucester gives an action of waste and the punishment therein against him that holds for life or for years, and by the equity thereof a man shall have an action of waste against him who holds but for a year, or for twenty weeks, and yet this is out of the words of the act, for he that holds but for one year does not hold for years; but it is within the intent of the act, and the words which enact the one do by equity enact the other. And so there are an infinite number of cases in our law which are in equal degree with others provided for by statutes, and are taken by equity within the meaning of those statutes. And from hence, it appears that there is a great diversity between these two equities, for the one abridges the letter, the

one person for another, notwithstanding that in some cases the thing is penal.”¹ The word “ancestor,” in Westminster the

other enlarges it; the one diminishes it, the other amplifies it; the one takes from the letter, the other adds to it. So that a man ought not to rest upon the letter only, *nam qui hæret in litera, hæret in cortice*, but he ought to rely upon the sense, which is tempered and guided by equity, and therein he reaps the fruit of the law; for as a nut consists of a shell and a kernel, so every statute consists of the letter and the sense, and as the kernel is the fruit of the nut, so the sense is the fruit of the statute. And in order to form a right judgment when the letter of a statute is restrained, and when enlarged by equity, it is a good way, when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity; then you must give yourself such an answer as you imagine he would have done, if he had been present. As, for example, in the case before mentioned where the strangers scale the walls, and defend the city, suppose the law-maker to be present with you, and in your own mind put this question to him: Shall the strangers be put to death? Then give yourself the same answer which you imagine he, being an upright and reasonable man, would have given, and you will find that he would have said, ‘they shall not be put to death.’ . . . And therefore when such cases happen which are within the letter, or out of the letter of a statute, and yet don’t directly fall within the plain and natural purport of the letter, but are in some measure to be conceived in a different idea from that which the text seems to express, it is a good way to put

questions and give answers to yourself thereupon, in the same manner as if you were actually conversing with the maker of such laws, and by this means you will easily find out what is the equity in those cases. . . . And where the statute of 37 H. 8, cap. 8, took away clergy from him that stole any horse, and the statute of 1 Edw. 6, cap. 12, enacted that those who were attainted of stealing horses should not have their clergy, but that in all other cases of felony persons attainted should have their clergy, I by no means commend the scrupulosity of the judges in these times who took the law to be thereupon, that he who stole one horse only should have his clergy, and therefore procured the act of 2 Edw. 6, cap. 33, to be made, which ousted him of his clergy who stole one horse only; for where the statute speaks of stealing horses, although it speaks in the plural number, yet, by equity (which considers the intent of the legislature), it ought also to comprehend one singular horse only, and that as fully as if it had said horses or horse; and the clause in the act which says that in all other cases of felony persons attainted thereof shall have their clergy is to be interpreted and intended of others than those who steal horses or a horse; for, as the statute of Gloucester, which gives an action of waste against him that holds for years, in the plural number, may be taken to comprehend him who holds but for one year, so may the said statute which speaks of horses in the plural number be interpreted to comprehend one horse in the singular number. And if it be said that the law is penal in

¹ See *Wheatley v. Lane*, 1 Williams’ Saund. (& Williams’ Notes) 216.

First,¹ is extended so as to include predecessor.² The remedy given by the 9th Edward III., chapter 3, against executors, was extended by equitable construction to administrators.³ The statute of 1 Richard II., chapter 12, which forbade the warden of the Fleet to suffer his prisoners for judgment debts to go at large until they had satisfied their debts, was held to include all jailors.⁴ The statute of Westminster 2, chapter 31, which gave the bill of exceptions to the ruling of the judges of the common pleas, was held applicable to the other judges of the superior courts, and also to the county courts, the hundred and the courts baron; to the inferior courts, because their judges were still more liable to err.⁵ The statute of Gloucester, chapter 11,⁶ in speaking of London, was considered as intending to include all cities and boroughs equally, the capital having been named alone for excellency.⁷ The statute, or writ of *circumspecti agatis*, 13 Edward I., which directs the judges not to interfere with the Bishop of Norwich or his clergy in spiritual suits, was construed as protecting all other prelates and ecclesiastics, the Bishop of Norwich being put but for an example.⁸

§ 414. Whatever the reasons for this latitudinary construction of statutes, whether it came from their being brief and general, framed by the judges themselves, and the uncertainty of the line dividing legislative from judicial functions, it is part of the history of the law. The underlying principle is obsolete,⁹ though to a limited extent it still exercises some influence in the domain of liberal construction. Some examples of it are yet made to do duty, as fit illustrations of the expansive and elastic quality of remedial laws.¹⁰ The principle on which

this case, to this it may be answered that so it is also in the other case; but equity knows no difference between penal laws and others, for the intent (which is the only thing regarded by equity, as may appear to every one who pursues the method of inquiry by way of question and answer in the manner before intimated) ought to be followed and taken for law, as well in penal laws as in others." See *Wimbish v. Tailbois*, 1 Plowd. 38.

¹ 3 Edw. I. ch. 40.

² 2 Inst. 242.

³ *Eyston v. Studd*, *supra*. See *Hoguet v. Wallace*, 28 N. J. L. at p. 526.

⁴ *Platt v. Lock*, 1 Plowd. 35.

⁵ 2 Inst. 426; *Strother v. Hutchinson*, 4 Bing. N. C. 83.

⁶ 6 Edw. I.

⁷ 2 Inst. 321; *Endlich*, Int. St. § 322.

⁸ *Id.*; 3 Inst. 487.

⁹ *Hardcastle on St.* 39; *Ex parte Walton*, L. R. 17 Ch. Div. 750.

¹⁰ *Simonton v. Barrell*, 21 Wend. 362; *United States v. Freeman*, 3 How. at p. 565.

the courts proceeded in giving effect to the equity of a statute seems to have been that of supplementing the statute by extending it to like cases, and arresting its operation in cases not deemed to be within its purpose. It has an ingredient of legislative discretion,¹ and is not strictly or solely a principle of construction. The court did what it was supposed from the act passed the legislature would have done had its attention been called to the similar case in hand. They applied the common-law maxim, *quod in uno similium valet, valebit in altero*, or, as Coke puts it, "If they be in like reason, they are in like law."² Lord Westbury spoke of equitable construction of statutes as "a mode of interpretation very common with regard to our earlier statutes, and very consistent with the principle and manner according to which acts of parliament were at that time framed."³ In *Guthrie v. Fisk*,⁴ Bayley, J., denounced it as "a dangerous rule of construction to introduce words not expressed because they may be supposed to be within the mischief contemplated." And another learned judge on the English bench said: "I think there is always danger in giving effect to what is called the equity of a statute, and that it is much 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."⁵ Lord Camden⁶ said: "Where it is clear the person or thing expressed is put by way of example, the judges must fill up the catalogue; yet we ought to be sure, from the words and meaning of the act itself, that the thing or person is really inserted as an example. . . . Whenever this rule is to take place, the act must be general, and the thing expressed must be particular. . . . In all cases that fall within this rule, there must be a perfect resemblance between the persons or things expressed and those implied."

§ 415. What is liberal construction.—A statute extends no further than it expresses the legislative will. When it is held to embrace a case which is within its spirit, though not

¹ *Annan v. Houck*, 4 Gill, at p. 332.

² Coke Lit. 191a.

³ *Hay v. Lord Provost of Perth*, 4 Macq. Sc. App. at p. 544.

⁴ 3 B. & C. at p. 183.

⁵ Lord Tenterden in *Brandling v. Barrington*, 6 B. & C. at p. 475.

⁶ *Entick v. Carrington*, 19 How. St. Tr. 1029, 1060.

within its letter, it is not meant that the courts have authority to extend a statute to cases for which it does not by its words provide, or beyond the sense of its language. A statute is a written law, and it cannot be construed to have a sense and spirit not deducible from its provisions. It is a general rule that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction; the courts cannot arbitrarily subtract from or add thereto.¹ The modern doctrine is that to construe a statute liberally or according to its equity is nothing more than to give effect to it according to the intention of the law-maker, as indicated by its terms and purposes. This construction may be carried beyond the natural import of the words when essential to answer the evident purpose of the act; so it may restrain the general words to exclude a case not within that purpose.

§ 416. There is no arbitrary form of words to express any particular intention; the intent is not identical with any phraseology employed to express it. Any language is but a sign, and many signs may be used to signify the same thing. In statutes the sense signified is the law; the letter is but its servant or its vehicle. Language is so copious and flexible that when general words are used there is an absence of precision, and all words and collocations of words admit of more than one interpretation.² In the construction of remedial statutes, while the meaning of words is not ignored, it will be subordinated to their general effect in combination in a whole act or series of acts, read in the light of all the pertinent facts of every nature of which the courts take judicial notice. Liberal construction of any statute consists in giving the words a meaning which renders it most effectual to accomplish the purpose or fulfill the intent which it plainly discloses. For this purpose the words may be taken in their fullest and most comprehensive sense. Where the intent of the act is manifest, particular words may have an effect quite beyond their natural signification in aid of that intent.³ The following cases

¹ *Tynan v. Walker*, 35 Cal. 634.

² *Wilberf. on St.* 235; *Avery v.*

³ See *Regina v. Skeen*, Bell, C. C. Groton, 36 Conn. 304; *Smith v. Stevens*, 82 Ill. 554; *Dean and Chapter*

appear to the writer to fitly illustrate the degree of elasticity of statutes which are to be liberally construed: An Alabama statute provided that "All actions of trespass *quare clausum fregit*, and actions of trespass to recover damages for injuries to personal property, may, if the plaintiff or plaintiffs die, be revived by his or her or their representatives in the same manner as actions upon contract." This was held not to authorize the representatives to bring an action originally for such torts, but only to revive actions brought by plaintiffs who have died. Reasons may have influenced the legislature in giving a remedy in the one case which it was unwilling to extend in the other. In the former the deceased had himself elected to seek redress, and should his suit abate by his death his estate would be subjected to costs. In the latter he had brought no action, and may have intended to waive the wrong. "These considerations," say the court, "it is possible, may have influenced the legislature in thus limiting the remedy. Be this as it may, the construction [that an original action might be brought on the equity of the statute] cannot be given to it unless we go, not only *ultra* the strict letter, but *contra* the letter also, which is inhibited by every just principle of construction."¹ A provision that all actions against sheriffs and coroners upon any liability incurred by them by the doing of any act in their official capacity, or by the omission of any official duty, shall be brought within three years after the cause of action shall have accrued, though construed very liberally, is held not to apply to actions for acts done merely *colore* but not *virtute officii*.² An act modified the common law with regard to the effect of the voluntary discharge of a defendant from arrest on a judgment by giving the plaintiff a remedy by further execution or other *process*. This word in strictness was held to mean only *scire facias*; but as the statute was remedial, it should be construed to include an action of debt also.³

§ 417. When the scope and intention of an act are ascertained by all the aids available, words whose ordinary acceptation is

of *York v. Middleburgh*, 2 Y. & J. 196; *Vigo's Case*, 21 Wall. 648; *Turtle v. Hartwell*, 6 T. R. at p. 429; *Atcheson v. Everitt*, 1 Cowp. at p. 391; *State v. Powers*, 36 Conn. 77; *Hyde v.*

Cogan, 2 Doug. 699, 706; *Houk v. Barthold*, 73 Ind. 21.

¹ *Blakeney v. Blakeney*, 6 Port. 115.

² *Morris v. Van Voast*, 19 Wend. 283.

³ *Simonton v. Barrell*, 21 Wend. 362.

limited may be expanded to harmonize with the purpose of the act. This interpretation is admissible of statutes generally, but has a more liberal application to remedial and some other statutes which are liberally construed. It is applied to every case within the object of the act if it can reasonably be brought within its language. Thus in *Silver v. Ladd*¹ the court held that in construing a benevolent statute enacted to confer a public benefit, by encouraging citizens to settle on distant portions of the public domain, the words "single man" may, in the light of the context showing the scope and purpose of the act, be taken in a general sense as including an unmarried woman.²

¹ 7 Wall. 219.

² "This case may be taken as an illustration of the elasticity of words in an act to be liberally construed. It explained the provisions of the act of congress of the 27th of September, 1850, commonly called the Donation Act. Miller, J., speaking for the whole court, said: "We admit the philological criticism that the words 'single man' and 'married man,' referring to the conjugal relation of the sexes, do not ordinarily include females; and no doubt it is on this critical use of the words that the decision of the Oregon court is mainly founded. But conceding to it all the force it may justly claim, we are of opinion that it does not give the true meaning of the act, according to the intent of its framers, for the following reasons:

"1. The language is that there is hereby granted to 'every white settler or occupant of the public lands, above the age of eighteen years,' etc. This is intended to be the description of the class of persons who may take, and, if not otherwise restricted, will clearly include all women of that age as well as men.

"2. It is only in prescribing the quantity of land to be taken that the restrictive words are used, and even

then the words are capable of being construed generically, so as to include both sexes. In the case of a married man it is clear that it does include his wife.

"3. The evident intention to give to women as well as men is shown by the provision that, of the six hundred and forty acres granted to married men, one-half shall go to their wives, and be set apart to them by the surveyor-general, and shall be held in their own right. Can there be any reason why a married woman, who has the care and protection of a husband, and who is incapable of making a separate settlement and cultivation, shall have land given to her own use, while the unprotected female, above the age of eighteen years, who makes her own settlement and cultivation, shall be excluded?

"4. But a comparison of the manifest purpose of congress and the language used by it, in section 4 of this statute, with those of section 5, will afford grounds for rejecting the interpretation claimed by defendants which are almost conclusive.

"The first of these sections applies, as we have already said, to that meritorious class who were then residing in the territory, or should become residents by the 1st of December

§ 418. An act which authorized justices to make orders in bastardy proceedings against the putative father of the bastard child of "any single woman" was held to include a widow, for the description did not mean never married;¹ it included a married woman living apart from her husband, when his non-access is proved. Lord Denman, referring to 7 and 8 Vict., chapter 101, said in *Regina v. Collingwood*:² "The language of the statute applies in terms only to single women; so did the language of 6 Geo. II., chapter 31; yet Lord Ellenborough, and the whole court in *Rex v. Luffe*,³ held that an order might be made on the putative father of the bastard child of a married woman, who was to be considered single under the existing circumstances and for that purpose." Sergeant Godson, arguing for that construction, remarked that "the adultery

thereafter. It extends to persons not citizens of the United States, to persons only eighteen years old, and it gives to each a half section of land. The fifth section makes a donation of half this amount, and is restricted to citizens of the United States, or those who have declared their intention to become citizens, and to persons over twenty-one years of age. But what is most expressive in regard to the matter under discussion is, that the very first line of that section, in which the class of donees is described, uses the words 'white male citizens of the United States.' Now when we reflect on the class of persons intended to be rewarded in the fourth section, and see that words were used which included half-breeds, foreigners, infants over eighteen, and which provided expressly for both sexes when married, and used words capable of that construction in cases of unmarried persons, and observe that in the next section, where they intend to be more restrictive, in reference to quantity of land, to age of donee, citizenship, etc., they use apt words to express this restriction and then use the words 'white males' in

reference to sex we are forced to the conclusion that they did not intend, in section 4, the same limitation in regard to sex which they so clearly expressed in section 5. The contrast in the language used in regard to the sex of the donees in the two sections is sustained throughout by the other contrasts in the age and character of the donees, and the quantity of land granted." The context in this case shows that the donor did not intend to limit the donation to males; hence the words "single man" and "married man" were brought into harmony with that intention by construing them in a generic sense.

In *Reg. v. Wymondham*, 2 Q. B. 541, in construing a statute relative to the settlement of a pauper, which is a statute to be strictly construed, the judges were not willing to construe "single and unmarried" persons as meaning also "not having children" or "never married."

¹ *Reg. v. Wymondham*, 2 Q. B. 541; *Antony v. Cardenham*, Fortes. 309.

² 12 Q. B. 681.

³ 3 East, 193.

of the wife places her in the position of a single woman." Lord Campbell, C. J., said, in *Regina v. Pilkington*:¹ "It would be strange if one class of bastards, though small, were left entirely destitute, and there were no liability in the putative father." A statute of Alabama provided that, "For any breach of any official bond or undertaking of any officer of this state, executor, administrator or guardian, or of any bond or undertaking given in an official capacity to the state of Alabama, or any officer thereof, the person aggrieved may sue in his own name, assigning the appropriate breach."² This statute was declared remedial. It was intended that suits on official and the other bonds mentioned should be prosecuted by the party really aggrieved, in his own name, dispensing with the mere form, which obedience to the rule of the common law required, of introducing on the record, as nominal plaintiff, the obligee of the bond, who had no right or interest involved, and who could not control the suit — who was not answerable for costs, and could not release or discharge the recovery. The bond of a county treasurer, though a county and not a state officer, was not within the words of the section, if taken in a narrow or strict sense. But because such a bond, when the subject of a suit by an individual aggrieved by the county treasurer's official delinquency, is as much within the mischief the section was intended to correct as other bonds coming within its letter, it is not a strained construction to read the statute as embracing it and the bond of any public officer.³ A statute of the same state provided that, "Whenever any officer, required by law to give an official bond, acts under a bond which is not in the penalty, payable and conditioned as prescribed by law, such bond is not void, but stands in the place of the official bond, subject, on its condition being broken, to all the remedies which the person aggrieved might have maintained upon the official bond of such officer, executed, approved and filed according to law." This section was held to apply to bonds which were in the penalty, payable and conditioned as prescribed by law, but which were not executed, approved and filed within the time limited thereby.⁴

¹ 2 E. & B. 546.

² Rev. Code of 1867, § 2552.

³ *Morrow v. Wood*, 56 Ala. 1, 5, 6; *Sprowl v. Lawrence*, 33 id. 674.

⁴ *Sprowl v. Lawrence*, 33 Ala. 685.

In this case the court say: "An examination of the various provisions of the code in reference to the bonds

§ 419. Where the words of a statute prescribing compensation to a public officer are loose and obscure and admit of two

of public officers will satisfy any one of the studious solicitude with which the legislature has sought to afford the most ample protection to all persons interested in the performance by such officers of their official duties. This section we are considering is a part of the legislation designed to effect this general object, and it is our duty to put upon it such a construction as will harmonize with the substance and spirit of the text to which it belongs. It is a remedial statute, and we must construe it largely and beneficially so as to suppress the mischief and advance the remedy; or, in the language of Lord Coke, so as 'to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*.' *Hayden's Case*, 3 Rep. 7; *Sedgwick on St.* 359-60. It must be admitted that the words of this section are not as clear and precise as they might be; and it is a well-settled rule that, when the words are not precise and clear, such construction will be adopted as shall appear the most reasonable and best suited to accomplish the object of the statute; and a construction which would lead to an absurdity ought to be rejected.

"Viewing section 132 (quoted in the text) in the light of these rules, we cannot assent to the construction of it urged by the counsel for the appellee. The result to which that construction leads demonstrates, in our opinion, its fallacy. By section 120 it is declared that the bond of any officer which is not in the penalty, and payable and conditioned as prescribed by law, 'should not be approved,' and that the officer approving the same 'neglects his duty.' Section 132 is evidently based on the

supposition that bonds which were not in the penalty, and payable and conditioned as prescribed, would, or to say the least might, not be approved and filed; and this for the simple reason that the officers intrusted with the authority to approve and file are advised by an emphatic admonition from the legislature that such bonds 'should not be approved' and that no bond shall be filed unless first approved. Code, §§ 120, 126. Hence the language is that such a bond, if the officer executing it '*acts under it*,' shall be subject to all the remedies which could be maintained 'on the official bond of such officer, executed, *approved and filed according to law*.' These last words seem to imply that a bond which did not conform to the statutory requirements as to penalty, payee and condition would not be executed, approved or filed according to law. And yet, if the sheriff *acts under* such a bond, it stands in the place of and is subject to all the remedies which could be maintained upon the official bond of such officer, executed in all respects in strict conformity to the statute. Hence we conclude that, so far as the operation of section 132 is concerned, it makes no difference whether the bonds there spoken of have or have not been approved and filed. The bonds referred to in that section could not be properly approved or filed; for the law expressly declares that bonds thus defective *should not be approved*, and that the officer who does approve them *violates his duty*. If a bond is approved and filed when it should not have been, and if the officer who approves and files it violates his duty in doing so, the act of approval and filing, it would seem,

interpretations, they should be construed in favor of the officer. This was held by Story, J., in the construction of a statute authorizing the secretary of the treasury to limit and fix the number and compensation, among others, of deputy collectors, with a proviso that no such deputy, in certain named districts, should receive more than \$1,000, "nor any such other deputy more than \$1,000 for any services he may perform for the United States in any office or capacity." That eminent judge and jurist said the last clause was obscurely drawn, and, "after weighing the subject with a good deal of care, I have come to the conclusion that the true intent and meaning of the clause is to limit the emoluments of the deputy collector in that office to the sum specified, and to make no allowance to him on account of any incidental services he may perform or emoluments he may receive beyond that sum; and that it was not intended to say that if he actually performed the duties or services of any other independent office, such as inspector, in any of the non-enumerated ports, he was not entitled to receive the emoluments thereof. In short, I read the language as if it were 'in any *such* office or capacity.'"¹ A Missouri statute was: "The county in which the indictment is found shall pay the costs in all cases where the defendant is sentenced to imprisonment in the county jail, and to pay a fine, or either of these modes of punishment, and is unable to pay them."² A prosecution for an offense so punishable was dismissed by an agreement between the circuit attorney and the defendant, with the consent of the court, at the defendant's cost. The costs were taxed and an execution issued for them. It was held that the county was liable not only for the costs taxed, but also for the

cannot be otherwise than nugatory as such, though it would doubtless be convenient and plenary proof of the delivery of the bond by the obligors. This section, therefore, in our judgment, applies to a bond which does not conform to any of the statutory requirements, either as to its penalty, payee, conditions, approval or filing, provided the officer executing it has acted under it. Much more clearly does it apply to a bond which the officer executing it has acted under,

and which does conform to all the requirements of the law except the last two, approval and filing. To hold otherwise would be to maintain the paradox that the validity of the bond is enhanced by its increased imperfections — that a total is less hurtful than a partial departure from the statute, and that an instrument in fact gets better as it grows worse."

¹ United States v. Morse, 3 Story, 87.

² Gen. St. ch. 219, § 2.

costs on the execution.¹ The statute of 38 Geo. III., chapter 87, section 1, says that "at the expiration of twelve calendar months from the death of a testator, if the executor to whom probate of the will has been granted is then residing out of the jurisdiction of his majesty's courts of law and equity, it shall be lawful to make a grant of administration to the persons interested." An executor was residing in the jurisdiction at the expiration of the twelve calendar months, and continued so to reside for four years. He then removed out of the jurisdiction, and at the date of the application was still residing abroad. The question was whether the statute applied to him. It was held that it did. The statute was held remedial to enable persons interested in the estate to enforce their claims. Lord Penzance said: "My difficulty arose on reading the words 'then residing;' but it was pointed out to me that if I restricted the operation of the statute to the case of the executor residing out of the jurisdiction at the expiration of twelve months, the intention of the statute could hardly be worked out."²

In *Evans v. Jones*³ the court of great session was abolished, and a statute provided that "the court of common pleas shall have the like power and authority to amend the

¹ *State v. Buchanan Co. Ct.* 41 Mo. 254.

² In the *Goods of Ruddy*, L. R. 2 P. & D. 330.

³ Bing. 311. In this case a liberal construction was allowed on the authority of cases decided upon the equity of statutes. "Many instances," says the Lord Chief Justice, "occur in the books of similar construction of statutes. The 9 Rich. II., ch. 3, gives a writ of error to him *in reversion*, if a tenant for life lose in a *precipe*; but it was resolved, that though the statute speaks only of reversions, yet remainders are also taken to be within the purview thereof. *Winchester's Case*, 3 Rep. 4. The action of debt for an escape, which is against every sheriff and gaoler where the prisoner escapes out of execution, is grounded upon the

statute of 1 Rich. II., ch. 12, which is altogether silent about sheriffs and gaolers, and mentions only the warden of the Fleet. So the statute of *circumspectè agatis* (13 Edw. I.), which mentions only the Bishop of Norwich, has been always extended to include all other bishops. 2 Inst. 487. The statute of Westminster I gives a remedy where 'outrageous toll is taken;' by construction of law that remedy applies either where a reasonable toll is due and excessive toll is taken, and when no toll at all is due, and yet toll is unjustly usurped. 2 Inst. 220. In these and many other instances, the particular expression used in the statute is looked upon only as an example of other cases lying within the same mischief, and, therefore, calling for the same remedy."

records of fines and recoveries passed heretofore in any of the courts abolished by this act, as if the same had been levied, suffered or had in the court of common pleas." On this statute the question arose whether, under the power to *amend*, an entire record could be made. Tindal, C. J., said: "We think this provision of the statute is remedial, and, consequently, that it should receive, not a strict, but so far a liberal, construction as will meet and remove the difficulty which the act itself has created."

An insolvent act invalidated voluntary conveyances made by insolvents "within three months before the commencement of the imprisonment." That language would exclude the time of imprisonment; so that, taken literally, conveyances during such time would not be invalidated. But, being construed liberally to carry out the obvious intention of the act, it was interpreted as if the words had been "within the period commencing three months before the imprisonment."¹

§ 420. It was provided by a statute of Georgia that, "when any guardian, executor or administrator chargeable with the estate of any *orphan* or deceased person to him, her or them committed, shall die so chargeable, his, her or their executors or administrators shall be compellable to pay out of his, her or their estate so much as shall appear to be due to the estate of such orphan or deceased person, before any other debt of such testator or intestate."² The subject-matter of this statute is the estate or property of minors, and the purpose or motive of the legislature was its security and protection in the hands of a guardian at his death. Hence the word orphan included a child having separate property, though his parents were living. The usual popular meaning of words is ordinarily to be adopted, yet not necessarily nor universally. They are to be considered as having regard to the subject-matter; that is presumed to be always in the eye of the legislator. Hence when a word or words are of doubtful meaning, in the application of a statute, the subject-matter may dissolve doubts and fix their meaning so as to make it harmonious with the object of the legislature. "Looking to the subject-matter of this law," say the court in *Ragland v. The Justices, etc.*,³ "the estates

¹ *Becke v. Smith*, 2 M. & W. 198.

³ 10 Ga. 65, 71.

² *Cobb's New Dig.* 288.

of minors, and looking to the reason and object of the law, the protection of these estates, it will be impossible to conclude that when the legislature speaks of an orphan it meant to designate alone a minor whose parents are dead." The following case shows a special application and use of the word *loan*: A township being unable to procure volunteers under a bounty law for \$300, the citizens voluntarily advanced money to pay bounties beyond that amount, with the understanding that it was to be repaid when a law should be passed authorizing taxation to repay them. An act was subsequently passed to repay "all loans made in good faith," and it was held that this law authorized the repayment of the sums so advanced. The loans contemplated were not loans in a *legal* sense; they had reference only to claims upon the conscience and moral sense of the community relieved thereby.¹ A right given by statute to "the owner or owners of land" to redeem land sold for taxes is to receive a liberal and benign construction in favor of those whose estates will be otherwise divested, especially where the time allowed is short, and ample indemnity is given to the purchaser. It was so held in *Dubois v. Hepburn*.² "The purchaser," say the court, "suffers no loss; he buys with full knowledge that his title cannot be absolute for two years; if it is defeated by redemption, it reverts to the lawful proprietors. It would, therefore, seem not to be necessary for the purposes of justice, or to effectuate the objects of the law, that the right to redeem should not be narrowed down by a strict construction." It was held that "any right which in law or equity amounts to an ownership in the land; any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate in it, makes the person the owner, so far as it is necessary to give him the right to redeem."³ In construing the redemption laws the courts hold that the word owner is a generic term, which embraces the different species of interest which may be carved out of a fee-simple estate.⁴ Statutes providing certain exemptions from

¹ *Weister v. Hade*, 52 Pa. St. 474. See *Miller v. Grandy*, 13 Mich. 540; *People v. Supervisor*, 14 id. 336.

² 10 Pet. 1, 22.

³ *Corbett v. Nutt*, 10 Wall. 464, 474; *Chapin v. Curtenius*, 15 Ill. 427; *Mas-*

terson v. Beasley, 3 Ohio, 301; *Patterson v. Brindle*, 9 Watts, 98; *Jones v. Collins*, 16 Wis. 594, 605; *Winchester v. Cam*, 1 Rob. (La.) 421; *Karr v. Washburn*, 56 Wis. 303.

⁴ *Blackwell on Tax Titles*, margi-

tolls on turnpikes are held to be liberally construed in favor of agriculture. It was enacted that no toll should be demanded for any horse, beast or other cattle or carriage employed in carrying, among other things, "fodder for cattle." "No doubt," said Cockburn, C. J., "there is some difficulty at first sight in saying that barley in the course of transit to a mill for the purpose of being ground into meal, to be afterwards eaten by cattle, is already fodder for cattle; but, giving a fair and liberal construction to the words of the statute, I think that everything which is ultimately destined to be used as food for cattle is fodder for them, although it may not have gone through the final process which will make it such."¹ So a provision exempting carts loaded with manure was held to exempt them from toll if they were going empty to fetch manure.² A "yoke" of oxen was held not necessarily to mean cattle broke to work. If they are intended by the owner for use as work cattle, and are old enough, they are a yoke within the exemption laws.³ Under a statute which authorizes an order for inspection of documents on application of either party upon an affidavit by such party, the affidavit must be made by the party himself.⁴ But if a corporation is a party the order may be granted upon the affidavit of their attorney, it being impossible for them literally to comply with the terms of the statute, and it being the intention of the legislature that its benefit should be extended to all suitors.⁵

§ 421. An English statute relative to parish rates, which included corporations as rate payers, gave a right of appeal to any person or persons aggrieved by any rate, and the appellant was required to enter into a recognizance with two sureties. The court would not exclude corporations from being liable for rates, nor deny their right of appeal because they could not enter into a recognizance. They had the right of

nal p. 423; *Alter v. Shepherd*, 27 La. Ann. 207.

¹ *Clements v. Smith*, 3 E. & E. 238.

² *Harrison v. James*, 2 Chitty, 547.

³ *Mallory v. Berry*, 16 Kan. 293. A pair of two-year-old steers, suitable for doing light work, are exempt under a statute exempting a pair of oxen. *Berg v. Baldwin*, 31 Minn.

541. But a colt four months old and its dam do not make a span of horses.

Ames v. Martin, 6 Wis. 361.

⁴ *Herschfeld v. Clarke*, 11 Exch. 712; *Christopherson v. Lotinga*, 15 C. B. (N. S.) 809.

⁵ *Kingsford v. Great W. R'y Co.* 16 C. B. (N. S.) 761.

appeal if they were persons capable of being aggrieved, and the provision requiring a recognizance applied only to those who were capable of entering into it. A doubt, however, was suggested that a corporation could enter into a recognizance by appointing an attorney for that purpose.¹ Littledale, J., said: "Where an act of parliament directs a thing to be done which it is impossible for a corporation to do, but which other persons may do, and another act which a corporation as well as others can do, then the corporation will be excused from doing the thing which it cannot do, and will be compelled to do the act which it is capable of doing. Assuming, therefore, that a corporation cannot of itself enter into a recognizance, still its sureties may; and I think, therefore, that a corporation might satisfy this clause by procuring sureties to enter into such recognizance."²

§ 422. Statutes exempting property from execution are in many states, if not generally, construed liberally.³ Sales of land on execution are statutory, and hence exemption of homesteads is not in derogation of any common-law right. They are humane, salutary as a factor in public economy, and generally construed liberally.⁴ It has been held that to constitute a family within their meaning the relation of parent and child or that of husband and wife must exist; there must be a condition of dependence on the one or the other of these relations; but it is not necessary that all the dependents should live under the same roof or that the family should live together; it is the relation and the dependence on that relation, not the aggregation of the individuals, that constitutes the family.⁵ Under a provision exempting "all tools and im-

¹ *Cortis v. Kent Water Works Co.* 7 B. & C. 314.

² *Id.*; *State v. Morris Canal, etc. Co.* 13 N. J. L. 192.

³ *Thompson on Homesteads and Exemptions*, § 4; *Davis v. Humphrey*, 22 Iowa, 137; *Charless v. Lamberson*, 1 id. 435; *Comstock v. Bechtel*, 63 Wis. 656; *Binzel v. Grogan*, 67 id. 147.

⁴ *Thompson on Homesteads and Exemptions*, § 4 and note; 45 Am. Dec. 252.

⁵ *Sallee v. Waters*, 17 Ala. 482, 489; *Allen v. Manasse*, 4 id. 554; *Cantrell v. Conner*, 51 How. Pr. 45; *Garaty v. Du Bose*, 5 S. C. 493; *Calhoun v. McLendon*, 42 Ga. 405; *Neal v. Sawyer*, 60 Ga. 352; *Dendy v. Gamble*, 64 id. 528. In the *Homestead Cases*, 31 Tex. 677, *Lindsay, J.*, says: "What constitutes a family? Lexicographers, from whom in our literary education we derive all our knowledge of the correct import of words, tell us that the word 'family,' in its origin, meant

plements of trade" it has been held that the press and type of a practical printer, which are necessarily used by him and his journeymen in the publication of a weekly newspaper, were exempt under that term.¹

§ 423. A statute of Wisconsin provided that on a writ of replevin from a justice's court the value of the property "shall be assessed according to the oath of one or more credible, disinterested persons whom the officer shall swear truly to assess the value thereof;" and that if on the return of any writ of replevin it shall appear that the value of the goods and chattels replevied shall have been assessed by the *jury* to be of greater value than the amount of which the justice has jurisdiction, then the justice shall certify the case to a superior court. The "jury" here mentioned was construed to mean not the jury called to try the case, though its ordinary meaning, but the "one or more credible, disinterested persons" to be sworn by

servants; that this was the signification of the primitive word. It now, however, has a more comprehensive meaning and embraces a collective body of persons living together in one house, or within the curtilage, in legal phrase. This may be assumed as the generic description of a family. It may, and no doubt does, have many specific senses in which it is often used, arising from the paucity of our own as well as of all other languages. Examining and criticising the word in all its specific uses and appropriations, it will be most obvious that it was in none of these specific senses that the term 'family' was used in the constitution. Its use in such a sense would have been objectless and nugatory, because it would be wholly impracticable in its application to the civil affairs of mankind. It was most certainly used in its generic sense, embracing a household composed of parents and children or other relatives, or domestics and servants; in short, every collective body of persons living together within the same curtilage, subsisting in common, di-

recting their attention to a common object—the promotion of their mutual interests and social happiness. These must have been the characteristics of the 'family' contemplated by the framers of the constitution in engrafting this provision upon it. It is, besides, the most popular acceptance of the word, and is more fully in unison with the beneficent conception of the political power of the state in making so humane and so wise a concession as that of the inviolability of a homestead from all invasion by legal process."

¹ *Sallee v. Waters, supra; Patten v. Smith*, 4 Conn. 450. But probably by a weight of authority, where there are several men employed in their use, they are not within the exemption. *Buckingham v. Billings*, 13 Mass. 82; *Spooner v. Fletcher*, 3 Vt. 133; *Danforth v. Woodward*, 10 Pick. 423. See as to analogies, *Batchelder v. Shapleigh*, 10 Me. 135; *Kilburn v. Demming*, 2 Vt. 404; *Ford v. Johnson*, 34 Barb. 364; *Meyer v. Meyer*, 23 Iowa, 375.

the officer; for in construing statutes particular words ought not to be permitted to control the evident meaning of the context.¹ The English statute of mortmain in terms forbade disposition of land to charities by other means than a deed executed a year before the grantor's death, and hence it was claimed, but without avail, that the statute did not apply to copyholds. "If it were perfectly clear," say the court, "that it was impossible for the mode of conveyance pointed out by the statute to be adopted in the case of copyhold, the only consequence that would follow would be that the statute would absolutely prohibit any conveyance of copyhold to charitable uses. But it would by no means be a legitimate consequence that copyhold lands could lawfully be conveyed without the formalities required by that act. The act was passed for the sake of public policy and to prevent persons from conveying their lands to charitable uses in a secret manner at or near to the time of their death." It was suggested by the court that, "admitting that there could not be an operative bargain and sale [in case of copyhold], still the parties might at least have attained the object of notoriety by executing a deed declaring the uses of the surrender in the mode required by the statute."² In Maryland, in addition to the ordinary bonds of executors, a statute provided for a bond on the giving of which they were relieved from exhibiting any inventory or account. This bond was conditioned for paying all just debts of and claims against the deceased, and all damages which might be recovered against him as executor, and also all legacies bequeathed by the will.³ All actions upon administration and testamentary bonds were required by the statute of limitations to be brought within twelve years after the giving of the said bonds and not after. It was held that the bond so provided for was a testamentary bond to which the limitation applied, though not provided for until after the enactment of the limitation law.⁴

§ 424. In several cases where suit has been brought within the period of the statute of limitations and has abated by death or marriage of one of the parties after the expiration of that period, a new suit commenced within a reasonable time

¹ Williams v. McDonal, 3 Pin. 331.

² Act 1798, ch. 101, subch. 14, § 6.

³ Doe v. Waterton, 3 B. & Ald. 149.

⁴ State v. Boyd, 2 Gill & J. 365.

by the party to or against whom the action survived has been maintained unaffected by the statute, though it contained no saving for such a case.¹

The nineteenth section of 4 and 5 Anne, chapter 16, provides that if any person or persons against whom a cause of action existed, or any of them, were beyond the seas, the statute of limitations should not commence to run until their return. Where one joint contractor died abroad, it was held that the statute did not begin to run until his death, and that, within

¹ In *Hodsden v. Harridge*, 2 Williams' Saunders, 64*a*, the suit abated by the marriage of the plaintiff, a female, and it was argued in support of the bar of the statute that the suit abated by the voluntary act of the plaintiff, and therefore she was not within the equity of the statute; but the court affirmed the right to bring the said action within two terms. See Durnford's note (*a*) to *Carver v. James*, Willes, 257. "By the statute of 21 Jac. 1, c. 16, § 4, it was provided that 'in all cases the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment reversed, on such judgment given against the plaintiff or outlawry reversed, and not after.' Within the equity of that section the courts have allowed an executor or administrator, within a year after testator's or intestate's death, to renew a suit commenced by the testator or intestate. *Gargorave v. Every*, 1 Lutw. C. P. 260; *Willcox v. Huggins*, Fitzg. 172, 290; 2 Str. 907. And in *Lithbridge v. Chapman*, 15 Vin. Abr. 103, and cited in *Willcox v. Huggins*, that indulgence was extended to fourteen months after the intestate's death. So if there be any delay in granting administration on account of any suit respecting the will, the time may be extended. 2 *Strange*, 907. No

precise time, indeed, appears to have been fixed. But in that case Fitz Lee, J., said: 'I think it should be in the nature of journeys accounts, which is a taking up and pursuing of the old action in a reasonable time, which is to be discussed by the discretion of the justices. *Spencer's Case*, 6 Coke, 9*b*. And by the same rule, I think, what is or is not a recent prosecution in a case of this nature is to be determined by the discretion of the court from the circumstances of the case; but generally the year in the statute is a good direction.' Where an act of parliament for dividing and allotting lands directed all disputed claims to be tried by a feigned issue, and limited the time for bringing such actions to six months, it was holden that an action brought within the time, but which abated by the death of the defendant, must be revived 'against the heir within six months afterwards.' *Knight v. Bate*, 2 Cowp. 738." *Crosier v. Tomlinson*, 2 Mod. 71; *Chandler v. Vilett*, 2 Saund. 120; *Matthews v. Phillips*, 2 Salk. 424; *Piggott v. Rush*, 4 Ad. & El. 912; *Curlew v. Mornington*, 7 El. & B. 283; *Kinsey v. Heyward*, 1 Lord Raym. 434; *Hunter v. Glenn*, 1 Bailey, 542; *Parker v. Fassit*, 1 Har. & J. 337; *Allen v. Roundtree*, 1 Spears, 80; *Martin v. Archer*, 3 Hill (S. C.), 211; *Angell on Lim.* 325-330; *Huntington v. Brinkerhoff*, 10 Wend. 278.

six years from his death, an action might be brought against his co-contractors; for though such a case was not within the literal words of the section, it was within their equity.¹ It has also been held that where a defendant has pleaded a partnership in abatement and the plaintiff commenced a new suit within a year and a day after the first writ was quashed, the bar of the statute did not apply; that the statute did not run after the commencement of the original action.² These decisions seem to proceed upon the cases interpreting old English statutes by their equity. There may be reason in England for adhering to the early decisions while the same statute continues in force, and in any other jurisdiction adopting the same statute, and therefore, presumably, adopting it with the home construction. Crompton, J., said: "I look upon the construction of old statutes as law not to be interfered with; it has been acted upon, and the legislature have taken it for granted. We are therefore to abide by the old decisions."³ But it is held to be no answer to the plea of the statute of limitations that after a cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that by reason of litigation as to the right of probate an executor of his will was not appointed until the expiration of the six

¹ *Towns v. Mead*, 16 C. B. 123, 134, 141. See *Townsend v. Deacon*, 3 Ex. 706; *Forbes v. Smith*, 11 id. 161. The charter of a commercial corporation restrained the making of debts owing at the same time, exceeding three times the amount of stock paid in, and provided that the directors should be personally liable for the excess, as well as the company. On the question whether such a liability of the directors came within the six months' limitation for bringing actions for penalties, fines and forfeitures, it was held that the statute was not penal, but remedial; therefore that it was not within that provision of the statute of limitations. *Neal v. Moultrie*, 12 Ga. 104.

² *Downing v. Lindsay*, 2 Pa. St. 382.

³ *Curlewis v. Mornington*, *supra*. This is well illustrated by the interpretation given in this country of the borrowed phrase "beyond seas"—out of the state: *Murray v. Baker*, 3 Wheat. 541; *Forbe v. Foot*, 2 McCord, 831; *Shelby v. Guy*, 11 Wheat. 361; *Bank of Alexandria v. Dyer*, 14 Pet. 141; *Pancoast v. Addison*, 1 H. & J. 350; *Wakefield v. Smart*, 8 Ark. 488; *Denham v. Holeman*, 26 Ga. 182; *Stephenson v. Doe*, 8 Blackf. 508; *Galusha v. Cobleigh*, 13 N. H. 79; *Richardson v. Richardson*, 6 Ohio, 125; *West v. Pickesimer*, 7 id. 235. Or out of the United States: *Mason v. Johnson*, 24 Ill. 159; *Marvin v. Bates*, 13 Mo. 217; *Fackler v. Fackler*, 14 id. 431; *Keeton v. Keeton*, 20 id. 530; *Gonder v. Eastabrook*, 33 Pa. St. 374.

years, and that the plaintiff sued the executor within a reasonable time after probate granted.¹ The death of the party to or against whom an action has accrued will not suspend the statute;² not even if the heir or devisee be under a disability will the running of the statute in such case be arrested.³

§ 425. Where a statute limited the time for suing, but gave a further period to persons abroad, after they returned, it was construed as giving that additional time to the executor of a person who never returned but died abroad.⁴ A Vermont statute of limitations provided that when any suit shall fail by reversal, on writ of error, motion in arrest of judgment, plea in abatement or on demurrer, and "the merits of the cause shall not be tried," the plaintiff may, from time to time, commence another suit within one year after such judgment reversed, etc. In *Phelps v. Wood*⁵ the court, by Redfield, J., said: "It is evident this exception, or proviso of the statute, was intended to reach all those cases where a suit was brought and the merits of the action failed to be tried, without the fault of the plaintiff, and the period of limitation had become complete during the pendency of the suit. So that the present suit is clearly within the equity of the proviso, although not strictly within its terms. It may be said, too, that should a suit be abated, without a plea, but on motion, as may sometimes be done, the case would not come within the exception. The same is true where the plaintiff is compelled by some error in pleading, variance, or otherwise, to become nonsuit, without his own fault. And no doubt these and many other cases, not coming technically within the terms of the proviso, would still be held to come within its equity."⁶ If the cause of ac-

¹ *Rhodes v. Smethurst*, 4 M. & W. 42.

² *Daniel v. Day*, 51 Ala. 431.

³ *Meeks v. Vassault*, 3 Saw. 206.

⁴ *Townsend v. Deacon*, 3 Ex. 706; *Forbes v. Smith*, 11 id. 161.

⁵ 9 Vt. 399.

⁶ This case sanctions a latitudinary construction to except cases on the equity of the statute, and is not in harmony with the general current of authority of that state in that regard. The learned judge gives several anal-

ogous instances from the reports. He puts them on the ground that the statute of limitations is founded on an arbitrary presumption of payment. "These cases," he says, "are all decided upon the principle of regarding the spirit and intent of the statute rather than a strict interpretation of its terms. We are inclined to adopt the same doctrine here, because we think it just and well warranted by decided cases in reference to this subject. As a general rule I

tion accrues after the intestate's death it has been considered in some cases as existing only from the time there was some one capable of suing, and hence that the statute commences to run only from the grant of administration.¹

§ 426. The statute of James I. was "worded very loosely;"² and its beneficial operation during the long period it has been in force has been ascribed to its liberal interpretation.³ Mr. Wood in his valuable work on limitations thus succinctly epitomizes some instances of that liberal construction: "Although there is no express mention of the action of *assumpsit*, which was at the period of its enactment the most important of all actions, yet as it was clear that this omission was unintentional,⁴ it was construed as embracing that action by fair intendment, and as coming within the reason of the statute, and also as coming under the head of trespass on the case.⁵ So,

should be averse to adopting such a rule of construction, as being unsafe and unsatisfactory. But statutes of limitation regard the remedy, and, being founded upon an arbitrary ground of presumption, require to be liberally expounded to prevent injustice."

Tynan v. Walker, 35 Cal. 634, contains a strong protest, well supported by authority, against implied exceptions to the statute of limitations on the theory that the cases were within the reason of the exceptions for which the statute itself provided; the allowance of such exceptions "overturn," says Sanderson, J., "the maxim that courts are authorized to declare the law only, and not to make it. If they may add at all to the exceptions provided for in the statute, under the pretense that the case before them is of equal equity with those given in the statutes, who is to fix the limit of their interpolations, or establish the line between legislative and judicial functions? If they may add one to the list of excepted cases, by parity of reason they may add another, and so on until the

entire body of the statute has become emasculated, and the will of the judiciary substituted for that of the legislature. How much more in keeping with the legitimate exercise of judicial functions are those cases where it has been held that the courts can create no exceptions where the legislature has made none."

¹ *Fishwick v. Sewell*, 4 H. & J. 399; *Geiger v. Brown*, 4 McCord, 423; *Aritt v. Elmore*, 2 Bailey, 595; *Clark v. Hardiman*, 2 Leigh, 347. See *Tynan v. Walker*, 35 Cal. 634.

² Parke, B., in *Inglis v. Haigh*, 8 M. & W. 769; Wood on Stat. Lim. § 16.

³ Wood on Limitations, sec. 16.

⁴ *Denman, C. J.*, in *Pigott v. Rush*, 4 A. & E. 912.

⁵ *Harris v. Saunders*, 4 B. & C. 411; Bac. Abr. title Limitations, E. L.; *Leigh v. Thornton*, 1 B. & Ald. 625; *Beatty v. Burnes*, 8 Cranch, 98; *Chandler v. Villett*, 2 Saund. 120; *Haven v. Foster*, 9 Pick. 112; *Crosier v. Tomlinson*, 2 Mod. 71; *Baldro v. Tolmie*, 1 Oregon, 176; *Williams v. Williams*, 5 Ohio, 444; *Maltby v. Cooper, Morris (Ia.)*, 59.

too, although the saving clause in cases of disability does not in terms mention any actions on the case except actions on the case for words, yet it has always been construed as extending to all actions on the case from the manifest inconvenience of a contrary construction."¹ The general rule is, undoubtedly, that the statute of limitation begins to run against a party immediately upon the accrual of the right of action, and continues to run, unless he was then under a disability mentioned in it, or its running is prevented or arrested by some fact specified for that effect in the statute.²

§ 427. Where the legislature has made no exception the courts of justice can make none, as this would be legislating.³ The insolvency of the defendant or the plaintiff's want of means to prosecute a suit, or his bankruptcy, will not suspend or prevent the running of the statute.⁴ But one implied exception has been extensively recognized, namely, that the statute does not run during a period of civil war as to matters of controversy between citizens of the opposing belligerents.⁵ Another example of avoiding a positive statute upon grounds of equity is afforded by those cases in which courts of equity give effect to unwritten contracts relating to lands on the ground of part performance.⁶ The great object of the statute of frauds is clearly expressed in the title prefixed to it. It is for the prevention of frauds and perjuries. It is not, therefore, to be presumed that it was intended in any instance to

¹ Wood on St. of Lim. sec. 16.

² Wells v. Child, 12 Allen, 333; The Sam Slick, 2 Curt. 480; Harrison v. Harrison, 39 Ala. 489; Dozier v. Ellis, 28 Miss. 730; Barnes v. Williams, 3 Ired. L. 481; Warfield v. Fox, 53 Pa. St. 382; Bucklin v. Ford, 5 Barb. 393; Sacia v. De Graaf, 1 Cow. 356; Pryor v. Ryburn, 16 Ark. 671; Favorite v. Booher, 17 Ohio St. 548; Howell v. Hair, 15 Ala. 194; Conover v. Wright, 6 N. J. Eq. 613; Clark v. Richardson, 15 N. J. L. 347; De Kay v. Darrah, 14 id. 288; Thorpe v. Corwin, 20 id. 311; Pinckney v. Burrage, 31 id. 21; Kistler v. Hereth, 75 Ind. 177; Parsons v. McCracken, 9 Leigh, 495; Rogers v. Hillhouse, 3 Conn. 398; Barker v. Mil-

lard, 16 Wend. 572; Sands v. Campbell, 31 N. Y. 345. In North Carolina, it was held in Vance v. Grainger, Conf. 71, that where the evidence of debt sued on had been detained in the hands of a master by order of a court of equity, the statute was meantime suspended.

³ Bank v. Dalton, 9 How. 522; McIves v. Ragan, 2 Wheat. 29; Troup v. Smith, 20 John. 33; Callis v. Waddy, 2 Munf. 511; Hamilton v. Smith, 3 Murphy, 115.

⁴ Mason v. Crosby, Davies, 303; Harwell v. Steel, 17 Ala. 372.

⁵ Wood on St. Lim. § 6; § 368, *ante*.

⁶ 2 Story's Eq. § 752 *et seq.*

encourage fraud, and we may infer that any construction which would have a certain tendency to do so would counteract the design of the legislature by advancing the mischief intended to be prevented.¹ As the statute was intended to prevent frauds and perjuries, any agreement in which there was no danger of either has been held to be out of the statute;² or if within the statute, it is taken out when specific performance is necessary to prevent fraud, as in case of one party refusing to perform when the other had partly performed.³

§ 428. Statutes which are to be liberally construed will, like all others, be so construed as to exclude all cases which, though within the letter, are not within the mischief to be remedied, or the remedial or benign object in view, and, therefore, not within the intention of the law-maker. A statute enacting that any deed from a husband to a wife for her use shall be void as against his creditors, who were such at the time of execution, does not prevent a voluntary conveyance by the husband of a chattel which is exempt from execution.⁴ As this interpretative function, however, of excluding cases and applications which are not within the legislative intention is not peculiar to liberal construction, a few cases by way of farther illustration will suffice.⁵ Municipal corporations, by reason of the purposes for which they are organized and for which they raise money and possess property, are excepted by implication from various statutes which apply to corporations generally. They are generally held not subject to garnishment.⁶ In some of the states, either by force of statutes

¹ *Wilber v. Paine*, 1 Ohio, 117; 2 Pomeroy's Eq. § 921.

² *Att'y-Gen'l v. Day*, 1 Ves. Sr. 221.

³ *Bond v. Hopkins*, 1 Sch. & Lef. 433; *Wilson v. West Hartlepool Co.* 2 De G. J. & S. 475; *Humphreys v. Green*, L. R. 10 Q. B. Div. 148; *Nunn v. Fabian*, L. R. 1 Ch. 35.

⁴ *Smith v. Allen*, 39 Miss. 469.

⁵ *Commercial Bank v. Foster*, 5 La. Ann. 516; *Ayers v. Knox*, 7 Mass. 306; *Green v. Commonwealth*, 12 Allen, 155; *Stockett v. Bird*, 18 Md. 484; *Electro-M. etc. Co. v. Van Auken*,

9 Colo. 204; *Covington v. McNickle*, 18 B. Mon. 262; *Wheeler v. McCormick*, 8 Blatchf. 267; *Maxwell v. Collins*, 8 Ind. 38; *Vane v. Vane*, L. R. 8 Ch. 383; *Union Canal Co. v. Young*, 1 Whart. 410.

⁶ *Erie v. Knapp*, 29 Pa. St. 173; *Bulkley v. Eckert*, 3 Pa. St. 368; *McLellan v. Young*, 54 Ga. 399; *Mobile v. Rowland*, 26 Ala. 498; *Hawthorn v. St. Louis*, 11 Mo. 59; *Pendleton v. Perkins*, 49 id. 565; *Fortune v. St. Louis*, 23 id. 239; *Hadley v. Peabody*, 13 Gray, 200; *Boone*

which indicate the purpose to subject them to such process, or by the courts' refusing to except the reasons operating elsewhere and thereon to accept them by implication, these corporations are liable, like natural persons and other corporations, to garnishment.¹ The revenues of public corporations are the essential means by which they are enabled to perform their appointed work. Deprived of their regular and adequate supply of revenue, they are practically destroyed, and the very ends of their creation thwarted. It is settled doctrine that the taxes and public revenues of such corporations cannot be seized under execution against them, either in the treasury or in transit to it.²

§ 429. The application of the words of a statute may be restrained to bring the operation of it within the intention of the legislature, when no violence is done by such interpretation to the language employed. On this principle the provision that no person shall be sued before any justice except in the township where he resides was held to have no application to a defendant who resided out of the state or in another county. The object of the statute was to prevent justices at the county seat of a county from engrossing the principal business at the expense of the justices of the other townships.³ "An act concerning conveyances" provided that every partition of any tract of land or lot made under any order or decree of any court, and every judgment or decree by which the title to any tract of land or lot shall be recovered, shall be recorded; . . . and until so recorded, such parti-

Co. v. Keck, 31 Ark. 387; Stillman v. Isham, 11 Conn. 123; Derr v. Lubey, 1 MacArthur, 187; Bradley v. Richmond, 6 Vt. 121; Parsons v. McGavock, 2 Tenn. Ch. 581; Memphis v. Laskie, 9 Heisk. 511; Burnham v. Fond du Lac, 15 Wis. 193; Buffham v. Racine, 26 Wis. 449; McDougal v. Hennepin Co. 4 Minn. 184; Merwin v. Chicago, 45 Ill. 133; Greer v. Rowley, 1 Pittsburgh, 1; Mayor, etc. v. Root, 8 Md. 95; Brown v. Gates, 15 W. Va. 131.

v. Hartford, 12 Conn. 404; Wilson v. Lewis, 10 R. I. 285; Wales v. Muscatine, 4 Iowa, 302; Drake on Att. (5th ed.) § 516.

² Dillon on Municipal Corporations (2d ed.), §§ 9, 65, and cases cited; Chicago v. Hasley, 25 Ill. 595; Egerton v. Municipality, 1 La. Ann. 435; Municipality v. Hart, 6 id. 570; New Orleans, etc. R. R. Co. v. Municipality, 7 id. 148. See Smoot v. Hart, 33 Ala. 69; Newark v. Funk, 15 Ohio St. 462.

³ Adams v. Tyler, 121 Mass. 380; Whidden v. Drake, 5 N. H. 13; Bray v. Wallingford, 20 Conn. 416; Ward

Wheeler v. McCormick, 8 Blatchf. 267.

tion, judgment or decree shall not be received in evidence in support of any right claimed by virtue thereof.¹ In an action of trespass to try title and for partition of land, a former unrecorded judgment was offered in evidence. It was held admissible; that this statute was only intended for the protection of *bona fide* purchasers and creditors; that it has no application when such judgment is offered in evidence in a second trial between the parties to the former suit in which it was rendered.²

¹ Pasc. Dig. art. 4710.

² Russell v. Farquhar, 55 Tex. 355. In this case Moore, C. J., said: "If courts were in all cases to be controlled in their construction of statutes by the mere literal meaning of the words in which they are couched, it might well be admitted that the appellant's objection to the evidence was well taken. But such is not the case. To be thus controlled, as has often been held, would be for the courts, in a blind effort to refrain from an interference with legislative authority by their failure to apply well-established rules of construction, to in fact abrogate their own power and usurp that of the legislature, and cause the law to be held directly the contrary of that which the legislature had in fact intended to enact. While it is for the legislature to make the law it is the duty of the courts to 'try out the right intendment' of statutes upon which they are called upon to pass, and by their proper construction to ascertain and enforce them according to their true intent. For it is this intent which constitutes and is in fact the law, and not the mere verbiage used by inadvertence or otherwise to express its intent, and to follow which would prevent that intent. In seeking to ascertain the intent of a statute, the words in which it is expressed should, and evidently must, receive our first as well

as chief consideration. If, upon the perusal of a statute, its intent, and the means for carrying such intent into effect, plainly appear, and there is no apparent conflict between it and other seemingly unrepealed laws, it should be construed and enforced by the courts in conformity with the ordinary signification of the words in which it is expressed, unless a necessity for otherwise construing it is made to appear. But if its mere perusal should not enable the court to satisfactorily interpret it, then it becomes the duty of the court to look diligently for the intention of the legislature, keeping in view at all times the old law, the evil and the remedy. R. S. art. 315, sec. 6. . . . The section in question forms a part of an act concerning conveyances. And when subsequently re-enacted, it is found in a law regulating and concerning registration. The evil in the legislative mind evidently was that, under existing laws, frauds might be perpetrated upon *bona fide* purchasers and creditors by persons who had previously parted with or been divested of their title to land, upon subsequent purchasers and creditors having no adequate evidence or information of such previous divestiture of title. By the old law the bringing of suit charged all the world with notice *lis pendens* of the matters then in litigation. But

A statute of Virginia prohibited the sale of any office or deputation of any office touching the administration of justice, and contained a proviso that nothing in the act should be so construed as to prohibit the appointment, qualification and acting of any deputy clerk or deputy sheriff who shall be employed to assist the principals in the execution of the duties of their respective offices.¹ The question arose on that statute whether a contract was legal by which a sheriff agreed that another should perform the duties of his office, and have all the fees, privileges and emoluments of it, and in consideration thereof should pay to the sheriff a gross sum, unconnected in any manner with the fees of the office. The court declared that it was settled by numerous authorities that, where the reservation or agreement is not to pay *out of the profits*, but to pay generally a certain sum, which must be paid at all events, this is a sale of the office; and a bond for the performance of such an agreement is void by the statute.² It apparently adopts the view of Willis, C. J., in *Layng v. Paine*, as to the principal reasons for making the statute: (1) that offices might be exercised by persons of skill and integrity, and (2) that they might take only the legal fees. The proviso, and the history of the office — it having been immemorially farmed out, — induced the court to hold that the contract in question was not prohibited. A statute which inhibited a party as witness testifying as to any transaction with or statement by a deceased party was held not to extend to conversations with a surviv-

this notice ceased with the termination of the case; and, therefore, conveyances by judgment or decree of court were within the same evil as existed in regard to transfers between parties prior to the registration laws. Hence it was essential that they should be subjected to the same rule. Public convenience also demanded that there should be one office in each county where those desiring to do so could inform themselves as to the transfers or incumbrances affecting all the real estate in the county. But if any one failed to have his transfer registered, certainly only those who were in some way

injured thereby had a right to complain, or to insist that another had lost some valuable or vested right by his failure to comply with the law." *Crosby v. Huston*, 1 Tex. 237.

¹ 1 Rev. Code of 1819, ch. 145, p. 559.

² *Salling v. McKinney*, 1 Leigh, 42, citing *Ingram's Case*, Co. Lit. 234a; *Trevor's Case*, Cro. Jac. 269; 12 Coke, 369; *Woodward v. Foxe*, 3 Lev. 289; 2 Vent. 187; 3 Inst. 148; *Layng v. Paine*, Willes' Rep. 571; *Parsons v. Thompson*, 1 H. Bl. 322; *Garforth v. Fearon*, id. 327; *Law v. Law*, Cas. Temp. Talb. 140; 3 P. Wms. 301; *Harrington v. Du Chatel*, 1 Bro. C. C. 124; *Noel v. Fisher*, 3 Call, 215.

ing partner of the deceased, though the testimony might result in establishing a contract with the firm.¹ A New Jersey statute makes void and of no effect any warrant of attorney for confessing judgment which shall be included in the body of any bond, bill or other instrument for the payment of money.² This provision was contained in an act which when passed was entitled "An act to regulate the practice of the courts of law." It was therefore held that it was a mere regulation of the practice in the courts of that state, and did not prohibit the making therein of such warrants of attorney for use in other states in the form that may be legal in their courts.³ "Laws," by construction, have been narrowed to mean only written laws, as in the application of that provision of the thirty-fourth section of the judiciary act of 1789, that "the laws of the several states, except when the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."⁴

In *Holmes v. Paris*⁵ the statute required a notice to a surveyor, or some municipal officer, of a defect in a highway, for a period not less than twenty-four hours prior to an accident, to render the town liable. But if the defect was caused by the surveyor while acting as a servant of the town, the notice was not necessary. The court say: "We incline to the opinion that the statute does not apply to a case such as this. In its literal terms, it does; in its purpose and intent, it does not. This particular provision of the statute was intended for another class of cases. Its purpose is to allow a town a reasonable opportunity to remove a defect after receiving information of its existence. Notice of a fact to a person who already knows the fact cannot be useful. . . . Statutes are often in some respects literally deficient by reason of their generality. They are necessarily expressed in general terms.

¹ *Bennett v. Frary*, 55 Tex. 145; *v. Tabb*, 18 Wall. 546; *Supervisors v. Whart*, Ev. § 469.

² Rev. of 1877, p. 81, § 1.

³ *Hendrickson v. Fries*, 45 N. J. L. 14 Wall. 665.
555.

⁵ 75 Me. 559.

⁴ *Swift v. Tyson*, 16 Pet. 1; *Boyce*

All cases that may arise under them cannot be anticipated. Therefore there must be some flexibility in their interpretation and application to facts. There must be some power and discretion in the courts to consider probable purposes, motives and results." The object of an act was to provide for the disposition of public property and not to interfere with the location of streets; it was therefore held that the designation therein of one of the boundaries of that property as the "eastern line of E street to its point of intersection with the northern line of J street," was not intended, and did not operate to extend E street northward to J.¹ A statute against gaming was that, "if any person shall lose to another," he might receive it back. This was held not applicable to one who sets up or is interested in setting up a faro bank, and loses money to those who bet against the bank.² "When the evil," say the court, "which led to the passage of the act is considered, it is evident that the legislature did not intend to embrace within its protection those who engage in gaming by means of contrivances which are only used by those who make gaming a business."³ A statute of Indiana required an official bond to be signed and acknowledged by the principal and his sureties in the presence of the county commissioners. The question arose whether a bond not so acknowledged was valid. The requirement was held directory. It had been decided that the surety of an officer executing an official bond upon the faith of a promise by the principal that it would be executed by another as surety, and allowing the principal to have the custody of the bond, would be discharged if the bond were tendered by the principal, and in good faith accepted, without being executed by that other. It was merely to remedy the mischiefs to the public which were apprehended in consequence of the law as thus declared, and such as might ensue from the forgery of sureties' names, that the statute in question was enacted. That mischief was the loss of public moneys by sureties of officers avoiding liability as such upon official bonds. The remedy was not, certainly, to devise additional methods by which liability might be avoided, but to close for the future the door of escape already existing, or sup-

¹ *Burr v. Dana*, 22 Cal. 11, 20; ² *Brown v. Thompson*, 14 Bush, 538.
Jacob v. Kruger, 19 id. 411. ³ *Id.*

posed to exist; not to relieve persons becoming sureties of county treasurers, but to protect the people from the defalcations of those officers. It was not for the benefit of the surety that he was required in person to acknowledge the bond before the commissioners, but it was to prevent him from afterwards making any question concerning the genuineness of his signature, or the validity of the instrument as against him.¹

§ 430. Liberal construction is given to suppress the mischief and advance the remedy. For this purpose, as has already been said, it is a settled rule to extend the remedy as far as the words will admit, that everything may be done in virtue of the statute in advancement of the remedy that can be done consistently with any construction.² Where its words are plain and clearly define its scope and limit, construction cannot extend it; or where the language is so explicit as to exclude any reasonable inference that such extension was intended. Lord Brougham said: "If we depart from the plain and obvious meaning, we do not in truth construe the act, but alter it. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreting it."³ "We are bound," said Buller, J., "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 law."⁴ It will make no difference if it appears that the omission on the part of the legislature was a mere oversight, and that without doubt the act would have been drawn otherwise had the attention of the legislature been directed to the oversight at the time the act was under discussion.⁵ When the language is general or obscure the court must construe it, and,

¹State v. Blair, 32 Ind. 313. The following cases contain implied exceptions for not being within the intention of the statute: Simpson v. Unwin, 3 B. & Ad. 134; Ramsden v. Gibbs, 1 B. & C. 319; Hearne v. Garton, 2 E. & E. 66; Aberdare Local Board v. Hammett, L. R. 10 Q. B. 162; Core v. James, L. R. 7 Q. B. 135; Reg. v. Sleep, L. & C. 44; Reg. v. Dean, 12 M. & W. 39; Lee v. Simpson, 3 C. B. 871; Reg. v. Harvey,

L. R. 1 C. C. R. 284; Edward v. Trevellick, 4 E. & B. 59.

²Turtle v. Hartwell, 6 T. R. at p. 429; Atcheson v. Everitt, 1 Cowp. at p. 391.

³Gwynne v. Burnell, 7 Cl. & F. 696.

⁴Jones v. Smart, 1 T. R. 44.

⁵Harde. on St. 21; Lane v. Bennett, 1 M. & W. 70; N. E. Ry v. Leadgate, L. R. 5 Q. B. 161.

as far as it can, make it available for carrying out the objects of the legislature and for doing justice between parties.¹

§ 431. *Casus omissus*.— It will be seen by the foregoing illustrations of liberal construction that where language has received an expansive construction it has been to effect the intention of the law-maker, not to give the statute an effect beyond the intention or to supply the defects of the statute. It results from the judicial function of expounding the law as it is that the courts cannot extend it to meet a case which has clearly and undoubtedly been omitted to be provided for.² As the judicial committee said in *Crawford v. Spooner*,³ “we cannot aid the legislature’s defective phrasing of an act; we cannot add and mend, and, by construction, make up deficiencies which are left there;” in other words, the language of statutes, but more especially of modern acts,⁴ must neither be extended beyond its natural and proper meaning, in order to supply defects, nor strained to meet the justice of an individual case.⁵ If the language is plain, precise and unambiguous, there is no room for construction; and the particular intention so expressed is alone to be carried into effect. A statute of Connecticut which validated deeds executed and acknowledged in any other state “in conformity with the laws of such state” was held not to apply to a deed of land situated in that state, executed in New York and acknowledged before a Connecticut commissioner, defective by the laws of Connecticut, if executed there, for having but one witness.⁶ In order to extend a statute by equitable construction beyond its letter, it must be collected from the act that the wrong sought to be redressed was one of the considerations for passing it; otherwise it is a *casus omissus* which a court of law cannot supply. Where an act denies to one class of suitors a remedy or defense which others enjoy, it will not be extended by equitable construction to cases not specified in it, unless the court

¹ *Phillips v. Phillips*, L. R. 1 P. & D. 173.

² *Harde. on St.* 20.

³ 6 *Moore’s P. C.* 9.

⁴ *Lord Brougham in Gwynne v. Burnell*, 7 Cl. & F. at p. 696; *Lord Selborne in Pinkerton v. Easton*, L. R. 16 Eq. at p. 492.

⁵ *Harde. on St.* 20, 21; *Lord Denman in Green v. Wood*, 7 Q. B. at p. 185; *Whiteley v. Chappell*, L. R. 4 Q. B. 147.

⁶ *Farrell Foundry v. Dart*, 26 Conn. 376.

is satisfied the case is within the mischief or occasion that was in the mind of the legislature at the time of its passage.¹ A statute in Maine provided that "hereafter when any woman possessed of property, real or personal, shall marry, such property shall continue to her notwithstanding her coverture, and she shall have, hold and possess the same as her separate property, exempt from any liability for the debts or contracts of her husband." It was held that under this statute she could not make sales and purchases of property. The court, by Shepley, J., said: "It was the intention of the legislature, as the title of the act declares, to secure to married women their rights in property, and it should receive such a construction as will make that intention effectual, so far as it can be done consistently with the established rules of law. But courts of justice can give effect to legislative enactments only to the extent to which they may be made operative by a fair and liberal construction of the language used. It is not their province to supply defective enactments by an attempt to carry out fully the purposes which may be supposed to have occasioned those enactments. This would be an assumption by the judicial of the duties of the legislative department."²

§ 432. An act which authorizes a municipal body to open and widen streets according to the procedure therein prescribed, and omits to prescribe a procedure for cases of widening streets, is to that extent inoperative.³ A statute providing for testing the accuracy of the weights and measures used in selling commodities, imposing penalties on those who use them contrary to the act in selling, is not applicable to persons engaged in buying.⁴ The heir at common law inherits except in the particular cases in which the statutes of descent provide for a different disposition of property,⁵ and by construction a court cannot extend such statutes to any other cases.⁶ An officer having authority in his county to take proof or acknowledgment of all instruments in writing conveying land therein

¹ Scaggs v. Baltimore, etc. R. R. Co. 10 Md. 268; Jones v. Smart, 1 T. R. 52; Hull v. Hull, 2 Strob. Eq. 174; Moore v. Indianapolis, 120 Ind. 483; S. C. 22 N. E. Rep. 424.

² Swift v. Luce, 27 Me. 285.

³ Chaffee's Appeal, 56 Mich. 244.

⁴ Southwestern R. R. Co. v. Cohen, 49 Ga. 627.

⁵ Johnson v. Haines, 4 Dall. 64.

⁶ Cresoe v. Laidley, 2 Binn. 279.

was empowered by a later statute to take acknowledgment of deeds for lands in any part of the state; and it was held that his power to receive proof of instruments was not thereby enlarged.¹ There may be no apparent reason why an enactment is confined to one of several things, which might for a similar or for precisely the same reason be provided for; yet, if such enactment is free from ambiguity and uncertainty, the courts cannot extend it.² A divorce act provided that any order made for the protection of a married woman in respect of her earnings might be discharged by the magistrate who made it; it was held that this power could not be exercised by his successor.³ An act authorized a specified and limited number of banking companies in each of twelve districts, five of which were authorized in H. county; it also provided that the number of such banking companies authorized to be formed and to engage in business in H. county should not exceed four; and the full number having organized, and in good faith engaged in business, it was held that the powers in this respect authorized by the statute were exhausted; that in case of the failure or surrender of the franchise by some of such companies, the statute gave no authority for the organization of new and additional companies to take the place of the defunct ones.⁴

§ 433. A general act providing for the organization of companies for the manufacture and supply of gas was held not to authorize the creation of a corporation for the purpose of supplying "natural gas" to consumers.⁵ In the judicial argument to this result the court said: "The judicial power of the government may sometimes impute a legislative intent not expressed with perfect clearness, where the words used import such intent, either necessarily or by a plain and manifest implication. But it would be a dangerous excess of judicial authority, not to be justified by any considerations, for a court to declare a law by the imputation of intent when the words

¹ *Peters v. Condron*, 2 S. & R. 80.

⁴ *State v. Chase, Governor*, 5 Ohio

² *Smith v. Rines*, 2 Sumn. 354; *Swift* St. 528.

v. Luce, 27 Me. 285.

⁵ *Emerson v. Commonwealth*, 108

³ *Reg. v. Arnold*, 5 B. & S. 322; *Pa. St.* 111.

Sharp, Ex parte, 10 Jur. (N. S.) 1018.

used do not import it, either necessarily or by plain implication, and when all the surroundings of the enactment clearly evince that the construction claimed could not have been within the legislative thought." By a statute an inspector was authorized at all reasonable times to enter any shop, and "there to examine all weights, measures, steelyards or other weighing machines;" "and if upon such examination it shall appear that the said weights and measures are light or otherwise unjust, the same shall be liable to be seized and forfeited."¹ It was held that this statute gave no power to seize and forfeit a weighing machine.²

§ 434. Remedial statutes.—These have been defined in very general terms as those which, in brief, are made to correct defects in the existing law—for amendment of the law;³ those which have for their object the redress of some existing grievance, or the introduction of some regulation conducive to the public good. They may be either affirmative or negative, as they command or prohibit anything in particular to be done or omitted.⁴ A variety of remedial statutes have been cited, with the decisions thereon, in the preceding pages. Guided by the general principles which underlie and justify liberal construction, the courts must continually add to the list; for, in the construction of the fluctuating luxuriance of legislation by the numerous legislative bodies in this country, there will be frequent occasions to apply these principles to new cases to cure defects and abridge superfluities which, in the phrase of Blackstone, "arise either from the general imperfection of all human laws, from the change of time and circumstances, from mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other causes whatever."⁵ Instances are chiefly valuable as illustrations of those principles and to teach their true scope and spirit. Statutes enacted to promote and facilitate the administration of justice are prominent in the category of remedial statutes.⁶

¹ 5 and 6 W. 4, ch. 63, § 28.

² *Thomas v. Stephenson*, 2 E. & B. 108.

³ *Bearpark v. Hutchinson*, 7 Bing. at p. 186.

⁴ *Van Hook v. Whitlock*, 2 Edw. Ch. 304, 310; *Fairchild v. Gwynne*, 16 Abb. Pr. 31.

⁵ 1 *Cooley's Black. Com.* 86, 87.

⁶ *Mitchell v. Mitchell*, 1 Gill, 66.

Acts providing for a change of venue for convenience of witnesses or to obtain an impartial trial;¹ regulating the practice of law,² or to expedite litigation,³ are remedial.

§ 435. Under an act to prevent delays in obtaining judgment on account of infrequent sessions of the courts, a permission therein to take judgment by default in vacation was construed to authorize a judgment to be entered by consent after service of process.⁴ Where a limited jurisdiction is conferred by statute the construction is strict as to the *extent* of jurisdiction; but liberal as to the *mode* of proceeding.⁵ The proceedings of a landlord to remove his tenant, being dilatory and expensive, a summary remedy was provided by a statute in derogation of the common law. In that respect it was held it should be strictly construed. It was remedial because intended to remedy the evils alluded to, and so far it should be construed liberally; that looking at the remedy the courts should take care that it be made effectual, if possible, in the manner intended.⁶ A statute extending, and thus, therefore, amending a similar statute affording a summary remedy, has been held to be remedial and to receive a liberal exposition. This was held in reference to the act of forcible entry and detainer, where the amendment consisted in extending it, first, to a vendor, under a contract of purchase, who has entered into possession before obtaining a deed and who refuses to comply with the contract; and second, to the case where lands have been sold under a judgment or decree and the party to such decree, after the time of redemption, refuses after demand to surrender possession.⁷ The amendment was held under the first clause to make the act applicable to one put in possession by such vendee, and under the second to make it applicable to a party purchasing the subject *pendente lite*. Without questioning the correctness of this decree it is proper to say that statutes providing for summary remedies are strictly construed. Why should not a later act merely extending such summary remedy

¹ Griffin v. Leslie, 20 Md. 15; Wright v. Hanmer, 5 id. 375.

² Hoguet v. Wallace, 28 N. J. L. 523.

³ People v. Tibbetts, 4 Cow. 384; 2 Inst. 251, 325, 393.

⁴ Hoguet v. Wallace, *supra*.

⁵ Russell v. Wheeler, Hempst. 3; Barret v. Chitwood, 2 Bibb, 431.

⁶ Smith v. Moffat, 1 Barb. 65; Lynde v. Noble, 20 John. 80; Wilkinson v. Colley, 5 Burr. at p. 2693.

⁷ Jackson v. Warren, 32 Ill. 331.

be governed by the same rule?¹ A provision introduced by amendment to extend it ought afterwards to be construed precisely as it would be construed had it been a part of the act as originally enacted. As an amendment it is intended to extend the summary remedy and to supply a defect in the existing law, but only in the sense in which the original act was intended to correct a defect in the existing law affording a different remedy in such cases. Such acts are within the definition of remedial laws; for that reason they should be liberally construed; but both the original and amendatory acts being in
 1. derogation of the common law and providing a summary remedy, they are subject to another rule requiring strict construction, which more than neutralizes the rule of liberal construction due to a remedial statute.

§ 436. By the probate procedure act of California a creditor of a decedent's estate is required to present his claim duly verified to the executor or administrator within ten months after publication of notice by such executor or administrator, otherwise it is barred. An amendatory act was passed adding a proviso "that when it is made to appear by the affidavit of the claimant to the satisfaction of the executor or administrator and the probate judge, that the claimant had no notice as provided in this act, by reason of being out of the state, it [the claim] may be presented at any time before a decree of distribution is entered." This amendment was held in that state to be remedial.² Such it obviously is, for it creates a meritorious exception to an arbitrary rule. A statute of Massachusetts provided that "when an executor or administrator dies or is removed from office during the pendency of a suit in which he is a party, the suit may be prosecuted by or against the administrator *de bonis non*," etc. By a liberal construction it has been held in that state that an administrator *de bonis non* to succeed an administratrix, whose marriage extinguished her authority, was within that provision. All the reasons which induced the passage of that law apply to such a case; all the mischief which it was intended to remedy would otherwise exist in such a case, namely, delay in the settlement of the estate, the loss of judgments already recovered, of attachments and costs. "In making this decision," say the court, "we apply

¹ *Ante*, § 398.

² *Cullerton v. Mead*, 22 Cal. 95.

an old and unshaken rule in the construction of statutes, to wit, that the intention of a remedial statute will always prevail over the literal sense of its terms, and, therefore, when the expression is special or particular, but the reason is general, the expression should be deemed general.”¹ An act providing for execution of powers in a will, by the successor of an executor, for sale of lands for purposes of the will and administration, is remedial and entitled to a liberal construction.² The statute which renders void bequests to witnesses was intended to prevent wills from becoming nullities by reason of any interest in witnesses to them, created entirely by the wills themselves. A wife of a legatee is within the mischief on account of the unity of husband and wife, in legal contemplation, and statutes concerning wills being subject to liberal construction, a bequest in a will so witnessed is void and the will properly attested.³

§ 437. Statutes are remedial which are intended to promote the convenience of suitors.⁴ So are statutes to improve the procedure for obtaining legal redress, so far as the rights of another party are not unduly prejudiced.⁵ A statute declared that it should be lawful for any one who had a cause of action against an insurance company “to bring suit in any county where the property insured may be located.” Its language did not apparently include life and accident insurance companies, both of which were equally within the mischief that required a remedy, and a supplemental act was passed, enacting that all provisions of the former act “shall apply to life and accident insurance companies.” This was construed to authorize suits to be brought in the counties where the person insured resided — where the subject of the risk insured against was domiciled or located.⁶ The requirement that a trial judge,

¹ *Brown v. Pendergast*, 7 Allen, 427, citing *Co. Lit.* 24*b*; *Beawfage's Case*, 10 Co. 101*b*; *Dwarr. on St.* 2d ed. 616; *Whitney v. Whitney*, 14 Mass. 92, 93; *People v. Utica Ins. Co.* 15 John. 381; *Crane v. Alling*, 2 Green (N. J.), 593; *Winslow v. Kimball*, 25 Me. 495; *Murphy v. Leader*, 4 Irish L. 143; *Jebb & Bourke*, 75; 1 Kent's Com. 6th ed. 461, 462.

² *Drayton v. Grimke*, 1 Bailey's Eq. 392.

³ *Winslow v. Kimball*, 25 Me. 493.

⁴ *Hoguet v. Wallace*, 28 N. J. L. 523; *Griffin v. Leslie*, 20 Md. 15; *Mitchell v. Mitchell*, 1 Gill, 66; *Smith v. Moffat*, 1 Barb. 65.

⁵ *Simonton v. Barrell*, 21 Wend. 363; *Sprowl v. Lawrence*, 33 Ala. 674.

⁶ *Quinn v. Fidelity Ben. Asso.* 100 Pa. St. 382.

on the request of either party, file his charge to the jury of record in the cause, when complied with, makes the charge a part of the record without anything more; it is not necessary to embody it in a bill of exceptions to make it a part of the record on error.¹ The statute allowing a defendant in ejectment to set off the value of improvements against mesne profits is remedial.² A statute requiring a court having power to issue a commission in the nature of a writ *de lunatico inquirendo*, to decide and direct who shall pay all the costs attendant upon the issuing and execution of such commission, was held remedial, and to be construed accordingly.³ A statute authorizing an officer of a municipal corporation to take all proper and necessary means to open and reverse judgments which he has reason to believe had been obtained by collusion, or founded in fraud, is a beneficial act, intended to protect the treasury against fraud, and should be very liberally construed; it was held that the officer need not disclose what has caused him to so believe.⁴ Where a justice of the peace of another town in the same county, next adjoining the residence of the plaintiff, has jurisdiction to try an action, two towns contiguous at either corner are adjoining towns within the meaning of the statute, in the absence of any legal definition to show what distance the junction of two towns must continue in order to adjoin.⁵

§ 438. Acts which promote the public convenience in criminal prosecutions and involve no hardship or injustice to the accused are remedial. A statute which provided that "when a person shall commit an offense on board of any vessel or float he may be indicted for the same in any county through any part of which such vessel or float may have passed on that trip or voyage," was held not confined to that part of the trip or voyage which had been performed before the offense was committed, but extended to the entire trip.⁶ Where a vessel had started on her voyage, and it was still intended to prosecute it, though when the offense was committed and for two days previously she was lying at anchor in a river by rea-

¹ *Downing v. Baldwin*, 1 S. & R. 298; *Wheeler v. Winn*, 53 Pa. St. 122, 127.

² *Learned v. Corley*, 43 Miss. 687, 697.

³ *Hassenplug's Appeal*, 106 Pa. St. 527.

⁴ *Sharp v. Mayor, etc.* 31 Barb. 572.

⁵ *Holmes v. Carley*, 81 N. Y. 290.

⁶ *Nash v. State*, 2 Greene (La.), 286.

son of adverse winds, it was held, nevertheless, that she was navigating the river within the meaning of a statute relating to offenses on board of vessels navigating any river. The statute did not define any crime or fix the punishment, but only changed the venue. It was not, properly speaking, a penal statute. It was held that the court was not bound to give it such straitened construction as would turn it into legal nonsense by holding that it only applied while the vessel was moving.¹ By a general statute of New Hampshire a justice of the peace was given jurisdiction to hear and determine prosecutions and actions of a criminal nature arising within his county, where the punishment was by fine not exceeding \$10.² By another statute it was provided that "if any person shall wilfully and maliciously commit any act whereby the real or personal estate of another shall be injured, such person shall be punished by imprisonment in the common jail for a term not less than thirty days nor more than one year, or by a fine not exceeding \$100, or by both said punishments, in the discretion of the court."³ The statute did not expressly designate the tribunal to try the offenses committed under it. The court say:⁴ "We cannot believe it to have been the purpose of the law-making power to ordain that the minor offenses under this act should be sent in the first instance to the grand jury for their investigation, rather than to the justices of the peace in the several counties where they were committed. It seems to us that the malicious act involved or implied in destroying by poison twelve hens or chickens may, with entire propriety, under the general law regulating the jurisdiction of justices of the peace, be investigated and finally settled, and punished under the decision of a justice of the peace." With a view to judicious administration of justice, the court does not exclude from the jurisdiction of a justice all cases which arise under the statute, though it prescribes a punishment generally for that class of offenses beyond the jurisdiction of such a court.

§ 439. Statutory provisions in relation to arbitrations are liberally construed.⁵ They tend to advance the public welfare

¹ *People v. Hulse*, 3 Hill, 309.

⁴ *In State v. Towle*, 48 N. H. 97.

² *Rev. Stat.* 1851, sec. 1, ch. 222.

⁵ *Tuskaloosa Bridge Co. v. Jemison*,

³ *Comp. St.* 1853, ch. 229, sec. 19.

33 Ala. 476; *Tankersley v. Richard-*

by putting an end to litigation, and discouraging a multiplicity of suits; and the parties cannot complain of them because the arbitrators are judges of their own selection, and cannot assume jurisdiction outside of the submission, nor bind the parties beyond their consent, as evidenced by the submission.¹ Where the reference and award are in substantial compliance with the statute, they will be upheld as made under it.² Where a cause depending before a justice of the peace was, by agreement of the parties, submitted to arbitrators, who made an award which was entered up in the judgment of the court, from which an appeal was taken, it was held that the award was final unless impeached on the grounds mentioned in the statute — corruption, want of notice, or other misconduct of the arbitrators. “It is wholly unimportant,” say the court, “whether the award is made under the statute or not, as it is equally conclusive as an award at common law, and can only be impeached” on those grounds.³ The statute should be liberally construed; but still the parties acting under it must substantially pursue its provisions; otherwise the award of arbitrators cannot be made a judgment of the court.⁴ Where a statute which provided a mode of submitting causes to arbitration enacted that each party should choose one arbitrator, and by the arbitrators thus chosen an umpire should be selected, and it was objected that the award was not a good statutory award, on the ground that by the terms of the agreement each party appointed an arbitrator, who then appointed the third man, and the cause was tried by the three, in the first instance, it was held that the objection went to the form merely, and was invalid.⁵ A statute prescribing certain forms for submission to arbitrators, and allowing parties to agree that a judgment of a court of record designated in the instrument of submission should be rendered upon the award, is cumulative, not exclusive; and an award pursuant to the submission which would have been valid at common law,

son, 2 Stewart. 130; Wright v. Bolton, 8 Ala. 548; Mobile Bay Road Co. v. Yeind, 29 id. 325; Bingham's Trustees v. Guthrie, 19 Pa. St. 418; Owens v. Withee, 3 Tex. 161.

¹ Tuskaloosa Bridge Co. v. Jemison, 83 Ala. 476.

² Id.

³ Wright v. Bolton, 8 Ala. 548.

⁴ Owens v. Withee, 3 Tex. 161.

⁵ Forshey v. Railroad Co. 16 Tex. 516.

but which does not conform to the statute, will support an action.¹

§ 440. Statutes giving the right of appeal are liberally construed in furtherance of justice; such an interpretation as will work a forfeiture of that right is not favored.² Where the statute gave the defeated party twenty days "after personal notice of the judgment," it was held that the right might be exercised within that period after he received written notice from the party recovering the judgment. The court say: "This does not mean twenty days after he shall ascertain by his own inquiries or investigation that such judgment exists against him, but twenty days after he shall receive personal notice of the judgment from the party himself in whose favor the judgment was entered."³ An act intended to extend the right of appeal is remedial and should receive a liberal construction. If it provides a remedy in a case where otherwise injustice might be done, it should be given effect in all cases where proceedings have not been had to such an extent as to exclude its application.⁴ A statute giving a *certiorari* was so framed that literally it was available only to the complainant, to review proceedings in the statutory action for forcible entry and detainer. But as it was deemed reasonable to extend to the defendant the same means for the correction of errors, as to the plaintiff when similarly situated, the right was held reciprocal and alike demandable by either party.⁵ Statutes

¹ *Browning v. Wheeler*, 24 Wend. 258; *Diedrick v. Richley*, 2 Hill, 271; *Burnside v. Whitney*, 21 N. Y. 148. This is not perhaps in any proper sense the result of liberal construction of the statute, but of the general rule that a new remedy created by statute where one exists at common law is cumulative unless a different intention is expressed; and that the legislature did not intend to make any innovation upon the common law further than the case requires. *Burnside v. Whitney*, *supra*. In *Deerfield v. Arms*, 20 Pick. 480, an award was held wholly inoperative in such a case. The court say that to hold the party bound by the submission as

upon an agreement for arbitration at common law would be to substitute a very different contract from that into which he entered.

² *Houk v. Barthold*, 73 Ind. 21, 25; *Pearson v. Lovejoy*, 53 Barb. 407; *Cally v. Anson*, 4 Wis. 223.

³ *Id.* As to notice in writing being required, see *Gilbert v. Columbia T. Co.* 3 Johns. Cas. 107; *Miner v. Clark*, 15 Wend. 425; *Lane v. Cary*, 19 Barb. 539; *Matter of Cooper*, 15 John. 532; *McEwen v. Montgomery Ins. Co.* 5 Hill, 104; *People v. Croton Aqueduct Board*, 26 Barb. 248.

⁴ *Converse v. Burrows*, 2 Minn. 229. See *Vigo's Case*, 21 Wall. 648.

⁵ *Russell v. Wheeler*, Hempst. 3.

providing for amendment of pleadings and proceedings in the courts are remedial and receive a very liberal construction.¹ To remedy the evils consequent upon the destruction of any public record by fire or otherwise, a statute was passed. It was held remedial though it altered the rules of evidence, as in making an abstract of title evidence.²

§ 441. Statutes which confer or extend the elective franchise,³ which take away penalties,⁴ which give compensation to those whose property is taken compulsorily,⁵ statutes which are in favor of those on whom taxes are assessed or burdens laid,⁶ or in favor of those who are subjected to prejudice by exercise of a special privilege granted by law,⁷ are remedial and to be liberally construed. Where the intent is plain to confer a privilege upon those whose rights are to be affected by a statutory proceeding in derogation of the rights of private property, and the language is doubtful as to the extent of the privilege, it is the duty of the courts to give it the largest construction in favor of the privilege which the language employed will fairly permit.⁸ This was declared of the time or period during which assessors were required to continue their sessions to revise assessments. The provision was that they should continue in session "each and every secular day for the period of twenty consecutive days." The court, regarding the revision as a privilege to persons assessed, excluded Sundays.⁹ Statutes providing a mode of reimbursement for outlays made pursuant to law for the benefit of another are favorably construed to make such indemnity effectual. Thus, a compulsory process was allowed a municipal authority to collect the cost of work on a sidewalk, the owner having failed to comply with a direction to do the work himself.¹⁰ "No penalty," say the court, "is imposed on the owner, but a remedial process is

¹ *Fidler v. Hershey*, 90 Pa. St. 363; p. 153; *Mayor, etc. v. Lord*, 17 Wend. Bolton v. King, 105 id. 78; *Dick's* 285; affirmed 18 id. 126.

Appeal, 106 id. 589, 596; *Goods of* ⁶ *White Co. v. Key*, 30 Ark. 603; *Ruddy*, L. R. 2 P. & D. 330. *Walker v. Chicago*, 56 Ill. 277.

² *Smith v. Stevens*, 82 Ill. 554.

⁷ *Boston, etc. Co. v. Gardner*, 2

³ *Thompson v. Ward*, L. R. 6 C. P. at p. 353.

Pick, 33, 37; *Finch v. Birmingham Canal Co.* 5 B. & C. 820.

⁴ *Evans v. Pratt*, 3 M. & G. at p. 767.

⁸ *Walker v. Chicago*, *supra*.

⁹ *Id.*

⁵ *Reg. v. St. Luke's*, L. R. 7 Q. B. at

¹⁰ *Hudler v. Golden*, 36 N. Y. 446.

provided for the purpose of securing simple indemnity for expenditures lawfully made for his benefit. The statute, therefore, is to be construed liberally, with a view to the beneficial ends proposed.”¹

§ 442. Statutory provisions for the protection of officers employed in the administration of justice in the discharge of their duty are remedial, and are to be extended by construction, as far as their words will permit, to embrace all cases within their purview.² An act was intended to grant a bounty to pioneer settlers on an exposed frontier, but was ambiguous as to the beneficiaries; it was resolved in favor of including all those equally within the reason of the bounty.³ Section 1594 of the Revised Statutes of the United States was derived from an act to promote the efficiency of the navy, and being intended to enable the president, with the advice and consent of the senate, to relieve a deserving officer from the consequences of the findings of retiring boards, it should, it was held, be liberally construed in favor of justice.⁴ An act legitimizing bastards has been held remedial and to be liberally construed.⁵ In New York, a statute “for the protection of married women” has been held remedial and to be liberally construed.⁶ Patents for inventions should be liberally construed.⁷ The provisions

¹ Hudler v. Golden, 36 N. Y. 446.

² Cook v. Clark, 10 Bing. at p. 21; Morris v. Van Voast, 19 Wend. 283.

³ Ross v. Barland, 1 Pet. 655. See Roane v. Innis, Wythe (Va.), 62.

⁴ United States v. Burchard, 125 U. S. 176.

⁵ Beall v. Beall, 8 Ga. 210.

⁶ Billings v. Baker, 28 Barb. 343; Goss v. Cahill, 42 id. 310.

⁷ Blanchard v. Sprague, 3 Sumn. 539. “Formerly, in England,” said Judge Story, “courts of law were disposed to indulge in very close and strict construction of the specifications accompanying patents, and expressing the nature and extent of the invention. This construction seems to have been adopted upon the notion that patent-rights were in the nature of monopolies, and, therefore,

were to be narrowly watched, and construed with a rigid adherence to their terms, as being in derogation of the general rights of the community. At present a far more liberal and expanded view of the subject is taken. Patents for inventions are now treated as a just reward to ingenious men, and as highly beneficial to the public, not only by holding out suitable encouragements to genius and talents and enterprise, but as ultimately securing to the whole community great advantages from the free communication of secrets, and processes, and machinery, which may be most important to all the great interests of society, to agriculture, to commerce and to manufactures, as well as to the cause of science and art.”

of the act of congress passed in 1851 to limit the liability of ship-owners, although they change the common law, are not penal nor in derogation of natural right so as to require a strict construction. They were enacted to remedy the rigor of the common law, and should be construed, if not liberally, at least fairly, to carry out the policy they were enacted to promote; and the term "any goods, wares or merchandise whatsoever" was held to include baggage.¹ The statutes requiring railroad companies to fence their roads are made *pro bono publico*, and are to be construed liberally to attain the end for which they are enacted.² But such statutes are not to be so literally construed as to render a railroad corporation liable for injuries occasioned upon its road, at a time when the fence is temporarily out of repair, without fault or negligence in any manner imputable to the company.³

§ 443. In construing a remedial statute which has for its end the promotion of important and beneficial public objects, a large construction is to be given when it can be done without doing actual violence to its terms; and this construction will be given in favor of a right of appeal by a party aggrieved, to procure a review of the acts of officers who by erroneous action have improperly defeated a public improvement.⁴ And a power granted to a municipal corporation to enlarge any of the slips in the city is a continuing power; and, being granted to subserve the public convenience, and connected with the necessary regulation and regular supply of a rapidly growing city, should be liberally construed in favor of the public interest. It was held to authorize the enlargement by extending the slips further into the river as well as widening them.⁵ An act empowering a company to contract for purposes of public advantage ought not to receive a narrow construction.⁶ So a law respecting public rights and interests, generally, should be liberally construed, so as to make it effectual against the evil it was intended to abate, when this can be done without depriving any individual of his just rights.⁷ Authority was given

¹ Chamberlain v. Western Transp. Co. 44 N. Y. 305.

⁴ Wolcott v. Pond, 19 Conn. 597.

² Tallman v. Syracuse, etc. R. R. 294.

⁵ Marshall v. Vultee, 1 E. D. Smith,

Co. 4 Keyes, 128.

⁶ Dover Gas L. Co. v. Dover, 7 De G.

³ Murray v. New York Cent. R. R. M. & G. 545.

Co. 4 Keyes, 274.

⁷ Plowman, Ex parte, 53 Ala. 440.

to designate a state paper, and to enter into a contract with the publisher for publication of legal and other notices required by law to be published therein. The statute conferring this power was held remedial and the power a continuing one; that it was not exhausted by a single exercise.¹

§ 444. Statutes for the prevention of fraud are remedial and liberally construed. Such is an act to prevent an insolvent debtor from making preferences among his creditors.² "These statutes," said Lord Mansfield, "cannot receive too liberal a construction, or be too much extended in suppression of fraud."³ It was held that an English statute imposing a penalty on any officer of a limited company who signs on its behalf a bill of exchange upon which its name does not appear, and also rendering him personally liable to the holder of the bill,

¹ *Weed v. Tucker*, 19 N. Y. 422. Denio, J., said: "When we are seeking to ascertain the intention of the law-maker, we are to assume that the statute was designed to be an adequate and final arrangement for the public exigency which called for its enactment. That exigency in this case was a provision which should secure the continued publication of these legal notices, and we are to intend that the statutory provisions were framed with a view to accomplish that result; and not that a temporary measure was in the consideration of the legislature, which, when it should fail from its inherent defects, could be supplied by further legislation. . . . We disclaim any power to supply a defect in it if one exists. If the language, reasonably construed, fails to carry out what we conceive to have been the general intention of the legislature, it is a *casus omisus*, which is irremediable by the courts. But when the question, as in this case, is what the language employed really means, it is important to ascertain from all legitimate sources what the emergency or public necessity was which led to the

enactment, and we are not to pronounce the measure inadequate without a faithful endeavor to accommodate the language to the obvious intention." In another part of the opinion the learned judge further said: "It is a part of the legal arrangements for carrying on the government and providing for the administration of justice among the citizens of the state, and is remedial in its character. In such cases the rule is that, if the words of a statute are not explicit, the sense is to be gathered from the occasion and necessity of the law, the defect in the former law, and the designed remedy. It is to be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. It is to be construed liberally, in contradistinction from a merely verbal construction—largely and beneficially—so as to suppress the mischief and advance the remedy."

² *Terrill v. Jennings*, 1 Met. (Ky.) 450; *Cadogan v. Kennett*, 2 Cowp. at p. 434; *Bank of United States v. Lee*, 13 Pet. 107.

³ *Cadogan v. Kennett*, *supra*.

was partly remedial and partly penal.¹ The same construction was placed on another statute for preventing false and double returns to parliament, which gave every person grieved by a false return a right of action against the returning officer.² Such statutes, so far as they inflict a penalty on the offender, are strictly construed; but where they act on the offense by setting aside the fraudulent transaction, they are construed liberally.³ An act that no member of the common council of a city, or other officer of the corporation, should be directly or indirectly interested in any contract, work or business, the price or consideration of which was to be paid from the city treasury, was held to apply to a newspaper owned by the health commissioner of the city and designated to publish the proceedings of the common council. This restriction was deemed highly salutary. It was designed to prevent persons employed and appointed to promote and protect the public interest from being diverted from those objects by the temptation of the pecuniary advantages they might otherwise secure to themselves. The policy of it is similar to that which courts of equity have, from a high sense of duty, imposed upon all persons acting in the capacity of trustees. Instead of being unreasonably restrained by construction, the provision should be liberally applied for the promotion of the end designed to be accomplished by its enactment.⁴

§ 445. Whenever a penal statute is declared to be remedial by a provision therein, as, for example, a law against gaming, a strict construction will not be applied.⁵ Where all civil laws are required by statute to be liberally construed, with a view to effect their objects and to promote justice, the courts must obey the statutory rule; nevertheless, to authorize an attachment, all material requirements must be substantially complied with.⁶

¹ Penrose v. Martyr, E. B. & E. 499. Ga. 253; Ellis v. Whitlock, 10 Mo.

² Wynne v. Middleton, 1 Wils. 125; 781; Smith v. Moffat, 1 Barb. 65. Wilb. on St. 234.

⁴ Mullaly v. Mayor, etc. 6 T. & C.

³ 1 Black. Com. 88; Twyne's Case, 3 168.

Co. 82b; Cadogan v. Kennett, 2 Cowp.

⁵ Seal v. State, 13 Sm. & M. 296.

432, 434; Gorton v. Champneys, 1

Bing. at p. 301; Cumming v. Fryer, 281.

Dudley (Ga.), 182; Carey v. Giles, 9

⁶ Dunnenbaum v. Schram, 59 Tex.

CHAPTER XVI.

DIRECTORY AND MANDATORY STATUTES.

§ 446. Preliminary explanation.	§ 454. Mandatory statutes.
448. Provisions as to time generally directory.	458. Statutes which confer new rights, privileges, etc.
451. Also formal and incidental provisions.	460. Statutes which are in form permissive.
453. Statutory bonds differing from statute.	

§ 446. Preliminary explanation of directory and mandatory statutes.— The consequential distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while a failure to comply with the requirements of the other is productive of serious results. This distinction grows out of a fundamental difference in the nature, importance and relation to the legislative purpose of the statutes so classified. The statutory provisions which may thus be departed from with impunity without affecting the validity of statutory proceedings are usually those which relate to the mode or time of doing that which is essential to effect the aim and purpose of the legislature or some incident of the essential act.¹ Directory provisions are not intended by the legislature to be disregarded; but where the consequences of not obeying them in every particular are not prescribed, the courts must judicially determine them. In doing so they must necessarily consider the importance of the punctilious observance of the provision in question to the object the legislature had in view. If it be essential it is mandatory, and a departure from it is fatal to any proceeding to execute the statute or to obtain the benefit of it.

§ 447. There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. Where the provision is in affirmative words, and there are no negative words, and it relates to the

¹ McKune v. Weller, 11 Cal. 49.

time or manner of doing the acts which constitute the chief purpose of the law, or those incidental or subsidiary thereto, by an official person, the provision has been usually treated as directory.¹ Generally, it is so; but it is a question of intention.² Where a statute is affirmative it does not necessarily imply that the mode or time mentioned in it are exclusive, and that the act provided for, if done at a different time or in a different manner, will not have effect. Such is the literal implication, it is true; but since the letter may be modified to give effect to the intention, that implication is often prevented by another implication, namely, that the legislature intends what is reasonable, and especially that the act shall have effect; that its purpose shall not be thwarted by any trivial omission, or a departure from it in some formal, incidental and comparatively unimportant particular. "It would not, perhaps, be easy," said Sharswood, J., "to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory or imperative. Where the words are affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may be and often have been construed to be directory; but negative words which go to the power or jurisdiction have never, that I am aware of, been brought within the category."³ "It is the duty of courts of justice," said Lord Campbell, "to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."⁴ Lord Penzance said: "I have been carefully through all the principal cases, but, upon reading them all, the conclusion at which I am constrained to arrive is this: that you cannot glean a great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of the *Liverpool Bank v. Turner*."

¹ *In re* Petition of Douglass, 58 Barb. 174; *Att'y-Gen'l v. Baker*, 9 Rich. Eq. 521; *State v. Harris*, 17 Ohio St. 608; *Bladen v. Philadelphia*, 60 Pa. St. 464.

² *Kellogg v. Page*, 44 Vt. 356.

³ *Bladen v. Philadelphia*, 60 Pa. St. 464, 466.

⁴ *Liverpool Bank v. Turner*, 30 L. J. Ch. 380.

He had said in the same judgment, "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision, and the relation of that provision to the general object intended to be secured by the act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or directory."¹ Unless a fair consideration of a statute, directing the mode of proceeding of public officers, shows that the legislature intended compliance with the provision in relation thereto to be essential to the validity of the proceeding, it is to be regarded as directory merely.² Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes the substantial purposes of the statute.³

§ 448. **Provisions directory as to time.**—Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards.⁴ In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of the power of the officer.⁵ And it was accordingly held that a

¹Howard v. Bodington, L. R. 2 P. Div. 211.

²Jones v. State, 1 Kan. 273.

³Neal v. Burrows, 34 Ark. 491; Mount v. Kesterson, 6 Cold. 452; Cheatham v. Brien, 3 Head, 552; Atkinson v. Rhea, 7 Humph. 59; Sellars v. Fite, 3 Baxt. 131.

⁴Wilson v. State Bank, 3 La. Ann. 196.

⁵People v. Allen, 6 Wend. 486; Jackson v. Young, 5 Cow. 269; Heath, Ex parte, 3 Hill, 42; Walker v. Chapman, 22 Ala. 116; Charter v. Greame, 13 Q. B. 216; Reg. v. Mayor, etc. 7 E. & B. 910; Reg. v. Ingall, L. R. 2 Q. B. Div. 199; Doe d. Phillips v. Evans, 1 Cr. & M. 450; Rex v. Denbyshire, 4 East, 142; Pond v. Negus, 3 Mass. 230; Wheeler v. Chicago, 24

brigade order, constituting a court-martial, issued in July, when by the militia law it was made the duty of the commandant of the brigade to issue such order on or before the 1st day of June in every year, was valid.¹ A provision that an appeal bond be executed before an appeal is perfected, when not a part of the essential steps to take an appeal, is directory.² So is a provision that an officer shall take his official oath within a certain period,³ or give his official bond,⁴ even where the issue of a commission to him is prohibited until such bond is given;⁵ for it would be attended with mischievous consequences if in such cases all the official acts of such delinquent were held void. His acts, if he in fact filled the office, would doubtless be valid. There could be no collateral inquiries affecting the right of a *de facto* officer to act. A statute which provides that commissioners to locate a county seat shall meet at a time and place provided for, that a majority shall constitute a quorum to do business, "and that the commissioners may adjourn to some other place or time, and may adjourn from time to time until the business before them may be completed," is directory merely, and the commissioners have the power to elect a chairman and empower him to fix the time of the next meeting.⁶

§ 449. A statute required the township clerk to certify on or before the first Monday of October in each year to the supervisor of his township the amount of the town indebtedness growing out of the payment of bounties. Where such certificate was not made within that period, but was within a

Ill. 105; Torrey v. Millbury, 21 Pick. 64; Colt v. Eves, 12 Conn. 243; People v. Cook, 14 Barb. 259; Wright v. Sperry, 21 Wis. 331; State v. Click, 2 Ala. 26; Limestone Co. v. Rather, 48 Ala. 433; St. Louis Co. Ct. v. Sparks, 10 Mo. 117; Lee v. State, 49 Ala. 43; Hugg v. Camden, 39 N. J. L. 620; Eustis v. Kidder, 26 Me. 97; Lackawana Iron Co. v. Little Wolf, 38 Wis. 152; Rex v. Leicester, 7 B. & C. 6; Bosanquet v. Woodford, 5 Q. B. 310; Rex v. Sparrow, 2 Str. 1123.

¹ People v. Allen, 6 Wend. 486.

² McCarver v. Jenkins, 2 Heisk. 629.

³ Howland v. Luce, 16 John. 135.

⁴ Boykin v. State, 50 Miss. 375; People v. Holley, 12 Wend. 481. In Flatan v. State, 56 Texas, 94, it was held that the statute requiring a party elected to office to qualify within a prescribed period of time will be construed as directory only in a case where, from reasons beyond his control, he cannot qualify within the time allowed; but such construction will not be given in a case of neglect or refusal to qualify.

⁵ McBee v. Hoke, 2 Speers, 138.

⁶ Edwards v. Hall, 30 Ark. 81.

week afterwards, and seasonably to answer the intended purpose, it was held good, and the provision so far directory. The information was to enable the supervisor to include the amount certified in the tax levy.¹ The provision of the statute requiring that grand jurors should "be summoned at least five days before the first day of the court" to which they may be summoned is manifestly merely directory to the sheriff and for the convenience of the jurors, that they may have sufficient notice of the service required of them. And though it may be true that a juror could not be compelled to attend unless so summoned, yet if he thinks proper to attend and serve without such notice, it constitutes no objection to the regular organization of the grand jury. The time of summoning jurors, except so far as their own convenience is concerned, is quite an immaterial thing which could in no wise affect their official acts.² And so of other departures from the letter of statutes relating to obtaining jurors.³ It is so of the requirement that defendant in replevin be summoned to appear at the next term.⁴ The provision requiring a judge who tries a cause without a jury to give his decision on or before the first day of the next term is directory. It imposes a duty upon the judge; but as the parties have no control over his action, it would be a harsh construction which should deprive them of the fruits of the litigation because the judge fails to decide by a particular day.⁵ So of the requirement that the officer before whom proceedings are had against an absconding, concealed or non-resident debtor, shall make his report within twenty days after the appointment of trustees, and that the latter cause their appointment to be recorded within thirty days.⁶ The omission of a justice of the peace to file his return to an appeal within the time required by law is not fatal. The appellate court will have jurisdiction of the case if the return is made after the time so prescribed.⁷ A statute spe-

¹ *Smith v. Crittenden*, 16 Mich. 152.

⁴ *Johnson, Ex parte*, 7 Cow. 424.

² *Johnson v. State*, 33 Miss. 363.

⁵ *Rawson v. Parsons*, 6 Mich. 401;

³ *State v. Carney*, 20 Iowa, 82; *Wood v. Chapin*, 13 N. Y. 509; *Fraser v. Willey*, 2 Fla. 116.

State v. Pitts, 58 Mo. 556; *State v. Gillick*, 7 Iowa, 287; *State v. Smith*, 67 Me. 328; *Huecke v. Milwaukee City Ry Co.* 69 Wis. 401; *Birchard v. Booth*, 4 id. 67.

⁶ *Wood v. Chapin*, 13 N. Y. 509.

⁷ *Kellogg, Ex parte*, 3 Cow. 372.

cified a time for trustees to make a sale of trust property; this was held directory, and that a sale made afterwards was good and passed the title.¹ A statute requiring a court, on the first day of a term, to assign cases for trial on particular days, was held directory.² If a statute direct a tax to be levied at a given time and it is omitted, it may be levied at a different time.³ Where a special act was passed in relation to the presentation of certain claims, otherwise not allowable, and requiring them to be presented within thirty days, and, therefore, made a distinction between such claims and ordinary ones as to the time of presentment, it was held mandatory; that the presumption was that such limitation as to time was material to be followed.⁴

§ 450. The assessors of a school district were directed by a statute to assess the district tax within thirty days after the clerk had certified the vote for raising the tax, and it was held to be merely directory, as there were no negative words in the statute limiting their power to make the assessment afterwards.⁵ A statute required ward inspectors of a city to certify the result of the ward elections, on the day subsequent to the closing of the polls, or sooner. It was held that their certificate was valid although it was not made till the second day after the closing of the polls.⁶ The statutory requirement that the polls of election be closed at sunset has been held to be directory.⁷ A certificate was required to be made out immediately, and though one was made seven months afterwards, it was received in evidence, and the election held good.⁸ The time mentioned by statute within which swamp lands granted by congress to Oregon should be selected was held not imperative, there being no limitation of the power of the selecting officer.⁹

¹ *Savage v. Walshe*, 26 Ala. 619, 2 Denio, 160; *Pond v. Negus*, 3 Mass. 631.

² *People v. Doe*, 1 Mich. 451.

³ *State v. Harris*, 17 Ohio St. 608; *State v. Horner*, 34 Md. 569; *State v. Co. Com'rs*, 29 id. 516; *Tuohy v. Chase*, 30 Cal. 524; *Shaw v. Orr*, 30 Iowa, 355; *People v. Lake Co.* 33 Cal. 487; *People v. Rochester*, 5 Lans. 11; *Corbett v. Bradley*, 7 Nev. 106; *Looney v. Hughes*, 30 Barb. 605; *Gale v. Mead*,

⁴ *Corbett v. Bradley*, 7 Nev. 106.

⁵ *Pond v. Negus*, 3 Mass. 230.

⁶ *Heath, Ex parte*, 3 Hill, 42.

⁷ *Holland v. Davies*, 36 Ark. 446; *Sweepston v. Barton*, 39 id. 549; *Fry v. Booth*, 19 Ohio St. 25.

⁸ *People v. Peck*, 11 Wend. 604.

⁹ *Gaston v. Stott*, 5 Oregon, 48.

§ 451. **Formal and incidental requirements directory.**—Statutes directing the mode of proceeding by public officers are directory, and are not to be regarded as essential to the validity of the proceedings themselves unless so declared in the statutes.¹ In *People v. Cook*² the court say: "Statutes directing the mode of proceeding of public officers are directory, and are not to be regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute." The qualification further on in the opinion is: "Unless there is something in the statute itself which plainly shows a different intent." As said by Cobb, C. J.:³ "The first rule appears . . . inaccurate. The words 'unless it be so declared in the statute' seem to require an express declaration that directing the manner is essential, however important and essential a just view of the policy of the statute may show such provisions to be." The learned chief justice added: "The rule secondly stated contains probably all that the learned justice intended to say in the first, and as a general proposition is doubtless correct. But the intent to make such provision essential may appear as well by the general scope and policy of the statute as by a direct averment. In other words, unless a fair consideration of the statute shows that the legislature intended compliance with the provision in relation to the manner to be essential to the validity of the proceeding, it is to be regarded as directory merely." This view was well illustrated by the case in which this language was used. There was a statutory provision relating to a special election for selecting a county seat in these words: "If upon the canvassing of said votes by said commissioners they shall find that no place has received a majority of all the votes cast, it shall be their duty to proclaim the same, and also the time of the second election, as herein provided; and the canvass of the votes of the second election and the proclamation of the result shall be the same as at the first." In a case where there was no choice at the first election, and a second election was held

¹ *People v. Cook*, 14 Barb. 259, 290; *Holland v. Osgood*, 8 Vt. 280; *Corliss v. Corliss*, id. 373; *Holding, Ex parte*, 53 Ala. 458. ² In *Jones v. State*, 1 Kan. 278. See *Westbrook v. Rosborough*, 14 Cal. 180; *Kenfield v. Irwin*, 52 id. 164; *People v. Thompson*, 67 id. 627.

³ 14 Barb. 259.

without a proclamation, the court held the provision imperative, and that there was no authority to hold the second election without it. It was an important and necessary provision. "Without it," said the chief justice, "the law provided no means for informing the people that any second election was to be held for the location of the seat of justice, and many of them might, and some of them probably would, know nothing about it." A statute required the reading and signing of the minutes of the board of supervisors. This was held merely directory, but it should be scrupulously observed; and the omission to do so, though it may indicate perhaps carelessness, if not incapacity, does not affect the validity of the proceedings.¹ A statute relating to docketing judgments by transcript has been held directory as to clerical particulars.²

It was provided that "no judgment shall affect any lands, tenements, real estate or chattels real, or have any preference as against other judgment creditors, purchasers or mortgagees until the record thereof be filed and docketed as herein directed." Those directions were that the clerk, at the time of filing the record, enter in an alphabetical docket a statement of the judgment, containing among other things the hour and day of entering the same. By another act the clerk, on request and payment of fees, was required to furnish a transcript containing all the facts necessary to make a perfect docket of the judgment; and on presenting the transcript to the clerk of any other county, it was his duty to file the same and docket the judgment, specifying among other particulars the day and the hour on which the judgment was perfected, and the day and hour of docketing the same. By a subsequent act, which was the subject of construction, it was declared that "no judgment or decree which shall be entered after this act takes effect shall be a lien upon real estate, unless the same shall be docketed in books to be provided and kept for that purpose by the county clerk of the county where the lands are situate." It was held that an error in the statement of the date, amount, etc., which would be amendable by the court in which the judgment was rendered would not vitiate the lien of such judgment as against persons who have not been actually misled and prejudiced thereby. "It could not, I think,"

¹ *Arthur v. Adam*, 49 Miss. 404.

² *Sears v. Burnham*, 17 N. Y. 445.

said Strong, J., "have been the intention of the legislature, by any of the provisions in regard to the docketing and lien of judgments, to require a strict, literal compliance in every particular with the requirements as to the contents of the docket, in order that the judgment may be a lien on lands as against other incumbrances. If such a compliance was necessary, a variance of a day or hour as to time, or a single penny as to the amount of the judgment, would vitiate the docket and render it a nullity as to securing a preference over other incumbrances. A substantial observance of those requirements, having reference to the object the legislature had in view of affording information to all who might be affected by the judgment, I am satisfied is all that was designed or is necessary. Those provisions are merely directory; and omissions and variances which cannot work any prejudice are immaterial. It is for the court so to administer the provisions as to the docketing and lien of judgments as carefully to secure the information designed to be given, and at the same time to protect the judgment creditor from the loss of his preference on account of slight omissions and defects entirely unessential to the docket for the purpose of such information."¹

§ 452. The clause in the constitution requiring the supreme court of appeals to "decide every point fairly arising upon the record, and give its reasons therefor in writing," is directory and does not affect the common-law doctrine of *res judicata*. The court say: "Notwithstanding that clause in the constitution, if the points are involved in the issue, they are *res judicata*, although not mentioned in the opinion of the court or noticed by counsel on either side. That clause of the constitution is merely directory to the court, and it ought to be followed; but it does in no wise change the common-law rule as to the doctrine of *res judicata*. The contrary doctrine would lead to endless litigation; and no suitor could know when his controversy was terminated. There would be anything but repose in such a construction of the constitution as that."² A statute requiring the instructions to the jury to be in writing is directory, and the violation thereof cannot

¹ See *Hunt v. Grant*, 19 Wend. 90, from \$2,000 to \$30,000. *Hart v. Reynolds*, 3 Cow. 42, note.

pro tunc by increasing the amount ² *Henry v. Davis*, 13 W. Va. 230.

be assigned as error in Texas, though the rule is otherwise in some states.¹ So is a provision that the judge shall caution the jury.² Under a statute providing a remedy by the verdict of a jury for the undervaluation of land by highway commissioners, the verdict was required to be certified by the justice who issued the summons. His duties in the premises were of a ministerial character. He had no control of the proceedings. He was not to preside, or to direct the admission or exclusion of evidence, as on a trial before him. His duties were limited to issuing a summons, drawing the names of six jurors, swearing them and witnesses, and finally certifying the verdict. The statute prescribed no penalty, and imposed no forfeiture in case of non-compliance with its provisions. There was no declaration that the verdict should be void for failure to comply with them. It was held that the verification of the verdict was not incapable of being certified in other ways as well as by the justice who issued the summons. It was a formal matter, because it proved nothing that could not be proved in other ways as satisfactorily. Its omission could work no prejudice to the certainty of the proceeding. The affidavit of some of the jurors, or the certificate of another justice, would accomplish the same purpose practically. The proper and just re-assessment and the verdict were the essential matters, and could not be dispensed with; but the certificate was a matter of form, which could be supplied by other evidence without prejudice to any one. The misconduct or mistake of a public officer in a matter of mere form should not prevent the attainment of right and justice. The requirement that the justice who issued the summons should certify the verdict was held directory.³ By statute no ordinance providing for subscription by parishes and municipal corporations to the stock of corporations undertaking works of internal improvements was valid until approved and ratified by a majority of the voters on whose property the tax was proposed to be levied. For the purpose of facilitating the taking of this vote, a certified list of such voters was to

¹ Galveston, etc. R'y Co. v. Dunlavy, 56 Tex. 256. *Contra*, Penberthy v. Lee, 51 Wis. 261; Householder v. Granby, 40 Ohio St. 430.

² Thompson v. State, 26 Ark. 323.

³ People v. Supervisors, 34 N. Y. 268.

be furnished to commissioners. This list was not furnished in a particular case, and its omission was urged as a fatal objection to a subscription pursuant to a favorable vote on a submission of the question. The court held that the provision requiring it was directory and not a condition precedent. "When a formality is not absolutely necessary," say the court, "for the observance of justice, but is introduced to facilitate its observance, its omission, unless there is an annulling clause in the law, will not annul the act."¹

The requirement that the inspectors of a corporate election be sworn, in the absence of a nullifying clause on account of the omission, was held directory; that the election was not invalidated by the failure of the officers to be sworn.² A statutory provision that the clerk of the district give notice of the annual meetings was merely directory, and that the proceedings after the meeting were valid although no notice was given.³ A board of canvassers cannot reject a poll book on account of its being transmitted to the clerk through one not an elective officer. Statutes concerning the manner of conducting elections are directory unless the non-compliance is expressly declared to be fatal to the validity of the election or will change or make doubtful the result.⁴ The sheriff was directed by statute, upon making a sale of real estate, to file his certificate of sale in the clerk's office; the statute was held directory, and that his omission to file it did not prejudice the proceedings.⁵ So a statute requiring the vote of the common council upon a resolution opening streets in a city to be taken by ayes and nays was held directory.⁶ Statutory provisions as to drawing jurors for a trial are directory, and irregularities therein, when not objected to at the time, are waived.⁷ Provisions requiring a sheriff to note on an execution the day of its receipt,⁸ requiring him to make a levy in the presence of two witnesses,⁹ requiring the secretary of state to publish the act

¹ *New Orleans v. St. Rome*, 9 La. Ann. 573.

² *Matter of Mohawk, etc. R. R. Co.* 19 Wend. 143.

³ *Marchant v. Longworthy*, 6 Hill, 616; S. C. 3 Denio, 526.

⁴ *Wilford v. State*, 43 Ark. 62; *McCrary on Elections*, § 200.

⁵ *Jackson v. Young*, 5 Cow. 269.

⁶ *Striker v. Kelly*, 7 Hill, 9.

⁷ *Cole v. Perry*, 6 Cow. 584.

⁸ *Hester v. Keith*, 1 Ala. (N. S.) 816.

⁹ *Davidson v. Kuhn*, 1 Disney, 405.

against dueling three months,¹ are directory. A statute which provided how a levy should be made when the defendant in execution failed or refused to point out property was held directory; that is, that he should levy first on personal or movable property, then on uncultivated lands, and lastly on improved lands, establishing that order. Though the failure to make a levy as required by statute might be sufficient in a particular case, properly presented, to set aside the levy and make the officer liable in damages, the sale would not necessarily be void.² The provision in the code as to advertising the adjournment of the supreme court is directory to the clerk, and, if not complied with, still the court may be held at the time fixed in the order of adjournment, and a party not prejudiced by the omission of the clerk cannot complain.³ Compliance with a requirement to make a plan for the drainage of the whole city is not imperative or a condition precedent to the power of contracting for work in any of the sewerage districts.⁴ Failure of the tax assessor to pin to the assessment roll the affidavit prescribed by statute does not so vitiate the assessment roll as to render nugatory all subsequent proceedings with reference to it and all the sales for taxes under it. It is manifest that the purpose of the legislature was to make all such requirements as this directory and not mandatory in the sense that failure to observe them will annul subsequent proceedings. The court say: "This affidavit is required to be made after the completion of the assessment roll as an additional guaranty to his oath of office to secure the performance of the duty of the assessor in the particular matters to which the affidavit relates. It was assumed that in order to be able to make the required affidavit the assessor would act as it suggests to be necessary in order to make it perfectly, and it was admonitory to him as well as a guide to the board of supervisors as to what was required of him. There is nothing to suggest a purpose in the legislature to make the required affidavit a condition of the validity of the assessment or essential to the jurisdiction of the board of supervisors to deal with the rolls as the law directs. On the

¹ State v. Click, 2 Ala. 26.

⁴ Matter of N. Y. Prot. E. Pub.

² Pearson v. Flanagan, 52 Tex. 266. School, 47 N. Y. 556.

³ Wise v. State, 34 Ga. 348.

contrary, we think the manifest purpose of the legislature was to make all such requirements directory and not mandatory in the sense that failure to observe them will annul subsequent proceedings."¹ The statute is directory in requiring the board of police to take deeds of trust on real estate to secure the repayment of loans of the common school fund, and makes it the plain duty of the board to do so. But it does not make void a note given for such loan not secured by a trust-deed.²

§ 453. **Statutory bonds not conforming with statute.**— In the absence of negative words a bond differing in form and mode of execution from what is required by statute, but containing substantially the required conditions, is valid. Referring to the official bond of a sheriff, Cooley, J., said: "If the several duties which the sheriff is called upon to perform could only arise because of the statute requiring the giving of the bond, there would be abundant reason for saying that until a bond in conformity with the statute was produced no recovery could be had. But this statute does not impose the duties; they would be the same if no official bond were required; and a sheriff *de facto* is charged with them under the same circumstances as is the sheriff *de jure*. It needs no statute to enable the officer to give a valid bond to perform any such duty; and had B. executed to H. and R. a common-law bond, conditioned that he would duly levy and return the execution they placed in his hands, there could have been no doubt of its validity.³ When a party gives a bond that he may have some privilege or right, as an office, appeal, supersedeas, or the like, and he has the benefit as upon having given the bond required by law, he cannot afterwards avoid responsibility upon it because he has departed in some particular from the statutory form, or omitted some formality in execution, approval or filing.⁴ An

¹ Chesnut v. Elliott, 61 Miss. 569; Marsh. 416; Governor v. Allen, 8 Fifield v. Marinette Co. 62 Wis. 532, Humph. 176; Montville v. Houghton, modifying Marsh v. Supervisors, 42 7 Conn. 543; Commonwealth v. Wolbert, 6 Binn. 292. See People v. Mitchell, 4 Sandf. 466; People v. Meighan, 1 Hill, 298; Armstrong v. United States, 1 Pet. C. C. 46; Van Deusen v. Hayward, 17 Wend. 67.

² Acts of 1854, ch. 345, and of 1856, ch. 27; Gaines v. Faris, 39 Miss. 403. See State v. State Bank, 5 Ind. 356.

³ Bay Co. v. Brock, 41 Mich. 45; United States v. Tingey, 5 Pet. 115; Thompson v. Buckhannon, 2 J. J. Supervisors v. Kaime, 39 Wis. 468.

appeal bond filed without a required justification of sureties is nevertheless good, and will support the appeal, if the sureties are in fact sufficient. The provision of the statute requiring a justification is so far directory where no different intention is manifest.¹

✕ § 454. **Mandatory statutes.**—Mandatory statutes are imperative; they must be strictly pursued; otherwise the proceeding which is taken ostensibly by virtue thereof will be void. Compliance therewith, substantially, is a condition precedent; that is, the validity of acts done under a mandatory statute depends on a compliance with its requirements. When a statute is passed authorizing a proceeding which was not allowed by the general law before, and directing the mode in which an act shall be done, the mode pointed out must be strictly pursued. It is the condition on which alone a party can ✕ entitle himself to the benefit of the statute, that its directions shall be strictly complied with. Otherwise the steps taken will be void. But when the proceeding is permitted by the general law, and an act of the legislature directs a particular form and manner in which it shall be conducted, then it will depend on the terms of the act itself whether it shall be considered merely directory, subjecting the parties to some disability if it be not complied with, or whether it shall render the proceeding void. If no emancipation were permitted, and an act of the legislature should permit owners of slaves to emancipate them in some prescribed form, if the form were not complied with the act would be void.² Where legislation points out specifically how an act is to be done, although without it the court or officials under their general powers

¹ St. Louis. etc. R. R. Co. v. Wilder, 17 Kan. 244. In *Hardy v. Heard*, 15 Ark. 184, it was declared that the design of the statute in requiring the recital of the judgment, execution, etc., in a sheriff's deed for land sold under execution was to relieve the purchaser from the necessity of producing the judgment, etc., and to leave to the party who would contest the sale to establish its invalidity; that a deed for land sold under execution, not containing the recital

mentioned in the statute, did not show on its face a compliance with the law, and could not be evidence under the statute. But if such deed is in compliance with the statute, it is only *prima facie* evidence, and may be entirely overthrown by evidence that the sale had never been made, or had not been made in accordance with the law. *Moore v. Brown*, 11 How. (U. S.) 424.

² *Monk v. Jenkins*, 2 Hill's Ch. 12.

would have been able to perform the act, yet as the legislature imposed a special limitation, it must be strictly pursued; and although performed by a discretionary officer, the limitation of the statute renders the doing of the act ministerial in him performing it, in which no discretion can be indulged.¹ Enabling statutes, on the principle of *expressio unius est exclusio alterius*, impliedly prohibit any other than the statutory mode of doing the acts which they authorize.² This is illustrated by the numerous cases where statutory rights and remedies are given in respect to which the statute must be strictly pursued.³ Where a statute in granting a new power prescribes how it shall be exercised, it can lawfully be exercised in no other way.⁴ Negative words in granting power or jurisdiction cannot be directory.⁵ And even affirmative words, in such a case, without any negative expressed, imply a negative. Where a statutory power or jurisdiction is granted, which otherwise does not exist, whether to a court or an officer; and in all cases where, by the exercise of such a power, one may be divested of his property, the grant is strictly construed; the mode of proceeding prescribed must be strictly pursued; the provisions regulating the procedure are mandatory as to the essence of the thing required to be done.⁶

¹ *Hudson v. Jefferson Co. Ct.* 28 Ark. 359.

² *Dalton v. Murphy*, 80 Miss. 59; *Veazie v. China*, 50 Me. 518; *Wendel v. Durbin*, 26 Wis. 390; *Beltz-hoover v. Gollings*, 101 Pa. St. 293.

³ *Ante*, § 393; *Buckley v. Lowry*, 2 Mich. 419; *Haley v. Petty*, 42 Ark. 392; *People v. Reed*, 5 Denio, 554; *Wilson v. Palmer*, 75 N. Y. 250; *Lane v. Wheeler*, 101 id. 17; *Stafford v. Bank*, 16 How. 135; *Stafford v. Canal & Banking Co.* 17 How. 283; *Illinois, etc. R. R. Co. v. Gay*, 5 Ill. App. 393; *Kirk v. Armstrong*, Hempst. 283; *Coffman v. Daveny*, 2 How. (Miss.) 854; *Maxwell v. Wessels*, 7 Wis. 103; *Brown v. Ry. Co.* 83 Mo. 478; *McLaughlin v. State*, 66 Ind. 193; *Flory v. Wilson*, 83 id. 391; *Dawson's Appeal*, 15 Pa. St. 480; *Cherry Overseers v. Marion Overseers*, 96 id. 528; *Road in Salem Town-*

ship, 103 id. 250; *Providence Co. v. Chase*, 108 id. 319; *Harris v. Gest*, 4 St. Ohio 469; *Campbell v. Allison*, 63 N. C. 568; *Bayley v. Hazard*, 3 Yerg. 487; *Whipley v. Mills*, 9 Cal. 641; *Hildreth v. Gwindon*, 10 id. 490; *Elliott v. Chapman*, 15 id. 383; *Gordon v. Wansey*, 19 id. 82; *Do ling v. Moore*, 20 id. 14; *Clinton v. Phillips*, 7 T. B. Mon. 117.

⁴ *Head v. Ins. Co.* 2 Cranch, 127; *Best v. Gholson*, 89 Ill. 465; *Franklin Glass Co. v. White*, 14 Mass. 286; *State v. Cole*, 2 McCord, 117.

⁵ *Bladen v. Philadelphia*, 60 Pa. St. 464.

⁶ *Potter's Dwaris*, 224; *Corwin v. Merritt*, 3 Barb. 341; *Harrington v. People*, 6 id. 607; *People v. Common Council of Brooklyn*, 22 id. 404; *Bloom v. Burdick*, 1 Hill, 130; *People v. Schemerhorn*, 19 Barb. 540; *Com-*

§ 455. What the law requires for the protection of the taxpayer, for example, is mandatory, and cannot be regarded as directory merely.¹ "One rule is very plain and well settled," said Shaw, C. J., "that all those measures which are intended for the security of the citizen, for securing equality of taxation, and to enable every one to know with reasonable certainty for what real and personal property he is taxed, are conditions precedent; and if they are not observed he is not legally taxed, and he may resist it in any of the modes provided by law for contesting the validity of the tax. But many regulations are made by statute, designed for the information of assessors and officers, and intended to promote method, system and uniformity in the modes of proceeding, the compliance or non-compliance with which does in no respect affect the rights of tax-paying citizens. These may be considered as directory; officers may be liable to animadversion, perhaps, to punishment, for not observing them, but yet their observance is not a condition precedent to the validity of the tax."² An order of court requiring forty clear days in a summons is mandatory."³ So is the requirement that there be inserted in venires the command that the officer summon twenty-four persons, "freeholders of his county or corporation residing remote from the place where the offense is charged to have been committed."⁴ So also, that sales of real estate under execution shall take place at the court-house of the county.⁵ When the power to affect property is conferred by statute upon those who have no personal interest in it, such power can be exercised only in the manner and under the circumstances specified. The requirement can never be dispensed with as being directory where the act, or omission of it, can by possibility work injury, however slight, to any one affected by it.⁶ Pro-

mon Council of Albany, Ex parte, 3 137; Hubbell v. Weldon, Lator, 139;
Cow. 358; Barnard v. Viele, 21 Wend. Sibley v. Smith, 2 Mich. 486.

89; Brisbane v. Peabody, 3 How. Pr. ¹ Clark v. Crane, 5 Mich. 151.

109; Rogers v. Murray, 3 Paige, 390; ² Torrey v. Millbury, 21 Pick. 67;

Atkins v. Kinnan, 20 Wend. 249; Sibley v. Smith, 2 Mich. 486.

Sherwood v. Reade, 7 Hill, 431; Sharp ³ Barker v. Palmer, L. R. 8 Q. B.
v. Speir, 4 Hill, 76; Morse v. William- Div. 9.

son, 35 Barb. 472; Sherman v. Dodge, ⁴ Whitehead v. Commonwealth, 19
6 John. Ch. 107; Denning v. Smith, Gratt. 640.

3 id. 331; Cohoes Co. v. Goss, 13 Barb. ⁵ Koch v. Bridges, 45 Miss. 247.

⁶ Id.

visions are directory where they relate to some immaterial matter not of the essence of the thing to be done; where a compliance is matter of convenience rather than substance; where the departure from the statute will cause no injury to any person affected by it.¹

§ 456. The special powers given to corporations, to courts or officers must be exercised with strict, substantial adherence to all directions of the statute.² When a statute which grants power or authority has expressly fixed, limited or declared the time, with reference to essential antecedent acts, when such authority shall begin to be exercised all other time is excluded; *expressio unius est exclusio alterius*.³ It was held under an act relative to the organization of corporations, which provided that "when the certificate has been filed as aforesaid the persons who shall have signed and acknowledged such certificate and their successors shall be a body politic and corporate," that until this certificate had been so filed there was no provision making such persons a corporation; therefore the filing of it was a condition precedent."⁴ A body corporate, created for a special purpose, with limited powers, being a creature of the statute, must conform in its action to the law of its creation, and acts done contrary to such regulations are simply void.⁵ In statutory proceedings the statute must be substantially complied with; every act required which is jurisdictional, or of the essence of the proceeding, or pre-

¹ *People v. Schemerhorn*, 19 Barb. 558. See *Koch v. Bridges*, 45 Miss. 247; *Hurford v. Omaha*, 4 Neb. 336; *Best v. Gholson*, 89 Ill. 465; *People v. Cook*, 14 Barb. 290; 8 N. Y. 67; *Marsh v. Chesnut*, 14 Ill. 223; *Clark v. Crane*, 5 Mich. 151; *State v. McLean*, 9 Wis. 292; *Norwegian Street*, 81 Pa. St. 349; *McKune v. Weller*, 11 Cal. 49.

² *Cope v. Thames Haven, etc. Co.* 3 Ex. 841; *Diggle v. London, etc. R. R. Co.* 5 id. 442; *Des Moines v. Gilchrist*, 67 Iowa, 210; *Pittsburg v. Walter*, 69 Pa. St. 365; *Pensacola v. Reese*, 20 Fla. 437; *Norwegian Street*,

81 Pa. St. 349; *Chollar Mining Co. v. Wilson*, 66 Cal. 374; *Seymour v. Judd*, 2 N. Y. 464; *Childs v. Smith*, 55 Barb. 45.

³ *Childs v. Smith*, 55 Barb. 45.

⁴ *Id.*; *Bigelow v. Gregory*, 73 Ill. 197. See *Vanneman v. Young* (N. J.), 20 Atl. Rep. 53; *Cross v. Pinckneyville Mill Co.* 17 Ill. 54.

⁵ *Cope v. Thames Haven, etc. Co.* 3 Ex. 841; *Freud v. Dennett*, 4 C. B. (N. S.) 576; *Gordon v. Winchester Building Asso.* 12 Bush, 110; *Beckett v. Uniontown Building Asso.* 88 Pa. St. 211; *Working Men's Building Asso. v. Coleman*, 89 id. 428.

scribed for the benefit of the party to be affected thereby, must be done; the requirement is mandatory.¹ Of this nature is the certificate of a justice of the peace of the town where the parties reside, as to the death of an infant's father, required by a statute relative to the binding of infants as apprentices to be given, before the consent of the mother can be deemed sufficient, and the indorsement of such certificate on the indenture itself.² Every material requirement must be strictly observed in carrying out the laws for condemning private property to public uses, and the proceedings must show affirmatively on their face a substantial adherence to the course prescribed by the statute.³ Land cannot be so taken without compliance with the preliminary requirement to endeavor to agree with the owner upon the compensation.⁴

§ 457. Where work required by a municipal charter to be let by contract on competitive bidding has been done by day's work there is a fatal departure from the statute.⁵ An act requiring a preliminary notice for the benefit of persons to be affected; or the information of the public, when a statutory power is to be exercised, is mandatory.⁶ A provision prohibiting the passing or adopting of certain resolutions by the common council until two days after the publication thereof in a prescribed manner, held mandatory; that compliance was essential — jurisdictional.⁷ So one requiring a comptroller to publish notices stating when the time for redemption of land

¹ *United States v. Wyngall*, 5 Hill, 16; *Olcott v. Frazier*, id. 562; *Sharp v. Speir*, 4 Hill, 76; *Sharp v. Johnson*, id. 92; *In re Petition of Ford*, 6 Lans. 92; *Weed v. Lyon*, Walk. Ch. 77; *Galpin v. Abbott*, 6 Mich. 17; *In re Selby*, 6 Mich. 193; *O'Donnell v. McIntyre*, 37 Hun, 615; *Thurston v. Prentiss*, 1 Mich. 193; *Duanesburgh v. Jenkins*, 46 Barb. 294; *Wheeler v. Mills*, 40 id. 644; *Whitney v. Thomas*, 23 N. Y. 281; *Hascall v. Madison University*, 8 Barb. 174; *In re Petition of Folsom*, 2 T. & C. 55.

² *People v. Gates*, 57 Barb. 291; *People v. Adirondack Co.* id. 656.

³ *Kroop v. Forman*, 31 Mich. 144; *Bennett v. Drain Commissioner*, 56 id. 634.

⁴ *People v. Hillsdale, etc. T. Co.* 2 John. 190.

⁵ *Matter of Manhattan R. R. Co.* 102 N. Y. 301; *In re Emigrant Industrial Savings Bank*, 75 id. 388; *In re Merriam*, 84 id. 596, 609; *In re Weil*, 83 id. 543; *In re Lange*, 85 id. 307.

⁶ *Lane v. Burnap*, 39 Mich. 736; *Barnett v. Scully*, 56 id. 374; *Bennett v. Drain Comm'r*, id. 634; *Welker v. Potter*, 18 Ohio St. 85.

⁷ *In re the Petition of Douglass*, 46 N. Y. 42.

sold for taxes would expire. It is intended for the protection of the land-owner, and unless complied with no title will pass by the deed.¹

§ 458. Statutes which confer new right, privilege, etc.— Where a statute confers a new right, privilege or immunity the grant is strictly construed, and the mode prescribed for its acquisition, preservation, enforcement and enjoyment is mandatory. An instance of such legislation is that relating to married women, by which they may acquire and dispose of property, make contracts in regard to it, and assert other rights. Such statutes, providing the form and mode of exercising the rights thus given, are mandatory; they must be followed substantially to give validity to their acts.² The same is true in regard to copyrights.³ Where a statute provided for sealed bids to be received until a certain day, when they are required to be opened, all bids put in after that day are excluded.⁴

§ 459. Where an existing right or privilege is subjected to regulation by a statute in negative words, or those which import that it is only to be exercised in a prescribed manner, the mode so prescribed is imperative.⁵ A provision of the Wisconsin registry law was that "no vote shall be received at any annual election in this state, unless" certain previous conditions were complied with; it was held to be imperative; that all votes received in violation of the regulation should be rejected in an action to try the title to an office.⁶ Where the language of

¹ Westbrook v. Willey, 47 N. Y. 4:7; Cruger v. Dougherty, 43 id. 107; Doughty v. Hopa, 3 Denio, 594; 1 N. Y. 79.

² Bartlett v. O'Donoghue, 72 Mo. 563; Hoskinson v. Adkins, 77 id. 537; Bagley v. Emberson, 79 id. 139; Beckman v. Stanley, 8 Nev. 257; Shumaker v. Johnson, 35 Ind. 33; Mattox v. Hightshue, 89 id. 95; Callum v. Petigrew, 10 Heisk. 391; Leggate v. Clark, 111 Mass. 308; Armstrong v. Ross, 20 N. J. Eq. 109; Trimmer v. Heagy, 16 Pa. St. 484; Glidden v. Strupler, 52 id. 400; Dunham v. Wright, 53 id. 167; Graham v. Long, 65 Pa. St. 383; Miller

v. Wentworth, 82 id. 280; Innis v. Templeton, 95 id. 262; Miller v. Ruble, 107 id. 395; Montoursville Overseers v. Fairfield Overseers, 112 id. 99.

³ Wheaton v. Peters, 8 Pet. 591; Jollie v. Jaques, 1 Blatchf. 618; Baker v. Taylor, 2 id. 82; Newton v. Cowie, 4 Bing. 234; Avanzo v. Mudie, 10 Ex. 203; Brooks v. Cock, 3 Ad. & E. 141; Henderson v. Maxwell, L. R. 5 Ch. Div. 892; Mathieson v. Harrod, L. R. 7 Eq. 270.

⁴ Webster v. French, 12 Ill. 302.

⁵ Stayton v. Hulings, 7 Ind. 144; Union Bank v. Laird, 2 Wheat. 390.

⁶ State v. Hilmantel, 21 Wis. 506;

a statute is that no debt or contract thereafter incurred or made by a municipal corporation shall be binding . . . unless authorized by law or ordinance, and an appropriation sufficient to pay the same be previously made, it is mandatory, and the power to contract is limited accordingly.¹ The provisions of the statute of frauds are another notable instance of mandatory regulations. Where the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other manner, no doubt can be entertained that the command is imperative.² The enactment, for instance, of the metropolitan building act,³ that the walls of buildings shall be constructed of brick, stone or other incombustible material, though containing no prohibitory words, obviously prohibits by implication and makes illegal their construction with any other.⁴ A statute provided that an assignment for the benefit of creditors shall be duly acknowledged by the assignor, and the certificate thereof duly indorsed, before delivery to the assignee; that the assignor at the date of the assignment, or within twenty days thereafter, make and deliver to the judge of the county of his residence a schedule, verified by him, as prescribed by the act, containing a full and true account of all his creditors and their residences, as far as known; the sum owing to each creditor, and the nature of the debt and how it arose; the consideration of the debt and the place where it arose; a statement of any security for any debt, etc. This statute also required a bond from the assignee for faithful performance of the trust. These provisions were held mandatory.⁵

State v. Stumpf, 23 Wis. 630; *In re Election of McDonough*, 105 Pa. St. 488. See *Dale v. Irwin*, 78 Ill. 170, and *Clark v. Robinson*, 88 Ill. 498, where it was held that the negative provision or prohibition was directory.

¹ *Bladen v. Philadelphia*, 60 Pa. St. 464.

² *Endl. on St.* § 431.

³ 18 and 19 Vict. ch. 122, § 12.

⁴ *Id.*; *Stevens v. Gourley*, 7 C. B. (N. S.) 99.

⁵ *Juliand v. Rathbone*, 39 N. Y. 269.

Grover, J., delivering the opinion of the court, said: "In construing these two latter sections, the supreme court . . . applied the rule adopted in the construction of statutes, prescribing the time for the performance of official acts by public officers, in the performance of which the public have an interest. In construing these latter statutes it is well settled that, where the act prescribes a time for the performance of the act, without anything prohibiting the doing it after the time so fixed, the act shall

§ 460. Statutes which are permissive in form.— Where statutes are couched in words of permission, or declare that it

be valid if performed after the time prescribed. The reason for this construction is that the public, or some portion thereof, have an interest in the performance of the act, and, to prevent injury from the *laches* of the officer, the rule has been adopted. That class of cases holding that, where the common law confers a right or gives a remedy, and a statute is enacted conferring a new right or giving a new remedy, it will be so construed as not to take away the common-law right or remedy, unless it contains negative words showing that such was the legislative intent, was somewhat relied on; neither class is analogous to the present statute. The acts to be performed are by private persons, not public officers. The act creates no new right or remedy, but is designed to regulate an existing right merely. In construing such statutes the common-law rule, as laid down by the elementary writers, is to consider, first, what mischief, if any, resulted from the exercise of the common-law right; second, what is the remedy provided by the statute for such mischief; third, to give the statute such construction, if practicable, as will suppress the mischief and make the remedy efficient. Applying the rule to the present statute the mischief to be remedied is obvious: to prevent pretended assignments being made obstacles in the way of creditors. The first section provides that it shall be acknowledged, and the proof thereof certified before delivery. This court has held (*Hardmann v. Bowen*, 39 N. Y. 196) that an assignment delivered without such acknowledgment and certificate is void. This does not necessarily determine the effect of non-compliance

with the requirements of the two following sections, as the judgment may be upheld by the provision that the acknowledgment, etc., shall be made before the delivery of the assignment. But in the absence of this, I think the same construction should be given to the clause, which then would read, every conveyance made by a debtor in trust for his creditors shall be acknowledged. Experience has shown that debtors frequently, with a view to defraud their creditors, and make compositions with them advantageous to themselves, made general assignments of all their property in trust for creditors, giving no information of the character, situation or value of the property assigned, or the amount of the debts, residence of creditors, whether the debts were secured, and giving no information to a creditor to enable him to ascertain anything in relation to the value of the property assigned, or the amount and *bona fides* of the debts entitled to share in the proceeds of the property." After pointing out how compliance with the provisions of the statute in question would remedy these evils, the learned judge continued: "but, in case of failure so to comply, the assignment must be adjudged void. This construction will render these sections efficient in suppressing fraud, while that adopted by the supreme court [holding these provisions directory] renders them almost nugatory and useless." "To make," says Casseday, J., "a voluntary assignment for the benefit of, or in trust for, creditors, valid as against the creditors of the person making the same, it is essential that all the requirements of the statutes should be substantially com-

shall be lawful to do certain things, or provide that they may be done, their literal signification is that the persons, official or otherwise, to whom they are addressed are at liberty or have the option to do those things or refrain, at their election. Where it was provided that the capital stock of a bank might consist of a certain sum, the provision was held discretionary and not imperative.¹ Story, J., said: "The argument of defendants is, that 'may' in this section means 'must,' and reliance is placed upon a well-known rule in the construction of public statutes where the word 'may' is often construed as imperative. Without question such a construction is proper in all cases where the legislature means 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 the 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 of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions." The words in a statute, "it shall be lawful," of themselves, merely make that legal and possible which there would otherwise be no right or authority to do. Their natural meaning is permissive and enabling only. But there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to show that there is an obligation to comply.² The lord chancellor said: "The words 'it shall be lawful' confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to ex-

plied with." *Shakman v. Schluter*, 46 N. W. Rep. 542, 77 Wis. —, citing 46.

Fuhrman v. Jones, 68 Wis. 497; *Clark v. Lamoreux*, 70 id. 508; *Hanson v. Dunn*, 76 id. 455.

¹ *Minor v. Mechanics' Bank*, 1 Pet.

² *Julius v. Lord Bishop of Oxford*, L. R. 5 App. Cas. 214.

ercise that power when called on to do so. Whether the power is one coupled with a duty such as I have described is a question which according to our system of law, speaking generally, it falls to the court of queen's bench to decide, on an application for a *mandamus*. And the words 'it shall be lawful,' being according to their natural meaning permissive and enabling only, it lies on those, as it seems to me, who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation."¹

§ 461. On an indictment against church wardens for not making a rate to reimburse the constables, the statute appears to have used the words "may make a rate," but it was naturally held that the constables were entitled to be reimbursed, and that the church wardens, being made the depositaries of a power for that purpose, could not refuse to exercise it.² *Rex v. Havering Atte Bower*³ was the case of a *mandamus* in reference to the power granted by royal charter to the steward and suitors of a manor, giving them authority to hear and determine civil suits. It was held that this was in effect the establishment of a court for the public benefit, and that the steward and suitors of the manor were bound to hold the court. In *Macdougall v. Paterson*⁴ the question was whether the plaintiff in a county court action who had recovered his debt should not have his costs taxed and allowed in a particular way. The statute had provided there, that under the circumstances in which the plaintiff stood, the court might, by rule or order, direct that he might recover his costs; and Jervis, C. J., delivering the opinion of the court, stated that the conclusion to be drawn from the cases was 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 (that is, having by statute the right) to make the application. The case of *Morrisse v. Royal British Bank*⁵ was a case of the same kind, and decided that, under the words "it shall be lawful for the court,"

¹ Backwell's Case, 1 Vern. 152.

⁴ 11 C. B. 755.

² *Rex v. Barlow*, 2 Salk. 609.

⁵ 1 C. B. (N. S.) 67.

³ 5 B. & Ald. 691.

a creditor who had obtained judgment against a joint-stock banking company, and had failed to collect his debt against it, was entitled as of right to an execution against a shareholder on complying with the conditions imposed by the statute. In *Regina v. Tithe Commissioners*¹ a power was given to the tithe commissioners in dealing with certain land-owners to confirm agreements for commutations of tithe, under certain special circumstances and conditions. The court held, upon the construction of the whole statute, that if a case occurred, coming within the terms of the statute, the commissioners were bound to confirm the agreement there mentioned. In delivering the opinion of the court Mr. Justice Coleridge observed: "The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom, that in public statutes words only directory, permissive or enabling may have a compulsory force, where the thing to be done is for the public benefit or in advancement of public justice."

§ 462. There is much conflict of authority on this question in this country as well as in England, owing probably in great part to diverse circumstances distinguishing the cases and indicating the intention with which the permissive words were employed. It is believed that the conclusion reached in the cases mentioned in the preceding section is supported by a preponderating weight of reason and authority. In all cases where the words "it shall be lawful" or the word "may" or any equivalent permissive expression is employed with reference to a court of justice, and independently of any precise conditions expressed or implied, they give the tribunal jurisdiction, leaving it to exercise its discretion according to the requirements of justice in each particular case.² Where, with reference to conditions expressed or implied, or independent of any special circumstances, it is manifestly intended that the power should be exercised for the promotion of justice or the public good, such permissive words are imperative in the former case upon

¹ 14 Q. B. 459.

² *Re Bridgman*, 1 Drew. & S. at p. 169; *Rex v. Justices of Norfolk*, 4 B. & Ad. 238; *Castelli v. Groom*, 18 Q. B. 490; *Reg. v. Bishop of Oxford*, L. R. 4

Q. B. Div. 525; *Julius v. Bishop of Oxford*, L. R. 5 App. Cas. 214; *Beach v. Reynolds*, 64 Barb. 506; *Jarman, Ex parte*, L. R. 4 Ch. D. at p. 838.

the requisite conditions being shown, and in the other upon application by those entitled to invoke the exercise of the power, such circumstances as were needful having been considered by the legislature.¹ Permissive words in respect to courts or officers are imperative in those cases in which the public or individuals have a right that the power so conferred be exercised.² Such words, when used in a statute, will be construed as mandatory for the purpose of sustaining and enforcing rights, but not for the purpose of creating a right or determining its character; they are peremptory when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public interest or the rights of third persons.³ Where a statute confers power upon a corporation, to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words "power and authority" in such case mean duty and obligation.⁴ The words "authorized and empowered" are imperative in respect to a board of supervisors where parties improperly assessed are entitled, under conditions stated in the statute, to have taxes refunded by the act and decision of such board.⁵ The "power to levy all needful taxes and to pay and discharge all claims on or against the county which have been expressly or impliedly authorized by law" conveys authority and imposes the duty of providing for any local object sanctioned by the legislature.⁶

An act provided that a city council might, "if it believe the public good and the best interests of the city required it," levy

¹ Girdlestone v. Allan, 1 B. & C. 61; Cook v. Tower, 1 Taunt. 372; Barber v. Gamson, 4 B. & Ald. 281; Crake v. Powell, 2 E. & B. 210; Macdougall v. Paterson, 11 C. B. 755; Asplin v. Blackman, 7 Ex. 386; Reg. v. Williams, 2 C. & K. 1001; Bower v. Hope Life Ins. Co. 11 H. L. Cas. 389, 402; Marson v. Lund, 13 Q. B. 664; Morisse v. Royal B. Bank, 1 C. B. (N. S.) 67; Reg. v. Boteler, 4 B. & S. 989; Reg. v. Mayor of Harwich, 8 Ad. & E. 919; Roles v. Rosewell, 5 T. R. 538; Hardy v. Bern, id. 636; Tolmie v. Dean, 1 Wash. Ty, 47.

² Tarver v. Commissioners' Court, 17 Ala. 527; Mitchell v. Duncan, 7 Fla. 13; Reg. v. Adamson, L. R. 1 Q. B. Div. 201.

³ Banks, Ex parte, 28 Ala. 28; Rex v. Barlow, 2 Salk. 609; Johnston v. Pate, 95 N. C. 68.

⁴ Mayor, etc. v. Marriott, 9 Md. 160; Com'rs of Pub. Schools v. Co. Com'rs, 20 id. 449; Barnes v. Thompson, 2 Swan, 317.

⁵ People v. Board of Supervisors, 56 Barb. 452.

⁶ Com'rs of Pub. Schools v. Co. Com'rs, *supra*.

a tax to pay its funded debt; and it was held imperative; that a *mandamus* lay at the instance of a creditor to compel such a tax to be levied. The court said: "The discretion thus given cannot, consistently with the rules of law, be resolved in the negative. The rights of the creditor and the ends of justice demand that it should be exercised in favor of affirmative action."¹ In another case the same court said: "The conclusion to be deduced from the authorities is, that where power is given to public officers in the language of the act before us, or in equivalent language, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in effect peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty."² A statute provided that the certificate of tax sale *may* be substantially in the following form. The word *may* in this provision was held to be equivalent to *shall*.³ The use of both *may* and *shall* in the same provision may afford a very forcible indication of the intention. Thus, the use of words that are plainly compulsory in one aspect, and the use of others which literally are permissive in another, necessarily leads to an inference that the primary meaning is to be retained.⁴ It is provided by the 18 and 19 Vict., chapter 128, that "every vacancy in the burial board *shall* be filled up by the vestry within one month, and in case any such vestry shall neglect to fill up any such vacancy, the vacancy *may* be filled up by the burial board at any meeting thereof." It was held that the word "*may*" in this provision was not imperative.⁵ By a statute it was provided that in a certain event a bridge should "become a

¹Galena v. Amy, 5 Wall. 705, 709. ler v. Houlihan, 32 id. 486; Gilfillan

²Supervisors v. United States, 4 v. Hobart, 35 id. 185.

Wall. at pp. 446, 447; Hogan v. Dev-
lin, 2 Daly, 184.

⁴Wilb. on St. 204.

⁵Id.; Reg. v. Overseers of South

³Clark v. Schatz, 24 Minn. 300; Kel- Weald, 5 B. & S. 391.

public bridge and *may* be maintained by the county." "This," say the court, "is a direction to a public body (not an option to a private person or corporation), in the execution whereof the inhabitants of that county have a pecuniary interest. In fact the public generally may be said to have such an interest. Where persons or the public have an interest in having the act done by a public body, 'may' in such a statute means 'must.'¹ This rule must prevail where there is nothing that would evince a contrary intention in the statute or in the surrounding facts."² Whether merely permissive or imperative depends on the intention as disclosed by the nature of the act in connection with which the word is employed and the context.³

¹ *Newburgh Turn. Co. v. Miller*, 5 104; *Spangler v. Jacoby*, 14 Ill. 297; *John. Ch.* 113; *Malcolm v. Rogers*, 5 *Supervisors v. People*, 25 Ill. 181. *Cow.* 188.

³ *Lewis v. State*, 3 *Head*, 127; 1

² *Phelps v. Hawley*, 52 N. Y. 23, 27; *Kent's Com.* 463; *Minor v. Mechanics' Bank*, 1 *Pet.* 46, 64.

CHAPTER XVII.

RETROACTIVE STATUTES.

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| <p>§ 463. Generally regarded with disfavor.</p> <p>465. <i>Ex post facto</i> laws.</p> <p>467. Retrospective laws relating to criminal procedure.</p> <p>470. Change of punishment by subsequent legislation.</p> | <p>§ 471. Laws impairing obligation of contracts.</p> <p>476. Change of remedy.</p> <p>480. Vested rights inviolable.</p> <p>483. Curative statutes.</p> |
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§ 463. Generally regarded with disfavor.—Retrospective statutes relate to past acts and transactions. Retroactive statutes are those which operate on such acts and transactions and change their legal character or effect. Congress, as well as the states, are expressly forbidden by the federal constitution to pass any *ex post facto* law,¹ and the states are forbidden to pass any law impairing the obligation of contracts.² As retrospective laws are generally unjust and in many cases oppressive, they are not looked upon with favor. Statutes not remedial will therefore not be construed to operate retrospectively, even when they are not obnoxious to any constitutional objection, unless the intent that they shall do so is plainly expressed or made to appear.³ Where the intention

¹ Art. I, secs. 9 and 10.

² Id.

³ Hill v. Nye, 17 Hun, 467; Dash v. Van Kleeck, 7 Johns. 477; McMannis v. Butler, 49 Barb. 176; Railroad v. Murrell, 11 Heisk. 715; Goshen v. Stonington, 4 Conn. 220; Life Ins. Co. v. Ray, 50 Tex. 512; Fultz v. Fox, 9 B. Mon. 499; Taylor v. Rountree, 15 Lea, 725; Buckley, Ex parte, 53 Ala. 42; Barnes v. Mayor, etc. 19 id. 707; Bond v. Munro, 28 Ga. 597; State v. Bradford, 36 id. 422; Allhusen v. Brooking, L. R. 26 Ch. Div. 564; Evans v. Williams, 2 Drew. & Sm. 324; Marsh v. Higgins, 9 C. B.

551; Waugh v. Middleton, 8 Ex. 352; Couch v. McKee, 6 Ark. 484; Graham, Ex parte, 13 Rich. 277; Johnson v. Johnson, 52 Md. 668; Appeal Tax Court v. Western, etc. R. R. Co. 50 id. 274; Blanchard v. Sprague, 3 Sumn. 279; Duval v. Malone, 14 Gratt. 28; Succession of Deyraud, 9 Rob. (La.) 357; Nicholson v. Thompson, 5 id. 367; Guidry v. Rees, 7 La. 278; Gilmore v. Shuter, 2 Lev. 227; Warder v. Arell, 2 Wash. (Va.) 282; Wallace v. Taliaferro, 2 Call, 447; Elliot's Ex'r v. Lyell, 3 id. 268; Green v. Anderson, 39 Miss. 359; Commonwealth v. Hewitt, 2 H. & M. 181; Ryan v. Com-

as to being retrospective is doubtful the statute will be construed as prospective only; but where the language clearly indicates that it was intended to have a retrospective effect, it will be so applied.¹

§ 464. A statute should not receive such construction as to make it impair existing rights, create new obligations, impose new duties in respect of past transactions, unless such plainly appear to be the intention of the legislature.² In the absence of such plain expression of design, it should be construed as prospective only, although its words are broad enough in their literal extent to comprehend existing cases.³ A general provision that the statute of limitations shall run against the state will not be construed retrospectively.⁴ A statute of limitations which does not purport to include existing cases will be applied only to those which subsequently arise.⁵ Although there is no vested right in an office which may not be disturbed by legislative enactment, yet to take away the right thereto the terms of the statute in which the purpose is stated must be clear.⁶ A statute provided that every will devising or purporting to devise all the testator's real estate shall be construed to pass all the real estate which he was entitled to devise at the time of his death. It was held to be prospective merely and did not operate on wills previously executed, though the testator died after its enactment. Thus, the power of sale in such a will did not embrace lands acquired after the will was executed. It was enacted expressly in the same statute that it should not affect the construction of any will previously made.⁷ A new constitutional provision as to the ad-

monwealth, 80 Va. 385; *State v. John*, 477; *Wood v. Oakley*, 11 Paige, Judge Bermudez, 12 La. 352; *Miller v. Reynolds*, 5 Martin (N. S.), 665; *Butler v. Palmer*, 1 Hill, 324; *Snyder v. Orr v. Rhine*, 45 Tex. 345; *Crigler v. Alexander*, 33 Gratt. 674; *State v. Norwood*, 12 Md. 195; *Quilter v. Mapleson*, L. R. 9 Q. B. Div. 672.

¹ *State v. Norwood*, 12 Md. 195.

² *Green v. Anderson*, 39 Miss. 359.

³ *Crigler v. Alexander*, 33 Gratt. 674; *Campbell, etc. Co. v. Nonpareil, etc. Co.* 75 Va. 291; *Moon v. Durden*

2 Exch. 22; *Dash v. Van Kleeck*, 7

John, 477; *Wood v. Oakley*, 11 Paige,

400; *Johnson v. Burrell*, 2 Hill, 238;

Butler v. Palmer, 1 Hill, 324; *Snyder*

v. Snyder, 3 Barb. 621; *Hackley v.*

Sprague, 10 Wend. 114; *McMannis*

v. Butler, 49 Barb. 176; *In re Application of Prot. Ep. School*, 58 Barb.

161.

⁴ *State v. Pinckney*, 22 S. C. 484.

⁵ *Pitman v. Bump*, 5 Oregon, 17.

⁶ *People v. Green*, 58 N. Y. 295.

⁷ *Green v. Dikeman*, 18 Barb. 535;

Parker v. Bogardus, 5 N. Y. 309.

vanced age which should prevent the incumbents of certain judicial offices from retaining them was held prospective; it did not apply to persons in office at the time of its taking effect. An officer was elected under the old constitution by the provisions of which he was eligible; a new constitutional provision took effect on the same day, which was the first day of the official term; he was held in office so as to be within the exemption. It was held also that it was not intended by the new judiciary article to overthrow or disturb what had been lawfully done under and in pursuance of the constitution and laws previously existing.¹ A statute provided for review by a court of assessments on complaints, with power to require the amount erroneously assessed to be deducted. After an application had been made and proof taken, the law was changed. It was held that the new act did not apply to pending cases.²

The repeal of a statute giving jurisdiction takes away the right to proceed in pending cases.³ Section 711 of the Revised Statutes of the United States, which provides that the jurisdiction of the federal courts shall be exclusive of the courts of the several states as to all matters and proceedings in bankruptcy, was held not to affect a creditor's bill filed in a state court before the Revised Statutes were adopted.⁴ An act which extended for four years the time in which a magistrate's execution may be levied without renewal was held to be prospective and not to embrace executions which were issued before it was passed.⁵ A statute which gave the probate court the power to entertain bills of review of its own decrees and judgments was held to have no retrospective operation so as

¹ *People v. Gardner*, 59 Barb. 198.

² *In re* *Petition of Remsen*, 59 Barb. 317; *In re* *Petition of Eager*, 58 id. 557; *In re* *Petition of Treacy*, 59 id. 525.

³ *Butler v. Palmer*, 1 Hill, 324; *Assessor v. Osbornes*, 9 Wall. 567; *McCardle, Ex parte*, 7 id. 506; *Baltimore, etc. R. R. Co. v. Grant*, 98 U. S. 398; *South Carolina v. Gaillard*, 101 id. 433; *North Canal St. Road*, 10 Watts, 351; *Fenelon's Petition*, 7 Pa. St. 173;

Hampton v. Commonwealth, 19 id. 329; *Uwechlan T. Road*, 30 id. 156; *Illinois, etc. Canal v. Chicago*, 14 Ill. 334; *Macnawhoc Plantation v. Thompson*, 36 Me. 365; *Lamb v. Schottler*, 54 Cal. 319; *Smith v. Dist. Court*, 4 Colo. 235; *Hunt v. Jennings*, 5 Blackf. 195.

⁴ *Davis v. Lumpkin*, 57 Miss. 506. See *Farris v. Houston*, 78 Ala. 250; *Gholston v. Gholston*, 54 Ga. 285; *McCool v. Smith*, 1 Black, 459.

⁵ *Briggs v. Cottrell*, 4 Strob. 86.

to confer upon it jurisdiction of a bill to review a decree rendered prior to the passage of the act. A statute respecting the title of personal property, requiring the deeds thereof to be recorded in the county where the property is, was held not to apply to conveyances of such property made prior to the passage of the act.¹ The father of an illegitimate child, begotten under a former act, but born under a new act, may be compelled to contribute towards its support by a prosecution under the latter.² It results from this conservatism that retrospective laws will be strictly construed.³

§ 465. *Ex post facto* laws.—An authoritative exposition of *ex post facto* laws was given in an early case by the supreme court of the United States.⁴ Chase, J., said: “The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this: That the legislatures of the several states shall not pass laws after a fact done by a subject or citizen which shall have relation to such fact and shall punish him for having done it. . . . I do not think it was inserted to secure the citizen in his private rights of either property or contracts. . . . I will state what laws I consider *ex post facto* laws within the words and the intent of the prohibition: 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited.

¹ *Palmer v. Cross*, 1 Sm. & M. 48.

Moon v. Durden, 2 Ex. 22; *Edmonds*

² *Willets v. Jeffries*, 5 Kan. 470.

v. Lawley, 6 M. & W. 285; *McCowan*

³ *Hedger v. Rennaker*, 3 Met. (Ky.)

v. Davidson, 43 Ga. 480.

255; *Couch v. Jeffries*, 4 Burr. 2460;

⁴ *Calder v. Bull*, 3 Dall. 386, 390.

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 to their commencement, as statutes of oblivion or of pardon. They are certainly retrospective and literally, both concerning and after the facts committed. But I do not consider any law *ex post facto* within the prohibition that mollifies the rigor of the criminal law; but only those that create or aggravate the crime or increase the punishment, or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime." This construction of the constitutional prohibition has been repeatedly affirmed in later cases.¹ It is settled that the term applies only to criminal and penal cases, and was not intended to prevent retrospective legislation affecting civil rights of persons or property.²

§ 466. Any law is an *ex post facto* law within the meaning of the constitution if passed after the commission of a crime charged against a defendant, which, in relation to that offense or its consequences, alters the situation of the party to his disadvantage.³

§ 467. **Procedure.**— A statute relating to procedure is not for that reason beyond the reach of the constitutional inhibition of *ex post facto* laws. So long as subsequent laws do not

¹ Fletcher v. Peck, 6 Cranch, 138; McCowan v. Davidson, 43 Ga. 480; Wilson v. Ohio, etc. R'y Co. 64 Ill. 542; Cummings v. Missouri, 4 Wall. 326. Ex parte Garland, 4 Wall. 390; Kring v. Missouri, 107 U. S. 221.

³ Kring v. Missouri, 107 U. S. 221;

² Watson v. Mercer, 8 Pet. 88; Wilson v. Ohio, etc. R'y Co. 64 Ill. 542; United States v. Hall, 2 Wash. 366; Hopt v. Utah, 110 U. S. 574; Medterlee v. Matthewson, 2 Pet. 380; In re, 134 id. 160.

have the effect to deprive a defendant of any substantial right which he had touching his defense as the law stood when the offense was committed, nor alter his situation in relation to the offense or its consequences to his disadvantage, they are not *ex post facto* within the meaning of that inhibition.¹ A. was convicted of murder in the first degree, in Missouri, and the judgment of condemnation was affirmed by the supreme court of the state. A previous sentence pronounced on his plea of guilty of murder in the second degree, and subjecting him to imprisonment for twenty-five years, had on his own appeal been reversed. By the law of that state in force when the homicide was committed, this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered the law was changed, so that by force of its provisions if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime. It was held that as to this case the new law was an *ex post facto* law within the meaning of section 10, article I, of the constitution of the United States, and that he could not be again tried for murder in the first degree. Mr. Justice Miller, delivering the opinion of the court, said: "The constitution of Missouri so changes the rule of evidence that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide, is not received as evidence at all, or, if received, is given no weight in behalf of the offender. It also changes the punishment; for, whereas the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished, notwithstanding the former conviction."

In another part of his opinion the learned justice said: "It cannot be sustained, without destroying the value of the constitutional provision, that a law, however it may invade or modify the rights of a party charged with crime, is not an *ex post facto* law, if it comes within either of these comprehensive branches of the law designated as pleading, practice

¹ Id.; Cooley, C. L. 329, 330; Marion v. State, 20 Neb. 233; 29 N. W. Rep. 911.

and evidence. Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offense was committed, and such legislation not held to be *ex post facto*, because it relates to procedure?" . . . "And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." After reviewing the course of decision upon the associated clause prohibiting state legislation impairing the obligation of contracts, he continues: "Why is not the right to life and liberty as sacred as the right growing out of a contract? Why should not the contiguous and associated words in the constitution relating to retroactive laws on these two subjects be governed by the same rule of construction? And why should a law, equally injurious to rights of the party concerned, be under the same circumstances void in one case and not in the other?"

The point is noticed that when the accused pleaded guilty of murder in the second degree the new constitution was in force, which altered the effect of conviction for the lesser degree of the offense by declaring that it should not be an acquittal of a higher degree. The answer was: "Whether it is *ex post facto* or not relates to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an *ex post facto* law. If passed after the commission of the offense it is as to that *ex post facto*, though whether of the class forbidden by the constitution may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character."¹ This decision is of the greatest importance in its bearing upon the effect of retrospective laws relating to procedure. Such laws must be tried by the test which is enunciated in that case. Any retroactive law, though relating to procedure, which deprives the prisoner of any substantial

¹ *Kring v. Missouri*, 107 U. S. 221.

right that he would have by the law as it stood at the time when the imputed offense was committed, or which as to that offense or its consequences alters his situation to his disadvantage, is an *ex post facto* law, within the constitutional prohibition.¹ In two cases which originated in Missouri the supreme court of the United States held that a law which excluded a minister of the gospel from the exercise of his clerical function and a lawyer from practice in the courts unless each would take an oath that he had not engaged in or encouraged armed hostilities against the government of the United States was an *ex post facto* law because it punished, in a manner not before punished by law, offenses committed before its passage, and because it instituted a new rule of evidence in aid of conviction.² A statute which provided that "every surveyor who shall have wilfully and knowingly violated the instructions of the surveyor-general in not marking out the boundaries of lands formerly granted, and which are within surveys by him or them made," should be criminally prosecuted, was held *ex post facto*.³ A statute which purports to authorize the prosecution, trial and punishment of a person for an offense previously committed, and as to which all prosecution, trial and punishment were, at the time of its passage, already barred according to the pre-existing statute of limitations, is unconstitutional and void.⁴ The repeal of a general statute of amnesty is *ex post facto* as to offenses previously committed.⁵

§ 468. A statute rendering ineligible as a voter or officeholder any person who teaches or practices polygamy or belongs to an association encouraging such practice, or any other crime, and providing for a test oath, is not an *ex post facto* law.⁶ A statute which enlarges the class of persons who may be competent as witnesses is not *ex post facto* in its application to offenses previously committed, for it does not attach criminality to any act previously done, and which was inno-

¹ Cooley, C. L. 330.

² Cummings v. Missouri, 4 Wall. 277; Garland, Ex parte, id. 333.

³ State v. Solomons, 3 Hill (S. C.), 96.

⁴ Moore v. State, 43 N. J. L. 203.

See State v. Sneed, 25 Tex. (Supp.) 66; State v. Keith, 63 N. C. 140; Hartung

v. People, 26 N. Y. 167; Yeaton v. United States, 5 Cr. 281; In re Murphy, 1 Woolw. 141.

⁵ State v. Keith, 63 N. C. 140.

⁶ Wooley v. Watkins (Idaho), 22 Pac. Rep. 102.

cent when done, nor aggravate past crimes, nor increase the punishment therefor; nor does it alter the degree, or lessen the amount or measure of the proof made necessary to conviction for such offenses. Such alterations relate to modes of procedure only which the state may regulate at pleasure, and in which no one can be said to have a vested right. Mr. Justice Harlan, in enunciating this doctrine as the opinion of the court, said: "Alterations which do not increase the punishment, nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but — leaving untouched the nature of the crime and the amount or degree of proof essential to conviction — only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions, or trials thereafter had, without reference to the date of the commission of the offense charged."¹ It had been previously decided by the same court that "a law changing the place of trial from one county to another county in the same district, or to a different district from that in which the offense was committed or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment."² Statutes are not *ex post facto* which provide on account of past convictions a severer penalty for repetition of like offenses in the future.³ In such a case the court said: "We entertain no doubt of the constitutionality of this section, which promotes the ends of justice by taking away a purely technical objection, while it leaves the defendant fully and fairly informed of the nature of the charge against him, and affords him ample opportunity for interposing every meritorious defense. Technical and formal objections of this nature are not constitutional rights."⁴

¹ Hopt v. Utah, 110 U. S. 574; Rand v. Commonwealth, 9 Gratt. 738; Laughlin v. Commonwealth, 13 Bush. Ross' Case, 2 Pick. 165.

261. See Hart v. State, 40 Ala. 32.

² Gut v. State, 9 Wall. 35.

³ People v. Butler, 3 Cow. 347;

⁴ Commonwealth v. Hall, 97 Mass. 570.

§ 469. Acts for transferring criminal cases to another court,¹ or providing a new tribunal or giving a new jurisdiction to try offenses already committed,² do not abridge any right, and are not *ex post facto*. When the offense was committed the jury was by statute judge of the law. This act was repealed before the trial. Such change, as applied to that case, was held not *ex post facto*.³ Nor are treaties which provide for surrender of persons charged with previous offenses;⁴ nor statutes giving additional challenges to the government;⁵ statutes reducing the defendant's peremptory challenges,⁶ or modifying the grounds of challenge for cause;⁷ statutes authorizing amendments to indictments;⁸ statutes regulating the framing of indictments with a view to exclude redundancies and reduce them to essential allegations;⁹ statutes generally to facilitate the routine of procedure and preclude defendants from taking advantage of mere technicalities which do not prejudice them.¹⁰ Where there has been a legal conviction, but an erroneous judgment thereon, which resulted according to the law in a discharge of the convict on reversal of the judgment, a law enacted subsequent to the commission of the crime, that on such a reversal the court in which the conviction was had should, on return of the record, pass such sentence thereon as the appellate court should direct, was not an *ex post facto* law.¹¹

In such a case, Shaw, C. J., said, with reference to the provisions of such a statute: "They relate simply to errors in the imposition of sentences, in cases where neither the law nor the

¹ State v. Cooler, 8 S. E. Rep. 692.

⁶ Dowling v. State, 5 Sm. & M. 664;

² Commonwealth v. Phillips, 11 Pick. 28; Wales v. Belcher, 8 id. 508; State v. Sullivan, 14 Rich. L. 281; Ewing's Case, 5 Gratt. 701.

South v. State, 86 Ala. 617.

⁷ Stokes v. People, 53 N. Y. 164.

³ Marion v. State, 20 Neb. 233; 29 N. W. Rep. 911.

⁸ Lasure v. State, 19 Ohio St. 43; State v. Manning, 14 Tex. 402; Sullivan v. Oneida, 61 Ill. 242.

⁹ State v. Corson, 59 Me. 137; State v. Learned, 47 id. 426.

⁴ In re De Giacomo, 12 Blatchf. 391.

¹⁰ Commonwealth v. Hall, 97 Mass. 570; Lasure v. State, 19 Ohio St. 43.

⁵ Jones v. State, 1 Ga. 610; Walston v. Commonwealth, 16 B. Mon. 15; Walter v. People, 32 N. Y. 147; Warren v. Commonwealth, 37 Pa. St. 45; State v. Ryan, 13 Minn. 370; State v. Wilson, 48 N. H. 398; Commonwealth v. Dorsey, 103 Mass. 412.

¹¹ Ratzky v. People, 29 N. Y. 124; Jacquins v. Commonwealth, 9 Cush. 279.

evidence upon which the convictions rest is in any respect impugned, where the original process is right, the facts sufficient and regularly proved, and all the proceedings, up to the sentence, were right, and where the alleged error is in the sentence only. Now is this act retrospective or prospective? It certainly refers, in its terms, to the future, and to writs of error thereafter to be brought. It was competent for the legislature to take away writs of error altogether, in cases where the irregularities are formal and technical only, and to provide that no judgment should be reversed for such cause. It is more favorable to the party to provide that he may come into court upon the terms allowed by this statute than to exclude him altogether. This act operates like the act of limitations. Suppose an act were passed that no writ of error should be taken out after the lapse of a certain period. It is contended that such an act would be unconstitutional on the ground that the right of the convict to have his sentence reversed upon certain conditions had once vested. But this argument overlooks entirely the well-settled distinction between rights and remedies."¹ A subsequent statute requiring the defense of insanity to be specially pleaded at the arraignment is not *ex post facto*.² "It works no injustice," say the court, "to the defendant and deprives him of no substantial right which he would otherwise have. It is not, therefore, objectionable as an *ex post facto* [law] when applied, as in the present case, to a crime already committed at the time of its enactment, any more than a statute authorizing indictments to be amended, or conferring additional challenges on the government, or authorizing a change of venue, or other like statutes regulating the mode of judicial or forensic proceeding in a cause."³

¹ *Jacquins v. Commonwealth, supra.*

² *Perry v. State*, 87 Ala. 30.

³ *Id.* A statute of Iowa authorized the treatment of traffic in intoxicating liquors as a nuisance and subject to equitable proceedings for abatement. A later statute authorized the court to tax an attorney fee in such cases against the defendant and to close the building in which the nuisance had been maintained for one year. This latter law, applied to a

nuisance created or maintained prior to its passage, was held not *ex post facto*. "This," say the court, "is a civil not a criminal proceeding, and the provisions of the statute referred to relate to the remedy. The right to a particular mode of procedure is not a vested one which the state cannot change or abolish." *Drake v. Jordan*, 73 Iowa, 707; 36 N. W. Rep. 653, citing *Cooley*, C. L. (5th ed.) 349, 443; *Tilton v. Swift*, 40 Iowa, 80;

§ 470. Change of punishment by subsequent legislation.—

Obviously enough a retrospective statute would be *ex post facto* which increased in kind the punishment, or which added new elements of punishment. But there has been some diversity of decision where the punishment has been changed and on the whole, as judicially considered, has thus been made less severe.¹ It is believed, however, that at the present time, the doctrine accepted as most consonant to reason and authority is that laid down in *Hartung v. People*.² After the prisoner had been convicted of murder and sentenced to death, and while her case was pending on appeal, the legislature changed the law for the punishment of murder in general, so as to authorize the governor to postpone indefinitely the execution of the sentence of death, and to keep the party confined in the penitentiary at hard labor until he should order the full execution of the sentence or should pardon or commute it. The court of appeals held that this later law repealed all laws for punishment for murders theretofore committed. It was *ex post facto* as to that case, and could not be applied to it. Mr. Justice Denio said: "It is highly probable that it was the intention of the legislature to extend favor, rather than increased severity, towards this convict and others in her situation; and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases, rather than that which existed when they committed the offenses of which they were convicted. But the case cannot be determined upon such considerations. No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at that time. It would be useless to speculate upon the question whether this would be so upon the reason of the thing, and according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of which no one disputes. . . . It is

Wormley v. Hamburg, id. 25; *Equitable L. Ins. Co. v. Gleason*, 56 id. 48; *County of Kossuth v. Wallace*, 60 id. 508.

¹ See *Strong v. State*, 1 Blackf. 193;

Herber v. State, 7 Tex. 69; *McInturf v. State*, 20 Tex. App. 335; *Clarke v. State*, 23 Miss. 261; *State v. Arlin*, 39 N. H. 179; *Turner v. State*, 40 Ala. 21.

² 22 N. Y. 95.

enough to bring the law within the condemnation of the constitution that it changes the punishment, after the commission of the offense, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law. . . . It is enough, in my opinion, that it changes it in any manner, except by dispensing with divisible portions of it. . . . Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. Any change which should be referable to prison discipline or penal administration as its primary object might also be made to take effect upon past as well as future offenses; as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase or mitigate the severity of the punishment of the convict; but would not raise any question under the constitutional provision " against *ex post facto* laws."¹

In *Commonwealth v. McDonough*² it was held that a law passed after the commission of the offense, which mitigated the punishment, as regarded the fine and the maximum of imprisonment that might be inflicted, was an *ex post facto* law as to that case, because the minimum of imprisonment was made three months, whereas before there was no minimum limit to the court's discretion. This slight variance in the law was held to make it *ex post facto* and void as to that case, though the effect of the decision was to leave no law by which the defendant could be punished, and he was discharged, though found guilty of the offense. As to a defendant convicted of carrying a concealed weapon, an amended law was held *ex post facto*, first, because it abrogated the right which before existed of defending against the charge on the ground that he had good and suffi-

¹ *Shepherd v. People*, 25 N. Y. 406; *Petty*, 22 Kan. 477; *Garvey v. People*, 6 Cal. 534; *State v. Willis*, 66 Mo. 131; *Marion v. State*, 16 Neb. 340; *Carter v. Burt*, 12 Allen, 424; *Green State v. Cooler*, 8 S. E. Rep. 692.
² 13 Allen, 581.

cient reason to apprehend an attack, and made an act criminal which was not so at the time the amendment was passed, and because it changed but did not mitigate the punishment for the offense. "There has been much diversity of opinion," said Arnold, C. J., "as to what would constitute mitigation of punishment in such a case; but the view best sustained by reason and authority is, that a law changing the punishment of offenses committed before its passage is objectionable, as being *ex post facto*, unless the change consists in the remission of some separable part of the punishment before prescribed, or is referable to prison discipline or administration as its primary object.¹ It is enough for courts to render judgment according to law, without being required to determine the relative severity of different punishments, when there is no common standard in the matter by which the mind can be satisfactorily guided."²

§ 471. **Laws impairing obligation of contracts.**—The federal constitution provides that no state shall pass any law impairing the obligation of contracts.³ The obligation of a contract is the law which binds the parties to perform their agreement.⁴ It is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation.⁵ A contract valid at its inception cannot be made invalid, its construction changed, or the remedy thereon taken away or materially impaired, by subsequent legislation. The laws which exist at the time and place of the making of a contract determine its validity, construction, discharge, and measure of efficiency for its enforcement.⁶ A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity. A statute declaring that the word "ton" should thereafter be held, in prior as well as subsequent contracts, to

¹ Cooley, C. L. 329.

² *Lindzey v. State*, 65 Miss. 542; Cooley, C. L. 324.

³ Art. I, sec. 10.

⁴ *Ogden v. Saunders*, 12 Wheat. 213; *Sturges v. Crowninshield*, 4 id. 122.

⁵ *Louisiana v. New Orleans*, 102 U. S. 203.

⁶ *Green v. Biddle*, 8 Wheat. 92; *Og-*

den v. Saunders, *supra*; *Bronson v. Kinzie*, 1 How. 319; *McCracken v. Hayward*, 2 id. 612; *Walker v. Whitehead*, 16 Wall. 314; *Von Hoffman v. Quincy*, 4 Wall. 535; *Edwards v. Kearzey*, 96 U. S. 595; *Tennessee v. Sneed*, id. 69; *Mason v. Haile*, 12 Wheat. 370.

mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedment may be extinguished by a process of bankruptcy would involve its discharge; and a statute forbidding the sale of any of the debtor's property under a judgment upon such a contract would relate to the remedy. It cannot be doubted, either upon principle or authority, that each of such laws passed by a state would impair the obligation of the contract, and the last mentioned not less than the first.¹

§ 472. The prohibition has been considered as extending to contracts executed and executory; to conveyances of land as well as commercial contracts; to public grants from the state to corporations and individuals, as well as private contracts between citizens; to grants and charters in existence when the constitution was adopted and even before the revolution, and to compacts between the different states themselves.² "An executed contract," says Chief Justice Marshall, "as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is therefore always estopped by his own grant. Since, then, in fact, a grant is a contract, the obligation of which still continues, and since the constitution uses the general term 'contract,' without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized

¹ *Von Hoffman v. Quincy*, 4 Wall. 552.

² *Ogden v. Saunders*, 12 Wheat. 217; *Fletcher v. Peck*, 6 Cr. 87; *New Jersey v. Wilson*, 7 id. 164; *Terrett v. Taylor*, 9 id. 43; *Town of Pawlet v. Clark*, id. 292; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Society, etc. v. New Haven*, 8 id. 464, 481; *Green v. Biddle*, id. 1; *Davis v. Gray*, 16 Wall. 203; *Hall v. Wisconsin*, 103 U. S. 5; *Montgomery v. Kasson*, 16 Cal. 189; *Grogan v. San Fran-*

cisco, 18 id. 590; *People v. Platt*, 17 John. 195; *Rehoboth v. Hunt*, 1 Pick. 224; *Lowry v. Francis*, 2 Yerg. 534; *State v. Barker*, 4 Kan. 379, 435; *University of North Carolina v. Fay*, 1 Murph. 58; *Wabash, etc. Co. v. Beers*, 2 Black. 448; *State Bank v. Knoop*, 16 How. 369; *Hartman v. Greenhow*, 102 U. S. 672; *Hawkins v. Barney's Lessee*, 5 Pet. 457; *De Graff v. St. Paul, etc. R. R. Co.* 23 Minn. 144; *Robertson v. Land Commissioner*, 44 Mich. 274.

of their former estates, notwithstanding these grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances."¹ When a state becomes a party to a contract, the same rules of law are applied to her as to private persons under like circumstances.² So when the state, as such, or any lesser public corporation, makes a grant, or otherwise contracts, it is bound by its obligations by the same supreme and paramount rule.³

§ 473. Charters creating corporations for private purposes, laws giving franchises, bounties to encourage enterprise and expenditures, and patents and copyrights, or any exclusive privilege, are also inviolable contracts, the obligations of which are secured by the constitutional provision under consideration.⁴ It does not apply to municipal charters or offices; they are mere agencies of government, and, except as specially restrained by other constitutional restrictions, are within the continued exclusive control of the legislature.⁵ Counties and

¹ *Fletcher v. Peck*, 6 Cranch, 87, 136.

² *Davis v. Gray*, 16 Wall. 232.

³ *Cincinnati, etc. R. R. Co. v. Carthage*, 36 Ohio St. 631; *State v. Commissioners, etc.* 4 Wis. 414.

⁴ *Slaughter-House Cases*, 16 Wall. 36, 74; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Planters' Bank v. Sharp*, 6 How. 391; *Trustees of V. University v. Indiana*, 14 How. 268; *State Bank v. Knoop*, 16 How. 369; *State v. Heyward*, 3 Rich. 389; *Norris v. Trustees, etc.* 7 G. & J. 7; *Grammar School v. Burt*, 11 Vt. 632; *Commonwealth v. Cullen*, 13 Pa. St. 133; *Backus v. Lebanon*, 11 N. H. 19; *State v. Noyes*, 47 Me. 189; *Bank of Natchez v. State*, 6 Sm. & M. 599; *People v. Manhattan Co.* 9 Wend. 351; *Miners' Bank v. United States*, 1 Greene (Ia.), 553; *Bridge Co. v. Hoboken Co.* 13 N. J. Eq. 81; *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 227; *People v. Jackson, etc. Plank Road Co.* 9 Mich. 285; *Hawthorne v. Calef*, 2 Wall. 10; *Bank of*

the Dominion v. McVeigh, 20 Gratt. 457; *Bank of the State v. Bank of Cape Fear*, 13 Ired. 75; *Mills v. Williams*, 11 id. 558; *Wales v. Stetson*, 2 Mass. 148; *Nichols v. Bertram*, 3 Pick. 342; *King v. Dedham Bank*, 15 Mass. 447; *Turnpike Co. v. Davidson Co.* 3 Tenn. Ch. 396; *Sloan v. Pacific Co.* 61 Mo. 24; *Central Bridge v. Lowell*, 15 Gray, 106; *State v. Richmond, etc. R. R. Co.* 73 N. C. 527; *Detroit v. Plank Road Co.* 43 Mich. 140; *Bruffett v. G. W. R. R. Co.* 25 Ill. 353; *State v. Tombeckbee Bank*, 2 Stew. 30; *Edwards v. Jagers*, 19 Ind. 407; *People v. Board of State Auditors*, 9 Mich. 327.

⁵ *Butler v. Pennsylvania*, 10 How. 402; *United States v. Hartwell*, 6 Wall. 385; *Newton v. Commissioners*, 100 U. S. 559; *Koontz v. Franklin Co.* 76 Pa. St. 754; *French v. Commonwealth*, 78 Pa. St. 339; *Augusta v. Sweeney*, 44 Ga. 463; *Opinion of Justices*, 117 Mass. 603; *People v. Green*, 58 N. Y. 295; *Wyandotte v. Drennan*, 46 Mich. 478; *State v. Kalb* 50 Wis. 178; *People v. Power*, 25 Ill.

towns are, as to their corporate existence, completely within such control. They may be changed, altered, enlarged, diminished or extinguished by the mere act of the legislature.¹ And all private corporations and grantees of franchises are subject to the exercise of all essential powers of government—to taxation,² so far as not contracted away upon consideration, to the power of eminent domain and of police.³ The legislative power of a state, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. It may increase or diminish the salary or change the mode of compensation.⁴

§ 474. The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed therein, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.⁵ Where municipal bonds have been put upon the market as commercial paper, the rights of the parties thereto are to be determined according to the statutes of the state as they were then

187, 181; *Sangamon Co. v. Springfield*, 63 Ill. 66; *Borough of Dunmore's Appeal*, 52 Pa. St. 374; *Guilford v. Cornell*, 18 Barb. 615; *Guilford v. Supervisors*, 13 N. Y. 143; *Richland Co. v. Richland Center*, 59 Wis. 591.

¹ *Id.*; *Beckwith v. Racine*, 7 Biss. 142.

² *Cooley*, C. L. 340.

³ *Matter of Kerr*, 42 Barb. 119; *West River Br. Co. v. Dix*, 16 Vt. 446; 6 How. 507; *Enfield Toll Br. Co. v. Hartford*, etc. R. R. Co. 17 Conn. 40, 454; *Providence Bank v. Billings*, 4 Pet. 514; *Thorpe v. R. & B. R. R. Co.* 27 Vt. 140; *McCulloch v. Maryland*, 4 Wheat. 327; *Ohio*, etc. R. R. Co. v. *McClelland*, 25 Ill. 140; *Osborn v. Bank of U. S.* 9 Wheat. 738; *Indian-*

apolis, etc. R. R. Co. v. *Kercheval*, 16 Ind. 84; *Bradley v. McAtee*, 7 Bush, 667; *State v. Noyes*, 47 Me. 189; *Vanderbilt v. Adams*, 7 Cow. 349; *State v. Sterling*, 8 Mo. 697; *Calder v. Kurby*, 5 Gray, 597; *Hirn v. State*, 1 Ohio St. 15; *Toledo*, etc. R. R. Co. v. *Jacksonville*, 67 Ill. 37; *Chicago Packing Co. v. Chicago*, 88 Ill. 221; *People v. Commissioners*, 59 N. Y. 92; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, id. 659; *Stone v. Mississippi*, 101 U. S. 814.

⁴ *Butler v. Pennsylvania*, 10 How. 402; *Newton v. Commissioners*, 100 U. S. 559.

⁵ *Green v. Biddle*, 8 Wheat. 84; *Planters' Bank v. Sharp*, 6 How. 327.

construed by her highest court; and in a case involving those rights the supreme court of the United States will not be governed by any subsequent decision in conflict with that under which they became payable. The settled judicial construction of a statute, so far as contract rights were thereunder acquired, is as much a part of the statute as the text itself, and a change of decision is the same in effect on pre-existing contracts as a repeal or an amendment by legislative enactment.¹ A bankrupt or insolvent law of any state, which discharges both the person of the debtor and his future acquisitions of property, is not "a law impairing the obligation of contracts," so far as respects debts contracted subsequent to the passage of such law. But a certificate of discharge, under such a law, cannot be pleaded in bar of an action brought by a citizen of another state in the courts of the United States or of any other state than that where the discharge was obtained.² A law which authorizes the discharge of a contract by the payment of a smaller sum or at a different time or in a different manner than the parties have agreed impairs its obligation by substituting for the compact of the parties a legislative act to which they have never assented.³ "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 a 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 deed is to render the prior deed fraudulent and void as against a subsequent purchaser, it is not a law impairing the obligation of contracts."⁴ Contracts made in violation of some interest or revenue regulation may be validated by repeal of such regulation. In validating a void contract its obligations are not impaired, but legal impediments to its enforcement according to the intention of the parties are removed.⁵ A corporation charter is not subject to forfeiture for acts or omis-

¹ *Douglass v. Pike Co.* 101 U. S. 677.

⁵ *Satterlee v. Matthewson*, 2 Pet.

² *Ogden v. Saunders*, 12 Wheat. 213.

406; *Gibson v. Hibbard*, 13 Mich. 214;

See *Denny v. Bennett*, 128 U. S. 439.

Welch v. Wadsworth, 30 Conn. 149;

³ *Golden v. Prince*, 3 Wash. 313.

Wood v. Kennedy, 19 Ind. 68. See

⁴ *Jackson v. Lamphire*, 3 Pet. 296.

Baughner v. Nelson, 9 Gill, 299.

sions which were not causes of forfeiture at the time they occurred.¹ If, when a private corporation contracts a debt, its stockholders are under a certain liability by law, this law cannot, as to creditors becoming such while it existed, be repealed.² So a statute imposing liabilities on stockholders in a corporation to which they were not subject by the charter or general law under which the corporation was organized is unconstitutional.³

§ 475. The prohibition of the constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the state, and to those of its agents acting under its authority, as well as to those between individuals. And that obligation is impaired, in the sense of the constitution, when the means by which a contract at the time of its execution could be enforced — that is, by which the parties could be obliged to perform it — are rendered less efficacious by legislation operating directly upon those means.⁴ As long as a city exists, laws are void which withdraw or restrict her taxing power, so as to impair the obligation of her contracts made upon a pledge, expressly or impliedly given, that it shall be exercised for their fulfillment.⁵ A statute authorized a city to issue bonds to a specified amount, and, among other stringent provisions to secure their prompt payment, prohibited the subsequent issue of any other bonds, for any other purpose whatever, except in payment of such bonded debt. It was held that the holders of those bonds were entitled to the benefit of this restriction as a most material element of the contract, and that it was not subject to legislative repeal and amendment so as to impair the right or diminish the security without their consent.⁶ Where a municipal corporation has

¹ *People v. Jackson, etc.* Pl. R. Co. 9 Mich. 285.

² *Hawthorne v. Calef*, 2 Wall. 10; *Corning v. McCullough*, 1 N. Y. 47; *Story v. Furman*, 25 N. Y. 214; *Norris v. Wrenschall*, 34 Md. 492.

³ *Ireland v. Palestine, etc.* T. Co. 19 Ohio St. 369.

⁴ *Wolff v. New Orleans*, 103 U. S. 358, 367.

⁵ *Wolff v. New Orleans*, 103 U. S. 358; *State v. Madison*, 15 Wis. 30; *Von Baumbach v. Bade*, 9 id. 559; *Phelps v. Rooney*, id. 70.

⁶ *Smith v. Appleton*, 19 Wis. 468; *People v. Woods*, 7 Cal. 579; *People v. Bond*, 10 id. 563; *Munday v. Rahway*, 43 N. J. L. 338; *Board of Liquidation v. McComb*, 92 U. S. 531.

lawfully issued its bonds for specified sums, to bear interest at a stated rate, it cannot subsequently provide for taxing that debt, and for detaining a part of it for payment of the tax.¹

§ 476. **Change of remedy.**—The constitutional provision is a negation. No law is permitted to be enacted to impair the obligation of contracts. There is no mandate to enact laws for their enforcement. Remedies exist in the common law. And courts are supposed to exist throughout the states with competent jurisdiction. The practical question arises upon changes in the law—upon affirmative legislation. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment.² If legislation “tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, *qui cito dat bis dat*,—he who gives quickly gives twice,—has its counterpart in a maxim equally sound,—*qui serius solvit, minus solvit*,—he who pays too late, pays less. Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition.”³ The rule affirmed by the court of last resort is that in modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit or alter them, provided that it does not deny a remedy, or so embarrass it with conditions as to seriously impair the value of the right.⁴ If a particular form of proceeding is prohibited, and another is left or is provided which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired.⁵ A statutory provision requiring a plaintiff having an

¹ *Murray v. Charleston*, 96 U. S. 432.

² *Walker v. Whitehead*, 16 Wall. 314.

³ *Louisiana v. New Orleans*, 102 U. S. 203, per Field, J.

⁴ *Tennessee v. Sneed*, 96 U. S. 69; *Bronson v. Kinzie*, 1 How. 311; *Sturges v. Crowninshield*, 4 Wheat. 122; *Mason v. Haile*, 12 id. 370; *Green v. Biddle*, 8 Wheat. 92; *White v. Hart*, 13 Wall. 646.

⁵ *Id.*; *Huntzinger v. Brock*, 3 Grant's Cas. 243; *Evans v. Montgomery*, 4 Watts & S. 218; *McDaniel v. Webster*, 2 Houst. 305; *Read v. Bank*, 28 Me. 318; *Walker v. Whitehead*, 16 Wall. 314; *Von Hoffman v. Quincy*, 4 id. 552; *Pollard, Ex parte*, 40 Ala. 77; *Nelson v. McCrary*, 60 id. 301; *Collins v. East Tenn. etc. R. R. Co.* 9 Heisk. 841; *Williams v. Weaver*, 94 N. C. 134; *Cutts v. Hardee*, 38 Ga.

executory judgment against a city to file a certified copy thereof with the controller, preliminary to obtaining a warrant on the treasury in payment, does not impair the obligation, and is constitutional.¹

§ 477. A statute, passed after the making of a mortgage, which declared that the equitable estate of the mortgagor should not be extinguished for twelve months after a sale under a decree in chancery, and which prevented any sale unless two-thirds of the amount at which the property had been valued by appraisers should be bid therefor, impaired the obligation of the contract.² Taney, C. J., says: "Undoubtedly a state may regulate at pleasure the modes of proceeding in its courts in relation to 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 a 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 an 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. Whatever belongs merely to the remedy may be

850; *Stocking v. Hunt*, 3 Denio, 274; *v. Loyal*, 38 Ga. 531; *Hardeman v. Wolfkell v. Mason*, 16 Abb. Pr. 221; *Downer*, 39 id. 425; *Sneider v. Heidelberg*, 45 Ala. 126; *Maull v. Vaughn*, id. 134; *Farley v. Dowe*, id. 324; *Rockwell v. Hubbell's Adm'r*, 2 Doug. (Mich.) 197; *Sprecher v. Wakeley*, 11 Wis. 432; *In re Kennedy*, 2 S. C. 216; *Breitung v. Lindauer*, 37 Mich. Kan. 123; *Morse v. Goold*, 11 N. Y. 217.
 281; *Hill v. Kessler*, 63 N. C. 437; *Martin v. Hughes*, 67 N. C. 293; *Story v. Furman*, 35 N. Y. 214, 223-4; *Maxey*

¹ *Louisiana v. New Orleans*, 102 U. S. 203.

² *Bronson v. Kinzie*, 1 How. 311.

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.”¹ In *McCracken v. Hayward*² it was held that a law which provided that a sale should not be made of property levied on under an execution unless it would bring two-thirds of its appraised value was unconstitutional and void for like reason. Baldwin, J., delivered the opinion of the court, in the course of which he said: “In placing the obligation of contracts under the protection of the constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all state legislation which impaired the obligation, it was left to the states to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right; compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution.” In *Edwards v. Kearzey*³ it was held that an exemption of a homestead to the value of \$1,000, inserted in a new constitution adopted after a debt was contracted, impaired the obligation of the contract.⁴ Mr. Justice Swayne

¹ *Bronson v. Kinzie*, 1 How. 311.

² 96 U. S. 595.

² 2 How. 608.

⁴ *Gunn v. Barry*, 15 Wall. 610;

delivered the opinion of the court, and, alluding to what had been said by the chief justice in *Bronson v. Kinzie* relative to the power of the states to enact exemption laws, said: "The learned chief justice seems to have had in his mind the maxim *de minimis*, etc. Upon no other ground can any exemption be justified. Policy and humanity are dangerous guides in the discussion of a legal proposition.¹ He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it." He concludes with this declaration: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution and is therefore void."

§ 478. Legislation cannot be permitted to affect the construction of existing contracts. It is also held that the parties are entitled to a remedy as efficacious as that afforded when the contract was made. They are entitled to have the identical compact enforced, but not by the precise modes of procedure in force at its execution; only an equivalent remedy. There is some diversity of opinion as to the degree of change or departure from an exact equivalence there may be without conflicting with the constitution. What the suitor has a right to claim is the use of such remedy as may be adequate to his demand; not that he shall be permitted to enforce that demand in any special form or by any specific process.² No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights; every case must be determined on its own circumstances.³ Statutes taking away all remedy on existing contracts would be manifestly void.⁴ Where the changes in-

Homestead Cases, 22 Gratt. 266; *Lessley v. Phipps*, 49 Miss. 790.

¹ See *Von Hoffman v. Quincy*, 4 Wall. 553.

² *Tennessee v. Sneed*, 96 U. S. 73, 74.

³ *Von Hoffman v. Quincy*, 4 Wall. 553.

⁴ *Call v. Hagger*, 8 Mass. 430; *State v. Bank*, 1 S. C. 63; *Osborn v. Nicholson*, 13 Wall. 662; *West v. Sansom*, 44 Ga. 295; *Johnson v. Bond*, Hempst. 533; *Rison v. Farr*, 24 Ark. 161; *McFarland v. Butler*, 8 Minn. 116; *Jackson v. Butler*, id. 117.

roduced are intended and suited to clog, hamper and embarrass the proceedings to enforce the right, so as to destroy it, the statute is not a regulation of the remedy but impairs the obligation of the contract.¹ The remedy for the enforcement of a contract to which a party is entitled under state statutes in force when the contract was made cannot be subsequently taken away by decisions of the state courts giving those statutes an erroneous construction, any more than by subsequent legislation.² It has been held that the remedy is within the discretion of the states, and that a stay of execution for a reasonable time is not obnoxious to constitutional objection.³ An act passed in Wisconsin in May, 1862, exempting from civil process all persons who had or might volunteer or enroll themselves as members of any military company, mustered into the service of the United States or of that state, during their service, was held to be void as operating to impair the obligation of contracts; that it was within the recognized power of the states to change or modify the laws governing proceedings in courts of justice in regard to past as well as future contracts. That power was held to be unrestricted, except that a substantial remedy must be afforded according to the course of justice as it existed at the time the contract was made.⁴ A Pennsylvania act of like nature passed in 1861, and construed to mean a stay during the war or for three years and thirty days, unless it should sooner terminate, was sustained. "In such cases," says Woodward, J., "the rule is that the remedy becomes part of the obligation of the contract, and any subsequent statute which affects the remedy impairs the obligation, and is unconstitutional. *Bronson v. Kinzie*⁵ and *Billinger v. Evans*⁶ are illustrations of this rule. The time and manner in which stay laws shall operate are properly legislative questions, and will generally depend, said Judge Baldwin in *Jackson v. Lamphire*,⁷ "on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to the enactment."⁸ The learned judge added: "It is

¹ *Oatman v. Bond*, 15 Wis. 20.² *Butz v. Muscatine*, 8 Wall. 575.³ *Chadwick v. Moore*, 8 W. & S. 49.⁴ *Hasbrouck v. Shipman*, 16 Wis.⁵ 1 How. 322.⁶ 4 Wright, 327.⁷ 3 Pet. 280.⁸ *Breitenbach v. Bush*, 44 Pa. St.

impossible to separate this question of reasonableness from the actual circumstances in which the country found itself at the date of the war. . . . Now, if a stay of execution for three years would not be tolerated in ordinary times, did not these circumstances [then historically known] constitute an emergency that justified the pushing of legislation to the extreme limits of the constitution? . . . In view of the extraordinary circumstances of the case we cannot pronounce it unreasonable. We see in it no wanton or careless disregard of the obligation of contracts. . . . Another circumstance which bears on the reasonableness of the enactment is the provision which suspends all statutes of limitation in favor of the soldier during the time he is exempted from process. The provisions were reciprocal and both were reasonable."¹ Where an indefinite stay was provided for on the consent of two-thirds of the creditors, subject to no other than their discretion, the obligation of the contracts held by the non-consenting minority was impaired.²

A statute directing that execution upon any judgment thereafter obtained should not issue until two years after the rendition of the judgment, unless the plaintiff should indorse upon the execution that satisfaction may be received in notes of particular banks, was held unconstitutional. Such a law attempts to impair the obligation.³ An ordinance, ostensibly to change the

¹ See *Coxe's Ex'r v. Martin*, 44 Pa. St. 322.

² *Bunn v. Gorgas*, 41 Pa. St. 441.

³ *Townsend v. Townsend*, Peck, 1; S. C. 14 Am. Dec. 722. "The contract," says Haywood, J., "is made by the parties, and, if sanctioned by law, it promises to enforce performance should the party decline performance himself. The law is the source of the obligation, and the extent of the obligation is defined by the law in use at the time the contract is made. If this law direct a specific execution, and a subsequent act declares that there shall not be a specific execution, the obligation of the contract is lessened and impaired. If the law in being at the date of the contract gives

an equivalent in money, and a subsequent law says the equivalent shall not be in money, such act would impair the obligation of the contract. If the law in being at the date of the contract gives immediate execution on the rendition of the judgment, a subsequent act declaring that the execution shall not issue for two years would lessen or impair the contract equally as much in principle as if it suspended execution forever; in which case the legal obligation of the contract would be wholly extinguished. The legislature may alter remedies, but they must not, so far as regards antecedent contracts, be rendered less efficacious or more dilatory than those ordained by the law in

jurisdiction of the courts, provided that all contracts, without regard to the terms of payment made by the parties, should be payable in four annual instalments. This was held unconstitutional.¹ A law which changes the rules of evidence relates to the remedy and is not within the constitutional inhibition.² A law abolishing distress for rent has been sustained as applicable to existing leases.³ The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The states may abolish it whenever they think proper.⁴ A law which takes from a mortgagee a right of possession until after foreclosure;⁵ a law suspending the right to sue on

being when the contract was made, if such alteration be the direct and special object of the legislature, apparent in an act made for the purpose." See *Farnsworth v. Vance*, 2 Cold. 108; overruled by *Webster v. Rose*, 6 Heisk. 93. A Missouri act extended the time for return of executions to second term after issue, and prohibited sales till within fifteen days of the return day, and from justices' courts for twelve months. This was held unconstitutional. *Stevens v. Andrews*, 31 Mo. 205. In this case *Napton, J.*, said: "We do not question the power of the legislature over remedies, whether they relate to past or future contracts, provided the new remedy does not impair the obligation of the contract. It is the unquestioned power of the legislature to regulate the modes of proceedings in their courts, and prescribe the forms of process, both final and *mesne*, and their manner and time of execution. General laws relating to the modes of proceeding, both before and after judgment, would hardly be called in question, although applied to past contracts, merely because of some incidental effect favorable to the plaintiff or defendant in the suit. . . .

The act now under consideration is not designed to make any permanent

change in the forms of proceedings heretofore in use. On the contrary, the old system is retained; and the act, without changing the rule, attempts to suspend its operation. It recognizes the propriety of letting executions run for six months as the permanent rule, but it suspends this general regulation for two years and applies the suspension to past contracts." See *Webster v. Rose*, 6 Heisk. 93; *Burt v. Williams*, 24 Ark. 91; *Hudspeth v. Davis*, 41 Ala. 399; *Taylor v. Stearns*, 18 Gratt. 244; *Cutts v. Hardee*, 38 Ga. 350; *Aycock v. Martin*, 37 id. 124; *Sequestration Cases*, 30 Tex. 688; *Clark v. Martin*, 8 Grant's Cas. 393; *Johnson v. Higgins*, 3 Met. (Ky.) 566.

¹ *Jacobs v. Smallwood*, 63 N. C. 112.

² *Neass v. Mercer*, 15 Barb. 318; *Howard v. Moot*, 64 N. Y. 262.

³ *Van Rensselaer v. Snyder*, 9 Barb. 302; 13 N. Y. 299; *Guild v. Rogers*, 8 Barb. 502; *Conkey v. Hart*, 14 N. Y. 22.

⁴ *Von Hoffman v. Quincy*, 4 Wall. 552; *Beers v. Haughton*, 9 Peters, 359; *Ogden v. Saunders*, 12 Wheat. 230; *Sturges v. Crowninshield*, 4 id. 200.

⁵ *Mundy v. Monroe*, 1 Mich. 68; *Blackwood v. Van Vleet*, 11 id. 252.

the note or bond until after foreclosure;¹ extending redemption;² or shortening the redemption,³ impairs the obligation, and is within the prohibition under consideration.

§ 479. Limitation laws relate to the remedy and not directly to the right. They are not considered as elements entering into contracts, for, it is said, parties do not look forward to a breach of their agreements, but to the performance.⁴ A law passed subsequently to a contract, and changing the period of limitation, is not necessarily a law impairing its obligation.⁵ And ordinarily courts disregard the limitation fixed in the place of the contract or tort and enforce only that of the *lex fori*.⁶ Usually the bar of a statute limiting transitory actions is said not to extinguish the right, because such actions may be brought anywhere, while the statute can have no effect beyond the territory of the sovereign that enacted it; therefore the right remains to support such action whenever the *lex fori* will permit it to be brought. But even under these statutes, if the subject-matter of an action and the opposing claimants of the right have continued within the same jurisdiction until the statutory term has expired, the title is transferred to him in whose favor the bar exists, and that title will be recognized and upheld in the tribunals of other states as well.⁷

§ 480. **Vested rights inviolable.**—Vested rights cannot be destroyed, divested or impaired by direct legislation. Their protection is one of the primary purposes of government. They are secured by the bill of rights, and the constitutional limita-

¹ Poice v. Boice, 27 Minn. 371.

² Robinson v. Howe, 13 Wis. 341;
Dikeman v. Dikeman, 11 Paige, 484;
Greenfield v. Dorris, 1 Sneed, 550;
January v. January, 7 T. B. Mon. 542;
Goenen v. Schroeder, 8 Minn. 387.
But see Stone v. Bassett, 4 Minn. 298.

³ Cargill v. Power, 1 Mich. 369.

⁴ Moore v. State, 43 N. J. L. 203;
Ogden v. Saunders, 12 Wheat. 313;
Don v. Lippmann, 5 Cl. & Fin. 1.

⁵ 3 Parsons on Cont. 557.

⁶ Moore v. State, 43 N. J. L. 203;
Gulick v. Loder, 13 id. 68; Town-
send v. Jemison, 9 How. 407; Ed-
wards v. Kearzey, 90 U. S. 595;

Drake v. Wilkie, 30 Hun, 537; Cal-
houn v. Kellogg, 41 Ga. 231.

⁷ Moore v. State, 43 N. J. L. 203;
Newby's Adm'r v. Blakey, 3 H. & M.
57; Brent v. Chapman, 5 Cr. 358;
Shelby v. Guy, 11 Wheat. 361;
Thompson v. Caldwell, 3 Litt. 136;
Story's Conf. L. § 582b; Huber v.
Steiner, 2 Bing. N. C. 202; Don v.
Lippmann, 5 Cl. & Fin. 1; Brown v.
Wilcox, 14 S. & M. 127; Davis v.
Minor, 1 How. (Miss.) 183; Woodman
v. Fulton, 47 Miss. 682; Spencer v.
McBride, 14 Fla. 403. See Swickard
v. Bailey, 8 Kan. 507.

tions upon the exercise of the sovereign powers.¹ There is a vested right in property which one owns, and it cannot be legislated away.² A vested right is property as tangible things are when they spring from contract or the principles of the common law.³ There is a vested right in an accrued cause of action;⁴ in a defense to a cause of action;⁵ even in the statute of limitations when the bar has attached, by which an action for a debt is barred. That statute presumes evidence from length of time which cannot now be produced; payment which cannot now be proved.⁶ A person in adverse possession is no longer subject to action to disturb him; the one has a vested right to his defense, and the other a title with all its incidents and implications.⁷ And it is then secure against legislative interference.⁸

¹ *Wilson v. Wall*, 34 Ala. 288; *Davidson v. New Orleans*, 96 U. S. 97; *Baughner v. Nelson*, 9 Gill, 299; *Maxwell v. Goetschius*, 40 N. J. L. 383; *Collins v. East Tenn. etc. R. R. Co.* 9 Heisk. 841; *Dash v. Van Kleeck*, 7 John. 477; *Davis v. Minor*, 1 How. (Miss.) 183; *Dodge v. County of Platte*, 16 Hun, 285; *Wood v. Mayor, etc.* 34 How. Pr. 501; *State Bank v. Knoop*, 16 How. 369; *Dodge v. Woolsey*, 18 id. 331; *Greenough v. Greenough*, 11 Pa. St. 489; *De Chastellux v. Fairchild*, 15 Pa. St. 18; *Smith v. Louisville, etc. R. R. Co.* 62 Miss. 510; *Halloran v. T. etc. R. R. Co.* 40 Tex. 465; *Aldridge v. Tuscumbia, etc. R. R. Co.* 2 St. & P. 199; *Boatwright v. Faust*, 4 McCord, 439; *Municipality No. 3 v. Michoud*, 6 La. Ann. 605; *Steele v. Steele*, 64 Ala. 438; *Coosa R. Co. v. Barclay*, 30 Ala. 120; *Dillon v. Dougherty*, 2 Grant's Cas. 99; *State v. Squires*, 26 Iowa, 340; *Smith v. Van Gilder*, 26 Ark. 527.

² *Lane v. Nelson*, 79 Pa. St. 407; *Greenough v. Greenough*, 11 Pa. St. 489; *De Chastellux v. Fairchild*, 15 Pa. St. 18; *Norman v. Heist*, 5 W. & S. 171; *Aldridge v. Tuscumbia, etc. R. R. Co.* 2 Stew. & Port. 199;

Thistle v. Frostburg Coal Co. 10 Md. 129.

³ *Collins v. East Tenn. etc. R. R. Co.* 9 Heisk. 841; *Dillon v. Dougherty*, 2 Grant's Cas. 99.

⁴ *Smith v. Louisville, etc. R. R. Co.* 62 Miss. 510.

⁵ *Davis v. Minor*, 1 How. (Miss.) 183.

⁶ *Davis v. Minor*, *supra*.

⁷ *Knox v. Cleveland*, 18 Wis. 249; *Moore v. Luce*, 29 Pa. St. 260; *Lefingwell v. Warren*, 2 Black. 599.

⁸ *Moore v. State*, 43 N. J. L. 207; *Maxwell v. Goetschius*, 40 id. 383. A statute provided that by particular pleading a borrower might defend against a usurious loan to the extent of the usury. It was regarded as remedial, and though imposing a duty to pay the loan and lawful interest in accordance with the debtor's equitable duty, and made to operate retrospectively in derogation of the statute in force when the loan was made by which the contract was unlawful, it was held not obnoxious to the objection that it took away a vested right, for it was said there could be no vested right to do wrong. *Baughner v. Nelson*, 9 Gill, 299; *Town of Danville v. Pace*, 25

If a contract when made is a nullity, it cannot be validated by an act of the legislature, for that would be to impose a binding agreement where none existed.¹ A right of redemption once vested is a property right which can only be taken by due process of law; it cannot be abrogated by a legislative act.² A lien or other right once attached cannot be destroyed by repeal of the law under which it was derived.³ After a tax has been legally remitted it cannot be reimposed.⁴ When a right has been perfected by judgment the fruits of recovery cannot be diverted by new legislation,⁵ nor subjected to new hazard by reviving a new right to appeal,⁶ or some other mode of review.⁷ An act cannot affect the construction of the will of a testator who died before it was passed.⁸ Rights of a husband in the property of the wife when vested cannot be impaired by subsequent legislation.⁹ Treaties are the supreme law of the land; rights which have vested under them cannot be destroyed or affected by the action of either the legislative

Gratt. 1; *Satterlee v. Mathewson*, 16 S. & R. 191; *The Ironsides*, Lushington, 458.

¹ *N. Y. etc. R. R. Co. v. Van Horn*, 57 N. Y. 473.

² *Willis v. Jelineck*, 27 Minn. 18.

³ *Appeal Tax Court v. Western R. R. Co.* 50 Md. 274; *Warren v. Jones*, 9 S. C. 288; *Daniels v. Moses*, 12 S. C. 130; *Walton v. Dickerson*, 4 Rich. L. 568. The repeal of a general corporation law by a statute substantially re-enacting and extending its provisions does not affect the existence of corporations organized under it. *United Hebrew B. Assoc. v. Ben-shimol*, 130 Mass. 325.

⁴ *Municipality No. 8 v. Michoud*, 6 La. Ann. 605.

⁵ *Commonwealth v. Welch*, 2 Dana, 330.

⁶ *Hooker v. Hooker*, 10 Sm. & M. 599; *Halloran v. T. & N. etc. R. R. Co.* 40 Tex. 465; *Burch v. Newbury*, 10 N. Y. 374.

⁷ *Stewart v. Davidson*, 10 Sm. & M. 351; *Johnson v. Johnson*, 52 Md. 668.

⁸ *Boatwright v. Faust*, 4 McCord, 439. Statutes prescribing the requisites to be observed in making a will may be made to operate upon wills already made where the testator dies afterwards. *Sutton v. Chenault*, 18 Ga. 1; *Wynne v. Wynne*, 2 Swan, 405. So its provisions may be controlled and their validity affected by legislation intermediate the execution of the will and the death of the testator. *Magruder v. Carroll*, 4 Md. 335. See *Blackman v. Gordon*, 2 Rich. Eq. 43. Congress has power to authorize by special act the extension of a patent, notwithstanding the fact that the original patent had previously expired and the invention has been introduced to public use. A special act of congress authorizing the extension of a particular patent should be read and construed in connection with the general acts on the subject of patents. *Jordan v. Dobson*, 2 Abb. (U. S.) 398.

⁹ *Westervelt v. Gregg*, 12 N. Y. 203; *Bouknicht v. Epting*, 11 S. C. 71.

or the executive department of the government, nor by the rules of practice adopted by the officers of the latter department; nor are the courts in determining those rights to be controlled by the action or rules of practice of the other departments.¹ It is not within the power of the legislature to create a legal liability out of a past transaction, for which none arose by the law as it stood at the time of its occurrence.²

§ 481. Imperfect and inchoate rights are subject to future legislation and may be extinguished while in that condition;³ but such statutes, and others which involve expense or interfere with the existing course of business, will not be construed to affect such rights or existing cases, or impose new duties or disabilities in respect of past transactions, unless the intention to do so is clearly expressed — even remedial statutes.⁴

§ 482. Remedial statutes may apply to past transactions and pending cases.⁵ — Where statutory relief is prescribed for a cause which is continuous in its nature, as a statute of limitations, or desertion for a certain time as ground for divorce, if the cause continues after the statute goes into effect, the future continuance of the cause may be supplemented by the time it was continuous immediately before the act was passed to constitute the statutory period.⁶ No person can claim a

¹ *Wilson v. Wall*, 34 Ala. 288. See *Hauensteine v. Lynham*, 28 Gratt. 62.

² *Steele v. Steele*, 64 Ala. 438; *Coosa R. Co. v. Barclay*, 30 id. 120; *Frasier v. Town of Tompkins*, 30 Hun, 168; *N. Y. etc. R. R. Co. v. Van Horn*, 57 N. Y. 473; *Sutherland v. De Leon*, 1 Tex. 250.

³ *Cage v. Hogg*, 1 Humph. 48; *Tivey v. People*, 8 Mich. 128.

⁴ *State v. Bradford*, 36 Ga. 422; *Bond v. Munro*, 28 id. 597; *The Ironsides*, Lush. 458; *Allhusen v. Brookings*, L. R. 26 Ch. Div. 564; *Evans v. Williams*, 2 Drewry & Sm. 324; *Marsh v. Higgins*, 9 C. B. 551; *Waugh v. Middleton*, 8 Ex. 352; *Green v. Anderson*, 39 Miss. 359.

⁵ *Ludeling v. His Creditors*, 4 Martin (N. S.), 603; *Carnes v. Parish of*

Red River, 29 La. Ann. 608; *Kimbray v. Draper*, L. R. 3 Q. B. 160; *Wright v. Hale*, 6 H. & N. 227; *Singer v. Hasson*, 50 L. T. 326; *Excelsior Manufg Co. v. Keyser*, 62 Miss. 155; *Garrison v. Cheeney*, 1 Wash. T'y, 489; *Gardenhire v. McCombs*, 1 Sneed, 83; *Johnson v. Koochogey*, 23 Ga. 183; *Lockett v. Usry*, 28 id. 345; *Eskridge v. Ditmars*, 51 Ala. 245; *Sumner v. Miller*, 64 N. C. 688; *Bailey v. R. R. Co.* 4 Harr. 389; *Berry v. Clary*, 77 Me. 482; *Costa Rica v. Erlanger*, L. R. 3 Ch. Div. 69; *Duanesburgh v. Jenkins*, 57 N. Y. 191.

⁶ *McCraney v. McCraney*, 5 Iowa, 232; *Benkert v. Benkert*, 32 Cal. 467; *Thornburg v. Thornburg*, 18 W. Va. 522; *Spencer v. McBride*, 14 Fla. 403; *Ross v. Duval*, 13 Pet. 45; *Hare v. Hare*, 10 Tex. 355; *Greenlaw v. Green-*

vested right in any particular mode of procedure for the enforcement or defense of his rights.¹ Where a new statute deals with procedure only, *prima facie* it applies to all actions — those which have accrued or are pending, and future actions.² If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings.³ But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened.⁴ A remedy may be provided for existing rights, and new remedies added to or substituted for those which exist.⁵ Every case must to considerable extent depend on its own circumstances. General words in remedial statutes may be applied to past transactions and

law, 12 N. H. 200; *Clark v. Clark*, 10 id. 391; *Crossman v. Crossman*, 33 Ala. 486; *Bailey v. Bailey*, 21 Gratt. 43.

¹ *Id.*

² *Chaffe v. Aaron*, 62 Miss. 29; *Wright v. Hale*, 6 H. & N. 227; *Edmonds v. Lawley*, 6 M. & W. 285; *Kimbray v. Draper*, L. R. 3 Q. B. 160; *Lawrence R. R. Co. v. Mahoning Co.* 35 Ohio St. 1; *Matter of Beams*, 17 How. Pr. 459; *Sampeyreac v. United States*, 7 Pet. 222; *Dobbins v. Bank*, 113 Ill. 553; *People v. Tibbets*, 4 Cow. 384; *People v. Supervisors*, 63 Barb. 83; *Lane v. Nelson*, 79 Pa. St. 407; *Gardner v. Lucas*, L. R. 3 App. Cas. 582; *People v. Peacock*, 98 Ill. 172; *Rockwell v. Hubbell*, 2 Doug. (Mich.) 197; *Henschall v. Schmidt*, 50 Mo. 454; *Jacquins v. Clark*, 9 Cush. 279; *Blair v. Cary*, 9 Wis. 543; *Commonwealth v. Bradley*, 16 Gray, 241; *Walston v. Commonwealth*, 16 B. Mon. 15; *McNamara v. Minn. etc. R. R. Co.* 12 Minn. 388; *Rivers v. Cole*, 38 Iowa, 677.

³ *Ludeling v. His Creditors*, 4 Mar-

tin (N. S.), 603; *Scott v. Duke*, 3 La. Ann. 253; *Commercial Bank v. Markham*, id. 698; *Featherstonh v. Compton*, 8 id. 285; *State v. Brown*, 30 id. 78; *Tennant v. Brookover*, 12 W. Va. 337.

⁴ *Culver v. Woodruff Co.* 5 Dill. 392; *Ewing's Case*, 5 Gratt. 701; *Trist v. Cabenas*, 18 Abb. Pr. 143; *Womack v. Womack*, 17 Tex. 1; *Litch v. Brotherhood*, 25 How. Pr. 416; *Tennant v. Brookover*, *supra*; *Newsom v. Greenwood*, 4 Oregon, 119; *State v. Solomons*, 3 Hill (S. C.), 96; *Bates v. Stearns*, 23 Wend. 482; *Bedford v. Shilling*, 4 S. & R. 401; *Butler v. Palmer*, 1 Hill, 324; *Williams v. Smith*, 4 H. & N. 559; *Palmer v. Conly*, 4 Denio, 374; *Satterlee v. Matthewson*, 2 Pet. 380.

⁵ *Anonymous*, 2 Stew. 228; *Commonwealth v. Hall*, 97 Mass. 570; *Sutherland v. De Leon*, 1 Tex. 250; *Davis v. Branch Bank*, 12 Ala. 463; *Coosa R. Co. v. Barclay*, 30 Ala. 120; *City v. R. R. Co.* 35 La. Ann. 679; *Buckley, Ex parte*, 53 Ala. 43; *Society, etc. v. Wheeler*, 2 Gall. 139.

pending cases, according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness and justice.¹

§ 483. **Curative statutes.**—The legislature has power to pass healing acts which do not impair the obligation of contracts nor interfere with vested rights.² They are remedial by curing defects, and adding to the means of enforcing existing obligations.³ The rule in regard to curative statutes is that if the thing omitted or failed to be done, and which constitutes the defect sought to be removed or made harmless, is something which the legislature might have dispensed with by a previous statute, it may do so by a subsequent one. If the irregularity consists in doing some act, or doing it in the mode which the legislature might have made immaterial by a prior law, it may do so by a subsequent one.⁴ On this principle the legislature may validate contracts made *ultra vires* by municipal corporations.⁵ It may thus ratify a contract of a municipal

¹ *Tilton v. Swift*, 40 Iowa, 78; *Miller v. Graham*, 17 Ohio St. 1; *Riggins v. State*, 4 Kan. 173; *State v. Smith*, 38 Conn. 397; *Mabry v. Baxter*, 11 Heisk. 682; *Mann v. McAtee*, 37 Cal. 11; *Chaney v. State*, 31 Ala. 342; *Merwin v. Ballard*, 66 N. C. 398; *Simco v. State*, 8 Tex. App. 406; *Bradford v. Barclay*, 42 Ala. 375; *Duanesburgh v. Jenkins*, 57 N. Y. 191.

² *Green v. Abraham*, 43 Ark. 420.

³ *Jarvis v. Jarvis*, 3 Edw. Ch. 462; *Satterlee v. Matthewson*, 2 Pet. 380.

⁴ *Green v. Abraham*, *supra*; *State v. Squires*, 26 Iowa, 340; *Watson v. Mercer*, 8 Pet. 88; *Chesnut v. Shane*, 16 Ohio, 599; *Newman v. Samuels*, 17 Iowa, 518; *Journey v. Gibson*, 56 Pa. St. 57; *Shonk v. Brown*, 61 id. 327; *Dulany v. Tilghman*, 6 G. & J. 461; *Dentzel v. Waldie*, 30 Cal. 138; *Johnson v. Richardson*, 44 Ark. 365; *Barnet v. Barnet*, 15 S. & R. 72; *Tate v. Stooltzfoos*, 16 id. 35; *Jackson v. Gilchrist*, 15 John. 89; *Raverty v. Fridge*, 3 McLean, 230; *Goshorn v. Purcell*, 11 Ohio St. 641; *Davis v.*

State Bank, 7 Ind. 316; *Thornton v. McGrath*, 1 Duv. 349; *State v. Town of Union*, 33 N. J. L. 350; *Jacksonville v. Basnett*, 20 Fla. 525; *Re Van Antwerp*, 1 T. & C. 423; 56 N. Y. 261; *Bass v. Mayor, etc.* 30 Ga. 845; *Honey v. Clark*, 37 Tex. 686; *Montgomery v. Hobson*, Meigs, 437; *Constantine v. Van Winkle*, 6 Hill, 177; *Van Winkle v. Constantine*, 10 N. Y. 422; *Hardenburgh v. Lakin*, 47 N. Y. 109; *Davis v. Van Arsdale*, 59 Miss. 367; *Jackson v. Dillon*, 2 Overt. 261; *Matthewson v. Spencer*, 3 Sneed, 513; *O'Brian v. County Commissioners*, 51 Md. 15; *Washington v. Washington*, 69 Ala. 281; *Vaughan v. Swayzie*, 56 Miss. 704; *People v. Supervisors*, 20 Mich. 95; *People v. Mitchell*, 35 N. Y. 551; *People v. McDonald*, 69 id. 362; *Duanesburgh v. Jenkins*, 57 N. Y. 191; *Morris v. State*, 62 Tex. 728.

⁵ *O'Brian v. County Commissioners*, 51 Md. 15; *Bass v. Mayor, etc.* 30 Ga. 845; *Single v. Supervisors*, 38 Wis. 363; *Brown v. Mayor, etc.* 63 N. Y. 239.

corporation for a public purpose. Municipal corporations are agencies of the state through which the sovereign power acts in matters of social concern. It may confer upon them, subject to such constitutional restraints as exist, power to enter into contracts, and may annex such limitations and conditions to its exercise as, in its discretion, it deems proper for the protection of the public interests. The right to limit involves the power to dispense with limitations; and in such case as the legislature could have authorized a contract without previous advertisement, or competitive bidding, it may affirm a contract made, although made originally without authority of law.¹ The legislature may establish contracts and deeds defectively executed, acknowledged or recorded,² including those of married women;³ marriages may be validated and offspring legitimated;⁴ also defective sales of property,⁵ defective assessments of taxes,⁶ and municipal ordinances irregularly adopted.⁷

§ 484. The important question on such statutes is, would the acts done be effectual for the purpose intended, if a law, made prior to those acts, had directed them as they were done; whether the statute alone made them essential for that purpose. Acts which are jurisdictional and could not be antecedently dispensed with by statute cannot be made immaterial by subsequent legislation.⁸ Rights resting upon such curable defects alone cannot be deemed meritorious and are not entitled to the protection accorded to vested rights. Where they are

¹ *Id.*; *In re Van Antwerp*, 56 N. Y. 261.

² *Jackson v. Dillon*, 2 Overt. 261; *Montgomery v. Hobson*, Meigs, 437; *Jackson v. Gilchrist*, 15 John. 89; *Hardenburgh v. Lakin*, 47 N. Y. 109; *Atwell v. Grant*, 11 Md. 101; *Cutler v. Supervisors*, 56 Miss. 115; *Hughes v. Cannon*, 2 Humph. 589.

³ *Constantine v. Van Winkle*, 6 Hill, 177; *Van Winkle v. Constantine*, 10 N. Y. 422; *Johnson v. Richardson*, 44 Ark. 365; *Watson v. Mercer*, 8 Pet. 88. But see *Alabama Ins. Co. v. Boykin*, 38 Ala. 510.

⁴ *Honey v. Clark*, 37 Tex. 666;

Washington v. Washington, 69 Ala. 281.

⁵ *Davis v. State Bank*, 7 Ind. 316; *Thornton v. McGrath*, 1 Duv. 349; *Power v. Penny*, 59 Miss. 5.

⁶ *Davis v. Van Arsdale*, 59 Miss. 367; *People v. McDonald*, 69 N. Y. 262; *Jacksonville v. Basnett*, 20 Fla. 525; *Cochran v. Baker*, 60 Miss. 282; *Franklyn v. Long Island City*, 32 Hun, 451; *Vaughan v. Swayzie*, 56 Miss. 704.

⁷ *State v. Town of Union*, 33 N. J. L. 350; *Walpole v. Elliott*, 18 Ind. 258; *Schenley v. Commonwealth*, 36 Pa. St. 29; *Morris v. State*, 62 Tex. 728.

⁸ *State v. Town of Union*, *supra*.

relied on as an excuse for repudiating contracts, executory or executed, they are not within the protection of the constitution.¹ If the jurisdictional facts are wanting the proceeding is a nullity and cannot be cured by any subsequent legislation, for no prior legislation could make it effectual. Thus, for example, in *Lane v. Nelson*:² "It is settled by a current of authority that the legislature cannot by an arbitrary edict take the property of one man and give it to another; and that when it has been attempted to be taken by a judicial proceeding, as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the legislature to infuse life into that which is dead."³

¹ *Baughner v. Nelson*, 9 Gill, 299; *S.* 171; *Greenough v. Greenough*, 11 O'Brian v. County Commissioners, Pa. St. 489; *De Chastellux v. Fairchild*, 15 id. 18; *Menges v. Dentler*, 3 Wall. 327; *People v. Mitchell*, 35 33 id. 495; *Bagg's Appeal*, 43 id. 512; *N. Y.* 551; *Johnson v. Richardson*, 44 *Schafer v. Eneu*, 54 id. 304; *Shonk v. Ark.* 365; *Green v. Abraham*, 43 id. *Brown*, 61 id. 320; *Richards v. Rote*, 420. 68 id. 248; *Hegarty's Appeal*, 75 id. 503.

² 79 Pa. St. 407.

³ Citing *Newman v. Heist*, 5 W. &

INDEX.

ABATEMENT —

of action, how prevented, by liberal construction of statute of limitations, in case of death or marriage of party, § 424.

ABSURDITY —

arguments based on, out of place against plainly expressed intention, §§ 238, 324.

general words may be restricted to avoid, §§ 246, 258, 410.

literal construction may be departed from to avoid, §§ 323, 324.

and if ambiguous or uncertain, will be avoided by construction, § 324.

ACCESSION TO OFFICE —

courts take judicial notice of, § 298.

ACTION —

plaintiff should have title at commencement of, § 148.

retrospective vesting of title presumed not intended to affect pending action, § 148.

statutes for limitation of, how construed, §§ 424-426.

statutes regulating procedure apply to pending, § 482.

ACTUS NON FACIT REUM, NISI MEUS SIT REA, §§ 354, 355.

AFFIDAVIT —

when required of a party may be made by attorney of corporation, § 420.

statutory direction to verify assessment roll by, directory, § 452.

AFFIRMATIVE STATUTES —

what are, § 202.

their operation, §§ 202-204.

how form affects construction as to being directory or mandatory, § 447.

AMBIGUITY —

• in public grants resolved in favor of government, §§ 378-380.

AMENDATORY ACTS —

constitutional regulations, § 131.

they are mandatory, § 131.

purpose of, § 131.

make no change in the effect of amendment, § 133.

require re-enactment of amended section, § 132.

even when a subdivision clause is amended, § 132.

not necessary to restate old act or section amended, § 132.

an erroneous recital of it, surplusage, § 132.

requirement when act revised, § 132.

AMENDATORY ACTS (continued) —

- a section amended to "read as follows," §§ 132, 133, 137.
 - repeals what is not embraced in amended form, § 133.
 - new matter thus introduced operates only from the taking effect of amendatory act, § 133.
 - old matter re-enacted is continued in force without interruption, §§ 133, 134, 142.
 - operates prospectively by virtue of re-enactment, § 133.
 - repeal of amendatory act repeals same matter in amended act, § 133.
 - general words of time construed distributively, § 133.
 - how statute amended operates prospectively, § 133.
 - when repeal and re-enactment not simultaneous, § 134.
 - constitutional regulation may apply to independent act which is intended to be amendatory, § 135.
 - implied amendments by independent acts, § 135.
 - not within the mischief intended to be remedied, § 135.
 - nor is a statute which furnishes a rule of construction, § 135.
 - nor one referred to for procedure, § 135.
 - of two constructions warranted by the words, that will be adopted which best harmonizes with the general tenor and spirit of amended act, § 323.

AMENDMENTS —

- admissible during process of enactment of bill, § 49.
- must be germane to subject of bill, § 49.
- concurrence in, made by other house, does not require yeas and nays, § 49.
- construction of remedial statute for, of records of courts, § 419.

ANIMALS —

- right to detain trespassing till charges paid, etc., strictly construed, § 398.

APPEAL —

- right of, to one who thinks himself aggrieved, not extended to default judgment, § 339.
- statutes prescribing method of, strictly construed, § 394.
- when recognizance required of appellant by statute, how construed as to corporations, § 421.
- statutes liberally construed which give a right of, §§ 440, 442.
- notice to give effect to limitations for, § 369.

APPROPRIATION ACT —

- provisions in, presumed to have temporary effect like the act itself, § 218.

ARBITRATION —

- statutes providing for and regulating, liberally construed, §§ 401, 439.

ASSESSMENT —

- affidavit to verify, not imperative, § 452.

ASSIGNMENTS —

for benefit of creditors, statutory regulations concerning, to prevent fraud, mandatory, § 459.

ASSOCIATED WORDS —

effect of, in construction, §§ 262, 266.

ATTACHMENT —

statute giving writ of, strictly construed, § 393.
and to be strictly followed, § 393.

ATTORNEYS-AT-LAW —

females not eligible by construction of the general word "citizen," § 321.

AUTHORITY —

statute should, if possible, be so construed as to bring it within the legislative power, § 423.

BASTARDS —

acts legitimating, liberally construed, § 442.
father of, affected by statute made after begetting, requiring contribution for support of, § 464.

BILL — ACT — ORDINANCE —

definitions, §§ 60, 61, 64.

BLACKSTONE, SIR WM. —

his views of the union of the fundamental powers, § 2.

BOARD OF SUPERVISORS —

statute requiring signing record of their proceedings, directory, § 451.

BONA FIDE PURCHASERS —

statutes for the protection of, and creditors, not applicable to others, § 429.

BOUNDARIES —

courts take notice of boundaries of state, § 298.

BOUNTY —

liberal construction of, § 442.

BRIDGE —

franchise to build not construed to be exclusive, § 378.
grant of right to build does not include right to obstruct navigation, § 386.
power to municipal corporation to lay out highways does not include right to obstruct navigation by, § 386.

BUILDING MATERIAL —

regulations concerning, in fire limits, mandatory, § 459.

BURDEN —

statute imposing, or exempting from common, strictly construed, §§ 361-364.

BY-LAWS —

not judicially noticed, § 296.
penalty of, may be incurred without criminal mind, § 355.

CALENDAR —

courts take notice of, § 302.

CASUS OMISSUS —

can never be supplied by court, §§ 430, 433.

not the province of courts to supply defective enactments, § 431.

act providing for companies to make and supply gas does not authorize them to supply natural gas, § 433.

CENSUS —

courts take judicial notice of the results of, when official, § 298.

CERTIORARI —

statute granting, liberally construed, § 440.

CHARGE TO JURY —

remedial provision for filing of record, § 437.

requirement to be in writing, how construed, § 452.

CHARTER —

of corporation, serves twofold purpose: to create and define the agreement between members, § 382.

is the measure of the corporate powers, § 382.

CHILD —

how construed, § 253.

illegitimate, when entitled to statutory rights granted to, § 371.

includes grandchild, § 253.

CITIZEN —

comprehensively understood includes females, but they may be excluded in considering existing laws and their policy, § 321.

CLAIM —

definition of, 253.

COLONIAL LAWS, §§ 17, 18.**COLONISTS —**

right of, to laws of mother country, § 15.

the force and nature of such laws, § 16.

what English statutes brought by, to this country, §§ 15, 16, 195.

English statutes passed after establishment of colonies, § 17.

COMITY —

as to effect of foreign laws, § 12.

transitory rights enforceable subject to principles of, § 13.

foreign law considered by, §§ 184, 188.

COMMON COUNCIL —

being granted power to judge of the election of its members does not oust the courts of jurisdiction, § 384.

acts prohibiting members being interested in contracts, business, etc., of municipality, § 444.

mandatory provisions governing proceedings by, § 457.

giving power, and permissive in form, § 462.

COMMON LAW (see COLONISTS) —

- act mitigating rigorous rule of, relative to ship-owners, how construed, § 442.
- statutes in derogation of, strictly construed, §§ 139, 290, 400.
 - if remedial, liberally construed, §§ 400, 401.
- when a statute changes a common-law offense, it is still a common-law offense, § 142.
- it is repealed when a statute defines and enacts a common-law offense and prescribes a penalty, § 142.
- words having definite sense in the, to be construed by, §§ 253, 291.
 - "heir," one capable of inheriting; "actions," "suit," "final judgment," "party," § 254.
- rules of interpretation derived from, § 289.
- its part in our jurisprudence, § 289.
- not presumed the legislature intends to make innovations upon, beyond necessity, § 290.
- statutory lien has common-law incidents, § 290.
- available to furnish means to effectuate a statute, § 291.
- statute in affirmance of, construed by, § 291.
- statutes in amendment of, construed in light of, § 291.
- courts take notice of, § 295.

COMMUNIS ERROR FACIT JUS —

- when may be invoked, §§ 309, 311.

COMPENSATION —

- for land taken for public use to be sought according to statute, § 398.
- acts giving, to persons whose property taken compulsorily, § 441.

COMPETITIVE BIDDING —

- requirement to let contract by, under municipal charter, imperative, § 457.
- sealed bids, and opening of, § 458.

COMPUTATION OF TIME —

- general rule of computing time consisting of days, weeks, months or years, § 111.
- the period consists of entire days, § 111.
- when fractions of a day recognized, § 110.
- when computation from an act done or date, the day of that act or date excluded, § 112.
- "from," is a term of exclusion, § 112.
- the words "to," "till" or "until" inclusive, § 112.
 - the first day excluded, and the last included in computing the period, § 112.
- computation, when a summons or notice required to be served a given number of days, § 113.
 - where right to be exercised within a determinate period, § 114.
- when Sundays included or excluded, § 115.

CONDITION —

- if act forbidden except on, and condition is impossible, the prohibition is absolute, § 222.

CONGRESS —

- has only delegated powers enumerated, § 4.
- their scope, §§ 21, 22.
- power to legislate for territories, § 23.

CONSEQUENCES —

- courts have no concern with, when the law is plain, § 324.
- it is then their simple duty to execute it, § 324.

CONSTITUTION (see TITLES OF STATUTES) —

- the great charter of republican government, § 2.
- the organic and paramount law, § 2.
- defines and divides the governmental powers, § 2.
- separation of legislative, executive and judicial powers, §§ 3-5.
- requirements as to legislative procedure mandatory, §§ 26, 41, 42, 56, 64-66.
- as to legislative powers, §§ 62-66.
- as to titles and subjects of statutes, § 76.
- generally regarded as mandatory, §§ 79-81, 117.
- mischiefs intended to be cured, § 78.
- liberally construed to aid legislation not within mischief, §§ 82, 92, 93.
- prohibition of special and local laws, § 116.
- requirement of general laws, and their uniform operation, § 116.
- whether general laws can be made applicable is a legislative question, § 117.
- if a general law exists, that question answered, § 118.
- imperative to pass only general laws on enumerated subject, § 118.
- applications of general words of statute denied or excepted when unconstitutional, § 336.

CONSTRUCTION (see CONTEMPORANEOUS CONSTRUCTION; LIBERAL CONSTRUCTION; STRICT CONSTRUCTION; WORDS AND PHRASES) —

- re-enactment of statutes to prevent implied repeal, §§ 138, 148-153.
- title by entireties not abolished by statute giving married woman control of her separate estate, § 150.
- when general and a particular intent expressed, latter prevails, §§ 153, 158, 159, 167, 216, 222.
- statute to take effect at a future day, how construed, § 160.
- of re-enacted statutes, § 168.
- of repealing statutes, § 168.
- reference had to pre-existing law in construction of revision, § 162.
- liberal, of remedial statutes, § 207.
- how qualified by other rules of construction, § 207.
- as where punitive compensation for wrong, § 208.
- strict, of certain statutes of remedial nature, § 207.
- of penal statutes against accused, § 208.
- of statutes in derogation of common law, § 207.
- of statutes for taking private property for public use, § 207.
- authorizing summary proceedings, § 207.
- more or less strict according to severity of penalty, § 203.
- use of title of statute in, § 210.
- effect of constitutional restriction to one subject expressed in title, § 211.

CONSTRUCTION (continued) —

- language of act to be construed in view of title, § 211.
- value of preamble for, §§ 212, 213, 247.
- one part of statute to be construed with another, § 215.
- presumed all parts intended to harmonize, § 215.
- general words may be qualified by expression of particular intent, § 216.
- general act may be limited by exceptions, provisos, etc., § 216.
- partial conflict may cause an exception, § 217.
- not allowed to revoke or alter a statute when words may have proper effect without, § 217.
- contradictions, however, cannot stand together, § 217.
- statute itself furnishes the best means of its own exposition, § 219.
 - when intention thus ascertained it will prevail, § 219.
- effect of provisos, exceptions and saving clauses, § 222.
 - what they qualify, § 222.
 - presumption that what is excepted would otherwise be within purview, § 222.
 - proviso strictly construed, § 223.
 - the intention of provisions qualified by provisos, saving clauses, etc., to prevail, §§ 221, 223.
- legislative, has weight, § 229.
- to depart from literal, what two things necessary, § 238.
- effect to be given to every part, §§ 239, 240.
- inconsistent expressions to be harmonized, §§ 239, 260.
- to be construed as a whole and so as to accomplish the legislative intent, §§ 239-246.
- of words and phrases, §§ 218, 219, 247-255.
- of re-enacted statutes, §§ 255, 256.
- of statutes adopted by general reference, § 257.
- of statute incorporated in another, § 257.
- of words of reference, § 257.
- with reference to grammatical sense, §§ 258, 259.
- should receive reasonable and common sense, § 259.
- mistakes may be corrected by, § 260.
 - mistaken reference may be corrected by context, § 260.
 - where one word has been used for another, or omitted, § 260.
 - the strict letter is thus made to yield to the intention, § 260.
- meaningless words may be eliminated by, § 260.
- to supply omitted words, or read statute in different words, intent must be clearly expressed, § 260.
- of associated words, §§ 262-266.
- of relative and qualifying words and phrases, § 267.
- when general words follow particular, §§ 268-281.
- reddendo singulari singulis*, § 282.
- regulations on a given general subject will extend to new class of same subject subsequently added, § 284.
 - and exceptions in such regulations will apply, § 284.
- doubtful provisions not to be construed to conflict with general principles, § 287.

CONSTRUCTION (continued) —

- of statutes *in pari materia*, § 288.
- with reference to the common law, § 289.
- a statute should be construed as a whole with reference to the whole system of which it is a part, § 219.
- value of preamble in, §§ 212, 213, 247.
- extrinsic facts, which are supposed to have been known to legislature, not provable to aid, § 298.
- liberal, §§ 408–445.
- of statute of limitations, §§ 424–426.
- of old statutes re-enacted after having received a construction, § 424.
- when statute has made no exception the courts can make none, § 427.
- of statute of frauds, § 427.
 - to prevent delays in obtaining judgment, § 435.
 - relative to arbitrations, § 439.
 - giving right of appeal, § 444.
 - extending elective franchise, § 441.
 - taking away penalties, § 441.
 - providing compensation to parties whose property compulsorily taken, § 441.
- of provisions in favor of tax-payers, § 441.
 - in favor of those affected by proceedings in derogation of common right, § 441.
 - for protection of officers, § 442.
 - married women, § 442.
- of acts for accomplishment of public objects, § 443.
- strict, will not be given to penal laws which are declared by the statute to be remedial, § 445.
- as to being directory or mandatory, §§ 446–462.
- opposed to giving retrospective effect, § 463.
 - or to affect existing rights, § 464.
 - or to create new obligations, § 464.
- as to being *ex post facto*, §§ 465–470.
- as to impairing obligation of contracts, §§ 471–479.
- documents for, to be read in view of surrounding facts, § 300.
- any document equally authentic as a statute in which the objects of a statute are made known may be referred to, § 300.
- journals of convention referred to to learn intention of words in constitution, § 300.
 - of legislature for like purpose, § 300.
 - or history of enactment, § 300.
 - or to see if duly passed, § 300.
- declarations of members of legislature as aid to construction, § 300.
- contemporaneous, when invoked, § 307.
- statutory, prospectively conclusive, § 307.
- when acted on by inferior courts, § 307.
- when decisions conflicting, § 307.
- effect of general usage on, § 308.
- local differences in construction of general statutes disregarded, § 308.

CONSTRUCTION (continued) —

- practical, by those for whom law enacted not lightly questioned, § 309.
- effect of in interior department of the general government, § 309.
- of state and county officers, § 309.
- should be adhered to, §§ 310, 313-320.
- with reference to effects and consequences, §§ 321-324.
- presumed not intended to affect existing institutions, systems and policies any further than the terms of the statute require, § 321.
- ought to be reasonable if the words will permit, §§ 322, 324.
- so that public and private rights are not infringed, §§ 322, 323, 324.
- considerations of what is reasonable, convenient, causes hardship or injustice have weight, §§ 322, 323.
- pernicious consequences will be avoided by, if possible, § 322.
- presumed that legislature intend every part of a law to have effect, § 325.
- that statutes passed from good motives, § 330.
- that facts necessary to validity of statute existed, § 331.
- that the legislature did not intend a vain thing, § 331.
- or to violate the constitution, § 331.
- strict and liberal compared, §§ 346-348.
- strict, not precise converse of liberal, §§ 347, 348.
- does not admit of expansion beyond letter, §§ 347, 348.
- strict, varies according to gravity of consequences, § 347.
- strict, results from many rules of, § 347.
- strict, consistent with effect to carry out intention, §§ 348-350.
- strict, of penal statutes, §§ 347-361.
- penal statutes cannot be extended beyond their letter by, § 350.
- cases within the policy or mischief of statute excluded if not within the letter, §§ 350-352.
- strict, does not preclude the application of common sense, §§ 350-356.
- most favorable to accused to be adopted, §§ 353, 357.
- of revenue laws, §§ 361-363, 365.
- exemption from taxation and other common burdens, § 364.
- statutes against common right, § 366.
- of limitations, § 368.
- as to new trials and appeals, § 369.
- interfering with legitimate industries, § 370.
- of statutes creating liabilities, §§ 371-377.
- for costs, §§ 371, 372.
- causing death, § 371.
- discharging insolvent debtors, § 372.
- granting exemptions from execution, § 372.
- allowing recoveries for damages resulting from intoxication, against sellers, etc., §§ 373-377.
- of public grants, §§ 378, 379.
- delegation of power, §§ 379-396.
- of statutory rights, §§ 397, 398.
- statutes in derogation of the common law, § 400.

CONSTRUCTION (continued) —

- interpretation clause authoritative, § 402.
- contemporaneous legislative construction high evidence of intention, § 402.
- so far as it professes to declare the past or present meaning of statute, not binding on the courts, § 402.
- policy of law, how considered for, § 407.

CONTEMPORANEOUS CONSTRUCTION —

- what is, §§ 307-312.
- when invoked, § 307.
- length of time continued important consideration, § 312.
- has implied judicial, legislative and popular sanction, §§ 307, 309.
- where statute doubtful, effect of long construction by inferior courts, § 307.
- of constitution, long acquiesced in, § 307.
- by official usage, § 309.
- judicial interpretation, § 310.

CONTEXT —

- may serve to engraft an exception to general words by implication, § 216.
- to restrict general words, or expand them, §§ 216, 239-241.
- words expanded or limited to agree with general intent, §§ 218, 237-246.
- statute itself furnishes the best means of its own exposition, §§ 219, 237, 241.
- when the words not certain, intent may be collected from context, etc., § 241.
- may modify meaning and effect of words of absolute repeal, § 242.
- and of particular words and expressions, § 242.
- may show the word orphan to mean minor, § 242.
- jury merely a credible person, § 242.
- birds not live animals, § 242.
- may show intent that limited expression shall be expanded, § 245.
- to be consulted to learn in what sense words intended to be used, § 246.
- will not change effect of words contrary to intent, § 246.
- popular meaning of words accepted unless contrary intention appears by, § 250.
- otherwise when the context shows different intention though a general statute directs that the popular meaning be followed, § 251.
- "and" and "or" used indifferently, unless other intent indicated in, § 252.
- effect of, showing repeated use of same words, § 254.
- available to correct mistakes, § 260.
- effect of associated words, §§ 262-265.
- effect of, when general words follow particular, §§ 268-281.

CONTINUING POWER —

- when not conferred, § 432.

CONTRACTS —

- illegal when in contravention of law, §§ 335, 336.
- may be valid though contravening revenue regulations, § 336.
- obligation of, defined, §§ 471, 477.
- what are, within prohibition of laws impairing obligation of, § 472.
- certain laws part of, § 471.
- state, like a natural person, bound by its contracts, § 472.
- municipal charters not, § 473.
- charters giving bounties, patents and copyrights are, § 473.
- may be validated by statute, § 474.
- of state, protected from impairment like those of private persons, § 475.
- how its contracts may be impaired, § 475.
- if a contract a nullity it cannot be made good by subsequent legislation, § 480.
- when, may be made good by statute, § 483.

CONTRADICTIONS —

- cannot stand together, § 217.
- how resolved where general provision, applicable to multitude of subjects, antagonized by another, applicable to a part of those subjects, § 217.
- considerations of reason and justice have weight in adjusting such conflict, § 217.
- effect of analogies in such case, § 217.
- effect of total conflict, § 220.
- effect of, by provisos and saving clauses, § 221.

CONVENIENCE —

- argument based on, forcible, § 152.
- out of place against plainly expressed intention, § 238.
- considered in construction of statutes, §§ 322, 324.
- argument upon, has no force when the law is plain, §§ 325, 332.
- presumption that inconvenience, injustice and absurdity not intended, § 332.
- acts remedial when intended to promote public, § 438.

CONVICTION —

- can be none for offense unless the law violated be in force, § 166.

CORPORATIONS —

- established by public law, judicially noticed, § 295.
- municipal, vested with portion of governmental authority, § 380.
- confined in their action to powers granted, § 380.
- grants to, whether public or private, strictly construed, §§ 380, 381, 383.
- city having power to make contracts to supply water cannot constitute a monopoly, § 384.
- charter construed with reference to the whole, and not the individual's, § 381.
- cannot be created except by statute, § 382.
- powers of, only such as statutes confer, § 382.
- no particular form of words necessary to create, § 383.
- may result from necessary implication, § 383.

CORPORATIONS (continued) —

enumeration of powers implies exclusion of others, § 382.

may be organized under general law for every purpose within its language, § 383.

even for a business which could not have been within the legislative contemplation, § 383.

granting to common council power to judge of the election of its members does not oust the courts of jurisdiction, § 384.

must pursue statutory modes when any are prescribed; otherwise may act in customary way, § 385.

grants of special powers to, to be followed as mandatory, § 456.

construction of law authorizing, to act when certificate of organization filed, § 456.

must conform their action to law of their creation, § 456.

all subject to the exercise of the essential powers of government, § 473.

liability of stockholders cannot be altered by law subsequent to contracting debt, § 474.

COSTS —

statutes allowing, how construed, § 371.

statutory provision permissive in form as to, imperative, § 461.

construction of statute relative to payment of by county when convict unable to pay, § 419.

COUNTIES —

subject to legislative control, § 473.

COURTS —

construction of foreign law by, § 192.

have power to declare invalidity of unconstitutional laws, § 331.

will use their best energies to reconcile acts with constitution, § 331.

of two possible constructions will adopt that which will maintain statute, § 332.

will not pervert language and sense of statute to maintain it when plainly unconstitutional, § 332.

judicially notice public statutes, § 335.

what included in supervisory power over inferior tribunals, § 342.

inherent power of, to make rules, § 342.

statutes not presumed to be intended to oust jurisdiction of superior, § 333.

constitutional directions as to scope of decision directory, § 452.

statutory direction that instructions to jury be in writing, how construed, § 451.

that they caution jury, directory, § 452.

to advertise adjournment of, directory, § 452.

terms of, fixed by law, judicially noticed, § 298.

take notice who are their own officers, § 299.

and their signatures, § 299.

of their own records, § 299.

not of what relates to another case, § 299.

garnishment not another case, § 299.

COURTS (continued) —

- provisions granting special powers to, mandatory, § 456.
- words permissive in form, or importing power and authority, imperative, § 461.
- may declare statutes, contravening constitution, void, § 169.
- take judicial notice of public statutes, §§ 181, 198.
- and their derivation, validity, commencement and operation, § 181.
- state, take notice of federal statutes, § 181.
- will inform themselves of facts which affect statutes, §§ 181-183, 292-312.
- cannot judge of wisdom of statutes, § 235.
- cannot correct excesses or omissions in, § 235.
- confined to statutory power, § 391.
- to take notice of all proper records affecting the validity of statutes, §§ 41-45, 52-54.
- power of to make rules, § 68.
- to determine what are general laws, § 118.
- are not to determine when general laws can be made applicable, § 118.

COVENANT —

- none implied in public grants, § 378.

CRIMES —

- are in their nature local, § 12.
- punishable exclusively in the country where committed, § 12.

CRIMINAL MIND —

- necessary to conviction for offenses, §§ 354, 355.
- in what the wrongful intention may consist, § 355.
- by-laws may be violated without this element, § 355.
- reasonable belief in existence of circumstances may rebut, § 355.
- may have exculpating effect, like absence of reasoning faculty, § 355.

CUMULATIVE —

- grant of jurisdiction, when not exclusive, §§ 396, 399.
- new remedy where one already exists, § 399.

CURATIVE ACT —

- as to instruments recorded, held not repealed by subsequent statute prohibiting recording such instruments, § 148.
- have a wholesome effect, § 206.
- legislature has power to pass, § 483.
- if they do not interfere with vested rights nor impair obligation of contracts, § 483.
- when valid, § 483.
- may validate contracts and deeds defectively executed, acknowledged or recorded, § 482.
- marriage may be validated, § 483.
- and offspring legitimated, § 483.
- jurisdictional facts being wanting, a proceeding requiring them fatally defective, §§ 323, 484.
- and such defects cannot be cured by legislation, § 484.

DAMAGES —

- allowed by statute for causing death, § 371.
- resulting from intoxication, §§ 373-377.
- no apportionment of, among vendors of liquors, § 377.

DEATH —

- statutes giving right of action for, to widow and next of kin, how construed, §§ 371, 398.
- confined generally to pecuniary damages, § 371.
- liberal construction of statute of limitations as applied to actions abated by death or marriage, § 424.

DEED OF TRUST —

- of mode of security, required on loaning public funds, not imperative, § 452.

DELEGATION —

- of legislative power, §§ 67-73.
- of taxing power, strictly construed, § 365.
- of governmental authority, must be clearly made, § 380.
- powers granted to city not to be delegated to committee, § 384.

DEVISE —

- power to take land by, not implied from that to incorporate, § 378.

DIRECTORY STATUTES —

- explanation of, in comparison with mandatory statutes, § 446.
- no universal rule as to, § 447.
- affirmative statutes do not always imply a negative, § 447.
- importance of provision to be considered, § 447.
- its relation to others, § 447.
- provisions as to time, §§ 448-450.
- which are formal and incidental, §§ 451-453.
- substantial observance of, sufficient, § 451.

DISTANCE —

- how computed on a river, § 253.

DOCKET —

- of judgments, statutory directions concerning, how construed, § 451.

EJUSDEM GENERIS —

- when things included in general words following particular must be, §§ 268-276.
- such general words will not include things or persons of a superior class, § 277.
- construction when enumeration is exhaustive, § 278.
- intention appearing it controls these rules, §§ 279, 280.

ELECTION —

- statutes requiring proclamation concerning, mandatory, § 451.
- that inspectors of, be sworn, directory, § 452.
- concerning manner of conducting, directory, § 452.
- power granted to common council to judge of election of their members not exclusive, § 384.

ELECTIVE FRANCHISE —

acts for extension of, liberally construed, § 441.

EMERGENCY CLAUSE —

constitutional provisions requiring, § 108.

effect of omitting, § 108.

sufficiency of emergency is for the legislature, § 108.

EMINENT DOMAIN —

grant of right to take private property without consent of owner must be in plain words, § 387.

strictly construed, § 387.

statutes for condemnation of private property not to be extended by implication, § 387.

being a common-law right, statutes regulating its exercise not to receive most rigid construction, § 387.

what interest or estate in lands to be taken, § 387.

necessity of taking a judicial question, § 387.

determination of corporate board not conclusive, § 387.

in construing acts for exercise of, two rules recognized, § 387.

exercise of, in respect to property already devoted to public use, § 388.

power to invade prior appropriation not ordinarily implied, § 388.

construction with reference to property already appropriated to public use, § 388.

mode provided for obtaining compensation exclusive, § 398.

never implied that the government has surrendered the right of, § 378.

every material requirement of the statute to be strictly observed, § 456.

proceedings to show this on their face, § 456.

ENABLING STATUTES —

to be strictly pursued, § 454.

ENACTING STYLE —

importance of, under constitutions prescribing form, §§ 62-66, 214.

ENACTMENT —

proof of, §§ 27-45.

ENUMERATION —

object of, in statute, § 270.

no *a priori* presumption that things enumerated are all of the same kind, § 270.

when general term follows, §§ 268-281.

weakens general law as to things not expressed, § 328.

EQUITABLE CONSTRUCTION —

what is, §§ 413, 414.

now obsolete, §§ 413, 414.

ESSENCE —

of proceeding, statutes relating to, mandatory, § 456.

EXCEPTION —

what is, § 222.

introduced to qualify general language, § 216.

EXCEPTION (continued) —

intended when particular intent expressed in opposition to general intent, § 216.

partial conflict between statutes causes, §§ 217, 243.

context may have the effect to engraft an exception by implication, §§ 216, 243.

an exception is not co-extensive with provision it qualifies, § 219.

when part of enacting clause restricts merely to matter excepted, § 222.

is co-extensive with matter which precedes, § 222.

not always, § 222.

must be negatived in pleading, § 222.

express mention of certain, excludes others, § 326.

strengthens force of general law, § 328.

where the statute of limitations makes none, the courts cannot make any, § 427.

unless in case of civil war, § 427.

exception from a statute liberally construed will be construed strictly, § 223.

exceptions to general competency of witnesses, § 224.

immemorial practice may control in construction of general words of statute, § 429.

EXECUTION —

statute requiring officer to file certificate of sale under, directory, § 452.

so the requirement to note on it the time of its receipt, § 452.

directing how levy under be made, directory, § 452.

requirement that sales under be made at court-house, mandatory, § 455.

EXECUTIVE POWER —

of executive department, § 4.

EXECUTORS —

construction of remedial statute relating to new appointment of, on change of residence, § 419.

act remedial providing for execution of powers of will by succession of, § 436.

EXEMPTIONS —

in penal statutes construed liberally for the accused, § 227.

in favor of debtors liberally construed, §§ 223, 420-423.

from tolls on turnpikes liberally construed in favor of agriculture, § 420.

yoke of oxen not necessarily yoke broken to work, § 420.

from all taxation may by evident intention in context be only from taxation for revenue, § 243.

confined to taxes mentioned in the act, § 246.

what included in one-horse or ox-cart, § 248.

statutes exempting from taxes or other common burden strictly construed, § 364.

of property from execution, how construed, §§ 372, 422.

what change admissible as to existing debts in favor of debtors, §§ 477, 478.

EX POST FACTO LAWS —

- effect of changing penalty by adding milder alternative, § 143.
- prohibited by constitution, §§ 206, 463.
- definition of, § 465.
- application of prohibition in federal constitution, §§ 465–470.
- prohibition of, applies only to criminal laws, § 465.
- test of application, §§ 465–467.
- requiring test oath as to past transactions, § 467.
- present acts, § 468.
- enlarging class of witnesses, § 468.
- taking away technical objections, § 469.
- changing place of trial, § 469.
- providing new tribunal, § 469.
- new treaties for surrender of fugitives, § 469.
- giving additional challenges to people, § 469.
- reducing defendants' challenges, § 469.
- modifying grounds of challenge for cause, § 469.
- authorizing amendments of indictments, § 469.
- regulating the framing of indictments to facilitate procedure, § 469.
- requiring defense of insanity to be pleaded, § 469.
- allowing attorney fee to be added to penalty recoverable by civil action for unlawful liquor traffic, § 469.
- providing for severer penalty for repetition of offense, § 468.
- change of punishment is, § 470.
- except abatement of separable part, § 470.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS —

- maxim in aid of interpretation to ascertain intention, § 325.
- when mention of one or more things exclusive, §§ 325, 326.
- not applicable when instance stated by way of example merely, § 329.
- nor when declaratory of common law, § 329.
- nor when there is reason for mentioning one and not other, § 329.
- express saving, exception, etc., exclusive, § 328.
- when statute enumerates persons or things to be affected, others excluded, § 327.
- when statute mentions the property on which rates to be levied, they can be levied on no other, § 327.
- enumeration of circumstances constituting personal qualification exclusive, § 327.
- repeal limited to clause specified, § 327.
- revision repeals acts not included, § 327.
- statutory jurisdiction confined to enumerated subjects, § 327.
- when right given by statute and remedy therefor prescribed, it is exclusive, §§ 399, 454–459.
- when new power granted, and means of executing it, they are exclusive, §§ 399, 454–459.
- when emancipation forbidden by general law, an act permitting it in a particular form, exclusive, § 454.
- enabling statutes governed by this maxim, § 454.
- as to time, § 456.

FEDERAL STATUTES —

their scope and authority, § 21.

federal and state legislation compared, §§ 21, 22.

belong to one system, § 22.

FEMALES —

presumed not to be meant by the term "citizen" when used to designate persons who may be admitted as attorneys, § 321.

FERRY —

franchise to establish not construed to be exclusive, § 378.

public, not included in public grant of land or water-course, § 379.

private right of, passes with fee, § 379.

FORCIBLE ENTRY AND DETAINER —

act extending remedy by, liberally construed as remedial, § 435.

FORECLOSURE BY ADVERTISEMENT —

statute regulating must be substantially followed, § 390.

no intendments in favor of regularity, § 390.

such sales are by contract, and therefore statute to have reasonable construction, § 391.

FOREIGN LAW —

effect of depends on comity, § 12.

not judicially noticed by courts, §§ 12, 295.

rejected when repugnant to local policy, § 12.

criminatory acts done under, and consummated against law of forum, § 12.

penal, etc., laws not enforced, § 12.

in case of colonization, § 15.

laws of one state foreign to another state, § 22.

not foreign in federal courts, § 22.

presumption that it is the same as the *lex fori*, § 184.

how proved, §§ 188, 190.

functions of court and jury in relation to, § 192.

authoritative exposition of, §§ 186, 191.

what is, §§ 189, 190.

proof of construction of, § 192.

FOREIGN NATIONS —

existence of, judicially noticed, § 297.

and their forms of government, as recognized by the executive department, § 297.

FORMAL ACTS —

statutory provisions concerning, directory, §§ 451-453.

FORMS OF LEGISLATION (§§ 60-66) —

when held to be directory, §§ 62, 63.

when held mandatory, §§ 64, 65.

reasons for holding mandatory, § 66.

FRANCHISE —

legislature may grant exclusive, § 164.

but will be strictly construed, § 164.

FRANCHISE (continued) —

- cumulative franchises not exclusive may be granted, § 164.
- grants of, by public, strictly construed, § 378.
- no implication of an exclusive grant, § 378.
- public, can only be created by an act of the legislature, § 378.
 - public grants of, not implied to be exclusive, § 378.
 - the grant of right to take and exact toll not implied, § 378.
 - power to incorporate does not include power to take lands by devise, § 378.

FRAUD —

- liberal construction of acts to prevent, § 444.
- statutory regulations to prevent, in assignments for benefit of creditors, mandatory, § 459.

FRAUDS, STATUTE OF —

- liberal construction to carry out its purpose, § 427.

FUNDAMENTAL POWERS —

- necessity of their separation, § 2.
- how separated and how corrected, §§ 2, 3.
- the province of each, §§ 2, 3.
- not defined in the constitution, § 6.

FUNDAMENTAL RIGHTS —

- statutes not construed to interfere with, § 290.

GAMING —

- what is, § 352.
- contract for purchase of options is not, § 352.
- statutes intended for protection against, not applicable to professional gamblers, § 429.

GARNISHMENT —

- law of, inapplicable to municipal corporations, § 423.
- not another case, § 299.

GENERAL LAWS —

- what are such laws, §§ 116, 120.
- a law applying to some townships and excepting others is not a general law, § 159.
- when a general law exists on a subject, it is judicially apparent that such a law can be made applicable, § 118.
- enumerated subjects must be dealt with by, § 118.
- courts must determine what are, § 118.
- laws are general when they deal with a whole generic class, § 121.
- classification of subjects for general legislation, § 121.
- laws of a general nature, §§ 121-123.
- uniform operation of laws of general nature, §§ 121-123.
- implied requirement of, § 126.

GENERAL PRINCIPLES —

- doubtful provisions not construed so as to conflict with, § 287.

GENERAL USAGE —

- effect of, in construction of statute, § 308.
- must be universal, § 308.
- practice inconsistent with statute cannot repeal it, § 308.
- of no avail against plain statute, § 308.
- practical construction by those for whom a law is enacted, § 309.
- not allowed to defeat manifest purpose, § 309.

GEOGRAPHY —

- courts take notice of, of state, §§ 299, 301, 304.
- of notorious surveys, etc., § 298.
- of civil divisions created by law, § 298.

GRAMMATICAL SENSE —

- presumed to be intended unless evidence of different intention, § 258.
- only a rule of interpretation and gives way when a different intent appears, § 258.
- common-sense construction may require departure from, § 259.
- application of relative words, § 259.
- effect of general qualifying words at end of sentence or in middle, § 259.
- tense of statutes not always followed, § 259.
- relative words refer to last antecedent, §§ 257, 259, 267.

GRANDCHILD —

- when included under term child, § 253.

GRANT OF POWER —

- strictly construed when by its exercise one may be divested of his property, § 454.
- the prescribed procedure mandatory, § 454.

HARDSHIP —

- considered in construction of ambiguous statute, § 324.
- otherwise if intention plain, § 324.

HEIR —

- denotes one capable of inheriting, § 253.

HEIRS —

- inherit according to common-law where statute silent, § 432.

HISTORY —

- courts take judicial notice of, as to facts of general interest, § 298.
- courts take more particular notice of the, of the state where they sit, § 298.

HOMESTEAD AND EXEMPTIONS —

- law of, *in pari materia* with dower law, § 284.

HOUSE OF LORDS —

- branch of legislature and a judicial tribunal, § 3.
- relation of judges thereto, § 3.

IMPLICATIONS AND INCIDENTS —

- what is a necessary implication, § 336.
- what is implied from a statute is a part of it, § 334.

IMPLICATIONS AND INCIDENTS (continued) —

statutory felony includes common-law elements and incidents, § 334.

procurers and abettors are principals and accessories on the same terms, § 334.

in such cases, same peremptory challenges allowed, § 334.

it is incident to all public laws that they be noticed judicially by courts, § 335.

otherwise as to private statutes, § 335.

if penalty imposed for doing an act, it is impliedly prohibited, § 335.

implied that a contract about things unlawful is void, § 336.

all cases to which a statute cannot constitutionally apply impliedly excepted, § 336.

when statutory provision general, everything necessary to make it effectual implied, § 337.

public grant to individuals to be enjoyed in a corporate capacity creates corporation, § 337.

of rights, may be asserted by statutory designation, § 337.

statute enlarging rights of married women impliedly abolished estates by curtesy, § 338.

disability under statute of limitations, § 338.

right to trade implied from right to own and enjoy merchandise, § 338.

where new statute extends existing new power, it is extended with its limitations, § 145.

that established policy not intended to be departed from, § 145.

married women may incur liability for repairs to separate property, § 338.

private examination of married women unnecessary when they acknowledge deed of separate property, § 338.

power to trade includes that to borrow money, § 338.

that married woman borrows on her separate estate, § 338.

that a default judgment is by consent and not appealable, § 339.

when duty to repair implied from condition to build, § 339.

of disability of minors to sue for partition from provision that plaintiff must state titles of parties, § 339.

from existence of a right that there is appropriate remedy by statute or common law, § 340.

grant of power implies a grant of all necessary or incidental power, §§ 341, 344, 345.

when measure directed ordinary means implied, § 341.

power to examine witnesses; authority to subpoena them implied, § 341.

power to grant alimony, incident to divorce jurisdiction, § 341.

extending expressly penal regulations to new subjects, implies that they were not before included, § 325.

implied exclusion of things not mentioned, § 325.

enactment of law does not imply it was not the law before, § 329.

power to sheriff to sell personal property implies power to take possession, § 343.

power to create a municipal debt implies power to levy taxes to pay it, § 343.

IMPRISONMENT FOR DEBT —

not part of contract, and may be abolished without impairing its obligation, § 478.

IMPROVEMENTS —

remedial act for set-off of, § 437.

INDICTMENT —

subsequent statute regulating framing or amendments of, not *ex post facto*, § 469.

IN FORMA PAUPERIS —

right so to sue construed strictly, § 398.

INJUSTICE —

argument based on, forcible, §§ 152, 322, 324.

INSOLVENT DEBTORS —

statutes for discharge of, strictly construed, § 372.

INSTITUTIONS —

created by law judicially noticed, § 295.

INTENTION —

literal meaning may be departed from to avoid absurdity and carry out, § 323.

of statute, when ascertained, controls in construction of its parts, § 218.
general words restricted to it and narrower words expanded to it, §§ 218, 219.

may be cut down to avoid conflict with settled policy, § 218.

when ascertained, §§ 218, 219.

words may be altered or supplied to harmonize parts with it, § 218.

construction which accords best with subject and general purpose will prevail, § 219.

when a general intent and a particular intent are expressed the latter will prevail, §§ 153, 158, 159, 167, 216, 222, 231.

otherwise if the general act intended to be universal and exclusive, § 159.

where general act required and repeals inconsistent provisions it repeals special acts on same subject, § 159.

intention to make unconstitutional exception will not be imputed to legislature, § 159.

intention of a statute is the law, § 234.

must be embodied and expressed in the statute, § 234.

a statute is hence a written law, § 234.

it is there to be first sought for without other aids, §§ 236, 237.

all rules of interpretation are intended to reach it, § 234.

where it is plain and obvious no interpretation necessary, § 234.

rules of construction are only important as they serve to ascertain the intention, §§ 234, 235.

and this is true as to all statutes, § 234.

if plainly expressed in the statutes it cannot be controlled by anything extraneous, § 237.

whole statute to be read to determine it, § 239.

INTENTION (continued) —

then the simple duty of the courts to enforce the law according to its terms, §§ 237, 238.

cases cannot be included or excluded merely because there is no reason against it, § 237.

if different from the literal import, it should prevail, §§ 237, 245.

question for the court is, what did the legislature really intend, § 238.

if it is plain from the statute itself, and others *in pari materia*, no different intent can be imputed to serve a supposed policy or maintain its validity, § 238.

one part to be construed with another, § 239.

the general intent the key to that of all the parts, § 240.

it is controlling as to minor parts, §§ 241, 245.

declaration of, in an act controlling, § 246.

ascertained from whole act, a guide in reading particular words and expressions, §§ 241-246.

may exclude cases within the letter, § 243.

in following the, where reason ceases, the law ceases, § 243.

notice not necessary to officer of his own act, § 243.

possession of game during period prohibited when consistent with innocence, § 243.

requirement of notice of things done, may require notice of non-action, § 243.

general exemption from taxation may be confined to taxation for revenue, § 243.

new condition may be supplied by implication, § 244.

or new exceptions, § 246.

inaccuracies of name may be corrected, § 244.

literal sense of words departed from, §§ 245, 246, 251, 259.

"city" may include incorporated town, § 245.

limited words or expressions may be expanded, § 245.

or general words restricted, § 246.

seemingly incongruous provisions brought to harmonize, § 245.

restrictive clauses in one section may be amended by implication in others, § 246.

context will not modify natural effect of words contrary to, § 246.

words and phrases to be construed according to, § 247.

"immediate danger" qualified to effectuate, § 251.

"and" and "or" used indifferently and construed according to, § 252.

presumption of, where legislature enact a statute without change after it has received construction, § 255.

when re-enacted with change, §§ 255, 256.

will control grammatical sense, § 258.

may be effectuated by correction of mistakes by context, § 260.

omitted words may be supplied, wrong word changed to correct one, and meaningless disregarded, § 260.

by transposing clauses, § 260.

must be clear to correct words of statute, § 260.

INTENTION (continued) —

controls the rule from associated words and maxim of *eiusdem generis*, §§ 267, 279, 280.

proof of extrinsic facts supposed to have been known to legislators and to have influenced their intentions, § 298.

strict construction not to defeat, §§ 348–350, 356.

case must be within, and also letter of penal statute, §§ 349, 350.

to bring case within penal statute there should be a criminal intention, §§ 354, 355, 356.

liberally inferred in construing remedial statutes, § 409.

cases not within, excluded, § 411.

how to be learned, § 412.

no set form to express, § 416.

words controlled by, when manifest, §§ 416, 417, 423.

how it controls in construction of statute of limitations, §§ 424–426.

of statute of frauds, § 428.

cases not within, excluded though within the letter of statute, § 428.

municipal corporations excluded from general law of garnishment, § 428.

words may be restrained to bring operation of statute within, §§ 428, 429, 436.

whether statute directory or mandatory decided upon, § 447.

where doubtful, statute construed to operate prospectively, §§ 463, 434.

INTERPRETATION (see CONSTRUCTION) —

compared with construction, § 236.

INTERPRETATION CLAUSE —

introduced to remove possible obscurity, § 216.

binding, authoritative, §§ 229, 231, 246.

criticisms of, § 230.

general and special provisions of the nature of, § 231.

latter of most weight, § 231.

enactment based on misconception of what the law is, does not of itself change the law, § 231.

general statutory definition will apply only where no different intention appears, § 331.

when authoritative, § 402.

not binding on the courts, § 402.

when legislative construction high evidence of intention, § 402.

to what applicable, § 402.

when strictly construed, § 402.

regarded with disfavor in England, § 403.

not always regarded as containing definitions, § 404.

but provisions by way of extension, § 404.

will still include its proper sense, § 404.

not generally absolute, but only applicable when not inconsistent with intent, § 405.

when penal acts declared remedial, § 445.

INTOXICATING LIQUORS —

nature of judicially noticed, § 303.

INTOXICATION —

statute allowing recovery of damages for, against vendors of liquors and of renters, § 373.

held remedial, §§ 373-377.

actual damage necessary, § 374.

injury to person must be physical, § 374.

exemplary allowed only where there are aggravations, § 374.

exception in Ohio, § 374.

consequential injuries recoverable, § 374.

construction as to elements of damage, §§ 374, 376.

form of remedy and parties, §§ 376, 377.

JUDGMENT —

statute providing for obtaining, on motion strictly construed, §§ 393, 398.
construction of remedial statute as to effect of voluntary discharge from arrest under, § 416.

act to prevent delays in obtaining, remedial, § 435.

providing for docketing, how construed, § 451.

JUDICIAL KNOWLEDGE —

of public statutes, § 181.

of facts affecting them, §§ 181-183, 292-312.

of the common law, § 184.

of other states, § 184.

of state statutes by federal courts, § 185.

of public law, §§ 293, 294.

commencement, expiration and repeal of statutes and their construction, § 293.

of any decision that they are unconstitutional, § 293.

includes notice of all facts and proceedings which concern their validity and interpretation, § 294.

may resort to history to do away with obscurity, § 294.

of the common law and the fundamental law, § 295.

the law of nations, § 295.

the law merchant, § 295.

of the antecedent laws, § 295.

of matters so notorious as to be universally known, § 293.

matters within the cognizance of the particular court, § 293.

when acts done in pursuance of foreign law made effectual by domestic, the former noticed, § 293.

of territorial divisions of state, § 295.

of corporations and institutions established by law, § 295.

of state laws by federal courts, § 293.

treaties, law of the land and judicially noticed, § 293.

of general customs, § 295.

of meaning of C. O. D., § 295.

business of mercantile agencies, § 296.

JUDICIAL KNOWLEDGE (continued) —

commercial usages as to holidays, § 296.

customs of the road, § 296.

of the sea, § 296.

private statutes and by-laws not noticed, § 296.

nor municipal ordinances, § 296.

of existence of foreign nations, § 297.

their national emblems and flags and seals, § 297.

that they have judicial tribunals, etc., § 297.

and general nature of their jurisprudence, § 297.

supreme court maintained its appellate jurisdiction depending on amount by taking notice of vast mining operations on the public lands, § 298.

courts take notice of the result of an official census, § 298.

of derivation of land titles, § 298.

that a portion of state was in insurrection, § 298.

and under whose control, § 298.

that in consequence certain courts closed, § 298.

civil law suspended, § 298.

what law prevailed, § 298.

that the Confederate currency imposed by force, and at discount, § 298.

of the general facts relating to its emission, etc., § 306.

the accession of persons to office and the tenure under constitution and laws, § 298.

the geography and topography of state, §§ 298, 304, 305.

the navigability of large rivers, § 303.

the history of state as to facts of general interest, § 298.

of the boundaries of state, § 298.

its civil divisions created by law, § 298.

of notorious surveys, streets, areas and lines, § 298.

of terms of courts fixed by law, § 298.

of their own officers, and records, § 299.

not of contents of record in another case, § 299.

garnishment not another case, § 299.

of facts in general, §§ 301–306.

of the character of a trade as to being a nuisance, § 301.

of gift enterprises, § 303.

of the seasons, § 302.

calendar, § 302.

that a patent was void for want of novelty, § 304.

of the course of nature, §§ 302, 305.

mortuary tables based on, § 302.

of the nature of liquors, § 303.

that coal oil inflammable, § 305.

of the course of agriculture, § 302.

when particular crops mature, § 302.

not of vicissitudes of climate, § 302.

of what is generally known in their jurisdiction, § 304.

JUDICIAL KNOWLEDGE (continued) —

- of the art of photography, § 305.
- of philosophic and scientific facts and principles, § 305.
- that work of barber not one of necessity on Sunday, § 306.
- of the nature of lotteries, of billiard tables, § 306.
- of the character of the circulating medium and meaning of popular language concerning it, § 306.
- of the changes in the course of business and of new processes to facilitate it, § 306.
- of railroad superintendent's general authority, § 306.
- of the customary price of ordinary labor, § 306.
- of meaning of well-known abbreviations, § 306.
- that free masonry a charitable institution, § 306.
- the usual duration of voyage across the Atlantic, § 306.
- the ordinary incidents of railway travel, § 306.
- that the language of all countries fluctuates, § 306.
- the distance between well-known cities, § 306.
- the speed of railway travel between them, § 306.
- particular facts of state history, § 298.

JUDICIAL POWER —

- what its exercise includes, § 5.
- authority in exposition of law, § 5.
- nature of, § 6.
- determines what the law is, § 11.
- and kind and measure of redress, § 11.

JUDICIARY —

- its function to expound the laws, § 2.
- what measure of judicial power vested in, § 5.
- within province of, to decide as to validity of statutes, § 41.

JURISDICTION —

- may be taken away by repeal of statutes conferring, § 165.
- effect of, § 165.
- effect of abolishing and restoring, on pending cases, § 165.
- special, must be confined to enumerated subjects, § 380.
- and exercised according to statute, §§ 394-396.
- over waters, with reference to low-tide line, § 386.
- towns may have co-extensive, § 386.
- statutory, conferred on courts, how construed, § 391.
- methods of obtaining, strictly construed, § 394.
- of courts, not given or lost by implication, § 395.
- not taken away by grant of similar to another tribunal, §§ 395-397.
- granted by constitution, cannot be abridged or altered by legislation, § 397.
- repeal of statute giving jurisdiction takes away power to proceed in pending cases, § 464.
- statutory, confined to enumerated cases, § 342.
- when general, § 342.
- granted by constitution, unalterable by legislature, § 397.

JURISDICTION (continued) —

- statutory, act conferring construed strictly as to extent, liberally as to mode of exercise, § 435.
- of justices, as to penalty, § 438.
- divorce, includes power to grant alimony, § 341.
- incidental powers from, general and special, §§ 342, 343.
- statutes assuming by regulating exercise of, confer, § 342.
- granted to a court, to be exercised as such, § 342.
- statutes not presumed to intend to oust, of superior courts, § 333.
- a statute giving common council power to judge of the election of its members does not oust the jurisdiction of the courts, § 384.
- depending on junction of towns, § 437.

JURY —

- held to mean a witness in a procedure act, § 423.
- statutory provisions as to summoning, directory, § 449.
- as to drawing, directory, § 452.

LAND GRANTS —

- for public enterprises, how construed, § 379.
- do not include right of public ferry, § 379.
- to ascertain intent of, courts may consider condition of country and the purpose declared on face of, § 379.

LANDLORD AND TENANT —

- statute amending another affording summary remedy between, liberally construed, § 435.

LAW MERCHANT —

- courts take notice of, § 295.

LAW OF NATIONS —

- courts take notice of, § 295.

LAW OF THE CASE —

- a decision of the supreme court is the, in subsequent proceedings, § 320.

LAWS —

- in case of change of sovereignty, § 19.
- of colonists, §§ 15, 16.

LAWS IMPAIRING OBLIGATION OF CONTRACTS —

- recording laws affecting priority may be passed, § 474.
- contracts may be validated by subsequent statute, § 474.
- corporate charter not subject to be forfeited by statute for past acts, which when done not cause, § 474.
- state contracts within constitutional prohibition, § 475.
- what impairment of prohibition prevents, § 475.
- municipal power of taxation cannot be withdrawn to impair its capacity to pay debts, § 475.
- remedy within control of state, but cannot be so changed as to material; affect obligation of contracts, §§ 476, 477.
- how greatly may remedy be changed, § 478.
- list of admissible changes, § 476.

LAWS IMPAIRING OBLIGATION OF CONTRACTS (continued) —

effect of mortgage cannot be changed, § 477.

mode of redemption may not be altered, § 477.

nor conditions of sale, § 477.

how far exemptions allowed, §§ 477, 478.

legislation not permitted to affect construction of existing contracts, § 478.

and parties entitled to a remedy as efficacious as when the contract was made, § 478.

stay laws, § 478.

change of jurisdiction of courts to adjudge present payment or collection of debts, § 478.

imprisonment for debt may be abolished, § 478.

preventing mortgagee from taking possession before foreclosure, § 478.

shortening the time of redemption, § 478.

suspending the right to sue on the bond or note until after foreclosure, § 478.

prohibited by constitution, § 206.

laws affecting validity, construction, discharge or efficient enforcement, §§ 471, 474.

applies to executed and executory contracts, § 472.

to corporate charters, §§ 472, 473.

state cannot impair obligation of its contracts, § 472.

statutes granting franchises, bounties, patents, copyrights, etc., protected against impairment, § 473.

prohibition does not permit any degree of impairment, § 474.

does not permit any change of the terms, § 474.

extends to change of law by judicial decision, § 474.

bankrupt or insolvent law for discharge of debtor prohibited, § 474.

or discharge by part payment, § 474.

laws of this effect prohibited, § 463.

what laws come within prohibition, §§ 471-479.

LEGISLATIVE INTERPRETATION —

when conclusive, § 307.

long, should be adhered to, § 311.

LEGISLATIVE JOURNALS —

not records at common law, § 44.

their force as evidence to affect validity of statutes, §§ 30-45.

records, when required by the constitution, § 44.

may be consulted for parliamentary history of an act, § 48.

silence of journals as to facts not required by the constitution to be entered will not affect statute, §§ 46, 47.

entries necessary to show compliance with constitution in particulars required by it to be there shown, § 48.

when there is power to dispense with readings on separate days the cause need not be entered on, § 47.

LEGISLATIVE POWER —

distinct from other fundamental powers, § 2.

of federal government, vested in congress, § 4.

LEGISLATIVE POWER (continued) —

- of congress, § 4.
- of state legislatures, §§ 4, 6.
- its sole function of law making, § 6.
- nature of, §§ 6, 8.
- how it acts, § 7.
- scope of its exercise, §§ 7, 8, 11.
- limitations, §§ 10, 11.
- federal and state, §§ 4, 21.
- cannot be delegated, § 67.
- exceptions, § 70.
- what is a delegation of legislative power, § 69.
- powers may be granted which are *quasi*-legislative, § 68.
- delegation of, §§ 67-73.

LEGISLATIVE PROCEDURE —

- constitutional regulations of, mandatory, §§ 26, 30, 41, 42, 50, 64, 65, 66.
- bills must be signed by presiding officer, § 51.
 - only necessary when expressly required, § 51.
 - signatures of presiding officers not a part of legislative process, § 51.
 - purpose of requiring them, § 51.
- when acts should be approved, §§ 55, 56.
 - nature of functions of executive on bills, § 55.
 - how a bill will become a law without approval, § 57.
 - computation of time for this purpose, §§ 57-59, 111, 115.
- how a bill to be returned when vetoed, § 59.
- submitting to popular vote laws or questions relating thereto, §§ 71-73.
- local laws may be made to depend on popular vote, § 75.

LEGISLATIVE RECORDS —

- at common law, §§ 27, 28, 30.
- conclusive, §§ 27, 30, 40.
- when legislative journals may be consulted to impeach, §§ 40, 45.

LEGISLATURE —

- has exclusive power to make laws, § 2.
- scope of its functions, §§ 7, 10.
- must be legal, § 26.
- is in America a representative body, § 29.
- derives its power from a constitution, § 29.
- compared with British parliament, § 23.
- must legally convene, § 26.
- it exercises a delegated power, § 26.
- must keep within power granted as to membership, etc., § 26.
- procedure prescribed in constitution mandatory, §§ 26, 29, 30, 41, 42, 50.
- limitation as to time for introduction of bills, § 26.
 - not to be evaded by amendments, § 26.
- common-law record of legislation, § 27.
- legislative records under constitutions, §§ 30, 45.
- cannot authoritatively declare what the law is or has been, § 229.
- a legislative construction of a statute has weight, § 229.

LEGISLATURE (continued) —

- its authority is exclusively to declare what it shall be in the future, § 229.
- presumed to know existing statutes, §§ 226, 287.

LEVY —

- statutory provisions as to making, before witnesses not imperative, § 452.

LIABILITY —

- statutes creating or increasing, strictly construed, § 371.

LIBERAL CONSTRUCTION —

- to what statutes applied, §§ 408, 409.
- applied to remedial and other statutes enacted *pro bono publico*, unless prevented by some paramount rule of construction, §§ 410, 412.
- applied to carry out intention, § 409.
 - intention liberally inferred by, § 409.
- what is, and illustrations, §§ 415–433.
 - consists in giving words such meaning as renders statute effectual to carry out intention, § 416.
- of redemption laws, § 420.
- exemptions, §§ 420–422.
- of word “jury” in procedure act, § 423.
- of statute of mortmain, § 423.
- of testamentary bond, § 423.
- of statute of limitations, §§ 424–426.
 - when action abated by death or marriage, § 424.
- of the statute of frauds to effectuate its purpose, § 427.
- by, cases excluded though within the letter, if not within the intention, §§ 428, 429.
- of act to prevent delay in obtaining judgment, § 435.
- purpose of, § 430.
- of statutes relative to arbitrations, § 439.
- of statutes giving right of appeal, § 440.
- of acts extending elective franchise, § 441.
 - taking away penalties, § 441.
 - providing compensation, § 441.
- provision in favor of tax-payers, etc., § 441.
 - for protection of officers, § 442.
 - married women, § 442.
- of acts for accomplishment of public objects, § 443.
 - for prevention of fraud, § 443.

LICENSE —

- pursuing profession without required license vitiates claim for services, § 335.

LIMITATIONS —

- defense of statute of, a vested right, § 480.
- time occurring before passage of statute may be added to time afterward to make up period, § 482.

LIMITATIONS (continued) —

- under successive, part of time under one may be added to period under another, § 151.
- general provision that statute of shall run against the state will not be construed retrospectively, § 464.
- effect of title sustained by the bar where parties reside, § 479.
- statute of, will not be construed to apply to existing cases, § 464.
- statute of, relates to remedy and not directly to right, § 479.
- does not necessarily impair obligation of contract, § 479.
- statute of, at place of suit applies, § 479.
- of action against sheriffs, etc., in remedial statute, how construed, § 410.
- statutes of, how construed, §§ 368, 424, 426.
- where action has abated by death or marriage, § 424.
- when statute has made no exception, the courts can make none, § 427.
- one recognized in case of civil war, § 427.
- as to new trials and appeals, § 369.

LOAN —

- may be construed in remedial statute to mean moneys voluntarily advanced without legal request, § 420.

LOCAL LAWS (see SPECIAL LAWS) —

- may be made to depend on popular vote, § 75.

MANDATORY STATUTES —

- what they are, § 454.
- where a particular mode of doing an act authorized by statute is pointed out it must be pursued, § 454.
- enabling statutes are, § 454.
- prescribed procedure for exercise of newly granted power mandatory, § 454.
- laws protecting tax-payers are such, § 454.
- provision requiring certain words to be inserted in venires, § 455.
- sales under execution to be made at court-house, § 454.
- statutory requirement can never be dispensed with as directory where departure from can work injury, § 455.
- acts such, when of the essence, § 455.
- when mandatory as to time, § 456.
- statutory proceedings governed by rule of, § 456.
- letting work by competitive bidding under municipal charter, § 457.
- statutes for exercise of power of eminent domain, § 457.
- prescribing mode of adopting resolutions for certain purposes by common council, § 457.
- regulations as to new right, privilege or immunity, § 458.
- relating to sealed bids, § 458.
- regulating municipal proceedings to contract debts, § 459.
- statute of frauds, § 459.
- where intention would otherwise be defeated, statutes are mandatory, § 459.
- relating to building material for protection against fire, § 459.

MANDATORY STATUTES (continued) —

- for certain mode of making assignments for benefit of creditors to prevent fraud, § 459.
- when permissive in form, §§ 460-462.

MARGINAL NOTES —

- effect of, in construction, § 233.

MARRIAGE —

- under prohibited conditions may not constitute bigamy where there is no criminal purpose, § 355.
- statutes abolishing any of the incidents of, strictly construed, § 400.
- how statute of limitations construed as applied to suits abated by, § 424.

MARRIED WOMEN —

- enlargement of their rights implies abolition of estate by curtesy, § 338.
- removes disability under statute of limitations, § 338.
- right of to own and enjoy merchandise implies right to trade, § 338.
- to convey land without private examination, § 338.
- their power to trade implies power to borrow money, § 338.
- that she borrows on her separate estate, § 338.
- when statute specifies cases in which they may sue, others excluded, § 327.
- statutes increasing powers of, strictly construed, § 400.
- have been held remedial and to be liberally construed to effect intent, § 400.
- a statute authorizing them to have, hold and possess property will not authorize them to make sales and purchases, § 431.
- acts for protection of, liberally construed, § 442.
- statutes prescribing mode of exercising or enforcing new rights mandatory, § 458.
- exemption from statute of limitation gives them control of separate property, § 146.
- acts giving them such control do not abolish title by entireties, § 150.
- statute denying them right to dispose of land not impliedly repealed by act entitling them to receive and hold property, § 149.

MAY —

- when mandatory, §§ 460-462.
- when "may" and "shall" used in same provision, § 462.

MEMBERSHIP OF LEGISLATURE —

- constitutional limit imperative, § 26.

MERITS OF LEGAL CONTROVERSY —

- what law governs, § 11.
- plaintiff to have title at commencement of action, § 148.

MESNE PROFITS —

- act for set-off of value of improvements against, § 437.

MISCHIEF —

- intended to be cured considered in construction, § 292.
- liberal construction of remedial statutes to suppress, §§ 409, 410, 430.

MISTAKES —

may be corrected by construction, § 260.

MONTESQUIEU, BARON —

his view of the union of the fundamental powers, § 2.

MONTH —

not a technical word, and understood generally as a calendar, § 253.
otherwise in England and New York, § 253.

MORTGAGE —

subsequent legislation restrained affecting sale, redemption, etc., by prohibition of laws impairing obligation of contracts, § 477.
also to prevent mortgagee from taking possession until after foreclosure, § 478.
subsequent statute suspending the right to sue on the note or bond until after foreclosure impairs the obligation, § 478.
so a statute shortening the time of redemption, § 478.

MOTIVES —

no issue allowable as to legislature, § 380.

MUNICIPAL BONDS —

how protected by constitutional prohibition of laws impairing obligation of contracts, §§ 474, 475.

MUNICIPAL CORPORATIONS —

under legislative control, § 473.
their charters not contracts, § 473.
taxing power of, cannot be withdrawn so as to impair the means of paying their debts, § 475.
contract which is *ultra vires* may be made good by curative act, § 483.
provision of charter that work be let to lowest bidder imperative, § 457.
provisions mandatory requiring particular proceedings to contract debt, § 459.
not within law of garnishment, § 428.

MUNICIPAL PRACTICE —

under indefinite provisions of charter respected, § 311.

NEGATIVE STATUTE —

what is, §§ 202, 203.

NEGATIVE WORDS —

make a statute mandatory, §§ 447, 454.
provisions granting new power prescribing mode of exercise, imply them, § 454.
statutes regulating with, mandatory, § 459.

NEW TRIALS —

statutes as to notice to give effect to limitations, § 369.

NEXT OF KIN —

statutes giving action to, for causing death, § 371.
illegitimate child not included in England, § 371.
otherwise in this country, § 371.
statutes allowing damages to, resulting from intoxication, §§ 373-376.

NON-USER —

will not repeal a statute, § 137.

NOTICE —

construed to be written, when, § 245.

when made necessary to create a duty to repair, not necessary to officer who caused defect, § 243.

when required of affirmative action, may also require of non-action, § 243.

if required to impose a duty, should be actual notice, § 354.

requirement of, as to limitations for new trial or appeal, § 369.

required by letter of statute, may be dispensed with when not within intention, § 429.

preliminary, when required to persons to be affected by proceedings, § 457.

publication of, mandatory in respect to redemption, § 457.

OBJECT —

of a statute, when plain, controls effect of particular words and expressions, §§ 241-246, 273.

of statute, may be considered for construction, § 292.

OFFICE —

courts take notice of accession of persons to, and their tenure under the constitution and laws, § 298.

a statute will not be given a retroactive effect to take away an office, § 464.

will not apply to incumbents to exclude on account of advanced age, § 464.

what is the sale of, § 429.

when immemorial custom will make an exception, § 429.

not held by contract, § 473.

subject to legislative control, § 473.

salary of, may be increased or diminished, § 473.

OFFICER —

not one who has gone out of office, § 358.

construction of remedial act to prevent certain, from being interested, § 444.

OFFICERS —

statutes impose duty on, by words importing power and authority, or permission, §§ 460-462.

acts for protection of, liberally construed, § 442.

construction of doubtful statutes relating to compensation of, § 419.

OFFICIAL ACTS —

statutory provisions concerning, directory as to time, §§ 448-450.

OFFICIAL BONDS —

construction of remedial statute relative to actions for breach of, § 418.

statutory requirements to facilitate proof of execution of, how construed, § 429.

good, though not executed according to directions of statute, § 453.

OFFICIAL USAGE —

effect of, in construction of statute, § 309.

“OR” AND “AND” —

construed as if used accurately if according to intent, § 252.

may be understood as used indifferently if intent require it, § 252.

ORDINANCE —

definition, § 61.

municipal, not noticed by courts, § 296.

ORPHAN —

may be construed in remedial statute by context and manifest intent to mean infant with living parents, § 420.

PALEY, DR. —

his views relative to separation of the legislative and judicial characters, § 2.

PARI MATERIA —

when statutes are in such relation, §§ 283–288.

general words in a later law often qualified by previous acts on same subject, § 284.

new subjects introduced by general words will fall into established classifications, §§ 284, 287.

homestead and exemptions are in, with dower laws, § 284.

law for attachments against water-craft in, with general attachment law, § 284.

“any person” in a later statute in, construed to harmonize with earlier one requiring certain qualifications, § 285.

being in, does not warrant disregard of conflict in the later act, § 286.

when statutes not in, § 286.

act in relation to confinement of stock not in, with provisions as to speed of railroad trains, § 286.

regard must be had to all parts of statutes in, § 287.

statutes in, construed as a connected whole, § 288.

a code relating to one subject governed by one spirit and policy, § 288.

PARLIAMENTARY GOVERNMENT IN THE BRITISH COLONIES, §§ 17, 18.**PARLIAMENTARY PROCEDURE (§ 30) —**

constitutional regulations mandatory, §§ 26, 41, 42.

PASSENGERS —

statutes depriving them of compensation for injuries received while riding on platform, § 372.

PENAL DAMAGES —

given to injured party are intended to be part of his indemnity, § 360.

are assignable, § 360.

action for, not a criminal action and has none of its incidents, § 360.

PENAL LAWS —

when declared by same to be remedial will not be strictly construed, § 445.

PENAL LAWS (continued) —

- what are such, § 208.
- construed strictly, § 208.
- statutes may be penal in part and remedial in part, § 208.
- construed strictly against accused and favorably for him, § 208.
- include not only such as provide for punishments pursuant to state prosecutions, but all punitive statutes, § 358.
- and those prescribing punitive compensation to injured party, § 358.
- those which impose a burden or take away any right or benefit of injured party, § 358.
- making tender of certain bills a bar to a demand, § 358.
- though beneficial not to be construed liberally, §§ 358, 359.
- acts penal and remedial, how construed, §§ 359, 360.
- revenue laws held not to be, § 361.
- to be strictly construed according to severity of penalty, § 347.
- should be so construed as to carry out the obvious intention, §§ 354, 356.
- words in, not to have narrowest interpretation, § 357.
- what statutes are penal, § 358.
- must exist at the time of conviction, § 166.
- acts mitigating punishment, § 166.
- repealing effect of statutes changing criminal laws, §§ 142-144.
- repeal and re-enactment in same words a continuation, § 142.
- when part unconstitutional and part not so, §§ 170-173.

PENALTIES —

- acts taking away, liberally construed, § 441.
- when party may have vested right in, § 166.
- lost by repeal of statute before judgment, § 166.

PERMISSIVE STATUTE (§ 205) —

- when mandatory, §§ 460, 462.
- as to persons having right to invoke permissive provisions imperative, § 462.

PLACE OF TRIAL (see PROCEDURE) —

- construction of act when offense committed on board a boat, § 438.

POLICE —

- statutes extending, control over private property or restraining use of, strictly construed, § 367.
- never implied that the government has surrendered the police power, § 378.

POLICY —

- of government, not safe rule for construction, § 407.

POWER —

- the legislative a distinct, § 2.
- statutory, lost by repeal of statute, § 165.
- when jurisdiction of court prohibited pending causes fall, § 165.
- statutory, strictly construed, §§ 378, 397.
- when mandatory, though permissive in form, §§ 460-462.

POWER (continued) —

of sheriff to sell personal property includes right to take possession, § 343.

to create municipal debt includes power to levy tax to pay it, § 343.

to examine witnesses includes that to subpoena them, § 341.

those incidental granted with principal, § 344.

statutes granting, strictly construed, § 390.

granted to several all must act, § 390.

of officers in levying taxes and selling property for non-payment, strictly construed, §§ 361-366, 390.

and to be strictly followed, § 390.

power to sell in such acts does not include power to convey, § 390.

given to a city to open and widen streets, but procedure only for laying out, is inoperative as to widening, § 390.

given to freeholders to make prudential rules for improving their common lands does not include imposing penalties on strangers, § 390.

of summary foreclosure by advertisement, § 390.

to towns to make donations to railroads, etc., not invalid because means of determining amount, etc., wanting, § 390.

such construction to be given as will answer intention, § 390.

grant of, generally implies reasonable means for exercise of, § 390.

act conferring powers recited in former act construed as embracing them, § 390.

when granted with reference to another act for definition, only includes the general power there recited, § 390.

special, conferred on a court, strictly construed, § 391.

when to be exercised according to existing law, § 390.

statutes granting, and prescribing how it is to be exercised, exclude any other mode, § 454.

affirmative words in such case imply a negative, § 454.

negative words in such case cannot be directory, § 454.

new grant of, by exercise of which one may be divested of his property, strictly construed, § 454.

to affect property, must be exercised in prescribed manner, § 455.

special, to be exercised by corporations, courts and officers substantially according to statute, § 456.

words importing, and authority, when imperative, § 456.

PRACTICAL CONSTRUCTION —

not lightly questioned, §§ 309, 311.

effect of, depends on long continuance, § 312.

only the interpreter of doubtful statute, § 312.

the length of time required to give strength to, § 312.

PREAMBLE —

what is, § 212.

value of, for construction, §§ 212, 213, 247.

not part of law, § 212.

true office of, § 212.

PRECEPTIVE STATUTE, § 205.

PRESUMPTIONS —

- that foreign law is the same as that where the court sits, § 184.
- none that the government has surrendered any of its fundamental powers, § 378.
- of principal's disability when deputy acts, § 309.
- that what is excluded from a statute by an exception would otherwise be within it, § 222.
- not universal, § 222.
- that proviso applies to preceding matter, § 223.
- this removed by a different intention appearing, § 223.
- that legislature proceeded with knowledge of existing laws, §§ 226, 287.
- that legislature re-enacting statutes intended to adopt construction they have received, § 333.
- that legislature did not intend any further change in existing law than is expressed, § 333.
- nor to violate fundamental principles, § 333.
- or oust jurisdiction of superior courts, § 333.
- nor to surrender public rights, § 333.
- that statutes are to be construed by the common law, § 333.
- that statutory powers are to be executed according to common law, § 333.
- that discretionary power is to be reasonably exercised, § 333.
- are conclusive or rebuttable, § 330.
- that statutes duly authenticated are duly enacted, § 330.
- passed from good motives, § 330.
- that legislation is founded upon proper evidence, § 331.
- facts recited cannot be disproved to invalidate a statute, § 331.
- presumed that the legislature have not done a vain thing, § 331.
- that the legislature intends its acts to be valid and have effect, § 331.
- statutes presumed to be valid, § 331.
- that the legislature is acquainted with the law, § 333.

PRINTED STATUTES —

- may be corrected by original act, § 40.

PRIVATE GRANT —

- words of, taken most strongly against the grantor, § 378.

PRIVATE STATUTES —

- definition, § 194.
- not judicially noticed, § 296.

PRIVILEGE —

- public grants of, strictly construed, § 378.
- statutes conferring private, should not be so construed as to work public mischief, § 386.

PROCEDURE —

- change of, after commission of crime, may come within prohibition of *ex post facto* laws, § 465.

PROCEDURE (continued) —

- acts to improve procedure remedial, § 437.
- giving right to bring action against insurance company at place where is the subject of insurance, § 437.
- act that trial judge file charge to jury of record, § 437.
- resort had to common law for, where statute giving a right or creating an offense is silent as to, § 396.
- where statutory fails, §§ 397, 399.

PROHIBITION —

- implied from penalty, § 335.
- from proviso that provision not be construed to permit, § 343.

PROHIBITIVE STATUTE, § 205.

PROPERTY —

- public grants of, strictly construed, § 378.
- land grants by government construed strictly, §§ 378, 379.

PROSPECTIVE STATUTE, § 206.

PROVISO —

- what is, § 222.
- introduced to qualify or restrict general language, §§ 216, 223.
- totally repugnant to purview repeals it, § 221.
- repealed by statute which repeals the provision it qualifies, § 222.
- presumption that what is excluded from a statute by, would otherwise be within it, § 222.
- otherwise when introduced from abundant caution, § 222.
- what it applies to, § 223.
- does not apply to another section, unless intent appears, § 223.
- applies to the provision or clause immediately preceding, §§ 223, 267.
- if irrelevant, has been rejected, § 223.
- strictly construed, § 223.
- it takes no case out of enacting clause which does not fall within its terms, § 223.
- matter of, may tend to enlarge purview, § 223.
- in penal statutes construed liberally for accused, § 227.

PUBLIC GRANTS —

- words of, construed most strictly against grantee, § 378.
- any ambiguity in, operates in favor of government, § 378.
- the presumption is against the government having parted with any of its powers for accomplishing its ends, § 378.
- against its having parted with any part of its sovereign power of legislation, 378.
- or of police or taxing power, § 378.
- or power of eminent domain, § 378.
- in grant of land no implied covenant to do any further act, § 378.
- in grant of franchise to build a bridge or road, or to establish a ferry, no implied contract not to grant same to others, § 378.
- of power to incorporate does not include power to take land by devise, § 378.

PUBLIC GRANTS (continued)—

- construction of grant to city of right to use soil under road to lay pipes to convey water, § 386.
- of land bordering on tide water, § 386.

PUBLIC OBJECTS —

- liberal construction of acts for accomplishment of, § 443.

PUBLIC RIGHTS —

- not deemed relinquished except by plain words, § 386.
- not to be prejudiced by construction of statutes conferring private privilege, § 386.

PUBLIC STATUTES —

- what are such, §§ 120, 121, 193, 198.
- a statute establishing a municipal court is such, §§ 120, 121.

PUNCTUATION —

- effect of, in construction, § 232.

PURVIEW —

- is the enacting part of statute, § 137.

QUALIFYING WORDS AND PHRASES —

- to what they refer, §§ 267, 269.
- have been applied to several preceding sections, § 267.

REASONABLENESS —

- has a potent influence in construction, § 322.

REBELLION —

- statutes enacted by states in, § 20, note.

RECORD —

- remedial act that trial judge file of record his charge, § 437.

REDDENDO SINGULA SINGULIS —

- when general words so construed, § 282.

REDEMPTION —

- right of, liberally construed, § 420.
- word "owner" used in generic sense in law of, § 420.
- cannot be annulled by legislation, § 480.

RE-ENACTMENT —

- of statute which has received construction, § 255.
- with change of phraseology, § 256.

REFERENCE —

- adoption of statute by general, § 257.
- confined to matter immediately preceding. §§ 257, 259.

RELATIVE WORDS —

- their application or reference, §§ 257, 259, 267.

REMEDIAL STATUTES —

- to receive a liberal construction, §§ 346, 347.
- may be extended to cases clearly within mischief, § 348.
- giving penalty to aggrieved party remedial as well as penal, § 359.

REMEDIAL STATUTES (continued) —

- when in part penal, how construed, §§ 358-360.
- providing for arbitrations, § 439.
 - appeal or *certiorari*, § 440.
- extending elective franchise, § 441.
- taking away penalties, § 441.
- providing compensation to those whose property is compulsorily taken, § 441.
- in favor of taxed persons, § 441.
 - of those affected by proceedings in derogation of their rights, § 441.
- for protection of officers, § 442.
 - of married women, § 442.
 - of ship-owners, § 442.
- for accomplishment of important public objects, § 443.
- what are such, § 207.
- liberally construed, § 207.
 - such construction when precluded, § 207.
- statutes may be remedial in part and penal in part, § 208.
- what are, for purpose of liberal construction, §§ 408, 412, 434, 445.
- statutes such, unless excluded by some rule of construction, §§ 410, 412.
- letter of, may be extended to embrace cases within the mischief, § 410.
- three points to be observed in construction of, § 409.
- intention of to be carried out, § 409.
 - more liberally inferred in construing such statutes, § 409.
- construed liberally to reach mischief and advance remedy, §§ 410, 411.
- cases not within intention excluded, § 411.
- use of particular words will not be permitted to control evident intention, § 423.
- what testamentary bond construed to include, § 423.
- construction of statute of limitations, §§ 424-426.
- act to prevent delays in obtaining judgment, § 435.
- act extending time, in exceptional cases, for presenting claims against decedent's estate, § 436.
- act for execution of powers of will, by successor of executor, § 436.
- act making void bequest to witness to will, § 436.
- statutes intended to promote the convenience of suitors, § 437.
 - to improve procedure, § 437.
 - or promote public convenience, § 438.
- provision that trial judge file of record his charge to jury, § 437.
- for set-off of value of improvements, § 437.
- act empowering court to decide about costs on commissions *de lunatico*, § 437.

REMEDY —

- may be changed if right not impaired, § 164.
- restored by repeal of law prohibiting, § 164.
- when affirmative statute provides, where one existed at common law, § 202.
- rule where such statutes successively provide, § 202.
- liberal construction given to statutes to advance, § 430.

REMEDY (continued) —

- everything may be done consistently with any construction for that purpose, § 430.
- but not where contrary intention clearly expressed, § 430.
- statutes of limitation relate to, § 479.
- no vested right in, § 482.
- new remedy may be added to or substituted for those which exist, § 482.
- and applied to existing cases, § 482.
- subject, however, to a contrary intent appearing, and considerations of reasonableness, § 482.
- governed by law of forum, § 18.
- given by statute, limited to strict statutory bounds, § 392.
- not to be enlarged by construction, § 392.
- only available on statutory conditions, §§ 392, 393.
- when new given, one already existing, § 399.

REPEAL —

- when added to unconstitutional act, § 175.
- words expressing absolutely may be qualified by context, § 242.
- of law giving jurisdiction takes away power to proceed in pending cases, § 404.
- effect of repealing statute adopted by general reference, § 257.
- power of repeal, § 186.
- modes of, § 137.
- will take effect from any subsequent statute expressing intent, § 137.
- the word repeal not necessary, § 137.
- repealing words may be qualified by context, § 242.
- suspension not a repeal, § 137.
- what is, § 137.
- what are repealing statutes, § 209.
- may be express or implied, § 137.
- is express when declared in direct terms, § 137.
- is implied when there is subsequent repugnant legislation, §§ 137, 138.
- takes effect when repealing statute goes into operation, § 137.
- when statutes profess to make a change repeal suggested, § 137.
- repeal of all laws within purview is a repeal of all on same subjects, § 137.
- repugnancy of later statute causes repeal, § 137.
- being ascertained, later act in date or position will prevail, §§ 138, 170.
- repugnancy in principle or spirit not sufficient, § 137.
- of unconstitutional provision has no effect, §§ 137, 147.
- will not repeal private act, § 137.
- non-user or custom will not repeal, § 137.
- statute will not cease on removal of some of the evils aimed at, § 137.
- statutes may be rendered inoperative by repeal of fundamental part, § 137.
- implied repeals ascertained as legislative intent is ascertained in other cases, by construction, § 138.
- not favored, and only allowed to extent of repugnancy, § 138.
- statutes not repugnant unless they relate to the same subject, §§ 133, 142.

REPEAL (continued) —

difference in repealing effect between affirmative and negative statutes, §§ 138, 139.

repugnance of any previous statute contrary to a negative statute readily seen, § 139.

not so apparent in case of affirmative statutes, §§ 139, 140.

when a statute gives an exclusive rule it implies a negative, § 139.

when affirmative words imply a negative, § 140.

new grant of part of power already possessed repeals residue, § 141.

repeal by changing criminal law, § 142.

common law is repealed as to a common law offense when it is defined and enacted by statute which also prescribes the punishment, § 142.

change of elements of an offense or punishment a repeal, § 142.

creation by statute of an offense consisting of some of the elements of an existing offense and others, no repeal of the existing offense, §§ 142, 143.

if an offense identified by name or otherwise is altered in degrees or incidents it is repealed, § 143.

where a new law covers whole subject of an old one, adds new offenses and prescribes different penalties, it is a repeal, § 143.

a revision is an implied repeal, § 143.

where act does not refer to old law, defines an offense punishable by old law and provides new punishment, it does not affect a past offense, § 143.

no repeal where penalty reduced or place of confinement changed, § 143.

granting a larger or a different power is a repeal of limitations, § 145.

when exercise of new power requires grantee to go beyond previous limits, § 145.

where new grant ignores former conditions, § 145.

radical change in leading part of an act will repeal inconsistent provisions, § 146.

restriction on bottomry loans impliedly removed on abolition of monopoly to which it was subsidiary, § 146.

estate by curtesy abolished by enlargement of rights of married women, § 146.

implied, removed their exemption from statute of limitations, § 146.

difference as to implied repeal where there is express repeal or inconsistent legislation, § 147.

no repeal by re-enactment of part of act in another for a different scheme, § 147.

nor will suspension of latter suspend the other, § 147.

statutes adopted by reference not repealed by repeal of statute adopted, §§ 147, 150.

instance of appointing election on county seat question at April election, and subsequent change of that election, § 147.

presumption against implied repeal, and courts endeavor to harmonize statutes, §§ 148-153.

illustrations, §§ 148-153.

REPEAL (continued) —

contradictory act of less scope will have effect to impose a limitation,
§ 150.

or exception, §§ 153, 167.

acts passed at same session deemed less likely to conflict, §§ 151, 153.

act imposing new regulations of existing duty has no repealing effect,
§ 151.

an affirmative act providing a new procedure, cumulative, §§ 150, 151.

no repeal by passage of successive limitation laws, § 151.

successive affirmative acts relative to venue may stand together, § 151.

not sufficient to repeal that acts are different; they must be contradictory, § 152.

as act presumed to be passed deliberately and with knowledge of existing laws, repugnancy must be irreconcilable, § 152.

considerations of convenience, justice and reasonableness strong against implied repeal, § 152.

revision a repeal, § 154.

what is revision, § 154.

a new statute intended to be exclusive effects a repeal, §§ 152, 153.

general laws will not repeal those which are particular, §§ 157, 158.

when general laws required and repeal inconsistent legislation, particular or special acts repealed, § 159.

what is a later law potent to repeal, § 160.

provision later in position is such, § 160.

effect of, without a saving clause, § 162.

indefinitely suspended while the repealing statute in force, § 162.

revival by repeal of repealing statute, § 162.

inchoate rights lost by repeal, § 163.

otherwise if perfected by judgment, § 163.

rights arising on contract, when not affected by repeal, § 164.

vested rights not affected by, § 164.

causes of action barred by statute of limitations not revived by its repeal, § 164.

repeal of statute after judgment will not defeat an appeal previously taken, § 164.

repeal of statute essential to a judgment after repeal requires reversal, § 164.

repeal of statute prohibiting remedy restores it, § 164.

prohibiting defense of usury, repeals law of usury, § 164.

powers derived wholly from statute extinguished by its repeal, § 165.

proceedings in progress at time of repeal ended, § 165.

effect of, on penalty or forfeiture, § 166.

effect of, pending appeal, §§ 164-166.

operates as a pardon, § 166.

acts mitigating punishment, § 166.

see SAVING CLAUSE.

where is no express, none is presumed to be intended, § 321.

not presumed to change the law or existing institutions, systems or policies more than the terms of statute require, § 321.

REQUIRED READINGS OF BILLS —

- purpose of, § 49.
- actual, required, § 250.
- amendments do not require same readings as bills, § 49.
- does not extend to everything which becomes law by the act, § 49.
- requirement to read on separate days, § 49.
- what sufficient cause for dispensing with, not a judicial question, § 49.

RES JUDICATA —

- decision of case is, though not made in compliance with constitution, § 451.

RETROSPECTIVE LAWS —

- such law giving illegitimates a right to inherit, presumed not intended to affect pending action in which plaintiff had no title at its commencement, § 148.
- may take away defenses based on irregularities, § 164.
- may validate contracts, § 164.
- when obnoxious, § 206.
- when not unjust, § 206.
- may have effect prejudicially on private interests, when not protected by constitution, § 206.
- strictly construed, § 406.
- statutes which change the rule of evidence relate to the remedy, and do not impair the obligation of contracts, § 478.
- a law abolishing distress for rent has been sustained, § 478.
 - also imprisonment for debt, which is not considered as part of the contract, § 478.
- statutes of limitation may be changed and affect existing cases, § 479.
- legislature cannot create a legal liability out of past transaction, § 581.
- statutes will not be construed to injure inchoate rights, if it can be avoided, § 481.
 - nor to interfere with the existing course of business, unless the intention is clearly expressed, § 481.
- remedial statutes which are retrospective, how construed, § 482.
- continuing fact commencing before passage of act, and continuing afterwards, how affected, § 482.
- statutes relating to procedure *prima facie* apply to existing cases, § 482.
 - pending proceedings good as far as they have gone when new act takes effect, § 482.
- definition, § 463.
- regarded with disfavor as generally unjust, § 463.
- ex post facto* laws and laws impairing obligation of contracts prohibited, § 463.
- statute should not be so construed as to affect existing rights, § 464.
 - or impose new duties or obligations in respect of past transactions, § 464.
- general provision that statute of limitations shall run against state, not be construed retrospectively, § 464.

RETROSPECTIVE LAWS (continued) —

- statute of limitations will not be construed to apply to existing cases, § 464.
- statute will not be construed to take away a right to an office, § 464.
 - as by applying to incumbents new regulation as to age, § 464.
- new statute for review of proceedings on complaints against assessments, not applied to pending cases, § 464.
 - for review by probate court of its own decisions given only prospective effect, § 464.
- new record of deeds not applicable to existing deeds, § 464.
- strictly construed, § 464.
- subsequent act allowing attorney's fee to be added to penalty, § 469.
- what are *ex post facto* laws, §§ 465, 470.
- what laws impair obligation of contracts, §§ 471–479.
- recording laws may apply to existing deeds, § 474.
- contracts may be validated, § 474.
- periods of limitation may be changed, § 477.

REVENUE LAWS —

- how construed, § 361.
- tax laws construed strictly, § 362.
- also statutes delegating the taxing power, § 365.
- and statutes exempting from taxation, § 364.

REVISION —

- repeal of, does not revive revised acts, § 168.
 - nor the common law, § 168.
- what is, § 154.
- implied repeal, §§ 154–156.
- to be alone consulted when the meaning is plain, § 156.
- when there is a conflict original acts consulted, § 156.
- title of original act may be considered in case of doubt, § 156.
- does not repeal exceptions in original law, § 156.
- dates of original enactments will determine priority of parts, § 161.

REVIVAL —

- repealed statute revived by repeal of repealing statute, §§ 162, 168.
 - otherwise where constitution requires new act to contain revised law, § 168.
- repealing a statute revives common law, § 168.
- where repealing statute substitutes other provisions, § 168.
- may be made to depend on contingent event, § 168.
- where act expressly revived, how to be construed, § 168.
- incomplete proceedings, made void by repeal, not revived by revival of statute, § 168.
- repeal of revision does not revive revised acts, § 168.

REVIVAL OF ACTIONS —

- law for, against representatives *in pari materia* with law for appointment of executors and administrators, § 284.
- construction of remedial statute for, on death of plaintiff, §§ 416, 436.

RIGHTS —

- law at the time of their accrual governs, § 11.
- statutory, inchoate when, § 11.
- under foreign law, § 13.
- in action, plaintiff should have title when suit brought, § 148.
- statutory right, while inchoate, lost by repeal, § 163.
- distinguished from remedy, § 164.
- when vested under statute while in force, not destroyed by repeal, § 164.
- public, not treated as relinquished by inference, § 386.
- when statute creates, effect on existing, § 202.
- effect of repeal on statutory, while inchoate, § 163.
- statutes against common right strictly construed, §§ 366, 367.
- liberal construction of acts for persons affected prejudicially by favors granted to others, § 441.
- inchoate, are subject to legislation, § 481.
- new remedy may be provided for existing, and added to or substituted for those which exist, § 482.
- vested, not to be legislated away by curative statutes, § 483.
- not meritorious which rest upon defects, § 484.
- if jurisdictional facts are wanting, the proceeding cannot be sustained nor cured, § 484.
- the proceeding will be fatally and incurably defective, § 484.
- statutes conferring new, strictly construed, § 458.
- prescribing mode of enforcement mandatory, § 458.
- regulating existing, with negative words, mandatory, § 459.
- common law, not taken away unless intention clear, § 400.

ROAD —

- franchise to build not construed to be exclusive, § 378.
- grant to plank-road company to lay its road on established highway implies no power to take exclusive possession, § 378.

RULE OF ACTION —

- how applied judicially, § 9.
- prescribed by the legislature, § 10.

RULE OF CIVIL CONDUCT —

- what is, §§ 7, 8.

RULE OF PROPERTY —

- when doubtful statute construed by inferior courts and has become a, § 307.
- practical construction binding when it has become a, § 309.
- constructions which are, strongly adhered to, §§ 314, 317, 318.

SALARY —

- not changed by appropriation being made of a less sum, § 150.

SALE —

- of real estate on execution, statute requiring certificate of to be filed, directory, § 452.
- requirement that execution, be made at court-house, mandatory, § 455.

SAME SESSION —

laws passed at same session deemed less likely to conflict, §§ 151, 153, 283.

SAVING CLAUSE —

what is, §§ 222, 225.

is void if totally repugnant to purview, §§ 221, 228.

generally restricts repeal, § 225.

strictly construed, § 225.

in penal acts provisos and exemptions in favor of accused liberally construed, § 227.

general intent of repeal cut down by special intent in saving clause, § 225.

its effect, § 225.

a general saving law will have effect unless a different intent is manifested in subsequent repeals, § 226.

general excluded by special, § 325.

general provisions will operate, § 325.

express saving, exception or exemption excludes others, § 328.

effect of against repeal, § 167.

general statute may operate as such, § 167.

SEALED BIDS —

statutes regulating, mandatory, § 458.

SEA SHORE —

grants of, how construed, § 386.

act to incorporate city bordering on, vests no part of, § 386.

SESSIONS OF LEGISLATURE —

time and length of, prescribed in constitution, mandatory, § 26.

must be held at proper place, § 26.

extra sessions, § 26.

SET-OFF —

remedial act allowing, of improvements, § 437.

SHALL BE LAWFUL —

when mandatory, §§ 460-462.

SHIP-OWNERS —

construction of act mitigating rules of common law in favor of, § 442.

"SINGLE MAN" —

may be made by context and manifest intent to include unmarried woman, § 417.

SINGLE SUBJECT OF STATUTES —

constitutional provisions, § 76.

held mandatory, §§ 79-81.

what is the subject or object, § 83.

no limit to its magnitude, § 84.

the required unity, § 84.

no objection that subject only partially treated, § 84.

all the provisions must be germane to subject, § 85.

and not broader than the title, § 85.

SINGLE SUBJECT OF STATUTES (continued) —

- a subject includes incidents and subsidiary details, § 98.
- what an act of incorporation may include, § 94.
- illustrations, showing what details and incidents are germane, §§ 94, 95, 96.
- includes abolition of things inconsistent, § 97.
- a plurality of similar subjects may be grouped and constitute a single subject, § 98.
 - but if individualized in treatment there is no unity, § 98.
- a curative act may apply to many instruments or proceedings, § 99.
- one act may relate to all or a portion of the courts of a state, § 100.
- under title to amend an act, only provisions can be included which might have been included in the act amended, § 101.
 - curative provisions would make the act double, § 101.
- provisions not germane to or outside the title, void, §§ 102, 170.
- effect of including more than one subject in act and in title, § 103.

"SINGLE WOMAN" —

- may be made by context and manifest intent to include married woman, § 418.

SOVEREIGNTY —

- every nation possesses exclusive within its own territory, § 13.
- what it extends to, § 13.
- all residents subject to it, § 13.
- local law governs acts done, contracts made, etc., § 13.
- how change of, affects the laws, § 19.
- is in the people, § 41.
- grant of right to sue state strictly construed, § 386.

SPECIAL LAWS —

- prohibition of in constitution, § 116.
 - object of prohibition, §§ 120, 127.
- definition, §§ 120, 127.
 - local laws are special as to place, § 127.
- legislature has power to pass special and local laws in the absence of constitutional inhibition, § 119.
- invalidity of unequal special laws, § 119.
- prohibition of, on enumerated subjects is an implied requirement of general laws, §§ 126, 127.
- individual cases of enumerated class cannot be provided for, §§ 126, 129.
- curative laws cannot be passed, § 130.

STARE DECISIS —

- statutory constructions should be adhered to, §§ 310, 312.
- when a point has been once settled it should be adhered to, § 313.
 - to give stability to law, § 313.
- precedents have effect on legal science as experiments in philosophy, § 313.
- decisions have effect beyond the particular case, § 313.
 - they become authority, § 313.
 - the highest evidence of what the law is, § 313.

STARE DECISIS (continued) —

- distinction between precedents which are rules of property and those which are not, §§ 314, 315, 317, 318.
- will be regarded as a rule of property if its nature is such or will operate to become such, § 318.
- no absolute rule when imperative, § 316.
- when departed from there is a thoughtful comparison of consequences, § 316.
- two grounds for departing from a single decision, § 317.
- applicable to constitutions and statutes, § 317.
- applies only to decisions on points involved in causes, § 317.
- applies not always to the reasoning, but only the conclusion and whatever that necessarily involves, § 320.
- there is no effect on questions not decided, though they might have arisen, § 318.
- a judicial construction of statutes becomes a part of them, § 319.
 - and rights which have attached under a construction, especially under contracts, cannot be divested by a change, § 319.
- contract rights are protected by the federal constitution from such impairment, § 319.
- a decision of the supreme court is law of the case in its subsequent trial and proceedings, § 321.

STATE —

- bound like a natural person by its contracts, § 472.
- its contracts protected from impairment like contracts of private persons, § 474.

STATUTE OF FRAUDS —

- applicable to prior contracts, may impair their obligation, § 471.

STATUTE OF LIMITATIONS (see LIMITATIONS).**STATUTES (see REPEALS; TITLES OF STATUTES and SINGLE SUBJECT OF STATUTES) —**

- have no extraterritorial effect, §§ 12, 14.
- effect of foreign statutes and laws, § 12.
- extraterritorial effect in case of colonization, § 15.
- continuance after change of sovereignty, § 19.
- of states in rebellion, § 20.
- domain of federal and state statutes, §§ 21, 22.
- statutes of one state foreign to other states, § 22.
- state statutes not foreign to general government, § 22.
- common-law record of, § 27.
 - no plea denying admitted, §§ 27, 53.
- validity of, how tried, §§ 27, 43, 44, 52, 182.
- how question of existence raised and decided, §§ 27, 52, 53, 54.
- legislative record, § 28.
- parol evidence not sufficient to impeach, § 43.
- journals may be consulted for parliamentary history of, § 43.
- absence of provision for verifying all proceedings necessary to due enactment of, §§ 40, 41.

STATUTES (continued) —

- will not be declared void on facts admitted by parties litigant, § 45.
- presumed valid, § 46.
- operation of, may be made to depend on contingency, §§ 72-74.
 - or foreign legislation, § 74.
- constitutional requirements as to single subject and title, §§ 76-103.
- duration of, § 136.
- take effect from date of passage unless other date specified, §§ 104, 106.
- date of passage is date of last act in process of enactment, § 104.
- purpose of specifying future commencement, § 104.
- formerly acts of parliament took effect from beginning of session, § 105.
 - has been changed by statute, § 105.
 - same rule recognized in North Carolina, § 106.
- legislature may fix future day for act to take effect, § 107.
- speak from the day they take effect, § 107.
 - and from the first moment of that day if it be a future day, § 111.
- if they take immediate effect, they commence to operate at the precise time of passage, § 110.
- taking effect on publication, § 109.
- effect of general statute fixing future date for acts to commence, § 107.
- supplemental act taking immediate effect may give such effect also to the original act, § 107.
- constitutional provisions regulating the time of acts taking effect, §§ 108, 109.
 - are mandatory, § 108.
 - emergency clause, § 108.
 - in the absence of emergency clause when required, time of taking effect not shortened, § 108.
- repealing power, § 136.
- repeals express and implied, §§ 136-178.
- negative statute is one expressed in negative terms, § 139.
- affirmative statute is one expressed in affirmative terms, § 139.
- what penal laws include, § 142.
- where statute changes punishment of common-law offense it is still a common-law offense, § 142.
- specific regulations in general law adopted by general reference in local act, how affected by subsequent changes, § 390.
- courts have no concern with policy or expediency of statutes, § 237.
- whether expressed in general or limited terms, legislature to be taken to mean what it has plainly said, § 237.
- a different intent is not thus to be imputed to legislation to serve any supposed policy or to maintain its validity, § 238.
- to be read so as to harmonize and give effect to all their parts, §§ 239-246.
- every part to have effect, § 240.
- literal import not to govern against evident intention, §§ 241-246.
- intention declared in, controlling, § 246.
- interpretation of words and phrases, §§ 247-255.
- recitals in, effect of, § 194.
 - value of, in construction, § 247.

STATUTES (continued) —

prohibitory statutes not construed on principles of leniency, § 254.

prohibited things not void for their tendency, § 254.

user of words in, § 255.

re-enacted after receiving construction, § 255.

effect of re-enacting with change, § 256.

every change does not indicate change of intent, § 256.

adoption of, by general reference, §§ 257, 300.

confined to object of adoption, § 257.

effect of repeal after adoption, § 257.

effect of incorporating existing statute in a new one, § 257.

not vitiated by bad grammar, § 259.

may be fatally vague and ambiguous, § 261.

in pari materia, §§ 283-288.

to be construed with reference to whole system of which it is a part, § 284.

doubtful provisions not to be construed in conflict with general principles, § 287.

courts will judicially notice history of act in process of enactment for certain purposes, § 300.

to be read in view of surrounding facts, § 300.

when object may be learned from another document, § 300.

contemporaneous construction of, § 307.

effect of general usage in construction of, § 308.

practice inconsistent with, cannot repeal, § 308.

should be so construed, if possible, as to make it valid, § 324.

duly authenticated, presumed duly enacted, § 330.

except where by organic law it is provided otherwise, § 330.

expediency and moral justice of, not considered by courts to affect validity, § 330.

facts assumed by act cannot be disproved to invalidate, § 331.

act creating county cannot be invalidated by disproving required population, § 331.

presumed to be intended to have effect and capable of it, § 331.

presumed valid, § 331.

every intendment made in favor of, § 332.

specific prevails over general, § 325.

in derogation of existing law strictly construed, § 333.

public, noticed by courts, § 335.

private, not noticed, § 335.

construed with reference to object or purpose, § 346.

strict construction of, § 346.

construction rests upon many rules, § 347.

penal, strictly construed, § 349.

cannot be extended by implication, § 350.

strict construction applies whether statute refers to description of the offense, the penalty or procedure, § 352.

revenue laws, how construed, § 361.

for taxation, §§ 362, 363.

STATUTES (continued) —

- exemption from taxation, or other burdens, § 364.
- against common right strictly construed, § 366.
- of limitations, § 368.
- fixing limitations of right to move for new trial or to take appeal, § 369.
- interfering with legitimate industries, how construed, § 370.
- creating or increasing liability, § 370.
- giving action to widow and next of kin for negligently causing death, §§ 371, 398.
- costs, § 371.
- for discharge of insolvent debtors, § 372.
- for exemption of property from execution, § 372.
- depriving passengers of compensation for injuries who ride on platform, § 372.
- allowing recovery of damages from intoxication against sellers and renters, §§ 373-377.
- modified expressly or by implication by later legislation, § 287.
- doubtful provision not construed to conflict with general principles, § 287.
- or fundamental rights, § 290.
- object of, has potent influence in construction of, § 292.
- state, in federal courts, § 293.
- every part of, should have a reasonable effect, § 398.
- authorizing persons to sue *in forma pauperis*, § 398.
- construction of insolvent act as to voluntary conveyances, § 419.
- act providing compensation of public officers, § 419.
- when intended for the protection of purchasers and creditors, not applicable to others, § 429.
- remedial, §§ 434, 444.
- when declared to be remedial, how construed, § 445.
- directory, §§ 446-453.
- mandatory, §§ 454-462.
- statutory direction to secretary of state to publish, directory, § 452.
- to make plan of drainage before directing work to be done, directory, § 452.
- retrospective, §§ 463-482.
- curative, §§ 483, 484.

STATUTORY DEFINITIONS —

- apply where a statute does not otherwise interpret itself, § 231.
- their general application, § 231.
- special statutory definitions exclude all others, § 231.
- not applicable to pleadings on the statute to which they apply, § 251.

STATUTORY LAW —

- definition of, §§ 6, 7, 8.
- what included in, §§ 7, 8, 11.
- cannot be extended to govern existing cases, § 11.
- has no extraterritorial effect, § 12.
- essential that there be a legal legislature, § 26.

STATUTORY LIEN —

has only common-law incidents, § 290.

STATUTORY POLICY —

strict construction, to prevent overturning established and well defined,
§ 407.

general language will be construed in harmony with, § 407.

STATUTORY PROCEEDINGS —

must be conformable to statute, § 456.

every act which is jurisdictional, or of essence of proceeding, or for
benefit of party affected, mandatory, § 456.

certificate of justice of death of infant's father, as a prerequisite to
mother's consent to apprenticeship, § 456.

every material requirement of statute to be followed in exercise of
power of eminent domain, § 456.

provision that work under municipal charter be let to lowest bidder,
mandatory, § 457.

STATUTORY RIGHTS —

depend on statutes creating them, § 398.

to recover for death caused by negligence, §§ 371, 398.

statutes for accommodation of particular citizens or corporations, § 398.

to sue *in forma pauperis*, § 398.

to detain trespassing animals, § 398.

for allowance of gratuitous credits against debt to state, § 398.

mechanic's lien law, § 398.

to obtain summary judgment, § 398.

as to mode of obtaining compensation for property taken for public use,
§ 398.

statutes regulating, mandatory, §§ 458, 459.

STAY LAWS —

construction of as to impairing obligation of contracts, § 478.

STORY, MR. JUSTICE —

his views of the separation of fundamental powers, § 3.

STRICT CONSTRUCTION —

a statute in derogation of an existing statute will be strictly construed,
§ 137.

best to follow reason and rule of common law, § 290.

statute in affirmance of the common law construed by it, § 291.

extraneous facts in aid of, § 292.

object of statute has potent influence in, § 292.

contemporaneous, § 292.

object of statute considered, § 292.

extrinsic aids in, § 292.

compared with liberal, §§ 346-348, 359, 360.

not precise converse of liberal construction, §§ 347, 348.

applied to penal laws, § 361.

does not embrace a case not within letter, §§ 348, 350, 354.

so if not within the intention, § 350.

not so applied as to defeat intention, §§ 348-350.

STRICT CONSTRUCTION (continued) —

- not opposed to application of common sense, § 350.
- applies to description of offense, penalty and procedure, § 353.
- statute not to be extended beyond grammatical sense on a plea of failure of justice, § 353.
- penalty not inflicted if meaning in doubt, § 353.
- if notice necessary to impose a duty it must be actual notice, § 354.
- doubts on reading statute to be resolved in favor of accused, §§ 353, 357.
- ambiguities not to be imagined in order to apply a lenient construction, § 357.
- of revenue statutes, § 361.
- of statutes which impose taxes, §§ 362, 363.
 - or exempt from taxation, § 364.
 - or delegate the taxing power, § 365.
- of statutes against common right, § 366.
 - limiting right to move for new trial or take appeal, § 369.
 - interfering with legitimate industries, § 370.
- of public grants, §§ 378, 379.
- of delegation of power to corporations, §§ 379-386.
 - eminent domain, §§ 387-389.
- of statutes granting power, §§ 390, 391.
 - providing new remedy, §§ 392, 393.
 - summary proceedings, § 393.
 - new methods of proof, § 393.
 - methods of appeal, § 394.
 - exceptional methods of obtaining jurisdiction of parties, § 394.
- of new procedure for new offense, § 396.
- of statutory rights, §§ 397, 398.
 - statutes in derogation of common law, § 400.
- of statutes relative to married women, § 400.
- when interpretation clause strictly construed, § 402.
- of retrospective laws, §§ 406, 464.
- of statutes to prevent interference with well defined and established statutory policy, § 407.
- applied to statutes granting new right, privilege or immunity, § 458.

SUBJECT-MATTER —

- of statute, controlling effect of in construction, § 218.
- general words may be restrained to it, § 218.
- words of narrower import expanded to it, § 218.
- general provision in appropriation act presumed temporary, § 218.
- act giving pilot's lien construed not to apply to government vessels, § 218.
- general saving clause limited to acts repealed by same act, § 218.
- exemption in revenue law limited to taxes provided for in same act, § 218.

SUITORS —

- acts remedial which are intended to promote convenience of, § 437.

SUPPLEMENTAL ACTS (see **AMENDATORY ACTS**), § 135.

SUMMARY PROCEEDINGS —

statutes for, strictly construed, §§ 207, 303, 399.

TAXATION —

statutes authorizing, or delegating power of, construed strictly, §§ 361-363, 365.

also exemptions from, § 364.

never implied that the government has surrendered the power of, § 378.

TAX-PAYER —

provisions for protection of, mandatory, § 454.

publication of notice as to time of redemption, § 457.

TECHNICAL WORDS —

when used technically to be construed according to technical meaning, §§ 247, 253, 254.

in the sense generally accepted among those engaged in the trade, etc., to which they apply, § 254.

TENSE —

of statutes not always followed, § 259.

TERRITORIAL DIVISIONS —

established by public statutes judicially noticed, § 295.

TERRITORIAL LAWS —

power of congress to legislate for territories, §§ 23, 24, 195.

TERRITORIES —

power of congress to legislate for, §§ 23, 24.

nature of government in, §§ 24, 25.

TESTAMENTARY BOND —

what construed to include, § 423.

TEST OATH —

statute requiring of suitors, strictly construed, § 367.

statute requiring in respect to past acts, *ex post facto*, § 467.

when applicable to present acts, § 468.

TIME WHEN STATUTES TAKE EFFECT (§§ 104-111, 160) —

statutory provisions requiring official acts, directory as to, §§ 448-450.

TITLE —

acquired by laws of one country good everywhere, § 13.

TITLE TO LAND —

courts take judicial notice of the source whence derived, § 298.

TITLES OF STATUTES —

constitutional requirement to express subject of act, § 76.

held mandatory, §§ 79-81.

indispensable part of every act, §§ 86, 211.

how subject required to be stated in, § 86.

must be as comprehensive as the subject, § 87.

and broad enough to cover all the provisions, §§ 87, 211.

the purpose for which title must express the subject, § 88.

TITLES OF STATUTES (continued) —

the degree of particularity in expressing the subject left to discretion of the legislature, § 88.

it may be too general; if misleading will vitiate act, § 90.

it need not index the details of act, §§ 88, 211.

it may index details, and will be good expression of the general subject in which they converge, § 95.

it need not give synopsis of means to accomplish the statutory purpose, § 88.

"etc." may increase scope of the title, § 89.

should accompany bill in its passage, § 91.

a subject stated generally in the title includes incidents and subsidiary details, §§ 93-95.

amendatory and supplemental acts, § 101.

sufficient if it identifies the original act and expresses the purpose to amend or supplement it, § 101.

may contain whatever might have been inserted in amended or supplemented act, §§ 101, 132.

if act and title contain more than one subject, whole act void, § 103.

no part of statute, § 210.

of great importance in modern legislation, § 210.

could not, at common law, control plain words in the statute, § 210.

referred to in case of doubt to clear away ambiguities, §§ 210, 213.

acts identified by, § 210.

when no constitutional barrier, plain words may give act effect beyond, § 210.

effect of constitutional restriction to one subject in, § 211.

act to be construed in view of, § 211.

is a limitation to scope of act, § 211.

TOLL —

franchise to take not implied in grant, § 378.

TOPOGRAPHY —

courts take judicial notice of, of state, § 298.

TOWNS —

subject to legislative control, § 473.

may be changed or abolished at the will of the legislature, § 473.

TRADE —

includes a cod fishery, § 356.

TRANSITORY RIGHTS—

may be enforced anywhere, §§ 13, 14.

title acquired under laws of one country universally recognized, § 13.

contracts the same if not contrary to policy of the law of forum, § 13.

TREATIES —

rights which have vested under cannot be destroyed by the legislature nor the executive branch of the government, § 480.

are part of the law, §§ 197, 294.

judicially noticed, § 294.

UNIFORM OPERATION OF LAWS OF GENERAL NATURE (§§ 1. 121-123)—

- there may be differences in details, § 121.
- provision does not prevent special legislation, § 122.
- requirement intended to prevent privileges or immunities to one class and not others, § 121.
- to prevent unjust discriminations, § 122.
- of this nature are laws as to sufficient fences, § 122.
 - those requiring all fields to be inclosed therewith, § 122.
 - or prohibiting sheep from running at large, § 122.
 - relating to libel, § 122.
 - or taxes, § 122.
- criminal laws must have a uniform operation, § 123.
 - also laws relating to common schools, § 123.
 - divorce, descent and distribution of property of decedents, § 123.
- the general form of a statute not the criterion, § 123.
- whether a law be of a general nature depends upon its subject-matter, § 123.
- judicious classification admissible, § 123.
 - what is, §§ 127-129.
- a law in general terms and restricted to no locality, operating equally, must apply to a group of subjects needing peculiar legislation, § 127.
- distinctions which do not call for peculiar legislation cannot be basis of classification, § 128.
- limitation to even such classification, § 129.
- a general act cannot be restricted in territory, § 129.
- what is uniform operation, § 124.
- operation is uniform if law operates uniformly under like conditions and circumstances, § 124.
- fees may be allowed according to population, § 124.
- how uniformity secured in Tennessee, § 124.
- the number of persons affected does not control, § 125.
- legislation as to certain liabilities may be confined to railroad companies, § 125.
 - exceptional jurisdiction may be given to justices in such cases, § 125.
- towns and cities may be classified according to population for appropriate legislation, § 125.
- railroads may constitute a class for legislation adapted to them as such, § 126.
- a law embracing whole subject must also have uniform operation, § 127.
- what is a general subject, § 127.
- such laws cannot be made special by amendment, § 130.

UNREASONABLENESS —

- argument against, forcible, § 152.
- out of place against plainly expressed intention, § 238.

UNWRITTEN LAW —

- what it includes, §§ 15, 16, 184.
- of real property, federal courts follow, as interpreted in state, § 187.

AGE —

- TITLE** —
 will not repeal a statute, § 137.
 long practice may clear away ambiguities, § 137.

VENIRE —

- requirement that certain words be inserted, mandatory, § 455.

VESTED RIGHT —

- retrospective laws impairing, § 206.
 what is, § 164.
 when party may have in penalty, § 166.
 cannot be destroyed or impaired, § 480.
 secured by the bill of rights, § 480.
 is property as tangible things are, § 480.
 there is, in an accrued cause of action or defense, § 480.
 a defense under statute of limitations is, § 480.
 a title may be so derived, §§ 479, 480.
 if a contract when made is a nullity it cannot be made good by an act
 of the legislature, § 480.
 a right of redemption once vested is a property right, § 430.
 it cannot be annulled by a legislative act, § 480.
 a husband's right in the property of his wife cannot be divested by sub-
 sequent legislation, § 480.

VOLUNTARY CONVEYANCES —

- construction of remedial statute relating to, § 419.

VOTER —

- statutory conditions to right to vote must be complied with, § 459.

WAR —

- in case of civil, exception to statute of limitations admitted, § 424.

WARRANT OF ATTORNEY —

- construction of statutes relative to, § 429.

WATER-COURSE —

- grant of, does not include public ferry, § 379.

WIDOW —

- statutes giving action to, and next of kin for causing death, § 371.
 damages from intoxication, §§ 373-377.

WILBERFORCE —

- his definition of statute law, § 7.

WILFUL —

- meaning in statutes, § 253.

WILL —

- act remedial providing for execution of powers of, by successor of exec-
 utors, § 436.
 construction of act making void bequest to witness to, § 437.
 statute providing requisites of, will not be applied to those which have
 been executed, § 464.

WILL (continued) —

construction of, cannot be affected by act passed after death of testator, § 480.

WITNESSES —

exceptions to competency of, restrictive, § 224.

construction of statute prohibiting a party as witness as to transaction after opposite party dead, § 429.

act remedial that bequest to, in will, void, § 436.

WORDS AND PHRASES —

to be construed, or altered or supplied, to advance intention of act, §§ 218, 246.

may be contracted or expanded for that purpose, §§ 219, 238.

general, may be cut down to avoid conflict with settled policy, § 218.

limited expression may be expanded to effect intent, § 245.

when intention ascertained it controls, § 218.

particular words may indicate a limited intent, §§ 218, 219.

general words in one part may be limited by particular words in another part, § 219.

meaning of, in a recent statute will have weight, § 229.

in common use, to be taken in their common signification, § 229.

contemporaneous construction of by legislature high evidence of its intention, § 229.

where they conflict with each other, their import may be varied to avoid the contradiction, § 238.

of absolute repeal, may be qualified by context, § 242.

where they do not directly apply to the particular case, the object of act will determine their sense, § 242.

orphan may be shown by context to mean minor, § 242.

natural sense of, their literal import, § 245.

may be departed from to carry out intention, §§ 245, 246, 250.

general, or clause, may be restricted by evident intention, § 246.

do not always extend to every case within them, § 246.

inquiry is in what sense they were intended to be used, § 246.

may be transposed, § 246.

when interpretation clause intended to give particular words another than their natural meaning, strictly construed, § 402.

the sense of, modified by context and associated words, § 262.

effect of qualifying, §§ 267, 269, 279-281.

when general, follow particular words, § 268.

"laws sometimes construed by context may mean only written laws," § 429.

common or popular, understood in a popular sense, §§ 247, 248, 254, 255, 258.

extended to all the objects they denote, § 247.

common law, in common-law sense, §§ 247, 253.

technical, in a technical sense, §§ 247, 346.

unless context shows a different intent, § 247.

of two significations of, the popular should have preference, §§ 248, 250.

WORDS AND PHRASES (continued) —

- general should receive general construction, § 249.
- a statute directing that they be understood according to common usage does not preclude other common-law rules, § 251.
- other rules of equal dignity and importance to give effect to legislative intent, § 251.
- "immediate danger," how qualified by general intent of act, § 251.
- in statute intended for people should be understood in popular sense, § 251.
- "or" and "and" construed as interchangeable, § 252.
- having special or definite sense in common law, understood accordingly, § 253.
- "heir" means one capable of inheriting, § 253.
- technical words used relative to technical subject, § 254.
- when not so used, § 254.
- common, having a technical meaning, presumptively used in popular sense, unless relating to technical subject, §§ 254, 255.
- in penal statute, must be clear evidence of intention to depart from popular sense, § 254.
- statutory user of, § 255.
- when used in statutes and construed, and afterwards re-enacted, § 255.
- where re-enactment is with change of phraseology, §§ 255, 256.
- meaningless words may be disregarded, § 260.
- omitted words may be supplied, § 260.
- wrong words may be corrected, § 260.
- when descriptive, and essential, must be clear and accurate, § 261.
- words not to receive narrowest interpretation, even in penal statute, § 357.
- "wife" may be construed "widow" in penal statute in order to effectuate its intention, § 357.
- "navigating" may be predicated of a vessel at anchor, § 357.
- "deserting," not predicable of leaving for cause, § 355.
- "tickets" do not include due-bill for a debt, § 358.
- technical words to receive a technical construction, § 346.
- popular, to be construed according to common acceptance, § 346.
- "trade" includes a cod fishery, § 356.
- to "persuade" in a penal statute equal to "aid," § 356.
- meaning of "prize" and "capture" affected by purpose of act, § 356.
- "mortgagee" in penal statute does not include "assignee," § 358.
- "officer" in penal laws against excessive fees does not include one who has gone out of office, § 358.
- may be restrained to bring operation of statute within its intention, § 429.
- limited to object and subject-matter of the statute, § 429.

WRITTEN LAW —

- what included, §§ 184, 189.