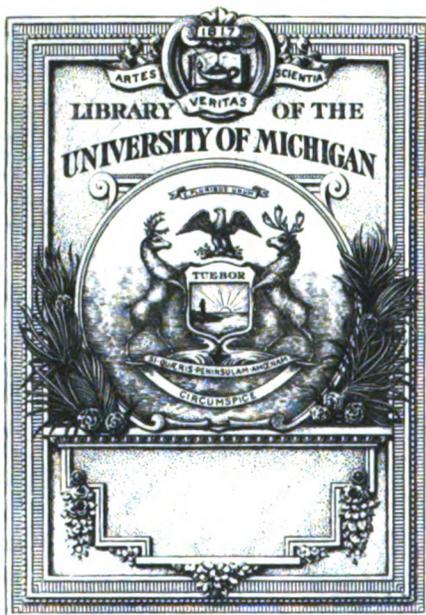


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# HANDBOOK

OF

# American Constitutional Law

BY

HENRY CAMPBELL BLACK, M. A.

Author of *Black's Law Dictionary*, and of *Treatises on Judgments, Tax  
Titles, Constitutional Prohibitions, Etc.*



A handwritten signature in cursive script, reading "H. C. Black", with a horizontal line underneath.

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## PREFACE.

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This book is intended primarily for the use of students at law and instructors in the law schools and universities. It contains a condensed review of all the leading principles and settled doctrines of American constitutional law, whether arising under the federal constitution or those of the individual states. These principles and doctrines are stated in the form of a series of brief rules, or propositions, numbered consecutively throughout the book, and are explained, amplified, and illustrated in the subsidiary text, and supported by the citation of pertinent authorities. The necessary limitation of space, as well as the purpose and plan of the work, have precluded any attempt at exhaustive discussion or minute elaboration of the great topics of constitutional law. But the book is believed to be comprehensive of the general subject and sufficiently detailed to equip the student with an accurate general knowledge of the whole field. And since the solution of new questions must be sought, not alone in the application of precedents, but also in the settled rules and the accepted canons of interpretation, and since the mind is often best prepared for the investigation of a specific problem by a rapid synoptical review of the results already worked out by the courts in that department to which it belongs, it is hoped that general practitioners may find the book to possess a special value for themselves. It would have been undesirable, even if it were possible, to discuss in these pages all the thousands of reported cases which bear upon the subject of constitutional law. Such an accumulation of authorities would have cumbered the work to the point of destroying its utility. But a very considerable number of the more important and valuable decisions have been suitably referred to, and more, perhaps, than any student would have time or occasion to read. But it was thought that both student and practitioner would appreciate the advantage of being directed to the principal authorities, especially as they may have occasion to study certain special topics with more detail and particularity than the handbook itself could undertake.

The subject of constitutional law is not free from disputed and unsettled questions. In respect to these, the author has invariably stated what he conceives to be the sound rule or the best principle for their interpretation. If his disposition of such topics should at times appear summary, or even dogmatic, it must be ascribed to the necessity for condensation, not to any failure to appreciate the possible arguments on both sides of the question. H. C. B.

Washington, D. C., January, 1895.

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# THE CONSTITUTION

OF THE

## UNITED STATES OF AMERICA.

---

**WE THE PEOPLE** of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

### ARTICLE I.

**SECTION 1.** All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

**SECTION 2.** The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

**SECTION 3.** The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments, until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

**SECTION 4.** The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

**SECTION 5.** Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased, during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office or Profit or Trust under them shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## ARTICLE II.

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who

have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers: he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

**SECTION 4.** The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

### ARTICLE III.

**SECTION 1.** The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

**SECTION 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

**SECTION 3.** Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

### ARTICLE IV.

**SECTION 1.** Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

**SECTION 2.** The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of

the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

**SECTION 3.** New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

**SECTION 4.** The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

#### ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

#### ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## ARTICLE VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In Witness whereof We have hereunto subscribed our Names.

[Signed by GEORGE WASHINGTON, as President and Deputy from Virginia, and by delegates from all the original states except Rhode Island.]

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**ARTICLES IN ADDITION TO AND AMENDMENT  
OF THE CONSTITUTION OF THE UNITED STATES  
OF AMERICA, PROPOSED BY CONGRESS AND RATI-  
FIED BY THE LEGISLATURES OF THE SEVERAL  
STATES, PURSUANT TO THE FIFTH ARTICLE OF  
THE CONSTITUTION.**

## ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## ARTICLE II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

## ARTICLE III.

No Soldier shall, in time of peace be quartered in any house without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

## ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

## ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

## ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## ARTICLE IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## ARTICLE XI.

The Judicial power of the United States shall not be construed to extend to any suit at law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

## ARTICLE XII.

The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as president, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

## ARTICLE XIII.

**SECTION 1.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

**SECTION 2.** Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XIV.

**SECTION 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**SECTION 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**SECTION 3.** No person shall be a Senator or Representative in Congress, or elector of President or Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**SECTION 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**SECTION 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## ARTICLE XV.

**SECTION 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

**SECTION 2.** The Congress shall have power to enforce this article by appropriate legislation.

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# HANDBOOK

OF

## AMERICAN CONSTITUTIONAL LAW.

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### CHAPTER I.

#### DEFINITIONS AND GENERAL PRINCIPLES.

1. Constitutional Law Defined.
- 2-3. Constitution Defined.
4. Meaning of "Constitutional" and "Unconstitutional."
5. Written and Unwritten Constitutions.
6. Constitutions not the Source of Rights.
7. Bills of Rights.
8. Right of Revolution.
9. Political and Personal Responsibility.

#### CONSTITUTIONAL LAW DEFINED.

1. Constitutional law is that department of the science of law which treats of the nature of constitutions, their establishment, construction, and interpretation, and of the validity of legal enactments as tested by the criterion of conformity to the fundamental law.

#### CONSTITUTION DEFINED.

2. The constitution of a state is the fundamental law, containing the principles on which the government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised.<sup>1</sup>

<sup>1</sup>Cooley, Const. Lim. 2.

**3. In American law, the constitution is the organic and fundamental act adopted by the people of the Union or of a particular state as the supreme and paramount law and the basis and regulating principle of the government.**

In public law, a constitution is "the organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers."<sup>2</sup>

In American constitutional law, the word "constitution" is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or of any one of the states, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even of the people themselves, will be altogether void. Any country which is not given over to anarchy may be said, in a sense, to possess a constitution, since there must be some fixed principle in accordance with which its government is established and administered. But usually the term "constitutional government" is applied only to those whose fundamental rules or maxims not only locate the sovereign power in individuals or bodies designated or chosen in some prescribed manner, but also define the limits of its exercise, so as to protect individual rights, and shield them against the assumption of arbitrary power.<sup>3</sup>

*Synonyms.*

In a certain sense, constitutions may be said to be laws. That is, they are rules of civil conduct prescribed by the supreme power in a state, and are as much within the definition of "laws," in the widest signification of that term, as are the acts of a legislature. Thus, the constitution of the United States is declared to be the

<sup>2</sup> Black, Law Dict. "Constitution."

<sup>3</sup> Cooley, Const. Lim. 3.

"supreme law of the land," no less than the acts of congress passed in pursuance of it. So, also, the same instrument forbids the several states to pass any law impairing the obligation of contracts, and declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. And it is held that these clauses do not relate solely to the acts of a state legislature, but that a state constitution or an amendment thereto is as much a "law," within their purview, as any statute. But in practice a distinction is made between those organic or fundamental laws which are called "constitutions" and such ordinary laws as are denominated "statutes." Both answer to the description of laws, but constitutions are seldom called "laws," and never called "statutes."

A constitution differs from a statute or act of a legislature in three important particulars:

(1) It is enacted by the whole people who are to be governed by it, instead of being enacted by their representatives sitting in a congress or legislature.

(2) A constitution can be abrogated, repealed, or modified only by the power which created it, namely, the people; whereas a statute may be repealed or changed by the legislature.

(3) The provisions of a constitution refer to the fundamental principles of government, or the establishment and guaranty of liberties, instead of being designed merely to regulate the conduct of individuals among themselves. But the tendency towards amplification, in modern constitutions, derogates from the precision of this last distinction.

#### MEANING OF "CONSTITUTIONAL" AND "UNCONSTITUTIONAL."

**4. "Constitutional" means conforming to the constitution. A statute or ordinance which is inconsistent with the constitution, or in conflict with any of its provisions, is said to be "unconstitutional."**

The term "constitutional" means consistent with the constitution; authorized by the constitution; not conflicting with any pro-

vision of the constitution or fundamental law of the state. It also means dependent upon a constitution, or secured or regulated by a constitution; as a "constitutional monarchy," "constitutional rights." Hence, in American parlance, a constitutional law is one which is consonant to and agrees with the constitution; one which is not in violation of any provision of the constitution of the United States or of the particular state. An unconstitutional law is one which is in violation of the constitution of the country or of the state. In those states where the same body which exercises the ordinary lawmaking power is also invested with the whole sovereignty of the nation, as is the case in Great Britain, an unconstitutional enactment is not necessarily void. There are many rules, precedents, and statutes, deemed a part of the British constitution, which are justly esteemed as valuable safeguards of liberty. But there is no one of them which parliament might not lawfully repeal. The Habeas Corpus Act, for example, might at any day be abrogated by act of parliament. Such a measure would be regarded as unconstitutional, because it would be in derogation of certain principles which are universally deemed a part of the constitution as it now stands. But it would not lack the sanction of legality. It would occupy precisely the position of an amendment to a written constitution, and would be no less the law of the land than had been the law which it destroyed. But in a country governed by a written constitution, which is of supreme authority over the lawmaking power, and to which all ordinary legislation must bend, an unconstitutional law is void and of no effect, and in fact is no law at all. Yet, so long as it stands on the statute book unrepealed, it will have the presumptive force of law, unless the proper courts have pronounced its invalidity. Until that time, any person may disregard it at his own peril, but officers are bound to give it force and effect. After it has been duly adjudged unconstitutional, the presumption is that no further attempt will be made to enforce it. But the protection of the individual rests on the probability that the courts will abide by their first decision in regard to the law.

**WRITTEN AND UNWRITTEN CONSTITUTIONS.**

**5. Constitutions are classified as written and unwritten. All the American constitutions, national and state, belong to the class of written constitutions.**

Among the various constitutional governments of the world, it is customary to make a distinction between those which possess a "written" constitution and those which are governed by an "unwritten" constitution. The distinction, however, is not very exact. It is difficult to conceive of a constitution which should be wholly unwritten. Practically, this term means no more than that a portion of what is considered to belong to the constitution of the country has never been cast in the form of a statute or charter, but rests in precedent or tradition. The so-called unwritten constitution of Great Britain consists, in large measure, of acts of parliament, royal grants and charters, declarations of rights, and decisions of the courts. It also comprises certain maxims, principles, or theories of government which, though not enacted with the force of law, have always been acquiesced in by the people and acted upon by the rulers, and thus, possessing historic continuity, may be said to enter into the fundamental conception of the nature and system of the government. The differences between written and unwritten constitutions, as these terms are generally employed, are chiefly as follows: First. A written constitution sums up in one instrument the whole of what is considered to belong to the constitution of the state; whereas, in the case of an unwritten constitution, its various parts are to be sought in diverse connections, and are partly statutory and partly customary. Second. A written constitution is either granted by the ruler or ordained by the people at one and the same time; while an unwritten constitution is gradually developed, and is contributed to not only by the executive and legislative branches of government, but also by the courts, and by the recognition, by rulers and people, of usages and theories gradually acquiring the force of law. Third. A written constitution is a creation or product, while an unwritten constitution is a growth. The one may be influenced, in its essentials, by history, but is newly made and set forth. The other is not

only defined by history, but, in a measure, is history. Fourth. A written constitution, in its letter, if not in its spirit, is incapable of further growth or expansion. It is fixed and final. An unwritten constitution, on the other hand, will expand and develop, of itself, to meet new exigencies or changing conditions of public opinion or political theory. Fifth. A written constitution, at least in a free country, is a supreme and paramount law, which all must obey, and to which all statutes, all institutions, and all governmental activities must bend, and which cannot be abrogated except by the people who created it. An unwritten constitution may be altered or abolished, at any time or in any of its details, by the lawmaking power.

In respect to the comparative merits of the two systems, their relative advantages may be gathered from the foregoing statement of the distinctions between them. Their respective faults are thus set forth by a writer of eminence and sound judgment: "The weakness of an unwritten constitution consists in this: that it is subject to perpetual change at the will of the lawmaking power, and there can be no security against such change except in the conservatism of the lawmaking authority, and its political responsibility to the people; or, if no such responsibility exists, then in the fear of resistance by force. \* \* \* The weaknesses of a written constitution are that it establishes iron rules, which, when found inconvenient, are difficult of change; that it is often construed on technical principles of verbal criticism, rather than in the light of great principles; and that it is likely to invade the domain of ordinary legislation, instead of being restricted to fundamental rules, and thereby to invite demoralizing evasions. But, the written constitution being a necessity in America, the attendant evils are insignificant, as compared with the inestimable benefits."<sup>4</sup>

*Contents of Written Constitutions.*

As to the contents of a written constitution, the lines of definition are not very clear. It is by no means easy to say, as a matter of abstract theory, what such an instrument must contain in order to be a complete constitution, or what kinds of provisions are essential to it, and what foreign or superfluous. So far as regards a consti-

<sup>4</sup> Cooley, Const. Law, 24.

tution for one of the United States, if it established a representative government, republican in form, provided for the three necessary departments of government, fixed rules for the election and organization of the legislative department and the executive offices, defined and guaranteed political rights, and secured the liberty of the individual in those particulars which are generally esteemed fundamental, it would probably be sufficient. On the other hand, there is practically no limit to the subjects or provisions which may be incorporated in the constitution. It might, for example, be made to include a code of civil or criminal procedure. The question in every case is how much the framers of the particular constitution are willing to leave to the legislative discretion, and what matters they desire to put beyond the reach of the legislature, in respect to their change or abolition. Whatever is enacted in the form of law by a legislature may be repealed by the same or a succeeding legislature. But what is incorporated in a constitution can be repealed only by the people. And the people, sitting in a constitutional convention, may put into their constitution any law, whether or not it has relation to the organization of the state, the limitation of governmental powers, or the freedom of the citizen, which they deem so important as to make it desirable that it should not be easily or hastily repealed. Of late years there is a very noticeable tendency towards longer and more elaborate constitutions, and towards the incorporation into them of many matters which properly have no relation to the idea of a fundamental organic act, but are intended as limitations upon legislative power. This disposition probably arises from a growing distrust of the wisdom and public spirit of the state legislatures, and also from a desire of the people to make their constitutions the means of bringing about reforms which a majority of them consider desirable, and are unwilling to trust to the slower and less certain action of the legislature.

#### CONSTITUTIONS NOT THE SOURCE OF RIGHTS.

6. The constitutions of the American states are grants of power to those charged with the government, but not grants of freedom to the people. They define and guaranty private rights, but do not create them.

The state constitutions, in this country, grant and limit the powers of the several departments of government, but, except in regard to political rights, they are not to be considered as the origin of liberty or rights. A constitution "is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but the consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power,—the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. There is nothing primitive in it; it is all derived from a known source. It presupposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny. A written constitution is in every instance a limitation upon the powers of government in the hands of agents, for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition."<sup>5</sup>

*Sources of American Constitutional Law.*

The system of government established by the constitution of the United States has no exact historical precedent. It was, in a sense, a creation and an experiment. But the framers of the constitution, though without a model for the whole structure, were guided, in respect to many details, by the experience and wisdom of other countries. To a very considerable degree, their action was determined by theories and ideas inherited from the mother country; and our constitution owes many of its provisions to that of Great Britain, as the latter then stood. Thus, the idea of a representative government, instead of a direct democracy, the principle of majority rule, the necessity of separating the three departments of government, the bicameral system in legislation, the doctrine of local self-government, and the balancing of centrifugal and

<sup>5</sup> *Hamilton v. St. Louis County Court*, 15 Mo. 13.

centripetal forces,—all these principles, and more, were incorporated into our constitution as a matter of course and because they were essential parts of the Anglo-American idea of government. Some further ideas were borrowed by the framers of the constitution from the constitutions then existing in several of the states, and some, it is probable, from ancient history. Many provisions of the constitution, as is well known, were no more than compromises, necessary to be made in order to secure a sufficient adherence to make its ratification by the states probable. The great principles which secure the natural, civil, and political rights of the citizen, and protect him against tyranny or oppression on the part of the government, were all derived from the British constitution, or suggested by its political history. Such rights were not created by the constitution, but were the lawful heritage of all Americans. Their original guaranties are found in those great monuments of English constitutional law, Magna Charta, the Petition of Right, the Habeas Corpus Act, the Bill of Rights, and in the common law.<sup>6</sup> The several states, in framing their constitutions, have been guided and influenced by the same theories and doctrines, and by the prevalence of the same political ideas among the people, and also, and to a very considerable degree, by the constitution of the United States.

#### BILLS OF RIGHTS.

**7. A bill of rights is a formal declaration, in a constitution, of the fundamental natural, civil, and political rights of the people which are to be secured and protected by the government.**

A bill of rights is in the nature of a classified list of the rights and privileges of individuals, whether personal, civil, or political, which the constitution is designed to protect against govern-

<sup>6</sup> "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness v. Pacard*, 2 Pet. 137.

mental oppression, containing also the formal assurance or guaranty of these rights. It is a charter of liberties for the individual, and a limitation upon the power of the state. Such declarations are found in all the state constitutions. And the lack of a bill of rights was one of the objections to the federal constitution most strongly urged when it was before the people for their ratification. Very soon after the adoption of the constitution, this defect was remedied by the adoption of a series of amendments, of which the first eight may be said to constitute the federal bill of rights. These guaranties, however, as will more fully appear in another connection, were intended to operate only as a limitation upon the federal power, and not to impose any restrictions on the action of the several states. The idea, as well as the name, of a bill of rights, was undoubtedly suggested by certain great charters of liberty well known in English constitutional history, and particularly the "Bill of Rights" passed in the first year of the reign of William and Mary, A. D. 1689.

#### RIGHT OF REVOLUTION.

**8. The right of revolution is the inherent right of a people to cast out their rulers, change their polity, or effect radical reforms in their system of government or institutions, by force or a general uprising, when the legal and constitutional methods of making such changes have proved inadequate, or are so obstructed as to be unavailable.**

This right is a fundamental, natural right of the whole people, not existing in virtue of the constitution, but in spite of it. It belongs to the people as a necessary inference from the freedom and independence of the nation. But revolution is entirely outside the pale of law. "Inter armes silent leges." Circumstances alone can justify a resort to the extreme measure of a revolution. In general, this right may be said to exist when tyranny or a corrupt and vicious government is entrenched in power, so that it cannot be dislodged by legal means; or when the system of government has become intolerable for other causes, and the

evils to be expected from a revolutionary rising are not so great as those which must be endured under the existing order of things; when the attempt is reasonably certain to succeed; and when the new order proposed to be introduced will be more satisfactory to the people in general than that which is to be displaced. "Revolution is either a forcible breach of the established constitution or a violation of its principles. Thus, as a rule, revolutions are not matters of right, although they are mighty natural phenomena, which alter public law. Where the powers which are passionately stirred in the people are unchained, and produce a revolutionary eruption, the regular operation of constitutional law is disturbed. In the presence of revolution, law is impotent. It is, indeed, a great task of practical politics to bring back revolutionary movements as soon as possible into the regular channels of constitutional reform. There can be no right of revolution, unless exceptionally; it can only be justified by that necessity which compels a nation to save its existence or to secure its growth where the ways of reform are closed. The constitution is only the external organization of the people, and if, by means of it, the state itself is in danger of perishing, or if vital interests of the public weal are threatened, necessity knows no law."<sup>1</sup>

#### POLITICAL AND PERSONAL RESPONSIBILITY.

**9. Generally speaking, the responsibility for political action is political only. That is, officers of the government, in either of its branches, are not liable at the suit of private parties for the consequences of acts done by them in the course of their public functions and in matters involving the exercise of judgment or discretion.**

In order to the due administration of government, it is necessary that the officers who are charged with the various duties of making, interpreting, and administering the laws should enjoy a due measure of immunity from being called to account for their public acts at the instance of private parties. Misgovernment is to be

<sup>1</sup> Bluntschli, Theory of the State, 477.

remedied at the ballot box, not by suits at law. If the legislature attempts to violate or defy the constitution, it will be held in check by the judicial department. But for unwise or oppressive laws, not conflicting with the constitution or private rights, there is no redress save by the election of a new legislature. The motives, the policy, the good faith, of the legislators cannot be inquired into. And if individuals suffer detriment by reason of the laws enacted, they have no right of action against the members of the legislative body. Even the members of the governing bodies of municipalities may claim a like immunity in respect to their purely public actions, unless they act corruptly, although they may be constrained by the courts to perform the duties specifically laid upon them, and may in some cases be personally amenable for violations of the rights of individuals.<sup>8</sup>

The judiciary are invested with a like privilege. Judges of inferior courts may be compelled, by appropriate process, to perform the duties laid upon them. But no judge can be held liable, at the suit of a private person, for any action taken or omitted by him, or decision rendered, in the exercise of his office of judge and of his judicial discretion, even though he acted with malice or corruptly, provided he kept within the bounds of his jurisdiction, which, in the case of superior courts, will be presumed.<sup>9</sup> A person who is indicted and tried for a felony, and is acquitted, cannot afterwards sue the grand jurors for conspiracy in finding the indictment against him.<sup>10</sup> So, also, the assessment of a tax is in the nature of a judicial act, and no action will lie against the assessors, for an erroneous determination, by one claiming to be exempt.<sup>11</sup> For gross abuses of power or malversations in office, on the part of the judiciary, the remedy is by impeachment.

A similar immunity protects the high officers of the executive

<sup>8</sup> *Borough of Freeport v. Marks*, 59 Pa. St. 253; *Baker v. State*, 27 Ind. 485.

<sup>9</sup> *Fray v. Blackburn*, 3 Best & S. 576; *Calder v. Halket*, 3 Moore, P. C. 28; *Barnardiston v. Soame*, 6 How. St. Tr. 1063; *Hamond v. Howell*, 2 Mod. 218; *Houlden v. Smith*, 14 Q. B. 841; *Scott v. Stansfield*, L. R. 3 Exch. 220; *Kemp v. Neville*, 10 C. B. (N. S.) 523; *Bradley v. Fisher*, 13 Wall. 335; *Shoemaker v. Nesbit*, 2 Rawle, 201.

<sup>10</sup> *Floyd v. Barker*, 12 Coke, 23.

<sup>11</sup> *Barhyte v. Shepherd*, 35 N. Y. 238.

department. They may be controlled in the performance of merely ministerial duties, involving the ascertained rights of individuals, by the process of the courts. But actions do not lie against them for damages sustained by private persons in consequence of their political or public acts.<sup>12</sup> For instance, the postmaster general is not to be sued by a private individual for any failure or default in the service which his department undertakes to perform for the benefit of the public.<sup>13</sup> In the case of these officers, also, great misbehavior is ground for impeachment. The inferior officers charged with the administration of the laws stand upon a different footing. In regard to those who are intrusted with a measure of discretionary power, and the authority to judge of their rights and duties, the rule is that they are not responsible to private persons for the consequences of acts done by them in good faith, and in the exercise of their discretion, but that any abuse of their authority, in the direction of willful, malicious, or unjustifiable violation of the rights of others, or of breach of duty to particular persons, will render them liable.<sup>14</sup> Thus, a local postmaster who refuses to deliver a letter to the person to whom it is addressed is liable in damages for the wrong done;<sup>15</sup> and so is a customs officer who uses his official authority for purposes of oppression or extortion.<sup>16</sup> "This is the rule," says Judge Cooley, "which is applied to election officers who are found guilty of having wrongfully refused to register voters, or to receive their ballots."<sup>17</sup> But

<sup>12</sup> *Mississippi v. Johnson*, 4 Wall. 475; *Marbury v. Madison*, 1 Cranch. 137; *Macbeath v. Haldimand*, 1 Term R. 172; *Gidley v. Lord Palmerston*, 3 Brod. & B. 275; *Grant v. Secretary of State*, 2 C. P. Div. 445.

<sup>13</sup> *Lane v. Cotton*, 12 Mod. 472; *Smith v. Powdich*, 1 Cowp. 182; *Rowning v. Goodchild*, 2 W. Bl. 906; *Whitfield v. Lord Le Despencer*, 2 Cowp. 754.

<sup>14</sup> *Burton v. Fulton*, 49 Pa. St. 151; *Billings v. Lafferty*, 31 Ill. 318; *Parmalee v. Baldwin*, 1 Conn. 313; *Mostyn v. Fabrigas*, 1 Cowp. 161.

<sup>15</sup> *Dunlop v. Munroe*, 7 Cranch, 242; *Teal v. Felton*, 12 How. 284.

<sup>16</sup> *Barry v. Arnaud*, 10 Adol. & E. 646.

<sup>17</sup> Cooley, *Const. Law* (2d Ed.) 162, citing *Lincoln v. Hapgood*, 11 Mass. 350; *Jeffries v. Ankeny*, 11 Ohio, 372; *Bevard v. Hoffman*, 18 Md. 479; *Goetcheus v. Matthewson*, 61 N. Y. 420; *Weckerly v. Geyer*, 11 Serg. & R. 35; *Miller v. Rucker*, 1 Bush, 135; *Carter v. Harrison*, 5 Blackf. 138; *Gordon v. Farrar*, 2 Doug. (Mich.) 411; *Dwight v. Rice*, 5 La. Ann. 580; *State v. Porter*, 4 Har. (Del.) 556; *Wheeler v. Patterson*, 1 N. H. 88; *Fausler v. Parsons*, 6 W. Va. 486; *Peavey*

those inferior officers whose duties are merely ministerial, and do not involve the exercise of any judgment or discretion, and are plainly prescribed for them by the law, are not exempt from liability for any illegal action on their parts.<sup>18</sup>

v. Robbins, 3 Jones (N. C.) 339; Rail v. Potts, 8 Humph. 225. And see Ashby v. White, 2 Ld. Raym. 938.

<sup>18</sup> Stockdale v. Hansard, 9 Adol. & E. 1; Milligan v. Hovey, 3 Bls. 13, Fed. Cas. No. 9,605.

## CHAPTER II.

### THE UNITED STATES AND THE STATES.

10. Nature of the American Union.
11. Sovereignty and Rights of the States.
12. Sovereignty of the People.
13. Form of Government in the United States.
14. The Union Indestructible.
15. The Constitution of the United States.

### NATURE OF THE AMERICAN UNION.

**10. The United States of America is a nation, possessing the character and attributes of sovereignty and independence. The form of government is that of a federal republic, the component parts being called "states." In addition, the Union includes several territories and the District of Columbia.**

#### *Definition of "Nation."*

A nation is a people, or aggregation of men, existing in the form of an organized jural society, inhabiting a distinct portion of the earth, speaking the same language, using the same customs, possessing historic continuity, and distinguished from other like groups by their racial origin and characteristics, and generally, but not necessarily, living under the same government and sovereignty. Besides the element of autonomy or self-government, that is, the independence of the community as a whole from the interference of any foreign power in its affairs or any subjection to such power, it is further necessary to the constitution of a nation that it should be an organized jural society, that is, both governing its members by regular laws, and defining and protecting their rights, and respecting the rights and duties which attach to it as a constituent member of the family of nations.

The word "nation" is to be distinguished from the related terms "people," "state," and "government." The people constitute the nation. But when we speak of the people, we use the term to

designate those who live within the territory of the nation and who belong to it by such residence and by race and community of customs and characteristics, without implying the idea of government. The word "nation" adds to this conception the idea that the "people" are organized into a jural society and occupy a position among the independent powers of the earth. But the term "nation" is more nearly synonymous with "the people" than is the word "state." The last term denotes a single homogeneous political society, or body politic, organized and administered under one government and one system of law. It is not so much used to characterize the inhabitants of the country, as to convey the idea of the government as a unit. A nation may be politically divided into several states, as was formerly the case in Italy. And conversely, one state may comprise several nations or parts of nations, as is the case in the Austro-Hungarian Empire. But such conditions are anomalous. Normally, the nation and the state are the same. The word "government" is properly used to denote either the act of administering the political affairs of a state, or the system of polity therein prevailing, or the aggregate of persons who, for the time being, are intrusted with the administration of the executive, legislative, and judicial business of the state.

*The United States a Nation.*

From the foregoing it will easily be seen that the United States, considered as a unit, possesses all the characteristics and attributes, and is entitled to the designation, of a nation. It is composed of one people, united by language, customs, laws, and institutions, as well as by birth on the soil or adoption into the family of native citizens. It has the character of an organized jural society, governed, in all things concerning the whole people, by one system of law and one constitution. It occupies a distinct portion of the earth's surface. And it acknowledges no political superior. It has also an inherent and absolute power of legislation. For a moment's reflection will show that the present apportionment of legislative power between the United States and the states rests solely on the will of the people, who constitute the nation.

*Definitions of "Sovereignty."*

"Sovereignty," as applied to states, imports the supreme, absolute, uncontrollable power by which any state is governed. A state is called a sovereign state when this supreme power resides within itself, whether resting in a single individual, or in a number of individuals, or in the whole body of the people. In the view of international law, all sovereign states are and must be equal in rights, because, from the very definition of a sovereign state, it is impossible that there should be, in respect to it, any political superior."<sup>1</sup> "In the intercourse of nations, certain states have a position of entire independence of others, and can perform all those acts which it is possible for any state to perform in this particular sphere. These same states have also entire power of self-government, that is, of independence upon all other states so far as their own territory and citizens not living abroad are concerned. No foreign power or law can have control except by convention. This power of independent action in external and internal relations constitutes complete sovereignty."<sup>2</sup>

*Two Aspects of Sovereignty.*

It will be perceived that sovereignty has two sides or aspects, the external and the internal. On the external side, it means that the state spoken of is not subject to the control, dictation, or government of any other power. It necessarily implies the right and power to receive recognition as an independent power from other powers, and to make treaties with them on equal terms, make war or peace with them, send diplomatic agents to them, acquire territory by conquest or occupation, and otherwise to manifest its freedom and autonomy. As the individual, in a free country, is the equal of all his fellow citizens in civil and political rights, though perhaps not in ability, influence, or power, so the sovereign state is the equal of all other states in the family of nations, in respect to its rights, though not in its prestige, territory, or power.<sup>3</sup> All independent states are bound by the rules of international law. But this law is established by their concurrent consent, and as it

<sup>1</sup> Cooley, *Const. Lim.* p. 1.

<sup>2</sup> Woolsey, *Pol. Science*, vol. 1, p. 204.

<sup>3</sup> *The Antelope*, 10 Wheat. 66, 122.

operates upon all alike, it is no derogation from the sovereignty of any. On the internal side, sovereignty implies the power of the state to make and alter its system of government, and to regulate its private affairs, as well as the rights and relations of its citizens, without any dictation, interference, or control on the part of any person or body or state outside the particular political community. Every statute is a manifestation of sovereignty. But where the country is governed under a written constitution, intended to endure against all change except by the solemn expression of the will of the people, the ultimate test of sovereignty must be found in the right and power to alter the constitution of government at will. If this power is possessed by the people of the particular state, or by any determinate persons or body within the state, free from all interference by any exterior power and from the binding force of the constitution or laws of any exterior power, then the state is entitled, in this respect, to be called a sovereign state, and that power or body within the state which possesses this power to change the constitution is the sovereign therein.

*Sovereignty of the United States.*

The United States possesses the character of a sovereign nation. The constitution confides to the general government plenary control over all foreign relations. The power to make treaties, send ambassadors and consuls, declare war and make peace, to regulate foreign commerce, to establish a uniform rule of naturalization, to define and punish offenses against the law of nations, to maintain an army and a navy, and generally to act as a nation in the intercourse of nations, is confided to the national authority alone. Moreover, the United States, as a political community, possesses absolute and uncontrolled power of legislation as concerns its internal affairs. That it could not be interfered with in the exercise of this power by any foreign power or by any one of the component states, is self-evident. Nor is it any objection to this proposition that the constitution, as it stands at present, has limited the sphere of operations of the national government. For the same power which established the constitution, namely, the people of the United States, could change it at will. It is no derogation from the powers of sovereignty that the body in which resides the

ultimate sovereign power has chosen to restrict the legislative power which it grants to its representatives. At present, certain matters are not intrusted to the regulation of congress, but are left to the action of the several states. But there can be no question that all such matters, if it should seem good to the people, might be withdrawn from the sphere of state activity, and placed under the paramount control of the Union. An inherent supreme power of legislation resides in the people who possess the sovereignty of the United States.

*The States.*

In American constitutional law the word "state" is generally employed to denote one of the component commonwealths of the American Union. These states, as will presently appear, are not sovereign. Neither are they nations, in any proper sense of the term. They are political communities, occupying separate territories, and possessing powers of self-government in respect to almost all matters of local interest and concern. Each, moreover, has its own constitution and laws and its own government, and enjoys a limited and qualified independence.

*The Territories.*

The position of the territories, in our system of government, is somewhat analogous to that of colonial dependencies, though it finds no exact parallel in past or contemporary history. The territories are not states of the Union. They do not possess full powers even of local self-government. They are subject to the exclusive jurisdiction and legislation of congress, although they are practically intrusted with a considerable measure of authority in respect to the government of their purely local affairs. Their officers are appointed by the President, and the acts of their legislative assemblies are liable to be overruled or annulled by the federal legislature. It may be said that they are held in tutelage by the general government; that their territorial condition is transitory and that their system of government is temporary and provisional only. For it is always understood that the people of a territory are destined to create and maintain a state government as soon as, in the judgment of congress, they shall be prepared therefor, and be admitted to the Union on an equality with the older states. But in the

meantime the United States exercises its power to govern them, and occupies the position of a sovereign dealing with dependent territory according as in its wisdom shall seem politic, wise, and just, having regard to its own interests as well as to those of the people of the territory.<sup>4</sup>

*The District of Columbia.*

The position of the District of Columbia is even more peculiar than that of the territories. In fact, it constitutes the most singular anomaly in our political systems. The District is that portion of territory ceded to the United States for a site for the national capital. It is subject to the exclusive jurisdiction of congress. It is neither a state nor a territory. Its people have no direct participation in the government, even in respect to the administration of municipal affairs. Its executive department consists of a board of three commissioners who are appointed by the President of the United States with the advice and consent of the senate. Its judges are appointed in like manner. Its local legislature is congress. Its permanent residents are citizens of the United States, if they fulfill the conditions of citizenship laid down in the fourteenth amendment, but they are not citizens of any state.

*Restricted Meaning of the Term "State."*

When the word "state" is to be taken in its more restricted sense, as designating one of the component states of the Union, there is often some difficulty in determining its exact limits. This ambiguity arises chiefly in connection with the peculiar position of the territories and the District of Columbia. The general rule is that while these communities are not technically "states" of the Union, as the term is used in the constitution, yet they may be held to come under that designation, as used in treaties and acts of congress, if plainly within their spirit and meaning. For instance, in the internal revenue acts of congress it is provided that the word "state" shall include the territories and the District of Columbia, whenever such construction is necessary to carry out their provisions.<sup>5</sup> So the District will be considered one of the

<sup>4</sup> American Ins. Co. v. Canter, 1 Pet. 511; Scott v. Jones, 5 How. 343.

<sup>5</sup> Rev. St. U. S. § 3140.

“states of the Union” if it is necessary so to hold in order to avoid defeating the provisions of a treaty with a foreign power.<sup>6</sup>

### SOVEREIGNTY AND RIGHTS OF THE STATES.

11. The several states have not the attribute of sovereignty, except in a limited and qualified sense. They are local self-governing communities, independent as respects each other, independent in a limited and qualified sense as respects the Union, but not ranking as nations or sovereign powers for the purposes of international law.

#### *State Sovereignty.*

The several states composing the American Union never enjoyed complete sovereignty as regards the external side, and do not now possess it. This is shown by the fact that they were always subject to some common superior in respect to their relations with foreign powers. First it was the king and parliament of England, then the revolutionary congress, then the confederation, and now the United States. For as all authority over foreign relations and affairs is confided to the national government, it follows as a necessary consequence that all such authority is denied to the separate states. None of them can deal directly with a foreign nation. “The only government of this country which other nations recognize or treat with is the government of the Union, and the only American flag known throughout the world is the flag of the United States.”<sup>7</sup> On the external side, therefore, we may entirely dismiss the notion of any state sovereignty. An apparent exception may be found in the case of Rhode Island and North Carolina, which remained out of the Union for a short time after the national government was organized, and thus acquired complete independence, and also in the case of Texas, which was a sovereign and independent republic at the time of its admission. But the two former states never sought or obtained recognition from any foreign government, nor exercised any act of external sovereignty. And the

<sup>6</sup> *Geofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295.

<sup>7</sup> *Fong Yue Ting v. U. S.*, 149 U. S. 698, 13 Sup. Ct. 1016; 1 Story, Const. § 210; Cooley, Const. Law (2d Ed.) 16, 17.

latter state, on coming into the Union, surrendered all such powers and rights as were incompatible with its new rank and position as one of the states. None of these states, therefore, now possesses any sovereignty except such as may be enjoyed by all the states alike.

But the question of state sovereignty is not determined alone with reference to external relations. It also depends in a measure upon the relation of the states to each other and to the Union, and on their internal powers of legislation. "As applied to a state within a federation, as one of the United States, or a kingdom or duchy of the German Empire, the term 'sovereign' signifies that the community referred to is the political equal in the federation of each of the other members. Not that it may have in all respects the same weight in the federal councils, but that its political tie with the others is alone through the federal government, and but for that tie the states would be independent of one another."<sup>5</sup> We may say, therefore, that, as respects each other, the several states of the Union enjoy a qualified sovereignty. It is not an absolute sovereignty, even here, because they cannot make treaties with each other (unless with the consent of congress), and there are numerous particulars in which the relation of the states is regulated by the federal constitution. •In all such matters as the effect of judicial proceedings, the extradition of criminals, and the privileges of citizens, the several states are not at liberty to deal with each other as independent communities.

Again, as regards the relation of the several states to the Union, it may be said that each state enjoys a qualified and relative sovereignty. "Not every subjection of a state," says Bluntschli, "destroys its sovereignty completely, since the dependence may not be absolute. In composite states, confederations, federal states, and federal empires, the particular states, although in certain respects subordinated to the whole, yet have a relative sovereignty limited in extent but not in content. Thus in Switzerland, cantonal sovereignty is distinguished from federal sovereignty; similarly in North America and in the German Empire, there is a difference between the sovereignty of the Union or Empire and that

<sup>5</sup> Crane & M. Comparative Pol. 33.

of the federated states."\* The practical description of the manner of this apportionment of sovereign power which has been agreed on by statesmen and courts is that each state retains plenary authority over those matters which have not been confided to the general government by the constitution nor prohibited to the states, and that the Union possesses plenary authority over those subjects which the constitution intrusts to its regulation.

Finally, in respect to the regulation of their own system of government and internal affairs, the states possess no more than a limited or qualified sovereignty. The ultimate test of sovereignty, in this respect, as we have already said, is the power to alter the constitution at will. But this the states cannot do. For there are numerous provisions of the federal constitution which impose limitations upon the power of the states, as well in the making or changing of constitutions as in the enactment of laws. For example, no state, in adopting or amending a constitution, could establish anything but a republican form of government, or abridge the privileges of citizens of the United States, or impair the obligation of contracts.

#### *State Rights.*

The rights of the several states of the Union, possessed and to be enjoyed by them as such, are political and governmental in their nature. They consist in such a degree of autonomy and such powers of free action and of regulation of their own affairs as may not be inconsistent with the nature of the relation of the Union to each of the states, nor with the exercise of those powers which are confided, by the constitution, to the federal government. They embrace all those powers which were possessed by the several states at the time of the adoption of that constitution, with the exception of such as are therein delegated to the central authority, or thereby prohibited to the states. But it is evident that, within the limits of this definition, there is room for great difference of opinion in details. And in fact, ever since the foundation of the Union, two schools of statesmen have been found, divided in their views on the nature and boundaries of state rights. According

\* Bluntschli, *Theory of the State*, 47b.

to one school, the federal constitution is to be subjected to a strict construction in respect to the powers granted to the national government and a liberal interpretation for the preservation of the autonomy of the states. According to the other school, the rule of interpretation is to be reversed. Those holding the one opinion contend that the government of the Union should be held strictly to the exercise of the powers expressly granted to it, and that its province and jurisdiction should not be enlarged by implication. According to the other party, the true theory of our government and institutions is in favor of such a construction of the constitution as will give the federal government the largest measure of power which is compatible with the continued and useful existence of the states. By them the nation is regarded as the only sovereign power, and they contend that it should be accorded all such rights and powers as may be convenient to enable it to discharge its functions as such and to maintain its place among the nations of the earth. The extreme advocates of the one view have maintained that it was within the rightful power of a state to nullify (that is, refuse submission to, and resist by any adequate force) any act of the general government which, in the judgment of that state, was contrary to the constitution or beyond the boundaries of the legitimate power of the Union. These theorists also contended that a state possessed the power and the right to withdraw from the Union and set up a new government, either alone or with other states which might follow its example, whenever, in its judgment, its own interests required such a dissolution of the tie which bound it to the other states. On the other hand, statesmen of the other party have gone so far as to regard the several states as mere emanations from the Union, and as standing in the same relation to it which is occupied by the municipal corporations of a state towards the state. Between these two extremes lies the truth. Although the two theories of construction, strict and liberal, still subsist, it is now quite generally agreed that both the several states and the Union are supreme, each within its own appropriate sphere; that the rights of the individual state and of the Union are equally necessary to be preserved and must be accommodated to each other; that the authorities of the Union are to judge of the extent of the powers granted to it; that the rightful autonomy of each state is

beyond the reach of federal interference; and that the Union is perpetual and indissoluble.

### SOVEREIGNTY OF THE PEOPLE.

**12. In America, sovereignty resides in the people. But the people here meant are the qualified electors, or a majority of them, and they can exercise their sovereign power only in the modes pointed out by their constitutions.**

The word "people" may have various significations according to the connection in which it is used. When we speak of the rights of the people, or of the government of the people by law, or of the people as a non-political aggregate, we mean all the inhabitants of the state or nation, without distinction as to sex, age, or otherwise. But when reference is made to the people as the repository of sovereignty, or as the source of governmental power, or to popular government, we are in fact speaking of that selected and limited class of citizens to whom the constitution accords the elective franchise and the right of participation in the offices of government. The people, in this narrow sense, are the "collegiate sovereign" of the state and the nation. But the sovereign can exercise his sovereign powers only in the mode pointed out by the organic law which he has himself ordained. "The voice of the people, acting in their sovereign capacity, can be of legal force only when expressed at the times and under the conditions which they themselves have prescribed and pointed out by the constitution, or which, consistently with the constitution, have been prescribed and pointed out for them by statute; and if by any portion of the people, however large, an attempt should be made to interfere with the regular working of the agencies of government at any other time or in any other mode than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and must be resisted and repressed by the officers who, for the time being, represent legitimate government."<sup>10</sup>

<sup>10</sup> Cooley, Const. Lim. 598.

**FORM OF GOVERNMENT IN THE UNITED STATES.**

**13. The government of the United States is a federal government. The United States is a republic, and so also is each of the states, the form of government being representative.**

*Federal Government.*

The American Union is commonly described as a federal government. And political writers and jurists usually speak of the federal constitution, the federal courts and jurisdiction, federal powers, the federal executive, etc. The use of this term is not made imperative by anything in the constitution. The nature of the government is not described therein. Nor can its employment settle anything as to the nature or powers of the government. But the term expresses the common understanding as to the kind of government prevailing in our country. And it is a correct designation, technically, if taken in its true sense. There is, in political science, a substantial difference between a confederation and a federal government. The former term denotes a league or permanent alliance between several states, each of which is fully sovereign and independent, and each of which retains its full dignity, organization, and sovereignty, though yielding to the central authority a controlling power for a few limited purposes, such as external and diplomatic relations. In this case, the component states are the units, with respect to the confederation, and the central government acts upon them, not upon the individual citizen. In a federal government, on the other hand, the allied states form a union, not indeed to such an extent as to destroy their separate organization or deprive them of quasi sovereignty with respect to the administration of their local concerns, but so that the central power is erected into a true state or nation, possessing sovereignty both external and internal, while the administration of national affairs is directed, and its effects felt, not by the separate states deliberating as units, but by the people of all, in their collective capacity, as citizens of the nation. The distinction is expressed, by the German writers, by the use of the two words "Staatenbund" and "Bundesstaat," the former denoting a league or confederation of

states, and the latter a federal government, or a state formed by means of a league or confederation. It is to the latter class that the American Union belongs.<sup>11</sup>

*A Representative Republic.*

The United States is a federal republic. So also each of the states is a republic, and the constitution guaranties to each the continuance of republican government. The exact meaning of this phrase will be more fully considered in another place. At present it is sufficient to say that a republic, as distinguished from a despotism, a monarchy, an aristocracy, or an oligarchy, is a government wherein the political power is confided to and exercised by the people. It is a government "of the people, by the people, and for the people." It implies a practically unrestricted suffrage, and the frequent interposition of the people, by means of the suffrage, in the conduct of public affairs. The system of government in the United States and in the several states is distinguished from a pure democracy in this respect, that the will of the people is made manifest through representatives chosen by them to administer their affairs and make their laws, and who are intrusted with defined and limited powers in that regard, whereas the idea of a democracy, non-representative in character, implies that the laws are made by the entire people acting in a mass-meeting or at least by universal and direct vote.

**THE UNION INDESTRUCTIBLE.**

**14. The United States is an indissoluble union of indestructible states. No state has the right to secede from it. The Union could be terminated only by the agreement of the people or by revolution.**

There is, in this Union, no such thing as a right of secession, no right in any state to leave the Union and set up an independent government. The Union is permanent, and cannot be dissolved or disintegrated by the action of any state or states. This was settled forever by the political events of the last half century, by the

<sup>11</sup> Woolsey, Pol. Science, vol. 1, p. 166-170.

concurrence of the people, and by the courts, the final interpreters of the constitution. In the important case of *Texas v. White*<sup>12</sup> we read as follows: "By the articles of confederation, the Union was declared to be perpetual. And when these articles were found to be inadequate to the exigencies of the country, the constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual union made more perfect is not?" Thus, when a state has once become a member of the Union, "there is no place for reconsideration or revocation, except through revolution, or through consent of the states." "But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government, by the states. Without the states in union there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the constitution, but it may not unreasonably be said that the preservation of the states and the maintenance of their governments are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible Union composed of indestructible states. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union and all the guaranties of republican government in the Union attached at once to the state. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other states was as complete, as perpetual, and as indissoluble as the union between the original states. Considered, therefore, as transactions under the constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null."

<sup>12</sup> 7 Wall. 700. See, also, *Shortridge v. Macon*, Chase, 136, Fed. Cas. No. 12,812. And see *White v. Cannon*, 6 Wall. 443.

*Governmental Acts of States in Rebellion, How Far Valid.*

It becomes pertinent here to inquire what was the effect upon private rights of the attempted secession of certain of the states in 1861. During the period of the war those states continued to have governments. Their legislatures enacted laws, relating not only to the prosecution of the war and other public affairs, but also to purely domestic interests and concerns. Their executive authority continued to administer the laws. Their courts adjudicated upon the rights of litigants. But these governments were disloyal. They were engaged in an armed resistance to the authority of the United States. They were out of their harmonious constitutional relations with the United States and the loyal states. Now acts done in furtherance of rebellion cannot be recognized as valid, even as the foundation of private rights. And consequently it is held that all the acts of the governments of those states, or of any department of their governments, which had direct relation to the prosecution of hostilities, or were designed in aid of the insurrection, were null and void, and that any rights claimed by individuals, growing out of or based upon such acts, could not be recognized.<sup>13</sup> But all such acts of those governments as had no relation to the war, but concerned merely the local law and domestic administration, whether proceeding from the legislative, the executive, or the judicial department, were regarded as valid, in so far as was necessary for the protection of private rights and property.<sup>14</sup> A few illustrations will make this clear. An executor invested funds in the bonds of the confederate government, by authority of the legislature of his state, and the investment was approved by the probate court. It was held that the whole transaction was illegal, and he might still be compelled to account for the funds as money. The reason was, that the investment was a direct contribution to the resources of the confederate government and therefore unlawful.<sup>15</sup> On the other hand, a contract for the payment of confederate states treasury notes, made between

<sup>13</sup> Ford v. Surget, 97 U. S. 594; Sprott v. U. S., 20 Wall. 459; Hanauer v. Doane, 12 Wall. 342; Hanauer v. Woodruff, 15 Wall. 439.

<sup>14</sup> Keppel v. Petersburg R. Co., Chase, 167, Fed. Cas. No. 7,722; Hatch v. Burroughs, 1 Woods, 439, Fed. Cas. No. 6,203.

<sup>15</sup> Horn v. Lockhart, 17 Wall. 570.

parties residing within the so-called confederate states, could be enforced in the federal courts, the contract having been made on a sale of property in the usual course of business, and not for the purpose of giving currency to the notes or otherwise aiding the rebellion.<sup>16</sup> So, also, judgments and decrees rendered by the courts of those states, merely settling the rights of private parties actually within their jurisdiction, in so far as they did not contravene the constitution or laws of the United States, or tend to defeat the just rights of citizens of the United States, and were not in furtherance of laws passed in aid of the rebellion, were good and valid.<sup>17</sup>

#### THE CONSTITUTION OF THE UNITED STATES.

15. The constitution of the United States is not a compact, league, or treaty between the several states of the Union, but an organic, fundamental law, ordained and adopted by the people of the United States, establishing a national federal government. It contains a grant of powers to the government which it creates, but is not exhaustive of the powers which the people who maintain it might confer upon that government. It is the supreme law of the land, and is equally binding upon the federal government and the states and all their officers and people. Any and all enactments which may be found to be in conflict with the constitution are null and void.

##### *Not a Compact or League.*

The system of government existing under the articles of confederation was not a federal government, but a confederacy, in the sense of these terms as already explained. The articles constituted a league or treaty between the several states. They purported to have been adopted by delegates from the individual states, and to establish a "firm league of friendship" between those states. They were superseded by the constitution of the United States. This new government created a federal republic. It was

<sup>16</sup> *Thorington v. Smith*, 8 Wall. 1.

<sup>17</sup> *Horn v. Lockhart*, 17 Wall. 570; *Cook v. Oliver*, 1 Woods, 437, Fed. Cas. No. 3,164.

not established by the states. It is not a league, treaty, convention, or compact between those states. It does not depend, either for its existence or its continuance, upon the consent of the states. The organic act, the constitution, was framed by delegates representing the several states in convention. But it was submitted to the consideration and acceptance of the people. The states did not act upon it. It was ratified and adopted by the people of the United States, who, acting for purposes of convenience within their respective states, appointed delegates for the sole purpose of deciding upon its adoption. Upon the ratification of the constitution, not merely the states, but also the people, became parties to the fundamental act. This is also shown by the language of the preamble, which declares that "We, the People of the United States, in order to form a more perfect Union, . . . . do ordain and establish this constitution for the United States of America." This doctrine is sanctioned by the decisions of the supreme court, the final interpreter of the constitution, from the very beginning of the government, by the course of the executive and legislative departments of the government in acting upon it and practically accepting it, and by the general consensus of opinion among the people, as shown by the events of our national history.<sup>18</sup>

*An Organic Fundamental Law.*

The United States being a sovereign and independent nation, the constitution is its organic and fundamental law. By this is meant that the constitution is the supreme act of legislation, ordained by the people themselves, by which the sovereignty, nationality, and organic unity of the nation is declared, the foundations of its government laid and established, and the organs for the execution of its sovereign will created. It is moreover a basic or fundamental law, which is supreme and unvarying, and to which all other laws, ordinances, and constitutions, by whomsoever adopted, must be referred as the criterion to determine their validity.

<sup>18</sup> 1 Story, Const. §§ 306-372; *Chisholm v. Georgia*, 2 Dall. 419; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *McCulloch v. Maryland*, 4 Wheat. 316; *Gibbons v. Ogden*, 9 Wheat. 1; *Rhode Island v. Massachusetts*, 12 Pet. 657; *Lane Co. v. Oregon*, 7 Wall. 71; *Texas v. White*, 7 Wall. 700; *U. S. v. Cruikshank*, 92 U. S. 542.

*A Grant of Powers.*

The constitution contains a grant of certain enumerated powers to the federal government or to one or other of its departments. All other powers of government are reserved to the several states or to the people. Historically, the United States, under its present government, is to be considered the successor of the confederation. And therefore the grant of powers to the United States by the constitution may be considered as an enlargement of, or addition to, the powers wielded by the central government under the articles of confederation. But it must not be forgotten that when the constitution was adopted there came into existence a nation (as distinguished from a league of states) which possessed absolute and unlimited inherent powers. The constitution should hence be considered as defining the powers and prerogatives which the sovereign people of the United States have deemed fit to confide to their federal government. The limits or scope of these powers might be either enlarged or restricted by further amendments to the constitution. But in the mean time, a certain measure of power has been intrusted to the national government, and the remainder is reserved, to be exercised by the several states, or to remain in abeyance until the people shall see fit to delegate it to one or the other government. But from this principle there follows an important difference, in regard to the test of validity, between federal action and state action. This will be more fully considered when we come to speak of the nature and boundaries of legislative power. At present, it is sufficient to remark that if the validity of federal action is questioned, the authority for it must be shown in the constitution. But if the question is as to the validity of state action, it is not the justification but the prohibition of it which must be pointed out. That is, state action is presumed to be well warranted until the objector has been able to point out the specific provision of either the federal constitution or the state constitution with which it is incompatible.

*The Supreme Law of the Land.*

The constitution itself declares that it shall be the supreme law of the land. This supremacy of the constitution means, first, that it must endure and be respected as the paramount law, at all

times and under all circumstances, and in every one of its provisions, until it is amended in the mode which itself points out or is destroyed by revolution. Secondly, it means that all persons are bound to respect the constitution as the supreme law. It is not merely a limitation upon legislative power, but is equally binding upon all the departments and officers of government, both state and national. Thirdly, it means that no act of legislation which is contrary to its provisions is to be regarded or respected as law. A treaty which is in violation of the constitution would be null and void. So also would any act of congress which should be in excess of the legislative power granted to that body by the constitution, or in disregard of any of its prohibitions. If the people of a state amend their constitution or adopt a new constitution, it must conform to the federal constitution. If it does not, it is of no effect. And every act of the legislature of every state must equally obey the mandates of the supreme law, at the risk of being declared a nullity. Moreover, acts of congress passed in pursuance of the constitution are also the "supreme law of the land." Hence any act of congress which is valid and constitutional is supreme as against any law of a state which conflicts with it. The state law must yield. Not only that, but it is in effect no law, but an abortive attempt to exercise a power not possessed by the state legislature. For this reason, any state statute which would tend to annul, or impede, or defeat an act of congress passed in pursuance of its power to regulate foreign and interstate commerce, would be treated as a mere nullity by the federal courts, and also by the state courts, as a matter of duty.<sup>19</sup> For this reason also, the state courts, as well as the federal courts, refused recognition to state laws which tended to obstruct the act of congress known as the "fugitive slave law."<sup>20</sup>

<sup>19</sup> *State v. Steamship Constitution*, 42 Cal. 578; *City of Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa, 338; *Foster v. Commissioners of Blue Earth Co.*, 7 Minn. 140 (Gil. 84).

<sup>20</sup> *Sims' Case*, 7 Cush. 285; *Ex parte Bushnell*, 8 Ohio St. 599.

### CHAPTER III.

#### ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

16. Historical Introduction.
17. Establishment of the Federal Constitution.
18. Amendment of the Federal Constitution.
19. Establishment of State Constitutions.
20. Amendment of State Constitutions.

#### HISTORICAL INTRODUCTION.

16. Previous to the War of Independence, the thirteen political communities which afterwards became the original states of the American Union were colonies of Great Britain. The first positive step towards the Union was the formation of the Continental Congress, a revolutionary body, which inaugurated the war, declared the independence of the colonies, and drafted certain articles of confederation. Upon the ratification of these articles by the states, the United States of America came into being.

##### *The Colonies.*

The colonies were generally divided into two classes, provincial and proprietary, according as the direct executive power was retained by the King of England or had been granted out to proprietaries. But three of the colonies were governed by charters, which, to a certain extent, secured their liberties and regulated the system of their government. And all the subjects of the British crown resident in the colonies claimed the benefit and protection of those great guaranties of freedom which had been accorded by that crown to their ancestors, (such as Magna Charta, the Habeas Corpus Act, the Bill of Rights settled upon the accession of William and Mary, and the provisions of the common law), and which afterwards were largely instrumental in determining the constitution and frame of government which the colonists, having secured their independence, adopted for themselves. But under the colonial system, the power of local

self-government was exercised in a very limited degree, even in those parts of the country where the most liberal charters were in force. In some, the popular legislative assembly was hampered by the right of a council, not chosen by the people, to share in their enactments. In all, the royal or proprietary governor claimed and exercised a veto power. Moreover, in some cases, the king in council had the prerogative of annulling acts of colonial legislation, though they were of binding force until so disapproved. There were also certain subjects in regard to which parliament claimed the right to legislate directly for the colonies, and the resistance to this claim, where it was not freely conceded, was one of the principal causes which led to the revolution.

*The Continental Congress.*

The first national legislative assembly in the United States was the Continental Congress, which met in 1774, in pursuance of a recommendation made by Massachusetts and adopted by the other colonies. In this congress all the colonies were represented except Georgia. The delegates were in some cases chosen by the legislative assemblies in the states; in others, by the people directly. The powers of this congress were undefined. The recommendation which led to it contemplated nothing more than a deliberation upon the state of public affairs. But by the acquiescence of the states and their people, it proceeded to take measures and pass resolutions which concerned the general welfare and had regard to the inauguration and prosecution of the war for independence. The first Continental Congress was succeeded in the following year, according to their own proposal, by another body chosen and organized in the same manner, in which all the states were represented. This body provided for the raising and equipping of an army, intrusted the command in chief to General Washington, and framed, adopted, and promulgated the Declaration of Independence. The Continental Congress was a revolutionary body. It was not authorized by any pre-existing law or ordinance. Its acts and determinations were entirely outside the pale of ordinary law. It was not intended to be permanent, nor was it designed to be a national or confederate government. It was merely raised up, as an extraordinary institution, to meet the special exigencies of the situation of the colonies. It was regarded rather as

an advisory body, wielding the war powers of the whole people, than as a government.<sup>1</sup>

*The Articles of Confederation.*

When it became apparent that a war had been entered on which must result either in the destruction of American liberties or in the introduction to the world of a new nation, it was evident to all those interested in the conduct of public affairs that the revolutionary congress was at once too weak and too indefinite a bond between the states. It was necessary to devise a scheme of association which would insure vigor and faithful co-operation in the conduct of hostilities and would also more clearly apportion the powers of government between the states and the congress. The congress, to this end, prepared a series of "Articles of Confederation and Perpetual Union," and submitted them to the states for their approval and ratification in 1777. Before the close of the following year the articles had been ratified by all the states except Delaware and Maryland. Of these, the former gave in its adherence in 1779, and the latter in 1781.

The articles of confederation provided that the style of the confederacy should be "The United States of America"; that "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in congress assembled;" that "the said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to or attacks made upon them or any of them on account of religion, sovereignty, trade, or any other pretense whatever." The articles also provided for interstate rights of citizenship, the extradition of criminals, and the according of full faith and credit to the records and judicial proceedings of each state in all the others. They provided for an annual congress of delegates to be appointed in the several states, but reserving to each state the power to recall its delegates or any of them, at any time during the year, and to send others in their stead. Each

<sup>1</sup> On the continental congress, see 1 Story, Const. §§ 198-217; Pom. Const. Law, §§ 45-56; Rawle, Const. pp. 19-26; 1 Von Holst, Const. Hist. pp. 1-5.

state was required to "maintain" its own delegates. Each state was given one vote in "determining questions in the United States." Provision was made for freedom of speech and debate, and for the protection of members of the congress from arrest. The prohibitions laid upon the individual states were as follows: They could not send or receive embassies or make treaties, without the consent of congress, nor grant titles of nobility. They could not make treaties with each other, without the same consent. They could not lay imposts or duties which might interfere with treaties made by the United States. They could not, in time of peace, maintain armies or navies, except to such extent as congress should judge to be necessary for their defense. They could not engage in war, without the consent of congress, except in case of actual invasion or a threatened Indian depredation, nor commission ships of war, nor grant letters of marque or reprisal, unless after the United States had declared war, and then only against the other belligerent and under congressional regulation, "unless such state be infested by pirates." "All charges of war and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in congress assembled shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the United States in congress assembled." The powers confided to "the United States in congress assembled" were principally as follows: To determine on peace and war; send and receive ambassadors; enter into treaties and alliances; establish rules for prizes and captures on land; to grant letters of marque and reprisal; establish courts for the trial of piracies and felonies committed on the high seas; to act as the last resort on appeal in all disputes and differences between the states on questions of boundary, jurisdiction, or other cause; to regulate the alloy and value of coin struck by their own authority or that of the respective states; to fix the standard of weights and measures; to regulate trade and manage

affairs with the Indians; to establish and regulate post-offices from one state to another; to appoint superior officers of the army and navy, and make rules for the government and regulation of the land and naval forces, and direct their operations; to appoint a committee, to sit in the recess of congress, to be denominated a "committee of the states," and consisting of one delegate from each state; to appropriate and apply money for defraying the public expenses; to borrow money and emit bills on the credit of the United States; and to raise and maintain an army and navy. But in regard to nearly all these powers (and certainly all the most important of them), it was provided that they should never be exercised by the congress "unless nine states assent to the same."

*Failure of the Confederation.*

The defects of the articles of confederation were obvious and vital. The United States, as thus constituted, was dependent on the states. There was a central government, but it was not intrusted with the means of its own preservation. It had no executive; it had no courts; it had no power to raise supplies. For the exercise of all its vital powers it was dependent upon the consent of nine of the states. It could adopt plans and inaugurate measures, but could not compel obedience to its mandates, or even co-operation in its efforts. It might contract debts, but could not secure their payment. It had the power to coin money, but had no bullion. It could emit bills of credit, but had no funds to redeem them. Even the expenses of its own members were to be defrayed by the states which sent them and which could recall them. It could make treaties, but their observance by the states could not be compelled. In effect, all the powers granted to the general government by this constitution, if they were not self executing, were entirely at the mercy of the individual states. It therefore became necessary to "form a more perfect Union" by establishing a constitution which should provide the central authority with adequate powers and adequate means for securing their enforcement.<sup>2</sup>

<sup>2</sup> On the articles of confederation, see 1 Story, Const. §§ 218-271; Pom. Const. Law, §§ 57-75; Rawle, Const. pp. 26-28; Cooley, Const. Law (2d Ed.) pp. 11-15.

**ESTABLISHMENT OF THE FEDERAL CONSTITUTION.**

**17. The constitution of the United States was framed by a constitutional convention called for the purpose of revising the articles of confederation. Being submitted to the people, it was duly ratified by them, acting within their respective states, and became the fundamental law of the nation.**

The constitutional convention met in 1787, in pursuance of a resolution of congress, whereby it was recommended that a convention of delegates, who should be appointed by the several states, be held at Philadelphia, for the sole and express purpose of revising the articles of confederation, and reporting to congress and the several legislatures such alterations and provisions therein as should, when agreed to in congress and confirmed by the states, render the federal constitution adequate to the exigencies of government and the preservation of the Union. The convention was composed of delegates from all the states except Rhode Island. The resolution from which they derived their authority contemplated nothing more than a revision of the articles of confederation. But the convention was not long in determining that the whole scheme of government therein contained was so defective that it was beyond hope that the evils and inconveniences complained of by the people could be remedied by any process of patching or mending the old constitution. In their judgment, what was needed was an entirely new frame of government. And this they proceeded to construct. Technically, they exceeded their authority, and hence, in a strict sense, their proceedings may be said to have been extra-legal, or even revolutionary. But they did not assume to impose the result of their labors upon the nation as a binding organic law, but offered it as a constitution to be discussed and to be ratified and confirmed before it should become operative. As a group of citizens, they had the unquestionable right to suggest a new constitution of government. And this was what in effect was done. The convention did not "report alterations and provisions" to be made in the articles of confederation. The authority granted to them was never exercised. But in lieu thereof, they submitted to congress and the peo-

ple a new frame of government, which was eventually accepted and confirmed. The draft of the constitution was laid before congress and by them submitted to the several states. It contained a provision that as soon as it should have been ratified by nine of the states, it should become binding on those states. There ensued long, exhaustive, and acrimonious debates on the question of its adoption. But in the course of a year eleven of the states had ratified the constitution, and in September, 1788, congress made provision for the first election of federal officers and the inauguration of the national government under the new constitution. On the 30th of April, 1789, the first President of the United States took the oath of office, and the present government began the exercise of its functions as marked out in the constitution. The states of North Carolina and Rhode Island were not in the Union from the beginning. The former ratified the constitution in 1789, and the latter in 1790.<sup>3</sup>

#### AMENDMENT OF THE FEDERAL CONSTITUTION.

18. The constitution of the United States provides for its own amendment in two methods. First, congress, when two-thirds of both houses shall deem it necessary, may prepare amendments and propose them to the states. Second, if the legislatures of two-thirds of the several states shall apply therefor, congress shall call a convention for proposing amendments. Amendments proposed in either method must then be ratified by three-fourths of the states, and this may be done by the legislatures of the states, acting as the representatives of the people, or by conventions held in each state, according as one or the other mode of ratification may be proposed by congress.

Thus far, fifteen amendments have been made to the federal constitution. In every case the amendment has been proposed by congress and ratified by the states. No convention for revising the constitution, or proposing amendments to it, has ever been called. It

<sup>3</sup> See 1 Story, Const. §§ 272-279.

should be noted that the article which contains the provision for amendments also enacts that no state, without its consent, shall be deprived of its equal suffrage in the senate. This is the one irrevocable clause of the constitution. And it is the provision which, more than all others, secures to each state its rightful independence and autonomy.

*The First Ten Amendments.*

The ratification of the constitution of the United States was procured from the states with great difficulty. Objections were offered to almost every one of its provisions. This arose partly from local pride and jealousies, and partly from a strong distrust of the central government about to be erected. The several states, in yielding their assent, proposed and strongly urged the addition of such amendments as would guaranty, on the one hand, the protection of personal rights and liberties against federal oppression, and on the other hand, the retention by the states of such powers as were not specifically granted to the general government. It is said that no less than 201 of such amendments were suggested in the different state conventions. So urgent was the call for a more explicit settlement of these questions that congress, at its first session, prepared and submitted to the states a series of twelve amendments to the constitution. Ten of these were ratified by eleven of the states during the next two years, that is, before the close of 1791. And these now constitute the first ten amendments. Nine of them are intended as a bill of rights. They guaranty to individuals protection (as against federal action only) in respect to those rights and immunities which were considered to be inadequately provided for in the constitution itself. The tenth establishes the principle that the government of the United States is one of delegated and limited powers, and that those powers which are not confided to it by the constitution, nor prohibited thereby to the states, are reserved to the states respectively or to the people.\*

*The Eleventh Amendment.*

This amendment was adopted in consequence of the decision of the supreme court in *Chisholm v. Georgia*, 2 Dall. 419, that a state of the Union was liable to be sued, like a private person, by a citizen

\* 1 Story, Const. §§ 303, 1857-1909.

of another state or of a foreign country. "That decision created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the supreme court. It did not in terms prohibit suits by individuals against the states, but declared that the constitution should not be construed to import any power to authorize the bringing of such suits."<sup>5</sup>

*The Twelfth Amendment.*

This amendment, which introduces a change in the manner of electing the President and Vice-President, was adopted in consequence of the difficulties which attended the election of 1801. In that year, when the electoral votes were counted, it was found that Jefferson and Burr had each received 73, and consequently, as the constitution then stood, the election was cast upon the house of representatives, although it was notoriously the intention of the electors that Jefferson should be President and Burr Vice-President. Hence congress, in 1803, proposed the twelfth amendment, in lieu of the original third paragraph of the first section of the second article of the constitution, and it was duly ratified by the states. The amendment remedies the defect in the original provision of the constitution by providing for the casting of separate ballots for the two offices.

*The Last Three Amendments.*

The thirteenth, fourteenth, and fifteenth amendments were ratified by the requisite majority of the states in 1865, 1868, and 1870, respectively. They were rendered necessary by the events of the civil war, and the desire to prevent the possibility of any similar conflict in the future. They were designed to insure the utter and final abolition of slavery throughout the United States and all its dominions, and to secure to the newly emancipated race the same privileges of citizenship, and of personal and political rights, which were previously enjoyed by all others under the constitution. The

<sup>5</sup> Per Bradley, J., in *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504.

legal effect of these amendments and of their specific provisions will be discussed in another place.

*Ratification of Amendments.*

Two questions of great practical importance, in regard to the amendment of the federal constitution, were suggested by the actual state of affairs at the time when the thirteenth and fourteenth amendments were before the people. The first question was this: Are states which were lately in rebellion, and not yet reconstructed, to be counted as states of the Union within the meaning of the provision which requires such amendments to be ratified by three-fourths of the states, or will the amendment become a part of the constitution if ratified by three-fourths of those states which are at the time in full harmony and relation with the general government? The second question was this: If a state has formally signified its ratification of a proposed amendment, does it retain the power to withdraw that ratification at any time before the amendment becomes a part of the constitution by the consent of the requisite majority of states, or is a ratification once given irrevocable? These questions have never been authoritatively answered. Very fortunately, any settlement of them became unnecessary, before the point was pressed to an issue, by the restoration into the Union of a sufficient number of states to do away with the condition of affairs which had raised the first question, and by the ratification of the amendments by such a number of the states as to render it immaterial whether the two states which had desired to withdraw their ratification were permitted to do so or not. It is most unlikely that the first of those questions can ever arise again. But the second remains open and may at some future day require an answer. The direction in which its answer should probably be sought is suggested by the solution of an analogous case, mentioned by Judge Cooley. Says this learned writer: "Where, by statute, a municipality is permitted, with the consent of a majority of its electors, to raise exceptional taxes or assume exceptional burdens, an election once held which results in a favorable vote is conclusive. If, however, the first election results in a majority against the proposal, and there is nothing in the law which negatives the right to vote again, the case stands as if no election had been had, and the sense

of the people may be taken again and again, and a favorable vote at the last election is as effectual as if it had been obtained at first." <sup>6</sup>

*President's Approval of Amendments.*

It has been made a question whether a proposed amendment is such an act of legislation as must be submitted to the President, before it goes to the state legislatures, for his approval, and whether he has the right to veto it. Executive and legislative precedent has settled this question in the negative, and considerations drawn from the wording of the constitution lead to the same result.<sup>7</sup> Nor is the question of great practical importance, because the concurrence of two-thirds of both houses of congress is required to the proposing of amendments, and the same majority would be sufficient to overrule the President's veto, should one be interposed. }

#### ESTABLISHMENT OF STATE CONSTITUTIONS.

19. All of the original states framed and adopted constitutions for themselves, eleven of them antedating the constitution of the United States. Whenever a new state is admitted into the Union, its people have the right to ordain their own constitution, which, however, must conform to the federal constitution. At the close of the late civil war, the states which had been in rebellion were required to adopt new constitutions recognizing the supremacy of the Union and the validity of the new amendments.

"The governments of the several states were also at first revolutionary, but their previous organization was such that the war disturbed them but little, and modified forms more than substance. All of them had local governments and the common law, which remained undisturbed; all of them had legislative bodies, which continued to perform their functions, but without the recognition

<sup>6</sup> Cooley, Const. Law (2d Ed.) 211, 212, citing *Woods v. Lawrence Co.*, 1 Black, 386; *Woodward v. Supervisors*, 2 Cent. Law J. 396; *Society for Savings v. New London*, 29 Conn. 174.

<sup>7</sup> See *Hollingsworth v. Virginia*, 3 Dall. 378.

of the pre-existing executive authority. The states, however, soon proceeded to adopt formal constitutions, apportioning, limiting, and defining the powers of the several departments of government, and with two exceptions (Connecticut and Rhode Island) they had completed this work before independence was acknowledged by Great Britain.”<sup>8</sup> These state constitutions were generally such adaptations of the old colonial governments as the altered condition of affairs rendered necessary.

*Reconstruction.*

At the end of the civil war, congress claimed and enforced the right to take measures for the restoration of those states which had passed secession ordinances to their normal and harmonious relations with the federal government. These acts were called the “reconstruction acts.” By them, among other things, those states were required to adopt constitutions which should recognize the supremacy of federal law, the inviolability of the Union, the abolition of slavery, and such other provisions as are found in the last three amendments. This being done by those states, their senators and representatives were again admitted to their places in the national legislature, and the states themselves to all the rights and privileges of the Union. It should be noticed that this was altogether a different matter from the action which congress may take upon the admission of a new state into the Union. For these states were never out of the Union. And neither was it an attempt on the part of congress to make constitutions for those states. The constitutions were made and adopted by the people of the several states affected.<sup>9</sup>

**AMENDMENT OF STATE CONSTITUTIONS.**

**20. A state constitution may be revised or amended by the people of the state, that is, the qualified electors. Their power in this respect can be exercised only in the mode pointed out by the constitution, if any, or directed by the legislature. Usually, the work of revision is done**

<sup>8</sup> Cooley, Const. Law (2d Ed.) 10.

<sup>9</sup> Texas v. White, 7 Wall. 700; In re Hughes, Phil. (N. C.) 57.

by a constitutional convention, chosen in some lawful manner, who refer the result of their labors to the popular vote.

*Who Authorized.*

It is within the power of the people of each state, who have made their constitution, to abolish it, to adopt a new one, or to revise or amend the existing constitution, as they may see fit, subject to such limitations as are expressed in or grow out of the constitution of the United States. But the word "people," as here used, does not mean the inhabitants of the state. It means those only who, under the existing constitution, are recognized as members of the existing body politic, and who, by that constitution, are invested with political rights which give them the privilege of sharing in the determination as to the frame of government. So long as any constitution stands, it must alone furnish the rule for determining those who are entitled to be reckoned as a part of the "people." If a constitution should be abrogated, and a new one adopted, by the whole mass of people in a state, acting through representatives not chosen by "the people" in the political sense of the word, but by the general body of the populace, the movement would be extra-legal.

*Mode.*

The power of the people to change or amend their constitution can be exercised only in some lawful and constitutional mode. If a volunteer convention (that is, one not authorized either by the constitution or an act of the legislature) should frame a revision or amendment of the constitution, their work would have no more force than the expression of so much private opinion. If it were submitted to a vote of the people, the election had upon it would be illegal. If it were ratified by a majority of the people, still it could gather no legality from their sanction. If then the attempt were made to set up the new constitution and dethrone the old, it could be done only by an act of force. And such an attempt, if successful, would be revolution, and if unsuccessful, treason.<sup>10</sup> If

<sup>10</sup> Wells v. Bain, 75 Pa. St. 39; Koehler v. Hill, 60 Iowa, 543, 14 N. W. 738, and 15 N. W. 609.

the constitution itself does not provide any means by which it may be revised or amended, it is competent for the legislature, acting in accordance with the wish of their constituents, to direct the calling of a convention to prepare amendments to be submitted to the vote of the people. And it has been thought that this could be done by the legislature, even when such a measure was in advance of, or supplementary to, the mode pointed out in the constitution.<sup>11</sup> But the generally accepted doctrine is that the method of amendment provided in the constitution is the only method in which it can be amended without revolution. Thus, if the constitution merely declares that the legislature may prepare amendments and submit them to the people, there is no power in the legislature to provide for the calling of a convention to draft a new constitution and then submit it to the popular vote.<sup>12</sup>

*Governor's Approval of Amendment.*

The amendment itself need not be submitted to the governor for his approval or veto. But the proposition, or resolution, of the legislature to refer the amendment to the popular vote may take such a shape as to fall within the designation of ordinary legislation, and so require the assent of the executive. The practice in the different states, in this particular, is not uniform.<sup>13</sup>

*Limits of Power.*

What is the limit to the power of the people of a state in revising and amending their constitution? Supposing the amendment to be proposed and adopted in a lawful manner, there are no limitations upon the scope or character of the amendments except such as are to be found in the constitution of the United States. But these are important. The people of a state could not, by means of such amendment, establish any form of government that was not in accordance with the theory and system of a republic, for the continuance of republican government in all the states is guaranteed by the federal constitution. They could not deny allegiance to the United States, nor deny that the federal constitution and laws

<sup>11</sup> *Wells v. Bain*, 75 Pa. St. 39.

<sup>12</sup> *In re Constitutional Convention*, 14 R. I. 649.

<sup>13</sup> See *In re Senate File 31*, 25 Neb. 864, 41 N. W. 981; *State v. Secretary of State*, 43 La. Ann. 590, 9 South. 776.

and treaties are the supreme law of the land. Nor could they exempt their legislative, executive, and judicial officers from taking an oath or affirmation to support the constitution of the United States. Neither could they divide the state into two or more states, thus bringing a new state or states into the Union, or unite with another state, to form one new state, without the consent of congress. Nor could they adopt any provision which would impair the obligation of contracts or pass any bill of attainder or ex post facto law, or grant titles of nobility. Nor could they deny full faith and credit to the public acts, records, and judicial proceedings of the other states; nor so regulate the rights of their own citizens as to deny their privileges and immunities to citizens of the other states, or abridge the privileges and immunities of citizens of the United States. Neither could they, by enactments in the form of a constitution or of amendments thereto, deprive any person of life, liberty, or property without due process of law; or deny to any person within their jurisdiction the equal protection of the laws. Nor could they thus establish or permit slavery, or deny or abridge the right of citizens of the United States to vote, on account of race, color, or previous condition of servitude. Nor could the state thus assume any of the powers exclusively vested in congress.

But so far as regards the functions and powers of government, and their distribution and separation, the institutions of the state, the regulation of personal, social, and political rights, even those heretofore deemed most fundamental and necessary to the maintenance of freedom, in so far as the same are not created or secured by the federal constitution, the power of the people, in making or amending their constitution, is plenary and supreme.<sup>14</sup>

*Powers of Constitutional Convention.*

If the convention is called for the purpose of amending the constitution in a specified part, the delegates have no power to act upon and propose amendments in other parts of the constitution.<sup>15</sup> The convention cannot take from the people their sovereign right to ratify or reject the constitution or ordinance framed by it, and can-

<sup>14</sup> Cooley, Const. Lim. 33; Penn v. Tollison, 26 Ark. 545; In re Gibson, 21 N. Y. 9.

<sup>15</sup> Opinion of the Justices, 6 Cush. 573.

not infuse life and vigor into its work before ratification by the people.<sup>16</sup> But the people, in conferring authority upon the convention, may intrust them with power not merely to prepare a draft of a new constitution, but to "enact" it, and when such authority is given, the new instrument need not be submitted to the popular ratification.<sup>17</sup> A constitutional amendment does not become operative upon the casting in its favor of the necessary majority of votes, but only after the due promulgation of the result.<sup>18</sup> A clause in the bill of rights, in a state constitution, may be amended in the same manner as any other part of the constitution.<sup>19</sup>

*Effect of Amendment.*

An amendment to a constitution is not to be considered as if it had been in the original instrument, but rather as analogous to a codicil or a second deed, altering or rescinding the first, which is referred to only to see how far the first must yield to give full effect to the last. The legal fiction regarding an amendment to a pleading as if inserted in the first instance, does not apply.<sup>20</sup>

<sup>16</sup> Woods' Appeal, 75 Pa. St. 59; State v. Mayor, etc., of City of New Orleans, 29 La. Ann. 863.

<sup>17</sup> Sproule v. Fredericks, 69 Miss. 898, 11 South. 472.

<sup>18</sup> Sewell v. State, 15 Tex. App. 56; State v. Mayor of Morgan City, 32 La. Ann. 81; People v. Norton, 59 Barb. 169.

<sup>19</sup> State v. Cox, 8 Ark. 436.

<sup>20</sup> University v. McIver, 72 N. C. 76, per Pearson, C. J.

**CHAPTER IV.****CONSTRUCTION AND INTERPRETATION OF CONSTITUTIONS.**

21. Office and Duty of the Judiciary.
22. Adjudging Unconstitutionality.
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**OFFICE AND DUTY OF THE JUDICIARY.**

**21. The judicial department of the government is the final and authoritative interpreter of the constitution.**

There is a sense in which every person, even a private individual, must judge of the meaning and effect of the constitution, in order to govern his own actions and his dealings with other men. And the executive and legislative departments of government are clearly under the necessity of making similar determinations, at least in ad-

vance of authoritative expositions by the courts. But as the constitution is a law, and questions concerning its scope and interpretation, and of the conformity of public and private acts to its behests, are questions of law, the ultimate determination of such questions must belong to the department which is charged with the function of ascertaining and applying the law. And as the courts have the power to enforce their judgments, their determination of such questions is final. And as their decisions are entitled to respect and obedience as precedents, their expositions of the constitution are authoritative.

#### ADJUDGING UNCONSTITUTIONALITY.

**22. It is the right and duty of the courts to examine the constitutional validity of every statute brought fairly before them as applicable to a pending controversy; and if they find such statute to be in contravention of the constitution, they may and must pronounce it a nullity and no law.<sup>1</sup>**

It is the business of the judicial department of government to interpret and apply the law to cases brought before them. In so doing, they must determine what is the law applicable to a particular case. A statute which, if valid, will govern the case, is presumptively the law for its decision. But a statute is the expressed will of the legislature, while the constitution is the expressed will of the people. The latter is paramount. If the statute conflicts with it, it is invalid; it is no law. Now when this question of unconstitutional legislative action is raised, in such a manner as to become necessary to the determination of the pending cause, the court must decide it. And if it shall find that the statute is in violation of the constitution, and therefore no law, it must so declare, and decide the case accordingly. This is the whole rationale of the power of the courts to adjudge statutes invalid. It is not a veto power. It is not a supervisory power over legislation. It is simply the power to ascertain and decide what is the law for the determination of the cause which happens to be before the court.<sup>2</sup>

<sup>1</sup> *Van Horne's Lessee v. Dorrance*, 2 Dall. 304.

<sup>2</sup> *Griffin v. Cunningham*, 20 Grat. 31.

*An American Institution.*

This power of the judiciary to judge of the constitutional validity of acts of legislation is an invention of the American people and an institution peculiar to our country. It is not one of the political ideas borrowed from the British constitution. No such power belongs to the English judges. It is true there are some cases in their reports, prior to the revolution, in which the judges would appear to have asserted a right to decide upon the validity of acts of parliament and to adjudge them void if they violated the great principles of liberty or of natural justice. Thus in *Bonham's Case*,<sup>3</sup> Lord Coke is reported to have said: "It appeareth in our books that in many cases the common law will control acts of parliament and adjudge them to be utterly void; for where an act of parliament is against common right and reason or repugnant or impossible to be performed, the common law will control it and adjudge it to be void." But a careful examination of the authorities will show that these statements mean no more than that the judges would not so construe an act of parliament as to give it an unjust, unreasonable, or oppressive operation, if they could avoid it, and that, to escape such consequences, they would resort even to a forced and unnatural construction, assuming that parliament could not have intended such a result. But it was clearly settled in England, at the time of the American revolution, that if it was the positive will of parliament to enact an unjust or unreasonable law, and if that will was too clearly expressed to admit of its being construed away, then the judges were bound to obey it, and there was no power which could control it, unless it were by a revolution.<sup>4</sup> Neither is there at the present day any court on the continent of Europe which possesses the power and authority to pronounce against the validity of an act of

<sup>3</sup> 8 Coke, 118a. And see, also, *Day v. Savadge*, Hob. 87; *City of London v. Wood*, 12 Mod. 687.

<sup>4</sup> 1 Bl. Comm. 91; 1 Kent, Comm. 447. *Winthrop v. Lechmere*, Thayer, Cas. Const. Law, 34, was a case (in 1727) in which the privy council adjudged an act of the colony of Connecticut to be null and void, because in conflict with the royal charter of the colony, in that it was contrary to the laws of England. But this can hardly be considered as a precedent for the American doctrine, on account of the limited nature of the legislative authority of the colony and its dependent position.

the national legislature on account of its conflict with the written constitution of the state.<sup>5</sup> So that the position of the American courts, in this regard, is virtually unique. It is not to be supposed, however, that this power of our courts was created by the constitution of the United States. It may be justified by that instrument. But there are several well-authenticated instances in which the courts of the states declared against the validity of acts of their legislatures, on account of repugnance to their constitutions, before the federal constitution was adopted. Therefore if we regard the power as expressly given by the federal constitution to the federal courts, it was not an invention of the framers of that constitution, but was in line with precedents already furnished by the states. And if we are to consider that the federal courts claimed the power as an implication from their constitution and office, they had authority for the claim in the previous action of the state courts.<sup>6</sup> The first case

<sup>5</sup> Professor Thayer, in his valuable collection of cases on constitutional law (pp. 146-149), quoting from Coxe on Judicial Power, mentions a case of *Garbade v. State of Bremen*, in the Hanseatic court of upper appeal, in 1875, in which judgment was given against the validity of a law of Bremen, because it was in contravention of the constitution of that state. It is stated that the court was much influenced in this case by the writings of the jurist Von Mohl, who, in turn, based many of his views on the works of Story, Kent, and the Federalist. But this decision was expressly overruled, in 1883, by the imperial tribunal (or supreme court) of the German Empire, in the case of *K. v. Dyke Board of Niedervieland*, in which the power of the judiciary to pass upon the constitutional validity of statutes was categorically denied. See, also, *Krieger v. State of Bremen*, in Thayer, *ubi supra*. It appears that the federal court of Switzerland may in some cases pronounce against the validity of a cantonal law. Bryce, *Am. Com.* vol. 1, p. 430, note. And the supreme court of Hawaii may adjudge statutes unconstitutional. *King v. Young Tang*, 7 Hawaii, 49. These are the only known exceptions to the general rule, and in both these cases the idea was evidently borrowed from the American system.

<sup>6</sup> Among these early cases, particular attention should be directed to the following: *Bayard v. Singleton*, 1 Mart. (N. C.) 42; *Rutgers v. Waddington*, Thayer, *Cas. Const. Law*, 63; *Com. v. Caton*, 4 Call, 5; *Bowman v. Middleton*, 1 Bay, 252; *Byrne v. Stewart*, 3 Desaus, Eq. 466; *Com. v. Smith*, 4 Bin. 117; *Trevett v. Weeden*, Thayer, *Cas. Const. Law*, 73. In the last-named case, in 1786, the superior court of judicature of Rhode Island decided against the constitutionality of an act of assembly which authorized summary convictions in certain cases without a trial by jury. The indignation of

in which the supreme court of the United States adjudged an act of congress to be unconstitutional and void was *Marbury v. Madison*,<sup>7</sup> in which the decision was against that portion of the judiciary act which gave to the supreme court authority to issue writs of mandamus to public officers. This power has not always been claimed by the courts. There are some instances in which they have distinctly repudiated it.<sup>8</sup> But it is now fully and irrevocably settled, not only that the power belongs to the judicial tribunals, but that they are bound to exercise it in all proper cases.

the legislature was aroused, and they summoned the judges to appear before them, "to render their reasons for adjudging an act of the general assembly unconstitutional and so void." The judges accordingly appeared, and defended themselves with dignity, but with much vigor and learning. It was then voted by the legislature that they were not satisfied with the reasons given by the judges, and a motion was made to dismiss the judges from their office. But it was shown that this could not be done except by impeachment "or other regular process;" and it was finally resolved that the judges be discharged from any further attendance upon the assembly, on the ground that they were not charged with any "criminality" in rendering the judgment they had given. No impeachment proceedings were had, but we are told that in the succeeding year the legislature elected a new bench of judges, who were more compliant to their will.

<sup>7</sup> 1 Cranch, 137. Marshall, C. J., in delivering the opinion, vindicated the right and duty of the judiciary with great clearness and ability. *Cooper v. Telfair*, 4 Dall. 14, was an earlier case, but there, while the court inclined to the opinion that an act in plain violation of the constitution might be adjudged invalid, they refused to so rule in regard to a bill of attainder passed by the legislature of Georgia in 1782, on the ground that there was at that time no specific provision of the constitution which forbade such acts, and that they must be considered as within the general scope of legislative power unless prohibited.

<sup>8</sup> Thus, in *Eakin v. Raub*, 12 Serg. & R. 330, Judge Gibson, of Pennsylvania, expressed the opinion that the judiciary had no right or power to pronounce an act of the legislature void for conflict with the constitution of the state, although they were not bound to give effect to acts which were in violation of the constitution of the United States. But twenty years later, in *Norris v. Clymer*, 2 Pa. St. 281, this judge admitted that he had changed his opinion on this point, partly "from experience of the necessity of the case."

**SAME—THE COURT.**

**23. All courts have the right to judge of the constitutionality of a statute. But there are certain cases in which the decision of one court, on such a question, is binding on other courts.**

Considerations relating to the relative rank of different courts, and the effect of precedents, have given rise to the following rules:

1. If the court is an inferior one, it should proceed with great diffidence, and not pronounce a statute invalid unless the case is too clear to admit of the slightest doubt, or unless it is impossible to wait for an authoritative decision of the superior court without serious injury to the parties.<sup>9</sup>

2. If the court of last resort in a state has pronounced in favor of or against the constitutionality of a state statute, its decision is binding on all the inferior courts of the state, and the question is no longer an open one for such courts.<sup>10</sup>

3. If the question of the validity of a statute of one state comes legitimately before the courts of another state, such courts are at liberty to determine the question for themselves. But in so doing, they will pay great respect to the opinions of the courts of the state which enacted the statute, if the question concerns its conformity to the constitution of that state. If the question arises from an alleged repugnance to the federal constitution or an act of congress, the court trying the case will be bound by a decision of the United States supreme court, if any there be, on the same question, otherwise it will be at liberty to exercise its own judgment.<sup>11</sup>

4. The judgment of the highest court of a state, that a statute has been enacted in accordance with the requirements of the state constitution, is conclusive upon all the courts of the United States and will not be reviewed by them. But if the ground of invalidity urged against the statute is that it contravenes the federal constitu-

<sup>9</sup> *Mayberry v. Kelley*, 1 Kan. 116; *Ortman v. Greenman*, 4 Mich. 201; *White v. Kendrick*, 1 Brev. 469.

<sup>10</sup> *Palmer v. Lawrence*, 5 N. Y. 389; *Wheeler v. Mice*, 4 Brewst. 129.

<sup>11</sup> *Stoddart v. Smith*, 5 Bin. 355.

tion or an act of congress, the federal courts will not be bound by the decisions of the state courts.<sup>12</sup>

5. The validity of an act of congress may be passed upon by the state courts, until it has been settled by the supreme court of the United States; after that, the question is no longer open.

6. A decision of the supreme federal court, for or against the validity of an act of congress, or for or against the validity of a state law in respect to its conformity to the federal constitution or federal laws, is binding and conclusive, until overruled, on all courts of every grade, both state and national.

#### SAME—FULL BENCH.

**24. It is a rule adopted by many appellate courts, though not all, that they will not decide against the constitutionality of a statute unless the hearing is had before the full bench. That is, a judgment on such questions will not be passed by a majority of a quorum, being less than a majority of the whole court.<sup>13</sup>**

The reasons for this rule are two. In the first place, it is possible that a judgment so pronounced might be overruled by the full court when a similar question again arises. And all courts are disposed to avoid events which so seriously unsettle the law. Secondly, the courts are inclined to defer the decision of such questions until a full bench can be had on account of the great importance of the question involved and on account of a delicacy in the matter of setting aside a legislative act unless their full number has considered it. But this is a rule of custom and propriety and not of imperative duty. And it is sometimes impossible to apply it. For instance, the decision in the very important case known as the Chicago Lake Front Case\* was rendered by four judges out of the nine who compose the supreme court. But that was because two of the judges, on account of interest, took no part in the decision of the case, and three dissented.

<sup>12</sup> Atlantic & G. R. Co. v. Georgia, 98 U. S. 359.

<sup>13</sup> Briscoe v. Bank of Kentucky, 8 Pet. 118.

\* 146 U. S. 387, 13 Sup. Ct. 110.

**SAME—NATURE OF THE LITIGATION.**

25. To induce the courts to pass upon the constitutionality of a statute, the question must arise in the course of an actual and bona fide litigation.

The judicial tribunals will decline to exercise this high office unless it becomes necessary in order to determine the rights of parties in a real and antagonistic controversy. "It never was thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."<sup>14</sup>

**SAME—PARTIES INTERESTED.**

26. A statute will not be declared unconstitutional on the application of a mere volunteer or person whose rights it does not specially affect. This will be done only in a proper case where some person seeks to resist the operation of the statute and calls in the judicial power to pronounce it void as to him, his property, or his rights.<sup>15</sup>

For instance, a law which is unconstitutional only because it impairs the obligation of contracts is not necessarily null as to the rights of persons not concerned in the contracts whose obligations are so impaired.<sup>16</sup> Persons may also become estopped from denying the constitutionality of a statute, by participating in the procurement of its passage, by ratifying or acquiescing in it after its passage, or by becoming recipients of benefits under it, although it may be invalid as to all other persons.<sup>17</sup> And an individual has no right to complain that a law is unconstitutional after he has endeavored to take the benefit of it to the injury of others.<sup>18</sup>

<sup>14</sup> Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400.

<sup>15</sup> Jones v. Black, 48 Ala. 540; Marshall v. Donovan, 10 Bush. 681; Wellington, Petitioner, 16 Pick. 96; State v. Rich, 20 Mo. 393.

<sup>16</sup> Moore v. City of New Orleans, 32 La. Ann. 726.

<sup>17</sup> Ferguson v. Landram, 5 Bush. 230; Embury v. Conner, 3 N. Y. 511; Haskell v. New Bedford, 108 Mass. 208.

<sup>18</sup> Hansford v. Barbour, 3 A. K. Marsh. 515.

**SAME—NECESSITY OF DECISION.**

**27. The question of constitutionality will not be decided unless it is imperatively necessary to the right disposition of the case.**

The courts will be loath to pass upon the constitutionality of a statute if they can avoid doing so. They will not adjudge against the validity of a law, unless the decision of that very question becomes imperative in the disposition of the case before them. If there is any other ground in the case, on which it can be fairly and satisfactorily disposed of on its merits, the decision will be rested on that ground, and the question of constitutional law will be left open.<sup>19</sup> And if a judgment on the question of constitutionality was not necessary to the determination of the particular case, it will usually be regarded as obiter dictum and not as concluding the question. As a corollary to the foregoing rule, it may be stated that the courts will ordinarily refuse to decide upon the constitutionality of a statute except when the decision is necessary to the final disposition of the case. That is, they will not allow the question to be raised, or will not determine it, upon preliminary, provisional, or collateral proceedings, such as motions for a preliminary injunction, motions to strike out pleadings, hearings concerning costs, or the like.<sup>20</sup>

**SAME—CONSTRUCTION.**

**28. Unconstitutionality will be avoided, if possible, by putting such a construction on the statute as will make it conform to the constitution.**

The courts will not so construe the law as to make it conflict with the constitution, but will rather put such an interpretation upon it

<sup>19</sup> *Weimer v. Bunbury*, 30 Mich. 201; *Allor v. Wayne Co.*, 43 Mich. 76, 4 N. W. 492; *Smith v. Speed*, 50 Ala. 276; *Ex parte Randolph*, 2 Brock. 447, Fed. Cas. No. 11,558; *Hoover v. Wood*, 9 Ind. 286; *Frees v. Ford*, 6 N. Y. 176.

<sup>20</sup> *Deering v. York & C. R. Co.*, 31 Me. 172; *Lothrop v. Stedman*, 42 Conn. 583.

as will avoid conflict with the constitution and give it the force of law, if this can be done without extravagance. They may disregard the natural and usual import of the words used, if it is possible to adopt another construction, sustaining the statute, which shall not be strained or fantastic. In so doing, they construe the act in accordance with the presumed intention of the legislature. For the law-making body is always presumed to have acted within the scope of its powers.<sup>21</sup>

#### **SAME—EXECUTIVE CONSTRUCTION.**

**29.** While the courts are to determine for themselves all questions of constitutionality which come properly before them, yet it is proper and usual for them to show much respect to the decisions of the executive and legislative departments, made for their own guidance, upon the same questions, especially when such decisions have been acquiesced in and acted upon for a long period of time.<sup>22</sup>

#### **SAME—PRESUMPTION OF LEGALITY.**

**30.** Every presumption is in favor of the constitutionality of an act of the legislature.

Legislators, as well as judges, are bound to obey and support the constitution, and it is to be understood that they have weighed the constitutional validity of every act they pass. Hence the presumption is always in favor of the constitutionality of a statute; every reasonable doubt must be resolved in favor of the statute, not against it; and the courts will not adjudge it invalid unless its violation

<sup>21</sup> *Inkster v. Carver*, 16 Mich. 484; *Newland v. Marsh*, 19 Ill. 376; *Roosevelt v. Godard*, 52 Barb. 533; *Parsons v. Bedford*, 3 Pet. 433; *Grenada Co. v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125.

<sup>22</sup> *Stuart v. Laird*, 1 Cranch, 299; *Bank of U. S. v. Halstead*, 10 Wheat. 51; *Edwards' Lessee v. Darby*, 12 Wheat. 206; *Surgett v. Lapice*, 8 How. 48; *Bissell v. Penrose*, Id. 317; *Union Ins. Co. v. Hoge*, 21 How. 35; *U. S. v. Gilmore*, 8 Wall. 330; *U. S. v. Moore*, 95 U. S. 760.

of the constitution is, in their judgment, clear, complete, and unmistakable.<sup>23</sup>

#### SAME—REFERENCE TO JOURNALS OF LEGISLATURE.

**31. The journals of the legislature may be resorted to for the purpose of determining whether the act was passed in due form; but no evidence will be received to contradict the journals.**

A statute may be unconstitutional for lack of compliance with the forms prescribed by the constitution in the process of its enactment. If it is shown to the court that the legislature has neglected or violated its duty in any of these particulars, the act must be pronounced invalid. And for this purpose, the court may go behind the enrolled or printed bill and examine the journals of the two houses. But the act will not be adjudged void unless the journals affirmatively show a lack of compliance with such forms.<sup>24</sup> And since each house of the legislature is the exclusive judge of the election and qualification of its own members, no court can be permitted to inquire whether the members who voted for a bill were legally chosen and qualified.<sup>25</sup>

#### SAME—MOTIVES OF LEGISLATURE.

**32. The motives of the legislature, in passing a particular measure, cannot be inquired into, nor can it be shown that it was procured by fraud or bribery.**

The constitutionality of a statute is a bare question of legislative power, and any inquiry as to the motives operating on the minds of

<sup>23</sup> Tonnage Tax Cases, 62 Pa. St. 286; *Kerrigan v. Force*, 68 N. Y. 381; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Kellogg v. State Treasurer*, 44 Vt. 356; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194; *Mayor, etc., of Baltimore v. State*, 15 Md. 376; *Osburn v. Staley*, 5 W. Va. 85; *Stewart v. Supervisors of Polk Co.*, 30 Iowa, 9.

<sup>24</sup> *Prescott v. Illinois Canal*, 19 Ill. 324; *Common Council of Detroit v. Board of Assessors*, 91 Mich. 78, 51 N. W. 787. Compare *Kilgore v. Magee*, 85 Pa. St. 401.

<sup>25</sup> *People v. Mahaney*, 13 Mich. 481.

the legislators, in voting for the measure, is entirely incompetent. The validity of a statute does not in the least depend on the considerations which induced the legislature to enact it. Evidence to establish fraud, bribery, or corruption against the members of the legislature, as a ground for setting aside the statute, is not admissible. The courts are not made guardians of the morals of the legislators, nor are they at liberty to impute to them any improper motives.<sup>26</sup> As a corollary to this rule it may be stated that the courts will assume that the legislature had before it all such evidence as was necessary to enable it to take the action in question.<sup>27</sup>

#### SAME—POLICY OF LEGISLATION.

**33. A statute cannot be declared void on considerations going merely to its policy or propriety.**

The courts have nothing whatever to do with the policy, expediency, wisdom, or propriety of acts of the legislature. Such matters are questions for legislative determination, but do not belong to the judiciary. Consequently, if a given statute does not violate any provision of the constitution, and is within the general scope of legislative power, the courts cannot adjudge it void merely because it appears to them to be impolitic, unjust, improper, absurd, or unreasonable. To do so would not be an exercise of the judicial functions, but an usurpation of legislative powers.<sup>28</sup>

#### SAME—NATURAL JUSTICE.

**34. A statute cannot be declared invalid because it is opposed to the principles of natural justice or the supposed spirit of the constitution.**

<sup>26</sup> *Fletcher v. Peck*, 6 Cranch, 87; *Ex parte McCardle*, 7 Wall. 506; *Ex parte Newman*, 9 Cal. 502; *State v. Fagan*, 22 La. Ann. 545; *Williams v. Nashville*, 89 Tenn. 487, 15 S. W. 364.

<sup>27</sup> *Johnson v. Joliet & C. R. Co.*, 23 Ill. 202; *Lusher v. Scites*, 4 W. Va. 11.

<sup>28</sup> *Bennett v. Boggs*, *Baldw.* 74, *Fed. Cas. No.* 1,319; *People v. Draper*, 15 N. Y. 532; *People v. City of Rochester*, 50 N. Y. 525; *Pennsylvania R. Co. v. Riblet*, 66 Pa. St. 164; *Sears v. Cottrell*, 5 Mich. 251; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194; *Madison R. Co. v. Whiteneck*, 8 Ind. 217; *Bull v. Read*, 13 Grat. 98.

It has sometimes been held that if a statute, in the judgment of the court, was contrary to the principles of natural justice, or the general spirit of the constitution, or the maxims of republican government, or the principles of right and liberty supposed to lie at the base of all institutions in a free country, it was the duty of the court to pronounce it invalid.<sup>29</sup> But the prevailing opinion at the present day is that there is no such power in the courts. The legislature of a state possesses the power to pass any and every law, on any and every subject, which does not amount to an encroachment upon the province of either of the other departments and is not in conflict with the express terms of either the federal or state constitution. Consequently, one who objects to the validity of an act of the legislature must be able to point out the specific prohibition, requirement, or guaranty which it violates. If this cannot be done, the act is valid. Natural justice, the principles of republican government, and the equal rights of men, are supposed to be adequately guaranteed, in this country, by the express provisions of the constitutions. If they are not, the constitutions are at fault. But that is no limitation upon the legislative power. And the spirit of the constitution cannot be appealed to except as it is manifested in the letter.<sup>30</sup>

#### SAME—PARTIAL UNCONSTITUTIONALITY.

**35. Where part of a statute is unconstitutional, but the remainder is valid, the parts will be separated, if possible, and that which is constitutional will be sustained.**

It frequently happens that some parts, features, or provisions of a statute are invalid, by reason of repugnancy to the constitution, while the remainder of the act is not open to the same objection. In such cases it is the duty of the court not to pronounce the whole statute unconstitutional, if that can be avoided, but, rejecting the

<sup>29</sup> *Ham v. McClaws*, 1 Bay, 93, 98; *People v. Salem*, 20 Mich. 452; *Loan Association v. Topeka*, 20 Wall. 655; *Regents v. Williams*, 9 Gill & J. 365.

<sup>30</sup> *Com. v. McCloskey*, 2 Rawle, 369, 374; *Sharpless v. Mayor*, etc., of Philadelphia, 21 Pa. St. 147, 161; *People v. Draper*, 15 N. Y. 532; *People v. Mahaney*, 13 Mich. 481; *Beebe v. State*, 6 Ind. 515; *State v. Wheeler*, 25 Conn. 290; *Bertholf v. O'Reilly*, 74 N. Y. 509.

invalid portions, to give effect and operation to the valid portions. The rule is, that if the invalid portions can be separated from the rest, and if, after their excision, there remains a complete, intelligible, and valid statute, capable of being executed, and conforming to the general purpose and intent of the legislature, as shown in the act, it will not be adjudged unconstitutional in toto, but sustained to that extent.<sup>31</sup> The constitutional and the unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the former may stand although the latter fall.<sup>32</sup> But when the parts of the statute are so mutually dependent and connected, as conditions, considerations, inducements, 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 independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them.<sup>33</sup> If the purpose of the act is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless sufficient remains to effect the object without the aid of the invalid portion.<sup>34</sup> And if the unconstitutional clause cannot be rejected without causing the statute to enact what the legislature never intended, the whole statute must fall.<sup>35</sup>

<sup>31</sup> *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. 590; *Mobile & O. R. Co. v. State*, 29 Ala. 573; *State v. Exnicios*, 33 La. Ann. 253; *People v. Kenney*, 96 N. Y. 294.

<sup>32</sup> *Com. v. Hitchings*, 5 Gray, 482; *Mayor, etc., of Hagerstown v. Dechert*, 32 Md. 369; *State v. Clarke*, 54 Mo. 17.

<sup>33</sup> *Warren v. Mayor, etc.*, 2 Gray, 84; *Campau v. Detroit*, 14 Mich. 276; *State v. Dousman*, 28 Wis. 541; *Slauson v. Racine*, 13 Wis. 398; *W. U. Tel. Co. v. State*, 62 Tex. 630; *Eckhart v. State*, 5 W. Va. 515; *Willard v. People*, 5 Ill. 461; *Com. v. Potts*, 79 Pa. St. 164; *Baker v. Brainan*, 6 Hill (N. Y.) 47; *State v. Commissioners of Perry Co.*, 5 Ohio St. 497.

<sup>34</sup> *People v. Cooper*, 83 Ill. 585.

<sup>35</sup> *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988.

### SAME—PREAMBLE.

**36. A statute will not be declared unconstitutional on account of a statement of the reasons for enacting it, or anything else, found in the preamble, when the objection does not appear in the body of the act.<sup>36</sup>**

### SAME—EFFECT OF DECISION.

**37. A decision against the constitutionality of a statute, rendered by a competent court in a proper case, makes the statute entirely null and inoperative so long as the decision stands.**

An unconstitutional act of congress or of a state legislature is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office. It is, in legal contemplation, as inoperative as though it had never been passed.<sup>37</sup> And if the statute is adjudged unconstitutional in part, that part which is rejected will be a nullity. But in view of the fact that courts sometimes overrule their decisions on constitutional questions, it is necessary to observe that while a statute, once adjudged invalid by the court of last resort, will continue inoperative as long as that decision is maintained, yet a later decision, sustaining the validity of the statute, will give it vitality from the time of its enactment, and thereafter it is to be treated as having been constitutional from the beginning.<sup>38</sup> Notwithstanding some difference of opinion, the better authorities hold that a repealing clause in an unconstitutional statute (repealing all laws and parts of laws in conflict with it or inconsistent with it) is equally invalid with the rest of the statute, and therefore leaves the former laws untouched.<sup>39</sup>

<sup>36</sup> *Lothrop v. Stedman*, 42 Conn. 583; *Sutherland v. De Leon*, 1 Tex. 250.

<sup>37</sup> *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121; *Sumner v. Beeler*, 50 Ind. 341; *Woolsey v. Dodge*, 6 McLean, 142, Fed. Cas. No. 18,032; *Kelly v. Bemis*, 4 Gray, 83.

<sup>38</sup> *Pierce v. Pierce*, 46 Ind. 86.

<sup>39</sup> *Campau v. Detroit*, 14 Mich. 276; *Tims v. State*, 26 Ala. 165.

**CONSTRUCTION OF CONSTITUTIONS—INTENT.**

**38. It is a cardinal rule in the interpretation of constitutions that the instrument must be so construed as to give effect to the intention of the people, who adopted it. This intention is to be sought in the constitution itself, and the apparent meaning of the words employed is to be taken as expressing it, except in cases where that assumption would lead to absurdity, ambiguity, or contradiction.**

Where the meaning shown on the face of the words is definite and intelligible, the courts are not at liberty to look for another meaning, even though it should seem more probable or natural, but they must assume that the constitution means just what it says. When the words employed, taken in their ordinary sense and in the order of their grammatical arrangement, embody a definite and sensible meaning, which involves no conflict with other parts of the same instrument, then that meaning thus apparent upon the face of the instrument is the only one that can be presumed to have been intended, and there is no room for construction.<sup>40</sup> But if the words of the constitution, thus taken, are devoid of meaning, or lead to an absurd conclusion, or are contradictory of other parts of the constitution, then it cannot be presumed that their prima facie import expresses the real intention. And in that case the courts are to employ the process of construction to arrive at the real intention, by taking the words in such a sense as will give them a definite and sensible meaning, or reconcile them with the rest of the instrument. And this sense is to be determined by comparing the particular clause with other parts of the constitution, by considering the various meanings, vernacular or technical, which the words are capable of bearing, and by studying the facts of contemporary history and the purpose sought to be accomplished, and the benefit to be secured or the evil to be remedied by the provision in question.<sup>41</sup>

<sup>40</sup> *Hills v. Chicago*, 60 Ill. 86; *Newell v. People*, 7 N. Y. 9, 97.

<sup>41</sup> *People v. Potter*, 47 N. Y. 375; *Taylor v. Taylor*, 10 Minn. 107 (Gil. 81).

### SAME—POPULAR SENSE OF WORDS.

**39. The words employed in a constitution are to be taken in their natural and popular sense, unless they are terms of art, in which case they are to be taken in their technical signification.**

“Narrow and technical reasoning,” says Judge Cooley, “is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned or unlearned, may be able to trace the leading principles of government.”<sup>42</sup> Hence the rule that the words of a constitution are to be understood in the sense in which they are popularly employed, unless the context or the very nature of the subject indicates otherwise.<sup>43</sup> But there are many technical legal terms employed in the constitutions. And if the technical signification of these words differs from the vernacular, the former is to be preferred in construction. This is particularly true of the terms derived from Magna Charta and the other great English charters, which are to be interpreted in the light of history, and have acquired a fixed and exact technical meaning from the expositions of the courts and the understanding of the people. But where the constitution uses technical terms of law and jurisprudence, which are common to our law and the law of England, if there is a difference of signification in the two countries, the meaning which they bear in this country is to be preferred.<sup>44</sup>

### SAME—UNIFORMITY.

**40. The construction of a constitutional provision is to be uniform.**

The constitution cannot be made to mean different things at different times. Its interpretation should not fluctuate according to the changes in public sentiment or the supposed desirability of adjusting the fundamental rules to varying conditions or exigencies. The

<sup>42</sup> Cooley, Const. Lim. 59.

<sup>43</sup> *Greencastle Tp. v. Black*, 5 Ind. 557.

<sup>44</sup> *The Huntress, Daveis*, 82, Fed. Cas. No. 6,914.

meaning of the constitution is fixed when it is adopted, and afterwards, when the courts are called upon to interpret it, they cannot assume that it bears any different meaning.<sup>45</sup>

#### **SAME—EFFECT TO BE GIVEN TO THE WHOLE.**

**41. In case of ambiguity, the whole constitution is to be examined in order to determine the meaning of any part, and the construction is to be such as to give effect to the entire instrument and not to raise any conflict between its parts which can be avoided.**

An examination of other parts of the constitution will often enable the court to ascertain the sense in which the words in particular clauses were used. And this method of investigation must be resorted to before aid can be sought from extraneous sources. Moreover, a construction which raises a conflict between different parts of the constitution is not permissible when, by any reasonable construction, the parts may be made to harmonize.<sup>46</sup> But when the constitution speaks in plain language in reference to a particular matter, the courts have no right to place a different meaning on the words employed because the literal interpretation may happen to be inconsistent with other parts of the instrument in relation to other subjects.<sup>47</sup> Where the bill of rights and the rest of the constitution differ, the latter is to be taken as the established or adopted limitation, or the limited adoption, of the general principles previously declared.<sup>48</sup>

#### **SAME—COMMON LAW.**

**42. A constitution should be construed with reference to, but not overruled by, the doctrines of the common law.**

Except in so far as it is superseded by the constitutions, the common law is generally in force in the United States. Hence the im-

<sup>45</sup> *People v. Blodgett*, 13 Mich. 127.

<sup>46</sup> *Cooley*, Const. Lim. 58.

<sup>47</sup> *Cantwell v. Owens*, 14 Md. 215.

<sup>48</sup> *Mayor, etc., of Baltimore v. State*, 15 Md. 376. Compare *In re Dorsey*, 7 Port. (Ala.) 293.

portance of comparing constitutional provisions, in order to arrive at their true meaning and effect, with the great body of the common law, both for the purpose of understanding the language employed and of measuring the changes and innovations designed to be introduced. But the constitution is superior to the common law, and is not to be understood as in any way controlled or limited by it. It is a familiar rule that a statute in contravention or derogation of the common law ought not to be extended by construction. But if this rule has any application to the construction of constitutions, it must be applied with great care, and not made a paramount principle.<sup>49</sup>

#### SAME—WORDS FROM OTHER CONSTITUTIONS.

**43. Where a clause in a constitution, which has received a settled judicial construction, is adopted in the same words by the framers of another constitution, it will be presumed that the construction thereof was likewise adopted.**

This rule applies to the case where the constitution of one state copies a clause or provision from the constitution of another state, and also to the case where a new or revised constitution retains a clause or provision from the superseded constitution. In either such case, the courts will presume that the clause or provision was adopted with a knowledge of its settled judicial construction and with the intention that it should be understood in accordance with that construction. And the same principle applies, where it can naturally be applied, to the case of a single term or phrase thus transcribed from one constitution to another.<sup>50</sup>

#### SAME—EXTRANEOUS FACTS.

**44. If an ambiguity exists which cannot be cleared up by a consideration of the constitution itself, then, in order to determine its meaning and purpose, resort may be had to extraneous facts, such as the prior state of the law, the**

<sup>49</sup> See Cooley, Const. Lim. 61. Compare *Brown v. Fifield*, 4 Mich. 322.

<sup>50</sup> *Ex parte Roundtree*, 51 Ala. 42; *Jenkins v. Ewin*, 8 Heisk. 456.

**evil to be remedied, the circumstances of contemporary history, or the discussions of the constitutional convention.**

When the text of a constitutional provision is not ambiguous, the courts, in construing it, are not at liberty to search for its meaning beyond the instrument itself. If the text is ambiguous, the endeavor must first be made to arrive at its meaning from other parts of the same instrument. It is not until the means of solution afforded by the whole constitution have been exhausted without success that the courts are justified in calling outside facts or considerations to their aid. But when this becomes necessary, it is permissible to inquire into the prior state of the law, the previous and contemporary history of the people, the circumstances attending the foundation of the constitution, the evil intended to be remedied or the benefit sought to be secured by the provision in question, as well as broad considerations of expediency. The object herein is to ascertain the reason which induced the framers of the constitution to enact the particular provision, and the purpose sought to be accomplished thereby, in order to so construe the words as to make them consonant to that reason and calculated to effect that purpose.<sup>51</sup> In order to arrive at this reason and purpose, it is also permissible to consult the debates and proceedings in the constitutional convention. But it must be remembered that these are never of binding force or of anything more than persuasive value. They may throw a useful light upon the purpose sought to be accomplished or upon the meaning attached to the words employed, or they may not. The courts are at liberty to avail themselves of any light derivable from such sources, but are not bound to adopt it as the sole ground of their decision.<sup>52</sup>

<sup>51</sup> Mayor, etc., of Baltimore v. State, 15 Md. 376; Cronise v. Cronise, 54 Pa. St. 255.

<sup>52</sup> See Springfield v. Edwards, 84 Ill. 626, 643; Coutant v. People, 11 Wend. 511.

**SAME—MANDATORY AND DIRECTORY.**

**45. The provisions of a constitution are almost invariably mandatory; it is only in extremely plain cases that they can be construed as merely directory.**

It is not to be presumed that any provision deemed essential to be incorporated in an instrument so solemn and enduring as a constitution, was designed to be merely in the nature of a direction, without imperative force. Nevertheless, such may be the case, where the intention is unmistakably clear. In such cases the same rules, to distinguish between mandatory and directory provisions, should be used which control in similar cases arising upon the construction of statutes.<sup>53</sup>

**SAME—NOT RETROSPECTIVE.**

**46. A constitutional provision should not be construed with a retrospective operation, unless that is the unmistakable intention of the words used.**

It is the invariable rule that a statute will be so construed as to operate prospectively only, unless the words used, being too clear and plain to admit of any doubt, require that it should have a retrospective effect. This rule, with the very substantial reasons upon which it rests, will be considered in a later chapter. The same reasons apply equally to the interpretation of constitutional provisions. Hence, if the language employed admits of a substantial doubt on this point, the courts should not construe the provision retrospectively. But if such an effect is manifestly intended, they are not at liberty to narrow the meaning of the constitution from any considerations of justice or expediency.<sup>54</sup>

<sup>53</sup> *People v. Lawrence*, 36 Barb. 177.

<sup>54</sup> *In re Oliver Lee & Co.'s Bank*, 21 N. Y. 9.

**SAME—STARE DECISIS.**

**47. The principle of stare decisis applies with special force to the construction of constitutions, and an interpretation once deliberately put upon the provisions of such an instrument should not be departed from without grave reasons.**

The stability of many of the most important institutions of society depends upon the permanence, as well as the certainty, of the construction placed by the judiciary upon the fundamental law. Hence, when the meaning of the constitution on a doubtful question has been once carefully considered and judicially decided, every reason is in favor of a steady adherence to the authoritative interpretation, and especially is this so when the question is not simply as to the constitutionality of a law, but involves the validity of contracts, the protection of vested interests, the rights of innocent parties, or the permanence of a rule of property.<sup>56</sup>

<sup>56</sup> *Maddox v. Graham*, 2 Metc. (Ky.) 56.

## CHAPTER V.

### THE THREE DEPARTMENTS OF GOVERNMENT.

48. Necessity and Principle of the Division.
49. Nature of the Three Classes of Power.
50. The Separation not Absolute.
51. Limitations on the Three Departments of Government.
52. Political Questions.
53. Advisory Opinions by the Courts.

### NECESSITY AND PRINCIPLE OF THE DIVISION.

**48. It is a fundamental maxim of political science, recognized and carried into effect in the several American constitutions, national and state, that good government and the protection of rights require that the three great governmental powers, to wit, the legislative, the executive, and the judicial, should not be confided to the same person or body, but should be apportioned to separate and mutually independent departments of government.<sup>1</sup>**

The idea of an apportionment of the powers of government, and of their separation into three co-ordinate departments, is not a modern invention. It was suggested by Aristotle in his treatise on Politics,<sup>2</sup> and was not unfamiliar to the more advanced of the medieval jurists. But the importance of this division of power, with the principle of classification, were never fully apprehended, in theory, until Montesquieu gave to the world his great work on the "Spirit of the Laws." Since then his analysis of the various powers of the state has formed part, as Maine says,<sup>3</sup> of the accepted political doctrine of the civilized world. Montesquieu says: "In each state there are three sorts of power; the legislative power, executive power with relation to matters depending on international law, and executive power with relation to matters depending on the

<sup>1</sup> Sill v. Village of Corning, 15 N. Y. 297, 303.

<sup>2</sup> Book 6, c. 11, § 1; Woolsey, Pol. Science, ii., 259.

<sup>3</sup> Sir Henry Maine, Popular Government, 219.

civil law. . . . The last is called judicial power. . . . If the legislative power is united, in the same person or body of magistrates, with the executive power, there is no liberty; for it is to be apprehended that the monarch or the senate, as the case may be, will make tyrannical laws in order to execute them tyrannically. Neither is there any liberty if the judicial power is not separated from the legislative and the executive power. If it were joined with the legislative power, there would be arbitrary authority over the life and liberty of the citizens; for the judge would be the law-maker. If it were joined with the executive power, the judge would have the might of an oppressor. All would be lost if the same man, or the same body of chiefs, or of nobles, or of the people, exercised these three powers, that of making the laws, that of executing the public resolutions, and that of judging the crimes or controversies of individuals.”<sup>4</sup> The framers of our constitution were strongly influenced by these opinions of the French jurist, to whose views, in general, they were disposed to pay great deference, as is fully apparent from the pages of the *Federalist*. And though the British constitution, as it stood at that time, furnished a precedent for a partial and limited independence of the several departments of government,<sup>5</sup> it is not probable that the constitution of the United States would have carried out this principle of division as thoroughly as it did, and particularly in securing the independence of the judiciary, had it not been for the attention paid to the writings mentioned, and the conviction of the framers as to the soundness of the views therein expressed.

It requires a constitutional provision to effect the separation of the three departments of government. That is to say, if it is not otherwise provided by the constitution, the power to execute and interpret the laws, or to dispose of the executive and judicial duties, will belong to the legislative department, as being the repository of the general authority to enact laws. And in American history, prior to the revolution, the separation of these functions was by no means an invariable rule.<sup>6</sup> But this important principle of civil

<sup>4</sup> Montesq. *Esprit des Lois*, liv. 11, c. 6.

<sup>5</sup> See 1 *Bl. Comm.* 146, 154.

<sup>6</sup> *Calder v. Bull*, 2 *Root*, 350.

liberty and good government is now recognized and secured throughout the states by the provisions of the constitutions. It is to be observed, however, that, as regards each state, it depends upon the constitution of the state. There is nothing in the federal constitution which forbids the legislature of a state to exercise judicial functions.<sup>7</sup> And further, there may be cases in which a particular power cannot be said to be certainly either legislative, executive, or judicial. And if such a power is not by the constitution unequivocally intrusted to either the executive or the judicial department of the government, the mode of its exercise and the agency must necessarily be determined by law, that is, by the legislature.<sup>8</sup>

*Independence of the Judiciary.*

In making secure provision for the independence of the judicial department, the framers of the federal constitution went far beyond the limits then established in the constitution of the mother country. Yet the conception of the judiciary as guardians of the constitution existed in the English system, and had been put forward as a bulwark against the encroachments of the king or the parliament on many notable occasions. More than once had the English judges resolutely set their faces against unlawful extensions of the royal prerogative, and refused to carry into effect the grants or decrees of the king when contrary, in their judgment, to "the law of the land," that is, the constitution.<sup>9</sup> The American doctrine is that the judicial department is an independent, co-ordinate branch of the government, neither superior, inferior, or ancillary to either of the others. It is not to be controlled or dictated to by the legislature. Nor, on the other hand, in the exercise of such powers as are involved in adjudging the unconstitutionality of a statute, does it assume any supervisory authority or control

<sup>7</sup> *Satterlee v. Matthewson*, 2 Pet. 380, 413.

<sup>8</sup> *Cooley*, *Const. Law* (2d Ed.) 42, 43, citing *Calder v. Bull*, 3 Dall. 386.

<sup>9</sup> Among the cases of this kind to which the attention of the student should be particularly directed are the following: *In re Cavendish*, 1 And. 152; *Darcy v. Allen* (Case of Monopolies), Moore, 671; *Case of Ship-Money*, 3 How. St. Tr. 825; *Case of Proclamations*, 12 Coke, 74; *Thomas v. Sorrell*, Vaughan. 330; *Bates' Case*, 2 How. St. Tr. 371. Compare *Godden v. Hales*, 2 Show. 475.

over the legislative department.<sup>10</sup> It is inherently the weakest of all, but is sustained by the public appreciation of the need of independent tribunals and the public confidence in the judges.<sup>11</sup> When the constitution creates a single system of courts, or provides for their creation by the legislature, and invests them in general terms with judicial power or judicial authority, this necessarily implies that they shall possess and exercise the entire judicial power and authority rightfully appertaining to that sovereignty, save only in such particulars as may be expressly excepted by the constitution. And this will preclude the other departments of the government from exercising any such power or authority, and will be sufficient in itself to render invalid any attempt by such other departments to encroach upon the legitimate boundaries of the judicial power.<sup>12</sup>

#### NATURE OF THE THREE CLASSES OF POWER.

**49. The legislative power is the power to make and ordain laws, including the power to alter and repeal them at will. The executive power is the power to execute and enforce the laws and to see that they are duly executed and enforced. The judicial power is the power to ascertain, interpret, and construe the laws, and to apply them to controversies properly brought before the courts, and to pronounce judgment accordingly.**

The fundamental distinction between legislative and judicial action is that the former establishes a rule which regulates matters and transactions occurring after its passage, while the latter determines rights and obligations concerning matters and transactions which already exist or which have taken place prior to the exercise of the judicial power.<sup>13</sup>

<sup>10</sup> *Bates v. Kimball*, 2 D. Chip. (Vt.) 77; *Lindsay v. Commissioners*, 2 Bay, 38, 61.

<sup>11</sup> *U. S. v. Lee*, 106 U. S. 196, 223, 1 Sup. Ct. 240.

<sup>12</sup> *Greenough v. Greenough*, 11 Pa. St. 489; *Alexander v. Bennett*, 60 N. Y. 204; *Van Slyke v. Trempealeau Co. Ins. Co.*, 39 Wis. 390.

<sup>13</sup> *Taylor v. Place*, 4 R. I. 324; *Wayman v. Southard*, 10 Wheat. 1; *Swift v. Tyson*, 16 Pet. 1; *Shumway v. Bennett*, 29 Mich. 451; *Jones' Heirs v. Perry*, 10 Yerg. 59; *Ex parte Burns*, 1 Tenn. Ch. 83.

**THE SEPARATION NOT ABSOLUTE.**

50. Under the American system of government, the separation of these powers is not made so absolute as to deprive either department of the authority necessary for maintaining its integrity and legitimate activity, or to allow of the lodgment of arbitrary power in any quarter. But it is carried far enough to insure the proper independence of each department and to prevent either from encroaching upon the functions of the others or usurping their authority.

There are three reasons why the separation of the departments of government is not made absolutely exclusive.

*First Reason.*

Each department must possess such powers as are necessary to the preservation of its independence and dignity, and to enable it to discharge its appropriate functions. It is for this reason that each house of a legislature is empowered to judge of the election and qualification of its own members, and to appoint or elect its own officers, though appointments to office usually belong to the executive. So also the courts are frequently allowed to appoint their inferior ministerial officers, as well as to admit attorneys to practice before them, and usually to make rules of practice. So the executive department may make rules and regulations for the administration of the public business belonging to its sphere, and put its own practical construction upon the laws, subject to the interpretation of the courts.

*Second Reason.*

A certain mixture of powers furnishes a system of checks and balances, and tends to make the whole government stronger and more compact and harmonious. The veto power is a conspicuous illustration of this reason. By it the executive is enabled to take part in the making of laws, not, indeed, by way of initiative, nor absolutely in any event, but so far as to establish a salutary check on hasty, unwise, or unjust legislation. The requirement that the federal executive shall make appointments to office "by and with the

advice and consent of the senate" is another example of the blending of executive power with legislative functions, for the purpose of establishing a check on arbitrary power. The power of impeachment vested in the legislative department is a grant of judicial authority to that body with a view to correcting any tendency to usurpation or malfeasance on the part of either of the other departments. And the pardoning power should be mentioned here, as it amounts to an authority to alter or reverse the sentences of the judicial department in criminal cases, but is lodged with the executive as a means of correcting failures of justice in the courts.

*Third Reason.*

The line of distinction between the three classes of power is not always clear. Thus, rules of practice in the courts are sometimes made by the legislature, sometimes by the courts. While they are rules, they are not laws, in the same sense as are the public statutes. Again, though the function of making appointments to office is essentially executive, yet the legislature, in enacting laws, may frequently create the agencies, or even designate the persons, by whom they are to be carried into effect, and this without usurping any lawful prerogative of the executive.<sup>14</sup> To this head also must probably be referred the participation of the senate with the President in the making of treaties. A treaty is in the nature of a contract with a foreign power, and therefore belongs to the executive department; but it is also the supreme law of the land, and therefore should be sanctioned by at least one house of congress.

**LIMITATIONS ON THE THREE DEPARTMENTS OF GOVERNMENT.**

51. The three departments are co-ordinate and equal in dignity and authority within their respective spheres. The principle of their separation requires that each should be independent of the others, that neither should usurp the powers or encroach upon the jurisdiction of the others, and that neither should be charged with duties foreign to the field of its legitimate activity.

<sup>14</sup> *Bridges v. Shallcross*, 6 W. Va. 562; *Field v. People*, 2 Scam. 79.

*Limitations on Legislative Power—As Respects the Executive.*

The legislature cannot lawfully usurp any of the functions confided by the constitution to the executive department, such as the power to make appointments to office.<sup>15</sup> And for the same reason an act of the legislature granting a pardon or reprieve, or remitting a fine, or authorizing courts to suspend their sentences, is unconstitutional.<sup>16</sup> Nor can the legislature require or authorize any other officer or person to perform the duties laid upon the chief executive by the constitution, or excuse him from any of his constitutional duties.<sup>17</sup>

*Same—As Respects the Judiciary.*

Any act of the legislature which should undertake to determine questions of fact or law, affecting the rights of persons or property, would be judicial in its character and therefore invalid.<sup>18</sup> The legislature cannot lawfully, by statute, reverse or annul a judgment of a court, or grant a new trial, or otherwise re-open private controversies which have been finally settled by the courts or by lapse of time under the statute of limitations.<sup>19</sup> Nor (as it is generally held) can the legislature grant an appeal from a judgment, in cases where the right to appeal has been lost.<sup>20</sup> Declaratory statutes, the office of which is to declare what shall be taken to be the true meaning and intent of a law already in force, are valid if they are to apply only to controversies thereafter arising; but in so far as they are

<sup>15</sup> Wood v. U. S., 15 Ct. Cl. 151. See Mayor, etc., of Baltimore v. State, 15 Md. 376.

<sup>16</sup> Haley v. Clark, 26 Ala. 439; Ogletree v. Dozier, 59 Ga. 800; Butler v. State, 97 Ind. 373. See The Laura, 114 U. S. 411, 5 Sup. Ct. 881.

<sup>17</sup> Cooley, Const. Lim. 115.

<sup>18</sup> Ponder v. Graham, 4 Fla. 23.

<sup>19</sup> De Chastellux v. Fairchild, 15 Pa. St. 18; Oliver v. McClure, 28 Ark. 555; Opinion of the Supreme Court in Re Dorr, 3 R. I. 299; Lewis v. Webb, 3 Me. 326; Dorsey v. Dorsey, 37 Md. 64; Hooker v. Hooker, 18 Miss. 599; Bradford v. Brooks, 2 Aik. 284; Brent v. Chapman, 5 Cranch, 358; Leffingwell v. Warren, 2 Black (U. S.) 599.

<sup>20</sup> Miller v. State, 8 Gill, 145; Hill v. Sunderland, 3 Vt. 507; Burch v. Newbury, 10 N. Y. 374; Carleton v. Goodwin, 41 Ala. 153. But compare Prout v. Berry, 2 Gill, 147; Page v. Matthews, 40 Ala. 547; Wheeler's Appeal, 45 Conn. 306. For the legislature to take away a right of appeal given by statute is not an invasion of the judicial authority. Ex parte McCardle, 7 Wall. 506.

intended to have a retrospective operation, that is an unlawful assumption of judicial power and invalid.<sup>21</sup> Neither can the legislative department make rules for the governance of the courts in the decision of causes, or authorize a minority of the judges who compose a court to decide a case, contrary to the opinion of the majority.<sup>22</sup> For the same reasons it is not competent for the legislature to declare that parties interested shall be bound by the recitals of facts in a statute,<sup>23</sup> or to prescribe that any given piece of evidence (for example, a tax deed) shall be conclusive in respect to the merits of the controversy and in effect determine its result.<sup>24</sup> But it is not unconstitutional to enact that such evidence shall have a *prima facie* force and effect.<sup>25</sup> Neither can the legislature direct the collection of a tax which has already been declared invalid by the courts,<sup>26</sup> or direct that a criminal or class of criminals shall be discharged by the courts,<sup>27</sup> or interfere with the sentence imposed by a court in a criminal case, by providing for a reduction of the term of imprisonment for good conduct.<sup>28</sup> But on the other hand, a legislative act of divorce is not an unconstitutional encroachment upon the office of the judiciary, if it proceeds no further than to the dissolution of the relation of marriage, without affecting property rights of the parties.<sup>29</sup> Nor does the legislature usurp judicial func-

<sup>21</sup> *Union Iron Co. v. Pierce*, 4 Biss. 327, Fed. Cas. No. 14,367; *Haley v. City of Philadelphia*, 68 Pa. St. 45; *Stebbins v. Pueblo Co.*, 4 Fed. 282; *Cambridge v. Boston*, 130 Mass. 357. But a mere mandate of the legislature to the judiciary, directing what construction shall be placed on an existing statute, is an unconstitutional assumption of judicial power. *Governor v. Porter*, 5 Humph. 165.

<sup>22</sup> *Cooley*, Const. Lim. 96, citing *Clapp v. Ely*, 27 N. J. Law, 622.

<sup>23</sup> *Parmelee v. Thompson*, 7 Hill (N. Y.) 77.

<sup>24</sup> *McCready v. Sexton*, 29 Iowa. 356; *Callanan v. Hurley*, 93 U. S. 337; *Abbott v. Lindenbower*, 42 Mo. 162.

<sup>25</sup> *Groesbeck v. Seeley*, 13 Mich. 329.

<sup>26</sup> *Mayor, etc., of Baltimore v. Horn*, 26 Md. 194; *Searcy v. Turnpike Co.*, 79 Ind. 274.

<sup>27</sup> *State v. Fleming*, 7 Humph. 152.

<sup>28</sup> *Com. v. Halloway*, 42 Pa. St. 446.

<sup>29</sup> *Starr v. Pease*, 8 Conn. 540; *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723; *Levins v. Sleator*, 2 Greene (Iowa) 604; *Bingham v. Miller*, 17 Ohio, 445; *Craue v. Meginnis*, 1 Gill & J. 463.

tions in undertaking to regulate the rules of pleading.<sup>30</sup> And it may lawfully pass statutes authorizing particular persons occupying a fiduciary position, such as guardians, executors, or trustees, to make sales of lands, provided there is no controversy between parties, and the enactment of the statute does not amount to an adjudication upon title or rights.<sup>31</sup>

*Limitations on Executive Power.*

It is not competent for the executive officers of the government to assume any share in the making of laws. Their business is merely to enforce the laws.<sup>32</sup>

Aside from the few cases in which the executive is charged with quasi-judicial powers (as in the instance of his authority to grant pardons), the independence of the judicial department requires that it should be free from his control, authority, or influence. It is his duty to execute the judgments and sentences of the courts. He cannot suspend the operations of the tribunals in their regular duty of administering the laws nor supersede their authority, unless in case of war, or, to a limited extent, by a declaration of martial law, nor has he the power, under our constitutions generally, to remove the judges from their office. The chief executive of a state or of the nation has the right, and it is his duty, in considering a legislative bill awaiting his approval, to judge for himself as to its constitutional validity, and especially where its tendency is to en-

<sup>30</sup> Whiting v. Townsend, 57 Cal. 515.

<sup>31</sup> Cochran v. Van Surlay, 20 Wend. 365; Rice v. Parkman, 16 Mass. 326; Watkins v. Holman's Lessee, 16 Pet. 25; Carroll v. Olmsted, 16 Ohio, 251. But it is otherwise if the permission is thus given with the view to the payment of claims which have not been judicially established, or otherwise involves a legislative determination of facts in controversy. Thus an act authorizing an administrator to sell lands for the payment of debts, without providing for any judicial proceedings to ascertain whether debts are due, is unconstitutional. Rozier v. Fagan, 46 Ill 404; Lane v. Dorman, 3 Scam. 238.

<sup>32</sup> The governor of an English colony has not, by virtue of his appointment, the sovereign authority delegated to him, and an act done by him, legislative in its nature, on his own authority, unauthorized either by his commission, or expressly or impliedly by any instructions, is not equivalent to such an act being done by the crown itself, and is not valid. Cameron v. Kyte, 3 Knapp, 332.

croach upon his own powers. But when once the measure has been enacted as a law, with or without his assent, he ought to assume that it is in accordance with the constitution and proceed to enforce it. And when the validity of the act has been passed upon by the courts, the executive is as much bound by their decision as any private citizen. It would be a gross trespass upon the functions of the judicial department if he should attempt to enforce a law which they had pronounced invalid, or refuse to execute a statute which had passed their scrutiny, in accordance with his private judgment.

*Limitations on Judicial Power—As Respects the Legislature.*

The judicial department is not to make the law, but to interpret and administer it. Nevertheless it is well known that much of the law actually administered in our courts does not owe its existence to legislative enactment, or even to the adoption of the common law, but to the interpretations of the courts, to their enforcement of custom, to the growth of lines of precedents, and to the development of the system of equity. But the gradual formation of this body of law, called "case-law" or "judge-made law," is not regarded as an infraction of the principle under consideration, or as an usurpation of legislative power by the courts. But as regards statutes, not unconstitutional, it is the plain duty of the courts to apply them as they find them. For instance, the correctness or incorrectness of a legislative opinion on which an act is founded is not a question within the province of the courts to determine; they must assume the fact to be as the legislature states or assumes it.<sup>33</sup> Another application of the main rule teaches us that legislative powers cannot be imposed upon the judicial department. For example, a statute authorizing a court to assess county taxes is unconstitutional, as it orders a judicial tribunal to do a legislative act.<sup>34</sup>

*Same—As Respects the Executive.*

There are but few conceivable cases in which the judicial department could usurp purely executive functions or attempt the performance of purely executive acts. But the importance of the

<sup>33</sup> *People v. Lawrence*, 36 Barb. 177.

<sup>34</sup> *Hardenburgh v. Kidd*, 10 Cal. 402. See, also, *Vaughn v. Harp*, 49 Ark. 160; *Ex parte Griffiths*, 118 Ind. 83, 20 N. E. 513.

principle, in this connection, is discovered in the rule that the courts must arrogate no supervision or control over the executive department in the discharge of its proper duties. The judiciary does not possess, and cannot exercise, any revisory power over executive duties.<sup>35</sup> Thus the courts have no authority to require the chief executive of the state by mandamus, or forbid him by injunction, to perform any executive act which is political in its character, or which involves the exercise of judgment or discretion. At the same time, it is generally (though not universally) conceded that if the duty sought to be enforced is one within the scope of the governor's powers, but is merely ministerial in its nature, not political and not involving the exercise of judgment or discretion, but simply obedience to the commands of positive law, then, if the rights of private persons depend upon the performance of this duty by the executive, the writ of mandamus may issue to compel him.<sup>36</sup> The rule settled by the United States courts in this regard is that they "will not interfere by mandamus with the executive officers of the government [such as the heads of departments or bureaus] in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the courts having no appellate power for that purpose. But when they refuse to act in a case at all, or when, by special statute or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, mandamus will be issued to compel them."<sup>37</sup>

<sup>35</sup> *Astrom v. Hammond*, 3 McLean, 107, Fed. Cas. No. 596.

<sup>36</sup> *Harpending v. Haight*, 39 Cal. 189; *Bates v. Taylor*, 81 Tenn. 319, 11 S. W. 266; *State v. Fletcher*, 39 Mo. 388; *Rice v. Austin*, 19 Minn. 103 (Gil. 74); *People v. Bissell*, 19 Ill. 229; *People v. Yates*, 40 Ill. 126; *Hawkins v. Governor*, 1 Ark. 570; *State v. Governor*, 25 N. J. Law, 331; *State v. Warmoth*, 22 La. Ann. 1; *State v. Chase*, 5 Ohio St. 528.

<sup>37</sup> *U. S. v. Black*, 128 U. S. 40, 9 Sup. Ct. 12; *Marbury v. Madison*, 1 Cranch, 137; *U. S. v. Schurz*, 102 U. S. 378; *Gaines v. Thompson*, 7 Wall. 347; *Secretary v. McGarrahan*, 9 Wall. 298; *Noble v. Union River L. R. Co.*, 147 U. S. 165, 13 Sup. Ct. 271; *Board of Liquidation v. McComb*, 92 U. S. 531; *U. S. v. Blaine*, 139 U. S. 306, 11 Sup. Ct. 607; *Decatur Bank v. Paulding*, 14 Pet. 497.

## POLITICAL QUESTIONS.

**52. It is a well settled rule that the courts will not undertake to decide questions which are of a political nature. When such questions arise, they will accept as conclusive the determination made by the political departments of the government, namely, the executive and legislative.<sup>38</sup>**

The question which of two opposing governments, each claiming to be the rightful government of a state, is the legitimate government, is an illustration of the kind of questions which the courts will refuse to decide, on the ground of their belonging to the political departments.<sup>39</sup> So also is the question whether a state of war exists, or whether peace has been restored.<sup>40</sup> And to this class belong questions relating to the government of a foreign country, as, what is its rightful government, whether the party in power constitutes a *de facto* government, what form of government obtains, and the like.<sup>41</sup> The same is true of the question of the admission of a state into the Union,<sup>42</sup> and of the question of the extent of the jurisdiction of a foreign power.<sup>43</sup> The maintenance of tribal relations by the

<sup>38</sup> A good illustration of this rule is found in the case of *Georgia v. Stanton*, 6 Wall. 50. It was a bill filed by the state of Georgia against the Secretary of War, the general of the army, and the commander of the third military district, to restrain them from executing the "Reconstruction Acts" of congress, on the ground that such execution would annul and abolish the existing state government of Georgia, and establish another and different one in its place. The bill also alleged the ownership by Georgia of certain real and personal property, including the state capitol and executive mansion, and that the execution of the acts would deprive plaintiff of the possession and enjoyment of its property. It was held that the rights thus sought to be protected, being rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with its constitutional powers and privileges, the questions presented were political questions merely, belonging to the two great political departments of the government, and not the subject of judicial cognizance.

<sup>39</sup> *Luther v. Borden*, 7 How. 1.

<sup>40</sup> *U. S. v. Anderson*, 9 Wall, 56.

<sup>41</sup> *The Hornet*, 2 Abb. U. S. 35, Fed. Cas. No. 6705; *Gelston v. Hoyt*, 3 Wheat. 246, 324.

<sup>42</sup> *Marsh v. Burroughs*, 1 Woods, 463, Fed. Cas. No. 9,112.

<sup>43</sup> *Williams v. Suffolk Ins. Co.*, 13 Pet. 415.

Indians, or the right of certain Indians to recognition as a tribe, is also a political question.<sup>44</sup> But on the other hand, the ascertainment of a boundary between two states, or between a state and a territory, is not so far political in its nature that the courts may not determine it.<sup>45</sup> Nor is the question of the eligibility of a person elected to executive office in the state government.<sup>46</sup> Neither is the question whether or not an apportionment act (dividing the state into districts for the election of members of the legislature) conforms to the requirements of the constitution.<sup>47</sup>

#### ADVISORY OPINIONS BY THE COURTS.

**53. The courts cannot be required to render their opinions upon questions of law, except in cases actually before them. But in a few of the states, the constitutions empower the executive or legislative departments to demand the opinion of the supreme court on important questions relating to pending measures.**

For instance, the constitution of Massachusetts declares that "each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court upon important questions of law and upon solemn occasions."<sup>48</sup> And in five or six other states similar constitutional provisions are found. But unless the constitution so provides, it is not within the lawful power of the other departments of the government to thus propound questions to the courts and require answers to them. A statute authorizing either house of the legislature to do this is unconstitutional, for the reason that it imposes on the courts duties which are not judicial in their nature.<sup>49</sup> The President of the United States does not possess any authority

<sup>44</sup> The Kansas Indians, 5 Wall. 737.

<sup>45</sup> U. S. v. Texas, 143 U. S. 621, 12 Sup. Ct. 488; Rhode Island v. Massachusetts, 12 Pet. 657.

<sup>46</sup> State v. Gleason, 12 Fla. 190.

<sup>47</sup> State v. Cunningham, 81 Wis. 440, 51 N. W. 724.

<sup>48</sup> Const. Mass. c. 3, art. 2.

<sup>49</sup> In re Senate, 10 Minn. 78 (Gil. 56).

to require the opinion of the supreme court on questions propounded to them.<sup>50</sup> "In giving such opinions, (where authorized by the constitution) the justices do not act as a court, but as the constitutional advisers of the other departments of the government, and it has never been considered essential that the questions proposed should be such as might come before them in their judicial capacity."<sup>51</sup> But it is held that questions relating to the desirability or policy of proposed legislation cannot be thus propounded to the court.<sup>52</sup> "It is well understood, and has often been declared by this court, that an opinion formed and expressed under such circumstances cannot be considered in any sense as binding or conclusive on the rights of parties, but is regarded as being open to reconsideration and revision; yet it necessarily presupposes that the subject to which it relates has been judicially examined and considered, and an opinion formed thereon."<sup>53</sup> A finding of law and fact made by the Court of Claims, at the request of the head of a department, with the consent of the claimant, and transmitted to such department, but which is not obligatory on the department, is not a judgment. The function of the court in such a case is ancillary and advisory only, and hence its decision is not appealable.<sup>54</sup>

<sup>50</sup> 2 Story, Const. § 1571.

<sup>51</sup> Opinion of the Justices, 126 Mass. 557.

<sup>52</sup> In re Senate Bill 65, 12 Colo. 466, 21 Pac. 478.

<sup>53</sup> Green v. Com., 12 Allen, 155.

<sup>54</sup> In re Sanborn, 148 U. S. 222, 13 Sup. Ct. 577.

## CHAPTER VI.

### THE FEDERAL EXECUTIVE.

54. Election of President.
55. Qualifications of President.
56. Vacancy in Office of President.
57. Compensation of President.
58. Oath of Office of President.
59. Independence of the Executive.
60. Veto Power of President.
61. Military Powers of President.
62. The Cabinet.
63. Pardoning Power.
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65. Appointments to Office.
66. Presidential Messages.
67. Convening and Adjourning Congress.
68. Diplomatic Relations.
69. Execution of the Laws.
70. Impeachment.

### ELECTION OF PRESIDENT.

54. The executive power of the United States is vested in a President of the United States, who holds his office during a term of four years, and who, together with the Vice-President, chosen for the same term, is elected by an electoral college appointed or elected in the several states; or, in certain contingencies, the President is chosen by the house of representatives and the Vice-President by the senate.

The method of electing the President and Vice-President is prescribed by the twelfth amendment to the constitution, together with such parts of the first section of the second article as have not been superseded by that amendment. The presidential electors, chosen as therein directed, constitute what is commonly called the "electoral college." It will be observed that congress may determine the time of choosing the electors and the day on which they shall give their

votes, which day shall be the same throughout the United States. In pursuance of this power, the day for casting the votes was at first fixed on the first Wednesday of December in every fourth year. But by the statute now in force (Act Jan. 23, 1845), the electors are to be chosen on the Tuesday next after the first Monday of November. But the manner of choosing the electors is left entirely to the individual states. The state legislatures have exclusive power to direct the manner in which the presidential electors shall be appointed. Such appointment may be made by the legislature directly, or by popular vote in districts, or by a general ticket, as the legislature may direct.<sup>1</sup> At the present day, the last mentioned method is almost universally in vogue. The constitution does not prescribe the qualifications of a presidential elector, except in a negative way. No person is eligible to this office who is a "senator or representative, or who holds an office of trust or profit under the United States." And by the third section of the fourteenth amendment, no person is eligible who has violated an oath previously taken to support the constitution of the United States, by engaging in insurrection or rebellion against the same, or giving aid or comfort to the enemies thereof, unless his disability has been removed by congress. A disqualification for the office of presidential elector, caused by the holding of an office, cannot be removed by the resignation of that office after the choosing of the elector but before he comes to cast his vote for President.<sup>2</sup> The courts of a state have jurisdiction of an indictment for illegal voting for presidential electors.<sup>3</sup>

The electors are required to make lists of the votes which they cast, and sign and certify the same, and transmit them sealed to the president of the senate. It is also provided that this officer, in the presence of both houses of congress, shall open all the certificates. The constitution then provides that the votes shall be counted. But it is not prescribed by whom the counting shall be done, nor who shall declare the result. But this is now regulated by statute, the duty being cast upon the president of the senate, who was obviously intended to discharge it. But neither in the original plan nor in

<sup>1</sup> *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. 3.

<sup>2</sup> *In re Corliss*, 11 R. I. 638.

<sup>3</sup> *In re Green*, 134 U. S. 377, 10 Sup. Ct. 586.

the twelfth amendment is any provision made for the determination of questions which may arise as to the regularity or authenticity of the returns or the right or qualification of the electors, or the manner or circumstances in which the votes should be counted. This serious defect in the constitution was made apparent in the memorable contest of 1877. The electoral commission, by which that election was determined, was created only to meet the particular emergency, and was not made applicable to future cases. But since that time, congress has provided regulations for these matters with such care and minuteness of detail that no such dispute is likely ever to recur.<sup>4</sup>

Great importance was attached by the framers of the constitution to the interposition of the electoral college between the passions and prejudices of the indiscriminating multitude of voters and the high office of President. But in no single instance have their designs and theories been more completely frustrated by the practical workings of the system than in this. It is well known that at present the electors have no independent choice of the candidates for whom their votes shall be cast. The candidates are nominated by national conventions of the political parties, and the electors have merely the perfunctory task of registering their votes for the candidate of the party by whom they were chosen. Only in very rare instances do the presidential electors find themselves at liberty to exercise their personal judgment or preference. In general, the electoral college is a mere survival.

The house of representatives is to elect the President in case no person has a majority of the electoral votes. In that event, the persons receiving the greatest number of votes (not exceeding three candidates) are to be voted for, the vote is by states, each state having one vote, and a majority of all the states is necessary to elect. In the same contingency, the senate is to choose the Vice-President, voting for the two candidates standing highest on the list.

<sup>4</sup> Act Cong. Feb. 3, 1887 (24 Stat. 373); Act Oct. 19, 1888 (25 Stat. 613).

**QUALIFICATIONS OF PRESIDENT.**

**55. No person except a natural born citizen of the United States is eligible to the office of President. In addition to this qualification, he must have attained the age of thirty-five years and have been for fourteen years a resident within the United States.**

Congress would clearly have no power to add to these qualifications, nor to dispense with any requisite laid down in the constitution. "By residence, in the constitution, is to be understood, not an absolute inhabitancy within the United States during the whole period, but such an inhabitancy as includes a permanent domicile in the United States. No one has supposed that a temporary absence abroad on public business, and especially on an embassy to a foreign nation, would interrupt the residence of a citizen so as to disqualify him for office. If the word were to be construed with such strictness, then a mere journey through any foreign adjacent territory, for health or for pleasure, or a commorancy there for a single day, would amount to a disqualification."<sup>5</sup>

**VACANCY IN OFFICE OF PRESIDENT.**

**56. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the office, the same devolves upon the Vice-President. If both these should die, or be incapacitated from discharging the duties of the office, as above, then, by a statutory provision, the office devolves upon certain members of the cabinet, succeeding each other in a prescribed order.**

The constitution gives to congress the power by law to "provide for the case of removal, death, resignation, or inability both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disa-

<sup>5</sup> 2 Story, Const. § 1479.

bility be removed or a President shall be elected." In pursuance of this power, it was at first provided that, in the case supposed, the president of the senate, or, if there were none, then the speaker of the house of representatives for the time being, should act as President.<sup>6</sup> But this law was repealed by an act passed in 1886<sup>7</sup> wherein it is provided that in default of both a President and Vice-President capable of acting, the heads of departments shall succeed them in the following order: The secretary of state; the secretary of the treasury; the secretary of war; the attorney-general; the post-master-general; the secretary of the navy; the secretary of the interior. This act settles a question of considerable importance which was left open under the former law. It declares that its terms shall apply only to such among the above named officers as are eligible to the office of President under the constitution and not under impeachment at the time. If the Vice-President becomes acting President, he will hold the office until the expiration of the term for which the President was elected. And so also, it would appear, will a member of the cabinet, succeeding under the terms of the law mentioned above, except in the case where the cause of his succession is a temporary disability of the President, in which event he is only to hold the office until the disability is removed. In view of the possibility of the President desiring to resign his office, a case contemplated by the constitution, it was very important that the method of effecting the resignation should be pointed out, and that there should be some authoritative declaration of the proof of such resignation to be required. This desideratum was met by an early act of congress providing that the resignation shall be made by some instrument in writing, declaring the same, subscribed by the party, and delivered into the office of the secretary of state.<sup>8</sup>

#### COMPENSATION OF PRESIDENT.

**57. The constitution provides that the President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during**

<sup>6</sup> Rev. St. U. S. §§ 146-150.

<sup>7</sup> 24 Stat. 1.

<sup>8</sup> Act March 1, 1792, c. 8, § 11 (Rev. St. U. S. § 151).

the period for which he shall have been elected, and he shall not within that period receive any other emolument from the United States or any of them.

The object of this provision is of course to put the President beyond either the fear or favor of congress, by depriving that body of the power to coerce him into submission to its wishes by cutting off his stipend, or to bribe his compliance by an increase of salary. The salary of the President was at first fixed at \$25,000 per annum, and so continued until it was increased to \$50,000 by the act of March 3, 1873. As this statute was enacted on the last day of the first term of President Grant, who entered upon his second term on the next following day, it is regarded as having established a precedent to the effect that an increase of salary made after the re-election of a President may govern his compensation during the second term.

#### OATH OF OFFICE OF PRESIDENT.

58. The constitution requires that the President, before he enters on the execution of his office, shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the constitution of the United States."

This official oath is usually taken by the President-elect in front of the Capitol at Washington, in the presence of both houses of congress. It is commonly administered by the chief justice of the supreme court, but this is a matter of precedent only, and any person having authority to administer such an oath could legally perform the office. As to the Vice-President, his official oath is not expressly provided for in the constitution, but it falls within the provision of the last clause of the sixth article, which requires that "all executive and judicial officers both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution." And if he succeeds to the presidency, he then takes the oath of office prescribed for the President.

## INDEPENDENCE OF THE EXECUTIVE.

59. The constitution makes the President of the United States an independent, co-ordinate branch of the government, and his acts and determinations, within the sphere of his constitutional powers, cannot be controlled, questioned, or overruled by congress or the courts. He is invested with political discretion, and in the exercise thereof he is responsible to no other person or department of the government. He also has such other incidental privileges and immunities as are necessary to enable him to exercise his powers and discharge his duties without interference or hindrance.

“In the exercise of his political powers he is to use his own discretion, and is accountable only to his country and to his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive.”<sup>9</sup> The exercise by the President of his executive powers can neither be commanded nor restrained by the ordinary process of the courts. Nor can the discharge of his executive duties be thus compelled, or in any wise interfered with. Thus in the case of *State of Mississippi v. Johnson*,<sup>10</sup> it was held that a writ of injunction cannot be issued to restrain the President from carrying into execution an act of congress, on the allegation that the act is unconstitutional. Nor can the writ of mandamus be issued to compel the President to perform an act which lies within his political discretion.<sup>11</sup> And since the grant of executive powers to the President necessarily implies that he shall be enabled to exercise them without any obstruction or hindrance, it follows that he cannot be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office, and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.<sup>12</sup> It is

<sup>9</sup> 2 Story, Const. § 1569.

<sup>10</sup> 4 Wall. 475. See, also, *Georgia v. Stanton*, 6 Wall. 50.

<sup>11</sup> *Marbury v. Madison*, 1 Cranch, 137.

<sup>12</sup> 2 Story, Const. § 1569.

doubtful whether he could be compelled to appear in court in obedience to the writ of subpoena. Such a writ was served on President Jefferson on the trial of Aaron Burr, but he refused to obey it, and the matter was never pressed to a decision.

The exemption of the President from being controlled or interfered with by the process of the courts extends also to the heads of departments and other high executive officers, in so far as relates to matters in which they are invested with discretion, or political matters, though not in relation to duties which are merely ministerial, or which do not involve the exercise of any discretion, and where the rights of private parties are concerned.<sup>13</sup> Reference has already been made to this topic, in the first and fifth chapters, in connection with the rule of personal and political responsibility and the independence of the executive department.

#### VETO POWER OF PRESIDENT.

**60. Every bill passed by the two houses of congress, and also every order, resolution, and vote to which the concurrence of both houses is necessary (except on a question of adjournment) shall, before it becomes a law, be presented to the President. If he approves it, he shall sign it; but if not, he shall return it, with his objections, to that house in which it originated. When a bill is thus returned with a veto message, the house receiving it shall enter the President's objections at large on its journal and proceed to reconsider the bill. The bill may then be passed over the President's veto, by a vote of two-thirds of both houses, the vote being taken by yeas and nays and the names of those voting for and against the measure being entered on the journals. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, it shall become a law in like manner as if he had signed it, unless congress, by their adjournment, prevent its return, in which case it shall not be a law.**

<sup>13</sup> Kendall v. U. S., 12 Pet. 527; Marbury v. Madison, 1 Cranch. 137.

This power vested in the President is not executive in its nature, but essentially legislative. It makes him, in effect, a branch of congress, though only to a limited and qualified extent. It operates as a check on the enactment of hasty, unwise, or improper laws. The provision which requires the executive to exercise his veto power within ten days, if at all, is a very important and substantial limitation upon this power. For if it were not for this clause, it would be within the power of the President to prevent or indefinitely suspend all legislation which might be personally or politically obnoxious to him, by mere inaction, without being compelled to disclose the ground of his opposition or come before congress and the country with any explanation of his views. And then, by way of a counter check, it is provided that congress shall not rob the executive of his right to exercise this power by terminating its session before the President can act. A further and very important check upon congress, in its relation to the executive in this respect, was rendered necessary by the consideration that the requirement that "every bill" should be sent to the President for his approval might easily be evaded by calling the particular measure an "order" or a "resolution." Hence it was thought good to provide that all orders, resolutions, and votes, to which the concurrence of both houses shall be necessary, save on a question of adjournment, shall take the same course and be subject to the same veto power as a bill.

Extensive as the veto power is, there is yet one particular in which, in the opinion of many publicists, it might profitably be extended. That is, a constitutional amendment might give to the President the authority to disapprove of any particular part or item of a bill which may appear to him to be objectionable. At present, the chief magistrate must act upon the "bill" as a whole. An appropriation bill or a revenue measure may consist of a great number of separable items, some of which, in the judgment of the executive, may be unconstitutional or inexpedient. Yet he must either approve or reject the entire act. He has no power to veto any individual item.

As to the grounds on which the President may exercise this power, the constitution prescribes no limitations. He is merely required to return the bill "with his objections." It is within the scope

of his power, and it is probably one of the purposes for which it was given, that he should judge of the constitutionality of all proposed legislation. But he is not restricted to this ground of objection, in considering a bill laid before him. He may also judge of its economic or political wisdom, its expediency, its policy, or its relation to other laws or to treaties. In fact, though the ground of his objection should be entirely arbitrary or capricious, or the result of personal feeling or prejudice, still the constitution does not forbid him to make it the basis of a veto. This would merely furnish a reason for the attempt to pass the bill without his approval.

The courts have not yet been called upon to construe the provisions of the constitution relating to the practice in the matter of submitting a bill to the President or his returning it. But a decision has been made, under a similar clause in the constitution of California, which throws light on a question that might at any time arise. It was held that the "return" of a bill by the executive to that branch of the legislature in which it originated, in order to be within the spirit of the constitutional provision, must be such a return as places the bill beyond the executive control and in the possession, actual or potential, of the house. If the executive messenger is unable to deliver it to the house while in session, in consequence of an adjournment for the day on the last day allowed for its return by the governor, he should deliver it to some officer or other suitable person connected with the house. If it is redelivered to the governor and retained by him, no such return has been made as will prevent its becoming a law.<sup>14</sup>

#### MILITARY POWERS OF PRESIDENT.

**61. The constitution provides that the President shall be commander in chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States.**

It is very important, in this connection, to observe the distinction between the powers and functions of the President and those of congress, and their mutual relations. The subject is best discussed by

<sup>14</sup> Harpending v. Haight, 39 Cal. 189.

considering it first with reference to the prevalence of a state of peace, and then in relation to a war footing. In time of peace, the President has two sets of duties to discharge with reference to the army and navy. First, he is the commander in chief, and as such must exercise supreme and unhindered control. Secondly, he "shall take care that the laws be faithfully executed," and in pursuance of this duty he must give due effect to the acts of congress which concern the military and naval establishments. Congress has power to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces. Under these grants of authority it may clearly regulate the enlistment of soldiers and sailors, prescribe the number, rank, and pay of officers, provide for and regulate arms, ships, forts, arsenals, the organization of the land and naval forces, courts-martial, military offenses and their punishment, and the like. And all these laws and regulations the President is to carry into effect, not as the commander in chief, but as a part of his general executive duty, and with as great or as little choice of means and methods as congress may see fit to confide to him. But again, in virtue of his rank as the head of the forces, he has certain powers and duties with which congress cannot interfere. For instance, he may regulate the movements of the army and the stationing of them at various posts. So also he may direct the movements of the vessels of the navy, sending them wherever in his judgment it is expedient.<sup>15</sup> Neither here nor in a state of war is there any necessary conflict. The President has

<sup>15</sup> The President, as commander in chief, may establish rules and regulations for the government of the army and navy. The power is regularly exercised through the war and navy departments, and not by personal direction. And the rules and orders made and issued by the secretary of war and the secretary of the navy are to be considered as emanating from the President. *U. S. v. Eliasson*, 16 Pet. 291; *U. S. v. Freeman*, 3 How. 556. He may dismiss an officer from the service. *Blake v. U. S.*, 103 U. S. 227; *Keyes v. U. S.*, 109 U. S. 336, 3 Sup. Ct. 202. But he may not revoke the order of dismissal, and thereby restore the dismissed officer to his former position. *U. S. v. Corson*, 114 U. S. 619, 5 Sup. Ct. 1158. Nor can he produce the same result by revoking his acceptance of a resignation of a commission. *Mimmack v. U. S.*, 97 U. S. 426. He may direct a commitment in accordance with the sentence of a naval court martial of one convicted of an attempt to desert. *Dynes v. Hoover*, 20 How. 65.

no power to declare war. That belongs exclusively to congress.<sup>16</sup> But when war has been declared, or when it is recognized as actually existing, then his functions as commander in chief become of the highest importance, and his operations in that character are entirely beyond the control of the legislature. It is true that congress must still "raise and support" the army and "provide and maintain" the navy, and it is true that the power of furnishing or withholding the necessary means and supplies may give it an indirect influence on the conduct of the war. But the supreme command belongs to the President alone. In theory, he plans all campaigns, establishes all blockades and sieges, directs all marches, fights all battles.<sup>17</sup>

By an early act of congress (Feb. 28, 1795), it was provided that

<sup>16</sup> As the power to declare war is vested in congress exclusively, the President has no power to originate a war. But without any declaration of war, or before such declaration is made, he may recognize the actual existence of a state of war, and employ the army and navy against the enemy. *The Prize Cases*, 2 Black, 635. A declaration of war by congress does not imply an authority to the President to extend the limits of the United States by conquering the enemy's country. That is, he may take possession of the enemy's country, and hold it, as a means of prosecuting the war, but that does not make the conquered territory a part of the United States. It could be annexed to the United States only by the act of the legislative department. *Fleming v. Page*, 9 How. 603.

<sup>17</sup> During the prevalence of war, the President has all the powers recognized by the laws and usages of war, but at all times he must be governed by law, and his orders which the law does not warrant will be no protection to officers acting under them. *Little v. Bareme*, 2 Cranch, 170. In war, he may employ secret agents to enter the enemies' lines, and obtain information as to the strength, resources, and movements of the enemy, and may engage to pay for such services out of the contingent fund. *Totten v. U. S.*, 92 U. S. 105. He may establish a provisional court in insurgent territory in the actual occupation of the troops. *The Grapeshot*, 9 Wall. 129; *Mechanics' Bank v. Union Bank*, 22 Wall. 276; *Leitensdorfer v. Webb*, 20 How. 176. But it is not in his power to establish a prize court. *Jecker v. Montgomery*, 13 How. 498. And if he appoints an unlawful military commission, which proceeds to try and punish offenders against the law, his order therefor, being void, will not protect those acting under it. *Milligan v. Hovey*, 3 Biss. 13, Fed. Cas. No. 9,605. The President's order, during the late war, authorizing the arrest, wherever found within the jurisdiction of the United States, of persons absenting themselves to avoid being drafted into the service, was a legal and valid order. *Allen v. Colby*, 47 N. H. 514. Compare *Jones v. Seward*, 40 Barb. 563.

"in case of an insurrection in any state against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened) to call forth such number of the militia of any other state or states as may be applied for, as he may judge sufficient to suppress such insurrection." By this act, the power of deciding whether the exigency has arisen upon which the government of the United States is bound to interfere is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitutes the legislature, and who is the governor, before he can act. If there is an armed conflict, the President must of necessity decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act.<sup>18</sup>

#### THE CABINET.

**62. The President, under the constitution, may require the opinion in writing of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices.**

It is a noteworthy fact that this is the only reference made in the constitution (except for that clause which gives congress power to vest the appointment of inferior officers in the heads of departments) to that very important branch of the executive organization known as the cabinet. The executive departments are all created by acts of congress, and their number is increased, from time to time, as the exigencies of the public service may seem to require. The cabinet, as such, is not known to the constitution. The provision that the President may require the written opinion of the heads of departments on subjects relating to the duties of their offices has several times been resorted to, in exact conformity to the constitution. But the usual practice, from Jefferson's time to the present, has been for the President to assemble the members of his cabinet, at stated times or upon extraordinary occasions, and advise and consult with them, not merely upon subjects relating to the duties of their sev-

<sup>18</sup> Luther v. Borden, 7 How. 1. See, also, Martin v. Mott, 12 Wheat. 19.

eral departments, but upon all questions of administrative policy, both domestic and foreign. But it must be observed that this is entirely discretionary with the President. A cabinet council is no more than an advisory committee. And the chief executive is no more legally bound by their advice or their opinions than he would be by the suggestions of any of his personal and unofficial friends.

The members of the cabinet are the executive agents of the President. Except in cases where specific duties are laid upon them by act of congress, they do not act independently of him, and they are responsible to no one else for their acts. As they are, in all these matters, the agents of the President, all their official acts are considered in law as done by him, and the responsibility is his alone.<sup>19</sup> But the responsibility here spoken of is political alone. The President cannot be called to account for his official acts, in any civil or criminal proceeding, except by way of impeachment.<sup>20</sup> It is within the power of congress to impose upon the head of a department specific duties, to be performed by him as an officer of the government, and independently of the President, when such duties are not repugnant to any provisions of the constitution. And when this is done, he is responsible to congress for the due discharge of such duties.<sup>21</sup> Finally, it should be noted that there are certain duties of the President which are judicial in their character, and not merely administrative, and which therefore cannot be delegated to the heads of departments, but must be performed by the President in person. Thus, when the duty is imposed upon him of reviewing the proceedings of courts-martial, he must himself consider the proceedings laid before him, and decide personally whether they ought to be carried into effect.<sup>22</sup>

<sup>19</sup> *Parker v. U. S.*, 1 Pet. 293; *Wilcox v. Jackson*, 13 Pet. 498; *Lockington v. Smith*, Pet. C. C. 466, Fed. Cas. No. 8,448; *U. S. v. Cutter*, 2 Curt. 617, Fed. Cas. No. 14,911; *Ware v. U. S.*, 4 Wall. 617; *Wolsey v. Chapman*, 101 U. S. 755; *Williams v. U. S.*, 1 How. 290.

<sup>20</sup> *Durand v. Hollins*, 4 Blatchf. 451, Fed. Cas. No. 4,186.

<sup>21</sup> *Kendall v. U. S.*, 12 Pet. 524.

<sup>22</sup> *Runkle v. U. S.*, 122 U. S. 543, 7 Sup. Ct. 1,141.

**PARDONING POWER.**

**63. The President has power, under the constitution, to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.**

A pardon is "an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment which the law inflicts for a crime he has committed."<sup>23</sup> A reprieve is a suspension of the execution of a sentence which has been pronounced after conviction, and consists in withholding the punishment for a limited time. The President may exercise his power to grant pardons in three general ways. First, he may grant a pardon to a particular individual by name after his conviction for a particular offense, and this will take effect from its delivery, unless the pardon itself otherwise provides. Second, before any legal proceedings have been instituted for the punishment of a particular offense, he may grant a pardon to a person or persons named, or to a described class of persons, in respect to such offense. Third, he may grant what is called a general amnesty; that is, he may issue a proclamation containing a grant of pardon to all persons whatsoever, or to all persons with certain named exceptions, who may have been guilty of the specified offense or offenses. This kind of pardon takes effect from the time of the signing of the proclamation.<sup>24</sup> Furthermore, the power to grant pardons includes the power to accord conditional pardons; that is, pardons which are expressed to take effect upon the performance of certain conditions, or which are to take effect at once but to be forfeited in case of the breach of conditions to be thereafter performed.<sup>25</sup> And this power also includes the power to reduce, mitigate, or commute the punishment imposed by the sentence, but not to substitute a punishment of a different nature.<sup>26</sup> The pardoning

<sup>23</sup> U. S. v. Wilson, 7 Pet. 160.

<sup>24</sup> Lapeyre v. U. S., 17 Wall. 191; Ex parte Garland, 4 Wall. 333; U. S. v. Klein, 13 Wall. 128.

<sup>25</sup> U. S. v. Wilson, 7 Pet. 150; Ex parte Wells, 18 How. 307; Greathouse's Case, 2 Abb. (U. S.) 382, Fed. Cas. No. 5,741; Haym v. U. S., 7 Ct. Cl. 443.

<sup>26</sup> Ex parte Wells, 18 How. 307.



power also includes the power to remit fines, penalties, and forfeitures, and it may in the last resort be exercised for this purpose by the executive, although it is in many cases by the laws of the United States confided to the secretary of the treasury.<sup>27</sup> But in this respect the power to grant pardons is limited by the rule that it must not invade or destroy vested rights which have been acquired by private persons, by the prosecution of judicial proceedings, such as a right to a share of the penalty or to property forfeited and actually sold.<sup>28</sup> The pardoning power also extends to the remission of fines or imprisonment imposed as punishment for contempts of court.<sup>29</sup>

#### THE TREATY-MAKING POWER.

**64.** The constitution provides that the President shall have power, by and with the advice and consent of the senate, to make treaties, provided that two-thirds of the senators present concur. All treaties which shall be made under the authority of the United States are declared to be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

This power embraces the making of treaties of every sort and condition; for peace or war, for commerce or territory, for alliances or succors, for indemnity, for injuries or payment of debts, for the recognition and enforcement of principles of public law, for the regulation of immigration and the rights of aliens, for rules of navigation, for arbitrations, in short, for all the varied purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other.<sup>30</sup> But while there is no express limitation on the power of the President as to the scope or the terms of

<sup>27</sup> 2 Story, Const. § 1504.

<sup>28</sup> *Osborn v. U. S.*, 91 U. S. 474; *Armstrong Foundry Case*, 6 Wall. 766; *Carlisle v. U. S.*, 16 Wall. 147; *Knute v. U. S.*, 95 U. S. 149; *U. S. v. Lancaster*, 4 Wash. C. C. 64, Fed. Cas. No. 15,557; *U. S. v. Harris*, 1 Abb. (U. S.) 110, Fed. Cas. No. 15,312. Compare *U. S. v. Thomasson*, 4 Biss. 336, Fed. Cas. No. 16,479.

<sup>29</sup> *In re Mullee*, 7 Blatchf. 23, Fed. Cas. No. 9,911.

<sup>30</sup> 2 Story, Const. § 1508.

the treaties which he may make, yet his authority is subject to certain restrictions necessarily implied from various parts of the constitution. Thus it is evident that he could not, by treaty, surrender the autonomy of the country, or change its constitution of government. Neither could he by this means strip himself of his constitutional powers, nor rob any other department of the government, or any of the states, of their constitutional authority. Treaties may be made, and frequently are made, having reference to commercial intercourse. But the executive could not constitutionally abrogate, in this manner, the power of congress to "regulate foreign commerce."<sup>31</sup> Although a treaty, when concluded, becomes the law of the land, yet the power of treaty-making is not properly legislative but pertains to the political department. For this reason it is confided to the President. But lest the power should be perverted, by his unwisdom or disloyalty, to the destruction of the country, a check is placed upon it by requiring the ratification of the senate. But it will be observed that the functions of the senate are only advisory, or at most extend to accepting or rejecting the work of the President. He alone has the right to determine whether a treaty shall be made. The senate cannot make a treaty nor dictate its terms. It might indeed advise the making of a treaty, but the President would be in no wise bound to heed its recommendations. Nor is he bound to consult the senate in advance. It may suggest amendments to a completed treaty, but these must be accepted by the President to be of any force.

If the treaty is of such a nature as to be self-executing, that is, if it does not require legislative action to give effect to its provisions, it will take effect from the time of its ratification and promulgation, and be at once binding as the law of the land.<sup>32</sup> But when the treaty is executory, when its terms import a contract, when either of the parties engages to perform a particular act, then the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the courts.<sup>33</sup> If the treaty involves the payment of money

<sup>31</sup> *Geofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295.

<sup>32</sup> *Foster v. Neilson*, 2 Pet. 253; *U. S. v. Arredondo*, 6 Pet. 691; *Garcia v. Lee*, 12 Pet. 511.

<sup>33</sup> *Foster v. Neilson*, 2 Pet. 253; *Pom. Const. Law*, § 676.

to the foreign power (as in the case of purchase of territory), the very important question arises whether congress is bound as a matter of law to make the necessary appropriations, or whether, by refusing to vote the amount required, that body can nullify the treaty. On this point opinion has always been divided. The position taken by the house of representatives has negated the idea that there was any such compulsion resting upon it. On the other hand, if congress could thus block the progress of international business wherever appropriations were needed, the President and senate would be stripped of a main division of their constitutional power to make treaties. The only possible answer to the question is that it is the duty of congress to give effect to the treaty by voting the necessary supplies, but that there is no legal method whatever by which it can be coerced into the performance of this duty.<sup>34</sup>

A treaty being the supreme law of the land, any state enactment which is in conflict with it, whether made before or after the treaty, must give way to it.<sup>35</sup> But "as between a law of the United States made in pursuance of the constitution and a treaty made under the authority of the United States, if the two in any of their provisions are found to conflict, the one last in point of time must control. For the one as well as the other is an act of sovereignty, differing only in form and in the organ or agency through which the sovereign will is declared. Each alike is the law of the land in its adoption, and the last law must repeal whatever that is of no higher authority is found to come in conflict with it. A treaty may therefore supersede a prior act of congress, and on the other hand, an act of congress may supersede a prior treaty."<sup>36</sup> Whether the foreign government with which the treaty is negotiated could lawfully deal with the subject matter of the treaty and grant the rights which it purports to transfer, and whether the persons with whom the executive dealt in making the treaty were duly authorized for that purpose by their own government, are questions with which the courts can-

<sup>34</sup> On this subject, see 2 Story, Const. § 1840; Miller, Const. p. 181.

<sup>35</sup> *Ware v. Hylton*, 3 Dall. 199.

<sup>36</sup> *Cooley*, Const. Law (2d Ed.) 30, 31; *Foster v. Neilson*, 2 Pet. 253; *The Cherokee Tobacco*, 11 Wall. 616; *Ropes v. Clinch*, 8 Blatchf. 304, Fed. Cas. No. 12,041; *Taylor v. Morton*, 2 Curt. 454, Fed. Cas. No. 13,799; *In re Clinton Bridge*, 1 Woolw. 150, Fed. Cas. No. 2,900.

not deal. These questions are political in their nature, and must be determined by the political departments of the government.<sup>37</sup> In the construction and interpretation of a treaty, the courts will follow that adopted by the executive department, unless such construction is repugnant to the language or purpose of the treaty.<sup>38</sup>

#### APPOINTMENTS TO OFFICE.

**65. The President has power to nominate, and by and with the advice and consent of the senate, to appoint, ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not otherwise provided for in the constitution. He also has power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session. But congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments. The power of appointment to office includes the power of removing from office, with certain limitations.**

With the exception of the small number of offices which are created by the constitution, it is the right and duty of congress to decide what offices shall be created and for what purposes. That is a legislative function. But when the office is brought into existence, it is for the executive to choose the incumbent. For, in order to the effective administration of the government, it is necessary that those officers, at least, whose duties are not merely clerical but involve the exercise of discretion and are political in their character, should be in sympathy with the executive for the time being. But at the same time it was deemed necessary to impose a check upon this great power of the President, lest he should be able, by the unrestrained choice of the federal officers, to subvert the whole administrative machinery of government to his own selfish or disloyal pur-

<sup>37</sup> Doe v. Braden, 16 How. 635; Fellows v. Blacksmith, 19 How. 306.

<sup>38</sup> Castro v. De Uriarte, 16 Fed. 93.

pose. To this end a power of rejecting unsuitable nominations has been lodged with the senate.

The offices which are "otherwise provided for" in the constitution are those of President and Vice-President, presidential electors, and the members of the senate and house of representatives. To these must also be added the officers of the two houses of congress, who, according to the constitution, are to be chosen by the respective houses. All other officers of the United States are subject to the joint appointing power of the President and senate, save those inferior officers whose appointment is intrusted by law to the President alone, or to the courts or the heads of departments. Who are "inferior officers" within the meaning of the constitution? As the term is relative, the question cannot be answered abstractly with any degree of precision. We must look to the construction put upon this clause by the action of congress. And in the sense of the laws of the United States, the term is generally to be restricted to such officers as fill a merely clerical position, or whose powers and duties are very subordinate.<sup>39</sup>

Another question of much practical importance is as to when an appointment to office becomes complete, so as to put the appointee beyond the arbitrary will of the executive. This question received very careful consideration in the early and leading case of *Marbury v. Madison*,<sup>40</sup> wherein it was declared that when a commission has been signed by the President, the appointment is final and complete. The officer has then conferred on him legal rights which cannot be resumed. Neither a delivery of the commission, nor an actual acceptance of the office, is indispensable to make the appointment perfect.

We are next brought to the consideration of the subject of removals from office. The power of appointment necessarily includes

<sup>39</sup> *U. S. v. Hartwell*, 6 Wall. 385; *U. S. v. Moore*, 95 U. S. 760; *U. S. v. Germaine*, 99 U. S. 508; *U. S. v. Tinklepaugh*, 3 Blatchf. 425, Fed. Cas. No. 16,526. When congress by law vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it may deem best for the public interests. *U. S. v. Perkins*, 116 U. S. 483, 6 Sup. Ct. 449.

<sup>40</sup> 1 Cranch, 137. See, also, *U. S. v. Le Baron*, 19 How. 73; 2 Story, Const. § 1546.

the power to remove the appointee for cause. But the question which has been earnestly debated by statesmen and jurists is, where does this power reside, under the constitution? Is it in the President alone, or must the senate concur in a removal proposed by the executive, or is the whole matter within the jurisdiction of congress? On this point the constitution is entirely silent. But the whole course of executive and legislative interpretation of the constitution, from the earliest times until now, as well as the settled precedents, have practically determined that the power to remove public officers, when not otherwise expressly provided for, resides in the President alone. A complete discussion of this matter is beyond our present limits, but the reader may consult the authorities cited in the margin.<sup>41</sup> It should be here mentioned, however, that the construction thus put upon the question was at one time practically reversed by an act of congress. This was the "Tenure of Office Act," so called, passed in 1867.<sup>42</sup> This statute in effect denied to the President the power to remove public officers without the consent of the senate. And it provided that, if good cause for the removal of any officer should arise during a recess of the senate, the President should only have the power to suspend the officer until the next session of the senate. But this statute was repealed by an act passed in 1887, which apparently amounts to a concession that the power of removal in such cases belongs to the President alone.<sup>43</sup> It should also be noticed that if the agreement of the senate is necessary to the removal of any particular officer, this consent may be manifested by the action of the senate in confirming the appointment of a successor to the incumbent, as well as in any other way.<sup>44</sup> Thus the President has power to supersede or remove an officer of the army or navy by the appointment, by and with the advice and consent of the senate, of his successor.<sup>45</sup>

<sup>41</sup> U. S. v. Avery, Deady, 204, Fed. Cas. No. 14,481; Ex parte Hennen, 13 Pet. 230; 2 Story, Const. §§ 1537-1544; Pom. Const. Law, §§ 647-661; Miller, Const. pp. 156-162.

<sup>42</sup> Rev St. U. S. § 1767 et seq.

<sup>43</sup> 24 Stat. 500.

<sup>44</sup> Ex parte Hennen, 13 Pet. 230; Bowerbank v. Morris, Wall. Sr. 119, Fed. Cas. No. 1,726.

<sup>45</sup> Blake v. U. S., 103 U. S. 227.

In the case of vacancies happening during the recess of the senate, the President has power to make appointments to such offices, at his own pleasure and discretion, but such appointments hold good only until the end of the next session. There is some doubt as to whether a newly created office, which never has been filled, presents a case of "vacancy" within the meaning of this provision. In practice, the question has been decided both ways. But the plain inferences from the context seem to indicate with sufficient clearness that the constitution originally contemplated only those offices which were in existence and filled before the particular recess began.<sup>46</sup> It has also been ruled by the courts that if a vacancy in an office occurs during the session, but remains unfilled at the end of the session, this is a case of vacancy "happening" during the recess.<sup>47</sup> But the President has no power to anticipate a vacancy and make an appointment in advance to fill it.<sup>48</sup> A commission issued by the President to fill a vacancy in an office, during a recess of the senate, continues in force until the end of the next session of congress, unless sooner determined by the President, even although the person commissioned shall have been in the mean time nominated to the office, and his nomination rejected by the senate.<sup>49</sup> But the decision of the executive that a vacancy exists is not held to be conclusive.<sup>50</sup>

#### PRESIDENTIAL MESSAGES.

**66. The President is not only empowered, but he is required, from time to time, to give to congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient.**

Under the first two Presidents of the Republic, it was the custom for the chief executive to meet the two houses of congress in

<sup>46</sup> 2 Story, Const. § 1559; McCrary, Elect. § 237.

<sup>47</sup> In re Farrow, 4 Woods, 491.

<sup>48</sup> McCrary, Elect. § 257.

<sup>49</sup> In re Marshalship of Alabama, 20 Fed. 379.

<sup>50</sup> Page v. Hardin, 8 B. Mon. 648.

person, at the opening of each session, and address them upon the state of the Union, recommending at the same time such acts of legislation as he deemed important or necessary. But from the time of Jefferson on, it has become the invariable practice for the President to make all his communications to congress, under this clause of the constitution, in writing. An annual message is prepared by the President and delivered to congress by his private secretary. And from time to time he sends to congress special messages relating to particular topics of national interest, often accompanied by correspondence or other documents. The propriety of laying this duty upon the President is at once apparent when we consider how many details in the practical administration of the government are within the personal supervision of the President or the heads of departments, and can be made known to congress only by this means, and how important it is that the legislative body should have the most full and accurate information as to the state of the Union, in order to frame its laws with reference to public needs and interests. Story says that the President "is thus justly made responsible, not merely for a due administration of the existing systems, but for due diligence and examination into the means of improving them."<sup>51</sup> It is also usual for congress to request the President to communicate to it facts or papers in his possession or knowledge which bear upon any subject to which the attention of congress is addressed, either by way of contemplated legislation or of investigation. These requests are always complied with, unless in the judgment of the executive the interests of the nation require that such facts or documents, or the dealings of the executive department with the subject in hand, should for the present be kept secret.

#### CONVENING AND ADJOURNING CONGRESS.

**67. The President may, on extraordinary occasions, convene both houses of congress or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper.**

<sup>51</sup> 2 Story, Const. § 1561.

“The power to convene congress on extraordinary occasions is indispensable to the proper operations and even safety of the government. Occasions may occur in the recess of congress requiring the government to take vigorous measures to repel foreign aggressions, depredations, and direct hostilities, to provide adequate means to mitigate or overcome unexpected calamities, to suppress insurrections, and to provide for innumerable other important exigencies arising out of the intercourse and revolutions among nations.”<sup>52</sup> This power is seldom exercised to the extent of calling together both houses of congress in extra sessions. But it is usual for a newly inaugurated President to call an extra session of the senate, for the purpose of confirming the nominations to his cabinet, and considering other important nominations. As to the power to adjourn congress in case of a disagreement as to the time of adjournment, it is said that this power is equally as indispensable as that to convene them. For it is the only peaceable way of terminating a controversy which can lead to nothing but distraction in the public councils.<sup>53</sup>

#### DIPLOMATIC RELATIONS.

**68. The constitution provides that the President shall receive ambassadors and other public ministers.**

This grant of authority, together with the treaty-making power, invests the federal executive with entire control over the foreign relations of the United States. It is somewhat remarkable that foreign consuls should not have been mentioned in this clause. For they do not come under the designation of “public ministers,” not being diplomatic agents, but mere commercial representatives of foreign powers, and yet they exercise very important powers within their own sphere of action. But the power of the executive to receive them and recognize their credentials may fairly be inferred from other parts of the constitution. And indeed foreign consuls have never been allowed to discharge any functions of office until they have received the exequatur of the President.<sup>54</sup> The power to receive foreign ministers necessarily implies the power in the Presi-

<sup>52</sup> 2 Story, Const. § 1562.

<sup>53</sup> 2 Story, Const. § 1563.

<sup>54</sup> 2 Story, Const. § 1565.

dent to refuse to receive any particular person accredited to him by a foreign government, whether the ground of his refusal be that he is unwilling to consider the special subject with relation to which the diplomatic agent is sent, or because he prefers not to recognize the accrediting authority as a rightful government, or whether his reasons are merely personal to himself. And after a foreign minister has been received by the President, the latter has the power, for reasons satisfactory to himself, to request the accrediting government to recall the minister, or, in case of refusal or delay in recalling him, to dismiss him or refuse longer to hold relations with him. But the most important feature of the President's diplomatic power is the authority to give recognition to the party or persons claiming to be the rightful government of a foreign country, or to withhold it. The reception of a diplomatic representative is equivalent to a formal recognition by the receiving power that the party or faction sending him is at least the *de facto* government of that country. And in this respect the constitution appears to give the President unrestrained authority and consequently unlimited discretion. The question has indeed been raised whether congress could not, by a solemn declaration, disavow or repudiate the action of the executive in either giving or withholding recognition of a *de facto* government. But as no necessity for such a course has yet arisen, the question has remained one of abstract interest only, and has never received an authoritative answer. One principle, however, is certain and well settled. The determination of the question which of two opposing governments, each claiming to be the rightful government of the state or country, is the legitimate power, does not belong to the courts. The judicial department cannot take notice of, or recognize, any new government or sovereignty, until it has been officially recognized by the political departments of the government.<sup>55</sup>

<sup>55</sup> *Gelston v. Hoyt*, 3 Wheat. 324; *U. S. v. Palmer*, 3 Wheat. 610, 634, 643; *The Divina Pastora*, 4 Wheat. 52; *The Neustra Senora de le Caridad*, 4 Wheat. 497; *Rose v. Himely*, 4 Cranch, 241; *Luther v. Borden*, 7 How. 1.

**EXECUTION OF THE LAWS.**

**69. The President is required by the constitution to "take care that the laws be faithfully executed."**

"The great object of the executive department is to accomplish this purpose. And without it, be the form of government whatever it may, it will be utterly worthless for offense or defense, for the redress of grievances or the protection of rights, for the happiness or good order or safety of the people."<sup>56</sup> The President "is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the senate, to appoint the most important of them and to fill vacancies. He is declared to be commander in chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the constitution, and by the creation by acts of congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.'"<sup>57</sup> While congress cannot delegate to the President any legislative power, yet it may give him the power, upon ascertaining the existence of a state of facts provided for in the statute, to suspend the operation of an act of congress.<sup>58</sup>

**IMPEACHMENT.**

**70. The President of the United States, the Vice-President, and all civil officers of the United States, may be removed from office on impeachment for, and conviction**

<sup>56</sup> 2 Story, Const. § 1564.

<sup>57</sup> In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658.

<sup>58</sup> Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 493.

of, treason, bribery, and other high crimes and misdemeanors. The house of representatives has the sole power of impeachment, and the senate the sole power to try all impeachments. When sitting for that purpose, they are to be on oath or affirmation. When the President is tried, the chief justice shall preside. No person shall be convicted without the concurrence of two-thirds of the senators present. Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States, but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law. By an express provision of the constitution, the right of trial by jury does not extend to cases of impeachment.

The persons liable to impeachment under the federal constitution are the President, the Vice-President, and "all civil officers of the United States." This excludes, in the first place, all private and unofficial persons. In the next place, it excludes all officers of the army, navy, and marine corps, because they cannot properly be called "civil" officers, and because they are triable for offenses by courts-martial and under the laws of war. It is also settled, by a legislative precedent, that a senator of the United States is not liable to impeachment. In general, so far as the matter can be said to be definitely settled, it appears that the officers liable to this process are those who are commissioned by the President (as provided by section 3, art. 2, of the constitution) excepting those employed in the land and naval forces, but including all the federal judges.

Treason and bribery are well defined crimes. But the phrase "other high crimes and misdemeanors" is so very indefinite that practically it is not susceptible of exact definition or limitation, but the power of impeachment may be brought to bear on any offense against the constitution or the laws which, in the judgment of the house, is deserving of punishment by this means or is of such a character as to render the party accused unfit to hold and exercise his office. It is of course primarily directed against official misconduct. Any gross malversation in office, whether or not it is a

punishable offense at law, may be made the ground of an impeachment. But the power of impeachment is not restricted to political crimes alone. The constitution provides that the party convicted upon impeachment shall still remain liable to trial and punishment according to law. From this it is to be inferred that the commission of any crime which is of a grave nature, though it may have nothing to do with the person's official position, except that it shows a character or motives inconsistent with the due administration of his office, would render him liable to impeachment. It will be perceived that the power to determine what crimes are impeachable rests very much with congress. For the house, before preferring articles of impeachment, will decide whether the acts or conduct complained of constitute a "high crime or misdemeanor." And the senate, in trying the case, will also have to consider the same question. If, in the judgment of the senate, the offense charged is not impeachable, they will acquit; otherwise, upon sufficient proof and the concurrence of the necessary majority, they will convict. And in either case, there is no other power which can review or reverse their decision.<sup>59</sup>

The constitution provides that the judgment, in cases of impeachment, shall not extend further than to removal from office and disqualification from further office. Since it also provides that the officers who are subject to this process shall be removed from office upon conviction under articles of impeachment, it follows that the party accused, if he is found guilty, must be adjudged to be removed from his office. But it rests in the discretion of the senate whether or not to add to this sentence the judgment of disqualification. The nature of this punishment is political only. Conviction upon impeachment is the single case in which the pardoning power of the President cannot be appealed to.

<sup>59</sup> On the question what offenses are impeachable, see Pom. Const. Law, §§ 717-727; 1 Story, Const. §§ 785, 796-805; Miller, Const. pp. 171, 214.

## CHAPTER VII.

### FEDERAL JURISDICTION.

- 71. Courts of the United States.
- 72. Judicial Power of the United States.
- 73. United States as a Party.
- 74. States as Parties.
- 75. Jurisdiction of Supreme Court.
- 76. Powers and Procedure of Federal Courts.
- 77. Removal of Causes.

### COURTS OF THE UNITED STATES.

**71. The constitution provides that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress may from time to time establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.**

#### *Power of Congress to Establish Courts.*

The supreme court, being thus provided for by the constitution, is largely independent of congress. It could neither be abolished nor stripped of any part of its original jurisdiction by any act of congress. But the number of the judges of the supreme court is left to the determination of congress. The number might be indefinitely increased. But since a judge of this court could not be lawfully legislated out of his office, the number of the judges could not be diminished in any other way than by providing that vacancies, as they might occur, should not be filled up, until the number of judges was reduced to a prescribed minimum. So the jurisdiction of the court, except in so far as it is granted by the constitution, is within the control of congress, and may be enlarged or restricted as that body may determine.

But the courts of the United States inferior to the supreme court do not derive their judicial powers immediately from the consti-

tution. They depend for their jurisdiction upon congressional legislation.<sup>1</sup> And the discretion of congress in respect to the number, character, and territorial limits of the courts among which it will distribute the judicial power of the United States is unrestricted, except as to the supreme court.<sup>2</sup> However, congress could not lawfully confer any part of the federal judicial power on the courts of a state, nor on any courts not established by its own authority.<sup>3</sup> Since the judges of all the federal courts are to hold their offices during good behavior, it is not within the power of either congress or the President to remove them at pleasure. A more difficult question is as to the power to legislate a judge out of his office by abolishing the court in which he sits. This has in fact been done by congress, and the legislative precedent, as far as it goes, is therefore in favor of the existence of such a power.

#### *The Federal Courts.*

The federal system of courts, as at present constituted, consists of the supreme court of the United States, a circuit court of appeals in each of the nine circuits, nine circuit courts, sixty-six district courts, the court of claims, and the court of private land claims. No mention is here made of the territorial courts, which are not constitutional courts, nor of the courts in the District of Columbia.

#### *Territorial Courts.*

The territorial courts "are not constitutional courts in which the judicial power conferred by the constitution on the general government can be deposited. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the constitution, but is conferred by congress in the execution of those general powers which that body possesses over the ter-

<sup>1</sup> U. S. v. Hudson, 7 Cranch, 32; Sewing-Machine Companies' Case, 18 Wall. 553.

<sup>2</sup> U. S. v. Union Pac. R. Co., 98 U. S. 569, 602.

<sup>3</sup> Martin v. Hunter, 1 Wheat. 304; Stearns v. U. S., 2 Paine, 300, Fed. Cas. No. 13,341.

ritories of the United States.”<sup>4</sup> Congress may therefore invest the courts of the territories with as much or as little jurisdiction as it may see fit, or with such measure as appears reasonable, necessary, and adapted to the local conditions prevailing. But in practice it is customary to invest such courts with all the powers and jurisdiction which are exercised, in the states, by the courts of both systems, state and federal. While congress creates the territorial courts and defines their jurisdiction, it leaves to the territorial legislature the power to regulate their practice and forms of procedure.<sup>5</sup> When a territory is admitted into the Union, that act puts an end to the powers and jurisdiction of the territorial courts. Thereafter they are *functi officio*, and have no jurisdiction to perform any judicial acts or exercise any judicial powers.<sup>6</sup> This would have the effect to put an end to all suits which were pending at the time of the admission of the state, for no court would have jurisdiction thereafter to proceed with them. But it is usual for congress, in such cases, to make provision for the saving of pending actions, by authorizing their transfer to the proper courts under the state organization, for further action and judgment.<sup>7</sup>

#### *Consular Courts.*

Congress has provided for courts, called “consular courts”, in certain non-christian countries, which are presided over by the United States consul at the port where the court is held, and which are invested with civil and criminal jurisdiction over Americans in that place, but proceed without a jury. Their establishment is authorized by treaties made with foreign countries, granting rights of ex-territoriality to the United States for this purpose. The object is to withdraw citizens of the United States from the operation of the crude, barbarous, or uncertain systems of justice there prevailing. It is held that these are valid courts, and that a judgment of a consular court, passing sentence of death upon an American seaman

<sup>4</sup> *American Ins. Co. v. Canter*, 1 Pet. 511; *Clinton v. Englebrecht*, 13 Wall. 434; *Forsyth v. U. S.*, 9 How. 571; *Good v. Martin*, 95 U. S. 90; *McAllister v. U. S.*, 141 U. S. 174, 11 Sup. Ct. 949.

<sup>5</sup> *Hornbuckle v. Toombs*, 18 Wall. 648.

<sup>6</sup> *Benner v. Porter*, 9 How. 235; *Forsyth v. U. S.*, *Id.* 571; *Simpson v. U. S.*, *Id.* 578.

<sup>7</sup> See *Express Co. v. Kountze*, 8 Wall. 342.

for a murder committed by him within the jurisdiction of the court, is valid, notwithstanding there was no indictment nor trial by jury, when there was a fair trial before the consul and four assessors. The constitution, it was said, was made for the United States, and not for foreign countries, and can have no operation outside the limits of the United States.<sup>8</sup>

*Courts Martial.*

Under the power to "make rules for the government and regulation of the land and naval forces" congress has authority to establish military and naval courts martial, or provide for their being ordered, and to give them jurisdiction of offenses against the rules and articles of war and the discipline of the service, and prescribe and regulate their procedure.<sup>9</sup> These tribunals are not courts of the United States, nor a part of the federal judicial system. But since they exercise judicial powers, their action should be taken in accordance with the great principles which regulate the administration of the laws under a system of free institutions. For example, courts martial, like all others, must accord to the person accused a due notice of the proceedings against him and an opportunity to be heard in his own defense.<sup>10</sup> In general, and except in so far as they are directed by statutes or military regulations, courts martial will regulate their proceedings and the execution of their functions in accordance with the customary military law.<sup>11</sup> But their jurisdiction is limited to such persons as are subject to the government of the articles of war, that is, those who are enrolled in the service of the United States or liable to be so enrolled.<sup>12</sup> If a court martial transcends its authority, and inflicts punishment upon a person not subject to its jurisdiction nor amenable to the military law, he has a remedy at common law by suit against all the persons responsible for the action taken against him.<sup>13</sup>

<sup>8</sup> In re Ross, 140 U. S. 453, 11 Sup. Ct. 897.

<sup>9</sup> In re Bogart, 2 Sawy. 396, Fed. Cas. No. 1,596.

<sup>10</sup> Meade v. Deputy Marshal, 1 Brock. 324, Fed. Cas. No. 9,372.

<sup>11</sup> Martin v. Mott, 12 Wheat. 19.

<sup>12</sup> Wise v. Withers, 3 Cranch, 331. See, also, Grant v. Gould, 2 H. Bl. 69.

<sup>13</sup> Milligan v. Hovey, 3 Biss. 13, Fed. Cas. No. 9,605; Luther v. Borden, 7 How. 1; Mostyn v. Fabrigas, 1 Cowp. 161.

*Military Commissions.*

These quasi-judicial tribunals are to be distinguished from courts martial. The latter are established only for the government of the military and naval forces, and subsist in time of peace as well as in war. But the former are erected only in actual warfare, or where martial law has been declared, and as an aid to the successful prosecution of belligerent operations or the enforcement of martial law, and they deal with the acts of private persons only when they come in conflict with the military government or where the regular courts of the country are prevented, by the war or otherwise, from discharging their proper functions of trying offenses against the general law.<sup>14</sup> These tribunals may take cognizance of offenses alleged to have been committed by soldiers upon citizens within the field of military operations against an armed rebellion, while the civil law is temporarily suspended, and to the exclusion of the ordinary jurisdiction when restored.<sup>15</sup> Provisional courts of this character were established by congress in the insurgent states, during the civil war, as fast as the territory in question came into the control of the federal forces. But at the close of the war, provision was made for their abolition and for the transfer of all causes which remained pending in those courts into the regular district courts.<sup>16</sup>

**JUDICIAL POWER OF THE UNITED STATES.**

**72.** The constitution declares that the judicial power of the United States shall extend to all cases, in law and equity, arising under the constitution, the laws of the United States, and treaties made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and be-

<sup>14</sup> *Ex parte Milligan*, 4 Wall. 2.      <sup>15</sup> *Coleman v. Tennessee*, 97 U. S. 509.

<sup>16</sup> *Edwards v. Tanneret*, 12 Wall. 446.

**tween a state, or the citizens thereof, and foreign states, citizens, or subjects.**

*General Considerations.*

The judicial department of the federal government is invested, by this clause, with powers which are even more extensive than those of the legislative or executive branch. It is clothed with jurisdiction over all controversies which may involve the interpretation of the national constitution or the enforcement of national laws and treaties, thus securing, so far as it rests with the courts, the supremacy of the central government within its proper sphere. And it possesses jurisdiction in all those classes of cases where the intervention of the federal judiciary is necessary or appropriate to insure the peaceful and harmonious relations of the states with each other, and to maintain the rights of citizens of the several states. But besides this it is intrusted with the determination of controversies which do not involve the maintenance or the application of federal law, but which are best placed within the control of the federal judiciary, because otherwise state interests or local prejudices or jealousies might well be expected to interfere with the due administration of justice. Attention should be paid to the words in which this grant of power is expressed. It is extended to all "cases" of a particular character. Before there can be any proper exercise of the judicial power a "case" must be presented in court for its action. A case implies parties, an assertion of rights, or a wrong to be remedied.<sup>17</sup> It extends to all cases in law or equity. And it is held that with the exception of admiralty, all modes of procedure for the assertion of rights must be arranged under one class or the other, either law or equity. Hence, the terms used include criminal cases, arising under the constitution or laws, as well as civil issues.<sup>18</sup> It will be perceived, in general, that the cases to which the federal judicial power extends may be arranged in two classes. The first includes all cases arising under the constitution or laws or treaties. And here it is the character of the suit which gives jurisdiction, without reference to the character of the parties. The second class includes controversies be-

<sup>17</sup> Miller, Const. p. 314.

<sup>18</sup> Tennessee v. Davis, 100 U. S. 257.

tween states, between a state and citizens of another state, between citizens of different states, and between a state or its citizens and aliens. Here the jurisdiction depends entirely on the character of the parties without reference to the subject of the controversy.<sup>19</sup>

*Legislation of Congress.*

Although the federal judicial power is defined and granted by the constitution, its provision, in this respect, was not self-executing. That is, the judicial power could not come into practical operation until courts were created by congress and their jurisdiction regulated. The supreme court is a constitutional court, but it was necessary for congress to make provision for its organization and fix the number of judges. All the rest of the judicial power of the United States remained to be dealt with by congress. And in creating the courts, congress was under no obligation to occupy the entire field of judicial power marked out by the constitution. It might confer on the courts constituting the federal system as much or as little of the judicial power specified in the constitution as it might see fit, and place restrictions upon such measure of jurisdiction as it granted out, and apportion that jurisdiction among the courts which it created according to its own discretion. In fact, much of the judicial power which might be made exclusive in the federal courts still remains concurrent in the state courts. The first act of congress directed to the organization of the federal system of courts and the regulation of their jurisdiction was the Judiciary Act of 1789. One of its authors was Oliver Ellsworth, afterwards chief justice of the United States. It is regarded as a contemporaneous exposition of the nature and extent of the federal judicial power. And though it has often been amended or changed in details, yet the framework of the great system which it established, and all its essential particulars, remain the same. It organized the supreme court, with a chief justice and five associate justices, which number has since been increased to eight. It provided for three judicial circuits and thirteen judicial districts, with courts in each. And it apportioned the federal judicial power among these courts, not, however, filling up the full measure granted by the constitution. For instance, although a case involved a

<sup>19</sup> *Cohens v. Virginia*, 6 Wheat. 264.

federal question, yet it could not, until 1875, be brought in a federal court unless there was also a diversity of citizenship between the parties.

*Jurisdiction of Federal Courts.*

As the law now stands, the federal courts have original and exclusive jurisdiction of cases between states or between the United States and a state; cases against ambassadors and consuls; crimes against the United States;<sup>20</sup> cases under the national bankrupt law; cases involving patents and copyrights; suits for penalties and forfeitures under federal laws; all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right to a common law remedy where the common law is competent to give it; and seizures under the laws of the United States, on land or waters not within the admiralty and maritime jurisdiction.<sup>21</sup> They have original jurisdiction of cases arising under the constitution or laws of the United States or treaties, and also those involving controversies between citizens of different states, provided the amount in controversy exceeds \$2,000. If the sum in dispute falls below that amount, the state courts have exclusive jurisdiction, but the decision of the highest state court is liable to be reviewed by the United States supreme court on error, if it is in denial of a right claimed under the constitution or an act of congress. If the amount exceeds \$2,000, the federal courts have concurrent jurisdiction with the state courts in both these classes of cases. But if the action is originally brought in the state court, it is liable, under certain conditions to be mentioned hereafter, to be removed into the federal court for trial and determination. The federal judicial power being limited, the federal courts are to be regarded as courts of limited (though not inferior) jurisdiction. Consequently their jurisdiction is never presumed. It must appear from the record that the court has jurisdiction; the presumption is against their jurisdiction until it is shown to exist.<sup>22</sup>

<sup>20</sup> Congress may constitutionally provide that the jurisdiction of prosecutions brought for violations of the laws of the United States shall be exclusive in the federal courts. *People v. Fonda*, 62 Mich. 401, 29 N. W. 26.

<sup>21</sup> Rev. St. U. S. § 711.

<sup>22</sup> *Ex parte Smith*, 94 U. S. 455; *Godfrey v. Terry*, 97 U. S. 171; *Robertson v. Cease*, Id. 646.

*Federal Questions.*

The importance of confiding to the federal courts the ultimate decision of all questions arising under the constitution or laws of the United States or treaties is easily seen. The orderly and successful working of government, or even its very existence, depends upon a fixed and harmonious interpretation of the organic law and the statutes passed in pursuance of it. But the grant of jurisdiction to the federal courts over controversies involving federal questions does not deprive the state courts of the right to construe and apply the federal constitution or acts of congress whenever they are properly involved in the cases before them. But the decisions of the federal courts on these questions are authoritative. "A case may be said to arise under the constitution, or under a law or treaty, when a power conferred or supposed to be, a right claimed, a privilege granted, a protection secured, or a prohibition contained therein, is in question."<sup>23</sup> "A case in law or equity consists of the right of one party as well as of the other, and may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends on the construction of either."<sup>24</sup> And it is no objection to the jurisdiction of the federal court that questions are involved which are not all of a federal character. If one of the latter exists in the case, if there be a single such ingredient in the mass, it is sufficient.<sup>25</sup> Under this grant of power, the federal courts may be invested with jurisdiction of all controversies to which federal corporations are parties, because all such cases may be said to arise under the laws of the United States.<sup>26</sup> So where the question at issue is whether certain state legislation relied on and affecting the rights of the parties does or does not impair the obligation of contracts, this is such a federal question as will authorize the removal of the suit into a federal court.<sup>27</sup>

<sup>23</sup> Cooley, Const. Law (2d Ed.) 113.

<sup>24</sup> *Cohens v. Virginia*, 6 Wheat. 264.

<sup>25</sup> *Mayor v. Cooper*, 6 Wall. 247.

<sup>26</sup> *Osborn v. Bank of U. S.*, 9 Wheat. 738; *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113.

<sup>27</sup> *People v. Illinois Cent. R. Co.*, 16 Fed. 881.

*Cases Arising under Treaties.*

As the federal government is the only power in this country which can make treaties, it is proper and necessary that the jurisdiction to construe them and determine their scope and effect should be confided alone to the national authorities. A treaty is primarily a compact between independent nations, and in that aspect of it the courts have nothing to do with its observance. But it is also the supreme law of the land, and it may become the foundation of private rights, and when that is the case, it becomes a proper subject of judicial inquiry and action.<sup>28</sup>

*Cases Affecting Ambassadors.*

Since the privileges of diplomatic agents are accorded to them as to their sovereigns or governments, and not for their personal advantage, it is proper that the courts of the government to which they are accredited, and with which alone they can have official dealings, should have exclusive cognizance of suits in which they are parties.<sup>29</sup> Accordingly the constitution extends the judicial power of the United States to cases affecting ambassadors, other public ministers, and consuls. And congress, at an early day, enacted that the supreme court "shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul is a party."<sup>30</sup> As an ambassador stands in the place of his sovereign, he is not subject to the municipal laws of the state to which he is accredited. And as immunity from all accountability to such laws is necessary to enable him to exercise his diplomatic functions freely, he can neither be sued in the civil courts nor arrested and tried for any breach of the criminal laws. This is a rule of international law to which there are very few exceptions, if any. The misconduct of a minister can be redressed only by international negotiation, and if he is to be punished, it can

<sup>28</sup> *Head Money Cases*, 112 U. S. 580, 598, 5 Sup. Ct. 247; *Hauenstein v. Lynham*, 100 U. S. 483.

<sup>29</sup> *Davis v. Packard*, 7 Pet. 276.

<sup>30</sup> Rev. St. U. S. § 687.

be done only by his own country. But a minister may consent to the prosecution of civil proceedings against him. And the courts are open to him if he desires to seek redress for injuries committed against him. The official character of an ambassador or minister is proved by a certificate from the secretary of state. This will be accepted by the courts as sufficient, and if it is produced, they will not go into collateral or argumentative proof.<sup>31</sup> An indictment for violating the law of nations by offering violence to the person of a foreign minister is not a case affecting ambassadors, within the meaning of the constitution.<sup>32</sup>

*Admiralty and Maritime Cases.*

The court of admiralty was originally so called because it was held by the Lord High Admiral of England. Its jurisdiction extended to causes of action (principally criminal) arising on the high seas or on the coasts or in ports and harbors, but not within the body of any county. If the matter occurred "infra corpus comitatus," it was subject to the jurisdiction of the ordinary civil courts, not that of the admiral. But in respect to the territorial limits of this jurisdiction, the United States has departed from the English rule. In the case of *Waring v. Clarke*,<sup>33</sup> the cause of action arose out of a collision on the Mississippi river ninety miles above New Orleans, but within the ebb and flow of the tide. And it was held that this clause of the constitution was neither limited to, nor to be interpreted by, what were cases of admiralty jurisdiction in England when the constitution was adopted, and that in cases of tort or collision as far up a river as the tide ebbs and flows, the admiralty courts have jurisdiction, although the place may not be on the high seas, but within the body of a county. And by an act of 1845, congress extended the jurisdiction to the Great Lakes. And the supreme court has entirely repudiated the doctrine that "navigable waters" are such only as are affected by the tide, substituting the rule, as better adapted to the circumstances of our country, that waters navigable in fact are navigable in law. Thus the admiralty jurisdiction was extended to all public navigable lakes, rivers, and waterways which are used,

<sup>31</sup> *In re Baiz*, 135 U. S. 403, 10 Sup. Ct. 854.

<sup>32</sup> *U. S. v. Ortega*, 11 Wheat. 467.

<sup>33</sup> 5 How. 411.

or may be used, as highways for commerce to be carried on between states or with foreign nations.<sup>34</sup> Though the body of water on which the cause of action arose is of artificial construction, and wholly within the bounds of a state, (like the Welland Canal), yet if it forms a link in a continuous water highway adapted for the purposes of commerce and the passage of vessels, it is "navigable water of the United States" and subject to the admiralty jurisdiction.<sup>35</sup> This jurisdiction also extends to cases of collision occurring on tide water, though the vessel be at a wharf or pier in a harbor.<sup>36</sup> But although the admiralty jurisdiction of the United States may extend within the boundaries of a state, following the course of a navigable river or lake, yet it does not deprive the state of all jurisdiction over the territory covered by such navigable water, but only of such portion of its jurisdiction as relates to admiralty or maritime causes. Hence if a crime against the laws of the state is committed on such waters, within the limits of the state, the jurisdiction to try and punish it belongs to the state and not to the federal admiralty court.<sup>37</sup> Nor, for similar reasons, does the federal admiralty jurisdiction deprive the state of the right to regulate the fisheries and the taking of oysters in its navigable waters, and to punish persons offending against such regulations.<sup>38</sup>

It should here be noted that the admiralty jurisdiction is an entirely distinct and separate thing from the power of congress to regulate commerce. Neither depends at all upon the other. Where the admiralty jurisdiction is invoked, it is the nature of the cause of action and the place where it arose which must govern, and not the character of the commerce in which the vessel may be engaged. Thus, for instance, the case of a collision between two ships on a navigable river or one of the Great Lakes is within

<sup>34</sup> *The Genesee Chief*, 12 How. 443; *The Eagle*, 8 Wall. 15; *Fretz v. Bull*, 12 How. 466; *Jackson v. The Magnolia*, 20 How. 296; *The General Cass*, 1 Brown Adm. 334, Fed. Cas. No. 5,307.

<sup>35</sup> *Scott v. The Young America*, Newb. Adm. 101, Fed. Cas. No. 12,549; *The Avon*, 1 Brown, Adm. 170, Fed. Cas. No. 680; *The Oler*, 14 Am. L. Reg. (N. S.) 300, Fed. Cas. No. 10,485. Compare *McCormick v. Ives*, Abb. Adm. 418, Fed. Cas. No. 8,720.

<sup>36</sup> *The Lotty, Olcott*, 329, Fed. Cas. No. 8,524.

<sup>37</sup> *U. S. v. Bevans*, 3 Wheat. 336.

<sup>38</sup> *Smith v. Maryland*, 18 How. 71; *McCready v. Virginia*, 94 U. S. 391.

the admiralty jurisdiction, notwithstanding the vessels were trading between ports of the same state and engaged wholly in internal commerce.<sup>39</sup> So also, in respect to the nature of the action, cases of admiralty and maritime jurisdiction are not defined by the constitution, nor do they depend upon it, nor "arise under it." They are determined by the ancient and settled rules of the admiralty jurisdiction, but are not limited either by the statutes or the judicial decisions of England.<sup>40</sup> Although the cause of action may be created by a state statute, and unknown to the ancient admiralty law, (as, liens on vessels for certain kinds of supplies or materials,) yet if it is properly of a maritime nature, the federal courts, sitting in admiralty, will take cognizance of it and enforce it.<sup>41</sup>

The constitution does not declare that the federal courts shall have exclusive jurisdiction in admiralty and maritime cases. But so far as relates to cases of prize, it has always been the doctrine that the jurisdiction of the federal courts must be exclusive, for the reason that the ordinary courts of law were never invested with jurisdiction in these cases. And the act of congress makes the jurisdiction exclusive in all civil cases of admiralty and maritime cognizance, saving to suitors a remedy by the common law, where the common law is competent to give it. Thus, these courts have exclusive jurisdiction of actions relating to maritime torts and contracts and liens for maritime services, when the action is in rem (against the vessel), though the state courts have jurisdiction in the same cases when the action is in personam, provided that it is authorized by the common law or a state statute.<sup>42</sup>

#### *Aliens.*

The federal jurisdiction attaches to a case where one of the parties is a foreign state or one of its subjects or citizens and the other is a state of the Union or one of its citizens. Where both parties are aliens the federal courts have no jurisdiction.<sup>43</sup> An

<sup>39</sup> *The Commerce*, 1 Black (U. S.) 574; *Ex parte Boyer*, 109 U. S. 629, 3 Sup. Ct. 434; *The Belfast*, 7 Wall. 624.

<sup>40</sup> *New England Mut. Ins. Co. v. Dunham*, 11 Wall. 1.

<sup>41</sup> *Ex parte McNiel*, 13 Wall. 236; *The Lottawanna*, 21 Wall. 558; *The Sea Gull*, Chase, 145, Fed. Cas. No. 12,578.

<sup>42</sup> *The Moses Taylor*, 4 Wall. 411; *The Lottawanna*, 21 Wall. 558; *Leon v. Galceran*, 11 Wall. 185.

<sup>43</sup> *Montalet v. Murray*, 4 Cranch, 46.

Indian residing within the United States is not a "foreign citizen or subject" within the meaning of the constitution, and cannot on that ground maintain a suit in the federal courts.<sup>44</sup> But a corporation existing under the laws of a foreign country is deemed an alien within the meaning of this clause; that is, it is presumed to be made up of corporators who are citizens or subjects of the government which chartered it.<sup>45</sup> An alien continues to be a "citizen or subject of a foreign state" until he has been fully naturalized under the laws of the United States. The fact that he has made his preliminary declaration of intention to apply for naturalization will not deprive him of the right to sue and be sued in the federal courts; nor will the fact that the state in which he resides has given him the right to vote or such other attributes of citizenship as lie within the gift of the state.<sup>46</sup> Suits may be maintained in the federal courts only by "alien friends", that is, citizens or subjects of a foreign nation with which our own country is at peace. It is not according to the rules of international law to open the courts to alien enemies.

*Suits Between Citizens of Different States.*

The reason for giving to the federal courts jurisdiction of controversies between citizens of different states was the apprehension that a citizen sued in the courts of his own state by a non-resident might be able to prevail unjustly, in consequence of his local influence, or the prejudice against citizens of other states, or state pride and jealousy. This has proved to be the largest source of federal jurisdiction. Cases between citizens of different states very far outnumber all other classes of actions in the circuit courts. "Citizenship" and "domicile" are considered as equivalent, for the purpose of this provision of the constitution, inasmuch as the causes which led to its introduction depend on the fact of residence in different states, and have nothing to do with the political aspects of citizenship.<sup>47</sup>

A citizen of the District of Columbia, or of one of the territories, not being a "citizen of a state," cannot maintain a suit in the fed-

<sup>44</sup> *Karrahoo v. Adams*, 1 Dill. 344.

<sup>45</sup> *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464.

<sup>46</sup> *Minneapolis v. Reum*, 6 C. C. A. 31, 56 Fed. 576.

<sup>47</sup> *Gassies v. Ballou*, 6 Pet. 761; *Shelton v. Tiffin*, 6 How. 163.

eral courts against a citizen of a state.<sup>48</sup> But it is now well settled that for all purposes of federal jurisdiction a corporation is conclusively considered to be a citizen of the state which created it, and no averment or proof as to citizenship of its members elsewhere, offered with a view to withdrawing the cause from the cognizance of the federal court, is admissible or material.<sup>49</sup> This, however, does not prevent the corporation from suing, or being sued by, one of its stockholders, as such, who resides in another state.<sup>50</sup> And a corporation created by the laws of one state, although consolidated with another of the same name in another state, under the authority of a statute of each state, is nevertheless, in the former state, a corporation existing under the laws of that state alone.<sup>51</sup> In order to confer jurisdiction on the federal courts in this class of cases, the requisite diversity of citizenship between the parties must appear on the face of the record.<sup>52</sup>

*Land Grants of Different States.*

The federal jurisdiction in this class of cases depends partly upon the citizenship of the parties and partly upon the character of the particular issue. "It was supposed that where there were grants under the authority of different states, there would be controversies. This provision was therefore introduced here for the purpose of giving the federal courts jurisdiction of that class of cases."<sup>53</sup> Some few cases have heretofore been brought in the courts of the United States under this provision.<sup>54</sup>

<sup>48</sup> *Hepburn v. Ellzey*, 2 Cranch, 445; *Sere v. Pitot*, 6 Cranch, 332; *New Orleans v. Winter*, 1 Wheat. 91; *Barney v. Baltimore*, 6 Wall. 280; *Scott v. Jones*, 5 How. 343; *Cissel v. McDonald*, 16 Blatchf. 150, Fed. Cas. No. 2,729.

<sup>49</sup> *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497; *Whitton v. Railway Co.*, 13 Wall. 270; *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. 935; *Bank of U. S. v. Devauk*, 5 Cranch, 61; *Bank of U. S. v. Planters' Bank*, 9 Wheat. 904; *Ohio & M. R. Co. v. Wheeler*, 1 Black (U. S.) 286; *Germania Fire Ins. Co. v. Francis*, 11 Wall. 210.

<sup>50</sup> *Dodge v. Woolsey*, 18 How. 331.

<sup>51</sup> *Muller v. Dows*, 94 U. S. 444.

<sup>52</sup> *Bingham v. Cabot*, 3 Dall. 382; *Jackson v. Ashton*, 8 Pet. 148; *Bailey v. Dozier*, 6 How. 23.

<sup>53</sup> *Miller*, Const. 334.

<sup>54</sup> See *Town of Pawlet v. Clark*, 9 Cranch, 292; *Colson v. Lewis*, 2 Wheat. 377.

## UNITED STATES AS A PARTY.

73. The United States, being a sovereign and independent nation, is not liable to be made defendant in any suit or proceeding without its own consent, either in one of its own courts or in the courts of a state.<sup>55</sup> But it may, as plaintiff, institute proceedings against an individual or a state in any proper court.

There is one apparent exception to the immunity of the United States against suits. That is the case of proceedings to appropriate property to public use under the power of eminent domain. It is admitted that land within a particular state, purchased and held by the United States as a mere proprietor, and not appropriated to or designed for any specific use pertaining to the functions of the national government, may be condemned and appropriated for streets, highways, or other public purposes; and this implies some sort of judicial proceedings to ascertain and foreclose the interest of the United States.<sup>56</sup> And since, in the administration of government, many claims accrue to individuals against the United States which ought, in justice and fairness, to be submitted to the examination of a judicial tribunal and enforced if found to be valid and legal, the government has established a court for this purpose, called the "Court of Claims." Various acts of congress have referred claims to the arbitrament of this tribunal or specified the classes of actions which may be brought in it. It may give judgment against the United States if it finds the legal right to be with the claimant. But there is no way of enforcing its judgments, since no constraint can be put upon the United States. In practice, however, congress, sooner or later, always appropriates money to pay such judgments.

As a plaintiff, the United States may institute and maintain a suit either in one of its own courts, or in the courts of a state, or in those of a foreign nation, according to the nature of the cause

<sup>55</sup> *Ableman v. Booth*, 21 How. 506.

<sup>56</sup> *U. S. v. Railroad Bridge Co.*, 6 McLean, 517, Fed. Cas. No. 16,114; *U. S. v. Chicago*, 7 How. 185; *U. S. v. Ames*, 1 Woodb. & M. 76, Fed. Cas. No. 14,441.

of action and the circumstances which determine the selection of a forum.<sup>57</sup> It brings many suits in the inferior federal courts, not only criminal actions against individuals, but suits to recover property, taxes, penalties, and the like. The United States may sue one of the states, and the proper forum for such a proceeding is the supreme court, which has original jurisdiction of it.<sup>58</sup> But in all other cases the government may choose its own forum, unless restricted by an act of congress.

#### STATES AS PARTIES.

**74. Since the adoption of the eleventh amendment, a state of the Union cannot be sued by any private person. But one state may sue another state, and a state, as plaintiff, may institute proceedings against an individual, and in these cases the supreme court of the United States has original jurisdiction.**

##### *States as Defendants.*

In the case of *Chisholm v. Georgia*,<sup>59</sup> it was ruled that, under the language of the constitution and of the judiciary act of 1789, a state of the Union was liable to be sued in the federal courts, against its will, by a citizen of another state or an alien. This decision occasioned so much surprise, excitement, and apprehension, that at the first meeting of congress after its promulgation the eleventh amendment was proposed, and was in due course adopted. This amendment actually reversed the decision of the supreme court. It provides that "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state." Long after the date of the amendment, the question was raised whether a state could be sued in a federal court by one of its own citizens, upon

<sup>57</sup> U. S. v. Wagner, L. R. 2 Ch. App. 582; *Queen of Portugal v. Glyn*, 7 Clark & F. 466.

<sup>58</sup> U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. 920; U. S. v. Texas, 143 U. S. 621, 12 Sup. Ct. 488.

<sup>59</sup> 2 Dall. 419.

a suggestion that the case was one arising under the constitution or laws of the United States. It was ingeniously argued that, under the language of the constitution, a case so arising is within the federal jurisdiction without any regard to the character of the parties; that a state is not exempted under this clause; and that the eleventh amendment does not deny the jurisdiction of the federal courts in cases where a state is sued by one of its own citizens. But the court refused to accede to the reasoning, and held that the suit would not lie.<sup>60</sup> At the present time, therefore, the rule is that a state cannot be sued by any private person, whether it be one of its own citizens, or a citizen of another state, or an alien. But there are still certain cases in which a state may be made a defendant without its consent. It may be sued by the United States, by another state, and probably also by a foreign prince or government. Questions frequently arise as to the effect of the eleventh amendment, in actions against state officers, wherein it is alleged that a law of the state has assumed to violate the obligation of its contracts. The rule is thus settled: If the suit is brought against the officers of the state as representing the state's action or liability, or demands affirmative official action on the part of the defendants to secure the performance of an obligation which belongs to the state in its political capacity, the effect is to make the state itself a real party, against which the judgment will so operate as to compel it to perform its contracts, and the suit is not maintainable. But if the suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state, and thus make themselves trespassers and personally liable, in that case, whether the suit is brought to recover money or property, or for damages, or for injunction or mandamus, it is not, within the meaning of the eleventh amendment, an action against the state.<sup>61</sup> A

<sup>60</sup> *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504.

<sup>61</sup> *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699; *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608; *Osborn v. Bank of U. S.*, 9 Wheat. 738; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91; *Davis v. Gray*, 16 Wall. 203; *Board of Liquidation v. McComb*, 92 U. S. 531; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903.

suit against a corporation chartered by a state, and of which the state is the sole stockholder, is not a suit against the state.<sup>62</sup> The eleventh amendment, it is held, does not restrict or take away the appellate jurisdiction of the supreme court in cases where a controversy arises under the constitution or laws of the United States, although a state may be a party to such controversy. And a writ of error will lie in such cases, although a state having commenced the suit in its own courts, will thus become a defendant in error in the appellate court.<sup>63</sup>

*Suits Between States.*

The reason for giving the supreme court original jurisdiction of controversies between two or more states was partly the consideration that such a jurisdiction was necessary to maintain the peaceful and harmonious relations of the states in the Union, and partly in order to secure the dignity of the states themselves, which might justly have been deemed compromised if the settlement of their disputes had been intrusted to any other or inferior authority. Before the constitution there was no court in which one state could sue another. In fact, while history furnishes some few illustrations of a central authority invested with power to hear controversies between quasi-independent powers, and to arbitrate between them, there is no exact historical parallel for this provision of the constitution, which erects the supreme federal tribunal not merely into an arbitrator but a judge between states, invested with full jurisdiction and with power to command obedience to its decisions. That court "can not only hear and determine all controversies between different states, of which it is given original jurisdiction, but can also bring them before it by process, as it can bring the humblest citizen, and declare its judgment, which it has usually been able to enforce."<sup>64</sup> But in order to call into exercise this jurisdiction of the supreme court, it is necessary that states, as such, should be

962; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128; *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609; *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240.

<sup>62</sup> *President and Directors of Bank of Kentucky v. Wister*, 2 Pet. 318; *Darlington v. Alabama*, 13 How. 12.

<sup>63</sup> *Cohens v. Virginia*, 6 Wheat. 264.

<sup>64</sup> *Miller*, Const. 330.

actually parties in interest in the controversy, and not merely nominal parties.<sup>65</sup> Very few cases between states have been brought in the supreme court, except in regard to the settlement of disputed boundaries. These cases, it is settled, are such controversies as the court may hear and determine.<sup>66</sup> And where two states have entered into a compact, litigation growing out of it, when between the states themselves, may be referred to the supreme court. It was so held in regard to the compact between Virginia and West Virginia, containing certain conditions, on the performance of which certain territory was to be detached from the one state and included within the other.<sup>67</sup> But in providing for the trial of causes "between two or more states," the constitution intends only the states of the Union, the term being taken in the strictest sense, and excluding the territories and the District of Columbia.<sup>68</sup> Neither is an Indian tribe a "state"; nor is it a foreign power or state. And consequently it cannot sue in the federal courts.<sup>69</sup>

*States as Plaintiffs.*

The supreme court has original jurisdiction of suits brought by a state against citizens of another state, as well as of controversies between two states. That is to say, a state may sue an individual, being a citizen of another state, in the supreme court, as well as another state.<sup>70</sup> And a suit brought by the governor of a state, in his official capacity and for the interest of the state, is a suit by the state.<sup>71</sup>

JURISDICTION OF SUPREME COURT.

**75. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state is a party, the supreme court of the United States has original**

<sup>65</sup> *Fowler v. Lindsey*, 3 Dall. 411; *New Hampshire v. Louisiana*, 108 U. S. 76, 2 Sup. Ct. 176.

<sup>66</sup> *Rhode Island v. Massachusetts*, 12 Pet. 657; *Missouri v. Iowa*, 7 How. 660; *Florida v. Georgia*, 17 How. 478; *Alabama v. Georgia*, 23 How. 505.

<sup>67</sup> *Virginia v. West Virginia*, 11 Wall. 39.

<sup>68</sup> *Scott v. Jones*, 5 How. 343.

<sup>69</sup> *Cherokee Nation v. Georgia*, 5 Pet. 1.

<sup>70</sup> *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370; *New Jersey v. Babcock*, 4 Wash. C. C. 344, Fed. Cas. No. 10,163.

<sup>71</sup> *Governor of Georgia v. Madrazo*, 1 Pet. 110.

jurisdiction. In all other cases to which the judicial power of the United States extends, the supreme court may have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as congress may prescribe.

Since the original jurisdiction of the supreme court is defined and limited by the constitution, that court can exercise no original jurisdiction not therein specified, nor can its jurisdiction, in this respect, be enlarged by any act of congress. Thus it has been decided that the court cannot have jurisdiction to issue a writ of mandamus to an officer of the executive department;<sup>72</sup> nor to issue a writ of habeas corpus to a district judge sitting as commissioner under a treaty;<sup>73</sup> nor a certiorari to a military commission ordered by a general of the army in command of a military department, which has tried and condemned a civilian.<sup>74</sup> Neither can it employ the writ of habeas corpus except as an appellate process.<sup>75</sup> But while its jurisdiction in the cases specified is original, it is not made exclusive by the constitution. Consequently congress may vest a like original jurisdiction in the inferior federal courts, concurrent, that is, with that of the supreme court.<sup>76</sup>

#### *Appellate Jurisdiction.*

The constitutional provision respecting the appellate jurisdiction of the supreme court is not self-executing. No appellate jurisdiction could be exercised without a grant of it by congress. And the appellate jurisdiction may be regulated, enlarged, or restricted, as congress shall see fit.<sup>77</sup> Since the creation of the circuit courts of appeals, and the vesting in them of considerable appellate jurisdiction, the supreme court has jurisdiction of appeals from the circuit or district courts only in the following cases: Where the jurisdiction of the court is in issue; from final sentences and decrees in

<sup>72</sup> *Marbury v. Madison*, 1 Cranch, 137.

<sup>73</sup> *Ex parte Metzger*, 5 How. 176.

<sup>74</sup> *Ex parte Vallandigham*, 1 Wall. 243.

<sup>75</sup> *Ex parte Yerger*, 8 Wall. 85.

<sup>76</sup> *Bors v. Preston*, 111 U. S. 252, 4 Sup. Ct. 407; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437; *U. S. v. Ravara*, 2 Dall. 297.

<sup>77</sup> *Barry v. Mercein*, 5 How. 103, 119; *Ex parte McCardle*, 7 Wall. 506, 513.

prize cases; in cases of conviction of a capital or otherwise infamous crime; in cases involving the construction or application of the constitution of the United States; in cases involving the constitutionality of an act of congress or a treaty; cases in which the constitution or a law of a state is claimed to be in contravention of the constitution of the United States. In all other cases the appellate jurisdiction is in the circuit courts of appeals. But the most important feature of the appellate jurisdiction of the supreme court (at least from the point of view of constitutional law) is that which gives it power to review the judgments of the highest courts of the states in certain cases. The judiciary act of 1789 provided that "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined, and reversed or affirmed, in the supreme court on a writ of error."<sup>78</sup> The constitutionality of this act has been fully vindicated.<sup>79</sup> But the supreme court holds itself strictly within the limits of the jurisdiction here laid down. It will not issue the writ of error merely on a showing that a federal question might have been involved and decided in the particular case. It must be shown that such a question actually did arise in the case, and become necessary to its decision, and that it was ruled in a particular way. And this must appear in the record, either expressly or by necessary implication.<sup>80</sup> And the court will confine its review of the judgment

<sup>78</sup> Rev. St. U. S. § 709; Judiciary Act, § 25.

<sup>79</sup> *Martin v. Hunter*, 1 Wheat. 304.

<sup>80</sup> *Owings v. Norwood*, 5 Cranch, 344; *Armstrong v. Treasurer of Athens Co.*, 16 Pet. 281; *Crowell v. Randall*, 10 Pet. 368; *Bridge Proprietors v. Ho-*

of the state court to the questions arising under the federal constitution or laws.<sup>81</sup> In order to be appealable, the judgment or decree must have been rendered by the highest court of the state "in which a decision in the suit could be had," that is, the court of last resort for that particular case, which is not necessarily the highest court of the state.<sup>82</sup> And it must be final. The inquiry therefore is important, what are final judgments and decrees which may be reviewed in the supreme court? The general rule is as follows: A final judgment is such a judgment as at once puts an end to the action by declaring that the plaintiff has or has not entitled himself to the relief for which he sues. And a decree is final which disposes of the whole merits of the cause and leaves nothing for the further consideration of the court. A decree is interlocutory which finds the general equities, but retains the cause for reference, feigned issue, or consideration, to ascertain some matter of fact or law when again it comes under the consideration of the court for final disposition.<sup>83</sup> "When a decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting by further decree the accounts between the parties pursuant to the decree passed."<sup>84</sup>

The statute authorizing this kind of review in the supreme court

boken Co., 1 Wall. 116; *Messenger v. Mason*, 10 Wall. 507; *Murdock v. City of Memphis*, 20 Wall. 590; *Bolling v. Lersner*, 91 U. S. 594.

<sup>81</sup> *Rector v. Ashley*, 6 Wall. 132.

<sup>82</sup> *Gelston v. Hoyt*, 3 Wheat. 246; *McGuire v. Com.*, 3 Wall. 382; *Green v. Van Buskerk*, Id. 448.

<sup>83</sup> 1 Black, *Judgm.* §§ 21, 41.

<sup>84</sup> *Forgay v. Conrad*, 6 How. 201; *Thomson v. Dean*, 7 Wall. 342; *Beebe v. Russell*, 19 How. 283; *Farrelly v. Woodfolk*, Id. 288; *Ogilvie v. Knox Ins. Co.*, 2 Black (U. S.) 539; *Wabash & E. Canal Co. v. Beers*, 1 Black (U. S.) 54; *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. 440; *Grant v. Phoenix Mut. Life Ins. Co.*, 106 U. S. 429, 1 Sup. Ct. 414; *Parsons v. Robinson*, 122 U. S. 112, 7 Sup. Ct. 1153.

includes only the case where the decision is against the validity of a treaty or statute or authority of the United States, or where a state statute is upheld against objections to its validity based on the federal constitution or laws, or where a title or right or privilege claimed under federal law is denied. But these cases are sufficient to defend the supremacy of the national constitution and laws and protect the rights of citizens thereunder. If the decision of the state court accomplishes the same result, by recognizing the validity of the federal statute, or denying that of the state statute, or allowing the right or privilege claimed, there is no need of a review by the federal courts, and revisory jurisdiction is very properly withheld from them.<sup>85</sup>

#### POWERS AND PROCEDURE OF FEDERAL COURTS.

**76.** The federal courts, constituting a different system from that of the state courts, are entirely independent of the latter. But in cases not governed by federal statutes or treaties, they will administer the law of the state in which they sit, including the common law, statutes, and customs, so far as the same is not inconsistent with federal law. And their practice and procedure, except in equity and admiralty cases, is assimilated to that of the state within whose limits they are established. The federal courts possess all such incidental and adjunct powers as belong to courts of record and which are necessary to enable them to exercise their constitutional jurisdiction.

##### *Independence of Federal and State Courts.*

In regard to the mutual respect to be paid to their judicial proceedings, and some other matters, the federal and state courts are not regarded as foreign to each other, but as related in the same way as the courts of two separate states in the Union. But in all other regards they are as distinct and independent in the exercise of their powers as the courts of two foreign nations might be.<sup>86</sup>

<sup>85</sup> *Gordon v. Caldcleugh*, 3 Cranch, 268; *Burke v. Gaines*, 19 How. 388; *Ryan v. Thomas*, 4 Wall. 603.

<sup>86</sup> *Rogers v. Cincinnati*, 5 McLean, 337, Fed. Cas. No. 12,008; *Riggs v. Johnson Co.*, 6 Wall. 166.

From this principle, and from considerations of comity and mutual respect, the following important rules have been derived: (1) When a controversy arises which is within the concurrent jurisdiction of the federal and state courts, that court which first acquires jurisdiction by the service of process will retain jurisdiction until the end of the case, and it will not be interfered with therein by the other.<sup>87</sup> (2) Where property has been taken and is held in the official custody of an officer of one of the courts, it cannot be taken from his possession by replevin or any other process issuing from the other court.<sup>88</sup> (3) When proceedings have been duly commenced and are pending in one of the courts, the other will not attempt to restrain them by injunction.<sup>89</sup> (4) When property is in the hands of a receiver appointed by one of the courts, the other court will make no attempt to remove the property out of his possession, nor authorize any other proceedings against him, except by permission of the court appointing him.<sup>90</sup> As an exception to these rules it must be remarked that claims of the United States, under the revenue laws or for forfeitures, being of paramount authority, must be enforced even against property which is in the possession of a state court or its officers.<sup>91</sup>

*No Common Law of the United States.*

It is well settled that there is no common law of the United States. All the law of the United States is constitutional and statutory. All the rights, powers, and jurisdiction of the United States,

<sup>87</sup> *Daly v. Sheriff*, 1 Woods, 175, Fed. Cas. No. 3,553; *Mallett v. Dexter*, 1 Curt. 178, Fed. Cas. No. 8,988; *Ruggles v. Simonton*, 3 Biss. 325, Fed. Cas. No. 12,120; *Tobey v. County of Bristol*, 3 Story, 800, Fed. Cas. No. 14,065; *Wadleigh v. Veazie*, 3 Sumn. 165, Fed. Cas. No. 17,031; *Shoemaker v. French*, Chase, 267, Fed. Case No. 12,800; *The Celestine*, 1 Biss. 1, Fed. Cas. No. 2,541.

<sup>88</sup> *Taylor v. Carryl*, 20 How. 583; *Freeman v. Howe*, 24 How. 450; *Buck v. Colbath*, 3 Wall. 334; *Fox v. Hempfield R. Co.*, 2 Abb. (U. S.) 151, Fed. Cas. No. 5,011; *The Oliver Jordan*, 2 Curt. 414, Fed. Cas. No. 10,503.

<sup>89</sup> *Diggs v. Wolcott*, 4 Cranch, 179; *City Bank of New York v. Skelton*, 2 Blatchf. 14, Fed. Cas. No. 2,739; *Ex parte Cabrera*, 1 Wash. C. C. 232, Fed. Cas. No. 2,278. Neither can a state court issue a mandamus to an officer of the United States. *McClung v. Silliman*, 6 Wheat. 598.

<sup>90</sup> *Wiswall v. Sampson*, 14 How. 52; *De Visser v. Blackstone*, 6 Blatchf. 235, Fed. Cas. No. 3,839.

<sup>91</sup> *U. S. v. The Reindeer*, 2 Cliff. 57, Fed. Cas. No. 16,144.

as such, are derived from the constitution, and its courts have no law to administer but the written federal law.<sup>92</sup> As a consequence of this, it follows that there can be no common law crimes or offenses against the United States. No act can be a crime against the United States unless it is made such, or recognized as such, by the federal constitution, or an act of congress, or a treaty.<sup>93</sup>

*What Law Administered.*

An act of congress provides that "the jurisdiction in civil and criminal matters conferred on the district and circuit courts . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern such courts in the trial and disposition of the cause."<sup>94</sup> The effect of this provision is that where the case is not governed by any federal statute or treaty, the federal courts will administer the law of the state wherein they sit, and will take notice of the common law of the state, and its statutes and customs, and apply them as the courts of the state would apply them to the same circumstances.<sup>95</sup> And although it is not in the power of the states to enlarge the jurisdiction of the federal courts or confer any new jurisdiction upon them, yet those courts have the right to take jurisdiction, in a case where the requisite diversity of citizenship exists, involving the application of a new remedy, or the enforcement of a new right, created by the laws of a state.<sup>96</sup>

<sup>92</sup> *Wheaton v. Peters*, 8 Pet. 591, 658.

<sup>93</sup> *U. S. v. Hudson*, 7 Cranch, 32.

<sup>94</sup> Rev. St. U. S. § 722.

<sup>95</sup> *Livingston v. Moore*, 7 Pet. 469; *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 137.

<sup>96</sup> *Clark v. Smith*, 13 Pet. 195; *Ex parte McNeil*, 13 Wall. 236.

*Following State Decisions.*

"Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But when the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence."<sup>97</sup> Thus when the question concerns the construction or effect of any provision of the constitution of the state or of a state statute, and it has been authoritatively decided by the court of last resort in the state, the federal courts will consider themselves bound to adopt and apply the doctrine so laid down.<sup>98</sup> And if the question has received different solutions in different cases before such court of last resort, the federal courts will generally follow the last settled adjudications.<sup>99</sup> But they will not be bound to follow the latest decisions if, as a result thereof, contract rights, which had accrued under earlier rulings, would be injuriously affected.<sup>100</sup> Nor does the rule apply when the question arises as to the conformity of the state constitution or statute to the federal constitution, or where the statute is in the nature of a contract and private rights are vested under it.<sup>101</sup> The cases in which the federal courts consider themselves as entirely independent of the judicial decisions of the state may be summarized as follows: (1) When such decisions are in-

<sup>97</sup> *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10; *Townsend v. Todd*, 91 U. S. 452; *Railroad Co. v. Georgia*, 98 U. S. 359; *Sims v. Irvine*, 3 Dall. 425; *Walker v. State Harbor Com'rs*, 17 Wall. 648.

<sup>98</sup> *Shelby v. Guy*, 11 Wheat. 361; *Township of Elmwood v. Marcy*, 92 U. S. 289; *Cornell University v. Fiske*, 136 U. S. 152, 10 Sup. Ct. 775.

<sup>99</sup> *Green v. Neal*, 6 Pet. 291; *Suydam v. Williamson*, 24 How. 427.

<sup>100</sup> *Douglass v. County of Pike*, 101 U. S. 677; *Taylor v. Ypsilanti*, 105 U. S. 60.

<sup>101</sup> *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Olcott v. Supervisors*, 16 Wall. 678.

consistent with the decisions of the supreme court of the United States on questions of constitutional law, or involve a construction of the federal constitution, or a treaty or act of congress, or the determination of a federal question.<sup>102</sup> (2) Where the question is one of general commercial law, not depending on state statutes or usages.<sup>103</sup> (3) Where the question is one depending on general public policy.<sup>104</sup> (4) Where the question is one of general equity jurisprudence.<sup>105</sup>

*Practice.*

An act of congress provides that "the practice, pleadings, and forms and modes of procedure in civil causes, other than admiralty and equity causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of procedure existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."<sup>106</sup> The effect of this provision is that the federal courts conform their practice, in all cases at common law, to that of the state in which they sit. If the state has adopted a code of procedure, proceedings in the federal courts, in actions at law, are governed by the code. If the state adheres to the common law pleading and practice, the federal courts will do the same. But proceedings in equity are not affected by this rule. In regard to the jurisdiction in equity, the acts of congress provide that the practice in equity in the federal courts shall be substantially the same throughout the Union. And accordingly the federal courts have a uniform and complete system of equity procedure which is administered without reference to the system prevailing in the particular state.<sup>107</sup> This practice is founded

<sup>102</sup> *Piqua Branch of State Bank of Ohio v. Knoop*, 16 How. 369; *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 436; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 3 Sup. Ct. 193.

<sup>103</sup> *Swift v. Tyson*, 16 Pet. 1; *Chicago v. Robbins*, 2 Black (U. S.) 418; *Boyce v. Tabb*, 18 Wall. 546; *Town of Venice v. Murdock*, 92 U. S. 494; *Roberts v. Bolles*, 101 U. S. 119; *Thompson v. Perrine*, 103 U. S. 806.

<sup>104</sup> *Railroad Co. v. Lockwood*, 17 Wall. 357.

<sup>105</sup> *Neves v. Scott*, 13 How. 268.

<sup>106</sup> Rev. St. U. S. § 914.

<sup>107</sup> *Hurt v. Hollingsworth*, 100 U. S. 100.

on the chancery practice in England, but modified by the rules in equity made by the supreme court. Alterations in the equity jurisdiction of the states cannot affect the jurisdiction of the federal courts in equity.<sup>108</sup> And under the constitution, the distinction between actions at law and suits in equity must be preserved in the federal courts, even where the distinction has been abolished in the state where the court is sitting.<sup>109</sup> And so in Louisiana, where the civil law forms the basis of the jurisprudence of the state, and the distinction between law and equity never was known, the federal courts must still have distinct branches for such causes as would be cognizable at common law and such as would belong to the jurisdiction of equity.<sup>110</sup>

*Adjunct Powers.*

The federal courts possess all the powers which are necessary to enable them to discharge their functions, and may exercise them for the full enforcement of their jurisdiction until full performance of their decrees or satisfaction of their judgments is had.<sup>111</sup> They may issue all the usual writs, as well as those of injunction and mandamus in proper cases, may punish for contempt, and admit and disbar attorneys. Judgments rendered by the federal courts against municipal corporations must be satisfied, and for that purpose the courts may require the proper officers to levy taxes.<sup>112</sup> But if there are no officers authorized to levy such taxes, the federal courts cannot appoint them for that purpose.<sup>113</sup>

*Habeas Corpus.*

Since the jurisdiction of the federal courts is statutory (except in the few cases in which the constitution vests original jurisdiction in

<sup>108</sup> Broderick's Will, 21 Wall. 503; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495; Reynolds v. Crawfordville First Nat. Bank, 112 U. S. 405, 5 Sup. Ct. 213.

<sup>109</sup> Bennett v. Butterworth, 11 How. 669; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712.

<sup>110</sup> Fenn v. Holme, 21 How. 481.

<sup>111</sup> Bank of U. S. v. Halstead, 10 Wheat. 51.

<sup>112</sup> Von Hoffman v. City of Quincy, 4 Wall. 535; Memphis v. Brown, 97 U. S. 300.

<sup>113</sup> Irees v. City of Watertown, 19 Wall. 107; Heine v. Commissioners, Id. 655.

the supreme court), the general power to issue the writ of habeas corpus, as a means of inquiring into restraints of liberty, does not belong to them, but to the state courts, and it can be exercised by the national courts only in the instances and for the purposes specified in the acts of congress.<sup>114</sup> But the power to issue the writ has been granted, by statute, to the various federal courts and their judges in certain classes of cases where its employment may be necessary to the discharge of their business, or where the deliverance of the prisoner may be necessary to the vindication of federal law or of the right of those courts to pass upon it finally. These cases are:

Where the prisoner is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof.

Where it is necessary to bring him into court to testify.

Where he is in custody for an act done or committed in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof.

Where he is in custody in violation of the constitution, or a law or treaty of the United States.

Where the prisoner, being an alien, is in custody for an act done or committed under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations.

Of the foregoing cases, that relating to the restraint of a prisoner on account of acts done under the laws of the United States was intended to prevent the state courts from punishing the federal revenue officers for their actions in executing the federal laws. It was provided for by a clause of the so-called Force Bill of 1833, which was prompted by the disposition of South Carolina to resist the enforcement of the tariff act. Several cases arose under it, in which persons so held were discharged by the federal courts.<sup>115</sup> Federal officers held

<sup>114</sup> *Ex parte Dorr*, 3 How. 103; *De Kraft v. Barney*, 2 Black (U. S.) 704.

<sup>115</sup> See *Ex parte Robinson*, 6 McLean. 355, Fed. Cas. No. 11,935; *Ex parte Bridges*, 2 Woods, 428, Fed. Cas. No. 1,862; *U. S. v. Jailer*, 2 Abb. (U. S.) 265, Fed. Cas. No. 15,463; *Ex parte Jenkins*, 2 Wall. Jr. 521, Fed. Cas. No. 7,259.

in custody by state authorities for doing acts which they were authorized or required to do by the constitution and laws of the United States (such as maintaining the peace of the United States, though that is not made their duty by any specific statute) are entitled to be released by this process.<sup>116</sup> And a person who is in custody under state process for extradition to another state may be brought up before a federal court on habeas corpus; for the process of interstate extradition is provided for by the constitution and taken under its authority.<sup>117</sup> The supreme court of the United States has power to issue this writ in the exercise of its appellate jurisdiction.<sup>118</sup> But the state courts have no jurisdiction, by means of this writ, to deliver from custody a person who is held under authority of the federal government or federal courts; and consequently, when such detention is shown by the return, it is their duty to dismiss the writ.<sup>119</sup>

#### REMOVAL OF CAUSES.

**77. In order to secure the ends for which the grant of judicial power to the federal system of courts was made by the constitution, provision has been made, by statute, for the removal of many kinds of actions from the state courts in which they were begun into the federal courts, for trial and decision, subject to certain conditions and limitations.**

It is competent for congress to authorize the removal to the federal courts of all classes of cases to which the federal judicial power of the United States, as defined by the constitution, extends, and to give them jurisdiction of the cases so removed; and it is no objection that a case authorized to be so removed is not one of which, under any act of congress, the federal courts would have had original jurisdiction.<sup>120</sup> Many acts of congress have been passed at

<sup>116</sup> *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658; *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617.

<sup>117</sup> *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968.

<sup>118</sup> *Ex parte Watkins*, 7 Pet. 568; *Ex parte Milburn*, 9 Pet. 704; *In re Kaine*, 14 How. 103.

<sup>119</sup> *Ableman v. Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397.

<sup>120</sup> *Gainnes v. Fuentes*, 92 U. S. 10.

different times on the subject of the removal of causes. But they were almost all repealed or superseded by the act of August 13, 1888,<sup>121</sup> which was designed to stand as the sole general law on the subject of removals, and must be looked to as furnishing the whole system in that regard, except in a few peculiar cases to be presently mentioned. This statute provides that any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties, in which the amount in dispute exceeds \$2,000, and which is instituted in a state court, may be removed by the defendant to the proper circuit court of the United States. But if the suit, without involving a federal question, is between citizens of different states, or citizens of the same state claiming lands under grants of different states, or between citizens of a state and aliens, it may be removed by the defendant, provided he is not a resident of the state where the suit is brought. If there is a separable controversy in any such suit, which is wholly between citizens of different states and can be fully determined as between them, then that controversy may be removed without the remainder of the suit. Further, if the action is between a citizen of the state where the suit is brought and a non-resident defendant, the latter may remove the case to the federal court if he can show that, in consequence of prejudice or local influence, he will not be able to obtain justice in the courts of the state. It will be observed that the plaintiff cannot remove the suit in any event. In addition to this statute there are some earlier acts still remaining in force. Thus, section 641 of the Revised Statutes provides for the more effectual operation of the civil rights acts of congress by authorizing the removal to the federal courts of civil and criminal cases against any person who is denied, or cannot enforce, in the state courts, any rights secured to him by those laws.<sup>122</sup> Another section

<sup>121</sup> 25 Stat. 433.

<sup>122</sup> Under this act it was held that a negro, prosecuted in a state court, could not remove the case merely because there was such a local prejudice against his race and color as to deprive him of the benefit of a fair trial. *Texas v. Gaines*, 2 Woods, 342, Fed. Cas. No. 13,847. Rev. St. § 640, provided that suits against certain federal corporations might be removed to the federal courts, upon a verified petition "stating that such defendant has a defense arising under or by virtue of the constitution or of any treaty or

provides for the removal of indictments against revenue officers for alleged crimes against the state, where it appears that a federal question or a claim to a federal right is raised in the case and must be decided therein.<sup>123</sup> Another act provides for the removal of a personal action brought in any state court by an alien against a civil officer of the United States, being a non-resident of the state where the suit is brought;<sup>124</sup> and another for the removal of causes where one party claims lands in dispute under a grant from another state than that in which the suit is brought.<sup>125</sup>

The right to remove a cause from a state court to a federal court is exclusively statutory, and hence the case shown by the petition must come clearly within the statute, or the federal court will not take jurisdiction.<sup>126</sup> Whether or not the case is one which is properly removable, and whether the proper steps to effect a removal have been duly taken, are questions for the federal court to determine.<sup>127</sup>

When the ground of removal is diverse citizenship, and there are several plaintiffs or defendants, all the parties must possess the requisite diversity of citizenship. That is, a removal will not be in order if any one of the plaintiffs is a citizen of the same state with any one of the defendants.<sup>128</sup> Corporations are within the removal acts, and they are presumed to be citizens of the state which chartered them.<sup>129</sup> So also, for the purpose of removing causes, public and municipal corporations are citizens of the state by which they were created.<sup>130</sup>

law of the United States." It was held under this act, that the mere fact that the corporation was organized under a law of the United States was sufficient to secure a removal. *Turton v. Union Pac. R. Co.*, 3 Dill. 366, Fed. Cas. No. 44,273. But this law was expressly repealed by section 6 of the act of 1887.

<sup>123</sup> *Tennessee v. Davis*, 100 U. S. 257.

<sup>124</sup> Rev. St. § 644.

<sup>125</sup> Rev. St. § 647.

<sup>126</sup> *Insurance Co. v. Peckner*, 95 U. S. 183; *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199.

<sup>127</sup> *Osgood v. Chicago, D. & V. R. Co.*, 6 Biss. 330, Fed. Cas. No. 10,604.

<sup>128</sup> *Strawbridge v. Curtiss*, 3 Cranch, 267; *Blake v. McKim*, 103 U. S. 336; *Removal Cases*, 100 U. S. 457.

<sup>129</sup> *Farmers' Loan & Trust Co. v. Maquillan*, 3 Dill. 379, Fed. Cas. No. 4,668.

<sup>130</sup> *Barclay v. Levee Com'rs*, 1 Woods, 254, Fed. Cas. No. 977.

Cases "arising under the constitution and laws of the United States" present the same class of federal questions as those of which the federal courts are given original jurisdiction by the terms of the constitution. For example, a United States marshal, being sued in trespass for the seizure of property under an attachment, and defending upon the ground that the property seized belonged to the defendant in the attachment, may remove the case to the federal court, for his act was done in executing the laws of the United States.<sup>131</sup>

As to the nature of suits removable, it may be remarked that the language of the statutes is wide enough to include every sort of judicial proceeding in the nature of an action at law or suit in equity, whether founded on contract, tort, or otherwise. Thus, proceedings for the appropriation of private property for public use, under the power of eminent domain are removable actions, if the requisite diversity of citizenship exists.<sup>132</sup>

In regard to the stage of the cause at which the removal must be applied for, the act of 1888 provides, in respect to all removals except those under the prejudice and local influence clause, that the application must be made "at the time or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." Where the ground of removability is prejudice or local influence, it directs that the application be made "at any time before the trial of the cause."<sup>133</sup>

It is not permissible for the states to deny the right of removal in cases where it is granted by congress, nor to put any restrictions or limitations upon it. Thus where a state statute creates a right of action for damages for personal injuries under certain circumstances, an action, founded on the statute, between citizens of different states, may be brought in a federal court, or removed thereto, notwithstanding the statute assumes to limit the remedy to suits

<sup>131</sup> *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677; *Etheridge v. Sperry*, 139 U. S. 266, 11 Sup. Ct. 565.

<sup>132</sup> *Boom Co. v. Patterson*, 98 U. S. 403; *Patterson v. Boom Co.*, 3 Dill. 465, Fed. Cas. No. 10,829; *Warren v. Wisconsin Val. R. Co.*, 6 Biss. 425, Fed. Cas. No. 17,204.

<sup>133</sup> See *Hazard v. Railroad Co.*, 4 Biss. 453, Fed. Cas. No. 6,276.

in the courts of the state.<sup>134</sup> Nor is it competent for a state, by legislative enactment conferring upon its own courts exclusive jurisdiction of proceedings or suits involving the settlement and distribution of decedents' estates, to exclude the jurisdiction in such matters of the federal courts, where the constitutional requirement as to citizenship of the parties is met.<sup>135</sup> And on the same principle, state statutes permitting foreign corporations to do business within their limits only on condition that they will not remove suits against them into the federal courts, are void.<sup>136</sup>

<sup>134</sup> *Railway Co. v. Whitton's Adm'r*, 13 Wall. 270.

<sup>135</sup> *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468.

<sup>136</sup> *Home Ins. Co. v. Morse*, 20 Wall. 445; *Hartford Fire Ins. Co. v. Doyle*, 6 Biss. 461, Fed. Cas. No. 6,160; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931.

## CHAPTER VIII.

### THE POWERS OF CONGRESS.

78. Constitution of Congress.
79. Organization and Government of Congress.
80. Powers of Congress Delegated.
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83. Enumerated Powers of Congress.
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### CONSTITUTION OF CONGRESS.

**78. The legislative power of the United States is vested in a congress, which consists of two co-ordinate branches called the senate and the house of representatives. The qualifications and privileges of the members are defined in the constitution.**

The first article of the constitution provides that the house of representatives shall be composed of members chosen every second year by the people of the several states, and that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature. To be eligible to the office of a representative in congress, it is necessary that the person should have attained the age of twenty-five years and have been a citizen of the United States for at least seven years, and he must, at the time of his election, be an inhabitant of the state choosing him. Representatives are apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when a state chooses to deny the right of voting to any of its male inhabitants who are citizens of the United States and twenty-one years of age, or abridges such right, except for participation in rebellion or other crime, then the basis of representation therein shall be reduced in the proportion which the number of such male

citizens shall bear to the whole number of male citizens twenty-one years of age in such state. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The senate is composed of two senators from each state, chosen by the legislature thereof, for six years, and each senator has one vote. The senate is arranged in three classes, the term of one of such classes expiring every second year; so that at every change in the house of representatives, one-third of the senate also changes. If vacancies happen by resignation or otherwise during the recess of the legislature of the state, the governor may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies. No person shall be a senator who shall not have attained the age of thirty years and have been nine years a citizen of the United States. And he must, when elected, be an inhabitant of that state for which he shall be chosen. The Vice-President of the United States is the president of the senate, but he has no vote except in the case of a tie.

The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

Congress shall assemble at least once in every year, and such meeting shall be on the first Monday of December, unless they shall by law appoint a different day. A majority of each house constitutes a quorum for the transaction of business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office. By the third section of the fourteenth amendment it is provided that no person shall be a senator or representative who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as

a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house remove such disability.

#### ORGANIZATION AND GOVERNMENT OF CONGRESS.

**79. The constitution invests congress as a body, and each house of congress, with all needful power to regulate its own organization and government. And it also secures the privilege of the members from arrest, and from being questioned or proceeded against for their speeches or debates made in the line of their official duty.**

The house of representatives may choose its speaker and other officers, and may originate all bills for raising revenue. The senate has power to choose its officers except its permanent president, and choose a president pro tempore. It may also propose or concur with amendments to revenue bills. Each house has power to judge of the election, return, and qualification of its own members; to compel the attendance of absent members; to determine the rules of its proceedings; to punish its members for disorderly behavior; to expel a member, two-thirds concurring; and to publish its journal, or withhold from publication such parts thereof as in its judgment may require secrecy. Both houses together (that is, congress as a body) may make or alter the regulations enacted by the states as to the time, place, and manner of holding elections for senators and representatives, except as to the places of choosing senators; may appoint a day for their assembling other than the first Monday of December; may agree to adjourn for more than three days or to another place; and may fix their own compensation.

#### *Contested Elections.*

The power to judge and determine a contested election to congress belongs solely and entirely to that branch of congress in which the contest occurs. It is not a matter over which the states or their courts have any jurisdiction. The state courts, for instance, cannot assume to decide whether the election of a United States senator by

the state legislature conforms to the regulations of congress or is void.<sup>1</sup> And if a witness in a contested congressional election case, testifying before a notary public of a state, swears falsely, the courts of that state have no power to punish him for perjury. He can be proceeded against only in the federal courts and under the federal criminal law.<sup>2</sup> Congress has power to regulate elections held in the states for membership in its own body, and to provide for the punishment of frauds and crimes committed at such elections.<sup>3</sup>

*Privilege of Members.*

The privilege of members of congress from arrest exempts them from the service of all process the disobedience to which is punishable by attachment of the person, such as a subpoena ad respondendum or ad testificandum, or a summons to serve on a jury, because the member has superior duties to perform in another place.<sup>4</sup> But it does not exempt him from the service of citations or declarations in civil suits.<sup>5</sup> It extends also for a reasonable length of time after the end of a session, to enable him to return in freedom to his home.<sup>6</sup> If this privilege is violated by the unlawful arrest or detention of a member, it is the right and duty of the house to which he belongs to issue its warrant, directed to its sergeant-at-arms or other proper officer, commanding him to deliver the body of the arrested member from the custody of those who may detain him and to produce him on the floor of the house. If this warrant is defied, it is a contempt of the house, for which it may proceed to punish the persons who were concerned in the arrest and detention. If such action is not taken by the house, still the arrest is none the less unlawful, and the member may obtain his discharge upon representing the facts to the court which issued the process against him, or by suing out a writ of habeas corpus from any other court which has authority to grant it.<sup>7</sup> It should be observed, however, that this

<sup>1</sup> In re Executive Communication, 12 Fla. 686.

<sup>2</sup> In re Loney, 134 U. S. 372, 10 Sup. Ct. 584.

<sup>3</sup> U. S. v. Gale, 109 U. S. 65, 3 Sup. Ct. 1.

<sup>4</sup> 1 Story, Const. § 860.

<sup>5</sup> Gentry v. Griffith, 27 Tex. 461; Merrick v. Giddings, McArthur & Mackey (D. C.) 55.

<sup>6</sup> Holiday v. Pitt, 2 Strange, 985; Hoppin v. Jenckes, 8 R. I. 453.

<sup>7</sup> Cooley, Const. Lim. 134; Coffin v. Coffin, 4 Mass. 27; Prentis v. Com., 5 Rand. (Va.) 697.

parliamentary privilege is not absolute in all cases. It cannot be claimed in cases of treason, felony, or breach of the peace.

*Rules of Procedure.*

The supreme court has sustained the validity of a rule of the house of representatives which authorized the counting in of members who were present in the house but refused to vote, in order to make up a quorum. "The constitution," it was said, "empowers each house to determine its rules of proceeding. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal." \*

*Power to Punish for Contempts.*

There is no power given by the constitution to either house of congress to punish for contempts, except when committed by its own members. And the supreme court has decided that neither house possesses any general power to punish for contempts, and that they cannot, by the mere act of asserting a person to be guilty of a contempt, establish the right to fine or imprison, or preclude redress through a collateral inquiry into the grounds on which the order was made. Except in a case where the constitution expressly confers upon one or the other house powers which are in their nature somewhat judicial, and which require the examination of witnesses, they possess no power to compel, by fine or imprisonment or both, the attendance of witnesses and answers to interrogatories which do not relate to some question of which the house has jurisdiction. But since each branch of congress has certain specific powers to make or-

\* U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507.

ders, which require the examination of witnesses, in that class of cases, where a witness refuses to testify, the house may enforce this duty by fine and imprisonment as a punishment for contempt. But these occasions are limited to such cases as the punishment of its own members for disorderly conduct or failure to attend sessions, or in cases of contested elections, or in regard to the qualifications of its own members, or in case of an effort to impeach an officer of the government, and perhaps a few other cases.<sup>9</sup>

#### POWERS OF CONGRESS DELEGATED.

80. The government of the United States being one of delegated powers, the field of its legislative authority is not unbounded. The power of congress to pass any given law is derived from and limited by the federal constitution. On the one hand, such power must be found in some express grant of authority given to congress by that constitution, or necessarily implied in its terms, or be found necessary to carry into effect such powers as are there granted. And on the other hand, the act in question must not be in violation of any of the prohibitions laid upon congress by the same instrument.<sup>10</sup>

As to the ultimate determination of the limits of federal power, it has been argued that, as the government of the Union is one of delegated powers, the right to decide upon the extent of the powers granted remains with the several states or with the people, under the provisions of the tenth amendment, and has not been confided to the national government itself. But it is now settled, both by authority and precedent, that the government of the Union is to judge, in the first instance at least, of the extent of the powers granted to it, as well as of the means of their proper exercise. In practice, the constitutionality of any act of congress must be deter-

<sup>9</sup> *Kilbourn v. Thompson*, 103 U. S. 168; *Anderson v. Dunn*, 6 Wheat. 204. See, also, *Miller*, Const. 414; 2 *Hare*, Am. Const. Law, 851.

<sup>10</sup> *Martin v. Hunter*, 1 Wheat. 304, 326; *Calder v. Bull*, 3 Dall. 386; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Gilman v. Philadelphia*, 3 Wall. 713; *Kilbourne v. Thompson*, 103 U. S. 168; 2 *Story*, Const. § 1907.

mined by the federal judiciary. And if the general sentiment of the people is not in accord with its findings, redress must be sought at the polls.<sup>11</sup>

#### EXCLUSIVE AND CONCURRENT POWERS.

81. Some of the powers granted to congress by the constitution are vested exclusively in that body; some others may be exercised concurrently by the states in the absence of action by the national government thereon. A power vested in congress is exclusive of all state action on the same subject when—

- (a) It is made so by the express language of the constitution.
- (b) Where in one part of the constitution an authority is granted to congress and in another part the states are prohibited from exercising a like authority.
- (c) Where a similar power in the states would be inconsistent with and repugnant to the authority granted to congress, that is, where the subject matter of the power is national and can be governed only by a uniform system.

82. In cases not falling under any of the foregoing heads, the states may lawfully pass laws relating to the subject of the power, unless and until congress shall take action for exercising the power with which it is invested. But in such cases of concurrent authority, when congress exercises its power it thereby supersedes and suspends all existing state legislation on the same subject, and prohibits similar state legislation until it shall again leave the field unoccupied.<sup>12</sup>

<sup>11</sup> See *M'Culloch v. Maryland*, 4 Wheat. 316; *Ferris v. Coover*, 11 Cal. 175; 1 Story, Const. § 432.

<sup>12</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *M'Culloch v. Maryland*, 4 Wheat. 316; *Houston v. Moore*, 5 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419; *Weaver v. Fegely*, 29 Pa. St. 27.

As an illustration of the first species of exclusive powers mentioned above, it is provided by the constitution that congress shall "exercise exclusive legislation in all cases whatsoever" over the district to be appropriated as the seat of government. Here the effect is to shut out not only state legislation conflicting with the regulations of congress but all state legislation whatever. As an illustration of the second class of exclusive powers, it will be noticed that one of the enumerated powers of congress (but not in terms exclusive) is the power to "coin money." In another part of the constitution it is provided that "no state shall . . . coin money." This necessarily invests congress with the sole right to establish a mint. In the third place, if the subject matter of the power is of such a nature as to relate to the concerns and the prosperity of the nation as a whole, and can be properly regulated only by a uniform national law, and if any action by the several states upon it would be inconsistent with that plenary control of congress which can alone effectuate these objects, then the authority of congress is exclusive, though not made so in express words. Thus, it was formerly thought that interstate commerce was a subject on which the states themselves might make rules and regulations, in the absence of any general action of congress on the same subject. But the supreme court has recently decided otherwise. "Whenever a particular power of the general government," it is said, "is one which must necessarily be exercised by it, and congress remains silent, this is not only not a concession that the powers reserved by the states may be exercised as if the specific power had not been elsewhere reposed, but on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled."<sup>13</sup>

There is another sense in which the powers of congress may be said to be exclusive. The states cannot, by indirect attacks, prevent

<sup>13</sup> *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681.

their being carried into effect or unduly hamper their exercise. Where any right or privilege is subject to the regulation of congress, it is not competent for state laws to impose conditions which shall interfere with the right or diminish its value.<sup>14</sup> And on the same principle, it is not within the constitutional power of a state to lay any tax upon the instruments, means, or agencies provided or selected by the general government to enable it to carry into execution its legitimate powers and functions.<sup>15</sup>

But in all cases where the powers vested in congress are not, for any of the foregoing reasons, exclusive, the states may legislate on the same subject matter. But in regard to these cases of concurrent powers, "the concurrency of the power may admit of restrictions or qualifications in its nature or exercise. In its nature, when it is capable from its general character of being applied to objects or purposes which would control, defeat, or destroy the powers of the general government. In its exercise, when there arises a conflict in the actual laws and regulations made in pursuance of the power by the general and state governments. In the former case, there is a qualification ingrafted upon the generality of the power, excluding its application to such objects and purposes. In the latter case, there is (at least generally) a qualification not upon the power itself, but only upon its exercise, to the extent of the actual conflict in the operations of each."<sup>16</sup>

Furthermore, in all such cases of concurrent authority, the enactments of the individual states can be no more than provisional; that is to say, their continuance in force depends upon the determination of congress not to exercise its own power over the subject by a general law. If congress shall choose to enter upon the domain confided to its jurisdiction, and to regulate the same by a statute, the result is that all existing state laws on the same subject are superseded and suspended, at least so far as they are inconsistent with the act of congress. The federal law does not make them invalid, if they were not so before. Neither does it repeal them. It merely assumes to itself entire control of the whole subject and leaves noth-

<sup>14</sup> *Cranson v. Smith*, 37 Mich. 309.

<sup>15</sup> *M'Culloch v. Maryland*, 4 Wheat. 429; *Osborn v. Bank of U. S.*, 9 Wheat. 738; *Ward v. Maryland*, 12 Wall. 418.

<sup>16</sup> 1 Story, Const. § 447.

ing for the state laws to operate upon. But no change of policy on the part of the state is indicated, such as would render it inconsistent to enforce the provisions of a statute which had been repealed. Hence a penalty incurred for a violation of the state law before the passage of the act of congress may be recovered after its passage.<sup>17</sup>

#### ENUMERATED POWERS OF CONGRESS.

**83. The specific powers granted to congress in the first article of the constitution are as follows:**

- (a) To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States.
- (b) To borrow money on the credit of the United States.
- (c) To regulate commerce with foreign nations and among the several states and with the Indian tribes.
- (d) To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States.
- (e) To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.
- (f) To provide for the punishment of counterfeiting the securities and current coin of the United States.
- (g) To establish post offices and post roads.
- (h) To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.
- (i) To constitute tribunals inferior to the supreme court.

<sup>17</sup> Sturgis v. Spofford, 45 N. Y. 446.

- (j) To define and punish piracies and felonies committed on the high seas and offenses against the law of nations.
- (k) To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.
- (l) To raise and support armies (but no appropriation of money to that use shall be for a longer term than two years.)
- (m) To provide and maintain a navy.
- (n) To make rules for the government and regulation of the land and naval forces.
- (o) To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.
- (p) To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress.
- (q) To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of congress become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.
- (r) To make all laws which shall be necessary and proper for carrying into execution the fore-

going powers and all other powers vested by this constitution in the government of the United States or in any department or officer thereof.

- (s) Moreover, in the fourth article is found the following: "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."
- (t) And finally, "New states may be admitted by the congress into the Union."

*Taxation.*

By the terms of the constitution, congress shall have power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts, and excises shall be uniform throughout the United States." Article 1, § 8. "No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken. No tax or duty shall be laid on articles exported from any state." Article 1, § 9. As the constitution originally stood, the following language was found in its first article and second section: "Representatives and direct taxes shall be apportioned among the several states which may be included in this Union according to their respective numbers," etc. But the fourteenth amendment provides that "Representatives shall be apportioned among the several states," etc. The omission of the words "and direct taxes" from the amended clause appears to do away with the necessity of this method of apportionment of such taxes, in so far as it depended upon the original clause. But the provision of the ninth section of the first article that no "direct tax shall be laid unless in proportion to the census or enumeration," probably accomplishes the same result. And if a direct tax should again be laid, it is not likely that it would be attempted to levy it in a different manner from that which was adopted before the fourteenth amendment was in force.

The general nature of the power of taxation, and the constitutional limitations upon its exercise, will be fully considered in the

chapter devoted to that subject. At present it is designed only to consider the power as vested in congress under the words quoted above, and the express limitations of the constitution. Taxation is a necessary and inherent power of sovereignty. And it is in general as unlimited in its scope and extent as the subjects over which the power of the particular sovereignty extends. But it is always competent for the people, in framing their constitution, to impose such express limitations upon the taxing power as they may see fit. And this right has been exercised in the formation of the federal constitution. The power of taxation vested in congress is not unlimited. On the contrary, it is limited both in respect to the purposes for which it may be exercised and in respect to the manner in which taxes shall be levied.

In the first place, the federal power of taxation is limited in respect to the purposes for which it may be exercised. The language of the clause of the constitution which contains the grant of this power is so far ambiguous as to admit of several possible meanings. But it is the universally accepted interpretation that the clause is to be read as if it declared that "congress shall have power to lay and collect taxes, etc., in order to pay the debts and provide for the common defense and general welfare of the United States."<sup>18</sup> It appears therefore that congress possesses the power of taxation, not for any and all purposes, but only for the three enumerated purposes, viz., to pay the debts of the United States, to provide for the common defense, and to provide for the general welfare of the United States. As the first two objects are very clear and specific, it is evident that questions as to the constitutional validity of any tax law of congress will chiefly arise under the third. That is, the question will be, does the tax in fact provide for, or promote, the general welfare of the United States? It is on this ground that objection has been taken to the constitutionality of the system of a protective tariff.<sup>19</sup>

Attention should be given to the four words used in the clause under consideration and their different meanings. "Taxes" is the

<sup>18</sup> Pom. Const. Law, § 273; Miller, Const. 229-231; 1 Story, Const. §§ 907, 921.

<sup>19</sup> See 1 Story, Const. §§ 958-974; Cooley, Const. Law (2d Ed.) 56; Veazie Bank v. Fenno, 8 Wall. 533; National Bank v. U. S., 101 U. S. 1.

most general and comprehensive of the four. It is a generic term, and includes duties, imposts, and excises. But as these latter terms have specific meanings, and as the larger word is sometimes used in contradistinction to the terms of more restricted scope, it was proper that they should all be enumerated in the constitution. "Duties" is a term of larger import than "imposts." They both relate to commercial intercourse, but duties are leviable on either imports or exports, while imposts relate only to goods brought into the country from abroad. Practically, however, the use of the word "duties" adds nothing to the scope of this grant of power, for another clause of the constitution forbids the imposition of duties on articles exported from any state. "Excises" means taxes laid upon the manufacture, sale, or consumption of commodities within the country and upon licenses to pursue certain occupations. A "capitation tax" is a poll tax. It is a fixed sum exacted from each person, without reference to his property or pursuits. But the chief difficulty has arisen in determining what is the difference between direct taxes and such as are indirect. In general usage, and according to the terminology of political economy, a direct tax is one which is levied upon the person who is to pay it, or upon his land or personalty, or his business or income, as the case may be. An indirect tax is one assessed upon the manufacturer or dealer in the particular commodity, and paid by him, but which really falls upon the consumer, since it is added to the market price of the commodity which he must pay. But the course of judicial decision has determined that the term "direct," as here applied to taxes, is to be taken in a more restricted sense. The supreme court has ruled that only land taxes and capitation taxes are "direct" and no others.<sup>20</sup> In 1794, congress levied a tax of ten dollars on all carriages kept for use, and it was held that this was not a direct tax.<sup>21</sup> And so also an income tax is not to be considered direct.<sup>22</sup> Neither is a tax on the circulation of state banks;<sup>23</sup> nor a succession tax imposed upon every "devolution of title to real estate."<sup>24</sup>

<sup>20</sup> Springer v. U. S., 102 U. S. 586.

<sup>21</sup> Hylton v. U. S., 3 Dall. 171.

<sup>22</sup> Pacific Ins. Co. v. Soule, 7 Wall. 433.

<sup>23</sup> Veazie Bank v. Fenno, 8 Wall. 533.

<sup>24</sup> Scholey v. Rew, 23 Wall. 331.

In regard to the manner of laying taxes, the federal authorities are placed under certain restrictions. Capitation and other direct taxes must be laid in proportion to the census or enumeration. "Duties, imposts, and excises shall be uniform throughout the United States." The requirement of uniformity in tax laws has given rise to a great deal of litigation and to many various or even conflicting rulings of the courts. It will be more fully considered in another connection. At present it is only necessary to remark that this requirement of the constitution is complied with if the tax operates with the same effect in all places where the subject of it is found. There is no want of uniformity simply because the thing taxed is not equally distributed in all parts of the United States.<sup>25</sup>

The power of taxation, whether it is given in general and unrestricted terms, or, as here, for limited purposes only, necessarily includes the authority to make provision for the collection of the taxes in all such modes and by all such means as are not inconsistent with the constitutional guaranties to private rights and property. But the methods must be fully defined by law, and those who are charged with the various steps in the proceedings must comply with the directions of the law in all the essential particulars, in order to insure the validity of the proceedings.<sup>26</sup>

The limitations upon the taxing power of the federal government must be sought in the constitution, and nowhere else. Many of these limitations we have already incidentally considered, as in regard to the purposes for which taxes may be levied, and the method of assessing direct taxes. An important provision is that which prohibits the imposition of taxes or duties on articles exported from any state. It has been held that a requirement that articles intended for exportation shall be stamped, in order to prevent fraud and secure the carrying out of the declared intent, is not laying a duty on such articles, although a small charge is laid for the stamp.<sup>27</sup> But if the stamp were required as a source of revenue to the government, it would amount to a tax, and therefore be invalid.<sup>28</sup>

<sup>25</sup> *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247.

<sup>26</sup> *Cooley*, *Const. Law* (2d Ed.) 61, 62; *Stead v. Course*, 4 Cranch, 403; *Williams v. Peyton*, 4 Wheat. 77; *Parker v. Overman*, 18 How. 137.

<sup>27</sup> *Pace v. Burgess*, 92 U. S. 372.

<sup>28</sup> *Almy v. California*, 24 How. 103.

*Money Powers of Congress.*

Congress possesses power, under the constitution, to borrow money on the credit of the United States, and to coin money and regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting the securities and current coin of the United States. The states equally possess the power to borrow money on their own credit, but they are prohibited by the constitution from coining money or emitting bills of credit and from making anything but gold and silver coin a tender in payment of debts. In this connection should be noticed the provisions pledging the public faith to the security of the public debt. These are the first paragraph of the sixth article, as follows: "All debts contracted and engagements entered into before the adoption of this constitution shall be as valid against the United States under this constitution as under the confederation," and the fourth section of the fourteenth amendment, as follows: "The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void."

*Same—Borrowing Money.*

As the grant of power to congress to borrow money is general and unlimited in its terms, it follows, on settled principles of interpretation, that it rests in the exclusive discretion of congress to select the means or methods of exercising the power. Money may be raised by the issue and sale of government bonds, or by issuing certificates of indebtedness, or scrip, or other forms of obligations for debts or services rendered. Or the same purpose may be accomplished by the issue of treasury notes, either directly, or indirectly through the instrumentality of the national banks. This principle was settled at an early day in our national history by the decisions sustaining the charter of the Bank of the United States. This institution was established as a useful and convenient means of aiding the general government in the management of its finances, negotiating its loans,

collecting its revenues, and regulating the currency. The power of congress to create such a corporation, though denied by the executive, was sustained by the supreme court.<sup>29</sup> As the power of congress to borrow money is unlimited in respect to the means which may be employed in its exercise, so also is it unlimited in respect to the purposes for which money may be raised. The grant must necessarily be taken as co-extensive with the needs and activities of the government. Every purpose for which money may be legitimately expended by the United States is therefore also a purpose for which congress may lawfully exercise its power to borrow money. Nor can this power be in any way controlled or interfered with by the states. The granting of the power is incompatible with any restraining or controlling power, and the declaration of supremacy in the constitution is a declaration that no such restraining or controlling power shall be exercised.<sup>30</sup> It follows that the states cannot tax the loans of the United States, whether they be evidenced by bonds, notes, scrip, or otherwise, nor its financial operations, however they may be conducted, nor the means or instrumentalities, such as banks, employed by the government in its monetary system, unless with the consent of the federal government, and then only in strict compliance with the terms of such permission.<sup>31</sup>

*Same.—Coining Money.*

“The power to coin money,” says Story, “is one of the ordinary prerogatives of sovereignty, and is almost universally exercised, in order to preserve a proper circulation of good coin of a known value in the home market.”<sup>32</sup> To coin money is to fashion pieces of metal into a prescribed shape, weight, and degree of fineness, and stamp them with prescribed devices, emblems, or other marks, by authority of government, in order that they may circulate as a medium of exchange. Seigniorage is a charge made by government for coining bullion into money at its mints. This power includes the power to establish mints and assay offices. The power to regulate the value

<sup>29</sup> *M'Culloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of U. S.*, 9 Wheat. 738. See, also, 2 Story, Const. §§ 1259–1271.

<sup>30</sup> 2 Story, Const. § 1055; *Weston v. City Council of Charleston*, 2 Pet. 449; *Bank Tax Case*, 2 Wall. 200; *Van Allen v. Assessors*, 3 Wall. 573.

<sup>31</sup> *The Banks v. The Mayor*, 7 Wall. 16; *Bank v. Supervisors*, 7 Wall. 26.

<sup>32</sup> 2 Story, Const. § 1118.

of coined money includes the authority to determine what denominations of money shall be struck at the mint, and also to fix the standard of purity, that is, to determine what proportion of pure metal and what proportion of alloy shall enter into the composition of each coin. Moreover, where a bi-metallic standard is maintained, the power to regulate the coinage includes the right to make such adjustments as may be necessary to maintain a uniform standard. It is also usual, and clearly within the scope of this power, to keep the baser metals, such as silver, copper, and nickel, from unduly affecting the circulation of gold, by providing that they shall be a legal tender only for small sums. The power to regulate the values of foreign coins, in so far as they are employed within this country in transactions to which the government is a party, is a necessary correlative of the powers already noticed. In point of fact, the value of the coins of some foreign nations is subject to such fluctuations that this power is frequently very necessary to preserve anything like a uniform standard. The latest action of congress taken in pursuance of this power is found in the act of October 1, 1890,<sup>33</sup> which provides that "the value of foreign coins, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the director of the mint, and be proclaimed by the secretary of the treasury."

*Same—Legal Tender.*

In 1862 and 1863, during the prevalence of the civil war, congress authorized the issue of a large amount of treasury notes, and provided that they should be a legal tender in payment of private debts and also of all public dues except duties on imports and interest on the public debt. These notes went into immediate circulation, and largely caused the gold and silver coin to disappear from the market. When the constitutionality of this law was first contested before the supreme court of the United States, it was adjudged that while the statute was valid in so far as it might apply to the payment of debts thereafter to be contracted, there was no constitutional authority for its attempted application to debts existing at the time

<sup>33</sup> 26 Stat. 624, § 52.

of its passage.<sup>34</sup> But shortly afterwards the question came again before the court, and this decision was reversed. The personnel of the court had in the mean season been changed, and a majority was now in favor of sustaining the validity of the statute. It was accordingly adjudged that it was within the constitutional power of congress to make such notes a legal tender in payment of debts, private as well as public, and pre-existing as well as subsequently contracted.<sup>35</sup>

*Regulation of Commerce—Origin of the Power.*

The reasons which induced the framers of the constitution to incorporate in it a provision giving to congress the right to regulate commerce with foreign nations and among the several states are so obvious, and so intimately connected with the main purposes for which a central authority was established, as to require but little comment. It should be remembered that the very first movement towards an amendment of the original articles of confederation consisted in a proposal to confer upon the general government more enlarged powers over the subject of commerce. When the convention assembled, it was universally agreed that this matter, if no other, must be committed to the central authority. "The oppressed and degraded state of commerce previous to the adoption of the constitution," says Story, "can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests,

<sup>34</sup> *Hepburn v. Griswold*, 8 Wall. 603.

<sup>35</sup> *Legal Tender Cases* (*Knox v. Lee*), 12 Wall. 457; *Dooley v. Smith*, 13 Wall. 604; *Bigler v. Waller*, 14 Wall. 297; *Juilliard v. Greenman*, 110 U. S. 421, 4 Sup. Ct. 122. If there be any other medium of exchange, besides those made a legal tender by the acts of congress, which circulates as money in the ordinary business transactions of the time and place, it is a good and sufficient tender in payment of debts, unless the creditor refuses the tender on the specific ground of objection to the medium offered to him. *Warren v. Mains*, 7 Johns. 476; *Snow v. Perry*, 9 Pick. 539; *Wheeler v. Knaggs*, 8 Ohio, 169. Persons entering into a contract which calls for the payment of money have the right to specify the currency in which the payment shall be made (as gold or "coined money"), and if they do so, the courts will require the terms of the contract to be observed, and in giving judgment upon it will direct that the judgment shall be paid in the medium specified by the parties. *Bronson v. Rodes*, 7 Wall. 229; *Butler v. Horwitz*, Id. 258; *Trebilcock v. Wilson*, 12 Wall. 687.

and our disunited efforts to counteract their restrictions were rendered impotent by a want of combination. Congress indeed possessed the power of making treaties, but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states."<sup>36</sup> It is generally understood that Madison was the author of this clause of the constitution, and was the one most strongly and personally interested in its incorporation in the constitution. The extreme importance of confiding this power to the councils of the nation is made apparent by the reluctance which Rhode Island manifested in regard to ratifying the constitution. This state enjoyed, at that time, the advantage of possessing one of the finest harbors on the whole Atlantic coast, situated at Newport. And a very large proportion of all the commerce conducted by all the northern states with foreign countries sought this port. Heavy taxes and duties were laid upon importations coming to the port of Newport, and the revenue derived by the state from this source alone was sufficient to defray all its public expenses. The prospect of being deprived of this very profitable means of raising revenue, by acceding to a constitution which would forever remove such regulations from the sphere of its competence, and prevent all discriminations against other less favored states, operated so strongly as to keep Rhode Island out of the Union for over two years.

*Same—In General.*

This clause of the constitution does not vest in congress the plenary control over commerce of every description, in the same way in which it is invested with paramount authority over the subjects of naturalization and bankruptcy. The commerce which is subject to the regulation of the national legislature is such only as is transacted with foreign countries or among the several states or with the Indian

<sup>36</sup> 2 Story, Const. § 1058.

tribes. It follows that each state retains full and complete control over all such commerce as is conducted wholly within its own borders. It is not until commerce passes the boundaries of a state and enters upon a course which is to end in another state or a foreign country that it becomes subject to the regulation of congress.<sup>37</sup> Nor does this grant of power to congress give it control over all those subjects which may become involved in foreign or interstate commerce or be transported as a part of that commerce or employed among its instrumentalities. All that is produced or made within a state, whether it be by the farmer, the artisan, or the manufacturer, may possibly be the subject of commerce which shall extend beyond the boundaries of the state. But it does not by any means follow that congress is to exercise authority over agriculture, manufactures, or the means by which such enterprise is encouraged and developed, or the means and facilities of transportation which lie within a state.<sup>38</sup> The power of congress in this regard is one which may be exercised partially, gradually, or temporarily. It was not intended that congress must avail itself of this authority at once and to the verge of its limits or not at all. It is competent for congress to select certain aspects, relations, or departments of such commerce, as the subjects of its legislation, and to refrain from taking any action on the others. For example, a navigation law is none the less a regulation of commerce because it does not regulate all possible modes in which commerce may be carried on. So it is within the authority of congress to build up a complete system of regulation for foreign and interstate commerce by degrees and a part at a time. And undoubtedly its regulations may be either temporary or permanent, as its discretion may determine, and may be changed from time to time as the interests or policy of the whole people may seem to require.

<sup>37</sup> *Veazle v. Moor*, 14 How. 568; *The Passaic Bridges*, 3 Wall. 782. In the absence of any action by congress on the subject, a state may control and regulate the fisheries on her coasts or within bays which are included in the limits of her territorial jurisdiction. *Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559.

<sup>38</sup> *Veazle v. Moor*, 14 How. 568.

*Same—The Leading Case.*

The leading case on the subject of this power of congress is that of *Gibbons v. Ogden*.<sup>39</sup> The opinion was written by Chief Justice Marshall, and is universally conceded to be one of the greatest efforts of his profound and luminous intellect. It contains an exhaustive disquisition on the subject of commerce and its regulation by congress, in all its bearings and aspects, and has furnished principles, or at least arguments, for the guidance of the courts in a very large proportion of the numerous and diverse cases which have since demanded solution at their hands. But the points actually decided in this case were only these: That commerce includes navigation, whether the motive power be steam or sails, and that when congress has legislated, in pursuance of its constitutional power, on any particular subject or department of commerce, the states are precluded from taking any action which would interfere with or tend to annul the acts of congress.

*Same—What is Included.*

The word "commerce", as here used, is to be broadly construed. Its general meaning is intercourse by way of trade and traffic between different peoples or states. But as used in the constitution, the term is not restricted to the sale and exchange of commodities, but includes also their transportation, whether this be by land or sea. Nor is it restricted to the fact or process of commercial intercourse, but includes as well the substance of commerce; and not only this, but it covers also the means, agencies, or instrumentalities by which commerce is carried on. It is not limited to the transportation of freight, but extends equally to passenger traffic, and even to the transmission of telegraphic messages. Many, if not all, of the incidents of commerce are within its scope. For example, it extends to the regulation and government of seamen on American ships; to the establishment of rules of navigation, the law of the road at sea, and the marine system of lights and signals; to the protection and security of commerce, including laws respecting light-houses, beacons, buoys, dykes, dams, levees, the improvement of rivers and harbors, derelicts, and wrecks of the sea; to the designation of ports of entry and delivery; to the charges of railroads engaged in interstate commerce,

<sup>39</sup> 9 Wheat. 1.

and many other such subjects.<sup>40</sup> This grant, moreover, was not made with reference solely to the condition and course of commerce as these existed at the time the constitution was formed. Its terms are broad enough to permit the authority and its exercise to keep pace with the progress and development not only of commercial intercourse but also of the means employed in that intercourse. Powers and agencies are now made available for the interchange of commodities which were little dreamed of by the fathers of the Republic. But the advance of science and the arts serves only to enlarge the field for the exercise of legislative authority, in this regard, without affecting the limits of the power itself.<sup>41</sup>

*Same — When Exclusive, When Concurrent.*

The question whether the power of congress to regulate foreign and interstate commerce is exclusive, or whether the states have a concurrent authority, to any extent, over the same subject, is the most difficult which has arisen in the construction of this clause of the constitution. The general result of the authorities may be stated as follows: First, the states cannot lawfully adopt any measures tending directly to regulate, obstruct, or interfere with such commerce as is confided to the paramount control of congress, or which may be inconsistent with the legislation of congress on the same subject.<sup>42</sup> Second, if the particular subject to which the power is to be directed is national in its character, or is such that it can properly be regulated only by a uniform system, in so much that varying regulations by the different states would cause inconvenience or detriment, it is not competent for the states to legislate on

<sup>40</sup> U. S. v. Craig, 28 Fed. 795; 2 Story, Const. §§ 1075, 1076. Natural gas, in the earth, may not be a commercial commodity, but when brought to the surface and placed in pipes for transportation, it completely assumes that character. Now the transportation of commercial commodities from state to state is interstate commerce, and a state can lay no burdens or restrictions upon it. Hence a state statute which has for its object to prevent persons from conveying natural gas out of the state and into another state, with the imposition of penalties for so doing, is unconstitutional and void. *State v. Indiana & Ohio Oil, Gas & Min. Co.*, 120 Ind. 575, 22 N. E. 778. But see *Jamieson v. Indiana Natural Gas & Oil Co.*, 128 Ind. 555, 28 N. E. 76.

<sup>41</sup> *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, 9.

<sup>42</sup> *Brown v. Maryland*, 12 Wheat. 419; *Welton v. Missouri*, 91 U. S. 275; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681; *Gibbons v. Ogden*, 9 Wheat. 1.

the subject, and if congress does not act, its silence is to be taken as an evidence of its will that the subject shall be free from all regulation or restriction.<sup>43</sup> Third, local and limited matters, not national in their character, which are most likely to be wisely provided for by such diverse rules as the authorities of the different states may deem applicable to their own localities, may be regulated by the state legislatures, in the absence of any act of congress on the same subject.<sup>44</sup> Fourth, there are certain classes of state legislation which, although they may incidentally or remotely affect foreign or interstate commerce, are not intended as regulations thereof, but have their primary relation to the domestic concerns of the particular state or of its citizens, and are properly in the nature of police regulations. In the absence of any act of congress covering the same ground, such laws are valid. And it is understood that, in so far as they relate to or affect commerce, congress, by refraining from acting on the same subject, sanctions and adopts them.<sup>45</sup> But there are certain classes of state legislation which so directly affect foreign or interstate commerce, or so plainly impose a burden or restriction upon it, that they are void even though they may not come in conflict with any regulation of congress on the same subject. As an illustration of this rule, we may cite the case of *Railroad Co. v. Husen*,<sup>46</sup> where the question arose upon a statute of Missouri, intended to prevent the introduction into that state of a disease supposed to be prevalent among the cattle in Texas, and which in effect declared that no cattle from Texas should be admitted into the state until they had been kept a sufficient time to prevent any danger of contagion. This act was adjudged unconstitutional, inasmuch as it amounted to an entire prohibition on the railroads from transporting cattle from the one state into or through the other.

<sup>43</sup> *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062; *County of Mobile v. Kimball*, 102 U. S. 691; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091.

<sup>44</sup> *Miller*, Const. 454; *Coolley v. Board of Wardens*, 12 How. 299; *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245.

<sup>45</sup> *Sherlock v. Alling*, 93 U. S. 99.

<sup>46</sup> 95 U. S. 465.

*Same—Navigation.*

The power of congress to regulate commerce includes the power to regulate navigation, in so far as it is conducted between this country and foreign nations or between the several states. And this power extends both to fresh and salt waters, and beyond, as well as within, the ebb and flow of the tide. But it is restricted to such waters as can be used in commerce between different states or with a foreign country. And it does not extend to such rivers or other streams as lie wholly within the territorial limits of a single state, unless, by their connection with other waters, they form a continuous highway over which commerce is or can be carried on with other states or foreign nations.<sup>47</sup> Even when a vessel is plying between ports of the same state, yet if it is navigating the high seas, it is subject, as well as the business in which it is engaged, to the regulating power of congress.<sup>48</sup> But a state may improve its own rivers and harbors, and take toll from those who use the improvements, provided the navigation of the waters is kept free and there is no interference with any system established by authority of congress.<sup>49</sup> So also a state may authorize the erection of a dam across a navigable river which is wholly within its limits, in the absence of any legislation of congress bearing on the case.<sup>50</sup> Nor is it unlawful for a state to establish ferries across navigable waters and license the owners of boats engaged in such ferry service, exacting a fee therefor.<sup>51</sup> The authority to regulate ferries has never been

<sup>47</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *Veazie v. Moor*, 14 How. 568; *Moore v. Veazie*, 32 Me. 343; *The Chusan*, 2 Story, 455, Fed. Cas. No. 2,717; *The Wilson v. U. S.*, 1 Brock. 423, Fed. Cas. No. 17,846; *The Daniel Ball*, 10 Wall. 557; *Withers v. Buckley*, 20 How. 84; *The Bright Star*, 1 Woolw. 266, Fed. Cas. No. 1,880; *The Montello*, 20 Wall. 430.

<sup>48</sup> *Lord v. Steamship Co.*, 102 U. S. 541; *Pacific Coast S. S. Co. v. Board of Railroad Com'rs*, 18 Fed. 10.

<sup>49</sup> *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 8 Sup. Ct. 113; *Benjamin v. Manistee R. I. Co.*, 42 Mich. 628, 4 N. W. 483; *Palmer v. Cuyahoga Co.*, 3 McLean, 226, Fed. Cas. No. 10,688; *McReynolds v. Smallhouse*, 8 Bush, 447; *Kellogg v. Union Co.*, 12 Conn. 7.

<sup>50</sup> *Pound v. Truck*, 95 U. S. 459.

<sup>51</sup> *U. S. v. The James Morrison*, Newb. Adm. 241; Fed. Cas. No. 15,465; *Conway v. Taylor*, 1 Black (U. S.) 603; *Wiggins Ferry Co. v. City of East St. Louis*, 107 U. S. 365, 2 Sup. Ct. 257.

claimed by the general government, but has always been exercised by the states and not by congress. But the states cannot impose license taxes upon tugs and towboats engaged in navigating the high seas and the great waterways of commerce.<sup>52</sup> Nor can they impose restrictions or conditions upon such vessels, except such as may relate only to the policing of their own harbors.<sup>53</sup>

The power to regulate navigation, as a part of foreign and interstate commerce, includes, as briefly stated above, the regulation of its incidents. In this connection congress has passed laws prescribing rules for navigation on the high seas, laws establishing a system of light-houses and buoys, life-saving stations, and other means of protecting and preserving those engaged in navigation, laws for the regulation of ports and harbors and the improvement of rivers and other waterways, laws for the government of American seamen, and laws relating to the liability of ship-owners and others engaged in commerce, either declaring, altering, or supplementing the rules of the common law or the general law-merchant.

*Same—Vessels.*

Since ships are among the principal means or instruments by which foreign and interstate commerce is carried on, it follows that they are subject to the regulation of congress. Hence all federal laws relating to the registry or nationality of American ships, or prescribing rules for their transfer, or for the recording of such transfers, or determining what shall be sufficient evidence of title to them, or providing for the recording of mortgages of ships, are to be sustained as enacted under the commerce power.<sup>54</sup> And since the authority of congress in this respect is paramount, state laws, in so far as they may be inconsistent with the acts passed by congress, must yield in authority. Thus, for example, an act of congress providing for the recording of mortgages of ships will control the state statute of frauds.<sup>55</sup> While the states cannot tax ships

<sup>52</sup> Moran v. New Orleans, 112 U. S. 69, 5 Sup. Ct. 38; Harman v. Chicago, 147 U. S. 396, 13 Sup. Ct. 306.

<sup>53</sup> Sinnot v. Davenport, 22 How. 227; Foster v. Master and Wardens of Port of New York, 94 U. S. 246; Steamship Co. v. Portwardens, 6 Wall. 31.

<sup>54</sup> White's Bank v. Smith, 7 Wall. 646; Blanchard v. The Martha Washington, 1 Cliff. 463, Fed. Cas. No. 1,513; Foster v. Chamberlain, 41 Ala. 158; Shaw v. McCandless, 36 Miss. 296.

<sup>55</sup> Mitchell v. Steelman, 8 Cal. 363.

as instruments of commerce, yet they may tax the owners of ships for their interest in the same as personal property.<sup>56</sup>

*Same—Regulation of Ports and Harbors.*

In the class of subjects generally left to the legislation of the individual states is included the regulation of ports and harbors, in respect to the establishment of harbor lines, the maintenance and regulation of wharves, state inspection laws, local pilotage rules, and all such measures as belong to the police regulation of the public ports and waterways of a state. The harbors and other navigable waters of a state are indeed subject to the regulating power of congress, in so far as they belong to or are used for that kind of commerce which may be denominated foreign or interstate, just as much as are the high seas. But until congress chooses to enter upon the field of legislation, in respect to the subjects here mentioned, state laws on those subjects are valid and must be enforced, and when congress acts, those laws are not repealed but suspended in their operation.<sup>57</sup> But a state statute entitling port wardens to receive a certain sum or fee for every vessel coming into port, whether they are called on to perform any service or not, is a regulation of commerce and unconstitutional.<sup>58</sup>

*Same—Embargo.*

The limits of the power of congress to regulate foreign commerce were very seriously considered in connection with the embargo laid upon such commerce in 1807, at the special recommendation of Jefferson, then President. Against the constitutionality of this measure it was urged that an embargo suspending foreign commerce for an indefinite or unlimited period cannot properly be described as a "regulation" of commerce, since it results in a temporary destruction of it. The power to regulate, it was said, does not include the power to annihilate. The supreme court has never passed upon this question. But it was decided in the inferior courts that the

<sup>56</sup> *Transportation Co. v. Wheeling*, 99 U. S. 273; *City of St. Louis v. Ferry Co.*, 11 Wall. 423; *Howell v. Maryland*, 3 Gill, 14.

<sup>57</sup> *Henderson v. Spofford*, 59 N. Y. 131; *The James Gray v. The John Fraser*, 21 How. 184; *Steamship Co. v. Joliffe*, 2 Wall. 450.

<sup>58</sup> *Steamship Co. v. Portwardens*, 6 Wall. 31; *Hackley v. Geraghty*, 34 N. J. Law, 332.

embargo act was a valid exercise of the power of congress, because it was not aimed at the destruction of commerce, but was intended as a means of defending, preserving, and protecting our foreign commerce. There can be no doubt, however, that this act went to the very extreme limit of the lawful exercise of this great power of congress.<sup>59</sup>

*Same—Pilotage.*

The states retain the power, until congress shall act, to establish rules for the qualification and licensing of pilots and as to their services upon vessels approaching or leaving their ports and the fees to be charged therefor. But as the subject concerns foreign commerce, it is within the domain intrusted to the control of congress, and that body has power either to adopt a uniform system on the subject of pilots, or to adopt and sanction the systems in force in the several maritime states. And if it should make the entire subject national in its character, and prescribe uniform rules and regulations, all provisions of the state statutes which might be inconsistent therewith would have to give way.<sup>60</sup> But a state pilot law which discriminates in favor of "coasters within the state" or vessels of that and the two adjoining states, conflicts with the federal statute and is void.<sup>61</sup>

*Same—Quarantine.*

It is within the lawful power of each state to enact laws to guard against the introduction of contagious or infectious diseases from foreign countries. To this end it may establish quarantine stations and provide for the inspection of vessels coming from abroad to ascertain their sanitary condition, and require such vessels to pay a fee to cover the cost of such inspection. Statutes of this character are not regarded as regulations of commerce but as police laws. At the same time they may and do in a sense affect foreign commerce, and for that reason the subject of quarantine is equally under the control of congress, and state laws must yield in all points where they are incon-

<sup>59</sup> See *U. S. v. The William*, 2 Am. Law J. 255, Fed. Cas. No. 16700; 2 Story, Const. §§ 1289-1292.

<sup>60</sup> *Cooley v. Port Wardens*, 12 How. 299; *Cisco v. Roberts*, 6 Bosw. (N. Y.) 494.

<sup>61</sup> *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988.

sistent with such general regulations as congress may see fit to impose.<sup>62</sup>

*Same—Imports.*

In pursuance of its power to regulate foreign commerce, congress has passed many laws with regard to the importation into this country of articles from abroad. Most of these acts have been so plainly within the scope of the power in question that their constitutionality has never been called in controversy before the courts. A detailed examination of these statutes is beyond our present purpose, but reference in general terms may be made to the laws establishing a tariff of customs duties, those designating the ports of entry, and those creating and regulating the bonded warehouse system. After goods imported from abroad have reached the custom house, they remain in the possession of the United States until delivered to the consignee, and the United States has a lien on them for the duties. During that period they cannot be attached or levied on, or otherwise taken out of the custody of the federal officers by any state process.<sup>63</sup> The states cannot lay any tax upon goods imported from abroad so long as they remain in the hands of the original importer, or, having left his hands, so long as they remain in the original packages of importation. When the importer has parted with them, or when the original cases have been broken up, then the goods become taxable as a part of the general mass of property in the state.<sup>64</sup>

*Same—Immigration.*

The term "commerce," as used in the constitution, is not limited to an exchange of commodities, but includes as well intercourse with foreign nations. And the term "intercourse" includes the transportation of passengers.<sup>65</sup> Consequently it is within the power of congress, under this grant, to regulate immigration. It may totally

<sup>62</sup> *Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 6 Sup. Ct. 1114.

<sup>63</sup> *Harris v. Dennie*, 3 Pet. 292.

<sup>64</sup> *Brown v. Maryland*, 12 Wheat. 419; *Cook v. Pennsylvania*, 97 U. S. 566; *People v. Wilmerding*, 62 Hun, 391, 17 N. Y. Supp. 102; *Waring v. Mayor*, 8 Wall. 110.

<sup>65</sup> *People v. Raymond*, 34 Cal. 492; *Passenger Cases*, 7 How. 283.

prohibit the coming into the United States of any class, degree, or nationality of immigrants, or it may prescribe conditions or restrictions upon such immigration, or impose a tax on the owners or masters of vessels bringing foreigners into the country. Examples of the exercise of this power by congress may be seen in the statute which forbids the importation of alien laborers under contract, and in that which excludes the Chinese. The only limitation upon the power of congress in this respect is that its regulations or prohibitions must not contravene the provisions of treaties between this country and foreign nations.<sup>66</sup> This rule also involves a limitation upon the power of the states. The several states may not lay any restriction upon immigration. It is not within the power of a state to impose taxes upon such immigration, or upon the masters or owners of vessels bringing foreigners into their ports for the privilege of so doing, or upon the aliens themselves. Such a tax would be an unlawful regulation of foreign commerce.<sup>67</sup> But a state law which requires a report to be made of the passengers brought from abroad into one of its ports, and prescribes a fine as a penalty for failure to comply with its terms, is not regarded as a regulation of commerce, but merely as a police regulation, and is not invalid.<sup>68</sup>

*Same—Railroads.*

Inasmuch as the control over commerce includes the means or agencies by which it is carried on, it follows that the business of railroad companies, in so far as it concerns traffic between points which do not lie within the same state, is subject to the regulation of congress and exempt from that of the states. Congress may provide that all railroad companies may carry passengers, mails, and property over their roads and bridges, on their way from one state to another, and receive compensation therefor, and may connect with other roads so as to form continuous lines for the transportation of

<sup>66</sup> *Edye v. Robertson* (Head Money Cases), 112 U. S. 580, 5 Sup. Ct. 247; *U. S. v. Craig*, 28 Fed. 795.

<sup>67</sup> *Henderson v. Mayor of City of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, Id. 275; *People v. Downer*, 7 Cal. 169; *People v. Compagnie Générale Transatlantique*, 107 U. S. 59, 2 Sup. Ct. 87; *People v. Pacific Mail S. S. Co.*, 16 Fed. 344; *Passenger Cases*, 7 How. 283.

<sup>68</sup> *New York City v. Miln*, 11 Pet. 102.

the same to their places of destination.<sup>69</sup> And congress likewise has authority to construct or authorize the construction of railroads across the states and territories of the United States, and the franchises thus conferred cannot, without its permission, be taxed by the states.<sup>70</sup> The most important application of this principle is in the limitation which it imposes upon the power of the states, in respect to interstate railroads, and especially with reference to taxation. A state law requiring all carriers engaged in interstate commerce to furnish equal privileges and accommodations to all persons using their conveyances, without discrimination on account of race or color, is not valid.<sup>71</sup> Neither have the states any power to impose taxes on travel on railroads running through or between states;<sup>72</sup> nor upon the offices or agencies of railroads engaged in interstate commerce;<sup>73</sup> nor upon the gross receipts of a railroad company, when such receipts are in part derived from the transportation of passengers and property into, through, and out of the state.<sup>74</sup> But if the state can distinguish between receipts derived from commerce which is carried on wholly within its own limits and such as are derived from interstate commerce, and tax only the former, or levy a tax upon a portion of the capital stock of the company or a portion of the value of its property, such portion fairly representing the value of the stock or property employed in its business within the state, as distinguished from that which is employed in interstate business, in either such case the tax does not amount to an interference with that commerce which is under the control of congress, but is lawful and valid.<sup>75</sup> The same rule applies to the taxation of parlor cars or sleeping cars. A privilege tax on sleeping cars is void in so far as it applies to the interstate transportation of passengers.<sup>76</sup> But

<sup>69</sup> *Railroad Co. v. Richmond*, 19 Wall. 584.

<sup>70</sup> *California v. Central Pac. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073.

<sup>71</sup> *Hall v. De Cuir*, 95 U. S. 485. But such a law is valid if it is strictly confined to business done within the state. *Louisville, N. O. & T. Ry. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348.

<sup>72</sup> *Piek v. Chicago & N. W. Ry. Co.*, 6 Biss. 177, Fed. Cas. No. 11,138; *Id.*, 94 U. S. 164; *Clark v. Philadelphia, W. & B. R. Co.*, 4 Houst. (Del.) 158; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958.

<sup>73</sup> *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881.

<sup>74</sup> *Fargo v. Michigan*, 121 U. S. 230, 7 Sup. Ct. 857.

<sup>75</sup> *Delaware Railroad Tax*, 18 Wall. 206.

<sup>76</sup> *Pickard v. Pullman South. Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635.

since the state has a right to tax personal property within its jurisdiction, even though it may be employed in interstate commerce, a state tax on such proportion of the whole capital stock of a foreign sleeping car company as the number of miles over which its cars are operated within the state bears to the total number of miles over which its cars are run, is valid and constitutional, although such cars are run into, through, and out of the state.<sup>77</sup> A state statute imposing on express companies a tax on their "receipts for business done within this state" is not an interference with interstate commerce.<sup>78</sup>

*Same—Bridges.*

Under this grant of power, congress has control over the navigable waters of the United States, that is, such waters as, in themselves or with their connections, form a continuous highway over which foreign or interstate commerce is or may be carried on. And in connection therewith, it is within the constitutional authority of congress to take measures for keeping such highways free and open for such commerce, and preventing obstructions. It may therefore prevent the erection of bridges over such streams, by the states or by private persons or corporations under their authority, or it may declare that a bridge so erected is not an obstruction to commerce but a lawful bridge, and it may also authorize or provide for the construction of bridges over streams between two states, and provide that such bridges shall be free for the crossing of all trains of railroads terminating on the sides of the river respectively.<sup>79</sup> The states may authorize the construction of railroad or other bridges across navigable streams, provided they do not interfere with any existing regulations of congress applicable to such streams, and do not constitute a material impediment to the course of commerce on those rivers. The latter requirement presents a question of fact which must be decided in each case with reference to its peculiar circumstances. But in general, if the obstruction to navigation caused by the bridge is greater than the benefit to the gen-

<sup>77</sup> Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876.

<sup>78</sup> Pacific Exp. Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250.

<sup>79</sup> See Railroad Co. v. Richmond, 19 Wall. 584; Pennsylvania v. Wheeling Bridge Co., 13 How. 518; Miller v. Mayor, etc., of New York, 109 U. S. 385, 3 Sup. Ct. 228; South Carolina v. Georgia, 93 U. S. 4; Escanaba & L. M. T. Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185.

eral commerce of the country resulting from it, it may be abated as a nuisance, otherwise it will stand.<sup>80</sup> But it must be remembered that, for the purpose of regulating commerce, congress retains paramount and plenary control over the navigable waters of the United States. Congress is not precluded, by anything that may have been done under the authority of a state, from assuming entire control, abating any erections that may have been made, and preventing any others from being made except in conformity with such regulations as it may prescribe. Or on the other hand, it may legalize a state bridge and declare it to be a lawful structure.<sup>81</sup>

*Same—Telegraphs.*

With reference to the electric telegraph, it has been said: "It cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of congress, certainly as against hostile state legislation."<sup>82</sup> Hence congress may regulate telegraphic communication between the several states, and where a state has given exclusive privileges which would preclude free intercourse, it may, under this power and the power to establish post roads, provide for the construction of competing lines.<sup>83</sup> No state can impose an impediment to the freedom of such communication by attempting to regulate the delivery in other states of messages received within its own borders.<sup>84</sup> In regard to state taxation of telegraph companies, the rule settled by the United States supreme court, with reference to such companies as have accepted the provisions of the act of congress relative to their use of the public domain,<sup>85</sup> is that they "cannot be taxed by the authorities of a state for any messages, or receipts arising from

<sup>80</sup> *Cardwell v. American Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423; *Gilman v. Philadelphia*, 3 Wall. 713; *Hamilton v. Vicksburg, S. & P. R. Co.*, 119 U. S. 230, 7 Sup. Ct. 206; *Jolly v. Terre Haute Drawbridge Co.*, 6 McLean, 237, Fed. Cas. No. 7,441; *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. 74, Fed. Cas. No. 12,851.

<sup>81</sup> *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 311; *Wheeling Bridge Case*, 13 How. 518, 18 How. 421.

<sup>82</sup> *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1.

<sup>83</sup> *Cooley*, Const. Law (2d Ed.) 64.

<sup>84</sup> *W. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126.

<sup>85</sup> *Rev. St. U. S.* §§ 5263-5268.

messages, from points within the state to points without, or from points without the state to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that messages of the former class are elements of commerce between the states, and not subject to legislative control of the states, while the latter class are elements of internal commerce, solely within the limits and jurisdiction of the state, and therefore subject to its taxing power."<sup>86</sup> Hence a single tax assessed under the laws of a state upon receipts of a telegraph company, which were partly derived from interstate commerce and partly from commerce within the state, and which were capable of separation, but were returned and assessed in gross and without separation or apportionment, is invalid in proportion to the extent that such receipts were derived from interstate commerce, but is otherwise valid.<sup>87</sup> But a state may lawfully provide that every telegraph company owning a line in the state shall be taxed on such proportion of the whole value of its capital stock as the length of the line within the state bears to the whole length of the line everywhere, after deducting the value of any property owned by it and subject to local taxation in the cities and towns of the state. Such a tax is not an unlawful interference with interstate commerce.<sup>88</sup> It has also been ruled that the transmission of messages by the telephone may be interstate commerce.<sup>89</sup>

*Same—Trade Marks.*

Statutes have been passed by congress purporting to secure to merchants and manufacturers exclusive rights in the use of registered trade marks. But the validity of such laws, at least in so far as they are not confined to commerce with foreign nations or among the several states, but virtually apply to all commerce at all points, cannot be sustained under the commerce clause of the constitution. Whether or not a trade mark has such a relation to commerce as

<sup>86</sup> *W. U. Tel. Co. v. Alabama State Board of Assessment*, 132 U. S. 472, 10 Sup. Ct. 161.

<sup>87</sup> *Ratterman v. W. U. Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127; *Telegraph Co. v. Texas*, 105 U. S. 460.

<sup>88</sup> *Massachusetts v. W. U. Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889; *W. U. Tel. Co. v. Attorney General*, 125 U. S. 530, 8 Sup. Ct. 961.

<sup>89</sup> *In re Pennsylvania Tel. Co.* (N. J. Ch.) 20 Atl. 846.

to bring it within congressional control when used or applied to the classes of commerce which fall within that control, remains still an unsettled general question.<sup>90</sup>

*Same—Penal Legislation.*

The power of congress to regulate commerce gives it also the right and power to provide by law for the punishment of offenses committed against commerce or of such a character as to defeat or obstruct it. For example, it has power to define and punish larceny from a ship, even when the vessel is not at sea.<sup>91</sup>

*Same—Commercial Law.*

This clause of the constitution cannot be so broadly interpreted as to give congress the power to enact a general code of commercial law which should be binding on the several states and their courts. Some incidents or branches of the law of merchants may come within the regulative power of the federal government under this provision, and the individual states are so far prohibited from regulating it that their acts must impose no restriction or hindrance upon foreign or interstate commerce. Also, the courts of the United States do not consider themselves bound by the decisions of the state courts on questions of general commercial law, but will be guided by their own conception of the doctrines of the mercantile law.<sup>92</sup> To this extent, therefore, there may be said to be a general commercial law of the United States, but its origin is not derived from the power of congress to regulate commerce.

*Same—Limitations on the Power.*

The power of congress to regulate foreign and interstate commerce is subject to two restrictions or limitations, prescribed in the same instrument by which the authority is granted. In the first place, the constitution provides that no tax or duty shall be laid on articles exported from any state. And secondly, it is provided that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."<sup>93</sup>

<sup>90</sup> Trade Mark Cases, 100 U. S. 82.

<sup>91</sup> U. S. v. Coombs, 12 Pet. 72.

<sup>92</sup> Oates v. National Bank, 100 U. S. 230.

<sup>93</sup> Const. U. S. art. 1, § 9.

*State Interference with Commerce Power.*

The power of congress to regulate foreign and interstate commerce involves a corresponding limitation upon the power of the states. That is, it is not within the lawful power of a state to regulate such commerce, or to impose restrictions or conditions upon it, or to interfere with it in any manner which would be inconsistent with the paramount control of congress or with the specific acts or the general policy of congress in regard thereto. Thus a state law which imposes limitations upon the powers of a corporation, created under the laws of another state, to make contracts within the state for carrying on commerce between the states, violates this clause of the constitution.<sup>94</sup> And so far as it may be necessary to protect the products of other countries and states from discrimination by reason of their foreign origin, the power of the national government over commerce reaches the interior of every state in the Union.<sup>95</sup> Hence a state law which prevents a non-resident manufacturer of liquors from sending his goods into the state, and there disposing of them in the original packages, through a clerk located there, is void as a regulation of interstate commerce.<sup>96</sup>

*Same—Taxation.*

Certain of the limitations upon the taxing power of the states, growing out of the control of congress over commerce, have already been noticed. But it remains necessary further to develop the general principles and to cite some further illustrations. In the first place, a tax distinctly laid on the commerce which comes under the regulation of congress is void, even though congress has refrained from legislating on the subject.<sup>97</sup> The fairest and most just construction of the constitution "leads to the conclusion that no state has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that

<sup>94</sup> *Cooper Manuf'g Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739.

<sup>95</sup> *Guy v. Baltimore*, 100 U. S. 434.

<sup>96</sup> *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725.

<sup>97</sup> *M'Culloch v. Maryland*, 4 Wheat. 316, 425; *Brown v. Maryland*, 12 Wheat. 419, 437; *Low v. Austin*, 13 Wall. 29; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592.

such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress.”<sup>98</sup> A tax on freight taken up within a state and carried out of it, or taken up out of a state and brought within it, is a tax on commerce between the states and therefore unconstitutional.<sup>99</sup> But “while interstate commerce cannot be regulated by a state, by the laying of taxes thereon in any form, yet whenever the subjects of taxation can be separated, so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising from commerce solely within its own territory.”<sup>100</sup> Goods, the product of a state, intended for exportation to another state, are liable to taxation as part of the general mass of property of the state of their origin, until actually started in course of transportation to the state of their destination, or delivered to a carrier for that purpose. That is, it is not until the transit has commenced which is to end out of the state that the goods become the subject of interstate commerce, and as such are subject to national regulation and cease to be taxable by the state of their origin.<sup>101</sup> And conversely, goods sent from one state to another cease to be in transit, and can be subjected to taxation, the moment they reach their place of destination and are there offered for sale, provided they are taxed as other goods are, and not by reason of their being brought into the state from another state, and are not subjected to any unfavorable discrimination.<sup>102</sup> A tax laid by a state law in such a manner as to discriminate unfavorably against goods which are the product or manufacture of another state, is an unlawful regulation of commerce.<sup>103</sup> And a state license tax on “drummers” which op-

<sup>98</sup> *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380; *Fargo v. Michigan*, 121 U. S. 230, 7 Sup. Ct. 857; *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118.

<sup>99</sup> *State Freight Tax Cases*, 15 Wall. 232.

<sup>100</sup> *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163.

<sup>101</sup> *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091.

<sup>102</sup> *Pittsburg & S. Coal Co. v. Bates*, 40 La. Ann. 226, 3 South. 642.

<sup>103</sup> *Woodruff v. Parham*, 8 Wall. 123; *Hinson v. Lott*, *Id.* 148; *Webber v. Virginia*, 103 U. S. 344; *Welton v. Missouri*, 91 U. S. 275; *Tiernan v. Rinker*, 102 U. S. 123.

erates to the disadvantage of non-resident manufacturers or dealers, or tends to discriminate against the introduction and sale of the products of another state, is for the same reason void.<sup>104</sup> But yet the state has the right to "tax trades, professions, and occupations, in the absence of inhibition in the state constitution in that regard, and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the constitution."<sup>105</sup> The business of insurance, as ordinarily conducted, is not commerce, and a corporation having an agency by which it conducts such business in another state, is not engaged in interstate commerce. Hence this provision of the constitution does not prevent the state from taxing foreign insurance companies or prescribing the conditions on which they may do business within its limits.<sup>106</sup> Neither is there any violation of the constitution in a tax imposed by a state upon brokers dealing in money or exchange. It is true that foreign bills of exchange are instruments of commerce. But such a tax is not laid specifically upon bills of exchange, or upon them as instruments of commerce.<sup>107</sup> For similar reasons, a state tax on legacies or successions payable to aliens is not repugnant to the constitution. Such legacies are not "exports," and the tax has no relation to commerce.<sup>108</sup>

*Same—Police Power.*

The states have no rightful authority to regulate or interfere with foreign or interstate commerce under the pretense of enacting police regulations. The commerce power of congress and the police power of the states are both necessary and both must be sustained, but neither should encroach upon the proper sphere of the other. This will

<sup>104</sup> Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. 454; Hurford v. State, 91 Tenn. 669, 20 S. W. 201; Corson v. Maryland, 120 U. S. 502, 7 Sup. Ct. 655; Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851.

<sup>105</sup> Ficklen v. Shelby County Taxing Dist., 145 U. S. 1, 12 Sup. Ct. 810.

<sup>106</sup> Paul v. Virginia, 8 Wall. 168; State v. Phipps, 50 Kan. 609, 31 Pac. 1097; Insurance Co. of North America v. Com., 87 Pa. St. 173.

<sup>107</sup> Nathan v. Louisiana, 8 How. 73.

<sup>108</sup> Mager v. Grima, 8 How. 490.

be more fully shown in the chapter specially devoted to the consideration of the police power.

*Interstate Commerce Act.*

The most important legislation of congress, in the exercise of its power to regulate commerce among the several states, is that which is embodied in the act of 1887, commonly called the "Interstate Commerce Act."<sup>109</sup> By the terms of this act, it applies to all common carriers engaged in the transportation of persons or property, by rail or water or both, under a common control or management or arrangement, from one state to another, or from any point in the United States into a foreign country, or from a point in the United States through a foreign country to another point in the United States. But the act is not to apply to traffic carried on wholly within a state. All charges made by such carriers for services rendered in such business shall be reasonable and just. No unjust discrimination shall be made, whether by rebate, special rate, drawback, or other device, nor shall any undue preference be given to any person, corporation, or locality, or to any particular description of traffic. Equal facilities for the interchange of traffic shall be extended to connecting lines, and no discrimination shall be made as between such lines. No greater aggregate charge shall be made for a "short haul" than for a "long haul," except by authorization of the commissioners. Carriers are prohibited from pooling their freight or earnings, and combinations among carriers, intended to prevent the transportation of goods from being continuous to their place of destination, are declared unlawful. A right of action for damages is given to any person injured by a violation of any of the provisions of the act. A commission, composed of five members, is established for carrying into effect the provisions of the act, and they are authorized to hear and investigate complaints, and to enforce the provisions of the law. All common carriers subject to the provisions of the act are required to make annual reports to the commission, setting forth certain statistics of their business.

*Commerce with Indian Tribes.*

The power of congress to regulate commerce with the Indian tribes is not territorially restricted. It is immaterial, with respect

<sup>109</sup> 24 Stat. 379.

to the exercise of this power, whether the Indians are located on reservations or within the territories or even within the limits of a state. And it extends to all Indians who retain their tribal relation, and to each of them, wherever they may be found. Hence an act of congress which makes it a penal offense to sell liquor to an Indian under charge of an Indian agent, although the sale may be made outside of any Indian reservation and within the limits of a state, is valid and constitutional.<sup>110</sup> And congress has power to prohibit all intercourse in the nature of commerce with the Indian tribes, except such as may be carried on under a license.<sup>111</sup>

*Naturalization.*

The power of congress to provide a uniform system for the naturalization of aliens is exclusive, and its exercise is entirely incompatible with the exercise of any similar authority on the part of the several states.<sup>112</sup> An alien is one who, in consequence of his birth under a foreign jurisdiction, is not by nature entitled to the privileges of citizenship in the particular state or country. And naturalization is the act by which, in pursuance of lawful authority, he is invested with the rights, privileges, and immunities belonging to the natural born citizen. The propriety of confiding the power of naturalization to the national government exclusively is supported by several obvious reasons. In the first place, our foreign intercourse is committed to the federal government exclusively, and as it is one of the privileges of American citizens to claim the protection of that government against all aggressions upon their rights by foreign powers or their agents, it is peculiarly the province of the United States to determine who are the persons entitled to that character. Again, under the constitution the citizens of each state are entitled to all the privileges and immunities of citizens in all the other states. And

<sup>110</sup> U. S. v. Holliday, 3 Wall. 407. See, also, Worcester v. Georgia, 6 Pet. 515; Johnson v. McIntosh, 8 Wheat. 543; Jackson v. Goodell, 20 Johns. 188.

<sup>111</sup> U. S. v. Cigna, 1 McLean, 254, Fed. Cas. No. 14,795.

<sup>112</sup> U. S. v. Villato, 2 Dall. 370, Fed. Cas. No. 16,622; Chirac v. Chirac, 2 Wheat. 259; Houston v. Moore, 5 Wheat. 1, 49; Thurlow v. Massachusetts, 5 How. 504, 585; Passenger Cases, 7 How. 283, 556; Golden v. Prince, 3 Wash. C. C. 313, Fed. Cas. No. 5,509. The early case of Collet v. Collet, 2 Dall. 294, Fed. Cas. No. 3,001, holding the contrary opinion, has long since been discredited.

if each state enjoyed the power of investing whomsoever it might choose with the character of citizenship, it could grant to any class or race of foreigners all the rights and privileges in other states which those states would be able to confer upon the persons of their own choice, thus introducing an element of intolerable discord. And further, any one state or district would be able to obtain great and unfair advantages over another by inducements held out to foreigners in easier measures of naturalization and shorter terms of probation.<sup>113</sup>

But while the states are thus prohibited from granting naturalization, it does not follow that they may not legislate on the subject of aliens and their rights and disabilities. For example, each state may grant to aliens the privilege of holding and transmitting real estate within its limits, or it may withhold this right. Again, the state may confer upon an alien, after he has resided a certain length of time within its borders, or on other conditions, the right of suffrage. And hence follows a curious anomaly in our laws. For it must be observed that the constitution of the United States does not confer the right of voting upon any one. Neither does it declare that voters for federal officers must be citizens of the United States, nor prescribe any qualification for those who shall be entitled to participate in federal elections other than that they "shall have the qualifications requisite for electors of the most numerous branch of the state legislature."<sup>114</sup> As a result, it is entirely possible for a state to confer upon a person such rights and qualifications as will entitle him to vote for representatives in congress, and for the members of the legislature which will elect United States senators, and even for the members of the electoral college which will choose the President, while nevertheless, for all purposes of federal jurisdiction and federal law, he remains as much an alien as if he had never set foot in the United States.<sup>115</sup> And this state of affairs actually exists in some of the western states.

In this sense and to this extent, the state can invest aliens with the privileges of its own citizenship. But it cannot make them

<sup>113</sup> Pom. Const. Law, § 386.

<sup>114</sup> Const. U. S. art. 1, § 2.

<sup>115</sup> 1 Hare, Am. Const. Law, 521; Cooley, Const. Law (2d Ed.) 79; Pom. Const. Law, §§ 208-210; *Minneapolis v. Reum*, 6 C. C. A. 31, 56 Fed. 576.

citizens of the United States. Nor can it make them "citizens of a state" in any complete sense. Whatever rights and immunities it may confer upon them must be restricted to its own territory and its own laws. Thus the individual states, in dealing with the status of the alien, cannot grant to him those privileges and immunities which the constitution guaranties and secures to the "citizens of each state" to be enjoyed in all the other states.<sup>116</sup>

Naturalization may be effected in at least four ways. First, by the grant of the privilege to certain named individuals. Second, under general laws of which any person who fulfills the requisite conditions may avail himself. Third, when the United States acquires territory formerly belonging to a foreign power, with its people, the latter thereupon become citizens of the United States. This was the case with the inhabitants of Florida, upon its cession by Spain to the United States. Fourth, there may be a collective naturalization upon the admission of a territory to statehood, including all those who are resident in the territory and included in the new political community, but who were not previously citizens of the United States.<sup>117</sup>

Congress has seen fit to restrict the privilege of naturalization. It is not accorded to aliens of all nations and races. Thus, persons of the Mongolian race are not entitled to be admitted as citizens of the United States.<sup>118</sup>

#### *Bankruptcy.*

The power of congress to enact uniform laws on the subject of bankruptcies does not deprive the states of the power to pass laws dealing with the same subject when there is no national bankrupt law in existence. But as soon as congress adopts a measure of this character, all the state laws relating to bankruptcy or insolvency are thereby superseded and suspended until the national law shall be repealed.<sup>119</sup> State laws, when lawfully in force, are subject to

<sup>116</sup> *Dred Scott v. Sandford*, 19 How. 393; *Lanz v. Randall*, 4 Dill. 425, Fed. Cas. No. 8,080.

<sup>117</sup> *Boyd v. Nebraska*, 143 U. S. 135, 170, 12 Sup. Ct. 375.

<sup>118</sup> *In re Hong Yen Chang*, 84 Cal. 163, 24 Pac. 156; *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104; *In re Look Tin Sing*, 21 Fed. 905.

<sup>119</sup> *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 213; *Baldwin v. Hale*, 1 Wall. 223; *Ex parte Eames*, 2 Story, 322, Fed. Cas. No. 4,237.

the limitation that they cannot affect debts previously contracted (since that would have the effect to impair the obligation of contracts) and that they have no application to non-resident creditors, unless it be with their own consent.<sup>120</sup> But since there is nothing in the federal constitution to prohibit congress from passing laws impairing the obligation of contracts, it is universally conceded that a national bankrupt law, though it includes such features, with provisions compulsory upon creditors, is valid and constitutional.<sup>121</sup> And although formerly merchants and traders alone were subject to the bankruptcy laws, it is competent for congress to bring all persons within their purview.<sup>122</sup> And a national bankrupt law which, by its terms, is made applicable to all the states alike, without distinction or discrimination, is not unconstitutional merely because its operation may be wholly different in one state from another; for example, in the matter of exemptions.<sup>123</sup> Thus far in our history this power of congress has been exercised three times, but only for a brief period in each instance. The bankrupt law of 1800 was repealed in 1803. That of 1841 was repealed in 1843. That of 1867 was repealed in 1878.

*Standard of Weights and Measures.*

The authority given to congress to fix the standard of weights and measures is another illustration of the powers which were deemed proper to be confided to the national legislature for the sake of securing uniformity and on account of their relation to trade and commerce. So far, however, nothing has been done by congress in the execution of this power, except to provide a stand-

<sup>120</sup> *Gilman v. Lockwood*, 4 Wall. 409; *Brown v. Smart*, 145 U. S. 454, 12 Sup. Ct. 958.

<sup>121</sup> *Evans v. Eaton*, Pet. C. C. 322, Fed. Cas. No. 4,559; *In re Owens*, 12 N. B. R. 518, Fed. Cas. No. 10,632; *Keene v. Mould*, 16 Ohio, 12; *Morse v. Hovey*, 1 Barb. Ch. 404.

<sup>122</sup> *Cooley*, Const. Law, 78; *Silverman's Case*, 1 Sawy. 410, Fed. Cas. No. 12,855; *In re California Pac. R. Co.*, 3 Sawy. 240, Fed. Cas. No. 2,315.

<sup>123</sup> *Darling v. Berry*, 4 McCrary, 470, 13 Fed. 659; *In re Smith*, 2 Woods, 458, Fed. Cas. No. 12,996; *In re Appold*, 16 Am. Law Reg. 624, Fed. Cas. No. 499; *In re Beckerford*, 1 Dill. 45, Fed. Cas. No. 1,209. Compare *In re Deckert*, 10 N. B. R. 1, Fed. Cas. No. 3,728; *In re Shipman*, 14 N. B. R. 570, Fed. Cas. No. 12,791.

ard troy pound for the regulation of the coinage, and to pass a permissive statute for the use of the metric system throughout the United States. In the mean time, and until congress shall act, each state has the right and power to adopt its own standard for the regulation of weights and measures.<sup>124</sup> But if congress should at any time proceed to adopt a uniform national system, all state laws, in so far as they might be inconsistent therewith, would be suspended and superseded.

*Punishment of Counterfeiting.*

The power of congress to "provide for the punishment of counterfeiting the securities and current coin of the United States" would naturally flow, says Story, "as an incident from the antecedent powers to borrow money and to regulate the coinage, and indeed, without it, those powers would be without any adequate sanction."<sup>125</sup> The "securities" here mentioned might be extended so as to include all instruments by which the rights and interests of the general government are secured. But the context and the peculiar language used show that the word is to be restricted to the evidences of indebtedness which the United States may have issued in pursuance of its power to borrow money. The bonds, treasury notes, certificates, and other written promises issued by the United States are within the class to which the term may properly be applied.<sup>126</sup> Since the grant of a greater power always includes the less, it is within the authority of congress to provide for the punishment, not only of making counterfeit coin, but also of passing counterfeit money, of having it in possession with intent to pass it, and of bringing it into the United States with intent to pass it.<sup>127</sup> But this power vested in congress does not preclude a state from passing a law to punish the offense of circulating counterfeit coin of the United States. The two offenses—that of counterfeiting the coin, and that of passing counterfeit money—are essentially different in their character. The former is an offense directly against the government, by which individuals may be affected; the latter is a private wrong by which the government may

<sup>124</sup> Weaver v. Fegely, 29 Pa. St. 27.

<sup>125</sup> 2 Story, Const. § 1123.

<sup>126</sup> Pom. Const. Law, § 417.

<sup>127</sup> U. S. v. Marigold, 9 How. 500.

be remotely, if in any degree, reached.<sup>128</sup> And it has been held that the state courts, as well as the federal courts, have jurisdiction to try persons charged with making counterfeit money.<sup>129</sup> Inasmuch as the general government is bound to protect to other nations the rights secured to them by the law of nations, congress also has the power to enact laws punishing the counterfeiting of foreign securities.<sup>130</sup>

*The Postal System.*

Under the articles of confederation, congress was invested only with the power of establishing and regulating post-offices "from one state to another" throughout the United States, and exacting such postage on the papers passing through the same as might be requisite to defray the expenses of the said office. The inadequacy of this provision was very apparent, and the larger grant of power in the constitution was given because it was felt that the subject was national in its character, and that it could be properly regulated only by a uniform and exclusive system. The words of the grant are awkward and ill-defined. But they have been taken by common consent as intended to invest congress with the exclusive control over the entire postal system, with all its incidents and accessories. The power, as thus understood, includes the organization of the post-office department, the appointment of its numerous officers, the designation of the cities and towns in which local post-offices shall be established, the providing of suitable accommodations for the post-office in such places, either by renting, buying, or building houses, the determination of the routes over which the mails shall be carried, the making of contracts for the transportation of the mails by railroads, steamboats, or other carriers, the purchase of the numerous supplies of every sort needed for the business of the post-office, the manufacture of stamps, and the definition and punishment of crimes which tend to defeat the operations of the government under this power, or endanger the security of the mails.<sup>131</sup>

<sup>128</sup> Fox v. Ohio, 5 How. 410; Moore v. Illinois, 14 How. 13.

<sup>129</sup> Sizemore v. State, 3 Head, 26; People v. White, 34 Cal. 183.

<sup>130</sup> U. S. v. Arjona, 120 U. S. 479, 7 Sup. Ct. 628; U. S. v. White, 27 Fed. 200.

<sup>131</sup> U. S. v. Marsells, 2 Blatchf. 108, Fed. Cas. No. 15,724.

The interpretation of the word "establish," in this grant of power, has given rise to serious debates. On the one hand, it has been contended that the power of congress, in this regard, is limited to designating or pointing out the existing roads or highways which shall be used as post roads, and securing the right of way thereon for the mails. On the other hand, it has been thought that the grant includes authority to construct or lay out roads, or assist in the building of railroads, to be so used, whenever in the judgment of the government such a course should be necessary or conducive to the better administration of the postal system. The discussion of this question would be too extensive for our present limits, and we shall be content with referring the reader to some of the principal authorities.<sup>132</sup>

Every road within a state, including railroads, canals, turnpikes, and navigable waters, existing or created within a state, becomes a post road when by law or by the action of the post-office department provision is made for the transportation of the mails upon or over it.<sup>133</sup> And when a part of an established route is found to be impracticable, by reason of being almost or quite impassable, the post-office department may change that part without thereby creating a new route not authorized by law.<sup>134</sup> It is also held that the control of congress over the mails gives it a right to decide what matter shall be carried in the mails. And this right necessarily involves the right to determine what classes of matter shall be considered unmailable. Hence the act of congress prohibiting the use of the mails for the dissemination of advertisements or other papers relating to lotteries is within the power of that body and is not unconstitutional. And the same reasoning and conclusion apply to the statute which forbids the depositing in the mails of any obscene or indecent matter.<sup>135</sup>

<sup>132</sup> See 2 Story, Const. §§ 1128-1150; 1 Kent, Comm. 267; *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 421; *Dickey v. Maysville, W. P. & L. Tp. Road Co.*, 7 Dana, 113.

<sup>133</sup> Cooley, Const. Law (2d Ed.) §5.

<sup>134</sup> *U. S. v. Barlow*, 132 U. S. 271, 10 Sup. Ct. 77.

<sup>135</sup> *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374; *U. S. v. Bennett*, 16 Blatchf. 338, Fed. Cas. No. 14,571.

*Patents and Copyrights.*

At common law, a writer is protected against the unauthorized publication of his manuscripts and letters, but when once his work is published, he must look for protection against piracy solely to the laws of congress.<sup>136</sup> The power given to congress over the subject of patents and copyrights is plenary, and may be exercised at its own discretion, the only restriction being that the grant of exclusive privileges shall be for a "limited time."<sup>137</sup> Thus, congress may make special grants to particular persons, or special extensions of grants, and it may give to its grants a retrospective operation. But the acts of congress in this behalf can have no ex-territorial effect.<sup>138</sup>

It has been suggested that the power of congress to grant patents and copyrights is not exclusive, but concurrent with that of the states, provided always that the acts of the latter do not contravene the acts of congress.<sup>139</sup> However this may be, it is settled that the rights secured to authors and inventors by this provision of the constitution, and by the statutes passed in pursuance of it, are not in derogation of the power of the several states to enact laws, in the nature of police regulations, relating to the sale and transfer of patent rights, or to dealing in the patented articles, or even prohibiting the manufacture and sale of such articles, if the same shall be deemed injurious to the safety, health, or morals of the community.<sup>140</sup>

The power here vested in congress gives it no authority to legislate for the protection of trade marks (a trade mark being neither an invention, a discovery, nor a writing, within the meaning of this clause of the constitution) except in so far as such legislation may

<sup>136</sup> *Wheaton v. Peters*, 8 Pet. 591; *Pope v. Curl*, 2 Atk. 342; *Bartlett v. Crittenden*, 5 McLean, 32, Fed. Cas. No. 1,076.

<sup>137</sup> *McClurg v. Kingsland*, 1 How. 202; *Evans v. Eaton*, Pet. C. C. 322, Fed. Cas. No. 4,559; *Bloomer v. Stolley*, 5 McLean, 158, Fed. Cas. No. 1,559; *Blanchard v. Sprague*, 2 Story, 164, Fed. Cas. No. 1,518; *Blanchard's Gun Stock Turning Factory v. Warner*, 1 Blatchf. 258, Fed. Cas. No. 1,521.

<sup>138</sup> *Brown v. Duchesne*, 19 How. 183.

<sup>139</sup> *Livingston v. Van Ingen*, 9 Johns. 507.

<sup>140</sup> *Patterson v. Kentucky*, 97 U. S. 501; *In re Brosnahan*, 18 Fed. 62; *People v. Russell*, 49 Mich. 617, 14 N. W. 568; *New v. Walker*, 108 Ind. 365, 9 N. E. 386; *Herdie v. Roessler*, 109 N. Y. 127, 16 N. E. 198; *State v. Bell Telephone Co.*, 36 Ohio St. 296.

be limited to the use of trade marks in foreign and interstate commerce.<sup>141</sup> But congress has power to extend the benefit of the copyright law to the author, inventor, designer, or proprietor of a photograph, so far as it is a representation of original intellectual conceptions.<sup>142</sup>

*Establishment of Courts.*

The power of congress to establish tribunals inferior to the supreme court has already been fully considered in connection with the subject of federal jurisdiction. Reference should here be made to the chapter dealing with that topic.

*Definition and Punishment of Piracies.*

The propriety, and even necessity, of confiding to congress alone the power to define and punish piracies and felonies committed on the high seas is to be deduced from the fact that the general government (and not the individual states) is the power which has control of our foreign relations, and to which other nations must look for co-operation in enforcing the rules of international law, as well as for the redress of injuries committed against that law. Piracy is robbery, or a forcible depredation, on the high seas, committed without lawful authority, and done *animo furandi*, and in the spirit and intention of universal hostility.<sup>143</sup> And this definition of the offense by the international law is so well understood and so universally accepted that a statute, passed by congress in the execution of this power, for the punishment of piracy "as defined by the law of nations" was held to be sufficient without further definition.<sup>144</sup> "But the manifest purpose of this provision is to empower congress to provide for the punishment as crimes of all such infamous acts committed on the high seas as constitute offenses against the United States or against all nations."<sup>145</sup> For instance, the slave trade is not piracy by the law of nations.<sup>146</sup> But as congress has the power, not merely

<sup>141</sup> Trade Mark Cases, 100 U. S. 82; 21 Stat. 502.

<sup>142</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279.

<sup>143</sup> 1 Kent, Comm. 183; *U. S. v. Palmer*, 3 Wheat. 610; *U. S. v. Smith*, 5 Wheat. 153.

<sup>144</sup> *U. S. v. The Malek Adhel*, 2 How. 210.

<sup>145</sup> Cooley, Const. Law (2d Ed.) 88.

<sup>146</sup> *The Le Louis*, 2 Dod. 210; *The Antelope*, 10 Wheat. 66.

to punish piracy but also to define it, it is entirely competent for congress to enact that the traffic in slaves shall be deemed piracy and punished accordingly, as many other nations have done. But robbery committed on a ship belonging to subjects of a foreign country, by one who is not a citizen of the United States, is a crime only against such foreign country and not punishable under the laws of the United States.<sup>147</sup>

The term "high seas," as here used, means tide waters, below low water mark, which are without the territorial limits of the country, excluding those portions of the sea which lie *infra fauces terrae*, such as tidal rivers, bays, basins, harbors, roadsteads, and the like.<sup>148</sup>

This clause of the constitution also gives congress power to define and punish offenses against the law of nations. Illustrations of the exercise of this power are to be found in the "neutrality laws," which forbid the fitting out and equipping of armed vessels, or the enlisting of troops, for either of two belligerent powers with which the United States is at peace; and again, in the laws which prohibit the organizing within the country of armed expeditions against friendly nations.<sup>149</sup>

#### *War Powers—Power to Declare War.*

The constitution confers upon congress the power to "declare war." This is the formal method of inaugurating hostilities against a foreign nation. But a war may be commenced, prosecuted, and terminated without any actual declaration of war by either of the belligerents.<sup>150</sup> And therefore congress also has the authority, instead of formally declaring war, to recognize the existence of actual hostilities and declare that a war in fact exists. \* The power to declare war necessarily includes the authority to prosecute the war, and make it effective, by all and any means, and in every manner, known to and exercised by any independent nation under the rules and laws

<sup>147</sup> U. S. v. Palmer, 3 Wheat. 610; U. S. v. Kessler, Baldw. 15, Fed. Cas. No. 15,528.

<sup>148</sup> U. S. v. Wittberger, 5 Wheat. 76; U. S. v. Grush, 5 Mason, 290, Fed. Cas. No. 15,268; U. S. v. Ross, 1 Gall. 624, Fed. Cas. No. 16,196; U. S. v. Pirates, 5 Wheat. 184.

<sup>149</sup> Pom. Const. Law, § 423.

<sup>150</sup> The Eliza Ann, 1 Dod. 244.

of war as the same are ascertained by the principles of international law. Hence it includes the power to authorize the seizure and confiscation of enemies' property, including debts due from citizens to alien enemies, and to dispose of it absolutely at the will of the captor.<sup>151</sup> It was in pursuance of this power, and as a war measure, that the federal authorities took the step of proclaiming the freedom of persons held in slavery by the insurgents during the war of the rebellion, and it was on this ground that the courts sustained the validity of that action.<sup>152</sup> But this power belongs to the government as such, and cannot be claimed or exercised by individuals unless under governmental sanction. Herein is seen the importance of the clause which gives to congress power to "make rules concerning captures on land and water." For until such rules are made, no private person can enforce any belligerent rights, by way of confiscation or forfeiture against enemies' property, nor can the courts give them any legitimate operation.<sup>153</sup>

*Same—Armies.*

The constitution provides that congress shall have power to "raise and support armies, but no appropriation of money to that use shall be for a longer term than two years." This clause of the constitution was bitterly opposed in the states before the adoption of the instrument. This opposition sprang from the jealousies of the states and from the extreme apprehension lest the grant of such a power might be the means of putting the whole country under a military domination or the rule of a standing army, and so imperilling or destroying the rights and securities of private persons. The influence of these fears is seen in the peculiar way in which the war powers were limited and distributed in the constitution as it stands. The President is the commander in chief. But congress is to raise and support the armies and appropriate what may be necessary for their maintenance. There can therefore be no danger that the executive might maintain a standing army of greater numbers or for a longer time than should seem to the people's representatives in congress to

<sup>151</sup> *Miller v. U. S.*, 11 Wall. 268; *Tyler v. Defrees*, Id. 331.

<sup>152</sup> *Slaback v. Cushman*, 12 Fla. 472; *Dorris v. Grace*, 24 Ark. 326; *Weaver v. Lapsley*, 42 Ala. 601; *Hall v. Keese*, 31 Tex. 504.

<sup>153</sup> 2 Story, Const. § 1177; *Brown v. U. S.*, 8 Cranch, 110.

be consistent with the safety and good government of the country. But not even congress is wholly trusted in this respect. For no such appropriations shall be for a longer term than two years. It is therefore always in the power of the people themselves, at every change in the house of representatives, to dictate the policy of the government in regard to the army and its maintenance.

Congress is invested with power to "raise" armies. The means or methods of so doing are not prescribed, and therefore the natural inference is that the federal authorities may resort to any and all means of raising troops which the exigencies of the particular occasion may seem to require, or to such general plans as shall seem to them to be sufficient and effective. Congress may undoubtedly provide for the voluntary enlistment of men into the regular army of the United States, prescribing their term of service and all other matters relating to the duties and engagement of the enlisted man.<sup>154</sup> If it shall seem necessary or proper, the same body may offer inducements, such as bounties or pensions, to enter the military service. In time of war, especially if it is of serious magnitude, the method of replenishing the ranks of the army by voluntary enlistments will generally be found insufficient. In that event, congress, under the general power to raise armies, unlimited as we have said in respect to the means, may resort to conscription or a draft. This was done during the late civil war, and though the validity of the draft laws was sometimes questioned, it was never authoritatively denied.<sup>155</sup> The power to raise armies also includes the right to determine the number of men who shall compose the army, and the method of their apportionment to the different arms of the service, and their organization into divisions, brigades, regiments, and companies. No limi-

<sup>154</sup> *In re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54.

<sup>155</sup> See *Kneidler v. Lane*, 45 Pa. St. 238; *Ex parte Coupland*, 26 Tex. 386; *Barber v. Irwin*, 34 Ga. 27; *Ex parte Tate*, 39 Ala. 254. The last three cases were ruled in the "confederate states" where the same measure was resorted to, and the question depended upon the same constitutional provisions. The practice of impressing seafaring men for service in the English navy was recognized as permissible at common law, and was valid and legal provided the persons impressed were proper objects of the law, and those employed in the service were armed with a proper warrant. *Rex v. Broadfoot*, 18 How. St. Tr. 1323; *Ex parte Fox*, 5 Durn. & E. 276. No such practice is permissible in this country.

tation is found in the constitution as to either the number of the forces or the age or qualification of the men. This is left entirely to the wisdom and discretion of congress. Minors may be enlisted into the service, under the general laws, without the consent of those having authority over them when the law does not require the giving of such consent.<sup>156</sup> The power to "support" the army is equally general in its terms. It authorizes the appropriation and expenditure of money by congress, not only for the pay, transportation, rations, and clothing of the troops, but also for the purchase or manufacture of arms and ammunition, for the maintenance of a medical corps, for the construction and maintenance of forts, arsenals, barracks, and fortifications of all kinds, and for the establishment and maintenance of schools for the instruction and training of officers or of those who are destined to become officers. It has also been thought to justify the construction of military roads, or the creation or purchase of facilities for the rapid mobilization and transportation of troops in case of need. Under this power also congress has created and maintains the department of war, with all its numerous retinue of officers and clerks, and its varied and important duties and functions.

*Same—Government of the Forces.*

The power of congress to "make rules for the government and regulation of the land and naval forces" gives it the authority to ordain and establish what is called military law, that is, a system of general orders and regulations for the organization, discipline, and government of the army and navy. This includes the power to define offenses against the military law and against the good order and government of the forces, and to provide for the trial of such offenses

<sup>156</sup> Ex parte Brown, 5 Cranch, C. C. 554, Fed. Cas. No. 1,972; U. S. v. Bainbridge, 1 Mason, 71, Fed. Cas. No. 14,497. An enlistment is a contract between the soldier and the government. And it is one of those contracts which (like marriage) operate a change in the status of the party, and which cannot be thrown off by him at will, although he may violate his contract. An enlisted soldier, therefore, cannot release himself, or avoid a charge of desertion, by showing that, at the time when he voluntarily enlisted, he was over or under the age at which the law allows recruiting officers to accept enlistments. In re Grimley, 137 U. S. 144, 11 Sup. Ct. 54; In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57.

by courts martial, and to prescribe the punishments to be inflicted. Proceedings in such courts are not required to be commenced by indictment; for the fifth amendment excepts from its provisions "cases arising in the land and naval forces or in the militia when in actual service."

*Same—The Militia.*

Congress has power to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." It may also "provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress." It will be perceived that there are no militia of the United States here provided for, and that the militia of the states are left very much to the government and control of their respective states. Congress may indeed call forth the militia, but only for specified purposes and under certain conditions. They may be enrolled in the service of the United States, and so become subject to the general military law, but only for the purposes mentioned, and even then the appointment of the officers is left to the states. Congress may provide for the organization and discipline of the militia. But if congress does not provide a general system for this purpose, it remains competent for the individual states to take such action in regard to the organization and governance of their militia as they shall deem best. And even when congress has prescribed a discipline, the authority of training the militia in accordance therewith remains in the states. The power over the militia thus reserved to the states is so complete that a state may, unless restrained by its own constitution, enact laws to prevent any body of men whatever, other than the regular militia of the state and the military forces of the United States, from associating themselves together as a military company or organization, or drilling or parading with arms within the state, unless with the governor's consent.<sup>157</sup> But when the militia force is actually employed in the service of the United States, it is subject to the control of congress in all particulars the same as the regular army. Thus the

<sup>157</sup> *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. 580.

officers, though appointed by the states, are subject, in this case, not only to the orders of the President as commander in chief, but also to those of any officer outranking their own who may, under the authority of the President, be placed over them. Congress may provide for calling forth the militia. And this is held to give congress the power to confer the power of calling them forth, under certain circumstances, on the President, as was done by the act of 1795, which is still in force.<sup>158</sup> The militia cannot be called forth to do service out of the limits of the United States. For the laws of the Union can be executed only on its own soil, and there can be no invasion or insurrection beyond those limits. But it is now agreed that there is nothing to prevent the militia, when duly called forth on a proper occasion, from being sent outside of their own states in the service of the general government. A state may lawfully provide that persons belonging to the militia and called forth under the authority of the United States, who neglect or refuse to obey the call, shall be tried by a state court martial and punished according to state laws.<sup>159</sup>

*Same—Letters of Marque.*

A letter of marque is a commission given to a private ship by a government to make reprisals on the ships of another government. The power to grant letters of marque is incidental and implied in the power to declare war. But it is also sometimes resorted to, not as a measure of hostility, but rather as a peace measure, and is intended to prevent the necessity of other or more extreme acts of hostility. It was therefore properly specified as one of the enumerated powers of congress, instead of being left to be inferred from the more general grant of authority to declare war. In 1857, at the close

<sup>158</sup> *Martin v. Mott*, 12 Wheat. 19; *In re Griner*, 16 Wis. 423. These doctrines were not always admitted by the states. Thus, in 8 Mass. 548, we find an opinion of the supreme court of that state to the effect that the commanders in chief of the militia of the several states have the right to determine whether any of the exigencies contemplated by the federal constitution exist, so as to require them to place the militia or any part of them in the service of the United States at the request of the President, to be commanded by him pursuant to the acts of congress; and that, when such exigency exists, the militia so employed cannot be commanded by any other officers than their own, save only the President.

<sup>159</sup> *Houston v. Moore*, 5 Wheat. 1.

of the Crimean war, the congress of plenipotentiaries from the powers which had been engaged in the conflict issued what was called the "Declaration of Paris," prescribing certain rules as to the conduct of war and the protection of neutrals and their property. The first article of this declaration is: "Privateering is and remains abolished." To this declaration most of the great European powers have subscribed, accepting its terms as a part of the international law by which they are to be governed. But the United States has never given its adherence. And it is a serious question whether it would be within the power of congress, or of the President and senate by treaty, to accede to this declaration. For that would amount to a deliberate surrender of a portion of the power confided to congress by the constitution. Whether it could be placed forever in abeyance, so that no future congress could exercise the right to commission privateers, without an amendment to the constitution, is at least very doubtful.

*Government of Ceded Districts.*

Soon after the formation of the federal government, the cession of territory, to constitute the seat of government, contemplated by this clause of the constitution, was made by the states of Maryland and Virginia. The tract thus acquired by the national government was at first called the "Territory of Columbia," but afterwards received the name which it now bears, "The District of Columbia." The portion granted by Virginia was afterwards retroceded to that state by the United States, so that the District, as at present constituted, lies wholly within the exterior boundaries of the original state of Maryland. For some time the District was under a territorial form of government, but this was afterwards abolished, and it is now only a municipal corporation.<sup>160</sup> The local laws of the two states making the cession, existing at that time, were held to remain in force, in so far as they affected rights of property, and until they were changed by congress.<sup>161</sup> But congress has now covered almost the entire field of civil and criminal legislation, by statutes enacted expressly for the District, and but small traces of the original laws of Maryland now remain in force.

<sup>160</sup> *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 10 Sup. Ct. 19.

<sup>161</sup> *Thaw v. Ritchie*, 136 U. S. 519, 10 Sup. Ct. 1037.

Since the constitution invests congress with the exclusive power of legislation for this District, evidently intending that it should act as the local legislature of the District, it has been very seriously questioned whether it was within its lawful power to delegate this authority by the creation of a territorial government, or whether it could ever again lawfully erect a law-making body for the District, at least to the extent of granting to it general legislative authority.<sup>162</sup> It will be perceived that, in respect to the District of Columbia, congress is invested with a double measure of power. The District is a part of the United States, and consequently all acts of congress which it has the power to ordain, as legislating for the United States, have force, so far as they are applicable, in the District. But the power of exclusive legislation over this territory also invests the national legislature with all the authority to make local rules and regulations which is possessed by the legislature of a state in respect to its own citizens. It must not be supposed, however, that in dealing with the District, congress is restricted in the same manner as the legislature of a state. For example, the power of "exclusive legislation" includes the power to tax. But it is not to be supposed that congress, in laying taxes in the District of Columbia, is territorially restricted as is the legislature of a state. That is, to justify such taxation, it is not required to be for district purposes only, but may be for any or all of the purposes for which congress may lawfully exercise the power of taxation. In other words, the general power of congress to lay and collect taxes extends to all places over which the government of the United States extends, and to the District of Columbia and all the territories, as well as to the organized states, and consequently direct taxes may be apportioned among the territories and the District, as well as among the several states.<sup>163</sup>

The power of exclusive legislation also and necessarily implies the right of exclusive jurisdiction.<sup>164</sup> And consequently the states cannot take cognizance of any acts done in the ceded places after the cession, and the inhabitants of those places cease to be citizens of

<sup>162</sup> *Roach v. Van Riswick, McArthur & Mackey* (D. C.) 171.

<sup>163</sup> *Loughborough v. Blake*, 5 Wheat. 317. See, also, *Cohens v. Virginia*, 6 Wheat. 264, 424; 2 Story, Const. § 1226.

<sup>164</sup> *U. S. v. Cornell*, 2 Mason, 60, Fed. Cas. No. 14,867.

the state, and can no longer claim or exercise any civil or political rights under state laws.<sup>165</sup> But this provision of the constitution does not apply to land ceded by a state but not purchased by the Union. The state, in such case, while granting exclusive jurisdiction, may reserve the right to tax private property within the district ceded.<sup>166</sup> And if there has been no cession of the place by the state, although it has been constantly occupied and used, under purchase or otherwise, by the United States, for a fort, an arsenal, or for any other constitutional purpose, the state jurisdiction still remains complete and perfect.<sup>167</sup> As to the limitations upon the power of congress in legislating for the District of Columbia and other ceded places, they must be sought alone in the constitution; there are no others. And these limitations, so far as concerns private and political rights, are found in the first eight and the last three amendments to the constitution. The provisions guarantying trial by jury, for instance, are applicable to the District, and cannot be violated by congress.<sup>168</sup>

<sup>165</sup> *Com. v. Clary*, 8 Mass. 72; *Sinks v. Rees*, 19 Ohio St. 306.

<sup>166</sup> Where the United States acquires lands within the limits of a state by purchase, with the consent of the legislature, for the erection of forts, dock-yards, arsenals, etc., the constitution confers upon the general government exclusive jurisdiction of the tract so acquired. But when it acquires such lands in any other way than by purchase with the legislative consent, the exclusive jurisdiction of the United States is confined to the land and buildings used for the public purposes of the general government. A state may, for such purposes, cede to the United States exclusive jurisdiction over a tract of land within its limits in a manner not provided for in the constitution, and it may prescribe conditions to the cession, if they are not inconsistent with the effective use of the property for the purposes intended. And if a state thus ceding to the United States exclusive jurisdiction over a tract within its limits, reserves to itself the right to tax private property therein, the acceptance of the grant, without dissent by the United States, will imply its consent to the reservation. *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995; *Chicago, R. I. & P. Ry. Co. v. McGlinn*, 114 U. S. 542, 5 Sup. Ct. 1005; *Benson v. U. S.*, 146 U. S. 325, 13 Sup. Ct. 60; *U. S. v. Cornell*, 2 Mason, 60, Fed. Cas. No. 14,867. Offenses committed upon lands purchased by the United States, for the erection of forts, with the consent of the legislature of the state, and of which jurisdiction has been ceded to the United States, are within the jurisdiction of the federal courts. *Kelly v. U. S.*, 27 Fed. 616.

<sup>167</sup> *People v. Godfrey*, 17 Johns. 225; 2 Story, Const. § 1227.

<sup>168</sup> *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301.

*Acquisition of Territory.*

The power of congress to acquire new territory, either by conquest, purchase, or annexation, was much debated at the time of the acquisition of Louisiana from France, in 1803, and in a less degree in connection with the purchase of Florida and of Alaska. It has now come to be recognized and established, rather by precedent and the general acquiescence of the people, than by any strict constitutional justification. In fact, the power cannot be derived from any narrow or technical interpretation of the constitution. But it is necessary to recognize the fact that there is in this country a national sovereignty. That being conceded, it easily follows that the right to acquire territory is incidental to this sovereignty. It is, in effect, a resulting power, growing necessarily out of the aggregate of powers delegated to the national government by the constitution. And if a more positive justification is needed, it may be said that whereas congress has power to make war, it has also the power to acquire territory by conquest; and that since the President and senate possess the power to make treaties with foreign nations, this may be understood as including the right to deal, by treaty, with all the subjects which come within the scope of the negotiations of independent sovereignties.<sup>169</sup>

An act of congress passed in 1856,<sup>170</sup> declared that guano islands taken into possession and occupation by American citizens, might be declared by the President to be "appertaining to the United States." In regard to this statute, the supreme court has recently declared that "by the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of congress concerning guano islands."<sup>171</sup>

<sup>169</sup> 2 Story, Const. §§ 1282-1288; *American Ins. Co. v. Canter*, 1 Pet. 511, 542.

<sup>170</sup> Rev. St. U. S. tit. 72.

<sup>171</sup> *Jones v. U. S.*, 137 U. S. 202, 11 Sup. Ct. 80.

*Disposition of Public Lands.*

Over all the public lands of the United States congress exercises not merely jurisdiction, but also the rights of a proprietor. And under the grant of power to dispose of the territory of the United States, congress may dispose of the public lands as it may see fit. An elaborate system for the survey and sale of the public lands has been devised, and an important bureau of the Department of the Interior is charged with the administration of the laws relating thereto. Congress has passed numerous acts for the disposition of the public domain to actual settlers and purchasers. And it has also, at different times, made extensive grants to railroads or other works of internal improvement on a large scale, as also to educational institutions, and in some cases to the various states. All such acts are unquestionably within the authority of congress, as it possesses the *jus disponendi* of these lands.<sup>172</sup>

*Government of the Territories.*

The general and plenary control of congress over the territories arises not merely from the grant of power in the constitution to make needful rules and regulations respecting them, but also from the right of the national government to acquire territory, flowing from its power to declare war and make treaties. And this plenary control extends to the acts of territorial legislatures.<sup>173</sup> Subject to the limitations expressly or by implication imposed by the constitution, congress has full and complete authority over a territory, and may directly legislate for the government thereof. It may declare a valid enactment of the territorial legislature void, or a void enactment valid, although it reserved in the organic act no such power.<sup>174</sup> It may therefore be regarded as definitely settled that the power of congress over the territories will enable it either to make its own rules and regulations for their government, or to erect territorial forms of government, and invest them with such measure of legislative power as it may deem best. And this power is exclusive, and exempt from all interference or control by the

<sup>172</sup> *U. S. v. Gratiot*, 14 Pet. 526; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548.

<sup>173</sup> *Mormon Church v. U. S.*, 136 U. S. 1, 10 Sup. Ct. 792; *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109; *American Ins. Co. v. Canter*, 1 Pet. 511.

<sup>174</sup> *National Bank v. County of Yankton*, 101 U. S. 129.

states. "The contrary dogma," says Pomeroy, "that the inhabitants of a territory have the entire control of their own local concerns, and may form their own governments independently of the national legislature, never rose above the level of a mere party cry; it never obtained the assent of any department of the government, and it has been distinctly repudiated by the supreme court."<sup>175</sup> In point of fact, the people of a territory, except as congress shall provide therefor, are not of right entitled to any participation in political authority, until the territory becomes a state.<sup>176</sup> As a general rule, however, congress has seen fit to invest the people of the territories with a certain measure of local self-government, by authorizing the election by the people of a legislative assembly, possessing general powers of legislation, subject only to the paramount authority and control of congress itself. Such a body may make any and all laws on rightful subjects of legislation which are not in conflict with the federal constitution, the organic act, treaties, or statutes, and come within the general sphere of legislative action.<sup>177</sup> They may also exercise those powers of sovereignty which are essential to the maintenance of government, such as taxation, the police power, and the power of eminent domain.<sup>178</sup> The organic act (i. e., the act organizing the territory) is to a territory what a constitution is to a state, and the legislative assembly cannot pass any act in opposition to it or in violation of it.<sup>179</sup>

If territory is acquired from a foreign power with a *de facto* government in full operation, this government will continue, with the presumed assent of the people, and in so far as it is not inconsistent with the federal constitution, until congress provides a form of government for the territory.<sup>180</sup>

<sup>175</sup> Pom. Const. Law, § 403.

<sup>176</sup> Cooley, Const. Law (2d Ed.) 171; *American Ins. Co. v. Canter*, 1 Pet. 511; *Territory v. Lee*, 2 Mont. 124; *Reynolds v. People*, 1 Colo. 179; *Carpenter v. Rodgers*, 1 Mont. 90.

<sup>177</sup> *Ferris v. Higley*, 20 Wall. 375; *Trustees for Vincennes University v. Indiana*, 14 How. 268; *Miners' Bank v. Iowa*, 12 How. 1; *Wisconsin v. Doty*, 1 Pin. 396; *Swan v. Williams*, 2 Mich. 427.

<sup>178</sup> *Carson River Lumbering Co. v. Bassett*, 2 Nev. 249; *Lewis Co. v. Hays*, 1 Wash. T. 109.

<sup>179</sup> *Smith v. Odell*, 1 Pin. 449; *Moore v. Koulby*, 1 Idaho, 55.

<sup>180</sup> *Cross v. Harrison*, 16 How. 164, 184.

*Same—The Northwest Territory.*

This was the name given to the great stretch of territory ceded to the United States by Great Britain at the close of the revolutionary war. Out of it were afterwards formed the five states of Ohio, Indiana, Illinois, Wisconsin, and Michigan. In 1787, before the adoption of the constitution of the United States, the congress of the confederation framed an "Ordinance for the Government of the Northwest Territory," which is chiefly interesting to the student of constitutional law on account of the liberal provisions which it made for the security of civil, religious, and political liberty, and for the fact that it prohibited slavery and involuntary servitude, except as a punishment for crime, within the territory. This ordinance was not abrogated by the adoption of the federal constitution, but remained in force as the municipal law of the territory in so far as it was not inconsistent with the constitution.<sup>181</sup>

*Admission of New States.*

The establishment of a state constitution by the people of a territory, which is to be admitted into the sisterhood of states, is regularly accomplished in the following manner: First of all, it is for congress to decide whether the proposed new state shall be admitted. The people of a territory have no right, under any circumstances, to demand admission into the Union, in any such sense that the authorization of congress can be dispensed with. The power to admit new states is vested in congress exclusively. And the people of a territory cannot force their way into the Union by framing and adopting a constitution, electing state officers, and assuming to act as a state. Notwithstanding such action, if they had not the authorization of congress, they would remain a territory and still subject as such to the supervision of the national government. Congress, in its political capacity and as the general guardian of the nation, must then consider whether it is expedient that the territory be admitted as a state. This question is not decided solely with reference to the population of the territory, nor exclusively with regard to the character and qualifications of the people. But there may be other considerations, such as anomalous institutions or inveterate social evils, which induce congress to

<sup>181</sup> *Spooner v. McConnell*, 1 McLean, 337, Fed. Cas. No. 13,245.

withhold its consent. But when it is decided to admit the new state, a statute is passed for that purpose, called an enabling act. It describes the boundaries of the new state, provides that the people may appoint a constitutional convention, prescribing the qualifications of the members thereof and the manner of their election, as well as the qualifications of those who are to be given the right to vote for them, provides that the convention so chosen shall proceed to frame a constitution, which shall provide for a government republican in form and not be repugnant to any provision of the national constitution, and which shall be adopted by the people, and then shall be submitted to congress for its approval, and enacts that upon such approval, the territory shall become and be a state of the Union. The enabling act may, and usually does, contain many other provisions, either as to the principles or contents of the new constitution, or as to matters between the new state and the Union which are deemed best settled upon the admission of the state. But the foregoing elements are those which alone are essential to it.<sup>182</sup> When the constitution thus framed is laid before congress, it is for that body to consider whether it has been properly adopted, and whether it is in conformity to the national constitution, and whether it contains those guaranties of private, social, and political rights which are secured to the citizens of the United States. If these facts are found in its favor, it is approved and thereupon comes into operation and effect as the constitution of the new state.

<sup>182</sup> It is entirely competent for congress, in giving its consent to the admission of a new state, to impose conditions which shall be binding and irrevocable. This may be done by requiring certain clauses to be inserted in the constitution of the new state, or by requiring its legislature to give a formal assent to the stipulations made by congress. These conditions could not be abrogated or evaded by the new state, as, by the adoption of a new or amended constitution, at least in so far as they formed a compact with the general government or were in accordance with the terms of the federal constitution. *Brittle v. People*, 2 Neb. 198. The following may be mentioned as examples of conditions thus imposed: A requirement that the new state shall renounce all jurisdiction and right of taxation over the lands of the United States within its borders; that it shall cede certain territory to another state, or that a disputed boundary shall be settled in a particular way; that slavery shall not be permitted; that no invidious laws shall ever be passed against certain classes or races of people.

It will be noticed that while the constitution provides that new states may be admitted into the Union, it does not prescribe any rules as to the mode or manner of their admission. Consequently, this whole matter being within the control of congress, that body has the power not only to provide a method of establishing a new state, but also of condoning any omission or irregularity in the manner in which its authorization or its directions are carried out. If the people of a territory, without waiting for an enabling act, should meet in convention and frame and adopt a constitution, and present it to congress, and claim admission as a state, it is true, as already stated, that congress would not be compelled to accept their petition. But congress could do so, and no question as to the legality of the admission of the state could thereafter be raised. So, if the provisions of an enabling act should be disregarded or irregularly carried out, it would unquestionably be within the power of congress to waive the irregularity. Again, it is proper for congress, in considering a constitution framed in any of these modes, to accept it conditionally, if it shall find sufficient reason for such a course.

It is not to be supposed that the authority of congress, in this matter, was limited to that domain which belonged to the United States at the adoption of the constitution, or that territory newly acquired may not be erected into a state or states if it shall seem good to congress, or that it is necessary first to give a territorial form of government. Texas, for example, was not a part of the original United States. It was an independent republic at the time of its annexation. But it is not to be doubted that its admission into the Union was in all respects conformable to the constitution. When a new state is admitted, it comes into the Union on an equal footing with the original states in respect to all its constitutional rights and privileges and its political and territorial sovereignty.<sup>183</sup>

The constitution also provides that no new state shall be formed or erected within the jurisdiction of any other state without the consent of the legislature of the state concerned. The case of

<sup>183</sup> Pollard v. Hagan, 3 How. 212; Strader v. Graham, 10 How. 82; Webber v. Harbor Com'rs, 18 Wall. 57; Hinman v. Warren, 6 Or. 408.

West Virginia constitutes an apparent violation of this rule. For it was formed out of the territory theretofore belonging to Virginia. But the doctrine on which this action was justified by the government was as follows: At that time the state of Virginia was in armed rebellion against the United States. Its government was insurrectionary. Its legislature, so far as concerned public acts, was unlawful. But the people occupying a part of its territory remained loyal to the United States. These people, with the consent of congress, might and did maintain a government loyal to the United States and in full constitutional relations with the general government. It was in the power of congress to recognize this loyal government as the rightful government of the state of Virginia. And such government could therefore give its consent to the erection of a new state, formed out of part of the territory of Virginia. The legislature of the new state, when established, could agree, by the consent of congress, with the government of the old state as to the terms and conditions of the partition. This doctrine has been accepted by the courts.<sup>184</sup>

#### SPECIFIED BUT UNCLASSIFIED POWERS.

**84.** There are certain powers vested in congress by the constitution which are not included in the list of powers contained in the eighth section of the first article, but are found specified in other parts of the instrument.

The powers to which reference is here made are as follows: The power vested in the senate to sit as a court of impeachment, and to advise and consent to the making of treaties with foreign powers and the appointment of federal officers; the power of congress to vest the appointment of inferior officers in the President alone or in the courts of law or the heads of departments; the power to determine the time of choosing presidential electors and the day on which they shall give their votes, and the power of the house of representatives, in a certain contingency, to elect the President; the power to declare the punishment of treason; the power to prescribe the

<sup>184</sup> Virginia v. West Virginia, 11 Wall. 39; Kanawha Coal Co. v. Kanawha & O. Coal Co., 7 Blatchf. 391, Fed. Cas. No. 7,606.

manner in which the public acts, records, and judicial proceedings of one state shall be authenticated for purposes of use in the courts of another state and the effect thereof; the power to propose amendments to the constitution of the United States; and the power to enforce the provisions of the thirteenth, fourteenth, and fifteenth amendments by appropriate legislation. As all these powers will be discussed in connection with the subjects to which they respectively refer, no examination of them need be here entered upon.

### IMPLIED POWERS.

**85. The constitution, after enumerating certain powers vested in congress, provides that congress shall have power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States or in any department or officer thereof." This clause is the foundation of the doctrine of implied powers.**

This clause, says Story, "neither enlarges any power specifically granted, nor is it a grant of any new power to congress; but it is merely a declaration for the removal of all uncertainty that the means of carrying into execution those otherwise granted are included in the grant. Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by congress. If not, congress cannot exercise it."<sup>185</sup> This clause might even be said to be superfluous. For it is a well settled rule of law that the grant of a principal thing impliedly carries with it the grant of all those incidental or accessory things which are needed to make the principal grant effectual. But since the whole constitution shows plainly that the national government is one of

<sup>185</sup> 2 Story, Const. § 1243.

limited and delegated powers, it was thought best, out of abundant caution, to insert a provision by which it should be shown that the grant of incidental and accessory powers was not to be excluded because not enumerated. It would have been practically impossible to make this provision more explicit. For a catalogue of the instrumental powers intended to be hereby vested would necessarily have excluded all others, and since the circumstances of the nation, or of those subjects upon which the powers of congress are to be exercised, change from time to time, it might very easily happen that the general grant of power would be defeated by the too strict limitation of the means to make it effective. In point of fact, the government of the Union is a national government, possessing powers of sovereignty within the sphere of its action. That sphere is limited by the organic law. But within it, the authority of the Union is supreme. And it is inconceivable that sovereignty should exist without the right to choose the means by which its sovereign powers shall be exercised and made effectual.

To recite all the various occasions on which congress has availed itself of this grant of incidental powers would amount to making a transcript of the federal statutes. But a few illustrations may profitably be introduced, in order to exhibit the practical working of the power. Almost the entire criminal jurisprudence of the United States is derived from this power. For the punishment of offenses against the revenue, against the postal service, perjury, embezzlement, malfeasance in office, and many other felonies or misdemeanors, is necessary to secure the due and effectual operation of the laws made by congress in the exercise of its enumerated powers. The money powers of the federal legislature are held to give it the right to create national banks and to make its treasury notes a legal tender. Its power to regulate commerce invests it with authority to appropriate money for the improvement of rivers and harbors, to erect light-houses, to establish a coast survey and a naval observatory, to regulate the liabilities of ocean carriers and the charges of railroads. It is authorized to lay and collect taxes; and this gives it the power to provide for the sale or forfeiture of delinquent property. Its authority to establish post offices and post roads includes the power to charge postage, to issue postal money orders, to exclude indecent matter from the

mails, to grant to telegraph companies a right of way over the public domain. Wherever congress advances to fill the sphere of legislative jurisdiction confided to it by the great grants of the constitution, there advances with it the right and power to choose the means by which its laws shall be made effectual and which are appropriate to the ends it is designed to accomplish.<sup>186</sup>

But it has been contended that the choice of means or instrumentalities is not unrestricted. They must be "necessary" for carrying into execution the enumerated powers. The important word here, however, is relative, not absolute. The necessity required is not an imperative necessity. The constitution does not mean that the power to be exercised must be the only power which could by any possibility be resorted to for carrying the design of congress into execution. There may, for instance, be two or more methods of accomplishing a given result. If the result must be accomplished, any one of these methods may properly be said to be necessary, although neither is absolutely necessary, since if one should fail the other would remain open and the result still be accomplished. The more liberal interpretation to be given to the word in this connection is shown by the use of the phrase "absolutely necessary" in that clause of the constitution which forbids the states to lay duties on imports or exports. This shows that the authors of the constitution were aware of the relative nature of the word "necessary," and did not intend to give it the most restrictive meaning in this part of the instrument. Moreover, it is here coupled with the word "proper." If the necessity intended were an absolute necessity, the addition of the word "proper" would be merely nonsensical. For imperativeness excludes all questions of propriety. But if we take the first word in a less restricted sense, the other may well be under-

<sup>186</sup> As an additional illustration of this doctrine, we may mention the act of congress prohibiting federal officers from giving, soliciting, or receiving contributions for political purposes. This statute is not unconstitutional. "The evident purpose of congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power." *Ex parte Curtis*, 106 U. S. 371, 1 Sup. Ct. 381. See, also, *Opinion of the Justices*, 138 Mass. 601. The government may give a priority or preference to its own claims and dues in the settlement of bankrupt or insolvent estates. *U. S. v. Fisher*, 2 Cranch, 358.

stood as requiring that the means chosen shall be actually appropriate to the ends in view. The result is that congress is invested with authority to avail itself of such means or agencies for carrying into effect its enumerated powers as shall be requisite, essential, or conducive to the accomplishment of that result and bona fide appropriate thereto. And of the existence of this kind of necessity, or of the conduciveness of the means to the end, congress is to judge in the first instance. Its decision is not conclusive. The courts may also determine the question when it is properly presented to them. But they will not set aside an act of congress as unconstitutional, on this ground, unless it is clearly apparent that the statute can by no means be needful or appropriate to the execution of any of the specified powers of the federal legislature. These principles are fully sustained by the decisions of the supreme court.<sup>187</sup>

It was on this ground that the constitutionality of the act incorporating the Bank of the United States was principally sustained. And the reasoning applies equally to other corporations. It is true that we cannot find in the constitution an express grant of power to congress to grant charters of incorporation. But if a bank, a railroad, a telegraph company, or any other kind of a corporation is a means or agency needed by congress in the exercise of its admitted powers, or conducive to their due execution, and plainly adapted to the accomplishment of that end, then congress has power, under this clause of the constitution, to incorporate it.<sup>188</sup>

Another question which at one time called for a construction of this part of the constitution was as to the validity of the Alien and Sedition Laws, passed in 1798. Their constitutionality was vigorously assailed, and they were the cause of the adoption of the Virginia and Kentucky resolutions, passed in that and the following year. The subject is no longer of practical interest, and belongs to the domain of political history.<sup>189</sup>

<sup>187</sup> *M'Culloch v. Maryland*, 4 Wheat. 316; *Martin v. Hunter*, 1 Wheat. 304; *Gibbons v. Ogden*, 9 Wheat. 1; *Hepburn v. Griswold*, 8 Wall. 603; *Legal Tender Cases*, 12 Wall. 457; *Juilliard v. Greenman*, 110 U. S. 421, 4 Sup. Ct. 122; *U. S. v. Coombs*, 12 Pet. 72.

<sup>188</sup> *M'Culloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of U. S.*, 9 Wheat. 738; *Farmers' & Mechanics' Nat. Bank v. Dearing*, 91 U. S. 29; 2 Story, Const. §§ 1259-1271.

<sup>189</sup> On the subject of the Alien and Sedition Laws, see 2 Story, Const. §§ 1293, 1294; 1 Von Holst, Const. Hist. 142. On the general subject of the

**LIMITATIONS ON POWERS OF CONGRESS.**

**86. The limitations upon the legislative power of congress, under the constitution, may be divided into four classes;—**

- (a) Implied limitations.**
- (b) General limitations.**
- (c) Specific limitations upon general powers.**
- (d) Specific limitations upon specific powers.**

*Implied Limitations.*

Besides the restriction upon the legislative power of the United States growing out of the fact that it is a government of enumerated powers, which has been already adverted to, there are certain limitations upon legislative power in general, arising from the nature of government and the partition of powers among the several departments of the government, which are applicable to congress, as to any legislative body. These limitations are not expressed in the constitution, but they are none the less effective and binding. We have chosen to describe them as "implied limitations." That the national legislature must not encroach upon the legitimate province and sphere of the state governments is abundantly evident from all parts of the federal constitution and has always been assumed as a fundamental principle of our systems. But it is equally true that an act of congress is invalid if it assumes to exercise powers which are confided to the executive or judicial department alone. It is also a settled rule, applying to congress as to any other legislative body, that the legislative power confided to it must be exercised by it alone, and cannot be delegated by it to any other body or individual. Again, it is not within the constitutional power of any legislative body to pass laws which cannot be repealed by its successors, or to limit the powers of succeeding legislatures by stripping itself of its prerogatives in favor of individuals or otherwise abrogating its powers and functions. Again, it is a fundamental maxim

Incidental and implied powers of congress, the reader may profitably consult 1 Hare, Am. Const. Law, 99-118; 2 Story, Const. §§ 1236, 1281; Pom. Const. Law, §§ 259-269; Cooley, Const. Law (2d Ed.) 97.

of public law that statutes must be enacted for the good of the whole people, and not for the benefit of private persons. But this general principle does not prevent congress from passing private bills, nor from exercising a large measure of discretion as to the determination of what measures have relation to the public welfare.

*General Limitations.*

The general limitations upon the power of the federal government are found in the ninth and tenth amendments to the constitution. In regard to the first of these, it has been said that it "was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim that an affirmation in particular cases implies a negation in all others, and, e converso, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies."<sup>100</sup> The tenth amendment was adopted in consequence of the jealousies felt by the states with regard to the power of the central government, and was designed to make it more clear and certain that the government of the United States was one of delegated and enumerated powers. The force and applicability of this amendment are chiefly apparent when it is considered in connection with the grant to congress of power to "make all laws which shall be necessary and proper for carrying into execution" its enumerated powers. It should therefore be studied in relation to the doctrine of implied and incidental powers.

*Specific Limitations upon General Powers.*

The specific limitations upon the general powers of congress are mainly found in the first eight amendments to the constitution and in the last three. These constitute what may be called the federal bill of rights. They are intended to secure those personal, social, and political rights which are generally esteemed characteristic of a free country, against all abridgment or invidious legislation on the part of the national government. These are best considered in connection with the study of those rights, and will be found treated in the chapters on civil and political rights and the constitutional

<sup>100</sup> 2 Story, Const. § 1905.

guaranties in criminal cases. But there are certain limitations of federal power, found in other parts of the constitution, which must be briefly noticed here, as belonging to this class. Thus, "the migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the congress prior to the year 1808." This obscure phrase was designed to secure the continuance of the African slave-trade until the year designated. Its insertion was necessary to secure the adoption of the constitution, and was one of the principal compromises of that instrument. As soon as the stipulated twenty years had elapsed, congress absolutely prohibited the further importation of slaves, and also made the slave-trade piracy and punishable with death. Again, "no money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." In regard to this provision, it is well said by Story that "as all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses and debts and other engagements of the government, it is highly proper that congress should possess the power to decide how and when any money shall be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation, and might apply all its monied resources at his pleasure. The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation."<sup>101</sup> The provision for the publication of statements of the receipts and expenditures is intended as a means of holding all the departments of the government, and particularly the legislature, under a due sense of responsibility to the people. The duty to see to this publication belongs to the executive.<sup>102</sup>

"No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of congress, accept of any present, emolument, office,

<sup>101</sup> *Id.* § 1348.

<sup>102</sup> Cooley, *Const. Law* (2d Ed.) 107.

or title, of any kind whatever, from any king, prince, or foreign state." The clause which prohibits the granting of titles of nobility has but little significance at the present day. But it was once thought important, as a means of preserving the simplicity of republican institutions and policy, and was also deemed a valuable safeguard against the possible ascendancy of powerful and ambitious families. The same prohibition is also laid upon the states.

*Specific Limitations upon Specific Powers.*

These limitations have already been discussed in connection with the powers to which they relate, and it is only necessary here to enumerate them, for the purpose of giving a complete conspectus of the powers and restrictions of the national legislature.

Congress may alter the regulations made by the several states as to the time, place, and manner of holding elections for senators and representatives, except as to the places of choosing senators.

Congress has power to lay and collect taxes. But all duties, imposts, and excises shall be uniform throughout the United States, and no capitation or other direct tax shall be laid unless in proportion to the census or enumeration, and no tax or duty shall be laid on articles exported from any state.

Congress has power to regulate foreign and interstate commerce. But no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another.

It has the power to enact laws concerning naturalization and bankruptcy. But these must be uniform throughout the United States.

It has power to grant patents and copyrights. But these must be for limited times only.

It may constitute courts. But these must be inferior to the supreme court. In other words, congress can never strip the supreme court of its functions and prerogatives by creating another court with appellate jurisdiction over it.

It has power to raise and support armies. But no appropriation of money to that use shall be for a longer term than two years.

It may provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. But there is reserved to the states the

appointment of the officers and the authority of training the militia according to the discipline prescribed by congress.

Congress has power to declare the punishment of treason. But no attainer of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

New states may be admitted by congress into the Union. But no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned as well as of congress.

## CHAPTER IX.

### INTERSTATE LAW AS DETERMINED BY THE CONSTITUTION.

87. General Principles.
88. Privileges of Citizens.
89. Public Acts and Judicial Proceedings.
90. Interstate Extradition.

#### GENERAL PRINCIPLES.

87. In all relations not regulated by the federal constitution, the several states of the Union occupy the position of independent powers in close alliance and friendship. And as between the several states, and their people, the principles of private international law apply with even greater force than as between the subjects of foreign nations. But in matters independent of the constitution, the principle of interstate comity must yield to the interests or the policy of the particular state.

If it were not for the provisions of the constitution of the United States, no state would be legally bound to give effect to the laws or institutions of another state within its own borders or in their application to its own citizens, or to recognize the judgments or decrees of the courts of another state as technically binding on its own courts, or to accord to the citizens of another state, when resident within its limits or there engaged in business, any greater rights or privileges than it might see fit to grant to citizens or subjects of foreign nations under like circumstances. In all the most fundamental particulars, this power to discriminate against each other is taken away from the states by the constitutional provisions which we are to consider in the following pages. But in all other matters, the several states, being foreign to each other, will apply the rules of private international law to questions concerning the property, rights, contracts, or actions of a citizen of one state projected over into another state. These rules, while recognized and enforced by the courts in the absence of any countervailing statute, yet rest on

no firmer foundation than the principle of interstate comity, and must give way whenever they are found to be in conflict with the laws or policy of a state in the interests of its own people.<sup>1</sup> We append a brief explanation of the more important of the rules referred to.

*Personal Property.*

It is a general rule of private international law that personal property has no situs of its own, but follows the law of its owner's domicile. That is, such property is always, in contemplation of law, with its owner, and the rules which govern it or his disposition of it are those which are in force at the place of his domicile, no matter where the property may actually be. Hence if the owner of such property resides in one state, while the property is in another, any disposition which he may make of it, whether by contract, conveyance, or will, or the disposition which the law will make of it in case of his death intestate, is to be governed and determined by the law of his domicile, and not the law of the state where the property lies. In such cases, the courts of the latter state would not apply their own laws, but those of the state of which the owner was a citizen.<sup>2</sup> Such is the rule of private international law. But this rule must yield to the policy or interest of the state where the property is found. No state or nation is bound to recognize or enforce any contracts which are injurious to its own interests or those of its citizens. For instance, if a transfer of property is made in a foreign jurisdiction, between parties who are both there, with the purpose and intention of evading or defying some law of the state where the property lies, or of using the property in some manner violative of a law of that state (as, its revenue or police laws), the latter state will refuse to recognize or enforce the transaction.<sup>3</sup> So again, each state will avail itself of the corporal possession

<sup>1</sup> *Shaw v. Brown*, 35 Miss. 246; *Donovan v. Pitcher*, 53 Ala. 411.

<sup>2</sup> *Sill v. Worswick*, 1 H. Bl. 665; *Ennis v. Smith*, 14 How. 400; *Harvey v. Richards*, 1 Mason, 381, Fed. Cas. No. 6,184; *Fuller v. Steiglitz*, 27 Ohio St. 355; *Grattan v. Appleton*, 3 Story, 755, Fed. Cas. No. 5,707; *Despard v. Churchill*, 53 N. Y. 192.

<sup>3</sup> *Waymell v. Reed*, 5 Durn. & E. 599; *Armstrong v. Toler*, 11 Wheat. 258; *Wilson v. Stratton*, 47 Me. 120; *Smith v. Godfrey*, 28 N. H. 379; *Webster v. Munger*, 8 Gray, 584.

of such property for the purpose of satisfying its own demands and those of its citizens. For example, it will not allow personal property of a deceased non-resident to leave the state, or to be distributed, until its own claims for taxes and the just debts of its own citizens have been satisfied out of such estate.<sup>4</sup>

*Real Estate.*

Real property has a situs of its own, and is governed by the law thereof, and not by the law of its owner's domicile, if that is different.<sup>5</sup> Thus, for example, if a person residing in one state and owning realty in another devises the same by his last will and testament, the courts of the latter state will not give effect to the devise unless the will was executed with all the formalities required by their own laws.

*Contracts.*

The rule is that all questions regarding the validity, effect, and enforcement of contracts are to be determined by the law of the place where the contract was made. Hence the courts of one state will often be called upon to construe and apply the laws of another state to contracts made within the latter jurisdiction. But if the place of performance of a contract is specified in it, it is the law of that place which is to govern. Contracts made in one state and sued on in another may therefore be governed, according to circumstances, by the *lex fori*, the *lex loci contractus*, or the *lex loci solutionis*.<sup>6</sup> But here also we are met by the limitation that no state will give effect to a contract which is contrary to the policy of its own laws. And if it consents to enforce a contract made within another jurisdiction, only those remedies will be available to the suitor which are established by the laws of the forum. In other words, while he may bring with him the law for the interpretation of the contract, he cannot import all the remedial process of the state where it was made.<sup>7</sup>

<sup>4</sup> *Swearingen v. Morris*, 14 Ohio St. 424; *Hill v. Townsend*, 24 Tex. 575.

<sup>5</sup> *Oakey v. Bennett*, 11 How. 33.

<sup>6</sup> *Bank of U. S. v. Donnelly*, 8 Pet. 361; *Andrews v. Pond*, 13 Pet. 65; *De Wolf v. Johnson*, 10 Wheat. 367.

<sup>7</sup> *Wilcox v. Hunt*, 13 Pet. 378; *Scudder v. Union Nat. Bank*, 91 U. S. 406.

*Corporations.*

Strictly speaking, corporations are creatures of the state which chartered them and have no existence elsewhere. By comity, however, they are recognized as persons, and permitted to transact business and make use of their corporate powers and franchises in other jurisdictions. This permission is always subject to limitations. Thus a state may impose upon foreign corporations desiring to enter its territory such conditions as it may choose, provided only that such conditions are not contrary to the rights and protections afforded to corporations by the federal constitution, and do not discriminate against them unlawfully. So also, the permission will be withheld when necessary to carry out the policy or further the interests of the state.<sup>8</sup> No corporation can claim the right to acquire and hold real estate in a state other than that which created it. Permission to do so, however, is usually given, and it will be understood as accorded, by the admission of the corporation to the privilege of doing business in the state, unless there is some statute or obvious policy of that state to the contrary.<sup>9</sup>

*Marriage and Divorce.*

The interests of society have dictated the accepted rule of private international law that a marriage which is valid by the law of the place where it is contracted is to be regarded as valid in every other jurisdiction.<sup>10</sup> So strongly is this rule supported by the very important considerations depending upon its observance that it is applied even in cases where the marriage constitutes a fraud upon the laws of the state where the parties afterwards come to reside. And the same principle applies where the parties to the marriage would not have been allowed to contract it by the laws of that state; as, for want of sufficient age, or on account of difference of race.<sup>11</sup> But this rule does not apply to marriages which would be incestuous or polygamous according to the law of nature. If a jurisdiction can be found where such unions would be recognized as valid,

<sup>8</sup> *Bank of Augusta v. Earle*, 13 Pet. 519; *Lafayette Ins. Co. v. French*, 18 How. 404; *In re Comstock*, 3 Sawy. 218, Fed. Cas. No. 3,078.

<sup>9</sup> *Runyan v. Coster*, 14 Pet. 122; *Thompson v. Waters*, 25 Mich. 214.

<sup>10</sup> *Medway v. Needham*, 16 Mass. 157; *Ponsford v. Johnson*, 2 Blatchf. 51, Fed. Cas. No. 11,266.

<sup>11</sup> *Com. v. Lane*, 113 Mass. 458; *State v. Ross*, 76 N. C. 242.

still no other state would be bound to regard them.<sup>12</sup> For similar reasons, a divorce which is valid where granted must be regarded as valid in all other states. But this is not held to apply to decrees of divorce obtained fraudulently, collusively, or without jurisdiction.<sup>13</sup>

*Penal Laws.*

No state is bound, by the principles of international law or comity, to give effect to the penal laws of another state. Such laws have no ex-territorial validity. Consequently, actions for the recovery of statutory penalties, and all similar proceedings, must be brought in the state where the statute is in force. Such, for example, would be a suit for the statutory penalty for usury, or proceedings for the affiliation of a bastard.<sup>14</sup> On the same principle, a statute giving a right of action for the recovery of damages against a person or corporation causing the death of a human being by negligence, default, or wrongful act (a species of action not known to the common law) will not be enforced except by the courts of the state which enacted it.<sup>15</sup> A like rule applies to those causes of action which, at common law, were called "local." They can be brought only in the jurisdiction where the cause of action arose. This class includes all suits for the recovery of lands or for trespass to the same. They will not be entertained by the courts of another state or district than that in which the property is situated.<sup>16</sup>

<sup>12</sup> *Sutton v. Warren*, 10 Metc. (Mass.) 451; *Wightman v. Wightman*, 4 Johns. Ch. 343; *Medway v. Needham*, 16 Mass. 157.

<sup>13</sup> *Chase v. Chase*, 6 Gray, 157.

<sup>14</sup> *First Nat. Bank v. Price*, 33 Md. 487; *Barnes v. Whitaker*, 22 Ill. 606; *Graham v. Monsergh*, 22 Vt. 543; *Richardson v. Overseers of Burlington*, 33 N. J. Law, 190.

<sup>15</sup> *Selma, R. & D. R. Co. v. Lacy*, 43 Ga. 461; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85.

<sup>16</sup> *McKenna v. Fisk*, 1 How. 241; *Livingston v. Jefferson*, 1 Brock. 203. *Fed. Cas. No. 8,411*; *Rundle v. Delaware & R. Canal*, 1 Wall. Jr. 275, *Fed. Cas. No. 12,139*; *Worster v. Winnipisogee Lake Co.*, 25 N. H. 525.

**PRIVILEGES OF CITIZENS.**

**88. The second section of the fourth article of the constitution of the United States provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.**

*What Privileges Intended.*

The supreme court of the United States has declared that it will not undertake to describe and define the rights and privileges of citizens under this clause in any general classification, preferring to decide each case which arises under this provision as it may come up.<sup>17</sup> It is evident, however, that the rights and privileges here intended are only such as belong to citizenship. And a more definite idea of the meaning of the clause may be obtained from a consideration of the purpose with which it was inserted in the constitution. This purpose was to prevent the states from making invidious discriminations against non-residents, and to promote the unification of the American people, by breaking down state lines, in respect to the enjoyment of social and business privileges and the favor and protection of the laws. Accordingly we may say that the "privileges and immunities" secured by this part of the constitution include protection by the government; the enjoyment of life and liberty, with the right to acquire, possess, and dispose of property of every kind, and to pursue and obtain happiness and safety, subject only to such restrictions as the government may justly prescribe for the general good; the right of a citizen of one state to pass freely into, through, and out of all the other states, or to reside in any other state, for the purposes of trade, professional pursuits, or otherwise; the right to claim the benefit of its laws, either as a protection against injustice or as a means of enforcing his rights in its courts; and the right to be exempt from all discriminations and from any higher taxes, impositions, or other burdens than are paid by the citizens of the state.<sup>18</sup> A statute which forbids the

<sup>17</sup> *Conner v. Elliott*, 18 How. 591.

<sup>18</sup> *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *McCready v. Com.*, 27 Grat. 985; *Ward v. Maryland*, 12 Wall. 418, 430; *Crandall v. Nevada*, 6 Wall. 35.

appointment of any non-resident of the state as trustee in a deed or mortgage or any other instrument except wills, and prohibits any such person so appointed from acting as such trustee, is unconstitutional, as infringing upon the constitutional rights of citizens of other states. For if the acquisition of property in trust could be denied to them, it would be equally possible to forbid them to acquire property in fee.<sup>19</sup>

*What Privileges not Included.*

This clause of the constitution does not confer upon the citizens of each state the right of voting, of being elected, or of holding office in the other states. These are political privileges which each state may justly reserve for its own citizens. But it would not be competent for the state to deny to non-residents the right to acquire citizenship among its own people, upon abandoning their former domicile, as a preliminary to exercising the right of suffrage.<sup>20</sup> Nor does this constitutional provision entitle the citizens of the various states to share in the common property of citizens of a particular state, e. g., the right of fishing in navigable waters of the state. It is not infringed by a state law confining the right of fishing in such waters to citizens of the state.<sup>21</sup> While a citizen of the United States not resident within the state cannot be denied access to the courts, a statute which restricts the right of commencing the process of foreign attachment to citizens of the state is not repugnant to this clause of the constitution.<sup>22</sup> Nor does it prevent the requirement that non-resident plaintiffs shall furnish security for costs, or that non-residents may be constructively served with process. So where the laws of a state provide that the relation of marriage shall be attended by certain property rights, as between the married parties, when they are married or reside within the state, it is not a privilege of a citizen of another state to enjoy, in the former state, those particular rights of property.<sup>23</sup>

<sup>19</sup> *Roby v. Smith*, 131 Ind. 342, 30 N. E. 1093.

<sup>20</sup> *Campbell v. Morris*, 3 Har. & McH. 535, 554.

<sup>21</sup> *McCready v. Virginia*, 94 U. S. 391; *State v. Medbury*, 3 R. I. 138. See, also, *Lemmon v. People*, 26 Barb. 270.

<sup>22</sup> *Kincaid v. Francis, Cooke (Tenn.)* 49.

<sup>23</sup> *Connor v. Elliott*, 18 How. 591.

*Who are Citizens.*

Since the constitution provides that the citizens of "each state" shall be entitled to these privileges and immunities, it may well be questioned whether citizens resident in the territories and the District of Columbia may claim the benefit of this clause. The same reason which excludes them from the right to sue citizens of the states in the federal courts would seem to be operative here. But the point has not been judicially decided. But it is settled that corporations are not citizens, within the meaning of this provision; it is intended to apply to natural persons only. Hence a state may lawfully either grant or refuse to foreign corporations the privilege of doing business within its limits, and if it accords the privilege, it may impose terms and conditions on its exercise.<sup>24</sup>

*Discriminating Taxes.*

A state statute imposing a license tax upon peddlers, salesmen, or traveling merchants, must not make any discrimination against citizens of other states, either by placing a heavier burden of taxation upon them than is borne by the citizens of that state, or by giving to its own citizens privileges which are not accorded to non-residents in the same line of business. If it does, it is obnoxious to the clause under consideration.<sup>25</sup> And any tax law of a state which necessarily discriminates against the introduction and sale of the manufactures or products of another state or states, and in favor of the manufactures or products of its own citizens and against those of other states, is unconstitutional, for the same reason.<sup>26</sup>

<sup>24</sup> Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410; Liverpool Ins. Co. v. Massachusetts, Id. 566; Warren Manuf'g Co. v. Etna Ins. Co., 2 Paine, 501, Fed. Cas. No. 17,206; Pembina C. S. M. & M. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737; Horn Silver Min. Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403; Slaughter v. Com., 13 Grat. 767; People v. Imlay, 20 Barb. 68; W. U. Tel. Co. v. Mayer, 28 Ohio St. 521; Fire Department v. Helfenstein, 16 Wis. 136.

<sup>25</sup> Ward v. Maryland, 12 Wall. 418; McGuire v. Parker, 32 La. Ann. 832; Daniel v. Trustees of Richmond, 78 Ky. 542; State v. Lancaster, 63 N. H. 287; Rash v. Holloway, 82 Ky. 674. See In re Rudolph, 6 Sawy. 295, 2 Fed. 65.

<sup>26</sup> Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. 454; Webber v. Virginia, 103 U. S. 344; Vines v. State, 67 Ala. 73.

**PUBLIC ACTS AND JUDICIAL PROCEEDINGS.**

**89. The constitution also provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."**

*Public Acts.*

This constitutional requirement implies that the public acts (that is, statutes) of every state shall be given the same effect by the courts of another state that they have by law and usage at home. This of course does not give them any ex-territorial effect, but applies only to the determination of cases which they are alleged to govern. But the courts of one state cannot take judicial notice of the laws of another state; they must be proved as facts.<sup>27</sup>

*Judgments and Decrees.*

If it were not for this provision of the constitution, and the acts of congress passed in pursuance of it, the judgments and decrees of each state would be regarded as foreign judgments in the courts of every other state, and their effect would have to be determined by the principles of international law or by such other considerations as are influential in fixing the status of judicial records brought from foreign countries.<sup>28</sup> A similar provision was found in the articles of confederation, and it was construed as prohibiting a re-examination on the merits of a decree rendered in a sister state.<sup>29</sup>

In pursuance of the power given to congress to prescribe the manner of authenticating the records and judicial proceedings of other states, and the effect thereof, that body early passed an act which was expressed as follows: "The records and judicial proceedings of the courts of any state shall be proved and admitted in any other court within the United States, by the attestation of

<sup>27</sup> Chicago & A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615, 7 Sup. Ct. 398.

<sup>28</sup> Buckner v. Finley, 2 Pet. 586; Warren Manuf'g Co. v. Etna Ins. Co., 2 Paine, 501, Fed. Cas. No. 17,206.

<sup>29</sup> Jenkins v. Putnam, 1 Bay (S. C.) 8.

the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." A subsequent statute extended the provisions of this act to "the territories of the United States, and the countries subject to the jurisdiction of the United States."<sup>30</sup> This statute, it is held, does not prevent a state from making such further rules, in regard to the authentication of foreign judgments, as it may deem best, provided only that they are not inconsistent with the act of congress. Neither does the statute render it inadmissible to prove such a judgment in a manner which would be sufficient at common law.<sup>31</sup>

It is now finally and firmly settled that a judgment rendered by a court of competent authority, having jurisdiction of the parties and the subject matter, in one state, is conclusive on the merits in the courts of every other state, when made the basis of an action, and in such action the merits cannot be inquired into.<sup>32</sup> Under this clause of the constitution, therefore, the judgment of a court in a sister state is to be accorded the same faith and credit which it receives at home. It is of a higher grade than a foreign judgment, for its effect is regulated by the constitution. But yet it is not the same as a domestic judgment, for it is not executory by itself. But the judgment, if valid at home, is to be considered valid everywhere within the United States, and if binding on the parties at home, it is conclusive in all other courts in the Union.<sup>33</sup> But the judgment, as already stated, is not executory in a foreign state; that

<sup>30</sup> Act May 26, 1790 (1 Stat. 122; Rev. St. U. S. § 905); Act March 27, 1804 (2 Stat. 298).

<sup>31</sup> *Gaines v. Relf*, 12 How. 472; *White v. Burnley*, 20 How. 235.

<sup>32</sup> *Mills v. Duryea*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234; *McElmoyle v. Cohen*, 13 Pet. 312; *Christmas v. Russell*, 5 Wall. 290; *Insurance Co. v. Harris*, 97 U. S. 331.

<sup>33</sup> *Armstrong v. Carson*, 2 Dall. 302, Fed. Cas. No. 543; *Nations v. Johnson*, 24 How. 195; *Field v. Gibbs*, 1 Pet. C. C. 155, Fed. Cas. No. 4,766; *Bryant v. Hunter*, 3 Wash. C. C. 48, Fed. Cas. No. 2,068.

is, it does not per se authorize the issue of final process or the exercise of auxiliary jurisdiction, but only when merged in a new judgment recovered in the foreign state.<sup>34</sup> Again, judgments of one state, when sought to be enforced in the courts of another, do not enjoy the right of privilege, priority, or lien which they have in the state where they are pronounced, but only that which the *lex fori* gives to them by its own laws in their character of foreign judgments.<sup>35</sup> And while the judgment is conclusive on the merits, yet it is open to the party who desires to assail it to show that it is not in effect a valid and subsisting judgment, such as is entitled to the benefit of the constitutional provision. Thus, he may show that the judgment has been set aside by the court which rendered it, or reversed by an appellate court. Further, he may show anything which goes in discharge of the judgment, as that it has been paid, or released, or compromised. Also he may show that the judgment, as a cause of action, is barred by the statute of limitations of the state where the judgment is sought to be enforced, if that statute is so framed as to include judgments.<sup>36</sup> So also, the party may deny that the court which rendered the judgment had jurisdiction of his person or of the subject matter of the suit, and thereupon it becomes the duty of the court where the record is offered to inquire into the allegation, and if it is found that there was such a lack of jurisdiction, then the judgment must not be enforced against him.<sup>37</sup> But the judgment is not impeachable in the courts of another state on the ground of any mere error or irregularity, or upon any allegations that it was unjust or ill-founded. And it seems also (though the point is not entirely free from doubt) that fraud in the obtaining of the judgment is not a good defense, for the party who desires to avoid it on the ground of fraud has

<sup>34</sup> *Claffin v. McDermott*, 12 Fed. 375; *Walser v. Seligman*, 13 Fed. 415.

<sup>35</sup> *McElmoyle v. Cohen*, 13 Pet. 312; *Story*, *Conf. Laws*, § 609.

<sup>36</sup> *McElmoyle v. Cohen*, 13 Pet. 312; *Napier v. Gidriere*, 1 Speer, Eq. 215; *Reid v. Boyd*, 13 Tex. 241; *Jacquette v. Hugunon*, 2 McLean, 129, Fed. Cas. No. 7,169.

<sup>37</sup> *D'Arcy v. Ketchum*, 11 How. 165; *Bischoff v. Wethered*, 9 Wall. 812; *Thompson v. Whitman*, 18 Wall. 457; *Galpin v. Page*, Id. 350; *Cheever v. Wilson*, 9 Wall. 108; *Arnott v. Webb*, 1 Dill. 362, Fed. Cas. No. 562; *Harris v. Hardeman*, 14 How. 334.

his opportunity in the court which rendered the judgment, and it is there he must avail himself of it.<sup>38</sup>

The question of the validity and effect of judgments from another state has most frequently arisen in cases where such judgments were given against non-residents. Without attempting to discuss all the various and interesting questions which are involved in this subject, it may be said, briefly, to be the accepted doctrine that the judicial process of a state has no ex-territorial force or efficacy; that such process cannot be sent into another state and there served on a party with the effect of legally obliging him to appear; that in such case the service amounts to no more than a constructive service; that the same consequences and no others attach to the service of process by published advertisement; that in neither of these modes can the courts of the state acquire such jurisdiction over the person of the defendant as will authorize them to pronounce a personal judgment against him; that a personal judgment rendered in an action where the only service of process on the defendant was constructive, is not to be regarded as valid or binding in the courts of any other state. But since each state has the right and power to legislate concerning the property which is within its limits, and to provide for its submission to pay the debts of its owner, it is held that where an action is begun against a non-resident by the attachment of property within the jurisdiction of the court, this will confer jurisdiction, not against the defendant personally, but against the property attached, to the extent of authorizing the court to render a judgment which may be enforced against that property. And such a judgment, to that extent, is to be regarded as valid and binding everywhere else.<sup>39</sup> While the statute of limitations of the state of the forum may be pleaded in defense, yet it would not be competent for a state to so frame its law of limitations, with respect to judgments from other states, as to effectually nullify them by cutting off all remedy whatever. It is always within the constitutional rights of parties to have a

<sup>38</sup> *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242; *Anderson v. Anderson*, 8 Ohio, 108; 2 Black, Judgm. §§ 916-921.

<sup>39</sup> See *Pennoyer v. Neff*, 95 U. S. 725; *Cooper v. Reynolds*, 10 Wall. 308; *D'Arcy v. Ketchum*, 11 How. 165; *Williams v. Armroyd*, 7 Cranch, 423; *Boswell v. Otis*, 9 How. 336; *Chase v. Chase*, 6 Gray, 157.

reasonable opportunity to enforce their demands.<sup>40</sup> A judgment rendered by a justice of the peace in another state, although the court be not one of record, is a judicial proceeding within the meaning of the constitution, and full faith and credit is to be accorded to it.<sup>41</sup> The federal tribunals are not regarded as foreign to each other or to those of the several states. Hence the judgment of a United States court, when sued on in a state court or in another United States court, is entitled to full faith and credit, and so are the judgments of the state courts when offered in the federal tribunals.<sup>42</sup> And the same rule applies to the effect of the judgments of the courts in the territories and the District of Columbia.<sup>43</sup>

#### INTERSTATE EXTRADITION.

**90. It is provided by the federal constitution that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."**

The articles of confederation contained a similar clause. It was in the following words: "If a person guilty of, or charged with, treason, felony, or other high misdemeanor in any state shall flee from justice and be found in any of the United States, he shall, on demand of the governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offense."<sup>44</sup> It is now regarded as settled doctrine that one nation cannot claim, as a matter of general international law, and independently of treaty stipulations, that another shall surrender up criminals fleeing from the justice of its laws.

<sup>40</sup> *Christmas v. Russell*, 5 Wall. 290.

<sup>41</sup> *Stockwell v. Coleman*, 10 Ohio St. 33; *Carpenter v. Pier*, 30 Vt. 81; *Glass v. Blackwell*, 48 Ark. 50, 2 S. W. 257.

<sup>42</sup> *Crescent City Live-Stock Co. v. Butchers' Union Slaughterhouse Co.*, 120 U. S. 141, 7 Sup. Ct. 472; *U. S. v. Dewey*, 6 Biss. 501, Fed. Cas. No. 14,956; *Amory v. Amory*, 3 Biss. 266, Fed. Cas. No. 334.

<sup>43</sup> *Johnson v. Dobbins*, 5 Wkly. Notes Cas. (Pa.) 537; 2 Black, Judgm. § 938.

<sup>44</sup> Articles of Confederation, art. 4, cl. 2.

This being the case, the undoubted moral duty which rests upon the several states of the Union in this regard could never be enforced if the matter had not been regulated by the federal constitution. And especially is this true since the states are forbidden to make treaties, and cannot, without the consent of congress, enter into any agreement or compact with each other. "The uniform opinion heretofore has been that the states, on the formation of the constitution, had the power of arrest and surrender in such cases, and that so far from taking it away, the constitution has provided for its exercise contrary to the will of a state in the case of a refusal, thereby settling, as among the states, the contested question whether, on demand, the obligation to surrender was perfect and imperative, or whether it rested on comity and was discretionary."<sup>45</sup>

It has never been fully decided whether this clause of the constitution intended to leave the regulation of interstate extradition wholly to the individual states, or whether it was intended that congress should pass laws to enforce the provisions of this article. But at a very early day (1793) congress assumed to define the duties of the states in this matter more explicitly than had been done in the constitution itself. It was enacted that "whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. Any agent so appointed who receives the fugitive into his custody shall be empowered to

<sup>45</sup> *Holmes v. Jennison*, 14 Pet. 540, 597. See *In re Fetter*, 23 N. J. Law, 311.

transport him to the state or territory from which he has fled.”<sup>46</sup> Since the constitution uses only the word “states,” in providing for extradition, while the act of congress applies by its terms equally to the states and the territories, the question has been raised whether the statute is not unconstitutional, in so far as it relates to the extradition of fugitives from the territories, for want of power in congress to prescribe it. But it has been ruled otherwise, and it is held that the statute is valid and constitutional in all its material parts.<sup>47</sup>

The alleged offense, for which extradition is asked, need not be an offense at common law, nor have been created by statute before the adoption of the constitution; it is sufficient if it is a crime by the laws of the state from which the accused has fled.<sup>48</sup> A person may commit an offense against the laws of a given state without being physically present at the time, as where he conspires with others to break the laws. But he cannot be said to have fled from justice from that state if he never was within the state; and in such a case, though he may be amenable to its laws, if caught within its territory, he cannot be brought there by process of extradition.<sup>49</sup> But when a person infringes the criminal laws of a state, and departs therefrom without waiting to abide the consequences of his act, he is a fugitive from justice, within the meaning of the constitution.<sup>50</sup>

“The charge against the accused must be made in some due form of law, in some species of judicial proceeding instituted in the state from which he is a fugitive. It will not be sufficient unless it contains all the legal requisites for the arrest of the accused and his detention for trial, if he were then within the state. Therefore noth-

<sup>46</sup> Rev. St. U. S. §§ 5278, 5279.

<sup>47</sup> *Prigg v. Pennsylvania*, 16 Pet. 539; *Spear*, Extradition, 232. For a criminal offense committed within the District of Columbia the offender, if found beyond the District, may be removed there for trial. *In re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102. But the Cherokee Nation is neither a “state” nor a “territory,” as these words are used in the constitution. Hence the constitution does not authorize the governor of a state to honor the demand of the chief of the Cherokee Nation for the extradition of a fugitive. *Ex parte Morgan*, 20 Fed. 298.

<sup>48</sup> *Ex parte Clark*, 9 Wend. 212, 221; *Morton v. Skinner*, 48 Ind. 123.

<sup>49</sup> *Ex parte Smith*, 3 McLean, 133, Fed. Cas. No. 12,963.

<sup>50</sup> *In re Voorhees*, 32 N. J. Law, 141.

ing short of an indictment, or a complaint under oath, making out a prima facie case, can be sufficient."<sup>51</sup> When the requisition is made by the proper authority and with all the necessary formalities, it is the imperative duty of the governor of the state in which the fugitive is found to comply with it, without inquiring whether the fugitive has committed a crime according to the laws of the state to which he has fled.<sup>52</sup> But if the governor refuses to comply with the requisition, there is no way of compelling him to do so. The United States courts cannot force the governor of a state into discharging his duty.<sup>53</sup> After the extradition papers have been served and the prisoner is in custody, it is perfectly proper for the courts of the state from which he is to be removed to allow him the benefit of a writ of habeas corpus, and thereupon to examine into the sufficiency of the papers. If the papers are not sufficient in law to hold the prisoner, he may be discharged. But this will not generally be ordered by those courts, except in cases where the defects in the papers are conspicuous and do not admit of any reasonable question.<sup>54</sup> Whether the prisoner is substantially charged with a crime against the laws of the state from which he fled is a question of law. But the question whether he is a fugitive from justice is one of fact, the decision of which by the governor of the state in which he is found is sufficient to justify his removal, at least until overthrown by contrary proof.<sup>55</sup> Moreover, if the state on which the requisition is made has an indictment pending, or some other unsatisfied demand, against the prisoner, it is proper for that state to proceed to enforce it before honoring the requisition. "No higher duty can be imposed upon her than that to satisfy the demands of her own laws."<sup>56</sup>

<sup>51</sup> Cooley, Const. Law (2d Ed.) 198; *People v. Brady*, 56 N. Y. 182; *State v. Hufford*, 28 Iowa, 391; *Kingsbury's Case*, 106 Mass. 223; *Ex parte Cubreth*, 49 Cal. 435; *Com. v. Deacon*, 10 Serg. & R. 125.

<sup>52</sup> *Johnson v. Riley*, 13 Ga. 97; *Ex parte Swearingen*, 13 S. C. 74; *In re Voorhees*, 32 N. J. Law, 141.

<sup>53</sup> *Kentucky v. Dennison*, 24 How. 66; *In re Manchester*, 5 Cal. 237.

<sup>54</sup> *Davis' Case*, 122 Mass. 324; *State v. Buzine*, 4 Har. (Del.) 572; *Ex parte Thornton*, 9 Tex. 635. See, also, *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148; *Hartman v. Avelline*, 63 Ind. 344.

<sup>55</sup> *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291.

<sup>56</sup> Cooley, Const. Law (2d Ed.) 200; *Taylor v. Taintor*, 16 Wall. 366; *In re Troutman*, 24 N. J. Law, 634.

It is generally provided by the extradition treaties made by this country with foreign nations that a surrendered criminal can be tried only for the specific offense for which he was extradited. And if he is tried and acquitted on that charge, or if he is not tried for that offense at all, he has then the right to be set at liberty, and must be allowed a reasonable time to return to the country from which he was taken, before being proceeded against on any other accusation.<sup>57</sup> And it has sometimes been thought that the same principle should apply to extradition as between the several states of the Union. But it is now settled that, in the case of extradition from one state to another, the prisoner has no right or claim to be afforded an opportunity of returning to the state to which he first fled before being tried for another and distinct offense from that designated in the requisition papers. In other words, when the state regains possession of the fugitive, it may proceed at once to try him for any and all charges which it may have against him.<sup>58</sup> If a person is kidnapped and forcibly brought back to the state where his crime was committed, without any extradition or other regular proceedings, this will give him a right to proceed against his abductor, but it is no reason why he should not be tried by the courts of that state for his offense against its laws.<sup>59</sup> Nor, in such a case, is there any mode in which the state from which he was abducted, or the prisoner himself, can demand and secure his restoration to that state, under the constitution and laws of the Union.<sup>60</sup>

<sup>57</sup> U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234.

<sup>58</sup> *Lascelles v. Georgia*, 148 U. S. 537, 13 Sup. Ct. 687; *Com. v. Hawes*, 13 Bush, 697; U. S. v. Lawrence, 13 Blatchf. 295, Fed. Cas. No. 15,573.

<sup>59</sup> *Kerr v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225.

<sup>60</sup> *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. 1204.

## CHAPTER X.

### REPUBLICAN GOVERNMENT GUARANTIED.

§1. By the fourth section of the fourth article of the constitution of the United States it is provided that "the United States shall guarantee to every state in this Union a republican form of government."

#### *Meaning of the Term.*

No particular government is designated as "republican," neither is the exact form to be guaranteed in any manner especially described. Here, as in other parts of the constitution, we are compelled to resort elsewhere to ascertain what was intended. The guaranty necessarily implies a duty on the part of the states themselves to provide such a government. All the states had governments when the constitution was adopted. In all, the people participated, to some extent, through representatives elected in the manner specially provided. These governments the constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the states to provide. Thus we have unmistakable evidence of what was "republican" in form within the meaning of the term as employed in the constitution.<sup>1</sup> A republican form of government, as distinguished from an autocracy, monarchy, oligarchy, aristocracy, or other form of government, is one which is based on the political equality of men. It is a government "of the people, for the people, and by the people." Its laws are made either by the whole people in a body (in which case the form of government is properly called a "democracy") or by representatives chosen for that purpose by the people. Its executive power is lodged in the hands of a chief magistrate, elected by the people, directly or indirectly. It excludes the idea of an hereditary ruler or class of rulers. But the idea of a republic by no means involves the principle of universal suffrage. It is not inconsistent with a repub-

<sup>1</sup> *Minor v. Happersett*, 21 Wall. 175.

lican government that the right to vote should be restricted to adults, males, property owners, or those possessing the elements of education. It is only necessary that the suffrage should be generally extended to those deemed competent to exercise it, or at least that it should not be so restricted as to exclude all but a favored class from participation in political rights and privileges. "By the constitution a republican form of government is guarantied to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves."<sup>2</sup> "In a republic all the citizens, as such, are equal, and no one can rightfully exercise authority over another but by virtue of power constitutionally given by the whole community, which authority, when exercised, is in effect the act of the community. Sovereignty resides in the people in their political capacity."<sup>3</sup>

*Importance of the Guaranty.*

"Without a guaranty, the assistance to be derived from the national government in repelling domestic dangers which might threaten the existence of the state constitutions, could not be demanded as a right from the national government. Usurpation might raise its standard and trample upon the liberties of the people, while the national government could legally do nothing more than behold the encroachments with indignation and regret. A successful faction might erect a tyranny on the ruins of order and law, while no succor could be constitutionally afforded by the Union to the friends and supporters of the government."<sup>4</sup>

*Extent of Federal Power.*

The power and duty of the United States to guaranty a republican form of government extends not only to the protection of the particular state whose government is threatened, for any cause, with change, but also to the protection of all the other states in the Union. Such is the relation between the several members of the

<sup>2</sup> In re Duncan, 139 U. S. 449, 461, 11 Sup. Ct. 573.

<sup>3</sup> Penhallow v. Doane's Adm'rs, 3 Dall. 93.

<sup>4</sup> 2 Story, Const. § 1814.

American Union that each has the strongest interest in the maintenance in all the others of republican government. The prosperity, and in some sense the safety, of each and of the whole depends upon the continuance in each of those forms and institutions which have come to be accepted as the American exposition of the system of republican government. Hence there might possibly be cases in which it would be the right and duty of the federal government to interfere, even although the particular state, or all its people, had no disposition to invoke the protection of the guaranty. In effect, the guaranty does not only contain a promise to each state that it shall continue to enjoy a republican form of government as long as the Union endures, but also it imports a command to each state to maintain and preserve that form of government, under penalty of the intervention of the federal Union for the benefit of all its members. But "the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guarantied. As long, therefore, as the existing republican forms are continued by the states, they are guarantied by the federal constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican constitutions, a restriction which, it is presumed, will hardly be considered as a grievance." <sup>5</sup>

"Under this article of the constitution, it rests with congress to decide what government is the established one in a state. For as the United States guaranty to each state a republican government, congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." <sup>6</sup>

<sup>5</sup> The Federalist, No. 21.

<sup>6</sup> Luther v. Borden, 7 How. 1.

But this power vested in congress does not give it the right to regulate the elective franchise in the several states, or prescribe the qualifications of voters. It is true that a state might so limit the right of suffrage as practically to restrict all participation in the government to a favored class, and the effect of such a restriction would amount to the establishment of an oligarchy or aristocracy, which would certainly be incompatible with a republican form of government. And in this extreme case, it might be the duty of congress to interfere. But while congress has the power to determine (and necessarily must determine in any given case) whether the government actually existing in a state is republican or not, it is not authorized to declare that universal suffrage is implied in the idea of a republican government or that such and such restrictions of the right of suffrage are inconsistent with such a form of government.<sup>7</sup>

*Reconstruction.*

The constitutional authority of congress to pass the "reconstruction acts," for the restoration of legitimate governments in the states which had joined in the late rebellion, was derived from this clause. In the leading case on this subject it was said, *inter alia*: "The government and the citizens of the state (Texas) refusing to recognize their constitutional obligations, assumed the character of enemies and incurred the consequences of rebellion. These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the state with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the national government. The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guaranty to every state in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a state, and for the time excludes the national authority from its limits, seems to be a necessary complement to the former.

<sup>7</sup> Pom. Const. Law, § 210.

Of this the case of Texas furnishes a striking illustration. When the war closed, there was no government in the state except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. . . . The new freemen necessarily became a part of the people, and the people still constituted the state; for states, like individuals, retain their identity though changed to some extent in their constituent elements. And it was the state thus constituted which was now entitled to the benefit of the constitutional guaranty. There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation and afford adequate security to the people of the state. In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the state to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the constitution. . . . The power to carry into effect the clause of guaranty is primarily a legislative power and resides in congress. . . . The action of the President must therefore be regarded as provisional, and in that light it seems to have been regarded by congress." Congress "proceeded after long deliberation to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the constitution and in the acts known as the reconstruction acts, which have been so far carried into effect that a majority of the states which were engaged in the rebellion [now all] have been restored to their constitutional relations, under forms of government adjudged to be republican by congress, through the admission

of their senators and representatives into the councils of the Union.”<sup>8</sup>

*Admission of New States.*

When a new state is to be admitted into the Union, it is the right and duty of congress, under this clause, to see to it that the form and constitution of government proposed to be adopted is republican. And the determination of congress to that effect, manifested by its admission of the new state, is final and conclusive.

*Amendment of State Constitutions.*

When the people of a state undertake to revise or amend the constitution of the state, their power in that regard is limited by the clause in question. That is to say, it would not be lawful for them to make such changes in their constitution as would amount to abolishing the republican form of government previously existing and setting up in its place an un-republican form or system. Such an attempted change would be revolutionary in its character, and it would justify and demand the direct interference of the federal government.<sup>9</sup>

*The District of Columbia.*

Since the District of Columbia is not a “state,” it appears that the United States is under no obligation to guaranty to the District or to its inhabitants a republican form of government. And in fact, the government of the District is not at all in the form of a republic, since its residents have no voice in the selection of those who make their laws, and no power to choose those who shall administer the laws.

<sup>8</sup> Texas v. White, 7 Wall. 700.

<sup>9</sup> Cooley, Const. Lim. 33.

## CHAPTER XI.

## EXECUTIVE POWER IN THE STATES.

92. The executive power in each of the states and in the territories is lodged in a chief magistrate, who is called the "governor." In the states, this officer is elected by the people. In the territories, he is appointed by the President of the United States by and with the advice and consent of the senate. In most of the states there is a second executive officer, called the "lieutenant governor," who is to succeed the governor in his office in case of the death, resignation, removal, or disability of the latter. The governor is invested with all those powers, and charged with those duties, which, under the American system, are regarded as executive in their nature, as distinguished from legislative and judicial powers and duties. And in the exercise of his constitutional powers, and in the discharge of his constitutional duties, he is independent of the other departments of government and free from any interference or obstruction on their part.

The general nature of executive power, and the ordinary powers and duties of a chief magistrate, have been discussed in the chapter on the Federal Executive, and will not be here repeated. But there are some questions relating peculiarly to the position and duties of state governors which must now be considered in order to complete our review of the distribution of governmental authority.

*State Governors under the Federal Constitution.*

The constitutional functions of the governor of a state are regulated to some extent by the constitution of the United States, and chiefly in relation to matters concerning the intercourse of the states with each other, and to the representation of the state in congress. Thus, by the fourth article of the constitution, a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand

of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime. Again, the United States is bound to protect each state against domestic violence, when application for federal aid is made by the legislature. But when the legislature cannot be convened, the executive of the state may call for such assistance. All executive officers of the several states are required to be bound by oath or affirmation to support the constitution of the United States. When vacancies happen in the representation of any state in congress, the executive authority thereof shall issue writs of election to fill such vacancies. And if vacancies happen in the senate, by resignation or otherwise, during the recess of the legislature of the state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

*Independence of Executive.*

The constitutional principle which requires that the executive department of government shall be separate from the legislative and judicial departments, and that the head of the one department shall be free and independent in the exercise of his constitutional powers from all control or interference of the others, has been fully considered in the chapter relating to the three departments of government, to which the reader is here referred. But with more specific reference to the governor of a state, it should be mentioned that such powers as are specially conferred upon him by the constitution cannot be abrogated by the legislature, nor can the legislature require or authorize his constitutional duties to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law.<sup>1</sup> But there are numerous other powers, not provided for in the constitution, which the legislature may create, and while these powers, if executive in their character, must be intrusted to some executive authority, the legislature may either grant them to the governor or to some other officer of the executive department, or to an authority specially raised up for the occasion.

<sup>1</sup> Cooley, Const. Lim. 115; Attorney General v. Brown, 1 Wis. 513; People v. Governor, 29 Mich. 320.

In regard to the manner of exercising those powers which the constitution does specifically confide to the governor, it seems that the legislature, while it cannot, under pretense of regulation, deprive the executive of any branch of his constitutional power, or unduly hinder him in the exercise of it, yet it may make rules for his governance in many cases where his authority over the subject is not exclusive of that of the legislature, or where the constitution has not furnished the exclusive rule for the exercise of the power.

While the governor may be called to account, like any other citizen, for the consequences of his private and personal acts, whether the liability therefor is civil or criminal, yet he is not answerable in the courts for any acts performed by him in his official capacity which are political in their character or involve the exercise of his judgment and discretion as governor.<sup>2</sup> Nor can he be compelled by the courts to appear and testify in relation to matters pertaining to the exercise of his executive functions; nor can he be constrained by attachment to disclose, in aid of an investigation before a grand jury, secrets of the business of the executive department which he does not consider it expedient to reveal.<sup>3</sup> In the case cited from New Jersey, it was said: "The governor cannot be examined as to his reasons for not signing the bill, nor as to his actions in any respect regarding it. But there is no reason why he should not be called upon to testify as to the time it was delivered to him. That is a bare fact that includes no action on his part. To this extent, at least, I am of opinion that he is bound to appear and testify. But I will make no order on him for that purpose. . . . Such order ought not to be made against the executive of the state,

<sup>2</sup> See pp. 12, 13, 82, *supra*. In English law, an ordinary action cannot be maintained against the king. But the subject may proceed by petition of right, which he may now by statute bring in any of the superior courts in which an action might have been brought if it had been a question between private parties. This method of procedure is illustrated in the *Bankers' Case*, 14 How. St. Tr. 1. The governor of an English colony is not exempt from being sued for his debts or torts, but if judgment is given against him, his person is not liable to be taken in execution while he is on service. *Hill v. Bigge*, 3 Moore, P. C. 465.

<sup>3</sup> *Hartranft's Appeal*, 85 Pa. St. 433; *Thompson v. German Val. R. Co.*, 22 N. J. Eq. 111.

because it might bring the executive in conflict with the judiciary. If the executive thinks he ought to testify, in compliance with the opinion of the court, he will do so without order. If he thinks it to be his official duty, in protecting the rights and dignity of his office, he will not comply even if directed by an order. And, in his case, the court would hardly entertain proceedings to compel him by adjudging him in contempt. It will be presumed the chief magistrate intends no contempt, but that his action is in accordance with his official duty."

*Powers of Governor in General.*

With some exceptions and variations, caused by differing provisions in the several states, the general powers and duties of a governor are as follows:

He is to take care that the laws are faithfully executed.

He is to inform the legislature of the condition of the state, and to recommend such measures of legislation as he deems important or necessary.

He may require information from the different officers of the executive department upon subjects relating to the duties of their respective offices.

He has the power of appointing certain of the officers of the state. But there is no uniformity in the different states as to the officers who come within the appointing power of the governor. In some states, he has a very considerable power in this respect. In others, nearly all the important officers of the state are to be elected, leaving only inferior and subordinate offices to be filled by the governor. For example, in some few states, the judges are to be appointed by the governor, or by the governor and council. But as a rule, the system of an elective judiciary prevails throughout the country. In some states, appointments made by the governor are to be confirmed by the senate or council.

He is commander in chief of the militia of the state, except when they are called into the actual service of the United States, in which case, by the provision of the federal constitution, the President becomes commander in chief.

He has the power to grant pardons and reprieves. But in many states this power is not confided to the governor alone, but is to

be exercised by a court of pardons, or board of pardons, of whom the governor must be one.<sup>4</sup>

He has the power to convene the legislature in special session, and to adjourn them in certain cases.<sup>5</sup>

In nearly all the states, the governor has power to veto bills passed by the legislature. But the veto may generally be overruled by a prescribed majority.<sup>6</sup>

*Executive Construction of Laws.*

The executive is bound to give effect to the laws which regulate his duties, and in so doing he must necessarily put a construction upon them.<sup>7</sup> But a mere ministerial officer cannot be allowed to decide upon the validity of a law, and thus exempt himself from responsibility for disobedience to the command of a peremptory mandamus, his disobedience to the law being the cause of his inability to obey the command of the court.<sup>8</sup>

<sup>4</sup> A pardon granted by one who is de facto the governor of the state is valid, notwithstanding that he has not a perfect title or evidence of title to the office. *Ex parte Norris*, 8 S. C. 408.

<sup>5</sup> In some of the states, it is specially provided by the constitution that when the legislature is called together in special session by the governor, they shall not consider or act upon any subject save that for which they were assembled, or which may have been submitted to them by a special message from the governor. But in the absence of any such constitutional restriction, the powers of the legislature, when so specially convened, are not limited to considering the special subjects which prompted the call or message, but they may act on any subject as at a regular session. *Morford v. Unger*, 8 Iowa, 82.

<sup>6</sup> Unless the constitution expressly otherwise provides, the power of the governor to approve or veto a bill passed by the legislature must be exercised by him during the session of the legislature; his approval of an act after the adjournment of the legislature is a nullity. *Hardee v. Gibbs*, 50 Miss. 802; *Fowler v. Peirce*, 2 Cal. 165. See *People v. Bowen*, 21 N. Y. 517. The governor's approval of a bill is not complete until the bill has passed beyond his control by the constitutional and customary mode of legislation; and at any time prior to that he may reconsider and retract any approval previously made. *People v. Hatch*, 19 Ill. 283; *Cooley*, Const. Lim. 154.

<sup>7</sup> *U. S. v. Lytle*, 5 McLean, 9. Fed. Cas. No. 15,652; *State v. Hallock*, 16 Nev. 373.

<sup>8</sup> *People v. Salomon*, 54 Ill. 39.

**CHAPTER XII.****JUDICIAL POWERS IN THE STATES.**

- 93. System of Courts.
- 94. Constitutional Courts.
- 95. Statutory Courts.
- 96. Judges.
- 97, 98. Jurisdiction.
- 99. Process and Procedure.

**SYSTEM OF COURTS.**

**93.** The judicial department, as has been heretofore stated, constitutes an independent, co-ordinate branch of the state government. The constitutions do not leave the judicial power to be prescribed and regulated at the discretion of the legislature, but declare, with a greater or less degree of minuteness, in what courts it shall be vested, and place their powers and functions, with more or less precision, beyond the reach of the legislative will.

The system of courts, in respect to its details, varies very greatly in the different states, but in its main features there is a marked similarity of plan. The general design is to establish one court of last resort, which shall have final appellate jurisdiction over all the rest, and a series of inferior courts, territorially distributed throughout the state, possessing general original jurisdiction, civil and criminal, together with certain courts of greatly restricted powers, and usually proceeding without a jury, which are intended for the trial and determination of minor causes. The court of last resort is sometimes called the "supreme" court, sometimes the "court of appeals," sometimes the "court of errors and appeals," and there are some other variations of these names. This court, as a rule, is vested with very narrow original jurisdiction, but with the ultimate appellate jurisdiction, both in civil and criminal causes. It also has power to issue various prerogative writs, or other extraordinary remedies, such as the writs of habeas corpus, certiorari, mandamus, injunction, quo warranto, and writs of error.

High original jurisdiction is vested in a series of courts, which are called "superior courts," "circuit courts," "district courts," "general terms of the supreme court," or "courts of common pleas." These courts possess general original jurisdiction of all suits, actions, and judicial proceedings. In some states, they are also vested with jurisdiction in equity; in others, there is a separate system of chancery courts. Criminal jurisdiction is vested also in these courts, though in some states they are designated by other names when sitting on the criminal side, such as courts of "oyer and terminer," courts of "quarter sessions," or courts of "general jail delivery." Courts of this class also possess appellate jurisdiction, in some states, from the inferior courts, such as justices of the peace, probate courts, or municipal courts.

Another series of courts is vested with the jurisdiction of the probate of wills, the granting of letters testamentary, and the settlement of the estates of decedents, and generally of the appointment of guardians for minors and the settlement of their accounts. These courts are variously called "probate courts," "surrogates' courts," "orphans' courts," or "courts of ordinary."

Justices of the peace are found in all the states, and they are privileged to hold courts for the determination of civil cases of minor importance, their jurisdiction being usually limited to cases in which the amount involved does not exceed a certain small sum, or where the title to real estate does not come into controversy. They are also conservators of the peace, and possess the powers of committing magistrates, and also, in some states, final jurisdiction over minor offenses and breaches of the peace.

In many of the states, there are established courts in the larger cities, called "municipal courts," which are invested with a minor civil jurisdiction similar to that of justices of the peace, usually limited to a small sum, and sometimes concurrent, up to that limit, with the jurisdiction of the circuit or district courts. They usually possess jurisdiction in criminal cases, extending to the final trial of minor offenses, such as violations of municipal ordinances or breaches of the peace, which are not triable by jury, and jurisdiction in graver cases to make a preliminary investigation and hold the offender to bail. In some states, they also have appellate jurisdiction over the justices of the peace.

The "police courts" found in some of the states are very similar to the municipal courts just mentioned, except that, as a general rule, they have no civil jurisdiction, being confined to the trial of petty criminal offenses and the preliminary inquiry into felonies and high misdemeanors.

The foregoing general view makes no mention of various courts which are peculiar to one or a few of the states. The state judiciary systems, as already observed, are marked by great diversities in the details. And the limits of the present work do not admit of a review of the powers of such courts as the "corporation courts," "hustings courts," "mayor's courts," "parish courts," "prerogative courts," "recorders' courts," and others, existing only in a few of the states.<sup>1</sup>

#### CONSTITUTIONAL COURTS.

**94. Such courts as are provided for in the constitution of the state can neither be abolished nor changed by the legislature. And whatever jurisdiction is intrusted to them by the constitution is beyond the reach of the legislature; it can neither be added to, diminished, nor modified. But the manner of its exercise may be regulated by statute.**

When the constitution of the state provides that the judicial power of the state shall be vested in certain enumerated courts, they are thereby constituted an independent branch of the government, and placed without the limits of legislative interference or control. The legislature cannot lawfully abolish, either directly or indirectly, any constitutional court. The judiciary system, as defined in the constitution, can be changed only by a revision or amendment of the constitution. And when the organic law creates a court and prescribes its jurisdiction, its provisions are generally self-executing; that is, as the court does not owe its existence to the legislature, so also there is no necessity for the legislature to recognize it or invest it with jurisdiction in order to enable it to proceed to the exercise of its constitutional duties and powers.<sup>2</sup> Nor can the juris-

<sup>1</sup> For more detailed information, the reader may consult Stimson, *Am. Stat. Law*, §§ 550-559.

<sup>2</sup> *State v. Gleason*, 12 Fla. 190.

diction of the court, as fixed by the constitution, be abridged by the legislative body. For instance, if the jurisdiction of the court is co-extensive with the state, it cannot be territorially restricted by statute.<sup>3</sup> So also, it is not competent for the legislature to abolish or abridge the appellate jurisdiction given to any court by the constitution, either directly or by making the judgment of an inferior court final and conclusive.<sup>4</sup> But it is no infringement of the constitutional powers of an appellate court to regulate or point out the mode in which its power shall be exercised, as, when by appeal and when by writ of error.<sup>5</sup> And so the establishment, repeal, or alteration of the statute of limitations as to the time of appealing to the supreme court is within the lawful power of the legislature.<sup>6</sup> And a statute allowing intermediate appeals to inferior courts is not unconstitutional, provided the right of an ultimate appeal to the court of last resort, as contemplated by the constitution, is not taken away.<sup>7</sup> And if the legislature cannot abridge or restrict the jurisdiction conferred on any court by the constitution, so neither can it enlarge such jurisdiction, or grant any species of jurisdiction, where such enlargement or new grant would violate either the letter of the constitution or its plain design with reference to the particular court. For instance, where the intention of the fundamental law is that the supreme court shall possess and exercise an appellate jurisdiction, and all original jurisdiction is denied to it, or denied except in a few specified cases, and vested in other courts equally created by the constitution, in such case it is not within the power of the legislature to confer original jurisdiction upon that court.<sup>8</sup> And in general, where the jurisdiction of any particular court is limited by the fundamental law, it would be unconstitutional for the legislature to attempt to increase the boundaries of its jurisdiction. Thus if, under the constitution, justices of the peace have jurisdiction only of actions on contract, it is incom-

<sup>3</sup> *Com. v. Commissioners of Allegheny Co.*, 37 Pa. St. 237.

<sup>4</sup> *Anderson v. Berry*, 15 N. J. Eq. 232; *Ex parte Anthony*, 5 Ark. 358.

<sup>5</sup> *Haight v. Gay*, 8 Cal. 297.

<sup>6</sup> *Page v. Matthews*, 40 Ala. 547.

<sup>7</sup> *Yalabusha County v. Carbry*, 3 Smedes & M. 529.

<sup>8</sup> *State v. Bank of East Tennessee*, 5 Sneed, 573; *Ward v. Thomas*, 2 Cold. 505; *State v. Jones*, 22 Ark. 331.

petent for the legislature to give them jurisdiction of actions for the invasion of the privileges of licensed ferries.<sup>9</sup> On the same principle, the legislature cannot confer appellate jurisdiction on courts which are restricted by the constitution to the exercise of original jurisdiction only.<sup>10</sup> Neither can the legislature confer upon one court the functions and powers which the constitution has conferred upon another.<sup>11</sup>

### STATUTORY COURTS.

95. The constitutions of some of the states contain provisions authorizing the legislature to create courts in addition to those established by the constitution itself, or inferior to the constitutional courts. Courts established in pursuance of such a grant of power are more directly under the control of the legislature. While the legislature could not itself usurp their functions or assume to regulate their decisions, it may abolish or modify them at discretion and adjust and control the limits of their jurisdiction.

It is only when the constitution expressly authorizes the statutory creation of other courts that this can be done. If the constitution confers the whole judicial power of the state upon certain enumerated courts, this must be understood to exclude the power of the legislature to vest any portion of it elsewhere, and consequently prohibits the creation of any courts in addition to those specified.<sup>12</sup> And if the constitution declares that the judicial power shall be vested in certain courts which it names "and in such other courts as the legislature may from time to time establish," these words must be taken as pointing only to a partition of judicial powers. They will not authorize the legislature to abolish any of the constitutional courts, or to divest them of their entire jurisdiction, or, in creating new courts, to invest them with jurisdiction exclusive of that of the constitutional courts, but the legislature may vest a portion of this jurisdiction or a concurrent jurisdiction, in courts from time to

<sup>9</sup> Gibson v. Emerson, 7 Ark. 172.

<sup>11</sup> Zander v. Coe, 5 Cal. 230.

<sup>10</sup> Deek's Estate v. Gherke, 6 Cal. 666.

<sup>12</sup> Cooley, Const. Lim. 90, note.

time established.<sup>13</sup> And such a grant of power to the legislature is broad enough to authorize the bestowal of judicial powers and functions, for special purposes, upon boards or bodies whose ordinary duties are not properly judicial. Thus, in Indiana, it is held that the legislature may erect the board of county commissioners into a court which shall have authority to adjudicate upon claims against the county.<sup>14</sup> And a general distribution, in the constitution, of the judicial power, not referring to courts martial, would not be held to prohibit, by implication, the creation of such courts or the grant to them of power to punish by fine.<sup>15</sup> A discretionary power bestowed by statute on a court may be taken away, in any particular case, by a special act of the legislature, as well as generally by a general act.<sup>16</sup>

#### JUDGES.

**96.** In some few of the states the judges of the courts are appointed by the governor. But in a majority, they are elected by the qualified voters. But the constitutions, in fixing their term of office, and in prescribing their compensation and declaring that it shall not be increased or diminished during their continuance in office, secure their necessary independence so far as concerns the interference or control of the legislative body.

It is a general rule of constitutional law, applicable to the judges of the courts as well as to other official persons, that when the constitution itself has created an office and fixed its term, and has also declared the grounds and mode for the removal of an incumbent of the office before the expiration of his term, the legislature has no power to remove or suspend the officer for any other reason or in any other mode.<sup>17</sup> As to whether a judge can be legislated out of his office by the abolition of the court to which he belongs, there has

<sup>13</sup> *Com. v. Green*, 58 Pa. St. 226; *Montross v. State*, 61 Miss. 429; *State v. Burton*, 11 Wis. 51.

<sup>14</sup> *State v. Board of Com'rs of Washington Co.*, 101 Ind. 69.

<sup>15</sup> *People v. Daniell*, 50 N. Y. 274; *Alden v. Fitts*, 25 Me. 483.

<sup>16</sup> *People v. Judge of Twelfth Dist.*, 17 Cal. 547.

<sup>17</sup> *Lowe v. Com.*, 3 Metc. (Ky.) 237; *State v. Emerson*, 39 Mo. 80.

been some difference of opinion. But the weight of authority seems to teach that if the legislature has the power to abolish the court, it cannot be restrained from so doing by the consideration that a judge would thereby be deprived of his office in a mode not directly contemplated by the constitution. And where the judge has been elected by the legislature itself, the legislature may curtail the territory of his jurisdiction down to the constitutional minimum, although it thereby diminishes his compensation.<sup>18</sup>

### JURISDICTION.

97. The judicial power of a state differs from that of the United States in this, that while the latter is limited to such subjects, and such controversies between such persons, as the constitution specifically enumerates, the former is general and extends to all cases and judicial controversies, of every sort and description, and between all classes of persons, except only in so far as it is limited by the provisions of the federal constitution.

98. The jurisdiction of the state courts, in so far as it is defined by their constitutions, is not subject to legislative control; and within the sphere of its power to regulate jurisdiction, the legislature is further bound by the implied limitation that it may not impose upon judicial officers duties which are not judicial in their nature, and that it cannot deprive them of any incidental powers which are necessary to the independent discharge of the constitutional powers and functions of the courts.

The judiciary system created by the federal constitution is entirely disconnected from and independent of the judiciary of the several states. Although the courts of the two systems exist side by side in the same territory, they are as independent as if they had been respectively established by two foreign nations. Each is entitled to the uninterrupted exercise of its own powers and functions. Neither may rightfully encroach upon the province of the other.

<sup>18</sup> Foster v. Jones, 79 Va. 642.

Neither can define, limit, or interfere with the constitutional jurisdiction of the other. Congress has no power to confer jurisdiction or judicial powers, under the constitution, upon the courts of a state. Neither has a state legislature any power to bestow jurisdiction, powers, or functions upon the federal courts, or to impose duties upon them under local law, or to annul their judgments or determine their jurisdiction.<sup>19</sup> It has been made a question (but not yet decided) whether a state can grant jurisdiction to the courts of another state, or grant to another state the right to authorize her courts to act on certain matters within the first state, or to constitute a court in the first state to act upon the rights and property of the citizens of the other state therein.<sup>20</sup>

Whatever provisions may be found in the state constitution as to the jurisdiction of the courts, or as to the classes of subjects over which they shall have jurisdiction, the legislature is of course bound and limited by such provisions.<sup>21</sup> Thus, if, under the constitution, a given court has no jurisdiction of civil proceedings which are not suits, complaints, or pleas, the legislature cannot confer upon it jurisdiction of contested election proceedings.<sup>22</sup> Furthermore, there is a very important limitation upon the power of the legislature in dealing with the courts, in this, that it is not competent to impose upon the judges, as such, any duties which are not strictly judicial in their nature. Such was the decision in regard to an early act of congress which required the judges of the circuit courts to examine and certify claims to pensions, their report to be subject to the supervision of congress or of an executive officer. This statute was resisted by the courts, and several of them filed opinions in which they refused to obey its behests, on the ground that it was an attempt to impose upon them duties not belonging to the judicial office, and also to make their judgments subject to the revision of congress or the executive department.<sup>23</sup> Neither can the courts be required

<sup>19</sup> *Ferris v. Coover*, 11 Cal. 175; *Ex parte Knowles*, 5 Cal. 300; *Greely v. Townsend*, 25 Cal. 604; *U. S. v. Peters*, 5 Cranch, 115.

<sup>20</sup> See *Eaton & Hamilton R. Co. v. Hunt*, 20 Ind. 457.

<sup>21</sup> *In re Application of Cleveland*, 51 N. J. Law, 311, 17 Atl. 772.

<sup>22</sup> *Gibson v. Templeton*, 62 Tex. 555.

<sup>23</sup> *Hayburn's Case*, 2 Dall. 469; *U. S. v. Todd*, 13 How. 52, note; *U. S. v. Ferreira*, 13 How. 40.

to act as appraisers in making or reviewing the assessments of property for taxation.<sup>24</sup> Nor can they by virtue of their equity powers appoint officers to assess and collect taxes from municipalities, even though it be to pay judgments against such municipalities standing on their own records.<sup>25</sup> But the same objections do not apply to an act of congress requiring the judges of the circuit courts to appoint supervisors of elections, since this comes within the authority given to congress by the constitution to vest the appointment of inferior officers in the courts of law.<sup>26</sup> But if no similar power of appointment is found in the constitution of a state, it is not competent for the legislature to empower the courts to appoint election officers.<sup>27</sup> But since it is proper that the courts should have a voice in the selection of their own officers, it is proper to provide that in case of an undecided election for the office of clerk of the court, the court itself shall decide.<sup>28</sup> In pursuance of the same general principle it has been held that while the courts are bound to decide the cases duly submitted to them, they are not bound to give written opinions, and the legislature has no power to compel them to do so.<sup>29</sup> And some of the appellate courts have refused to obey statutes requiring them to prepare the syllabi to their reported decisions. As a corollary to this general proposition it also follows that the judicial powers must be confined to the courts proper, and that it is not competent for the legislature to confer powers which are essentially judicial upon persons or officers who are not recognized by the constitution or statutes as courts or judges. Thus, a statute giving to masters in chancery authority to grant writs of habeas corpus would be unconstitutional for this reason.<sup>30</sup> And the same is true of a law authorizing clerks of courts to fix the amount of bail.<sup>31</sup> But a statute providing for the appointment

<sup>24</sup> Auditor of State v. Atchison, T. & S. F. R. Co., 6 Kan. 500.

<sup>25</sup> Rees v. Watertown, 19 Wall. 107; Heine v. Levee Com'rs, 1 Woods, 246, Fed. Cas. No. 6,325.

<sup>26</sup> In re Supervisors of Election, 2 Flip. 228, Fed. Cas. No. 13,628.

<sup>27</sup> In re Supervisors of Election, 114 Mass. 247.

<sup>28</sup> Lewis v. State, 12 Mo. 128.

<sup>29</sup> Houston v. Williams, 13 Cal. 24.

<sup>30</sup> Shoultz v. McPheeters, 79 Ind. 373.

<sup>31</sup> Gregory v. State, 94 Ind. 384.

of referees is not unconstitutional on the ground of creating a diversion of judicial power from its legitimate channels, for referees are subordinate officers of the courts.<sup>32</sup>

#### PROCESS AND PROCEDURE.

**99. Subject to the limitation that the lawful powers of the courts must not be infringed and that the vested rights of individuals must not be interfered with, the process, practice, forms, remedies, and procedure in the courts are subject to the regulation of the legislature at its own discretion.**

The constitution is seldom violated by any statute which has relation merely to the form or method of conducting judicial business. Some restrictions, however, may be found in the constitutions of some of the states, and it is scarcely necessary to observe that they must be strictly heeded by the legislative body. Thus, the legislature cannot prescribe a form of process at variance with that prescribed by the state constitution; as, for instance, if the constitution directs that every summons shall run in the name of the people, a summons in the form specified by a statute, but not in the name of the people, is defective.<sup>33</sup> So the legislature has the power reasonably to regulate, but not to abolish, either directly or indirectly, the use of the writ of certiorari.<sup>34</sup> The legislature can constitutionally authorize an execution issued by a city or county court to run throughout the state.<sup>35</sup> And it may authorize judges of the superior courts to hold special terms at their discretion,<sup>36</sup> or authorize the courts to review their own decrees in equity after the expiration of the term at which the decree was made.<sup>37</sup> But a case which has been submitted for decision to a court of record is not subject to any control by the legislature.<sup>38</sup>

<sup>32</sup> Carson v. Smith, 5 Minn. 78.

<sup>33</sup> Manville v. Battle Mountain Smelting Co., 17 Fed. 126.

<sup>34</sup> State v. Mayor, etc., of Jersey City, 42 N. J. Law, 118.

<sup>35</sup> Hickman v. O'Neal, 10 Cal. 292.

<sup>36</sup> Grinad v. State, 34 Ga. 270.

<sup>37</sup> Longworth v. Sturges, 4 Ohio St. 690.

<sup>38</sup> Lanier v. Gallatas, 13 La. Ann. 175.

## CHAPTER XIII.

### LEGISLATIVE POWER IN THE STATES.

- 100, 101. General Considerations.
102. Organization and Government of Legislature.
103. Limitations Imposed by the Federal Constitution.
104. Private, Special, and Local Legislation.
105. Delegation of Legislative Powers.
106. Enactment of Laws.
107. Title and Subject Matter of Statutes.

### GENERAL CONSIDERATIONS.

100. Under the system of government in the United States, the people of each of the states possess the inherent power to make any and all laws for their own governance. But a portion of this plenary legislative power has been surrendered by each of the states to the United States. The remainder is confided by the people of the state, by their constitution, to their representatives constituting the state legislature. At the same time, they impose, by the same instrument, certain restrictions and limitations upon the legislative power thus delegated. But state constitutions are not to be construed as grants of power (except in the most general sense), but rather as limitations upon the power of the state legislature.

101. Consequently, the legislature of a state may lawfully enact any law, of any character, on any subject, unless it is prohibited, in the particular instance, either expressly or by necessary implication, by the constitution of the United States or by that of the state, or unless it improperly invades the separate province of one of the other departments of the government, and provided that the statute in question is designed to operate upon subjects within the territorial jurisdiction of the state.<sup>1</sup>

<sup>1</sup> McPherson v. Blacker, 146 U. S. 25, 13 Sup. Ct. 3; Giozza v. Tiernan, 148 U. S. 661, 13 Sup. Ct. 721; People v. Draper, 15 N. Y. 532; People v.

*Territorial Restriction.*

The laws of a state can have no ex-territorial validity. That is, a state has power to legislate only concerning such subjects as are within its physical limits or the confines of its jurisdiction, and concerning such persons as, by citizenship or inhabitancy, are within the sphere of its operations. Its laws cannot affect subjects of property which are beyond its limits, except in so far as its own people may have dealings with them. Nor can its laws affect citizens or inhabitants of other states or countries, except in so far as, by making a sojourn within the state, they make themselves amenable to its regulations, or invoke the aid and protection of its laws by dealing with property subject to its local jurisdiction or seeking the remedies afforded by its courts. This, then, constitutes an implied limitation upon the powers of a state legislature, but not because it is specifically prohibited by the constitution, but because what is beyond the power of the people of a state, as a whole, cannot be within the power of their representatives who are intrusted with the making of their laws.<sup>2</sup>

*Legislature as a Trustee.*

Another implied limitation upon the power of a state legislature may be found in the fact that it holds certain governmental powers, and certain kinds of public property, in trust for the people. That the great powers of taxation and police are thus held under a trust which forbids their surrender by the legislature or their irrevocable alienation to private persons, will fully appear from other parts of this work. And the application of a similar doctrine to property belonging to the people as a whole was made in the celebrated "Chicago Lake Front Case."<sup>3</sup> Herein it was stated that the title which a state holds to lands under tide waters bordering on the sea or under the navigable waters of the Great Lakes, lying within her limits, is different in character from the

Flagg, 46 N. Y. 401; Thorpe v. Rutland & B. R. Co., 27 Vt. 140; Walker v. Cincinnati, 21 Ohio St. 14; Page v. Allen, 58 Pa. St. 338; Sears v. Cottrell, 5 Mich. 251; Cooley, Const. Lim. 87.

<sup>2</sup> Cooley, Const. Lim. 128.

<sup>3</sup> Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110. But compare Sunbury & E. R. Co. v. Cooper, 33 Pa. St. 278.

title of the state to lands intended for sale, or from that of the United States to the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, free from obstruction or interference by private parties. And it is not within the legislative power of the state to abdicate this trust by a grant whereby it surrenders its property and general control over the lands of an entire harbor, bay, sea, or lake, though it may grant parcels thereof for the foundation of wharves, piers, docks, and other structures in aid of commerce, or parcels which, being occupied, do not substantially impair the public interest in the waters remaining. But in general, as already stated, the legislature is the repository of all the legislative power of the state. And all the duties and powers of any of the departments, not disposed of or distributed to particular officers of those departments, are left to the disposal of the legislature.<sup>4</sup>

*Irrepealable Laws.*

Every legislative body, unless restricted by the constitution, may modify or abolish the acts of its predecessors. And there is no way in which a legislative act can be made irrepealable, except it assume the form and substance of a contract.<sup>5</sup> Nor can one legislature be bound by the acts of another as to the mode in which it shall exercise its constitutional powers.<sup>6</sup>

**ORGANIZATION AND GOVERNMENT OF LEGISLATURE.**

**102.** By constitutional provisions in the several states, or by common parliamentary law, the state legislature has the power to make and enforce rules for its own organization and government. Each house, as a rule, has the sole power to choose its officers, to adopt rules of procedure, and to determine finally upon the election and qualification of its own members. It may also control and

<sup>4</sup> Ross v. Whitman, 6 Cal. 361.

<sup>5</sup> Bloomer v. Stolley, 5 McLean, 158, Fed. Cas. No. 1,559.

<sup>6</sup> Brightman v. Kirner, 22 Wis. 54.

discipline its members, for disorderly or contemptuous behavior, even to the extent of expelling them. It may appoint committees and define their powers and authorize them to send for persons and papers in the course of their investigations, and to a limited extent it may punish persons who may be guilty of contempts against it or breaches of its privileges. Moreover, its members are exempt from arrest on civil process while engaged in their parliamentary duties or while going to or returning from the seat of government. Each house of the legislature will also keep a journal of its proceedings, the publication and amendment of which are within its power and discretion.

*Election and Qualification of Members.*

The power to determine whether a person claiming to be a state senator or representative was duly elected and is qualified to take his seat belongs exclusively to that branch of the legislature of which he professes to be a member. And its decision of the question cannot be challenged or inquired into by the executive or the judicial department.<sup>7</sup> And it is held that the constitutional requirement which obliges the members of each house to take the oath to support the constitution is merely directory, at least to the extent that the omission to take the oath does not affect the validity of the statutes passed by them.<sup>8</sup> The power of expelling members for adequate cause is generally granted in the constitution, but it would necessarily exist even without constitutional sanction, as it is a power which is indispensable for the proper discharge of those functions for which the legislature is created. The reasons for the expulsion, and the question whether the member was duly heard before sentence was passed upon him, cannot be inquired into by the courts in any collateral proceeding.<sup>9</sup>

*Privilege of Members.*

The constitutions of most, if not all, of the states provide that members of the legislature shall be privileged from arrest, except

<sup>7</sup> *People v. Mahaney*, 13 Mich. 481; *Opinion of the Justices*, 56 N. H. 570.

<sup>8</sup> *Hill v. Boyland*, 40 Miss. 618.

<sup>9</sup> *Hiss v. Bartlett*, 3 Gray, 468.

for treason, felony, or breach of the peace, while in attendance upon a session of the legislature. And in some states, this privilege also embraces the time which may be reasonably required by them for going to and returning from the place of meeting of the legislature. In some states, though not all, the members are also exempt from service of any civil process. But if the constitutional privilege extends only to arrest on a charge of crime, this will not prevent the service of process in a civil action.<sup>10</sup>

*Contempts.*

How far, or in what circumstances, the legislature may punish persons for contempts against it, is one of the unsettled questions of parliamentary law. But it appears to be agreed, in this country, that either house of a state legislature may inflict punishment upon any of its own members who may be guilty of a contempt, and upon other persons when the conduct alleged as a contempt consists in a violation of the privilege of the members from arrest, or in violent, tumultuous, or disorderly behavior in the presence of the house, or in such actions as tend directly and necessarily to defeat, embarrass, or obstruct the proceedings of the house.<sup>11</sup> The house also has power to appoint committees, and charge them with the investigation of questions which come within the proper sphere of legislative action. And it can compel witnesses to appear and testify before such committees, and a refusal to obey the behest of the committee, in regard to testifying or exhibiting books or papers, will amount to a contempt of the house.<sup>12</sup> But it is always the privilege of the citizen to be excused from responding to any questions the answers to which might tend to criminate him or furnish a link in a chain of criminal evidence against him. And what the courts cannot

<sup>10</sup> *Gentry v. Griffith*, 27 Tex. 461.

<sup>11</sup> See *Anderson v. Dunn*, 6 Wheat. 204; *Kilbourn v. Thompson*, 103 U. S. 168; *Burdett v. Abbott*, 14 East, 1; *Burnham v. Morrissey*, 14 Gray, 226; *State v. Matthews*, 37 N. H. 450. And see discussion of the same question in connection with the powers of congress, ante, p. 153. In England, it is well settled that the courts of law cannot inquire into the grounds of a commitment for contempt by the house of commons. *Sheriff of Middlesex's Case*, 11 Adol. & E. 273; *Howard v. Gossett*, Car. & M. 380; *Bradlaugh v. Gossett*, 12 Q. B. Div. 271.

<sup>12</sup> *Burnham v. Morrissey*, 14 Gray, 226; *In re Falvey*, 7 Wis. 620.

compel him to do, in this respect, cannot be required of him by a legislative body or one of its committees.<sup>13</sup>

*Lobbying.*

Contracts undertaking to influence the course of legislation by corrupt, secret, or unfair means are against public policy and therefore void. And they are also forbidden by statute in many of the states. This of course does not include the proper employment of attorneys or agents to appear before legislative bodies or their committees and present arguments in favor of or against proposed legislation. These services are entirely legitimate and proper, and contracts to render such services and to pay for the same will be enforced by the courts. But when the engagement is to undertake to secure or prevent the passage of a contemplated measure by bribery, by secret manipulation, or by other unfair and illegitimate means, it is utterly void, for important reasons of public policy.<sup>14</sup> The attempt to bribe a member of the legislature is also made a crime, either by the constitution or a statute, in all the states, as is also the taking of a bribe by such member. And it is held that a house of the legislature has power to investigate charges of bribery against one of its own members, and to summon and examine witnesses in relation thereto and compel them to answer.<sup>15</sup>

*Journals.*

The journals kept by each house of the legislature are public records and may be officially noticed by the courts. They are moreover the only proper and final evidence of the progress of a bill through the house and its final passage. It is held in some states that it is not admissible to go behind an enrolled statute, in seeking to show that it was not duly passed. But in other states (perhaps a majority) it is considered that if an allegation is put forward that the act in question was not passed by the legislature in the form and manner required by the constitution, recourse may be had to the journals of the legislature to determine the question. If the

<sup>13</sup> *Emery's Case*, 107 Mass. 172.

<sup>14</sup> *Frost v. Inhabitants of Belmont*, 6 Allen. 152; *Fuller v. Dame*, 18 Pick. 472; *Pingry v. Washburn*, 1 Aik. 264; *Clippinger v. Hepbaugh*, 5 Watts & S. 315; *Marshall v. Baltimore & O. R. Co.*, 16 How. 314.

<sup>15</sup> *Ex parte McCarthy*, 29 Cal. 395.

journals show that the bill was not agreed to by the requisite majority, or that it was not read the required number of times, or that the yeas and nays were not taken upon its final passage, where that is required by the constitution, or that any other mandatory provision of the constitution was disregarded, the courts will be justified in refusing to enforce the alleged law. But the presumption is always in favor of the legality and regularity of the proceedings of the legislature, and disobedience to the directions of the constitution will not be inferred from the mere fact that the journal is silent as to compliance with any particular step or requirement.<sup>16</sup>

The legislature may at the same or a subsequent session correct its journals, by amendments which show the true facts as they actually occurred, when it is satisfied that by neglect or design the truth has been omitted or suppressed.<sup>17</sup>

#### LIMITATIONS IMPOSED BY THE FEDERAL CONSTITUTION.

103. The constitution of the United States imposes numerous prohibitions upon the legislative power of the several states. These are of three kinds. In the first place, certain powers of law-making are granted to congress, and of these some are exclusive. In such cases the constitution implies that the several states shall not take any legislative action upon the subject matter of such exclusive powers of congress. In the second place, the constitution guaranties to the citizens of the United States certain rights and privileges, and certain other rights and privileges to the people of each state to be enjoyed within the other states, and also certain rights and privileges to be enjoyed by each of the states as a state. And it is implied that no state shall enact laws which would deny or derogate from these rights and privileges. In the third place, the constitution explicitly declares that no state shall pass any laws of certain kinds or on certain subjects, and that the

<sup>16</sup> *Miller v. State*, 3 Ohio St. 475; *Prescott v. Board of Trustees*, 19 Ill. 324; *Spangler v. Jacoby*, 14 Ill. 297; *Opinion of the Justices*, 52 N. H. 622.

<sup>17</sup> *Turley v. Logan Co.*, 17 Ill. 151.

**several states shall not exercise certain enumerated powers of legislation.**

The prohibitions of the first class have been discussed in connection with the powers of congress. An example of an exclusive power vested in congress is that which gives it the sole right to legislate for the government of the District of Columbia and the territories.

In the second class of prohibitions belong those which forbid the states to deprive the federal courts of any part of the jurisdiction conferred upon them by the constitution, or of the means of exercising that jurisdiction, and those which secure to the citizens of each state the privileges and immunities of citizens in the several states, and which provide for full faith and credit to be given to the public acts, records, and judicial proceedings of each state, and for the extradition of fugitives from justice, and also the guaranty to each state of a republican form of government. In each of these cases, the grant of rights or the guaranty carries with it an implied prohibition of any state legislation which would have the effect to deny it or derogate from its effectiveness.

The third class of prohibitions, those explicitly declared, are found in the following clauses of the federal constitution: "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility. No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay." (Article 1, § 10.) "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." (Thirteenth Amendment.)

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States or any claim for the loss or emancipation of any slave. (Fourteenth Amendment.) “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.” (Fifteenth Amendment.)

Some of these express provisions are of such importance, and involve so many principles and questions, that they require separate chapters for their full treatment. Others will be most appropriately discussed in connection with the guaranties of private and political rights, and can only be studied in connection with similar prohibitions laid upon the power of congress. The remaining limitations upon state power, found in the federal constitution and mentioned above, will now be considered in order.

But first, the reader must be again reminded that the various clauses of the federal constitution which impose restrictions, limitations, or prohibitions upon the exercise of legislative power were designed, generally, to guard the rights of the people against oppression on the part of that government which the constitution created, not against their own states. They are therefore to be considered as applicable only to the federal government, except in those cases where the states are explicitly mentioned. And this is particularly to be observed in regard to the first eight amendments,<sup>18</sup>

#### *Treaties and Compacts.*

The constitution gives to the general government the plenary and exclusive control over all our foreign relations and all our dealings as a nation among nations. Moreover, treaties made by the United States are the supreme law of the land, and it follows that the in-

<sup>18</sup> *Barron v. Mayor of Baltimore*, 7 Pet. 243; *Spies v. Illinois*, 123 U. S. 131, 8 Sup. Ct. 21; *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. 580; *Colt v. Eves*, 12 Conn. 243; *Fox v. Ohio*, 5 How. 410.

dividual states are not only prevented from forming alliances or arranging treaty rights with foreign countries, but also that it is not within their lawful power to disregard or obstruct those which are made by the national government.<sup>19</sup> But the states may make compacts with each other, by the consent of congress. It is said: "The agreements which may be entered into with the consent of congress differ from treaties, alliances, and confederations, which are absolutely forbidden in this, that the latter are made for perpetuity or for a considerable time, and generally have successive execution, while the former are made for temporary purposes, and are perfected in their execution once for all."<sup>20</sup> Thus, the states may settle their disputed boundaries by compact or treaty, subject only to the condition that their agreement shall have the assent of congress.<sup>21</sup> The consent of congress need not necessarily be manifested by an express assent to every proposition contained in the agreement, but the assent may be inferred from the legislation of congress on the subject.<sup>22</sup>

*Letters of Marque.*

The subject of letters of marque has been somewhat considered in connection with the war powers of congress.<sup>23</sup> It remains to add that the removal of this power from the field of state legislation, and the intrusting it exclusively to the general government, is a part of that general policy which dictated the principle that the powers of peace and war, with all their concomitants, should not be left to the discretion and the varying interests or prejudices of the individual states, but should be lodged alone in the central government. If it were not for this prohibition, it would be in the power of any state, at any time, to involve the whole nation in a war. "It is true," says Story, "that the granting of letters of marque and reprisal is not always a preliminary to war or necessarily designed to provoke it. But in its essence it is a hostile measure for unredressed grievances, real or supposed, and therefore is most generally the precursor of an

<sup>19</sup> *Fellows v. Denniston*, 23 N. Y. 420; *In re Metzger*, 1 Edm. Sel. Cas. 399.

<sup>20</sup> *Cooley*, Const. Law (2d Ed.) 92; *Holmes v. Jennison*, 14 Pet. 540, 572.

<sup>21</sup> *Poole v. Fleeger*, 11 Pet. 185.

<sup>22</sup> *Virginia v. West Virginia*, 11 Wall. 39.

<sup>23</sup> See ante, p. 202.

appeal to arms by general hostilities. The security (as has been justly observed) of the whole Union ought not to be suffered to depend upon the petulance or precipitation of a single state."<sup>24</sup>

*Bills of Credit.*

The history of paper currency during the revolution, with its inevitable and serious depreciation, and the public discredit which ensued, furnished the reason for the introduction into the constitution of a prohibition against the issue of bills of credit by the states. Not every species of evidence of debt put forth by a state comes within the description of bills of credit. The term does not include bonds issued by a state, or warrants for the payment of services out of a specific fund. To constitute a bill of credit, within the meaning of the prohibition, it is necessary that it should be issued by a state, that it should involve the faith of the state, but without the appropriation of any specific fund for its payment or ultimate redemption, and be designed to circulate as money, on the credit of the state, in the ordinary uses of business.<sup>25</sup> A bill drawn on a state, the payment of which is to be made out of a fund pledged therefor is not a bill of credit, within the meaning of this clause.<sup>26</sup> And bills issued by a banking corporation which has a paid up capital and may be sued upon its debts, are not to be deemed bills of credit, even though the state owns the entire stock of the bank, and the legislature elects the directors, and the faith of the state is pledged for the redemption of the bills, and they are made receivable for all public dues.<sup>27</sup> This prohibition of the constitution, though it declares only that "no state" shall issue such bills, applies with equal force to the case where two or more states confederate together and on their joint faith and credit issue bills of the forbidden character.<sup>28</sup>

<sup>24</sup> 2 Story, Const. § 1356.

<sup>25</sup> *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Craig v. Missouri*, 4 Pet. 410; *Woodruff v. Trapnall*, 10 How. 190; *Central Bank of Georgia v. Little*, 11 Ga. 346.

<sup>26</sup> *Gowen v. Shute*, 4 Baxt. 57.

<sup>27</sup> *Darrington v. Bank of Alabama*, 13 How. 12; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Curran v. Arkansas*, 15 How. 304.

<sup>28</sup> *Baily v. Milner*, 35 Ga. 330.

*Coining Money—Legal Tender.*

Under the articles of confederation, the several states possessed the power to coin money, as well as the United States. This appears from the language of the ninth article, where it is provided that "the United States in congress assembled shall have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority or by that of the respective states." But under the constitution, this power is removed from the states, not only by the grant of the power to coin money to congress, but also by the prohibition of it to the states. While the states may neither emit bills of credit nor make anything but gold and silver coin a tender in payment of debts, yet neither of these restrictions will prevent them from granting charters of incorporation to banking companies and authorizing them to issue their bills, intended to circulate as money, provided that such bills are issued upon the credit of the banks alone and not upon the faith of the states, and that it is not attempted to give them the character of legal tender notes.<sup>29</sup>

*Duties on Imports and Exports.*

The prohibition against state taxation of imports and exports is one of those provisions of the constitution which are designed more effectually to commit to the national government the entire control of foreign and interstate commerce. It was apparently deemed necessary to concede to the states a very limited power of taxation in this regard, for the purpose of allowing them to make and execute inspection laws. But so jealously was this concession restricted that all temptation to the states to encroach upon the limits set for them was taken away by the provision that the "net proceeds" of all duties so laid "shall be for the use of the treasury of the United States." Inspection laws are such as authorize and direct the inspection and examination of various kinds of merchandise intended for sale, or for exportation, especially food, with a view to ascertaining its fitness for use and excluding unwholesome or unmarketable goods from sale or exportation.<sup>30</sup> The word "imports" as here used is con-

<sup>29</sup> Miller, Const. 583.

<sup>30</sup> 1 Story, Const. § 1017. In order to make the law an "inspection law," it is not necessary that it should make provision for opening the package con-

strued as having reference only to goods imported from foreign countries, and it is not applicable to such as are merely transported from one state into another.<sup>31</sup> But the authority of the states to tax property brought into them from other states is restrained by another clause of the constitution, namely, that which grants to congress the power to regulate commerce. As to articles imported from foreign countries, it is held that they do not lose their character as imports, so as to become subject to state taxation as a part of the general mass of property in the state, until they have either passed from the control of the importer or have been broken up by him from the original cases, packages, or bales in which they were imported. Before this is done, any state tax upon them is void, whether it is imposed upon them distinctively as imports or as constituting a part of the importer's property.<sup>32</sup> In regard to the taxation of exports, the chief difficulty has been in the determination of the point of time at which goods cease to be a part of the general mass of property in the state and assume the distinctive character of exports. The result of the authorities may be stated in the following general rule: Goods produced in a state are not entitled to exemption from its tax laws merely because it is the intention of the owner that they shall be exported to another state or to a foreign country, or even because they have been partially prepared for that purpose by being deposited at a place of shipment. But in this case they must be

taining the article and examining the quality of its contents. To prepare the products of the state for exportation, it may be necessary that such products should be put in packages of a certain form, and of certain prescribed dimensions, either on account of the nature and character of the products, or to enable the state to identify the products of its own growth, and to furnish the evidence of such identification in the markets to which they are exported. And a law which provides for an official inspection, to ascertain whether the goods are thus prepared for export, and charges a reasonable fee to cover the cost thereof, is an inspection law within the meaning of the constitution. *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. 44. But a state cannot, under the guise of enacting inspection laws, make discrimination against the products and industries of other states and in favor of its own products and industries. *Voight v. Wright*, 141 U. S. 62, 11 Sup. Ct. 855. And see *Foster v. New Orleans*, 94 U. S. 246.

<sup>31</sup> *Woodruff v. Parham*, 8 Wall. 123; *Almy v. California*, 24 How. 169; *Hinson v. Lott*, 8 Wall. 148.

<sup>32</sup> *Brown v. Maryland*, 12 Wheat. 419; *Low v. Austin*, 13 Wall. 29.

taxed as other property in the state, of the same kind, is taxed, and it is not admissible to discriminate in taxation between articles intended for consumption within the state and those sold or intended to be taken into another. And the distinctive character of "exports" does not attach to the goods until they have been shipped, or entered with a common carrier for transportation to another state or foreign country, or have been started upon such transportation in a continuous route or journey.<sup>33</sup>

*Duties of Tonnage.*

The object of this prohibition was to prevent the states from burdening or interfering with foreign and interstate commerce by the indirect method of taxation. The imposition of a tonnage duty is taxation, but it also amounts to a regulation of commerce. The tonnage of a vessel is a measure of its size and carrying capacity; it is the measure of the ship's internal cubical capacity, estimated in tons of one hundred cubic feet each, measured in a particular manner. The supreme federal court has decided that "a duty of tonnage, within the meaning of the constitution, is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the states from imposing hindrances of this kind to commerce carried on by vessels."<sup>34</sup> The prohibition, therefore, amounts to this, that the states must not lay duties upon vessels, according to their tonnage, by way of exaction for the privilege of being employed as instruments of commerce or for such privileges as are indispensable to that employment.<sup>35</sup> But this does not preclude the states from taxing vessels as property, or rather, from taxing the owners of vessels, in respect to their property therein, when the vessels are subject to the taxing power or have their home situs within its limits; this is not an interference with commerce, but a lawful exercise

<sup>33</sup> *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475; *Turpin v. Burgess*, 117 U. S. 504, 6 Sup. Ct. 835; *Jackson Min. Co. v. Auditor General*, 32 Mich. 488.

<sup>34</sup> *Huse v. Glover*, 119 U. S. 543, 7 Sup. Ct. 313.

<sup>35</sup> *State Tonnage Tax Cases*, 12 Wall. 204; *Inman Steamship Co. v. Tinker*, 94 U. S. 238; *Steamship Co. v. Port Wardens*, 6 Wall. 31; *Peete v. Morgan*, 19 Wall. 581; *Transportation Co. v. Wheeling*, 99 U. S. 273.

of the general power of taxation.<sup>36</sup> And a statute which requires the payment of wharfage dues from vessels making fast to the wharves and discharging cargo thereat, is not obnoxious to the constitutional prohibition, even though such wharfage dues are graduated according to the tonnage of the vessel. The reason is that wharfage dues are not taxes or duties, nor do they amount to a regulation of commerce.<sup>37</sup> Furthermore, it has been decided that where a state statute requires every vessel passing a quarantine station to pay a certain fee for examination as to her sanitary condition, this is to be regarded as a part of the quarantine system and a compensation for services rendered to the vessel, and not as a tax, within the meaning of the constitutional limitation in respect to tonnage duties.<sup>38</sup>

*Keeping Troops—Engaging in War.*

“No state shall, without the consent of congress, keep troops or ships of war in time of peace, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.” These clauses of the constitution must be regarded as correlative to those which grant to congress the power to declare war and to maintain armies and navies. The general purpose of the whole is to invest the entire power of making war, and of maintaining a military equipment, in the national government, and to put it beyond the power of the states to enter upon hostilities with each other or with foreign nations. These provisions, says Justice Miller, “are designed to incapacitate the states from making war against each other or against the general government, or from putting themselves in a position to defy that government and overthrow its authority, withdrawing from them at the same time the power to do this successfully and discouraging the inclination to attempt it. The only war power which a state can exercise is one of defense, when actually invaded or in the most imminent danger of such

<sup>36</sup> Peete v. Morgan, 19 Wall. 581.

<sup>37</sup> Packet Co. v. Keokuk, 95 U. S. 80; Transportation Co. v. City of Parkersburg, 107 U. S. 691, 2 Sup. Ct. 732; Cannon v. New Orleans, 20 Wall. 577; Packet Co. v. Catlettsburg, 105 U. S. 559; St. Louis v. Ferry Co., 11 Wall. 423; Vicksburg v. Tobin, 100 U. S. 430.

<sup>38</sup> Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, 6 Sup. Ct. 1114.

invasion.”<sup>39</sup> But if a state should be precipitated into a war by an actual invasion, or imminently threatened therewith, it would undoubtedly be within its lawful power to meet the emergency by proceeding to raise an army, even without waiting for the consent of congress. And it must be observed that the “troops” here intended are such as constitute a stipendiary or standing army. The prohibition was not aimed at, nor does it affect, the militia of a state. This is proved by those parts of the constitution which recognize the militia forces of the states, as by providing that congress may call them forth to execute the laws of the Union or suppress insurrection, and that the President shall be their commander in chief when they are in the actual service of the United States, and the declaration in the second amendment that “a well regulated militia is necessary to the security of a free state.”

#### PRIVATE, SPECIAL, AND LOCAL LEGISLATION.

104. In many of the states, the constitution prohibits the legislature from passing any private, local, or special laws. In some, this restriction extends only to cases in which general laws could be made applicable. In others, many subjects are enumerated on which private or special legislation is forbidden. In several of the states, the prohibition is directed against the enactment of local or private statutes regulating the internal affairs of towns and counties. Many state constitutions also provide that charters of incorporation shall be granted only in accordance with general laws and not by special acts of the legislature. In some of the states a still different form is found, which provides that all laws of a general nature shall be uniform in their operation throughout the state. All these provisions are mandatory, and any laws which are found to be in violation of them will be declared unconstitutional by the courts.

The object of provisions of this sort is twofold. On the one hand, they are designed to deter the legislature from usurping judi-

<sup>39</sup> Miller, Const. 595.

cial functions and invading the peculiar province of the courts. And on the other hand, they are intended to prevent the enactment of laws characterized by favoritism, partiality, or invidious discriminations against persons or localities. A constitutional prohibition is needed to withdraw such power from the legislature. Where there is no constitutional restriction against the passage of private or local laws, they are within the legislative competency and the courts cannot hold them unconstitutional.<sup>40</sup> A private statute is one which operates only upon particular persons or private concerns.<sup>41</sup> And a law is "local" which, instead of relating to and binding all persons, corporations, or institutions to which it may be applicable, within the whole territorial jurisdiction of the law-making power, is limited in its operation to certain districts of such territory or to certain individual persons or corporations.<sup>42</sup> The fact that a statute is limited as to the time of its duration does not make it a local or special law, but such an act is termed a temporary one. A local or special statute is one limited in the objects to which it applies; a temporary statute is limited merely in its duration. Necessarily a local or special law may be perpetual, while a general law may be temporary.<sup>43</sup> A good illustration of laws of this objectionable character is found in a statute passed in Indiana in 1879, "legalizing the practice of circuit courts in entering judgments on the first day of the term." It was held to be unconstitutional, as being both local and special in its provisions. It was special because it did not apply to all judgments which might have been or might be taken on the first day of the term. And it was local because it did not in terms legalize the judgments of all the circuit courts of the state which had been theretofore taken on the first day of the term, but only of such of those courts as had "adopted rules of practice making the summons in civil causes returnable on the first day of the term."<sup>44</sup>

The prohibition against local and special laws is not to be evaded by merely calling the statute a general law. This device has many times been frustrated by the courts. A law which purports by its terms to be made for the whole state, but which then proceeds by

<sup>40</sup> *Beyman v. Black*, 47 Tex. 558.

<sup>42</sup> *Kerrigan v. Force*, 68 N. Y. 381.

<sup>41</sup> 1 Bl. Comm. 86.

<sup>43</sup> *People v. Wright*, 70 Ill. 388.

<sup>44</sup> *Mitchell v. McCorkle*, 69 Ind. 184.

exceptions, reservations, or provisos, to withdraw from its operation all but one or a few persons, or a special class of persons, or all but one or a few cities or counties, is in reality a private or local law, and will be so declared by the judicial department.<sup>45</sup> Thus, an act which by its terms can have application to but one county within the state, although purporting to be a general law, applicable to all counties having a certain population, is special legislation.<sup>46</sup> But a law in relation to cities and villages is not necessarily a local or special law because there may be certain cities and villages, organized under special charters, to which it does not apply.<sup>47</sup> But an act relating to the fees of the sheriff of a single county is clearly a local act.<sup>48</sup> In Pennsylvania, it is held that the classification of the cities of the state according to their population (with reference to their form of government and their corporate powers) is a proper and constitutional method, and is not open to objection on the charge of being special legislation.<sup>49</sup> But it is also there ruled that an act excluding perpetually from its operation all counties containing more than 150,000 or less than 10,000 inhabitants is a local law; for the perpetual exclusion of certain counties from the operation of a law is not a classification of the counties.<sup>50</sup> In New York, where the constitution prohibits the passage of local or private bills for "laying out or opening roads, highways, or alleys," it is considered that this is not applicable to streets in cities.<sup>51</sup>

In those states where the constitution prohibits local or special laws only in cases where a general law could be made applicable, there has been some difference of opinion as to what department of the government is to determine whether or not a general law

<sup>45</sup> *State v. Herrmann*, 75 Mo. 340; *State v. Mayor, etc., of Jersey City*, 45 N. J. Law, 297; *Belleville & I. R. Co. v. Gregory*, 15 Ill. 20; *Coutierl v. Mayor, etc., of New Brunswick*, 44 N. J. Law, 58; *Woodard v. Brien*, 14 Lea, 520; *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800.

<sup>46</sup> *Devine v. Commissioners*, 84 Ill. 590.

<sup>47</sup> *Potwin v. Johnson*, 108 Ill. 70; *People v. Newburgh & S. Plank-Road Co.*, 86 N. Y. 1.

<sup>48</sup> *Gaskin v. Meek*, 42 N. Y. 186.

<sup>49</sup> *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Com. v. Patton*, 88 Pa. St. 258.

<sup>50</sup> *Morrison v. Bachert*, 112 Pa. St. 322, 5 Atl. 739.

<sup>51</sup> *In re Lexington Avenue*, 29 Hun, 303.

could have been made applicable to the case in point. The better opinion seems to be that while the legislature must determine this question in the first instance, yet their decision is not final or conclusive, but the courts must also consider and decide upon the applicability of a general law, when the act passed is regularly presented to them for review, and must decide upon its constitutionality according to their opinion of the facts.<sup>52</sup>

In some of the states, as above mentioned, the constitution contains a provision against the enactment of private or special laws "regulating the internal affairs of towns and counties." It is held that this applies equally to cities.<sup>53</sup> It is violated by a law which, while general in form, serves but to give a salary to a single officer of a single county,<sup>54</sup> as also by a statute conferring upon all cities having a population of not less than 25,000 the power of issuing bonds to fund their floating debt.<sup>55</sup> In those states where the legislature is prohibited from creating corporations by special act, or from conferring corporate powers by special law, this provision is understood as applying only to private corporations and not to municipal bodies.<sup>56</sup> It does not prohibit the legislature from passing a special act changing the name of an existing corporation and giving it the power to purchase the property and franchises of another existing corporation.<sup>57</sup> But an act granting rights to a single corporation in reference to specific property in a certain location is void under this prohibition.<sup>58</sup>

The other form of prohibition mentioned in the text (that requiring that all laws of a general nature shall be uniform in their operation) is quite different in its meaning and effects. It does not entirely forbid the enactment of local or special laws. A statute is understood to be general and uniform in its operation when it operates equally upon all persons who are brought within

<sup>52</sup> *State v. Mayor, etc., of Newark*, 40 N. J. Law, 71; *People v. Allen*, 42 N. Y. 378. Compare *Board of Com'rs of St. Louis v. Shields*, 62 Mo. 247.

<sup>53</sup> *State v. Parsons*, 40 N. J. Law, 1.

<sup>54</sup> *Gibbs v. Morgan*, 39 N. J. Eq. 126.

<sup>55</sup> *State v. City of Trenton*, 42 N. J. Law, 486.

<sup>56</sup> *State v. Mayor, etc., of Newark*, 40 N. J. Law, 71.

<sup>57</sup> *Wallace v. Loomis*, 97 U. S. 146.

<sup>58</sup> *In re Union Ferry Co.*, 32 Hun, 82.

the relations and circumstances provided for;<sup>59</sup> or when it applies equally to all persons within the territorial limits described in it, although not applying to all parts of the state.<sup>60</sup> A revenue law, for example, is constitutional, so far as concerns this provision, if it affects, as nearly as possible, all persons and property alike; a revenue law which should be absolutely equal in its operation is an impossibility.<sup>61</sup> So an act fixing the rate of interest which may be charged by pawnbrokers is not in violation of this provision.<sup>62</sup>

The constitutions of many of the states contain provisions to the effect that there shall be no grant of special privileges, immunities, or emoluments to any citizen or class of citizens, unless in consideration of public services rendered. This, however, it is considered, has no reference to the private relations of the citizens, nor to the action of the legislature in passing laws regulating the domestic policy and business affairs of the people or any portion of them.<sup>63</sup>

#### DELEGATION OF LEGISLATIVE POWERS.

105. It is a general principle of constitutional law that the power conferred upon the legislature by the constitution to make laws cannot be delegated by that body to any other person or authority, in any such manner as to preclude the resumption of the power, or of its exercise, whenever the public interest requires it. The legislators are the agents or trustees of the people, and they have no right or power to place the trust irrevocably in other hands than their own.<sup>64</sup>

<sup>59</sup> *McAunich v. Railroad Co.*, 20 Iowa, 338.

<sup>60</sup> *Cordova v. State*, 6 Tex. App. 207.

<sup>61</sup> *People v. Coleman*, 4 Cal. 46.

<sup>62</sup> *Jackson v. Shawl*, 29 Cal. 267.

<sup>63</sup> *Williams v. Cammack*, 27 Miss. 209; and see *Smith v. Smith*, 1 How. (Miss.) 102.

<sup>64</sup> *Clark v. Mayor, etc., of Washington*, 12 Wheat. 40, 54; *Philadelphia v. Fox*, 64 Pa. St. 169; *Ex parte Cox*, 63 Cal. 21; *Brown v. Fleischner*, 4 Or. 132; *Rice v. Foster*, 4 Har. (Del.) 479; *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77; *Cooley, Const. Lim.* 116.

A good illustration of an unlawful attempt to delegate legislative power is found in a case in Minnesota, where a statute provided for the taking up of certain state bonds and issuing new ones in lieu of them; but it was doubtful whether this could be done legally without submitting the question to a vote of the people. The act therefore provided that the decision of this question should be left to the judges of the supreme court, or, in case they should decline to act, to an equal number of judges of the district courts, and that the matter should be submitted to the people, or not submitted, according as the judges decided. It was held that the act attempted to delegate legislative power to the judges mentioned, and was therefore unconstitutional.<sup>65</sup> On the same principle, the legislature cannot confer upon a private corporation power to enact by-laws contravening, repealing, or in any wise changing the statutory or common law of the state.<sup>66</sup> But this rule does not forbid the legislature to grant a franchise or right dependent on a condition of obtaining consent from another body. For instance, it may create a corporation with power to lay a street railroad, subject to the condition of obtaining the consent of the city to the use of the street.<sup>67</sup>

#### *Municipal Corporations.*

Municipal corporations are regarded as subordinate agencies of government, created with a view to the more judicious and effective administration of local governmental affairs. The legislature has power to erect such corporations, and to invest them with such powers and prerogatives as are necessary to enable them to make rules for the government of their own affairs, particularly in matters of taxation and police, provided that their by-laws and ordinances shall not be inconsistent with the general laws of the state. This is not to be regarded as an unlawful delegation of legislative power. For the legislature retains control over such corporations, to the extent that it may, in its discretion, resume or recall the powers granted out, unless in so far as these powers

<sup>65</sup> State v. Young, 29 Minn. 474, 9 N. W. 737.

<sup>66</sup> Seneca County Bank v. Lamb, 26 Barb. 595.

<sup>67</sup> City of Philadelphia v. Lombard & S. St. P. R. Co., 4 Brewst. (Pa.) 14; Blanding v. Burr, 13 Cal. 343.

are secured to the municipalities by the constitution.<sup>68</sup> All statutes creating municipal corporations, or imposing liabilities upon them, or authorizing them to incur obligations or make improvements, may be referred to the people of the districts immediately affected, to decide by their votes whether they will accept the incorporation or assume the burdens. But the legislature must enact a complete and valid law according to the prescribed usages, and it must derive its whole vigor and vitality from the legislature, and no additional efficacy from the popular vote.<sup>69</sup> The enactment of a law comprising general and uniform regulations for cities, towns, and villages, throughout the state, and leaving to a popular vote in each municipality the question whether it shall become subject to such law, is not an unconstitutional delegation of legislative power.<sup>70</sup> And so, in general, such questions as whether a county or township shall be divided and a new one created, or whether two shall be consolidated, or new territory be added to an existing division, or whether a county seat shall be located at a particular place, or be removed elsewhere, may properly be, and are frequently, referred to a vote of the people interested.<sup>71</sup> So it is also with the question of municipal aid to railroads. A statute may lawfully refer to the qualified voters of a municipality the decision of the question whether they will aid in the construction of a road which may be expected to benefit the locality, by grants of money or bonds or other assistance. This is not a delegation of legislative power; it is a grant of a privilege to the municipalities, taking effect immediately, but providing that their election to use the privilege shall be signified in a certain manner.<sup>72</sup>

<sup>68</sup> *Stone v. Charlestown*, 114 Mass. 214; *Dalby v. Wolf*, 14 Iowa, 228; *Durach's Appeal*, 62 Pa. St. 491; *People v. Kelsey*, 34 Cal. 470; *Cross v. Hopkins*, 6 W. Va. 223; *Perry v. City of Rockdale*, 62 Tex. 451; *People v. Pinckney*, 32 N. Y. 377; *Berlin v. Gorham*, 34 N. H. 266.

<sup>69</sup> *Lammert v. Lidwell*, 62 Mo. 188; *Clarke v. Rogers*, 81 Ky. 43; *Gorham v. Springfield*, 21 Me. 58; *Bank of Chenango v. Brown*, 26 N. Y. 467.

<sup>70</sup> *Guild v. Chicago*, 82 Ill. 472.

<sup>71</sup> *Burlington v. Leebrick*, 43 Iowa, 252; *State v. Elwood*, 11 Wis. 17; *Smith v. McCarthy*, 56 Pa. St. 359; *Com. v. Judges of Quarter Sessions*, 8 Pa. St. 391; *Call v. Chadbourne*, 46 Me. 206; *Com. v. Painter*, 10 Pa. St. 214.

<sup>72</sup> *Starin v. Genoa*, 23 N. Y. 439; *City of San Antonio v. Jones*, 28 Tex. 19.

*Local Option Laws.*

A "local option" law is a law framed for the purpose of prohibiting, or severely restricting, the sale of intoxicating liquors, and containing a provision that the several counties, townships, or other divisions of the state, may hold elections to determine by popular vote whether they desire the law to be in force in their limits, and with a further provision that in each case where such election results in favor of the adoption of the law, it shall take effect in the district so voting, but that each district rejecting it shall continue to be governed, in this respect, by the existing laws. In some few cases such laws have been ruled unconstitutional, on the ground that they delegated the power of the legislature. But the very great preponderance of authority is to the effect that such a statute, if it is a complete enactment in itself, requiring nothing further to give it validity, and depending upon the popular vote for nothing but a determination of the territorial limits of its operation, is a valid exercise of the legislative power.<sup>73</sup>

*Conditional Legislation.*

There is no provision in the American systems for a referendum on general subjects of legislative action, unless it may be in very rare and exceptional instances. The legislature is elected and authorized to make the laws. For that purpose the legislative power of the people is confided to them. That power cannot regularly be resumed and exercised by the people themselves. Neither can it be referred back to the people by the legislature in any particular instance. Delegation of legislative power to the people at large, from whom it was derived, is just as much against the spirit of the constitution as a delegation of it to one citizen. Nor can the legislature be allowed to shirk the responsibility of deciding upon the laws which should be made. For these reasons it is held that the law-making body has no power, in enacting a general law, applicable to all the people of the state, to make its taking effect conditional upon the cast-

<sup>73</sup> *Weil v. Calhoun*, 25 Fed. 865; *State v. Court of Common Pleas*, 36 N. J. Law, 72; *State v. Pond*, 93 Mo. 606, 6 S. W. 469; *Locke's Appeal*, 72 Pa. St. 491; *Com. v. Dean*, 110 Mass. 357; *Village of Gloversville v. Howell*, 70 N. Y. 287; *Anderson v. Com.*, 13 Bush, 485; *Gordon v. State*, 46 Ohio St. 607, 23 N. E. 63.

ing of a popular vote in its favor.<sup>74</sup> But if an act of the legislature is, by its terms, to take effect in any contingency, it is not unconstitutional to make the time when it shall take effect depend upon the event of a popular vote being for or against it, the time of its going into operation being postponed to a later day in the latter event.<sup>75</sup>

#### ENACTMENT OF LAWS.

**106. Such requirements as the constitution establishes, in regard to the forms and procedure to be observed in the enactment of laws by the legislature, and in regard to the majority which is necessary to pass a bill, are generally to be deemed mandatory, and not merely directory, and the neglect or disregard of them will be fatal to the validity of any particular statute.**

As a general rule, bills of any kind may originate in either house of a state legislature, and may be amended, accepted, or rejected by the other. The principal exception to this rule is in the case of measures for raising revenue, which, by the constitutions of most of the states, are required to be first introduced in the lower or more numerous branch of the legislature. It is the privilege of every member of either house to introduce bills, in the house of which he is a member. But in some of the states this privilege is restricted by the requirement that all bills which are to be considered shall be introduced at least a certain number of days before the end of the session. The purpose of this provision, says Judge Cooley, "is to prevent hasty and improvident legislation, and to compel, so far as any previous law can accomplish that result, the careful examination of proposed laws, or at least the affording of opportunity for that purpose, which will not always be done when bills may be introduced up to the very hour of adjournment, and, with the concurrence of the proper majority, put immediately upon their passage."<sup>76</sup> Until recently it

<sup>74</sup> *Barto v. Hilmrod*, 8 N. Y. 483; *Santo v. State*, 2 Iowa, 165; *Cooley, Const. Lim.* 120; *State v. Geebrick*, 5 Iowa, 491. But this doctrine is not entirely unquestioned. See *Robinson v. Bidwell*, 22 Cal. 379; *People v. Salomon*, 51 Ill. 37.

<sup>75</sup> *State v. Parker*, 26 Vt. 357; *Ex parte Wall*, 48 Cal. 315.

<sup>76</sup> *Cooley, Const. Lim.* 139.

has been the frequent practice, in those states, to evade this very wholesome provision of the constitution by the introduction of a new bill under the guise of an amendment to a bill formerly introduced, the amendment consisting in striking out all but the enacting clause of the old bill and substituting the new one as its body. Very often the old bill was a mere sham, and had been introduced in time merely for the purpose of thus serving as a skeleton on which to hang a new and totally different measure. But the court in Michigan has set a good precedent by ruling that where the new measure has the same general purpose and subject matter as the old one, it may be valid, but if it relates to an entirely different matter, it must be pronounced unconstitutional and void.<sup>77</sup>

The constitutions of many of the states require that a bill, before it shall become a law, shall be read a certain number of times (usually two or three) in each house. In respect to the manner of such reading, the provision is considered merely directory; but not so with regard to the fact of its being read. If the constitution is not obeyed in this latter particular, the statute is void.<sup>78</sup> Where the requirement is that the bill shall be read three times, it is the usual practice of legislative bodies to have it read twice by title merely and once at full length. And this is considered sufficient to make its enactment lawful, unless the constitutional provision is so expressed as to make it imperative that each reading should be of the entire contents of the bill.<sup>79</sup> In a considerable number of the states, the constitution provides that the three readings of a bill may be dispensed with in case of "urgency" by a vote of two-thirds or three-fourths of the members of the house where the bill is pending. When such an occasion arises, it is for the house alone to determine whether there is such "urgency" as to justify the passage of the bill without reading or with less than the usual number of readings. This is a question which will not be inquired into by the courts.<sup>80</sup> The several readings of each bill should regularly be recorded in the journals

<sup>77</sup> *Sackrider v. Board of Sup'rs of Saginaw Co.*, 79 Mich. 59, 44 N. W. 165.

<sup>78</sup> *Ramsey Co. v. Heenan*, 2 Minn. 330 (Gil. 281); *Miller v. State*, 3 Ohio St. 475; *Weill v. Kenfield*, 54 Cal. 111.

<sup>79</sup> *People v. McElroy*, 72 Mich. 446, 40 N. W. 750; *Weill v. Kenfield*, 54 Cal. 111.

<sup>80</sup> *Weyand v. Stover*, 35 Kan. 545, 11 Pac. 355; *Hull v. Miller*, 4 Neb. 503.

of the two houses. But the invalidity of a statute cannot be predicated on the mere fact that the journals do not affirmatively show a compliance with this requirement of the constitution. In such a case, the courts will indulge the presumption that the legislature complied with its duties under the constitution, notwithstanding the silence of the journals.<sup>81</sup>

In order that the bill should become a law, it is next requisite that it should be passed by a vote of the necessary majority in the two houses. In some special cases a majority of two-thirds or even three-fourths is prescribed. But ordinarily a simple majority is enough. If the constitution provides for a vote by a majority "of the members" or "of the whole representation," this is imperative. But if the requirement is simply that there shall be a majority, it is understood that a majority of those present and voting (provided they constitute a quorum) will be sufficient.<sup>82</sup> But whatever the constitutional requirement may be, it is absolutely necessary that the bill should receive the concurrent votes of a sufficient number of the members of each house to enact it into a law. If this is not the case, it never becomes a statute of the state, and the courts are not bound to regard or obey it.<sup>83</sup> Some of the state constitutions provide that on the final passage of every bill the vote shall be taken by the yeas and nays. This means that the roll of the house shall be called, and each member present and answering to his name shall vote "yea" or "nay," on the question of the passage of the bill, and the names of the members so voting on each side of the question shall be entered at large upon the journal. This provision is intended both to fix upon each member of the legislature the responsibility for his action in regard to the passage of every legislative measure, and also to secure an authoritative record of the passage of the bill by the requisite majority. Such a provision is mandatory. The legislature has no power to dispense with it. If an act does not appear from the journals to have been passed in this manner, where the constitution requires it, it is no law.<sup>84</sup> But if there is no provision in the consti-

<sup>81</sup> *Schuyler County v. People*, 25 Ill. 181; *Miller v. State*, 3 Ohio St. 475.

<sup>82</sup> *Southworth v. Palmyra & J. R. Co.*, 2 Mich. 287; *State v. McBride*, 4 Mo. 303.

<sup>83</sup> *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667; *Osburn v. Staley*, 5 W. Va. 85; *People v. Starne*, 35 Ill. 121.

<sup>84</sup> *Spangler v. Jacoby*, 14 Ill. 297; *Ryan v. Lynch*, 68 Ill. 160.

tution as to this manner of taking the vote, (or in all cases where the constitutional requirement does not apply) it is in the discretion of either house to decide, by rule, when the yeas and nays shall be taken, or in what cases a member, or a number of members, shall have the right to call for the yeas and nays.<sup>85</sup> A constitutional provision that the names of members voting on the two sides of the question shall be entered on the journals is no less imperative than that which requires the taking of the yeas and nays. In a case where the journal recited the names of those members who were present, and stated that they voted unanimously in favor of the bill, but did not recite the names of those voting, it was held that there was no compliance with the requirement.<sup>86</sup>

When a bill has been duly passed by the requisite majority, it is engrossed, and thereupon, by the constitutions of many of the states, it must be signed by the presiding officers of the two houses. This is the proper and constitutional mode of authenticating the act, and it cannot be dispensed with.<sup>87</sup>

#### TITLE AND SUBJECT MATTER OF STATUTES.

107. In most of the states, the constitution provides that no act of the legislature shall embrace more than one subject, and that such subject shall be expressed in the title of the act. This provision is mandatory, and if it is disregarded, the whole statute, or any separable part of it not embraced within the title, will be rejected as unconstitutional. But this requirement is construed liberally, and the courts are unwilling to defeat or embarrass legislation by putting too strained or technical a construction upon this clause of the constitution.

In regard to the degree of particularity required in the title of a statute, it is the accepted doctrine that it is sufficient if the title describes, with adequate clearness, the general purpose and scope

<sup>85</sup> *Lincoln v. Haugan*, 45 Minn. 451, 48 N. W. 196.

<sup>86</sup> *Steckert v. East Saginaw*, 22 Mich. 104.

<sup>87</sup> *State v. Robinson*, 81 N. C. 409; *Pacific R. Co. v. Governor*, 23 Mo. 364; *State v. Kiesewetter*, 45 Ohio St. 254, 263, 12 N. E. 807. But compare *Commissioners of Leavenworth Co. v. Higginbotham*, 17 Kan. 62.

of the act. It need not amount to an index or epitome of the statute, nor is it necessary that the title should set forth the modes, means, or instrumentalities provided in the law for its administration and enforcement. For example, a law incorporating a city, or one granting franchises to a business corporation, or one relating to the general subject of elections, or one regulating the manufacture and sale of intoxicating liquors, or one providing a general system of taxation for the state, will contain a great number of detailed and specific provisions. But if they all relate to the general subject matter of the act, and are all germane to its general purpose, it is not necessary that each should be mentioned in the title. In all such cases, a general and comprehensive title will meet the requirement of the constitution.<sup>88</sup> But an attempt to include in the same statute matters which have no relation to the purpose set forth in the title, or which are entirely incongruous therewith, will have the result of avoiding the act. And though the title and the law may both refer to the same general subject matter, yet if the title uses a term which describes a totally different branch of the subject from that dealt with in the body of the act, or an entirely different method of dealing with it, the act is void for this reason. For example, to entitle an act "to regulate the traffic in intoxicating liquors," and then in the body of the law, entirely to prohibit such traffic, is not complying with the constitutional requirement.<sup>89</sup> But the title may be broader than the act without avoiding it. And it is no valid objection if the title makes reference to matters which would be inconsistent with its general scope, provided no such inconsistent matters are found in the statute itself.<sup>90</sup> But it is well settled that the words "and for other purposes," added to the title of a statute, will be rejected as surplusage and of no importance, if there is really but one subject in the act and that is expressed in the remaining portion of the title.

<sup>88</sup> *People v. Mahaney*, 13 Mich. 481; *Indiana Cent. R. Co. v. Potts*, 7 Ind. 681; *People v. Briggs*, 50 N. Y. 553. An act "more effectually to prevent the offenses of grand larceny, arson, and burglary" does not violate a constitutional provision that each law shall embrace but one subject; for the subject of this act is "the more effectual prevention," etc., and not the three crimes named. *Miles v. State*, 40 Ala. 39.

<sup>89</sup> *In re Hauck*, 70 Mich. 396, 38 N. W. 269.

<sup>90</sup> *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559.

But any provisions in the body of the act which are not described in the remaining portion of the title cannot be brought in by the use of those words.<sup>91</sup>

When the legislature passes a general law on any subject, it may be a necessary part of its general plan and purpose to repeal certain previous statutes, or any and all statutes relating to the subject, and especially is this the case when the evident intention of the new law is to supersede all previous legislation on that subject and provide a new and complete system. In such circumstances, the repeal of former laws is distinctly connected with the subject of the new bill, and a provision for such repeal may be incorporated in the law without being specifically mentioned in the title.<sup>92</sup>

But even where two or more subjects are embraced in the act or expressed in the title, it does not always follow that the statute will be void in toto. The settled rules on this point are as follows:

1. If the statute relates to two or more distinct subjects, or relates to one subject and also contains inconsistent matters, and both or all of these subjects are expressed in the title, the whole statute is entirely inoperative and void. The reason is that, in such a case, it would be impossible for the courts to determine which of the several inconsistent matters was the real subject of the measure, or to select one subject and one part of the title and sustain it as complying with the constitution, and discard the rest.<sup>93</sup>

2. If the act relates to one subject matter which is properly expressed in the title, but also embraces provisions not related to such subject, which are not mentioned in the title, then the foreign or unrelated matters will be separated from the rest of the statute, if possible, and rejected, while the main body of the act will be sustained. This is in accordance with the general rule of constitutional construction which requires that unconstitutional portions of an act shall be expunged from it and the remainder sustained whenever it can be done. But in order to justify the courts in thus dealing with a statute, it is necessary that the remaining portion of the act, after the matters not indicated by the title shall have been pruned away,

<sup>91</sup> *Town of Fishkill v. Fishkill & B. Plank-Road Co.*, 22 Barb. 634.

<sup>92</sup> *Gabbert v. Jeffersonville R. Co.*, 11 Ind. 365; *Town of Guilford v. Cornell*, 18 Barb. 615.

<sup>93</sup> *City of San Antonio v. Gould*, 34 Tex. 49; *Cooley, Const. Lim.* 148.

be sufficient in itself to constitute a complete, intelligible, and sensible law, and one capable of being executed, and that it should be so independent of the rejected matters that it may fairly be presumed that the legislature would have enacted the restricted statute by itself, without making the rejected portions a condition to the passage of the whole act.<sup>94</sup>

<sup>94</sup> *People v. Briggs*, 50 N. Y. 553; *Cooley*, Const. Lim. 148.

## CHAPTER XIV.

### THE POLICE POWER.

108. Definition and General Considerations.
109. Scope of the Power.
110. Location of the Police Power.
111. Police Power Vested in Congress.
112. Police Power of the States.
113. Limitations of the Police Power.

#### DEFINITION AND GENERAL CONSIDERATIONS.

108. There is in every sovereignty an inherent and plenary power to make all such laws as may be necessary and proper to preserve the public security, order, health, morality, and justice. This power is called the "police power." It is a fundamental power and essential to government, and is based upon the law of overruling necessity. It cannot be surrendered by the legislature or irrevocably alienated in favor of individuals.

#### *Definition.*

In its most general sense, "police" is the function of that branch of the administrative machinery of government which is charged with the preservation of public order and tranquillity, the promotion of the public safety, health, and morals, and the prevention, detection, and punishment of crimes. And the police power is the power vested in a state to establish laws and ordinances for the regulation and enforcement of its police, as just defined. It has been remarked by the supreme court of the United States that while many attempts have been made to define the police power, the endeavor has never met with entire success. "It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate."<sup>1</sup>

<sup>1</sup> Stone v. Mississippi, 101 U. S. 814, 818. "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the

*Nature and Origin of Power.*

It cannot be doubted that the origins of this power must be sought in the very purpose and framework of organized society. It is fundamental and essential to government. It is a necessary and inherent attribute of sovereignty. It antedates all laws, and may be described as the assumption on which constitutions rest. For the state (whether we regard it as an association of individuals or as a moral organism) must have the right of self-protection and the right to preserve its own existence in safety and prosperity, else it could neither fulfill the law of its being nor discharge its duties to the individual. And to this end, it is necessarily invested with power to enact such measures as are adapted to secure its own authority and peace, and to preserve its constituent members in safety, health, and morality. Theories of the state, according as they tend to enlarge or restrict the legitimate sphere of its functions and activities, will create theories as to the proper limitations of the police power. But its existence, in a measure proportioned to the rights and duties it is to guard, is implied in the recognition of the state as a factor in law and civilization. "It is a power," as has been well said, "essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity."<sup>2</sup> For these reasons it appears that the nature and authority of the police power are best described by the maxim "salus populi suprema lex,"

state seeks not only to preserve the public order and prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." Cooley, Const. Lim. 572. "The police power of a state is co-extensive with self-protection, and is not inaptly termed 'the law of overruling necessity.' It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society." *Lake View v. Rose Hill Cemetery*, 70 Ill. 191. "The police power of a state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state." *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140.

<sup>2</sup> License Cases, 5 How. 588.

while the principle, "sic utere tuo ut alienum non laedas," furnishes, in most cases, a convenient rule for its application.<sup>3</sup>

*Police Power Distinguished from Eminent Domain.*

There is a broad distinction between the taking of private property for a public use, under the power of eminent domain, and the incidental injury or inconvenience, or damage or deterioration, which may result to property or business on account of the exertion of the police power of the state, when its purpose is the promotion of the public welfare. In the former case, compensation must be made to the owner; in the latter case, no such obligation arises. All rights of property are subject to the paramount authority of the state to prohibit any use which may be deemed detrimental to the public safety, health, or morals. "Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so far as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building and cover it with shingles, he might obtain a larger profit of his land than if obliged to build of stone or brick with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be spared the great expense of transportation. If a landlord could let his building for a smallpox hospital, or a slaughter house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use, of the property, or to take any benefit or profit to themselves from it, but because it would be a noxious use, contrary to the maxim, sic utere tuo ut alienum non laedas. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the power of eminent domain. The distinction, we think, is manifest in principle, although the facts and circumstances of different cases are so various that it is often difficult to decide whether a particular exercise of legislation is

<sup>3</sup> See *Wynelhamer v. People*, 13 N. Y. 378.

properly attributable to the one or the other of these acknowledged powers.”<sup>4</sup>

*The Power Inalienable.*

In several instances, police regulations have been assailed, in respect to their validity, on the ground that they were repugnant to that clause of the federal constitution which prohibits the states from passing laws impairing the obligation of contracts. But it has always been held that the police power is an inalienable attribute of sovereignty, and therefore can never be curtailed or diminished; that it is present, by implication, in every act of legislation; and that no legislature can either surrender or sell it, or destroy or hamper the power of its successors to make such enactments as they may deem proper in matters of public police. From this it follows that if an irrevocable grant of franchises or any contract made by the legislature with an individual or a corporation specifies or implies a relinquishment of the police power of the state, it is to that extent invalid, the legislature having exceeded the authority delegated to it by the people. In other words, the exercise by the state, at any time, of its right to legislate for the protection and good government of the community can never be construed into a violation of the prohibition in question, notwithstanding its effect may be to repeal existing charters, or otherwise invade the terms of legislative engagements.<sup>5</sup>

SCOPE OF THE POWER.

**109. The police power extends to the making of laws which are necessary for the preservation of the state itself and to secure the uninterrupted discharge of its legitimate functions, for the prevention and punishment of**

<sup>4</sup> *Com. v. Alger*, 7 Cush. 53, 86. See, also, *Moore v. City of Indianapolis*, 120 Ind. 483, 22 N. E. 424; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Beer Co. v. Massachusetts*, Id. 25; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273; *Bancroft v. City of Cambridge*, 126 Mass. 438. Compare *Wynehamer v. People*, 13 N. Y. 378, with the foregoing cases, and particularly with *Mugler v. Kansas*.

<sup>5</sup> *Stone v. Mississippi*, 101 U. S. 814; *Boyd v. Alabama*, 94 U. S. 645; *Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746, 4 Sup. Ct. 652.

**crime, for the preservation of public peace and order, for the preservation and promotion of the public safety, the public morals, and the public health, and for the protection of all the members of the state in the enjoyment of their just rights against fraud and oppression.**

There is a certain broad and general sense in which the scope of the police power may be made to include all legislation and to embrace almost every function of civil government. In this signification, the authority of the state to create educational and charitable institutions, to provide for the establishment and control of public highways, turnpikes, canals, wharves, ferries, and telegraph lines, to direct the reclamation of swamp lands, etc., may be referred to the power in question. But there is also a more particular and restricted sense, in which the term is almost always used when it enters into the discussion of constitutional questions. And in this meaning its scope is limited to the furtherance of the objects enumerated above.<sup>6</sup> Some laws are clearly within that scope. Others are more doubtful. But in the latter case, if the act in question is not open to objection on the ground of infringing some positive constitutional prohibition, its validity is sufficiently established without justifying it as a manifestation of the police power in action. And it is much better not to stretch the term to its widest limits. For the police power, properly so called, is so far-reaching in its importance and so paramount in its sway, even as against guaranteed private rights, that its enlargement, by continual loose applications of the term to cases where it is neither needed nor appropriate, is dangerous to the safeguards of freedom.

#### LOCATION OF THE POLICE POWER.

**110. Under the American system of government, plenary authority to make police regulations is vested in the legislatures of the several states, restricted only by the paramount authority of positive constitutional prohibitions.**

<sup>6</sup> *New Orleans Gaslight Co. v. Louisiana Light, etc., Co.*, 115 U. S. 650, 6 Sup. Ct. 252. And see *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499; *People v. Jackson & M. Plank-Road Co.*, 9 Mich. 307.

**Police power is also vested, to a limited extent and for special purposes, in congress. And it is vested, in a subordinate and delegated manner, in the authorities of municipal corporations.**

It must be observed that there is not a distinct police power inherent in municipal corporations, other than that of the state to which they owe their existence. In incorporating a municipality, the state delegates to it the power to make police regulations so far as may concern its own citizens, its own affairs, and its own territorial jurisdiction. This is in accordance with the principle of local self-government. Ordinances made in pursuance of this power must be tested as other municipal ordinances are. They must not contravene any constitutional provision, nor exceed the charter powers of the municipality, nor be unreasonable. The state may also make police regulations applicable to all its municipal corporations of a certain grade or class, or for particular cities, unless restrained by the constitution. And of course the police power delegated to a municipal corporation is not exclusive of that retained by the state. That is, municipal police regulations must yield to the general laws of the state, enacted under the same power, whenever there is a conflict between them.

#### POLICE POWER VESTED IN CONGRESS.

**111. Although the constitution does not confer upon congress any general power to make police regulations, and such regulations are generally left to the individual states, yet within the scope of its supreme authority, and in the exercise of its expressly granted powers, congress has the right to enact measures relating to the public police of the nation.**

The statement is frequently made that congress is not invested with the police power. It is true that congress has no general power to make police regulations for the people of the United States, nor has it authority to interfere, in matters not committed to its exclusive jurisdiction, with the internal affairs of the states, under the pretense of police regulations. The protection of the public safety, health, and morals is in general left to the care of the individual

states. For example, when congress passed an act prohibiting the sale of certain kinds of oil, or of oil unable to undergo a fire test, it was adjudged that this act was plainly a police regulation, relating exclusively to the internal trade of the states, and therefore beyond the rightful power of congress, and it could be operative only within the District of Columbia.<sup>7</sup> But within its appointed sphere, congress possesses paramount authority. In the highest sense it is vested with the power of police, since it possesses the power to legislate for the preservation of national existence, the protection of national integrity, and the supremacy of national law. The police power being primarily a right of self-defense, as applied to organized civil society, it must belong of right to every independent government, including that of the United States. Thus it is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities. And to this end, it may provide for the punishment of treason, the suppression of insurrection or rebellion, and for the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of the government or those operations of commerce over which it has exclusive jurisdiction. So also in the important case of *Re Neagle*,<sup>8</sup> the doctrine was laid down that there is "a peace of the United States," which it is the right and duty of federal officers to defend and preserve. And it belongs to the United States, as a sovereign and independent nation, to determine what classes or races of foreigners shall be admitted to settle within its limits, and who shall be forbidden, and also to expel or deport those unnaturalized aliens whose presence may be deemed detrimental to the general welfare. It is on this principle that the Chinese exclusion acts are sustained.<sup>9</sup>

<sup>7</sup> U. S. v. Dewitt, 9 Wall. 41.

<sup>8</sup> 135 U. S. 1, 10 Sup. Ct. 658. So, also, in *Ex parte Siebold*, 100 U. S. 371, Mr. Justice Bradley said: "We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

<sup>9</sup> See *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 659, 12 Sup. Ct. 336; *Chae Chan Ping v. U. S.*, 130 U. S. 581, 9 Sup. Ct. 623; *Fong Yue Ting v. U. S.*, 149 U. S. 698, 13 Sup. Ct. 1016.

Again, the constitution confers upon congress power to levy taxes to provide for the common defense and general welfare of the United States; to establish a uniform rule of naturalization; to provide a punishment for counterfeiting the securities or coin of the United States; to define and punish piracies and felonies committed on the high seas and offenses against the law of nations; to provide for calling out the militia; to raise and support armies and navies; and to declare the punishment of treason. Laws have been passed in execution of every one of these powers. And every one of such laws is strictly and properly speaking an exercise of the police power. Furthermore, congress, under the constitution, possesses exclusive jurisdiction over certain subjects. And in its legislation upon these subjects, an act is not to be declared invalid merely because it has a purpose and design which ranks it as a police regulation. For instance, congress has no authority to legislate directly for the suppression of lotteries. But having exclusive control over the postal system, it has the power to prohibit the use of the mails for the transmission of lottery advertisements.<sup>10</sup> So again, congress possesses the exclusive power to regulate foreign and interstate commerce. And in the exercise of this power it has passed laws to protect such trade and commerce against unlawful restraints and monopolies and against trusts and illegal combinations.<sup>11</sup> To the same category belong the acts of congress prohibiting the importation of adulterated articles of food or drink,<sup>12</sup> and the laws regulating immigration, and prohibiting the entry of insane persons, paupers, persons suffering from contagious diseases, convicts, polygamists, assisted immigrants, and alien laborers brought in under contract for their labor.<sup>13</sup> Here also should be classed the statute forbidding the importation of opium by the Chinese, and the national quarantine law.<sup>14</sup> In the exercise of its power to regulate commerce with the Indian tribes, congress may prohibit the sale of liquor to an Indian under the charge of an

<sup>10</sup> *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374.

<sup>11</sup> See *U. S. v. Patterson*, 55 Fed. 605.

<sup>12</sup> Act Aug. 30, 1890.

<sup>13</sup> See *U. S. v. Craig*, 28 Fed. 795; *Church of Holy Trinity v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511; *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247.

<sup>14</sup> The former of these is the act of February 23, 1887, and the latter the act of February 15, 1893.

agent anywhere within the United States.<sup>15</sup> And under the taxing power, and in connection with the internal revenue system, it has enacted a law "defining butter and imposing a tax upon, and regulating the manufacture, sale, importation, and exportation of oleo-margarine."<sup>16</sup> The character of these various statutes, as police regulations, will be more clearly seen by comparison with the examples of the exercise of the same power by the states, now to be mentioned.

#### POLICE POWER OF THE STATES.

**112. Subject to the authority of congress, within the sphere of its rightful powers, and subject to any restrictions imposed by the constitution, the legislature of each state of the Union possesses full power to enact police regulations on any of the subjects coming within the limits of that power as above defined.**

##### *The Public Safety.*

One of the prime objects for which the police power of the state may be exercised, if not the most important of all, is the preservation of the public safety. And in pursuance of this object, laws are passed by all the states, the constitutionality of which is never so much as brought in question. These are statutes for the prevention, detection, and punishment of crime, laws creating courts and their officers, regulating criminal procedure, providing for policemen, sheriffs, jails, and penitentiaries, in fact, establishing and directing the whole machinery of criminal justice. This branch of the power in question also includes the right of the state to confine convicted criminals in its prisons and subject them to proper prison discipline; also the right to require the confinement of dangerous lunatics and maniacs, and possibly of habitual drunkards, after due investigation and hearing; also the power to exercise police supervision over vagrants, tramps, and beggars, and the power to exercise control and supervision over habitual criminals, well known offenders, and suspicious characters.<sup>17</sup> Again, there is included in

<sup>15</sup> U. S. v. Holliday, 3 Wall. 407.

<sup>16</sup> See U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764.

<sup>17</sup> Morgan v. Nolte, 37 Ohio St. 23.

this power "the pulling down houses and raising bulwarks for the defense of the state against an enemy; seizing corn and other provisions for the sustenance of an army in time of war, or taking cotton bags, as General Jackson did at Orleans, to build ramparts against an invading foe."<sup>18</sup> Another illustration of police regulations for the benefit of the public safety is to be seen in laws authorizing the destruction of houses in a city, to prevent the spread of a conflagration. When the best or only available means of controlling a fire is to destroy buildings which stand in its path, and which would be burned if left standing, this may be done under proper authority; and the owners cannot complain that their property is taken without due process of law, although no compensation is provided for them.<sup>19</sup> Other examples of the operation of the police power for the same end are the laws limiting the number of passengers which steamboats may carry, providing for the inspection of their boilers, and requiring them to provide life-preservers; laws or ordinances requiring dangerous machinery to be so guarded as to prevent injuries and accidents; laws establishing fire limits in cities, within which wooden buildings may not be erected; laws prohibiting the keeping of gunpowder in unsafe quantities in cities and villages; laws taxing dogs, requiring their registration, or requiring them to wear a collar or muzzle, and authorizing their destruction if found running at large in violation of the law.<sup>20</sup> In this class of enactments must also be included laws or ordinances prohibiting the use of bicycles on certain roads unless permitted by the superintendent of such roads,<sup>21</sup> laws providing that all oils and fluids used for illuminating purposes shall be inspected by an authorized state officer before being sold or offered for sale,<sup>22</sup> laws forbidding the carrying of concealed deadly weapons, and laws prohibiting or regulating processions or parades of armed bodies of men not belonging to the military forces of the state or

<sup>18</sup> *Parham v. Justices of Inferior Court*, 9 Ga. 341.

<sup>19</sup> *Surocco v. Geary*, 3 Cal. 69; *Taylor v. Plymouth*, 8 Metc. (Mass.) 462; *Stone v. Mayor, etc., of City of New York*, 25 Wend. 157; *Russell v. Mayor of New York*, 2 Denio, 461.

<sup>20</sup> *Cranston v. Mayor, etc., of Augusta*, 61 Ga. 572.

<sup>21</sup> *State v. Yopp*, 97 N. C. 477, 2 S. E. 458.

<sup>22</sup> *Patterson v. Kentucky*, 97 U. S. 501.

of the United States.<sup>23</sup> To the same category belong the building laws in many of our cities and states. These often go into great minuteness of detail, and furnish an illustration of the closeness with which public authorities may scrutinize private operations in the interest of the public safety and health. Such laws may regulate the height of buildings, or prescribe a maximum height, either absolutely or in proportion to the width of the street. And they may also regulate all such matters as the thickness and strength of the walls, drainage and sewer connections, character of the plumbing, proper disposition of appliances for heating and lighting, elevators, skylights, fire-escapes, the number and character of exits in theaters and public halls, signs on shops, piazzas and balconies, etc.<sup>24</sup> On the same principle, it is competent for the proper authorities to require that all electric wires, in populous cities, shall be laid under the surface of the streets.<sup>25</sup> Finally, we may mention the statutes, in force in some of the states, which require that all bottles or packages sold by druggists and containing poison shall be plainly marked with the word "Poison," and those which require pharmacists to keep a record of all poisons sold by them, with the names of the purchasers. Laws of all the foregoing varieties have been sustained by the courts as valid and constitutional, whenever they have been called in question, on the ground that they are police regulations for the preservation of the public safety, notwithstanding the effect they may have on private rights or private property.

#### *The Public Morals.*

Many statutes have been enacted in the various states for the promotion and preservation of public morality. And they have almost without exception been sustained by the courts as valid police regulations. Among these should be mentioned the laws defining and punishing blasphemy; laws requiring the intermission of business and secular employments on Sunday; laws punishing offenses against decency; laws making it a misdemeanor to disturb a religious meeting; laws prohibiting or regulating the sale of intoxicating liquors; those designed for the extirpation of brothels;

<sup>23</sup> Dunne v. People, 94 Ill. 120.

<sup>24</sup> People v. D'Oench, 111 N. Y. 359, 18 N. E. 862.

<sup>25</sup> American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919.

those which prohibit the publication, exhibition, or sale of obscene books or pictures; those prohibiting gaming or the keeping of gaming tables or other gambling devices; those aimed at the suppression of lotteries and gift-enterprises; those prohibiting polygamous or incestuous marriages;<sup>26</sup> and ordinances prohibiting the exhibition of stallions in public places.<sup>27</sup> To this class, also, we should probably refer the laws forbidding and punishing cruelty to animals. The best justification for these last-mentioned statutes, however, lies in the vital interest which the state has in the development of peaceable and law-abiding citizens, and in the repression, by every proper means, of those savage and vindictive passions which prompt men to the commission of crimes of violence.

#### *The Public Health.*

The preservation of the public health is one of the chief objects for which the police power may lawfully be exercised. Quarantine laws established by the states furnish an illustration of a highly important application of the power to this purpose. Such laws are within the police power of the states.<sup>28</sup> And in the further discharge of the state's duty to prevent the introduction and spread of epidemics, it is competent to provide public hospitals or lazarettos, in proper places, for the treatment of dangerous, infectious, or contagious diseases, and to require the removal to such hospitals of all persons found to be suffering from such diseases, even in cases where it is probable that the patient himself would be properly cared for by his friends.<sup>29</sup> The same is true of regulations requiring houses where there are cases of such diseases to display a conspicuous sign or warning, and of compulsory vaccination laws, and laws authorizing an official inspection of dwelling houses, with reference to their sanitary condition, in times of epidemic or other great sickness. Other examples of statutes belonging to this class, and to be justified on this ground, are those intended to secure a wholesome and sufficient supply of pure water for cities, including the

<sup>26</sup> Reynolds v. U. S., 98 U. S. 145.

<sup>27</sup> Nolan v. Mayor, etc., of Franklin, 4 Yerg. 163.

<sup>28</sup> Gibbons v. Ogden, 9 Wheat. 203; Train v. Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929.

<sup>29</sup> Harrison v. Mayor, etc., of Baltimore, 1 Gill, 264; Brown v. Purdy, 54 N. Y. Super. Ct. 109.

purchase or maintenance of water-works,<sup>30</sup> those prohibiting the interment of dead bodies in designated parts of a populous city,<sup>31</sup> those making it an offense to disinter or remove from the place of burial the remains of any deceased person without a permit,<sup>32</sup> those requiring the clearing or draining of swampy or marshy lands which might otherwise breed disease, those regulating the sale of opium,<sup>33</sup> those authorizing the exclusion from the state, or the destruction, of animals affected with contagious diseases,<sup>34</sup> those requiring the laying of sewers in cities, and obliging the owners of dwelling houses to make connection with them. Here also should be mentioned inspection laws, when designed to protect the public against the introduction of commodities unfit for use. A city ordinance declaring that the cultivation of rice within the corporate limits of the city is injurious to the public health, and providing for the removal and destruction of the growing crops of rice within the limits of the city, is also a valid police regulation.<sup>35</sup> So the state or a city may lawfully forbid the depositing of garbage or filth in any place, public or private, except such places as may be designated for that purpose by the superintendent of highways.<sup>36</sup> And a city may prohibit the keeping of swine within particular districts of the city.<sup>37</sup> And the legislature may pass an act directing the removal of mill-dams, upon the ground that they are detrimental to the health of the surrounding country, just compensation being provided.<sup>38</sup> And again, a law requiring all physicians and midwives to report to the clerk of the court, within thirty days after their occurrence, all

<sup>30</sup> 1 Dill. Mun. Corp. § 146.

<sup>31</sup> *Coates v. Mayor of New York*, 7 Cow. 585; *Brick Presbyterian Church v. Mayor, etc., of New York*, 5 Cow. 538.

<sup>32</sup> *In re Wong Yung Quy*, 6 Sawy. 442, 2 Fed. 624.

<sup>33</sup> *Ex parte Yung Jon*, 28 Fed. 308. It has even been held that a law making it a misdemeanor to smoke opium is a valid exercise of the police power. *Ah Lim v. Territory*, 1 Wash. St. 156, 24 Pac. 588.

<sup>34</sup> *Railroad Co. v. Husen*, 95 U. S. 465; *Missouri Pac. Ry. Co. v. Finley*, 38 Kan. 550, 16 Pac. 951; *Newark & S. O. H. C. Ry. Co. v. Hunt*, 50 N. J. Law, 308, 12 Atl. 697.

<sup>35</sup> *Green v. Mayor, etc.*, 6 Ga. 1.

<sup>36</sup> *Ex parte Casinello*, 62 Cal. 538.

<sup>37</sup> *Com. v. Patch*, 97 Mass. 221.

<sup>38</sup> *Miller v. Craig*, 11 N. J. Eq. 175.

births and deaths which may come under their supervision, is valid and constitutional.<sup>39</sup>

*Purity of Food Products.*

It is undoubtedly within the legitimate scope of the police power to prohibit the adulteration of articles intended for human food, and to impose penalties upon those who sell, or offer for sale, tainted, unwholesome, or adulterated food products. Where the adulteration consists in the addition of something dangerous or deleterious to health, the ground of state interference is very clear. When the added ingredient is harmless in itself, the sale of the adulterated compound may still be forbidden, on the ground of the fraud and deception practised in its sale. The sale of provisions unfit for human use is indictable at common law.<sup>40</sup> For reasons partly connected with the public health, and partly with the prevention of fraud, it is held that laws prohibiting or regulating the manufacture and sale of oleomargarine are valid as an exercise of the police power. "Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is or may be conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such a manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine."<sup>41</sup> So also, a statute or city ordinance prohibiting the adulteration of milk, providing for an analysis of milk by an authorized milk inspector, and prohibiting the feeding of cows on still slops and the vending of the milk of cows so fed, is valid as an exercise of the police power.<sup>42</sup>

<sup>39</sup> *Robinson v. Hamilton*, 60 Iowa, 134, 14 N. W. 202. In order to connect a law of this kind with the police power, it is only necessary to reflect that modern sanitary science owes much to the system of registering and reporting dangerous diseases and the localization thereby of unsanitary conditions.

<sup>40</sup> See *Swain v. Schieffelin*, 134 N. Y. 471, 31 N. E. 1025.

<sup>41</sup> *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257. Compare *People v. Marx*, 99 N. Y. 377, 2 N. E. 29.

<sup>42</sup> *Com. v. Waite*, 11 Allen, 264; *Com. v. Carter*, 132 Mass. 12; *State v. Campbell*, 64 N. H. 402, 13 Atl. 585; *Johnson v. Simonton*, 43 Cal. 242.

The same is true of a law requiring baking powder which contains alum to be marked so as to show that fact.<sup>43</sup> And an ordinance is valid which requires the filling up of wells on premises where bread is made, when its object is to prevent the use of unwholesome well water in the making of bread for public distribution and consumption.<sup>44</sup>

### *Intoxicating Liquors.*

That the regulation of the manufacture and sale of intoxicating liquors is a proper subject for the exercise of the police power, is a proposition which has never been doubted. On all the grounds which are recognized as most safely and surely bringing a matter within the scope of this power, the production and selling of intoxicants is included within the sphere of its legitimate operations. Whatever form, therefore, the regulating or restricting law may assume, if it is not in contravention of some constitutional provision, it is to be sustained as valid on this ground. This has been the decision in regard to laws totally prohibiting the manufacture and sale of liquors, laws allowing such prohibition to particular parts of the state at their option, laws licensing the traffic in liquors, regulating or prohibiting the sale on certain days or in certain places, or to particular classes of persons, authorizing the search for and seizure of liquors illegally kept for sale, imposing special or punitive taxation upon the business, and laws giving a right of action in damages to persons injured as a consequence of particular sales against the persons making such sales.<sup>45</sup> One of the latest and most noteworthy attempts to regulate the traffic in such a manner as to minimize its evils was the South Carolina "Dispensary Law" of 1892. This statute prohibited the manufacture, sale, and traffic in

<sup>43</sup> *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410.

<sup>44</sup> *State v. Schlemmer*, 42 La. Ann. 1166, 8 South. 307.

<sup>45</sup> See *Beer Co. v. Massachusetts*, 97 U. S. 25; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13; *Fisher v. McGirr*, 1 Gray, 1; *Lincoln v. Smith*, 27 Vt. 328; *State v. Ludington*, 33 Wis. 107; *Fell v. State*, 42 Md. 71; *Sibila v. Bahney*, 34 Ohio St. 399; *Bertholf v. O'Reilly*, 74 N. Y. 509; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6; *Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. 8, 97; *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062; *Com. v. Intoxicating Liquors*, 115 Mass. 153; *Trageser v. Gray*, 73 Md. 250, 20 Atl. 905.

all intoxicating liquors, except by the officers, and according to the system, which it created. In effect, it gave to the state itself a monopoly of the business of liquor selling, by providing that all liquor intended to be sold should be purchased by a state commissioner, under the direction of a state board of control, and by him retailed to the county dispensers (also state officers under the law), who were authorized to sell to individuals, under severe restrictions as to the kind and class of persons to whom such sales might be made. The profits of the business were to be for the use of the state, and a large sum of money was appropriated for the expense of inaugurating and maintaining the system. The question of the validity of this law first arose in the United States circuit court, and it was sustained, as against objections based on various clauses of the federal constitution.<sup>46</sup> But afterwards the supreme court of the state held it to be void, as conflicting with the constitutional right of citizens to liberty, freedom of occupation, and the pursuit of happiness. And it was said that the law was not a police regulation of the business of selling intoxicating liquors, because it did not prohibit the sale except by the citizens of the state, but encouraged such sale by providing that the profits thereof should enure to the state, and because it gave the state a monopoly of the business, and the police power of the state does not extend to the regulation of a business conducted by itself.<sup>47</sup> At a later day, however, this decision was overruled; and the law is now sustained as valid and constitutional.\*

#### *Regulation of Railways.*

Among the many police regulations adopted by states and cities, for the safety and comfort of the public in connection with the operation of steam railways, all of which have been held constitutional, may be mentioned the following: Laws regulating the grade of railways, and prescribing how and upon what grade their tracks may cross each other, laws regulating the speed of trains at highways and other crossings,<sup>48</sup> laws requiring locomotives to ring their

<sup>46</sup> *Cantini v. Tillman*, 54 Fed. 969.

<sup>47</sup> *McCullough v. Brown* (S. C.) 19 S. E. 458. And see *In re Langford*, 57 Fed. 570.

\* *State v. City Council of Aiken* (S. C.) 20 S. E. 221.

<sup>48</sup> *Chicago, B. & Q. R. Co. v. Haggerty*, 67 Ill. 113; *Haas v. Railroad Co.*, 41 Wis. 44; *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33.

bells or blow their whistles immediately before crossing at grade or other dangerous places, laws requiring them to maintain gates or flagmen at street crossings, laws regulating the amount of damages to be recovered by persons injured by the negligence of railroad companies, and allowing punitive damages,<sup>49</sup> laws requiring them to carry impartially for all persons,<sup>50</sup> and laws requiring them to permit other railroads to cross their track and divide between them the expense of the crossing.<sup>51</sup> So also, it is a competent exercise of the police power to provide, by general statute, that all railroads in the state shall fence their road on both sides and provide sufficient cattle guards at all farm and road crossings, under penalty of paying all damages for killing stock caused by their neglect to comply with such requirements, and even double damages.<sup>52</sup> But such statutes cannot go beyond the imposition of such a penalty in cases where the fault lies at the door of the company. If the law attempts to make such companies liable for accidents which were not caused by their negligence or disobedience to the law, but by the negligence of others or by uncontrollable causes, or does not give the company an opportunity to show these facts in its own defense, it is void.<sup>53</sup> The reasons why railroad companies may be subjected to this kind of police regulation are very well explained in a decision of the United States supreme court, from which we quote as follows: "The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public, and

<sup>49</sup> Coosa River Steamboat Co. v. Barclay, 30 Ala. 120; Boston, C. & M. R. Co. v. State, 32 N. H. 215.

<sup>50</sup> Chicago & A. R. Co. v. People, 67 Ill. 11.

<sup>51</sup> Fitchburg R. Co. v. Grand Junction R. Co., 1 Allen, 552.

<sup>52</sup> Thorpe v. Rutland & B. R. Co., 27 Vt. 140; Birmingham M. R. Co. v. Parsons (Ala.) 13 South. 602; Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207.

<sup>53</sup> Zeigler v. Railroad Co., 58 Ala. 594; Ohio & M. R. Co. v. Lackey, 78 Ill. 55; State v. Divine, 98 N. C. 778, 4 S. E. 477. Railroad companies cannot be compelled to erect and maintain residence crossings at their own expense, for the use and benefit of individuals, when no statute existed at the time of the construction of the road requiring such action on their part. People v. Detroit, G. H. & M. R. Co., 79 Mich. 471, 44 N. W. 934.

they are invested with the right of eminent domain only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial, nor an infringement of the obligation of contracts, in the imposition upon them, in particular instances, of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state that, in such particulars, a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States.”<sup>54</sup>

*Regulation of Trades and Professions.*

In the exercise of the police power, the state may limit the right of employment. Trades and kinds of business which are essentially noxious may be altogether prohibited by the legislature, if it shall deem such action conducive to the public welfare. No person can have a right to engage in the business of gambling, prostitution, or any other avocation which is *contra bonos mores*. So also, the legislature may lawfully forbid the prosecution of any business which, though not inherently vicious or immoral, is regarded as contrary to public policy, or amounts to a depredation upon the lawful rights of others. An illustration of this would be the business which is popularly known as “ticket scalping.” In the next place, there are certain occupations and professions in which the safety of the public, in regard to life, health, or property, is closely and vitally dependent upon the possession, by those who practice them, of a competent degree of skill, knowledge, or technical training. And it is within the police power of the state to restrict the right to engage in such pro-

<sup>54</sup> *New York & N. E. R. Co. v. Town of Bristol*, 151 U. S. 556, 14 Sup. Ct. 437.

fessions or occupations to those persons who can show, in some prescribed manner, a satisfactory qualification for their pursuit. This principle applies to the professions of physicians and surgeons,<sup>55</sup> attorneys at law,<sup>56</sup> druggists and pharmacists,<sup>57</sup> plumbers,<sup>58</sup> pilots, masters of ships, and others. In some states, the statutes require that telegraph operators shall have a year's experience, and be examined, and procure a certificate of competency, before being employed on a railroad. And a state statute requiring all locomotive engineers to be examined and licensed by a state court, is valid and constitutional.<sup>59</sup> So also is a law requiring, in the case of certain classes of employes on railroads, an examination and certificate of fitness, as regards color blindness and defective vision, from a state board of medical men.<sup>60</sup> In the next place, in regard to persons who are physically unfitted for the more toilsome kinds of labor, as women and children, the state may prohibit, or regulate, their employment in those trades which are considered to be detrimental to their health and strength. And there are pursuits from which it is proper that females or those of immature years should be withheld, on account of the evil influences to which they would be exposed. Here the intervention of the state is to be justified on the ground of public morality. Thus, the grant of licenses to sell liquor may be restricted to men and denied to women.<sup>61</sup> And so a statute

<sup>55</sup> *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231; *People v. Phippin*, 70 Mich. 6, 37 N. W. 888; *Hewitt v. Charier*, 16 Pick. 353; *Ex parte Spinney*, 10 Nev. 323; *Austin v. State*, 10 Mo. 591; *State v. Forcier*, 65 N. H. 42, 17 Atl. 577; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192. But a statute regulating the practice of medicine which should discriminate in favor of or against one school of medicine would not be valid. *White v. Carroll*, 42 N. Y. 161.

<sup>56</sup> *In re Bradwell*, 55 Ill. 535; *Bradwell v. Illinois*, 16 Wall. 130. But while the right to practise law is a privilege, it is one of which the individual cannot be arbitrarily deprived. That is, an attorney cannot be disbarred except upon the regular presentation of specific and adequate charges against him, and after an opportunity to appear and be heard in his own defense. *Percy's Case*, 36 N. Y. 651.

<sup>57</sup> *State v. Heinemann*, 80 Wis. 253, 49 N. W. 818.

<sup>58</sup> *Singer v. Maryland*, 72 Md. 464, 19 Atl. 1044.

<sup>59</sup> *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564.

<sup>60</sup> *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28.

<sup>61</sup> *Blair v. Kilpatrick*, 40 Ind. 312. As to the validity of laws prohibiting the employment of women in drinking saloons, under a constitutional pro-

is valid, and a constitutional exercise of the police power, which forbids the exhibition of any female child, under the age of fourteen years, as a dancer, or in any theatrical exhibition, or in any exhibition dangerous or injurious to the life, limbs, health, or morals of the child.<sup>62</sup> On a somewhat different ground, it is held to be competent to forbid the exercise within the limits of a city, or within certain designated parts of the city, of any trade which is a nuisance or hurtful to the inhabitants, or dangerous to the health of the community, or attended by noisome or injurious odors.<sup>63</sup> And in this same general class of laws we must include those which regulate the carrying on of laundries in cities,<sup>64</sup> and those providing for the licensing and regulating of the trade of junk-dealers, pawnbrokers, and hawkers and peddlers. The police power is also manifested in laws prohibiting restaurants to be kept open after a certain hour in the evening,<sup>65</sup> and providing that no intoxicating liquors shall be used or kept in any refreshment saloon or restaurant within a city.<sup>66</sup>

*Regulation of Charges and Prices.*

It was once customary, in England and on the continent, for laws or royal proclamations to be issued regulating the rates of charges to be made for various kinds of services, the wages of labor, and also the price of various commodities. But the modern idea of freedom in business requires that such matters shall be left almost wholly to private arrangement. Government interference, in fixing wages or prices, is regarded as an unlawful invasion of personal liberty, except in so far as it may be justified by public exigencies. There are still, however, some cases in which private arrangements may be controlled by public law, under the police power. The authorities have the power to fix or regulate prices and charges, (1) when the particular business is not one in which any person may engage at will,

vision that "no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession," see *In re Maguire*, 57 Cal. 604; *Ex parte Hayes* (Cal.) 33 Pac. 337.

<sup>62</sup> *People v. Ewer*, 141 N. Y. 129, 36 N. E. 4.

<sup>63</sup> *Slaughter-House Cases*, 16 Wall. 36; *Ex parte Shrader*, 33 Cal. 279.

<sup>64</sup> *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357; *Ex parte White*, 67 Cal. 102, 7 Pac. 186.

<sup>65</sup> *State v. Freeman*, 38 N. H. 426.

<sup>66</sup> *State v. Clark*, 28 N. H. 176.

but is a franchise or special privilege granted by the state, or when it is aided or promoted by the state, by taxation, or by a grant of the right of eminent domain, or by special privileges in the public streets, highways, or waterways; (2) when the business is one of public importance, but is such as to become a virtual monopoly in the hands of one or a few, and is thus capable of being made the means of unlimited oppression or extortion; (3) when the business is "affected with a public interest." It is not easy to say exactly what this last phrase means. But the authorities appear to use it as descriptive of a business which is indispensable to the comfort or convenience of the whole community, or which directly affects so large a proportion of the people that the public prosperity and welfare may be considered to depend, in some measure, upon its being conducted upon fair and just principles and without unreasonable exactions. But even in respect to occupations of this class, the power of the state is limited by the rule that a power to limit or regulate is not a power to destroy, and the legislature may not compel such persons to lend their services without reward, nor can it appropriate their property for public use except upon compensation made, neither can it, in the exercise of this power, establish regulations obviously and grossly unjust or discriminating.<sup>67</sup> The class of persons whose business is "affected with a public interest" is understood to include common carriers, hack drivers, millers, wharfingers, ferrymen, bakers, and perhaps some others.<sup>68</sup> Thus, in consequence of the public nature of the services performed by railroad companies, the state has power to regulate the charges they may make for their services and accommodations, at least in so far as to require that they shall not be unreasonable in amount.<sup>69</sup> And this may be done through the intervention of a railroad commission appointed by state authority.<sup>70</sup> And on a similar principle, it is competent for the

<sup>67</sup> *Munn v. Illinois*, 94 U. S. 113; *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4.

<sup>68</sup> *Cooley*, Const. Lim. 594.

<sup>69</sup> *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028. It is competent for the state to require railroad companies to advertise, annually, a tariff of fares, and to adhere to the same throughout the year. *Railroad Co. v. Fuller*, 17 Wall. 560.

<sup>70</sup> But see *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup.

state to regulate the rate of charges to be made for the storage of grain in elevators, which are declared by the state constitution to be public warehouses.<sup>71</sup>

*Regulation of Labor.*

In regard to the extent to which state interference may rightfully go in the regulation of labor and industrial employment, the rule deducible from the best authorities must be stated to be this: Any and all laws may be passed which may be necessary to protect the physical safety, health, or morals of the classes employed in these pursuits, or of the general public as affected by them, but beyond this the authority of the state is generally limited by the right of private contract. To illustrate, a law prohibiting the employment of women and children in laboring in any manufacturing establishment more than sixty hours per week, is valid and constitutional.<sup>72</sup> And so is a statute prescribing the means and manner of ventilation to be adopted in coal mines for the safety and health of persons employed therein.<sup>73</sup> Nor could any constitutional objection be taken to laws requiring employers who use dangerous machinery to take reasonable precautions to protect their servants from injury. In a late work it is stated that "New York and Massachusetts have passed laws to regulate the manufacture and sale of clothing made in un-

Ct. 462, 702. In this case it appeared that a statute of Minnesota required all railroads, in respect to such portion of their route as lay wholly within the state, to make equal and reasonable charges for their services as carriers. It also established a railroad commission, which was invested with power, whenever it should find that a carrier amenable to the statute was making unequal and unreasonable charges, to require it to adopt such charges as the commission should declare to be equal and reasonable. The law was so framed as to make the decision of the commission final and conclusive, and it gave the carrier no opportunity to contest the reasonableness of the tariff of rates which it was required to adopt, but laid it open to punishment for failure to comply with the orders of the commission. This statute was held to be unconstitutional and void, on account of the arbitrary power which it lodged in the commission, in a matter which was properly of judicial cognizance, and deprived the carrier of its constitutional right to a hearing by due process of law.

<sup>71</sup> *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468.

<sup>72</sup> *Com. v. Hamilton Manuf'g Co.*, 120 Mass. 383.

<sup>73</sup> *Com. v. Bonnell*, 8 Phila. 534.

healthful places, directed against the so-called 'sweating system.' The Massachusetts statute requires a license to be obtained and a label to be used with the words 'Tenement made.' The New York statute requires a permit and a tag giving the state and town where the articles are made. These laws have yet to pass the test of the courts." But undoubtedly there are sufficient reasons to justify their enactment. But on the other hand, laws have been passed in several of the states limiting the hours of labor, or providing that so many hours shall constitute a day's work. So far as regards the employment of women and children, the welfare of society is so intimately connected with regulations of this kind that there can be no question as to their validity. Where the regulation applies (as in some states) to employes on railroads, such as conductors and locomotive engineers, it is easily seen that the safety of travelers may depend on their not being overworked. In other cases, the law allows employer and employe to agree upon different hours. But where none of these circumstances apply, it is very doubtful whether such laws do not unwarrantably interfere with the right of contract. A statute requiring certain classes of corporations to pay their employes' wages once a week is unconstitutional for this reason.<sup>74</sup> And the same is true of a statute forbidding mining and manufacturing companies to keep truck stores or to pay wages in store orders.<sup>75</sup> (Where such stores are maintained, the employes are generally required to take out a part of their wages in clothing, groceries, or other supplies from the store. That is, they are paid, wholly or in part, in orders on the stores, whereby the company makes a profit.) In Massachusetts, a statute providing that "no employer shall impose a fine upon, or withhold the wages or any part of the wages of, an employe engaged at weaving, for imperfections that may arise during the process of weaving," was held unconstitutional.<sup>76</sup> And in Illinois, the same conclusion was reached with regard to a law which provided that,

<sup>74</sup> *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62. Compare *State v. Brown & Sharpe Manuf'g Co.* (R. I.) 25 Atl. 246.

<sup>75</sup> *Frorer v. People*, 141 Ill. 171, 31 N. E. 395; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285; *Hancock v. Yaden*, 121 Ind. 360, 23 N. E. 253. And see *Archer v. James*, 2 Best & S. 67, 73.

<sup>76</sup> *Com. v. Perry*, 155 Mass. 117, 28 N. E. 1126.

in all cases where miners were paid on the basis of the amount of coal mined, the coal should be weighed on the pit cars before being screened, and the compensation should be computed on the weight of the unscreened coal. The court said: "There is nothing in the business of coal mining which renders either the employer or employé less capable of contracting in respect to wages than in any of the other numerous branches of business in which laborers are employed under analogous conditions."<sup>77</sup>

*Regulation of Rights of Property.*

The police power of the state over private property and rights of property is based on the principle that all property is held subject to the supervision of the government, in order that it may prevent the use of property to the injury or prejudice of others. Many limitations upon the owner's absolute control of his property, imposed by authority of the government in order to restrain him from so using it as to work detriment to the community or to the rights of other owners, have been noticed or suggested in what has already been said in this chapter. For example, the use of property for the carrying on of noxious, offensive, or dangerous trades, may be prohibited or regulated. And in the exercise of the same power, the right to acquire and hold real estate may be restricted to native or naturalized citizens. Again, there is "a power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense."<sup>78</sup> Or, as it is stated by the court in New Jersey, "It is in the power of the government to prescribe public regulations for the better and more economical management of property of persons whose property adjoins, or which, for some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls, making and maintaining partition fences and ditches, constructing ditches and sewers for the drainage of uplands or marshes,

<sup>77</sup> *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364.

<sup>78</sup> *Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. 1086.

which can more advantageously be drained by a common sewer or ditch.”<sup>79</sup> On this principle, a statute authorizing milling companies to overflow the lands of upper riparian proprietors, by the construction of their dams and other works, upon payment of proper compensation for the injury caused thereby, is not an unlawful appropriation of property to private uses, nor does it deprive such persons of their property without due process of law. Such an act “is clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which without some such regulation could not be beneficially used.”<sup>80</sup> Again, many of the authorities hold that the legislature, acting as the guardian and protector of those who are disabled to act for themselves by reason of infancy, lunacy, or other like cause, may constitutionally pass either general or private laws under which an effectual disposition of their property may be made. And in some of the cases such a power is justified (with more or less distinctness) as a part of the police power.<sup>81</sup>

*Laws Against Fraud and Oppression.*

The protection of the whole community, or of classes of individuals, against fraud, overreaching, and oppression, is a legitimate department of the police power. Historically this is shown by the old market laws, against engrossing and forestalling, and the criminal laws against fraud and conspiracy which have always existed; and theoretically it is justified by the consideration that one of the functions of the state is to protect all citizens in the equal en-

<sup>79</sup> *Coster v. Tide-Water Co.*, 18 N. J. Eq. 54. And see *Turner v. Nye*, 154 Mass. 579, 28 N. E. 1048. But in a case in Massachusetts, it appeared that a provincial statute authorized persons building brick or stone houses in Boston to set half the partition wall on the adjoining lot, and provided that the adjoining owner, when he came to build, might use such wall, on paying half its cost. This act was held void. The police power, it was said, “does not justify authorizing one man to appropriate and use the property of another without his consent and without adequate compensation.” *Wilkins v. Jewett*, 139 Mass. 29, 29 N. E. 214.

<sup>80</sup> *Head v. Amoskeag Manuf'g Co.*, 113 U. S. 9, 5 Sup. Ct. 441.

<sup>81</sup> See *Brevoort v. Grace*, 53 N. Y. 245; *Rice v. Parkman*, 16 Mass. 326.

joyment of their rights. "The decisions," says a learned judge, "show that the right of self-preservation, which exists in the commonwealth no less than in the individual, may, in some circumstances, justify limitations upon freedom of contract, and that when for any reason (for instance, the existence of a monopoly) real liberty of action is wanting on the side of one of the parties, in dealings forming part of the activities of civilized society, a reasonable check may justly be placed by law upon the power of the other to oppress his fellow citizen."<sup>82</sup> And it is to this head that we must refer the laws for the protection of infants, married women, lunatics, and seamen, in their business dealings. But no such power is applicable to the contracts and employment of laboring men, merely as such, as has been already shown. But trusts, monopolies, corners, engrossing of the market, and other combinations in restraint of trade or intended to raise prices, are all unlawful at common law, and it is within the police power of the state to prohibit them or punish those promoting them. And the same is true of strikes and boycotts, when accompanied by, or resulting in, any trespass upon the rights or property of others, or operated by means of force or threats or any other means save the employment of reason or solicitation.<sup>83</sup> Usury laws proceed upon the theory that the lender and the borrower of money do not occupy the same relations of equality that parties do in contracting with each other in respect to other matters, and that the borrower's necessities deprive him of freedom in contracting and place him at the mercy of the lender.<sup>84</sup> On the same general principle are to be considered the statutes regulating dealings in patent rights, those providing for the inspection of goods intended for sale or export,<sup>85</sup> those for the inspection and regulation of weights and measures,<sup>86</sup> those regulating the weight of bread,<sup>87</sup> and ordinances requiring hay

<sup>82</sup> *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, dissenting opinion of Barclay, J.

<sup>83</sup> *Raymond v. Leavitt*, 46 Mich. 447, 9 N. W. 525; *Arnot v. Pittstown & E. Coal Co.*, 68 N. Y. 558; *Maguire v. Smock*, 42 Ind. 1; *Hilton v. Eckersley*, 6 El. & Bl. 47; *Hornby v. Close*, L. R. 2 Q. B. 153; *Carew v. Rutherford*, 106 Mass. 1; *Cooley, Const. Law* (2d Ed.) 247.

<sup>84</sup> *Frorer v. People*, 141 Ill. 171, 31 N. E. 395.

<sup>85</sup> *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. 44.

<sup>86</sup> *Ritchie v. Boynton*, 114 Mass. 431.

<sup>87</sup> *Mayor of Mobile v. Yuille*, 3 Ala. 137.

and coal to be weighed on public scales or by public weighers.<sup>88</sup> And so, in New York, the court sustained a law which was intended to empower manufacturers of sparkling and aerated waters to stamp their bottles with a device or trade-mark and have the same registered, and which made it a criminal offense for all other persons to fill such bottles with the substances for which they were intended, or to sell the same without the written consent of the manufacturer or unless purchased from him.<sup>89</sup>

*Regulation of Roads and Streets.*

The power of a municipal corporation to order sidewalks of a particular kind to be laid, and to assess against the abutting property owners an amount necessary to pay for the same, and to pay for keeping the same in repair and proper condition for the use of the public, is generally upheld upon the ground that it is a proper exercise of the police power. And it is held that a statute authorizing a city to contract for sprinkling and sweeping the streets at the cost of the property owners along the line of such streets, is valid and constitutional.<sup>90</sup> So also, it has been held to be a competent exercise of the police power to require residents in cities to keep their sidewalks clear of ice and snow, under a penalty or under pain of having it removed by the public authorities at their expense. Such a law is not a tax or burden, and is not unequal or partial. The validity of such ordinances is sustained on the ground of the special power and opportunity which the individual residents possess to discharge this public duty with that despatch which the comfort and welfare of the whole community require, and also in view of their peculiar in-

<sup>88</sup> *Stokes v. New York*, 14 Wend. 87; *Yates v. City of Milwaukee*, 12 Wis. 752.

<sup>89</sup> *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759.

<sup>90</sup> *Reinken v. Fuehring*, 130 Ind. 382, 30 N. E. 413. The same principle applies to grading, curbing, or paving streets and laying sewers, at the cost, or partly at the cost, of abutting lot owners, the point, in all these cases, being that the charge upon such owners is not a tax but a local assessment for special benefits, and that they cannot complain that they are deprived of their property without due process of law or without compensation. But it is very doubtful whether these enactments are referable to the police power, properly and strictly so called. If such statutes are not unconstitutional as an exercise of the power of taxation, in a modified form, it is enough, and the police power need not be invoked for their justification.

terest in its performance.<sup>91</sup> The right of a city to take the land of a riparian proprietor to enlarge a roadway which has been encroached on by the waters of the river is an exercise of the police power vested in the city by the state, and not of the power of eminent domain; and hence an ordinance directing the appropriation of land for such a purpose, without compensation to the riparian proprietor, is not unconstitutional.<sup>92</sup>

#### *Game Laws.*

The preservation of game and fish has always been treated as within the proper domain of the police power, and laws limiting the season within which birds or wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts.<sup>93</sup> And the prohibition may be extended so as to include fish which have been artificially propagated or maintained.<sup>94</sup>

#### *State Engaging in Business.*

The police power of a state to regulate a business does not include the power to engage in carrying on that business. On this ground a statute of Minnesota, providing for the building and maintaining, at the charge of the state, and under the supervision of a commission, of a warehouse and grain elevator, was held unconstitutional.<sup>95</sup> And the reader will remember that this was also the objection which prevailed against the South Carolina dispensary law, mentioned a few pages earlier. In Massachusetts, it is held that the furnishing of gas and electricity for illuminating purposes is a public service. And the performance of this service can be delegated by the legislature to cities and towns for the benefit of themselves

<sup>91</sup> Goddard, Petitioner, 16 Pick. 504; Village of Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480. But in Illinois, the courts have refused to sustain laws of this character, holding that the sidewalk is a part of the public highway, under the care and control of the municipality, and in which the abutting lot owner has no other or different interest than all the other citizens. Gridley v. City of Bloomington, 88 Ill. 554; City of Chicago v. O'Brien, 111 Ill. 532.

<sup>92</sup> Ruch v. City of New Orleans, 43 La. Ann. 275, 9 South. 473.

<sup>93</sup> Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499.

<sup>94</sup> Com. v. Gilbert, 160 Mass. 157, 35 N. E. 454.

<sup>95</sup> Rippe v. Becker (Minn.) 57 N. W. 331.

and their inhabitants, and such cities and towns may be authorized to impose taxes for this purpose upon their inhabitants, and to establish reasonable rates which the inhabitants who use the gas or electricity may be compelled to pay.<sup>96</sup> But in the same state, a few years later, when the legislature propounded the following question to the supreme court: "Is it within the constitutional power of the legislature to enact a law conferring upon a city or town within this commonwealth the power to purchase coal and wood as fuel, in excess of its ordinary requirements, for the purpose of selling such excess, so purchased, to its own citizens?" a majority of the court (five judges out of seven) answered it in the negative.<sup>97</sup>

#### LIMITATIONS OF THE POLICE POWER.

**113. Police regulations, to be valid, must not violate any provision of the federal constitution, nor interfere with the exclusive jurisdiction of congress, nor contravene the constitution of the state, nor unlawfully discriminate against individuals or classes, nor be unreasonable, nor invade private rights of liberty or property unnecessarily. They must actually relate to some one or more of the objects for the preservation of which this power may be exercised, and be proper and adapted to that purpose.**

##### *Limitations under Federal Constitution.*

In the nice adjustment of rights and powers between the states and the Union, questions frequently arise which require a determination of the relative scope of the police power of the state and the authority vested in congress. In such cases, the integrity of each must be preserved, without encroachment upon the other.

<sup>96</sup> Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084. The same decision was made in Ohio in regard to cities furnishing a supply of natural gas for public and private use, and issuing bonds to cover the expense of the wells, works, etc. *State v. City of Toledo*, 48 Ohio St. 112, 26 N. E. 1061.

<sup>97</sup> Opinion of the Justices, 155 Mass. 598, 30 N. E. 1142. These cases are interesting and important as tending to show how our constitutions are opposed to state socialism, or to the wielding of municipal powers in the direction of co-operative business enterprises.

The jurisdiction secured to the federal government by the constitution sets a limit to the police power of the states. "The subjects upon which the state may act are almost infinite; yet in its regulations in respect to all of them there is this necessary limitation, that the state does not thereby encroach upon the free exercise of the power vested in congress by the constitution."<sup>98</sup> Yet a state has the same unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the federal constitution, and "all those powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrendered or restrained, and consequently in relation to these, the authority of a state is complete, unqualified, and exclusive."<sup>99</sup> For instance, notwithstanding the exclusive power of congress to grant patents for inventions, it still remains within the power of each state to make reasonable police regulations to protect the purchaser of patent rights against fraud and imposition in their sale, and also to regulate, or exclude from its internal commerce, articles which its legislature may deem dangerous, noxious, or unfit for use, although covered by patents.<sup>100</sup> But while the state has power to protect itself by lawful police regulations, they must not be inconsistent with any of the terms of the national constitution, such as those provisions which guaranty to citizens of one state the rights and privileges of citizens in all the states, or which prohibit the states from abridging the privileges and immunities of citizens of the United States.<sup>101</sup> Again, the requirement that no state shall pass any law impairing the obligation of contracts imposes a limitation upon the police power. But if the alleged con-

<sup>98</sup> *W. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126.

<sup>99</sup> *Mayor, etc., of City of New York v. Miln*, 11 Pet. 102, 139.

<sup>100</sup> *Patterson v. Kentucky*, 97 U. S. 501; *Reeves v. Corning*, 51 Fed. 774; *In re Brosnahan*, 18 Fed. 62.

<sup>101</sup> For example, a state law providing for the inspection of animals intended to be slaughtered for human food cannot be regarded as a rightful exercise of the police power if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent the introduction into the state of sound meats, the product of animals slaughtered in other states. *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213.

tract involves a relinquishment or surrender of that power to individuals or corporations, it is one which the legislature would have no power to make, and therefore, being void, may be abrogated by the same or a succeeding legislature.<sup>102</sup> Again, neither under this power nor any other exercise of governmental authority, can the citizen be deprived of his property without due process of law. At the same time, it is "the settled doctrine that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects, and that the fourteenth amendment was not designed to interfere with the exercise of that power by the states."<sup>103</sup>

*State Police Power and the Regulation of Commerce.*

It is often difficult to determine the boundary line between the police power of the state and the commercial power of congress. But the solution is to be found in their co-ordination and not in their antagonism. The power of the national government to regulate foreign and interstate commerce, and the power of the individual state to enact regulations for its internal police, are co-ordi-

<sup>102</sup> The leading case on this point is *Beer Co. v. Massachusetts*, 97 U. S. 25. The question at issue was whether the charter of a private corporation, authorizing it to engage in the manufacture of malt liquor, and, as incidental thereto, to dispose of the products, constituted a contract protected against subsequent legislation prohibiting the manufacture of liquors within the state. The beer company claimed the right under its charter to manufacture and sell beer without limit as to time, and without reference to any exigencies in the health or morals of the community requiring such manufacture to cease. It was decided that while the company acquired, by its charter, the capacity, as a corporation, to engage in the manufacture of malt liquors, its business was at all times subject to the same governmental control as like business conducted by individuals; and that the legislature could not divest itself of the power, by such appropriate means, applicable alike to individuals and corporations, as its discretion might devise, to protect the lives, health, and property of the people, or to preserve good order and the public morals. The prohibitory enactment of which the beer company complained was held to be a mere police regulation, which the state could establish even had there been no reservation of authority to amend or repeal its charter.

<sup>103</sup> *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257; *Munn v. Illinois*, 94 U. S. 113; *Munn v. People*, 69 Ill. 80.

nate powers. Each must be preserved entire, but neither must encroach upon the other. On the one hand, congress has no power, under pretense of regulating commerce, to interfere with the domestic police of the state. On the other hand, the state has no power, under pretense of police regulations, to interfere with the paramount control of congress over commerce. "The police power of a state and the foreign commercial power of congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments. The one operates upon our foreign commerce, the other upon the internal concerns of a state."<sup>104</sup> While a state, for example, in the exercise of its police power, may enact sanitary laws, quarantine laws, and reasonable inspection laws, and while it may take such action as will prevent the introduction into the state of convicts, paupers, and persons or animals suffering from contagious or infectious diseases, yet it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under cover of exerting its police power, substantially burden or prohibit either foreign or interstate commerce.<sup>105</sup> A tax on immigrants is an unlawful interference with foreign commerce, and cannot be justified as an exercise of the police power.<sup>106</sup> But on the other hand, a state law authorizing the erection of a dam across a small navigable creek, in order to exclude the tide and reclaim an unhealthy marsh, is not a regulation of commerce, but the exercise of the right, common to every state, to adopt such measures as will, in the opinion of the legislature, promote the health of the inhabitants or give additional value to the land.<sup>107</sup>

The limitation of the police power of the state, when it comes in conflict with the commercial power of congress is well illustrated by certain decisions touching the traffic in intoxicating liquors (a

<sup>104</sup> License Cases, 5 How. 504, 592; *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Sherlock v. Alling*, 93 U. S. 99.

<sup>105</sup> *Railroad Co. v. Husen*, 95 U. S. 465. And see *Kimmish v. Ball*, 129 U. S. 217, 9 Sup. Ct. 277.

<sup>106</sup> *Henderson v. Mayor of City of New York*, 92 U. S. 259.

<sup>107</sup> *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245.

subject admittedly within the general scope of the police power) to which we now direct the attention of the reader. It had been settled that, as regards foreign commerce, the power of congress was exclusive, and that no state had the power, by taxation, license laws, or otherwise, to impose any burden upon the importation or sale of any article authorized by the laws of congress to be imported into the country, so long as it remained in the hands of the importer and in the original bale, package, or vessel in which it was imported.<sup>108</sup> But it was supposed that the rule in regard to commerce between the states was different, at least to the extent that the several states might legislate upon the subject unless and until congress should pass an act occupying the ground. In the case of *Pierce v. New Hampshire*<sup>109</sup> the inquiry was as to the constitutionality of a law of New Hampshire, prohibiting the sale of liquor without a license, in its application to a case where the article sold was a barrel of American gin, purchased in Boston, and carried coastwise to a landing in New Hampshire and there sold by the importer in the same barrel. It was adjudged that the state law might validly apply to a sale under these circumstances, and that, in such application, it was not inconsistent with the provisions of the federal constitution. The grounds of this decision were summed up by Taney, C. J., in his opinion in the case, as follows: "Upon the whole, the law of New Hampshire is in my judgment a valid one. For although the gin sold was an import from another state, and congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several states, yet, as congress has made no regulation on this subject, the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or a sale altogether prohibited, according to the policy which the state may suppose to be its interest or duty to pursue." And thus the law remained for many years. It was the settled doctrine that liquors transported from one state into another were subject to the laws of the latter state relating to their sale, to the same extent as any other liquors already lawfully with-

<sup>108</sup> *Brown v. Maryland*, 12 Wheat. 419.

<sup>109</sup> *License Cases*, 5 How. 504.

in the state, and could not be sold at the place of destination, either in the original packages or other form, except as the laws of the state might prescribe; and that the police power of the state, so exercised, did not infringe on the power delegated to congress to regulate interstate commerce. But in 1890, a similar question came again before the United States supreme court, in the case of *Leisy v. Hardin*,<sup>110</sup> and then the License Cases were overruled. It was held that, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the states to do so, it thereby indicates its will that such commerce shall remain free and untrammelled; that restrictions upon the sale of articles imported from one state into another, so long as they continue to be objects of interstate commerce, are unlawful invasions of the exclusive power of congress; and that, in consequence of these rules, the prohibitory liquor law of Iowa, in so far as it forbade the sale of liquors imported from another state, by the importer thereof, in the original and unbroken packages of their importation, was unconstitutional and void. The effects of this decision, so far as concerns the particular case of intoxicating liquors, were counteracted by the act of congress passed the same year, and commonly called the "Wilson Law."<sup>111</sup> But still the rule in *Leisy v. Hardin* remains as an authority for the proposition that, whether or not congress has legislated upon any particular branch, department, or subject of interstate commerce, it is not within the lawful power of the states to lay any burden or restriction thereon directly and materially affecting either the transportation or the sale of the same, and the allegation of the police power is no justification for an unwarranted interference with the exclusive domain of the national government in this regard.

<sup>110</sup> *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681. This is the case called the "Original Package Decision."

<sup>111</sup> Upon this statute and its constitutional validity, see *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865.

*Unreasonable Laws and Unjust Discriminations.*

Police regulations must not be unreasonable, nor must they make unjust discriminations against individuals or classes. For example, an ordinance of the city of San Francisco set apart a certain district or portion of the city for the Chinese quarter, required all Chinamen to remove into such quarter, and required them thereafter to confine their residences and business establishments to such quarter, under heavy penalties. It was held that this was void. It was not a valid exercise of the police power of the state or city, because it operated as an unjust and oppressive discrimination against the Chinese, and did not profess to make any distinction between those individuals who might be dangerous or noxious to the safety or health of the city and those who were not thus objectionable.<sup>112</sup> Again, an ordinance which professed to regulate the establishment of laundries in wooden buildings, but which in effect gave to a board of supervisors an arbitrary and uncontrollable power to allow or prohibit the use of such buildings for that purpose, at their mere pleasure, and as concerned both persons and places, and which was in fact so enforced as to discriminate unjustly against the Chinese, was held void.<sup>113</sup> And so, while a city undoubtedly has the right to regulate the use of its streets, with a view to securing the peace and comfort of its inhabitants, yet its ordinances must be general and impartial, and applicable to all alike. And hence an ordinance which is aimed especially at the "Salvation Army," and designed to prevent their parading in the streets, by giving to the mayor arbitrary power to grant or refuse permission for such processions, operates as an unreasonable and unjust discrimination, and is not valid.<sup>114</sup> The same decision was made in regard to an ordinance which prohibited the erection of any steam engine within the limits of the city unless by permission of the mayor and council, and then subject to their power to revoke the permit.<sup>115</sup> The legislature of New York passed a statute making it a misdemeanor to manufacture cigars, in cities of more than 500,000 inhabitants (which included only New York and Brooklyn) in any tenement house oc-

<sup>112</sup> *In re Lee Sing*, 43 Fed. 359.

<sup>113</sup> *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064.

<sup>114</sup> *State v. Dering*, 84 Wis. 585, 54 N. W. 1104.

<sup>115</sup> *Mayor, etc., of Baltimore v. Radecke*, 49 Md. 217.

cupied by more than three families, except on the first floor of houses in which there was a store for the sale of cigars and tobacco. This was held unconstitutional, for reasons similar to those which determined the cases already mentioned.<sup>116</sup> To take one more illustration, a city ordinance required a railroad company to keep a flagman stationed at a particular street crossing. But the court considered, under all the circumstances of the case, that the danger to the public at this particular crossing was not sufficient to authorize the municipality to put the railroad to that trouble and expense, but could be sufficiently averted by other and simpler means. It was therefore held that the ordinance was unreasonable, and for that reason void.<sup>117</sup>

*Province of the Courts.*

"Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may, in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."<sup>118</sup> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended

<sup>116</sup> *In re Jacobs*, 98 N. Y. 98.

<sup>117</sup> *Toledo, W. & W. Ry. Co. v. City of Jacksonville*, 67 Ill. 37.

<sup>118</sup> *In re Jacobs*, 98 N. Y. 98.

the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.”<sup>119</sup>

*Federal Revenue System and State Police Power.*

A license granted by the United States, under the internal revenue laws, to carry on any species of business (as, that of a liquor dealer) in a particular state named, although it has been granted in consideration of a fee paid, does not give the licensee power to carry on the business in violation of the state laws forbidding such business to be conducted within its limits; nor does it relieve the holder from the necessity of taking out any license required by the laws of the state, if that is the system therein prevailing.<sup>120</sup>

<sup>119</sup> *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273. See, also, *Ex parte Hodges*, 87 Cal. 162, 25 Pac. 277.

<sup>120</sup> *License Tax Cases*, 5 Wall. 462; *McGuire v. Massachusetts*, 3 Wall. 387.

## CHAPTER XV.

### THE POWER OF TAXATION.

- 114. General Considerations.
- 115. Independence of Federal and State Governments.
- 116. Limitations Imposed by Federal Constitution.
- 117. Limitations Imposed by State Constitutions.
- 118. Purposes of Taxation.
- 119. Equality and Uniformity in Taxation.
- 120. Taxation and Representation.
- 121. Taxation under the Police Power.

### GENERAL CONSIDERATIONS.

**114. The power of taxation is an essential and inherent attribute of sovereignty and belongs as a matter of right to every independent state or government, and it is as extensive as the range of subjects over which the power of that government extends. Taxes are ratable burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes.**

Taxes are a ratable portion of the produce of the property and labor of the individual citizens, taken by the nation or the state, in the exercise of its sovereign rights, for the support of government, for the administration of the laws, and as the means for continuing in operation the various legitimate functions of the state.<sup>1</sup> "The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free state will possess it under the general grant of legislative power, whether particularly specified in the constitution among the powers to be exercised by it, or not. No constitutional government can exist without it, and

<sup>1</sup> Black, *Tax Titles*, § 2. "The word 'taxes' in its most enlarged sense, embraces all the regular impositions made by government upon the persons, property, privileges, occupations, and enjoyments of the people for the purpose of raising public revenue." Cooley, *Const. Law* (2d Ed.) 54, citing *Perry v. Washburn*, 20 Cal. 318, 350; *Hilbish v. Catherman*, 64 Pa. St. 154; *Opinion of the Justices*, 58 Me. 590.

no arbitrary government, without regular and steady taxation, could be anything but an oppressive and vexatious despotism, since the only alternative to taxation would be a forced extortion for the needs of government from such persons or objects as the men in power might select as victims."<sup>2</sup> "The power of taxing the people and their property," says Chief Justice Marshall, "is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. That is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state therefore give to their government a right of taxing themselves and their property, and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse."<sup>3</sup>

But it is not consonant with the constitutional idea of a tax that it should be exacted from individuals in an arbitrary or discriminating manner. The idea of taxation implies equality of burdens, and a regular distribution of the expenses of government among those persons, or those classes of property, which are rightly subject to the burden of them. Taxes, properly so called, are distinguished from arbitrary exactions or enforced contributions in this, that taxes must be laid according to some rule which apportions the burden of the tax between the subjects which are to contribute to it. An exaction which is made without regard to any rule of apportionment is not properly a tax, and such an exaction is not within the constitutional power of the government.<sup>4</sup>

<sup>2</sup> Cooley, Const. Lim. 479; Appeal of Fox, 112 Pa. St. 337, 352, 4 Atl. 149.

<sup>3</sup> McCulloch v. Maryland, 4 Wheat. 316, 428. And see Pullen v. Commissioners of Wake Co., 66 N. C. 361.

<sup>4</sup> Cooley, Const. Law, 55; Sutton v. City of Louisville, 5 Dana, 28; Grim v. Weissenberg School Dist., 57 Pa. St. 433. A state may make the ownership of property subject to taxation relate to any day or period of the year which it may think proper. Shotwell v. Moore, 129 U. S. 590, 9 Sup. Ct. 362.

Again, the exaction of money from individuals under the power of taxation, and the appropriation of private property for public use by virtue of the power of eminent domain, should not be confused. In paying taxes, the citizen contributes his just and ascertained share to the expenses of the government under which he lives. But when his property is taken under the power of eminent domain, he is compelled to surrender to the public something above and beyond his due proportion for the public benefit. The matter is special. The particular estate is taken because the government has special need for it. It is in the nature of a compulsory sale to the state. Hence arises the justice and necessity of a constitutional provision for compensation to the owner.<sup>5</sup> Furthermore, taxes are not debts in the ordinary sense of that word. The state may distrain and sell property for the payment of a tax, if not paid when demanded, without first obtaining a judgment, and as between it and creditors of the person owing the tax, the state is entitled to a preference. The claim of the government upon the citizen for the payment of taxes is paramount to all other claims and liens against his property.<sup>6</sup>

In respect to the kind of tax which shall be laid, and also in regard to the objects which shall be placed under its burdens, the legislature, as the representative of the sovereign people, must exercise its judgment and discretion, having in view the needs and conditions of the country. But the power to tax is of the broadest extent. "It is a power of unlimited force and most searching extent. It embraces every person and every object of property within the confines of the nation. It extends to every trade, profession, and employment. It covers every estate, interest, and evidence of debt. It has to do with the food we eat, it concerns itself with our labor and our amusements, and sometimes counts the windows of our houses. It imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or forfeiture of property."<sup>7</sup> But in this country the taxing power is subject to certain positive limitations, within which its exercise must be con-

<sup>5</sup> Booth v. Town of Woodbury, 32 Conn. 130; People v. Mayor, etc., of Brooklyn, 4 N. Y. 419.

<sup>6</sup> Jack v. Weiennett, 115 Ill. 105, 3 N. E. 445.

<sup>7</sup> Black, Tax Titles, § 4.

fined, in order to answer the requirement of legality. "Great as is the power of any sovereignty to levy and collect taxes from its citizens, it is not in a constitutional country without limitations which are of a very distinct and positive nature, and exist whether declared or not declared in the written constitution; but some of them it is not uncommon to specify, either out of abundant caution, or to keep them fresh in the minds of those who administer the government. Some others, in this country, spring from the peculiar form of the government and the relation of the states to the common authority. Still others are expressly imposed, either by the state constitution or by that of the Union." <sup>8</sup>

#### INDEPENDENCE OF FEDERAL AND STATE GOVERNMENTS.

115. The necessary independence of the federal and state governments imposes a limitation upon the taxing power of each. Neither can so exercise its own power of taxation as to curtail the rightful powers of the other, or interfere with the free discharge of its constitutional functions, or obstruct, embarrass, or nullify its legitimate operations, or destroy the means or agencies employed by it in the exercise of those powers and functions.

This limitation upon the taxing power is not expressed in the constitutions, but is to be implied from the nature of our system of government. No political community can in general lay assessments upon any subjects of taxation not within its territorial jurisdiction. But this axiom of law has a special and highly important application in this country, under our peculiar frame of government, which apportions the sovereign authority between the commonwealth and the nation, and gives to each, over certain subjects, an exclusive jurisdiction. Whatever pertains to this exclusive jurisdiction in either is eliminated from the taxing power of the other as completely as if it were beyond its territorial limits. In a leading case, the following rules were laid down as incontrovertible propositions: "That the power to tax involves the power to destroy; that the power to

<sup>8</sup> Cooley, Tax'n, 54.

destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, in respect to those very measures, is declared to be supreme over that which exerts the control.”<sup>9</sup> As a corollary from this rule it follows that the several states have no constitutional power to lay any tax upon the instruments, means, or agencies provided or selected by the United States to enable it to carry into execution its legitimate powers and functions. This principle was applied in the celebrated case of *McCulloch v. Maryland*,<sup>10</sup> which involved the constitutionality of a law of Maryland imposing a tax upon the circulation of the Bank of the United States. And the same doctrine was invoked in an interesting case in California, which further illustrates the rule here in question. It appeared that the Western Union Telegraph Company owned and operated lines by authority of the federal government along the military and post roads of the United States, and over, under, and across the navigable waters thereof, and that it used its lines in the transmission of messages from state to state and to foreign countries, and that it was likewise engaged in the transmission over its wires of messages for, from, and between the several departments of the federal government, giving such messages priority over all other business, and sending them at rates annually fixed by the postmaster general. On this state of facts it was considered that the company was one of the means or instruments employed by the United States government for carrying into effect its sovereign powers, and consequently, within the rule in *McCulloch v. Maryland*, a state tax upon its franchise, in addition to the tax which, in common with others, it paid on its property, was beyond the power of the state and was void.<sup>11</sup>

In pursuance of the same general principle, it is held that real property owned by the United States government, though situated within the territorial limits of a state, is not subject to taxation by that state; and this exemption from taxation remains effective until the United States has made sale or other disposition of the lands

<sup>9</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 431.

<sup>10</sup> 4 Wheat. 316.

<sup>11</sup> *City and County of San Francisco v. W. U. Tel. Co.*, 96 Cal. 140, 31 Pac. 10.

so as to divest its title.<sup>12</sup> Neither can a state rightfully impose any tax or assessment upon bonds issued by the United States, or its treasury notes, or other securities, obligations, or evidences of debt. If the states were permitted to tax such instruments at their own discretion, there would be no limit as to the amount of tax they might impose, and the power might well be so exercised as to seriously hinder the national government in the exercise of its power to "borrow money on the credit of the United States."<sup>13</sup> But still it is always competent for congress to authorize state taxation of such securities, guarding the concession against abuse by providing that they shall not be taxed at any other or higher rate than similar property which is already subject to the taxing power of the state. In that event, the state must take care not to exceed the limits set for it by the act of congress. In general, a state has no power to tax franchises conferred by congress upon a corporation created by it, to be exercised within the state.<sup>14</sup> And for similar reasons, the taxation of national banks or their stock is within the constitutional power of the states only so far as may be authorized and allowed by congress, which created them and uses them as instruments or agencies of the national government.<sup>15</sup> And it is not allowable for a state to impose any tax upon the salary or emoluments of an officer of the federal government.<sup>16</sup> So, again, "a tax upon persons may possibly, in some cases, tend to embarrass the operations of either the

<sup>12</sup> Van Brocklin v. Tennessee, 117 U. S. 151, 6 Sup. Ct. 670; Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. 341. An act of congress which provides that lands granted to a railroad company shall not be conveyed to the company or any party entitled thereto "until there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the company or party in interest," exempts these lands from state or territorial taxation until such payment is made into the treasury. Northern Pac. R. Co. v. Trull Co., 115 U. S. 600, 6 Sup. Ct. 201. See, also, Union Pac. R. Co. v. McShane, 22 Wall. 444.

<sup>13</sup> Weston v. City Council of Charleston, 2 Pet. 419; Bank Tax Case, 2 Wall. 200; Bank of Commerce v. New York, 2 Black (U. S.) 620; People v. Commissioners, 4 Wall. 244; Bank v. Supervisors, 7 Wall. 26; Palfrey v. Boston, 101 Mass. 329; Board of Com'rs of Montgomery Co. v. Elston, 32 Ind. 29.

<sup>14</sup> California v. Central Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073.

<sup>15</sup> Tappan v. Merchants' Nat. Bank, 19 Wall. 490.

<sup>16</sup> Dobbins v. Commissioners, 16 Pet. 435.

national or state government, in which case it would be void unless imposed by the government which was liable to be inconvenienced by it. And on this ground it has been held that a state tax of a certain sum on every person leaving the state by public conveyance was invalid, the tendency being to embarrass the functions of the national government, by obstructing the travel of citizens and officers of the United States in the business of the government and the transportation of armies and munitions of war."<sup>17</sup>

But the doctrine which exempts the instrumentalities of the federal government from the influence of state legislation not being founded on any express provision of the constitution, but on the implied necessity for the use of such instruments by the federal government, it follows that it must be limited by the principle that state legislation which does not impair the usefulness or capability of such instruments to serve that government is not within the rule of prohibition.<sup>18</sup> Further, the mere fact that a corporation is employed in the service of the United States will not suffice to exempt it from state taxation, as an instrument or agency of the government, when there is no legislation on the part of congress to show that such an exemption is deemed by it essential to the full performance of the company's obligations to the government, and when the corporation derives its existence from state law, and exercises its franchises thereunder, and holds its property within state jurisdiction and under state protection.<sup>19</sup>

The converse of this rule is equally true. That is to say, it is not within the constitutional power of congress to so adjust the revenue system of the United States as to interfere with or defeat the operations of the state governments within the sphere of their legitimate activities.<sup>20</sup> Thus, a municipal corporation, being a portion of the sovereign power of the state, is not subject to taxation by congress upon its municipal revenues.<sup>21</sup> Neither can congress impose a tax

<sup>17</sup> *Cooley, Tax'n*, 86; *Crandall v. Nevada*, 6 Wall. 35.

<sup>18</sup> *National Bank v. Com.*, 9 Wall. 353; *Railroad Co. v. Peniston*, 18 Wall. 5.

<sup>19</sup> *Thompson v. Pacific Railroad*, 9 Wall. 579; *County of Santa Clara v. Southern Pac. R. Co.*, 18 Fed. 385.

<sup>20</sup> *State Treasurer v. Collector of Sangamon Co.*, 28 Ill. 509.

<sup>21</sup> *U. S. v. Railroad Co.*, 17 Wall. 322.

upon the salary of a judicial officer of a state,<sup>22</sup> nor upon official bonds given to a state by its officers.<sup>23</sup> For the same reason, the state courts unanimously agreed that the provision of the internal revenue act of 1864, requiring stamps to be placed upon writs issuing from the state courts, and upon tax deeds, and other official documents, was not within the sphere of the legislative powers of the federal government and was inoperative, so far as it applied to such papers.<sup>24</sup> Nor is it competent for the United States to impose a tax upon a railroad owned by a state.<sup>25</sup>

#### LIMITATIONS IMPOSED BY FEDERAL CONSTITUTION.

116. The power of taxation possessed by the several states is limited, in certain important particulars, by specific provisions of the federal constitution. Thus, "no state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Nor may the states lay any duty of tonnage. Nor may state taxation be so imposed as to amount to an unlawful interference with that commerce over which congress is invested with exclusive jurisdiction. Neither will such taxation be valid if it discriminates against the rights and privileges of citizens of other states, or denies to any person or class of persons the equal protection of the laws, or impairs the obligation of contracts.

All of these limitations upon the taxing power of the states (and they are of the highest importance and practical interest) have been fully considered in other parts of this book, to which the

<sup>22</sup> *Collector v. Day*, 11 Wall. 113; *Freedman v. Sigel*, 10 Blatchf. 327, Fed. Cas. No. 5,080.

<sup>23</sup> *State v. Garton*, 32 Ind. 1.

<sup>24</sup> *Warren v. Paul*, 22 Ind. 276; *Moore v. Quirk*, 105 Mass. 49; *Fifield v. Close*, 15 Mich. 505; *Union Bank v. Hill*, 3 Cold. 325; *Sayles v. Davis*, 22 Wis. 225.

<sup>25</sup> *Georgia v. Atkins*, 1 Abb. (U. S.) 22, Fed. Cas. No. 5,350.

reader is referred. That the prohibition against laws impairing the obligation of contracts may in some cases amount to a check upon the power of taxation inherent in a state, will appear from an examination of the authorities cited in the margin.<sup>26</sup> And a state law imposing taxation which would be repugnant to the stipulations of a treaty made by the United States with a foreign nation would be void, for the treaty is declared by the constitution to be the supreme law of the land, anything in the constitution or laws of the state to the contrary notwithstanding.<sup>27</sup> But the federal constitution does not prohibit a state from taxing her resident citizens for debts held by them against a non-resident, evidenced by his bond and mortgage on land in another state.<sup>28</sup>

#### LIMITATIONS IMPOSED BY STATE CONSTITUTIONS.

117. The legislature of a state is further circumscribed, in the exercise of the sovereign power of taxation, by various limitations found in the state constitution. Whatever these restrictions may be, in the particular state, they must be strictly observed. But an intention to limit the power of taxation will never be presumed; it must be shown to follow from clear and definite provisions of the constitution.

“Great as is the power of the state to tax,” says Judge Cooley, “the people may limit its exercise by the legislative authority at pleasure. This, however, can only be done by the constitution of the state. And limitations or restrictions upon the exercise of this essential power of sovereignty can never be raised by implication, but the intention to impose them must be expressed in clear and unambiguous language.”<sup>29</sup> In some of the states, the constitution prescribes or limits the amount to be raised by state taxation in any one year. A provision of this sort is self-executing, for any taxation in excess of the rate allowed would be merely void and could not be collected by process of law. In several states, the

<sup>26</sup> *Murray v. Charleston*, 96 U. S. 432; *Hartman v. Greenhow*, 102 U. S. 672.

<sup>27</sup> *Cooley, Tax'n*, 100.

<sup>28</sup> *Kirtland v. Hotchkiss*, 100 U. S. 491.

<sup>29</sup> *Cooley, Tax'n*, 101.

fundamental law requires that every statute imposing a tax shall state distinctly the object of the same, to which only it shall be applied. In some, the constitution declares that poll taxes are oppressive and specifically forbids their imposition. It is scarcely necessary to say that no power resides in the legislature of any state to override provisions of this description, imposed as limitations upon its authority by the people themselves in framing their constitution.

Furthermore, it is a general principle that the taxing powers of a state are limited to persons and property within and subject to its jurisdiction. Hence it is entirely incompetent for one state to tax real property which lies within the boundaries of another, and if an attempt at such taxation is made, the right to tax the land in the latter state will not be affected thereby.<sup>30</sup> For a similar reason, the taxing power of a state does not extend to intangible personal property owned by a non-resident of the state. Thus, where a person residing in the state of New York owned stock representing the debt of the city of Baltimore, it was held that such stock was not taxable by the state of Maryland.<sup>31</sup>

It is also within the power of the legislature (as will more fully appear in another chapter) to bind the state, by contract founded on a consideration, to exempt particular property from taxation, either for a limited period or indefinitely. And when this has been done, the contract so established imposes a limitation upon the taxing power of the state. For any attempt to impose taxes on property so exempted would be a violation of the obligation of the contract, and therefore unconstitutional.

#### PURPOSES OF TAXATION.

118. One invariable limitation upon the power of taxation is that it must always be exercised for the benefit of the public, never for the advantage of individuals. It is immaterial that such a limitation may not be expressed

<sup>30</sup> *Winnipiseogee Lake Cotton & Woolen Manuf'g Co. v. Gilford*, 64 N. H. 337, 10 Atl. 849.

<sup>31</sup> *Mayor, etc., of Baltimore v. Hussey*, 67 Md. 112, 9 Atl. 19; *Case of State Tax on Foreign-Held Bonds*, 15 Wall. 317.

in the constitution. It follows as a necessary implication from the nature of the taxing power that the purposes for which money may be raised in this manner must be public purposes, otherwise the law will be invalid. Whether or not a particular purpose of taxation is a "public" purpose, is a question which must be determined, in the first instance, by the legislature. But its determination is not conclusive. And if the courts can see that the purpose of the tax is plainly and indubitably a private purpose, they will not allow its collection.

That the purposes for which the power of taxation may be employed must be public purposes is a necessary deduction from the definition of taxation. It does not consist in the power to take the money or property of the citizens generally. But it is the power to raise funds, by enforced proportional contributions, for the support of government and for the means of carrying into effect the objects for which government is established. This being the case, it is not even important to inquire whether the constitution of the particular state expressly forbids taxation for other than public purposes. Even the most unlimited grant of power to a legislature could not justify confiscation of private property under the pretense of taxation. The limitation will always exist by necessary implication. As is said by the courts, the general grant of legislative power in the constitution of a state does not authorize the legislature, in the exercise either of the right of eminent domain or of the power of taxation, to take private property, without the owner's consent, for any but a public object.<sup>32</sup>

But the question, what purposes are to be considered "public," within the meaning of this limitation, is one which gives rise to many controversies and not a little confusion in the authorities. A few general rules may be laid down, which will suffice to show the lines on which the inquiry must be conducted, and the tests usually applied to determine the question.

In the first place, in order that an object of taxation should be public, it is necessary that it should be for the benefit and ad-

<sup>32</sup> *Cole v. La Grange*, 113 U. S. 1, 5 Sup. Ct. 416.

vantage of the whole people. But it is not necessary to show that a direct and pecuniary benefit will accrue to each person to be affected by the tax. All citizens are interested in the general welfare of the state. Whatever promotes the prosperity of the whole community makes for the advantage of each. All persons are vitally concerned in the peace, order, and good government of the country in which they live.<sup>33</sup> In the next place, although the proximate object of the tax may be the benefit or advantage of an individual, it does not always follow that the general object may not be the public welfare. For the object in conferring this benefit upon an individual may be intimately connected with the advantage of the whole people. For example, when the government assumes to make grants of land or money as bounties, or to pay pensions to retired or disabled officers, civil or military, it is true that the persons to receive the gift are most directly concerned. But the grant is made upon consideration of public services rendered or to be rendered, and is calculated and intended to promote the efficiency and fidelity of the public service by extending the hope of a reward in certain contingencies. The only question as to such laws is therefore one of wisdom and expediency; it is a political question, not a legal question.<sup>34</sup> In the next place, a "public purpose" invariably means a purpose which concerns the aggregate of the people within the jurisdiction of the government which authorizes the assessment. For example, the construction of a system of sewers, or parks, or waterworks, in a city, is a public purpose, so far as concerns the residents of the city, and therefore a legitimate object of municipal taxation. But it is not a public purpose as regards the people of the state at large. Hence the tax area must be restricted to the district to be benefited. Taxation of the whole state for such a purpose would be clearly inadmissible. And conversely, there may be a public purpose which would serve as a basis for state taxation, but would not uphold the taxation which its municipal corporations might lawfully vote and collect. And so again, a tax cannot be imposed exclusively on any subdivision of the state to pay an indebtedness

<sup>33</sup> New York, *L. E. & W. R. Co. v. Commissioners*, 48 Ohio St. 249, 27 N. E. 548.

<sup>34</sup> Cooley, *Tax'n*, 111.

or claim which is not peculiarly the debt of such subdivision, or to raise money for any purpose not peculiarly for the benefit of such subdivision. In other words, if the tax be laid upon one of the municipal subdivisions of the state alone, the purpose must not only be public, as regards the people of that municipality, but also local.<sup>35</sup>

We have said that the determination of the question whether or not a particular object is a public purpose, so as to justify taxation, belongs in the first instance to the legislature. This means that the legislature must judge of the public nature of the proposed expenditure; that their determination is presumed to be correct; that it will in any case be sufficient to authorize the persons charged with the levy and collection of the tax in proceeding with their duties; that when the question is presented to the courts they will decide it as one of law, giving to the legislative action every presumption of regularity and validity, and refusing to hold the legislative body down to any narrow or technical rule, and not interfering unless the violation of the principle involved is clear and unquestionable. "To justify the court in arresting the proceedings, and in declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable, so clear and palpable as to be perceptible by every mind at the first blush."<sup>36</sup> But if the courts can perceive, on the face of the tax law, that the purpose is a private purpose and not one which would justify the imposition of taxes, then they will give relief to any person aggrieved who brings his case properly before them. This may be done, in some cases, by enjoining the collection of the tax; in others, by allowing the recovery of taxes paid under protest, or damages for the seizure of property in pursuance of its authority.

Among the many and varied purposes for which money is usually

<sup>35</sup> *Sanborn v. Commissioners of Rice Co.*, 9 Minn. 273 (Gil. 253); *McBean v. Chandler*, 9 Heisk. 349; *Wells v. City of Weston*, 22 Mo. 334; *Livingston Co. v. Weider*, 64 Ill. 427.

<sup>36</sup> *Booth v. Woodbury*, 32 Conn. 118; *Brodhead v. City of Milwaukee*, 19 Wis. 652; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147; *English v. Oliver*, 28 Ark. 317; *Cheaney v. Hooser*, 9 B. Mon. 330; *Hammett v. City of Philadelphia*, 65 Pa. St. 146; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518.

raised by taxation, there are some which are unquestionably "public" in every proper sense of the term. And there are others, in regard to which it is not always clear whether they are so far public as to constitute a legitimate basis for taxation. We shall proceed to consider some of these cases briefly. The preservation of the public peace and the good order of the community; provision for the due and efficient administration of justice, the enforcement of civil rights, and the punishment and prevention of crime; provision for the compensation of public officers; for erecting, maintaining, repairing, and protecting the public buildings and public property in general; paying the expenses of legislation and of administering the laws; establishing and maintaining free public schools and other public institutions of learning; public charities, including the relief of paupers, the care of the indigent sick, blind, or insane, and the maintenance of public asylums, hospitals, and work-houses; the construction, repair, and improvement of public roads, including highways, turnpikes, and paved streets in cities; the enforcement of sanitary regulations, designed to protect or promote the public health; the maintenance of public parks or pleasure grounds in the cities; the payment of such public debts as were lawfully and constitutionally contracted; the enforcement or discharge of certain public obligations which, though not legally a liability of the state or municipality, are of clear moral obligation,—all these are plainly and admittedly "public" purposes, and proper to be provided for by general taxation.

But when we pass from those objects which are properly the care and duty of the government, or which are calculated to benefit the entire community, to those which work a benefit only to private persons, we cross the line and enter upon the region of unlawful exactions. For example, though it was at one time doubted whether municipal corporations could legally donate money or issue their obligations in aid of the construction of railroads, the great preponderance of authority, at present, is in favor of the constitutionality of stock subscriptions by municipalities in aid of such roads, when duly authorized by the legislature, and of taxation by them for the payment of their bonds given to the railroad companies. These roads are regarded as improved modern highways, and al-

though they are owned by private corporations, they are of direct benefit to the entire people of the districts through which they pass.<sup>37</sup> But on the other hand, it is well settled that municipal corporations, with or without the sanction of legislative authority, have no legal power to donate money, lend their credit, or issue their obligations, to aid in the erection or conduct of manufactories or other business enterprises owned and controlled by private persons, or as a means of securing the location of such enterprises in the particular community; taxation for such purposes is not legitimate, and such obligations, if issued, are void.<sup>38</sup> To take another illustration, it is unquestionably within the power of the legislature to maintain public charities. But it is often difficult to draw the line between a legitimate public charity and the expenditure of public money for the benefit of private persons. Thus, a statute of Massachusetts, authorizing the city of Boston to issue bonds and lend the proceeds on mortgage to the owners of lands, the buildings on which were burned by the great fire of 1872, was held unconstitutional.<sup>39</sup> So an act authorizing townships, in districts where there had been a failure of the crops, to issue bonds, to supply the destitute with provisions and with grain for seed, was pronounced invalid.<sup>40</sup> Neither can a township raise money by taxation to reimburse its treasurer for a sum paid by him to the township to make good an amount of

<sup>37</sup> *Gilman v. City of Sheboygan*, 2 Black (U. S.) 510; *Augusta Bank v. Augusta*, 49 Me. 507; *Walker v. Cincinnati*, 21 Ohio St. 14; *Stockton & V. R. Co. v. City of Stockton*, 41 Cal. 147. Compare *People v. Township Board of Salem*, 20 Mich. 452.

<sup>38</sup> *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442; *Citizens' Sav. & Loan Ass'n v. Topeka*, 20 Wall. 655; *Allen v. Inhabitants of Jay*, 60 Me. 124; *Brewer Brick Co. v. Brewer*, 62 Me. 62. Bonds of a county issued to aid a company in improving the water power of a river for the purpose of propelling public grist mills, are issued to aid in constructing a "work of internal improvement," for which taxation is lawful. *Blair v. Cuming Co.*, 111 U. S. 363, 4 Sup. Ct. 44; *Burlington Tp. v. Beasley*, 94 U. S. 310. Compare *Osborne v. County of Adams*, 106 U. S. 181, 1 Sup. Ct. 168.

<sup>39</sup> *Lowell v. Boston*, 111 Mass. 454. But a city may raise and expend money for the erection of a memorial hall, to be used and maintained as a memorial to the soldiers and sailors of the civil war. *Kingman v. City of Brockton*, 153 Mass. 255, 26 N. E. 998.

<sup>40</sup> *State v. Osawkee Tp.*, 14 Kan. 418.

the public money of which he had been robbed.<sup>41</sup> Nor is it legitimate to raise money by taxation to refund to individuals what they have paid to relieve themselves from an impending military draft.<sup>42</sup> Again, it is admittedly proper for the state, or its municipalities, to undertake the work of draining and reclaiming marsh and swamp lands, for the purpose of abating the nuisance which such places create, and thereby promoting the public health, and the construction of levees, embankments, and ditches, and in furtherance of these objects the power of taxation may be employed.<sup>43</sup> But all such works must be public in their nature, that is, they must be for the benefit of the whole population of the district taxed, or else the raising of money by taxation cannot be justified. Thus, a tax to construct a drain, on private property, in which the public are not concerned, or of a dam which at discretion is to be devoted to private purposes, is invalid.<sup>44</sup> So again, while it is not denied that the establishment of free public schools, for the instruction of children of citizens in the elementary branches of secular learning, is a proper object of taxation, yet it is generally conceded that religious instruction does not stand on the same basis, and cannot be provided for by the application of public money.<sup>45</sup> In further illustration of this difference, it may be noticed that while public parks, since they contribute so largely to the public welfare in a variety of ways, especially in the large cities, are proper objects for the expenditure of public funds, yet it is no part of the office of government to provide amusements for the people. Thus, it is held that a city has no authority to furnish an entertainment for the citizens and guests of the city, on a public holiday, at the public expense.<sup>46</sup>

<sup>41</sup> *Bristol v. Johnson*, 34 Mich. 123.

<sup>42</sup> *Tyson v. School Directors*, 51 Pa. St. 9; *Crowell v. Hopkinton*, 45 N. H. 9; *Usher v. Colchester*, 33 Conn. 567; *Freeland v. Hastings*, 10 Allen, 570; *Miller v. Grandy*, 13 Mich. 540.

<sup>43</sup> *Dingley v. Boston*, 100 Mass. 544; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495.

<sup>44</sup> *People v. Board of Sup'rs of Saginaw Co.*, 26 Mich. 22; *Attorney General v. Eau Claire*, 37 Wis. 400.

<sup>45</sup> *Cooley, Tax'n*, 118.

<sup>46</sup> *Hodges v. City of Buffalo*, 2 Denio, 110.

**EQUALITY AND UNIFORMITY IN TAXATION.**

119. In many of the states, in pursuance of a general rule of justice and sound public policy, the constitutions provide that taxation shall be equal and uniform throughout the state, or throughout each municipality levying a tax. This provision is intended as a guide and standard for the action of the legislature, but cannot be made a test of the validity of a tax law, in the courts, unless in cases of a very gross and palpable violation of its injunctions.

That taxation should be equal is not only a maxim of constitutional law, but also a fundamental principle of sound political economy. That the public revenues should not be raised by unjust and discriminating impositions upon a few, but that all the citizens should be called upon to contribute to the support of government as nearly as possible in proportion to their respective abilities, or in proportion to the property which they enjoy under the protection of the government, is an obvious requirement of justice. In theory, taxation should fall equally and uniformly upon all, and be levied with perfect justice. But in practice, such a result is not attainable. No tax law has ever been devised which did not involve some measure of inequality or some lack of uniformity. "Perfect equality in the assessment of taxes is unattainable. Approximation to it is all that can be had. Under any system of taxation, however wisely and carefully framed, a disproportionate share of the public burdens will be thrown on certain kinds of property, because they are visible and tangible, while others are of a nature to elude vigilance."<sup>47</sup> It rests within the exclusive power and jurisdiction of the legislature to decide, subject only to the limitations of the constitution, for what purposes revenue shall be raised by taxation, and at what times and in what manner. And it must also select the objects for taxation. In all these matters, the legislative discretion is conclusive, and it belongs to no other branch of the government to question it or set it aside.<sup>48</sup>

<sup>47</sup> *Com. v. People's Five Cents Sav. Bank*, 5 Allen, 428, 436.

<sup>48</sup> *Mayor, etc., of Athens v. Long*, 54 Ga. 330.

And it follows that the courts have no power, on the application of an individual, to declare a tax illegal and void, merely because it is made to appear that some other method of levying the contribution, or apportioning the individual shares of the public burden, would probably or certainly have secured a more exact justice and equality. But still, when the particular case is on its face so palpably oppressive and unequal as to furnish conclusive evidence that equality was not sought for but avoided, and that confiscation, instead of lawful taxation, was designed, then it is the right and duty of the judiciary to declare that the legislative body has overstepped the limits of its legal discretion.<sup>49</sup>

In practice, therefore, "equality" in taxation means that, as nearly as may be practicable, all the citizens should be called upon to pay taxes, which taxes shall be strictly proportioned to the relative value of their taxable property. And "uniformity" in taxation means that all taxable articles, or kinds of property, of the same class, shall be taxed at the same rate. It does not mean that lands, chattels, securities, incomes, occupations, franchises, privileges, necessities, and luxuries, shall all be assessed at the same rate. Different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere, with all people, and at all times.<sup>50</sup> Hence this constitutional requirement does not prevent the legislature from arranging the different subjects of taxation in distinct classes and making discriminations in the rate of tax imposed upon the several classes, if it be done in pursuance of a fair and reasonable system. For example, a statute imposing a tax on debts, to be assessed on the actual value of debts owing from individuals, and on the nominal value of debts owing from private corporations, is not unconstitutional, since it makes corporate debts the subject of a distinct class for purposes of taxation, which the legislature has power to do.<sup>51</sup> And when a principle of classification is thus adopted, the interference of the judicial department will not be justified, unless the classification adopted should be based upon an invidious and unreasonable distinction or difference with refer-

<sup>49</sup> *Com. v. People's Five Cents Sav. Bank*, 5 Allen, 436; *Dundee Mortg. Trust Inv. Co. v. School Dist.*, 19 Fed. 359.

<sup>50</sup> *Miller*, Const. 241.

<sup>51</sup> *Com. v. Lehigh Val. R. Co.*, 129 Pa. St. 429, 18 Atl. 406, 410.

ence to similar kinds of property, or unless there should be discovered a lack of uniformity within the limits of the same class.<sup>52</sup>

Special assessments for local improvements, although they are subject to the rule of equality and uniformity in respect to the property on which they are levied, are not taxes, within the meaning of the constitutional and statutory provisions on the general subject of taxation. "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion."<sup>53</sup> But the constitutional principle under consideration requires that, when the class of persons who are to bear the expense is once ascertained, the assessment shall be made among them, not arbitrarily, but according to the relative value of their property to be benefited by the improvement.<sup>54</sup>

The rule of equality and uniformity may be said generally to demand that all persons who are liable, or all property which is liable, to taxation should be called upon to bear a share of the public burdens. Yet the exemption of persons or property from taxation will not invariably or necessarily violate this rule. Especially is this the case where the exemptions were made by reason of a public benefit or other adequate consideration moving to the state from the parties exempted. And the general principle is not to be taken so strictly as to deny the validity of the exemptions usually made for special reasons of public policy, such, for example, as the mechanic's tools, household furniture to a limited extent, the property of the very poor, and the property of religious, educational, and charitable associations. Commutation of taxes is not in general either unconstitutional or productive of inequality or a want of uniformity. For example, where a tax is levied in labor or anything else than money, and the privilege is extended to the tax payer of commuting the tax by the payment of an equivalent in money,

<sup>52</sup> *Singer Manuf'g Co. v. Wright*, 33 Fed. 121; *People v. Henderson*, 12 Colo. 369, 21 Pac. 144.

<sup>53</sup> *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921.

<sup>54</sup> *Taylor v. Palmer*, 31 Cal. 240.

such a provision is valid and legal, provided the privilege is offered to all who are called upon to pay the tax, without partiality or exception.<sup>55</sup> So it is within the power of the legislature to enact that a railroad company shall have immunity from state and county taxation upon a quarterly payment of a certain amount in commutation, the right being reserved on the part of the state to annul the agreement at any time.<sup>56</sup>

A just objection to a system involving double taxation would appear to follow as a corollary from the rule requiring equality and uniformity. But this must be taken with important restrictions. It not infrequently happens that personal property will be subject to duplicate taxation. A system of indirect taxes combined with a system of general taxation by value will usually produce this result; as where corporate stock is taxed and also the corporation itself, or where the purchaser of property on credit is taxed for its value and the vendor on the debt. Now while these results are apparently opposed to the rule of equality, the courts unite in holding that taxation is not, for this reason alone, invalid.<sup>57</sup> Nevertheless, there are certain cases where the duplication of the public burden would be so palpably unfair and partial as to be clearly incompatible with any constitution which prescribes equality and uniformity as the general rule for tax legislation. Such is the case where one person is called upon to pay two assessments upon the same property while his neighbor pays but one, e. g., where a merchant's stock in trade is taxed as such, and also, by value, as a part of his general estate.<sup>58</sup> And the presumption is always against double taxation, and a law will not be so construed as to produce this result, unless it is required by the plain and unambiguous terms of the act, or by necessary implication from its language.

<sup>55</sup> *Cooper v. Ash*, 76 Ill. 11.

<sup>56</sup> *Neary v. Philadelphia, W. & B. R. Co.* (Del. Err. & App.) 9 Atl. 405.

<sup>57</sup> *Augusta Bank v. Augusta*, 36 Me. 255, 259.

<sup>58</sup> *Cooley, Tax'n*, 225.

## TAXATION AND REPRESENTATION.

120. It is a fundamental maxim of republican government that taxation and representation should go together. But this means that the local legislature should make the local laws, including tax laws. It does not mean that a tax law is invalid unless every person who is liable to pay a part of the tax had a vote in the election of the legislative body which imposed it.

"This principle," says Cooley, "has sometimes been appealed to as if it meant that no person could be taxed unless in the body which voted the tax he was represented by some one in whose selection he had a voice; but it never had any such meaning and never could have, without excluding from taxation a very large proportion of all the property of the state. If the privilege of voting for representatives in the government were the only or even the principal benefit received from government, there might be the highest reason in exempting the non-voting infant or alien from taxation; but this privilege to any particular individual, as compared with the protection of life, liberty, and property, is really insignificant. And so long as all persons cannot participate in government the limits of exclusion and admission must always be determined on considerations of general public policy."<sup>59</sup> It is held by the courts, therefore, and notwithstanding the maxim in question, that the property of persons who have not the right to vote may be taxed, if the legislature shall so determine.<sup>60</sup> And a peculiarly apposite illustration of this is found in the District of Columbia, where the citizens have no right of suffrage and where, nevertheless, congress has the right to impose taxes upon all property owners.<sup>61</sup> At the same time, it is undoubtedly the rule that tax laws are to be construed, if possible, so as not to impose taxes without the consent of the people taxed, or of their immediate representatives.<sup>62</sup>

<sup>59</sup> Cooley, *Tax'n*, 58.

<sup>60</sup> *Wheeler v. Wall*, 6 Allen, 558; *Smith v. Macon*, 20 Ark. 17.

<sup>61</sup> *Loughborough v. Blake*, 5 Wheat. 317.

<sup>62</sup> *Keasy v. Bricker*, 60 Pa. St. 9.

**TAXATION UNDER THE POLICE POWER.**

121. Beside the general power of taxation, the state has power to impose burdens, in the nature of taxes, upon special occupations or special kinds of property, with a view rather to regulation than to revenue, under the power of police.

“There are some cases in which levies are made and collected under the general designation of taxes, or under some term employed in revenue laws to indicate a particular class of taxes, where the imposition of the burden may fairly be referred to some other authority than to that branch of the sovereign power of the state under which the public revenues are apportioned and collected. The reason is, that the imposition has not for its object the raising of revenue, but looks rather to the regulation of relative rights, privileges, and duties as between individuals, to the conservation of order in the political society, to the encouragement of industry, and the discouragement of pernicious employments. Legislation for these purposes it would seem proper to look upon as being made in the exercise of that authority which is inherent in every sovereignty, to make all such rules and regulations as are needful to secure and preserve the public order and to protect each individual in the enjoyment of his own rights and privileges by requiring the observance of rules of order, fairness, and good neighborhood, by all around him. This manifestation of the sovereign authority is usually spoken of as the police power.”<sup>63</sup> Examples of this kind of assessments are to be seen in the usual license fees for pursuing certain occupations which have an intimate relation to the public health or morals, such as the occupation of a retail liquor seller, and also in assessments for the construction or repair of sewers, sidewalks, levees, drains, and other such works.<sup>64</sup>

<sup>63</sup> Cooley, Tax'n, 586.

<sup>64</sup> Youngblood v. Sexton, 32 Mich. 406.

## CHAPTER XVI.

### THE RIGHT OF EMINENT DOMAIN.

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123. Definition and Nature of the Power.
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130. Compensation.

### IN THE CONSTITUTIONS.

**122.** In the fifth amendment to the federal constitution it is declared that private property shall not be taken for public use without just compensation. And the constitutions of all the states contain similar guaranties against the arbitrary or unrecompensed expropriation of private property.

The provisions of the fifth amendment were intended only as a limitation upon the powers of the general government, and do not affect the several states. But all the states have been careful to incorporate in their constitutions such provisions as would suffice to extend a similar protection to private property against the exertion of their own sovereign powers. In some of the states, the guaranty is in the same words as are employed in the federal constitution. In others, it is somewhat more comprehensive, declaring that no man's property shall be taken, damaged, or destroyed for public use without just compensation being made. In many of the states, the compensation for property so taken must be determined by a jury, and in the same and some other states, the compensation must be paid to the private owner before the taking. When private property is taken for public use in pursuance of these constitutional provisions, it is said to be taken under the power of "eminent

domain," and the power to so appropriate private property to public use is called the "power of eminent domain."

#### DEFINITION AND NATURE OF THE POWER.

**123. The right of eminent domain is the right of the nation or the state, or of those to whom the power has been lawfully delegated, to condemn private property to public use, and to appropriate the ownership and possession of such property for such use, upon paying to the owner a due compensation, to be ascertained according to law.**

There has been a certain ambiguity in the use of the term "eminent domain" in consequence of a confusion between the power and jurisdiction which the state exercises over the public property, and the right and power of the state to assume the ownership of that which before was private property. There is a lawful authority in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common. For example, in regard to the public waters of the state, it is the prerogative of the state to define and regulate the right of fishing in such waters. So also, unless grants to private persons interfere, the state is the owner of the tide-lands, or sea-shore, along its water front, and it may regulate the use of such lands, to the limits of its territorial jurisdiction, by prescribing the terms and conditions on which wharves, piers, and other structures may be maintained.<sup>1</sup> So again, the state is the paramount owner of the public parks, reservations, the state buildings, and other such public property. But it is not an accurate use of language to apply the term "eminent domain" to such property as is owned directly by the government and which has not yet passed into any private ownership. Such property is more correctly described as the "national domain" or the "public domain," as the case may be, and the power of the nation or of the state over it is best designated as "territorial sovereignty." The word "eminent," in this connection, implies a power or title which

<sup>1</sup> *Webber v. Harbor Commissioners*, 18 Wall. 57; *Pollard v. Hagan*, 3 How. 212.

is paramount to some other power or title. It implies that the land is held in private ownership, but that there exists in the state a higher claim, namely, the right to divest that ownership and vest the title in the state, when the public exigencies demand it, and upon making just compensation. The right of eminent domain is therefore a survival of the common law notion that the ultimate title to all lands was vested in the sovereign. It is true that in this country all tenures are now allodial. And the eminent domain does not give to the state a title to private land in any sense which would interfere with the free disposition of it at the owner's pleasure. But as all lands are supposed to be held, mediately or immediately, from the state, this power implies the right of the state, on given conditions, to resume the title supposed to have been granted by it. These conditions are, first, that it shall be for a public purpose, and, second, that just compensation shall be made. It will thus be perceived that the true idea of the power of eminent domain is that it is a right in the government, acting in the interest of the whole public, to force the owner of property to sell the same to the public, from whom his title originally came, and subject to whose needs it is always held. It also follows that this power is an inherent and necessary power of sovereignty, and is not created by the constitutions. In fact, the constitutions merely recognize its existence and then proceed to guard the citizen against its arbitrary or unjust exercise, by providing that it may not be wielded except for the benefit of the public and that compensation shall not be withheld.

The power of eminent domain, being an inherent attribute of sovereignty and a necessary power of the state, the preservation of which, unimpaired and unfettered, is essential to the growth and welfare of the community, is inalienable. That is to say, no legislature can have power, by any grant or contract, to surrender or bargain away the power of eminent domain so as to bind the state, in the future, to refrain from its exercise when a proper and necessary occasion shall arise.<sup>2</sup>

That this power is to be distinguished from the power of taxation has been explained in the chapter dealing with the latter power.

<sup>2</sup> Cooley, Const. Lim. 525; Hyde Park v. Oakwoods Cemetery Ass'n, 119 Ill. 141, 7 N. E. 627.

In paying taxes, the citizen contributes his just and ascertained share to the expenses of the government under which he lives. But when his property is taken under the power of eminent domain, he is compelled to surrender to the public something over and above his due proportion, for the public benefit, and for which he receives a direct pecuniary compensation. This power is also to be distinguished from the power to regulate the use of private property, to the end that such use shall not be detrimental to the public safety, health, or morals. Regulation of this kind and for this purpose is justified as an exercise of the police power, but it does not amount to an expropriation of the property or a divesting of the title.

The constitutional prohibition against depriving any person of his property "without due process of law" may also have some relation to the exercise of the power of eminent domain, at least so far as to require legal and orderly proceedings for its exercise, and perhaps to render necessary a judicial hearing on the question of damages. But in general, these matters are adequately provided for by the guaranties of just compensation and jury trial which accompany the constitutional recognition of the power.

#### BY WHOM THE POWER IS EXERCISED.

124. The power of eminent domain, being an attribute of sovereignty, belongs primarily to every government as such. It is possessed by the United States, so far as may be necessary for its proper duties and functions, and by each of the states. It may be delegated by the legislature to a municipal corporation, for purposes appropriate to such municipality, and may also be committed to private corporations which discharge a public duty or are designed to promote the public convenience.

Within its own sphere, and with reference to its own constitutional duties and functions, the government of the United States is sovereign, and therefore must possess the power of eminent domain, as well as all other sovereign powers. Whenever it may be necessary to appropriate private property for the carrying on of any of the proper undertakings or offices of the general govern-

ment, that government may exercise its power of eminent domain, as well within the limits of a state as in the districts subject to its exclusive jurisdiction, and the consent or co-operation of the state is not required.<sup>3</sup> For instance, the federal authorities may proceed directly, by their own officers and courts, and without the intervention of the state, to condemn and appropriate private property, anywhere situated, for post-offices, court-houses, forts, arsenals, light-houses, or military roads.

It is entirely proper, and in accordance with the principles of the constitution, that municipal corporations should be authorized to exercise the power of eminent domain for the benefit of their own restricted "public," and in furtherance of the objects for which a share of government is committed to them. In the exercise of this power, just as in the case of taxation, a use may be local and yet public. That is, it may be public, in a proper sense, although it does not directly concern the entire population of the state, if it does concern the entire population of a district or division of the state. Hence cities, towns, counties, school districts, and other municipal corporations may be authorized to appropriate private property for such uses as streets, parks, public buildings, school houses, water works, and the like.

Moreover, the right to exercise this power may be delegated by the legislature to private corporations which, although their business is pursued for purposes of gain, yet stand in such a relation to the public that they may be considered as promoting the public convenience, or discharging a public office or duty, or carrying on works which are of general public utility. Such are railroad companies, bridge and turnpike corporations, and irrigation companies. "On the principle of public benefit, not only the state and its political divisions, but also individuals and corporate bodies, have been authorized to take private property for the construction of works of public utility, and when duly empowered by the legislature so to do, their private pecuniary interest does not preclude their being regarded as public agencies in respect to the public good which is sought to be accomplished."<sup>4</sup>

<sup>3</sup> Kohl v. U. S., 91 U. S. 367; Darlington v. U. S., 82 Pa. St. 382; Trombley v. Humphrey, 23 Mich. 471.

<sup>4</sup> Cooley, Const. Lim. 537; Beekman v. Saratoga & S. R. Co., 3 Paige, 45;

**LEGISLATIVE AUTHORITY NECESSARY.**

125. The power of eminent domain can be exercised only in pursuance of legislative authority, and on the occasions and in the modes designated by the legislature. Statutes authorizing the exercise of this power will be strictly construed, and those charged with the execution of the power will be held to a strict compliance with all the conditions and requirements of the statute.

The power of eminent domain is indeed inherent in the sovereignty, but it remains formless and inactive until it is called into operation and directed to its object by the legislative power of the state. It is for the legislature to prescribe the occasions for its exercise, as also the conditions upon which the power may be resorted to, and the methods and instrumentalities by which its application to the property of individuals shall be compassed. It is also for the state, by its legislative body, to determine when the exigency arises which will justify calling this power into exercise. And it may likewise determine the specific objects to which it shall be directed. That is, the legislature may decide what parcels of land, or other property, shall be taken for a given public use, and the owner has no constitutional right to demand a hearing and an opportunity to contest the necessity of the particular appropriation which affects his interests. In practice, however, the determination of this question is usually referred to commissioners, before whom all the parties in interest have a right to appear and be heard, or to a jury.<sup>5</sup>

Weir v. St. Paul, S. & T. F. R. Co., 18 Minn. 155 (Gil. 139); *Secombe v. Railroad Co.*, 23 Wall. 108.

<sup>5</sup> *Cooley*, Const. Lim. 538. The question of the necessity of the appropriation (whether or not particular property shall be taken), aside from the question of the amount of compensation to be made, is not one which must be determined by a jury, or in the forms of judicial proceedings, unless the constitution of the state specifically so provides. No constitutional right of trial by jury can be here claimed, unless explicitly given. "The appropriation of the property is an act of public administration, and the form and manner of its performance are such as the legislature in its discretion may prescribe." *People v. Smith*, 21 N. Y. 595. See *U. S. v. Harris*, 1 Sumn. 21,

Since the exercise of the power of eminent domain is in derogation of common right, and is a high exertion of the paramount rights of the sovereign, it must be hedged about with all needful precautions for the protection and security of the citizen. And for this reason it is held that statutes authorizing the appropriation of private property for public use must be strictly construed. An intention to authorize such taking will never be presumed, nor deduced from anything but clear and unambiguous terms. Especially is this the case with regard to the delegation of this power to private corporations. Such a corporation will never be presumed to be invested with the power. If it claims the right to condemn property for its uses, it must show a grant of such power.<sup>6</sup> Nor will a grant of the power be enlarged by mere implication. Thus, if the charter of a corporation gives it the right to appropriate private property for certain enumerated purposes, it will possess no authority to take land for any other purposes, and no such extension of its powers can be deduced by mere inference from the terms of the grant.<sup>7</sup> Furthermore, the laws authorizing the exercise of this power must be exactly complied with, in respect to all the forms, conditions, and provisions made for the benefit and protection of the individual, before his property can lawfully be taken. "Those provisions must be regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceeding must show affirmatively such compliance."<sup>8</sup>

#### THE PURPOSE MUST BE PUBLIC.

**126. The purpose for which the power of eminent domain is to be exercised must be public, and not merely for the benefit of a private person. But it will be consid-**

Fed. Cas. No. 15,315. But if the constitution provides that the question of appropriation shall be submitted to a jury, the requirement is mandatory. *Arnold v. Decatur*, 29 Mich. 77.

<sup>6</sup> *Phillips v. Dunkirk R. Co.*, 78 Pa. St. 177; *Allen v. Jones*, 47 Ind. 433.

<sup>7</sup> *Currier v. Marietta & C. R. Co.*, 11 Ohio St. 228.

<sup>8</sup> *Cooley*, Const. Lim. 528; *Burt v. Brigham*, 117 Mass. 307; *Nichols v. Bridgeport*, 23 Conn. 189.

ered public if it actually concerns or promotes the welfare, comfort, or convenience of the whole people, notwithstanding one or more individuals may be peculiarly and directly benefited. The purpose must also be within the legitimate sphere of the government exercising the power. But it may be local (that is, confined to a municipal subdivision of the state) provided it is public with reference to the people inhabiting the district to be affected.

The power of eminent domain, like that of taxation, cannot be exercised by the state for the benefit of one or more particular individuals. There is no power in any state government to take the property of one man and give it to another, or to compel one man to sell his property to another, or to authorize one person to appropriate the property of another, even though compensation be made.<sup>9</sup> An example of an unconstitutional attempt to take private property for private use would be found in the case of a statute authorizing the appropriation of a right of way over private land for a purely private way or road. Such a purpose would not be public in any sense which would justify the exercise of this power.<sup>10</sup> And the mere fact that the legislature, in a statute, declares that a given use is a public use, and authorizes the taking of private property for it, does not necessarily make the use public, nor render lawful the appropriation of private property for it. It is well settled that if in fact the use is public, the decision of the legislature that the public needs require the taking of private property to promote the use is final and conclusive. But the question, whether or not a given use is a public use, is a judicial question, and this must be determined by the courts.

There are some cases in which the exercise of the power has been sustained by the courts although they came very near to the line which separates a public use from a purely private use. Thus, in some of the states (though not in all) it is considered that mills of various sorts are so necessary to the public that a person who cannot

<sup>9</sup> *Beekman v. Saratoga & S. R. Co.*, 3 Paige, 45, 73; *Tyler v. Beacher*, 44 Vt. 648; *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. 9; *Bankhead v. Brown*, 25 Iowa, 540.

<sup>10</sup> *Taylor v. Porter*, 4 Hill (N. Y.) 140; *Clack v. White*, 2 Swan, 540; *Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269.

obtain a suitable site for a mill without flooding the lands of others by the back water from his dam, may be empowered under the eminent domain to do so on making just compensation.<sup>11</sup> In one state it has been held that coal mining is an industry of such public importance that a person who cannot otherwise obtain access to his mine and the means of developing it may be authorized to condemn land for a private way to it over the estate of another without the latter's consent.<sup>12</sup> And some cases hold that the owners of lands covered with extensive swamps may be authorized to drain and reclaim them by means of ditches and canals cut through or across the lands of others, under the right of eminent domain.<sup>13</sup> But in this connection, it should be noticed that the drainage and reclamation of marshes and the building of embankments and levees, when done with a view to the benefit of the public health or safety, as also the construction of booms and dams in non-navigable rivers to facilitate the floating of logs, when lumbering is one of the extensive industries of the state, and the appropriation of watercourses, to the detriment of the rights of riparian proprietors, but for the purpose of supplying farming neighborhoods with water for irrigation, are always and unquestionably public purposes.<sup>14</sup>

The constitutions of several of the states undertake, with more or less exhaustiveness, to enumerate the purposes for which the right of eminent domain may be exercised. The following are among the cases specified in one or more of the state constitutions: Public buildings and grounds; roads, streets, and alleys in municipalities; water works, aqueducts, drains, and sewers in counties, cities, and towns; raising the banks of streams; removing obstructions therefrom, widening, deepening, or straightening their channels; railways; turnpike or toll roads; canals; irrigation ditches or aqueducts; wharves; docks; piers; bridges; chutes and booms; ferries; telegraph

<sup>11</sup> *Hazen v. Essex Co.*, 12 Cush. 475; *Jordan v. Woodward*, 40 Me. 317. Compare *Loughbridge v. Harris*, 42 Ga. 500.

<sup>12</sup> *Harvey v. Thomas*, 10 Watts, 63.

<sup>13</sup> *In re Drainage of Lands*, 35 N. J. Law, 497; *Talbot v. Hudson*, 16 Gray, 417.

<sup>14</sup> *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 333; *Lancaster v. Kennebec Log-Driving Co.*, 62 Me. 272; *Inge v. Police Jury*, 14 La. Ann. 117; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674.

and telephone lines; cemeteries; oil pipe lines.<sup>15</sup> In regard to the most of the foregoing, it may be remarked that, even in the absence of constitutional authorization, they would be regarded as public purposes in a sense which would justify the exercise of the power of eminent domain.

The local nature of the proposed work will not necessarily deprive it of the character of publicity. That is to say, it may pertain only to a district or subdivision of the state, and yet be public as regards all the citizens of that portion of the state. In this regard, the municipal corporation is only a miniature state. The people of the state at large may have no direct interest in the building of a courthouse or a jail in a city, or in the improvement of its streets, or the construction of its bridges, wharves, docks, and markets. But these purposes are all public with reference to the sphere of their utility, and therefore proper subjects for the exercise of the power of eminent domain.

#### WHAT PROPERTY MAY BE TAKEN.

127. The property which may be taken for public use under the power of eminent domain includes everything which is the subject of private ownership, recognized by the law, and in the enjoyment of which the possessor is entitled to the protection of the law. It includes incorporeal rights as well as tangible real or personal property. It includes interests and easements in land as well as the fee. And it includes the undisturbed and exclusive enjoyment of an estate as well as the corpus of the estate itself.

In order to constitute "property," in the legal sense of the term, it is not necessary that the person claiming compensation should be the owner in fee simple of the land taken. The owner of an estate for life or years, whether it be vested or contingent, and whether in possession, or reversion or remainder, the owner of a rent or easement affected by the appropriation of the land, a purchaser under an executory contract, and probably even a mortgagee or a judgment

<sup>15</sup> See Stim. Am. St. Law, § 1141; Hooper v. Bridgewater, 102 Mass. 512.

creditor, would also be entitled to compensation in proportion to his interest.

*Property of State and United States.*

It would appear, at first sight, that there could be no authority in a state to appropriate, under the power of eminent domain, property belonging to the United States, and conversely, that the federal government could not authorize the taking of property belonging to a state. But it is held that, unless the property in question has been already devoted to some public use under the authority of, or in connection with, the government of the United States, the state within whose borders the government land lies may authorize its condemnation under this power, for a public purpose, such as the construction of a railroad.<sup>16</sup> And in virtue of the control of the national government over navigable waters, as well as its power of eminent domain, it may authorize the construction of a bridge or other structure over such waters, and although a particular state may be the owner of the bed under such waters, on which the proposed structure is to rest, the federal government is not obliged to obtain the consent or authority of the state, or to make it any compensation.<sup>17</sup>

*Franchises.*

In a number of the states the constitutions provide that the right of eminent domain shall never be so construed as to prevent the legislature from taking the property or franchises of incorporated companies and subjecting them to public use the same as that of individuals. But even without such a provision in the organic law, franchises would be subject to this power in common with all other property within the state. Franchises are property, and there is nothing in their nature to exempt them from the liability to appropriation which attaches to all other property. They may therefore, if the public need requires it, be taken for public use on just compensation made.<sup>18</sup> A familiar example of the taking of a franchise

<sup>16</sup> U. S. v. Railroad Bridge Co., 6 McLean, 517, Fed. Cas. No. 16,114; U. S. v. Chicago, 7 How. 185.

<sup>17</sup> Stockton v. Baltimore R. Co., 1 Interstate Com. Rep. 411.

<sup>18</sup> Central Bridge Co. v. Lowell, 4 Gray, 474; Richmond, F. & P. R. Co. v. Louisa R. Co., 13 How. 71; Enfield Toll Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 40; West River Bridge Co. v. Dix, 6 How. 507; Com. v. Pennsylvania Canal Co., 66 Pa. St. 41.

under the power of eminent domain<sup>19</sup> is where a toll bridge, erected and maintained by a private corporation, is condemned and converted into a free county or state bridge.<sup>19</sup>

*Possession and Enjoyment.*

Every man is entitled by law to the undisturbed and exclusive enjoyment of his estate and to keep out all trespassers. And this right is part of his "property" in his estate. Consequently, if this exclusive enjoyment of property is taken away, there is a taking of the property, though the title is allowed to remain in the original owner. For this reason a telegraph company, desiring to erect poles and string its wires along the line and upon the right of way of a railroad, must obtain a right to do so either by the consent of the railroad or by an exercise of the power of eminent domain.<sup>20</sup>

*Streams.*

Watercourses and streams of running water, which are not navigable, may be appropriated under the power of eminent domain, for such public purposes as the supplying of water to cities and towns, and the development of irrigation works intended for the benefit of an extensive district or neighborhood. In such cases, compensation must be made to those riparian proprietors who have, at common law, a right to have the stream continue to flow in its accustomed channel, and whose own private use of the water is abridged or interfered with by the taking of the stream for public use.<sup>21</sup>

*Materials.*

Such materials as may be needed in the construction of public improvements come within the class of subjects over which the power of eminent domain may be exercised. Thus, timber, gravel, earth, or stone to be used in making or mending highways, and trees, earth, and gravel used in building a railway, may be appropriated under due legislative authority. And in general, authority

<sup>19</sup> Central Bridge Co. v. Lowell, 4 Gray, 474.

<sup>20</sup> Cooley, Const. Law (2d Ed.) 350; Atlantic & P. Tel. Co. v. Chicago, R. I. & P. R. Co., 6 Biss. 158, Fed. Cas. No. 632.

<sup>21</sup> St. Helena Water Co. v. Forbes, 62 Cal. 182; Smith v. Gould, 59 Wis. 631, 18 N. W. 457; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

may be given to any person or corporation engaged in works of public improvement to enter upon adjoining lands and take therefrom such materials as are needed for the work of construction.<sup>22</sup>

*Money.*

"Taking money under the right of eminent domain, when it must be compensated in money afterwards, could be nothing more or less than a forced loan, only to be justified as a last resort in a time of extreme peril, where neither the credit of the government nor the power of taxation could be made available. It is impossible to lay down rules for such a case, except such as the law of overruling necessity, which for the time being sets aside all the rules and protections of private right, shall then prescribe."<sup>23</sup>

*Extent of Appropriation.*

The general rule is that no more property shall be taken under the power of eminent domain, either in respect to quantity or interest, than is needed for the particular purpose. As the power is founded on necessity, so the measure of the public right, in any given case, must be determined by the actual requirements of the public use to which the property is to be put. For example, if a public building or a park is to be located on a tract of land more than sufficient in extent, no more of the land should be condemned and taken than is reasonably sufficient for the purpose. So also a railroad company should not be authorized to condemn more land than is needed for its right of way and works. It is true the owner may consent to the appropriation, and thus preclude himself from raising the question of the necessary extent of the appropriation. But unless he so consents, the mere fact of providing compensation will not justify an appropriation in excess of what is necessary. On the same principle, while the legislature may undoubtedly authorize the taking of the fee in land, if it shall judge it to be neces-

<sup>22</sup> *Wheelock v. Young*, 4 Wend. 647; *Parsons v. Howe*, 41 Me. 218.

<sup>23</sup> *Cooley*, Const. Lim. 527, note. In a state of war, private property may be taken by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public; but the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. *Mitchell v. Harmony*, 13 How. 115.

sary, yet this is not to be done if a less interest in the public, such as a mere easement, would suffice. In such cases the easement consists only in the right to use the property for the purpose for which the appropriation was made. The fee remains in the original owner, subject to the easement, and whenever the public use shall be discontinued the full title will revert to him.

#### APPROPRIATION TO NEW USES.

**128. When property which has already been appropriated to public use under the power of eminent domain is subsequently appropriated, under the same power, to a new and different use, then the original owner, provided an estate less than the fee was first taken or a portion of his land less than the whole, will be entitled to a new assessment and payment of compensation.**

The reason for this rule is that when a part only of a tract of land is condemned, the amount of compensation to be awarded is determined, in some measure, according to the question whether the remaining land will be benefited or injured by the use to which the part taken is to be devoted. Now the first use may be of positive advantage to the rest of the property, while the new use may be seriously detrimental to it. At any rate, if there is any important difference in the two uses, this will of itself introduce new elements which should be taken into consideration in arriving at a just estimate of the damages to be paid. The owner is therefore constitutionally entitled to a fresh appraisal of the injuries which he sustains, in view of the new conditions and their effect upon his estate. In cases where the whole tract was affected by the first condemnation, but it extended only to the taking of an estate less than a fee, the same principle applies, but for a different reason. It is now important to inquire whether the owner's right of reverter, in case of the discontinuance of the public use, will be affected by the new appropriation.

Notwithstanding some difference of opinion, it is now apparently settled that the appropriation of a public highway for the purposes of a plank road or turnpike is not a devotion of it to such a new

use as will require a new assessment and payment of damages to abutting owners. And the same is true of the grant of franchises for the operation of railroads in the streets of a city, where the motive power employed is merely intended and calculated to facilitate travel and traffic, such as horse power or electric motors.<sup>24</sup> But if a highway is appropriated to the use of a steam railroad, or a street in a city to the use of such a road, especially an elevated road, it seems that the conditions are so essentially different from those attending the first appropriation, which merely gave a public right of passage, as to entitle the owners at least to a judicial inquiry into the question whether or not they are additionally injured.<sup>25</sup>

#### THE TAKING.

129. In order to constitute a "taking" of property under the power of eminent domain, it is not necessary that the property should be destroyed, or that the owner should be entirely deprived or dispossessed of the estate. It is sufficient to entitle him to claim compensation if the work or improvement for which this power is exercised deprives him of the ordinary, necessary, and beneficial use of the property, or if its value, for such uses and purposes, is directly and necessarily diminished by the work in question. But he is not entitled to claim damages in respect of any merely incidental, indirect, or consequential injuries which his property may sustain by reason of the work or construction, where the same is justified by a lawful exercise of the powers of government and there is no actual appropriation of any property or right to which he has a legal claim.

The reason and spirit of the constitutional provision regulating the exercise of the power of eminent domain are broad enough to allow a recognition of the right of an owner to compensation in

<sup>24</sup> Murray v. County Com'rs, 12 Metc. (Mass.) 455; Elliott v. Fair Haven & W. H. R. Co., 32 Conn. 579; People v. Kerr, 27 N. Y. 188.

<sup>25</sup> Imlay v. Union Branch R. Co., 26 Conn. 249; Wager v. Troy Union R. Co., 25 N. Y. 526; Story v. New York El. R. Co., 90 N. Y. 122; Cooley, Const. Lim. 545-556.

cases where, without any actual expropriation of his property, there is such damage done to it, by the work in progress, as diminishes its value for all purposes, or seriously interferes with its use for the purposes to which it is adapted. For example, where the work for which the power of eminent domain is to be exercised is the construction of a dam across a stream, and the effect of its construction is to back water upon lands lying above and cover them with drift-wood and detritus, thus destroying or diminishing their value for purposes of farming or pasturage, or otherwise, there is such a "taking" of such lands as will entitle the owner to claim compensation.<sup>26</sup> So also, "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed upon it, so as effectually to destroy or impair its usefulness, it is a taking within the meaning of the constitution."<sup>27</sup> So again, it is held that the construction of a public improvement (such as an elevated railroad in a city) which has the effect to charge the air with smoke, gases, cinders, etc., and thus to interfere with the easement, belonging to each abutting land owner, to the passage of pure air, or which impairs his easement of light, either by reason of the structure itself or by the passage of trains upon it, or which diminishes the value of the property by impairing its capacity for quiet enjoyment, by reason of the noise, vibration, and confusion caused by the ordinary use of it, so directly and seriously affects the value of adjoining property as to entitle the owner to claim damages, although there has been no physical taking of his property.<sup>28</sup> And again, a necessary

<sup>26</sup> *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166; *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 Fed. 753; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308. The diversion of a stream, when the effect is to injure the property of a private owner, by destroying his water power or depriving him of his riparian rights, is a taking of his property under the power of eminent domain. *Harding v. Stamford Water Co.*, 41 Conn. 87; *Pettigrew v. Evansville*, 25 Wis. 223. And this rule applies as well to navigable as to private streams. Even where the object of the diversion is to create a new and better channel, yet if the result is to deprive the riparian owner of the benefit of the use of the stream, it is a taking for which compensation must be made to him. *People v. Canal Appraisers*, 13 Wend. 355.

<sup>27</sup> *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166.

<sup>28</sup> *Lahr v. Metropolitan El. Ry. Co.*, 104 N. Y. 268, 10 N. E. 528; *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush, 667.

part of the beneficial use of private property consists in the free right of access to a street, highway, or navigable stream on which it may abut. And if the work or improvement authorized by the state involves the entire cutting off of such means of access, there is a taking of the property of the abutting owner for which he may claim compensation.<sup>29</sup> When the state has granted a right or franchise for business purposes (such as the right to maintain a toll bridge, a ferry, and the like) and the grant was by its express terms exclusive, the subsequent grant of a franchise of the same kind, the use of which will compete with the first and diminish its profitability, amounts to a taking of the former franchise, within the meaning of the constitution.<sup>30</sup> It is also held in some states (though not in all) that if a railroad is constructed in close proximity to a man's house, and there is consequently a real, imminent, and constant danger of its being set on fire by the passing locomotives, and thereby its value, either for purposes of residence, business, or sale, is greatly diminished, such injurious effect upon the value of the property will found a claim for compensation.<sup>31</sup> And where one railroad company is authorized by statute to run its cars over the tracks of another, this is a taking for which compensation must be made.<sup>32</sup>

But if the injury to property is merely incidental or indirect, or affects the particular property only as it affects all other property similarly situated, there can be no just claim to compensation. Thus, for instance, the privilege of maintaining a toll bridge, previously granted by statute, may be seriously impaired by a subsequent grant to another of a franchise to maintain another bridge near the first. Or the value of a dam may be destroyed by the construction of a canal, or that of a turnpike by the construction of a railroad. But in these cases, if the first grant was not in terms exclusive, so that there is no question of a contract which

<sup>29</sup> *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Rumsey v. New York & N. E. R. Co.*, 133 N. Y. 79, 30 N. E. 654.

<sup>30</sup> *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Central Bridge Co. v. Lowell*, 4 Gray, 474; *Com. v. Pennsylvania Canal Co.*, 66 Pa. St. 41.

<sup>31</sup> *Pierce v. Worcester & N. R. Co.*, 105 Mass. 199; *Wilmington & R. R. Co. v. Stauffer*, 60 Pa. St. 374; *Lafayette, M. & B. R. Co. v. Murdock*, 68 Ind. 137.

<sup>32</sup> *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen, 262; *Sixth Ave. R. Co. v. Kerr*, 45 Barb. 138.

must not be impaired, the detriment which the first work will sustain in consequence of the construction of the second does not amount to such a taking of it as will require compensation to be made; it is merely the loss which any one may expect to suffer from successful competition.<sup>33</sup> Again, the value of private property may be seriously affected by a change of the grade of a city street on which the property abuts. But this is not a "taking" of the property, and the owner will not be entitled to claim compensation, unless, as is sometimes the case, the statute should make provision for it.<sup>34</sup> And in general, if, in consequence of the construction of a public work, an injury occurs, but the work was constructed on a proper plan and without negligence, and the injury is caused by accidental and extraordinary circumstances, the injured party cannot demand compensation.<sup>35</sup>

#### COMPENSATION.

130. The constitutional provisions for the protection of private property, when the power of eminent domain is to be exercised, require that just compensation shall be paid to the owner. This payment must be made in money. The amount of the damages must be ascertained by an impartial tribunal (not necessarily a jury) before which the owner shall have a right to appear and be heard, and in a manner conforming to the directions of the constitution or the statute. The damages must be assessed at the fair and just value of the property taken, or the fair and just measure of its depreciation in consequence of the work or improvement in question, allowing for direct benefits to other property of the same owner accruing therefrom, where a part only of a tract is taken, and also for corresponding injuries.

<sup>33</sup> *Troy & B. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100; *Lafayette Plank Road Co. v. New Albany R. Co.*, 13 Ind. 90; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9; *Northern Transp. Co. v. Chicago*, 99 U. S. 635.

<sup>34</sup> *In re Furman St.*, 17 Wend. 649.

<sup>35</sup> *Cooley*, Const. Lim. 542.

*The Tribunal.*

Proceedings for an assessment of damages upon an exercise of the power of eminent domain are not controversies of that nature which is contemplated by the constitutional provisions securing the right of trial by jury in civil issues. Consequently the owner of property thus taken has no constitutional right to demand that his compensation shall be assessed by a jury, unless there is a specific provision to that effect in the state constitution.<sup>36</sup> But it would not be competent for the state itself to fix, by statute, the amount of compensation to be paid. For it occupies a position adverse to that of the property owner, and to allow the determination of the damages to be made by a mere act of legislation would be to make the state a judge in its own cause, which would be in violation of the settled rules of constitutional law.<sup>37</sup> For the same reason, when the appropriation is made by a municipal or other corporation, an outside judgment must be obtained as to the amount of compensation. It is necessary, for the proper protection of the citizen, that an impartial tribunal should be provided, charged with the duty of ascertaining the amount of his damages, and that he should be permitted to appear before this tribunal and present his evidence and arguments in relation to the value of the property. The customary method is to provide for the appointment of a certain number of appraisers or commissioners (sometimes called "viewers") who are to determine the matter at issue according to their own judgment and the evidence which shall be adduced before them in relation to the value of the property or the extent of the injuries to it. These viewers, having duties to perform which are analogous to those of a jury, must be free from all legal disqualifications or disabilities and from all interest in the matter at issue, all relationship to the party, and all positive bias. They must strictly comply with the statute in regard to taking the oath and all other matters of substance.

*Method of Assessing Damages.*

In regard to the method and course of proceedings, on the assessment of damages, it may be remarked, as a general rule, that all

<sup>36</sup> *Backus v. Lebanon*, 11 N. H. 19.

<sup>37</sup> *Rich v. Chicago*, 59 Ill. 286; *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759.

such provisions of the constitution or the statute as are intended for the protection and advantage of the individual are to be strictly followed. He is to have every opportunity of contesting the proceedings, step by step, and of asserting and making good his claims to adequate compensation. For instance, the owner is entitled to due notice of the time and place at which the assessors will proceed to make their valuation, and he must be afforded an opportunity to be present, and if he attends he has a right to be heard and to present proper and pertinent evidence. If his rights, in any of these particulars, are abridged or denied, the proceedings will not be valid.<sup>38</sup> The award also should be in due form and executed and filed according as the law directs.

*Measure of Compensation.*

The rules for ascertaining the amount of compensation to be paid to the owner of property taken under the power of eminent domain are subject to some variations, depending on the circumstances of the particular case. But the general principles are always the same. And these may be arranged in three classes, according as the appropriation is of the whole of the tract or other property, or of only a portion thereof, or consists in injury and damage to the property without a physical taking of it.

In the first place, if the state or corporation takes the whole of a tract of land, or the franchise and plant of a corporation, or any other entire piece of property, the owner is entitled to receive the entire market value of the property. The market value is not the mere amount which the property has cost the owner; it may be much greater. Neither does it mean the amount which the property would bring at a forced sale, but what it would bring in the hands of a prudent seller at liberty to fix the time and the conditions of the sale.<sup>39</sup> If the property taken consists in the franchise and plant of a corporation, the market value is not to be ascertained by the par value of the stock or the cost of the improvements, but it is measured by the actual selling value of the entire capital stock. If the property has been improved and prepared for the carrying on of a particular business, and has a special value for the purposes of

<sup>38</sup> Powers' Appeal, 29 Mich. 504; Hood v. Finch, 8 Wis. 381.

<sup>39</sup> Everett v. Union Pac. R. Co., 59 Iowa, 243, 13 N. W. 109; Somerville & E. R. Co. v. Doughty, 22 N. J. Law, 495.

that business only, so that the business in fact increases the value of the property, this fact should be considered in computing the damages, though it should not alone govern.<sup>40</sup> And conversely, the fact that the property has not in fact been appropriated to any beneficial use will not necessarily prove that it has no value. "The inquiry must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted, that is to say, what is it worth from its availability for valuable uses?"<sup>41</sup> But on the other hand, the owner is not entitled to be compensated for any value, in excess of the market value, which the property may have in his eyes alone, arising from sentiment, association, or personal predilection. Such matters are not susceptible of pecuniary estimation, and do not properly enter into the computation. There is some uncertainty, on the authorities, as to the time at which the value to be put on the property is to become fixed. It may be either at the time of the commencement of the proceedings, or at the time of entry upon the property, or at the time of the view and appraisal. But at any rate, the value to be paid is that which the property bears at or before the completion of the condemnation proceedings, not that enhanced value which might afterwards attach to it in consequence of the uses to which it is to be put by the appropriator.

In the second place, if the appropriation extends only to a part of an entire tract belonging to the same owner, the amount of compensation is not to be measured solely by the market value of that which is taken. Here it will also be necessary to take into account the effect of the public work or improvement on the remaining portion of the estate. This effect may be either beneficial or injurious. In the first event, the increase of value accruing to the remainder of the estate is to be deducted from the amount to be awarded. In the second case, the compensation must be large enough to cover the depreciation of the balance of the tract. For example, if a part of a lot of land is taken for the erection of a

<sup>40</sup> *King v. Minneapolis Union Ry Co.*, 52 Minn. 224, 20 N. W. 135; *Chicago & E. R. Co. v. Jacobs*, 110 Ill. 414; *Little Rock & Ft. S. R. Co. v. McGehee*, 41 Ark. 202.

<sup>41</sup> *Boom Co. v. Patterson*, 98 U. S. 403.

public building, it is probable that the value of the remainder will be considerably enhanced thereby. So if a public street or avenue is run through a tract of land, thus opening it up to settlement and giving two fronts for building purposes, the value of the land will be increased out of all proportion to the value of the strip taken for the public. In such cases it is obviously just that the benefit which the owner derives from the improvement should be offset against the value of that which the public takes from him. On the other hand, if a railroad is run through the center of a farm, it may greatly depreciate the value of the whole for farming purposes, by separating the various buildings of the farm, or intersecting it with ditches or embankments, beside the increased risk of fire or accident. And here it would not be justice to the owner to require him to take merely the value of the land taken for the railroad's right of way. In such cases, therefore, the true rule of compensation requires that both benefits and injuries to the owner's remaining property shall be taken into account, and the damages computed with reference thereto.<sup>42</sup> "But in estimating either the injuries or the benefits, those which the owner receives or sustains in common with the community generally, and which are not peculiar to him and connected with his ownership, use, and enjoyment of the particular parcel of land, should be altogether excluded, as it would be unjust to compensate him for the one or to charge him with the other, when no account is taken of such incidental benefits and injuries with other citizens who receive or feel them equally with himself, but whose lands do not chance to be taken."<sup>43</sup> In some cases it will be found that a just estimate of the benefits received by the remaining land of the owner, as offset against the injury received or the value of that which is taken, will leave nothing whatever to be paid him. But he is not thereby deprived of his property without compensation. For the increased value of his other property is to be regarded as full and adequate compensation for the value of the part taken.<sup>44</sup>

<sup>42</sup> Powers v. Hazelton & L. Ry. Co., 33 Ohio St. 429; Hooper v. Savannah & M. R. Co., 69 Ala. 529; McReynolds v. Burlington & O. Ry. Co., 106 Ill. 152.

<sup>43</sup> Cooley, Const. Lim. 566; Walker v. Old Colony R. Co., 103 Mass. 10; Greenville & Columbia R. Co. v. Partlow, 5 Rich. Law, 423.

<sup>44</sup> White v. County Com'rs, 2 Cush. 361.

In the third place, if the taking does not consist in the actual appropriation of any specific property, but in injury to it, or diminution of its value, in consequence of the work or improvement for which the power of eminent domain is exercised, the assessment of compensation will become a measuring of damages. And the owner will be entitled to fair compensation for all such direct injuries to the property as accrue from the work in question and affect him personally in his ownership, use, or enjoyment of the property, and which are not common to the whole community.<sup>45</sup>

*Evidence.*

As the proceeding before the viewers is more in the nature of an arbitration than of a jury trial, considerable latitude is allowed in regard to the introduction of evidence. The object being to ascertain the actual market value of the property taken (or the actual extent to which it has been injured by the public work or improvement, as the case may be), almost anything which has a legitimate tendency to show such value should be admitted. And the appraisers will also be justified in acting on their personal knowledge and opinion of the value of the property, though this should not influence them to the exclusion of legal and proper evidence.

*Payment of Damages.*

In a number of the states we find constitutional provisions to the effect that the compensation to be awarded to the owner of property which is appropriated for public use must be paid before the taking of the property. When this is not the case, the question, whether the law is invalid for postponing the payment of the compensation until after the owner is deprived of his property, will depend upon whether it is the state or a municipal corporation which takes the property or a private corporation. If the power of eminent domain is exercised for the benefit of the state or one of its municipalities, it is not essential that payment should first be provided; for it is supposed that the public faith is a sufficient pledge and guaranty for the payment of what is awarded. But in this case, the law must provide a means of making his claim effective against the state or the municipality, which shall be adequate and certain, and which may be initiated by the property owner himself

<sup>45</sup> *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290.

at his own discretion.<sup>46</sup> But if the property is to be taken by a private corporation, the same reasons do not exist. On the contrary, it may well happen that the ability of the corporation to pay the damages which shall be assessed may be doubtful. Although there is no fixed and absolute rule on the subject, the better authorities agree that in such cases the statute should require the amount to be paid, or be held ready for payment, before the land passes into the exclusive control of the corporation.<sup>47</sup> But a person who is entitled to an award of damages, under eminent domain proceedings, may waive his right to receive the same, either by an express verbal or written agreement, or by neglecting to present or perfect his claim within the reasonable period of limitation prescribed by the statute.<sup>48</sup>

Since the appropriation of private property under this power is in the nature of a forced sale, it follows that the compensation to the owner must be made in money, or at least be pecuniary in character. The state, for instance, would have no power to compel the owner to accept other public lands in exchange for his lands thus taken. Nor could a railroad company, on appropriating lands, require the owner to accept a grant of other lands belonging to it.<sup>49</sup> But if the appropriation is made to a municipal corporation it seems that it may lawfully provide that the damages awarded shall be paid in interest-bearing bonds, either constituting a part of its existing debt, or issued specially for the purpose of meeting the new expense.

<sup>46</sup> *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. 9; *Orr v. Quimby*, 54 N. H. 500; *White v. Nashville & N. W. R. Co.*, 7 Heisk. 518; *Commissioners' Court v. Bowie*, 34 Ala. 461; *Talbot v. Hudson*, 16 Gray, 417.

<sup>47</sup> *Ash v. Cummings*, 50 N. H. 501; *Shepardson v. Milwaukee & B. R. Co.*, 6 Wis. 605; *Powers v. Bears*, 12 Wis. 213.

<sup>48</sup> *Fuller v. Plymouth Com'rs*, 15 Pick. 81; *Marble v. Whitney*, 28 N. Y. 297; *Callison v. Hedrick*, 15 Grat. 244.

<sup>49</sup> *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 315.

**CHAPTER XVII.****MUNICIPAL CORPORATIONS.**

- 131. Local Self-Government.
- 132. Nature of Municipal Corporations.
- 133. Power to Create Municipal Corporations.
- 134. Legislative Control of Municipal Corporations.
- 135. Debts and Revenue.
- 136. Officers of Municipalities.
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**LOCAL SELF-GOVERNMENT.**

131. The principle of local self-government is regarded as fundamental in American political institutions. It means that local affairs shall be decided upon and regulated by local authorities, and that the citizens of particular districts have the right to determine upon their own public concerns without being controlled by the general public or the state at large. For this purpose municipal corporations are established and are invested with rights and powers of government subordinate to the general authority of the state, but exclusive within their sphere.

“It is axiomatic that the management of purely local affairs belongs to the people concerned, not only because of being their own affairs, but because they will best understand and be most competent to manage them. The continued and permanent existence of local government is therefore assumed in all the state constitutions, and is a matter of constitutional right, even when not in terms expressly provided for. It would not be competent to dispense with it by statute.”<sup>1</sup> The institution of local self-government is not an American invention, but is traditional in England, and is justly regarded as one

<sup>1</sup> Cooley, Const. Law (2d Ed.) 358; *People v. Hurlbut*, 24 Mich. 44; *People v. Lynch*, 51 Cal. 15.

of the most valuable safeguards against tyranny and oppression.<sup>2</sup> It is but an extension of this idea that the government of the United States should be intrusted with only such powers and rights as concern the welfare of the whole country, while the individual states are left to the uncontrolled regulation of their internal affairs. The principle of local government being thus firmly implanted in our political system, it rests with the legislative authority of each state to apply and adjust it to the varying needs of its own people. The principle cannot be abrogated. But the people of any particular community or district cannot assert a valid claim to any special form or character of local government.<sup>3</sup> In other words, the general legislative authority of the state must determine what municipal corporations shall be created and what shall be their powers and the limit of their jurisdiction, according to its view of the requirements of the different sections and districts of the state, and their capacity and need of local government.

#### NATURE OF MUNICIPAL CORPORATIONS.

132. Municipal corporations are administrative agencies established for the local government of towns, cities, counties, or other particular districts. The special powers conferred on them are not vested rights as against the state, nor are they in the nature of contracts, but, being wholly political, they exist only during the will of the legislature. Such powers may at any time be changed, modified, repealed, or destroyed by the legislature, saving only the vested rights of individuals.

A municipal corporation is a public corporation created by the government for political purposes, and having subordinate and local powers of legislation; it is an incorporation of persons, inhabitants

<sup>2</sup> In the case of *Campbell v. Hall*, Cowp. 204, Lofft. 655, it was ruled that when the king of England has once delegated the power of legislation (including the right of taxation) to a legislative assembly of a colony, he cannot afterwards exercise the power of levying taxes there.

<sup>3</sup> *Barnes v. District of Columbia*, 91 U. S. 540; *Laramie Co. v. Albany Co.*, 92 U. S. 307.

of a particular place or connected with a particular district, enabling them to conduct its local civil government.<sup>4</sup> The more usual kinds of municipal or quasi municipal corporations in this country are cities, towns, townships, boroughs, villages, parishes, counties, school districts, poor districts, and road districts.

The charter of a municipal corporation is not a contract, within the meaning of that clause of the federal constitution which forbids the passage of laws impairing the obligation of contracts. Hence it follows that such charters may be altered, amended, or repealed by the legislature at its own discretion, without any violation of that clause, provided only that private vested rights are not infringed by the action which it may take in regard to the charter.<sup>5</sup> And municipal corporations, being creatures of legislation, have no constitutional guaranty of trial by jury, and such trial may be denied to them.<sup>6</sup> They are liable to have their public powers, rights, and duties modified or abolished at any time by the legislature. They are allowed to hold privileges or property only for public purposes. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact.<sup>7</sup> And one legislature cannot impose restrictions on the powers of a municipal corporation which a future legislature cannot modify or abrogate, except where a vested right or the obligation of a contract might be thereby divested or impaired.<sup>8</sup> But in many of the state constitutions there are provisions which prevent the legislature from passing any local or special law for the government of municipal corporations, either in general or in relation to certain specified matters, or from enacting any special law "regulating the internal affairs of a town or county."

<sup>4</sup> Philadelphia v. Fox, 64 Pa. St. 169, 180.

<sup>5</sup> Brown v. Hummel, 6 Pa. St. 86, 92; Philadelphia v. Fox, 64 Pa. St. 169; Yarmouth v. North Yarmouth, 34 Me. 411; Berlin v. Gorham, 34 N. H. 266; Paterson v. Society, 24 N. J. Law, 385; Marietta v. Fearing, 4 Ohio, 427.

<sup>6</sup> Borough of Dunmore's Appeal, 52 Pa. St. 374.

<sup>7</sup> Town of East Hartford v. Hartford Bridge Co., 10 How. 511, 534.

<sup>8</sup> State v. Pilsbury, 31 La. Ann. 1.

**POWER TO CREATE MUNICIPAL CORPORATIONS.**

133. The power to distribute the administrative functions of government, and from time to time to change their distribution, belongs exclusively to the legislature, and this includes the power to incorporate cities and other municipal corporations.<sup>9</sup>

The creation of municipal corporations is generally accomplished either by a special grant of a charter, or (where this is forbidden by the state constitution, as is now generally the case) by the enactment of a general law under which such corporations may be organized whenever the particular district possesses the requisite population and complies with the other conditions of the act. When the constitution empowers the legislature to establish but one system of town and county government, to be as nearly uniform as practicable, absolute uniformity is not required.<sup>10</sup>

*Boundaries.*

As it is for the legislature to determine whether municipal corporations shall be established, and how the subordinate functions of government shall be apportioned to them, so also it is within its power, unless restrained by the constitution, to decide what shall be the territorial boundaries of a city, county, or other such corporation, and after having established the boundaries it may, in its discretion, modify or change them, subject only to the proviso that private vested rights must not be injured by the alterations. And this power must generally be exercised by the legislative body itself, without an attempt to delegate it, though it is deemed permissible to submit to the voters of the territory the question of the division of a municipality or of consolidation, or other such questions.<sup>11</sup> Statutes fixing the boundaries of counties, and dividing such counties into towns, and providing for town organizations, are held to be properly within the sphere of the powers of the legislature, even though not expressly specified in the constitution.<sup>12</sup> And an act

<sup>9</sup> *Turner v. Althaus*, 6 Neb. 54; *Hope v. Deaderick*, 8 Humph. 1.

<sup>10</sup> *Catheart v. Comstock*, 56 Wis. 590, 14 N. W. 833.

<sup>11</sup> *Cooley*, Const. Lim. 119.

<sup>12</sup> *Chicago & N. W. Ry. Co. v. Langlade Co.*, 56 Wis. 614, 14 N. W. 844.

of the legislature fixing the county seat is not unconstitutional because it was passed without any consultation with the people of the county and without giving them an opportunity to petition the legislature; nor because two places were named in the act, and the choice between them left to the popular vote.<sup>13</sup>

*Classification.*

It is now a common practice to divide the cities of a state into several classes, according to their population, giving to those of each class a certain range of powers or privileges, or a form of government, different from those accorded to the other classes, the object being to adapt the municipal government and powers to the varying conditions and needs of the different populations. Laws making such a classification are not open to the objection that they are local or special. "A law applying to a certain class of cities, fixed by previous legislation, into which other municipal corporations may enter, and from which they may pass into other classes, by increase of population, is not special but general, since the grade of any particular city is not designated by the act, but depends upon its growth in population, as it may, by such growth, pass from one grade or class into another."<sup>14</sup> And it is no constitutional objection to such a law that there may be, at the time, only one city in the state which possesses a sufficient population to bring it into one of the designated classes,<sup>15</sup> unless it is evident that the legislature merely sought in this manner to evade the constitutional prohibition against special laws. It is possible that there may be other bases for classification beside the relative population, but whatever system is adopted, it must be such as to show clearly the need of differences in powers or governments. "The true principle of classification," says the court in New Jersey, "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 object so des-

<sup>13</sup> Ex parte Hill, 40 Ala. 121.

<sup>14</sup> State v. Hawkins, 44 Ohio St. 98, 108, 5 N. E. 228; Wheeler v. Philadelphia, 77 Pa. St. 338.

<sup>15</sup> State v. Hudson, 44 Ohio St. 137, 5 N. E. 225; Kilgore v. Magee, 85 Pa. St. 401.

ignated 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 or justify the restriction of the legislation."<sup>16</sup>

#### LEGISLATIVE CONTROL OF MUNICIPAL CORPORATIONS.

134. In respect to all those matters in which the people of the state generally have an interest or concern, the legislature may require and compel the municipalities to discharge duties, perform works, and if necessary contract debts. But in regard to matters of purely local concern, which are not of importance to the state at large, and which are generally best regulated by the local authorities, the rule of local self-government requires that the municipality should be controlled only by the preferences and determinations of its own citizens.

The double function of municipal corporations requires them to assume a share in the performance of state duties, as the legislature shall apportion the same, and also to regulate matters which concern only the particular community. In respect to the first class of duties, the legislature has the control, and it may grant, modify, or abrogate municipal powers as its wisdom shall dictate. It may also, within the same field, coerce a municipal corporation into the discharge of its proper functions, by laws requiring it to make contracts, issue bonds, or undertake public works. Thus, a city or county may be compelled to maintain local courts or a local police system, to lay out and keep in repair public highways, build bridges, and erect suitable public buildings. But in regard to its own local needs or advantages, the municipality alone is to judge of the desirability of making contracts, undertaking works, or incurring debts, and in these matters it cannot be compelled against its will to adopt the wishes of the state legislature. Thus, in regard to the main-

<sup>16</sup> State v. Hammer, 42 N. J. Law, 435.

tenance of municipal parks, the question of a municipal system of gas or waterworks, and other such private and local affairs, it is not in the lawful power of the legislature to force the municipality into engagements or debts.<sup>17</sup>

While municipal corporations are subordinate agencies of government, and, as such, subject to the regulation and control of the legislative authority of the state, yet they are also, in some particulars, assimilated to private corporations in respect to their rights and powers. Governmental powers granted to a municipality may be altered or revoked. But in its other capacity the municipality may acquire property, or valuable rights, or may receive grants from the state, or enter into contracts, for its own purposes and the advantage of its people. And in regard to such rights and property, the municipal corporation has the same right to be protected against legislative interference or spoliation as any private person or corporation.<sup>18</sup>

And the power of the legislature to control the municipal corporations is also limited by the necessity of preserving the rights of third persons which may in some cases intervene. Thus, the right to interfere with the powers and government of a city cannot be so exercised as to deprive bona fide creditors of the municipality of their remedies against it. The power of taxation, for example, cannot be so abridged that persons who had previously become creditors of the city, relying on its power to levy taxes to pay its debts, shall be deprived of all effectual means of collecting their claims.<sup>19</sup>

<sup>17</sup> In regard to these general propositions, see *Kimball v. County of Mobile*, 3 Woods, 555. Fed. Cas. No. 7,774; *People v. Draper*, 15 N. Y. 532; *Mayor, etc., of Baltimore v. State*, 15 Md. 376; *People v. Common Council of Detroit*, 28 Mich. 228; *Hasbrouck v. Milwaukee*, 13 Wis. 37; *Pope v. Phifer*, 3 Heisk. 682; *Howell v. Bristol*, 8 Bush, 493; *In re Washington Ave.*, 69 Pa. St. 352; *Western Saving Fund Soc. v. Philadelphia*, 31 Pa. St. 175; *Park Com'rs v. Mayor of Detroit*, 29 Mich. 343.

<sup>18</sup> *Terrett v. Taylor*, 9 Cranch, 43; *Pawlet v. Clark*, Id. 292; *State v. Haben*, 22 Wis. 660; *Western Saving Fund Soc. v. City of Philadelphia*, 31 Pa. St. 185; *Grogan v. San Francisco*, 18 Cal. 590.

<sup>19</sup> *Von Hoffman v. Quincy*, 4 Wall. 535; *State v. Common Council of Madison*, 15 Wis. 30; *Goodale v. Fennell*, 27 Ohio St. 426; *Nelson v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. 648.

**DEBTS AND REVENUE.**

**135.** The legislature has power to require and compel a municipal corporation to pay its just debts, even when they are not enforceable by the ordinary processes of law, and to this end it may require the municipality to raise money by taxation.

It matters not that the particular claim is not such as the courts would enforce without further legislative authority. If a moral obligation exists, the legislature may give it legal sanction. A law requiring a municipal corporation to pay a demand against it which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not open to constitutional objection, as being retroactive, or otherwise.<sup>20</sup> Thus, the legislature may authorize a municipality to issue bonds for a debt contracted, without legislative authority, for the improvement of its streets.<sup>21</sup> But the legislature cannot compel a municipal corporation to pay a claim which it is under no obligation, legal or moral, to pay; nor can it require a court to render judgment on proof of the amount thereof.<sup>22</sup>

The revenues of a county are not the property of the county in the sense in which those of a private person or corporation are regarded. The whole state has an interest in the revenue of a county, and for the public good the legislature must have the power to direct its application.<sup>23</sup>

**OFFICERS OF MUNICIPALITIES.**

**136.** Officers having to do with municipal corporations are of two sorts; those whose functions concern the whole state or its people generally, although territorially restricted, and those whose powers and duties relate exclu-

<sup>20</sup> *Lycoming v. Union*, 15 Pa. St. 166; *New Orleans v. Clark*, 95 U. S. 654.

<sup>21</sup> *Mutual Benefit Life Ins. Co. v. City of Elizabeth*, 42 N. J. Law, 235.

<sup>22</sup> *Hoagland v. Sacramento*, 52 Cal. 142; *Sadsbury Supervisors v. Dennis*, 96 Pa. St. 400.

<sup>23</sup> *People v. Power*, 25 Ill. 187.

sively to matters of purely local concern. Officers of the former class may be appointed or regulated by the state authorities, but the principle of local self-government requires that the choice of officers of the latter class should be left exclusively to the people of the particular community.

“The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of gas works or water works, the construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the state at large.”<sup>24</sup> Thus, a municipal board of police is clearly an agency of the state government, and not of the municipality, and therefore belongs to the first class above mentioned.<sup>25</sup> But on the other hand, a statute which has the effect of placing in the hands of a board of public works, who are to be appointed by the legislature, the exclusive control of the streets, bridges, etc., in cities subject to its provisions, without the consent of those to be affected thereby, infringes upon the inherent right of the citizens to local self-government and is unconstitutional.<sup>26</sup>

#### POWERS OF MUNICIPAL CORPORATIONS.

**137. A municipal corporation has no powers except such as are granted to it, expressly or by necessary implication, in its charter, or in constitutional or statutory provisions applicable to it, or such as are necessary to enable it to exercise its granted powers and effect the object of its incorporation.**

“The charter or the general law under which they [the municipal corporations of a state] exercise their powers is their constitution, in which they must be able to show authority for the acts they assume to perform. They have no inherent jurisdiction to

<sup>24</sup> 1 Dill. Mun. Corp. § 58.

<sup>25</sup> *People v. Hurlbut*, 24 Mich. 44.

<sup>26</sup> *State v. Denny*, 118 Ind. 382, 21 N. E. 274.

make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the state legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant." <sup>27</sup>

But besides the powers enumerated in the charter, there are certain implied powers which belong to municipal corporations merely in virtue of their status as public corporations. These are such as are necessary to enable the corporation to exercise its enumerated powers and to carry out the objects of its incorporation, and they are considered as inherent in the corporation because it must be presumed that they were within the contemplation of the incorporating power, which would not have granted a charter without the means to carry on a corporate existence. Among these implied powers, the most important are the power to sue and be sued, to have a common seal, to purchase and hold real and personal property for corporate purposes and to convey the same, to make such by-laws as may be necessary to accomplish the design of the incorporation and enforce the same by penalties, and to make contracts in pursuance of the purposes of the incorporation.<sup>28</sup>

#### BY-LAWS OF MUNICIPAL CORPORATIONS.

138. Municipal corporations are invested with subordinate powers of government, including the power to enact by-laws, or ordinances, which, within their sphere, shall have the force of law. But this power is subject to the same limitations which rest upon the general legislative power of the state and also to some others. Such municipal legislative power cannot be delegated, but must be exercised by the municipality through its appointed agencies.

<sup>27</sup> Cooley, Const. Lim. 192; *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361.

<sup>28</sup> Cooley, Const. Lim. 194.

A general rule of constitutional law prohibits the delegation of legislative power. But it is not regarded as a violation of this rule for the legislature, in creating municipal corporations, to invest them with appropriate powers of legislation for the due administration of the affairs of the municipality. But no such principle will justify the municipal authorities in attempting to make a delegation of the powers confided to them. All such powers as are essentially legislative in their nature must be exercised by the municipality itself or its duly authorized agents and officers pointed out by law. No such power can lawfully be turned over to the discretion of a private person, or to any officer or board of officers not authorized by the charter to exercise it.

Since municipal corporations are agencies of government, operating within a limited sphere, and since the regulations which they may establish will generally come into the closest relation with the conduct of the citizens, it is eminently proper that they should be invested with adequate powers to make ordinances in matters of police. All those matters which concern the public safety, comfort, health, or morals, are best regulated, in their more minute details, by the people of each community for themselves. And the general policy of our institutions is to intrust a large measure of discretion, in these particulars, to the several municipalities. Thus, in the absence of specific constitutional restrictions, it is competent for the legislature of a state, by a general incorporation law or by a particular charter, to empower a municipality to make ordinances, operative within its limits, for the regulation or licensing of the traffic in intoxicating liquors, although the subject may already be provided for by the general laws of the state. And a municipal charter or its by-laws may thus either expressly or by necessary implication, supersede the general laws on the subject, within the limits of the corporation.<sup>29</sup>

The principal limitations upon the power of municipal corporations to enact by-laws are as follows:

1. Such by-laws must not be violative of the restrictions which the federal constitution imposes upon the legislative power of the state.
2. They must not be in conflict with any provision of the constitution of the state.

<sup>29</sup> Davis v. State, 2 Tex. App. 425; Com. v. Fredericks, 119 Mass. 199; State v. Harper, 42 La. Ann. 312, 7 South. 446.

3. They must not conflict with the general statutes of the state.
4. They must not exceed or violate the limitations imposed by the charter of the particular municipality.
5. They must not be unreasonable.
6. They must not be uncertain.<sup>30</sup>

In general, "an ordinance cannot be held to be unreasonable which is expressly authorized by the legislature. The power of a court to declare an ordinance unreasonable and therefore void is practically restricted to cases in which the legislature has enacted nothing on the subject matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed incidental power of the corporation merely."<sup>31</sup> But a municipal ordinance which prohibits one citizen from engaging in a particular kind of business in a certain locality, under a penalty, while another is permitted to engage in the same business in the same locality, is unreasonable.<sup>32</sup> And so also is an ordinance which prohibits any person from putting up a steam engine without the consent of the mayor and common council, and allows the revocation of such permits and compels the removal of such engines on notice.<sup>33</sup> The requirement of certainty is specially important if the ordinance is penal, that is, enjoining or prohibiting the doing of some act under a penalty. In such cases it is necessary that it should describe the offense with certainty, and also it must fix the penalty with precision, and not leave its measure to the discretion of any officer.

<sup>30</sup> Cooley, Const. Lim. 198-203.

<sup>31</sup> *Coal Float v. City of Jeffersonville*, 112 Ind. 15, 19, 13 N. E. 115.

<sup>32</sup> *Tugman v. Chicago*, 78 Ill. 405.

<sup>33</sup> *Mayor, etc., of Baltimore v. Radecke*, 49 Md. 217.

## CHAPTER XVIII.

### CIVIL RIGHTS AND THEIR PROTECTION BY THE CONSTITUTIONS.

139. Rights in General.
140. Of Liberty.
141. Liberty of Conscience.
142. Personal Liberty.
143. Abolition of Slavery.
144. Right to Bear Arms.
145. Pursuit of Happiness.
146. Equal Protection of the Law.
147. Right to Choose Occupation.
148. Marriage and Divorce.
149. Sumptuary Laws.
150. Education.
151. Due Process of Law.
152. Due Process of Law in Revenue and Tax Proceedings.
153. Due Process of Law in Judicial Action.
154. Protection of Vested Rights.
155. Searches and Seizures.
156. Quartering of Soldiers.
157. Right to Obtain Justice Freely.
158. Trial by Jury.

### RIGHTS IN GENERAL.

139. With respect to the constitution of civil society, and in the sense in which the term is used in public law, "rights" are powers of free action. They are classed as natural, civil, and political.

Some rights are created by law, but others exist antecedently and independently of law. The latter class includes such rights as belong to a man merely in virtue of his personality. His existence as an individual human being, clothed with certain attributes, invested with certain capacities, adapted to a certain kind of life, and possessing a certain moral and physical nature, entitles him, without the aid of law, to such rights as are necessary to enable him to continue his existence, develop his faculties, pursue and

achieve his destiny. But some other rights are the offspring of law. They imply not only an individual but a state. They are not grounded alone in personality, but in an organized society with certain juristic notions. Still others add to these pre-requisites the idea of a participation in government or in the making of laws. We perceive, therefore, that for the purposes of constitutional law, rights are of three kinds. They may be classified as natural, civil, and political rights.

#### *Natural Rights.*

It was formerly the custom to use this term as designating certain rights which were supposed to belong to man by the "law of nature" or "in a state of nature." But clearer modern thought has shown that the "state of nature" assumed by the older writers is historically unverifiable and inadequate to account for the origin of rights. Even in savagery there is a rudimentary state. The law of physical nature recognizes no equality of rights; its rule is the survival of the fittest. In a state of nature, such as was once supposed, there could be no right but might, no liberty but the superiority of force and cunning. In reality, the only true state of nature is a civil state, or at least a social state. But it is permissible to use the phrase "natural rights" as descriptive of those rights which grow out of the nature of man and depend upon personality, as distinguished from such as are created by law and depend upon civilized society. An example of these natural rights is the right to life.

#### *Civil Rights.*

But since organized society is the natural state of man, and not an accident, it follows that natural rights must be taken under the protection of law, and although they owe to the law neither their existence nor their sacredness, yet they are effective only when recognized and sanctioned by law. Civil rights therefore will include natural rights, as the same are taken into the sphere of law. But there are also civil rights which are not natural rights. Thus, the right of trial by jury is not founded in the nature of man, nor does it depend upon personality. But it comes within the definition of civil rights, which are the rights secured by the constitution of any given state or country to all its citizens or to all its inhabitants, and not connected with the organization or administration of gov-

ernment. Hence it appears that while the term "civil rights" is broader than "natural rights," and indeed includes it, there are important differences between those civil rights which are properly described as "natural" and those which are not. Natural rights are the same all the world over, though they may not be given the fullest recognition under all governments. Civil rights which are not natural rights will vary in different states or countries.

*Political Rights.*

Political rights are such rights as have relation to the participation of the individual, direct or indirect, in the establishment or administration of government. For example, the right of citizenship, that of suffrage, the right to petition government for a redress of grievances, the right of free criticism of public officers and government measures, are political rights. They are not natural rights in any sense, since they owe their existence entirely to law. They are civil rights in a qualified sense, since they concern the citizen in his relations with other citizens, but only in respect to the administration of the state. But they are best considered as a separate class. Political rights vary in different countries even more widely than civil rights. Under a despotism they scarcely exist. In our own country they have reached their maximum.

OF LIBERTY.

**140. Liberty, whether natural, civil, or political, is the lawful power in the individual to exercise his corresponding rights. It is greatly favored in law. But it is restrained by the rights of the state and by the equal rights of all other individuals living under the same government.**

As rights are powers of free action, it follows that liberty must be the power in the possessor of rights to make them available and effective, without extraneous hindrance or control except such as may be imposed by lawful measures. And as rights are divided into natural, civil, and political, the different kinds of liberty must be subject to the same classification. Natural liberty is not correctly described as that which might pertain to man in a state of complete isolation from his fellows. But it is the liberty to enjoy and protect

those rights which appertain to his nature as a human being living in society with his kind. Civil liberty is the power to make available and to defend (under the sanctions of law) those rights which concern the relations of citizen with citizen and which are recognized and secured by the fundamental law of the state. Political liberty embraces the right to participate in the making and administration of the laws.

"In favor of life, liberty, and innocence," says the maxim, "all presumptions are to be indulged." According to Bracton, "liberty does not admit of estimation," that is, it cannot be valued or priced; it is invaluable. Such also were the doctrines of the Roman law. "*Libertas inestimabilis res est*," we read in the Digest. And again, "*Libertas omnibus rebus favorabilior*."

But although liberty is thus the foundation of rightful government, and is under the special favor and protection of law, it does not follow that it is unregulated by law. In an organized civic society, living under the dominion of law, liberty is something very different from mere license. The state has the right to take measures essential to its own health and preservation, and to enact regulations for the dealings of citizen with citizen. And rights must be exercised in accordance with these laws. By them liberty is not so much restricted as defined. Liberty is marked out, on the one side, by the reciprocal duties of government and subject, and on the other side, by the co-existence in all of equal rights. The state has a right to maintain its own existence. And for that reason it is not within the rightful freedom of any individual to subvert the government, and treason may be punished by law. For the same reason, the private right of property is subject to the condition that all persons shall contribute of their property to the support of the state. The state exists on condition that it shall assure to each the undisturbed enjoyment of his rights. Hence the legality of criminal justice. The government also is bound to protect the public health, safety, and morals against the aggressions of individuals. And thus the freedom of all may be limited by proper police regulations. Moreover, if the public good requires the appropriation of private property to public use, it may be taken under the power of eminent domain. Secondly, it is the necessary condition to the union of men in a jural society that each shall respect the rights of others.

Indeed, a large school of political economists define the law of liberty as granting to each person the freedom to do all that he wills, provided he does not infringe upon the equal freedom of any other person. Whenever, therefore, a man's unrestrained choice as to his acts or conduct would lead him into collision with the equal rights of others, at that point his liberty stops. This principle is expressed in the common law maxim, *sic utere tuo ut alienum non laedas*. Not only is this rule a lawful limitation upon individual freedom, but without it liberty could not exist. But for the recognition and enforcement of such a rule, freedom would be the prerogative of the strong and slavery the heritage of the weak.

It is the purpose of the present chapter to exhibit the great guaranties of natural and civil liberty imbedded in our constitutions, and at the same time to direct attention to their proper limitations.

#### LIBERTY OF CONSCIENCE.

141. The first amendment to the constitution of the United States provides that congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. And in all the states there are constitutional provisions, varying in language, but all tending to secure to the citizen the entire freedom of his conscience, to protect him against religious persecution, to prohibit the recognition of any particular form of religion as the established and compulsory religion of the state, and to prevent the appropriation of the public money or the public influence to the support of any church, sect, or religious body.

"The real object of the first amendment," says Story, "was not to countenance, much less to advance, Mahometanism or Judaism or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion which had been

trampled upon almost from the days of the Apostles to the present age. \* \* \* But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion and a prohibition of all religious tests. Thus the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship.”<sup>1</sup> It will be perceived that this amendment relates only to possible congressional action interfering with the liberty of conscience. It is not a limitation upon the power of the states, but only upon that of congress. If any state chose to establish a religion, it would not be contrary to the federal constitution. Whatever regulations the several states may see fit to make, either in extension or abridgment of the freedom of religion, they cannot be annulled by the national government or its courts.<sup>2</sup> But, as we have stated above, the constitutions of all the states make such provision on this subject as to secure the full measure of religious liberty which is deemed essential under American institutions and ideas.

*Christianity as Part of the Law of the Land.*

The statement that Christianity is part of the law of the land must be taken in a qualified and limited sense. It is incorrect if it means that the doctrines, precepts, and practices of the Christian religion are compulsory upon all citizens, in the same way as the statute laws or the unrepealed rules of the common law, or that those articles of faith and observance may be enforced by the legislature or the courts in the same manner and to the same extent as the positive enacted law. If the law demands obedience to any maxim or rule of Christianity, it is not because of its divine origin, but because that maxim or rule has been legally adopted as part of the municipal law. But the saying is true in this sense, that many of our best civil and social institutions, and the most important to be preserved in a free and civilized state, are founded upon the Christian religion, or

<sup>1</sup> 2 Story, Const. §§ 1877, 1879.

<sup>2</sup> *Permoli v. First Municipality*, 3 How. 589.

upheld and strengthened by its observance; that the whole purpose and policy of the law assume that we are a nation of Christians, and while toleration is the principle in religious matters, the laws are to recognize the existence of that system of faith, and our institutions are to be based on that assumption; that those who are in fact Christians have a right to be protected by law against wanton interference with the free and undisturbed practice of their religion and against malicious attacks upon its source or authority, calculated and intended to affront and wound them; and that the prevalence of a sound morality among the people is essential to the preservation of their liberties and the permanence of their institutions, and to the success and prosperity of government, and the morality which is to be fostered and encouraged by the state is Christian morality, and not such as might exist in the supposititious "state of nature" or in a pagan country. The law does not cover the whole field of morality. Much that lies within the moral sphere does not lie within the jural sphere. But that which does lie within the jural sphere, and which is enforced by positive law, is Christian morality.<sup>3</sup>

*Encouragement of Religion.*

The constitutional provisions for liberty of conscience do not mean that religion shall not be encouraged by the state. In point of fact, it is not the encouragement of religion which is forbidden by the constitutions, but any such discrimination in that encouragement as may compel men to violate their consciences, in respect either to the choice of a mode of worship or the support of religious bodies by their contributions.

*Public Recognition of Religion.*

From the foregoing principles it follows that there is no violation of religious liberty in the public recognition of religion, or in the observance of religious forms and ceremonies in public transactions and exercises, provided that no constraint is put upon the conscience of any individual. This rule is illustrated by the annual custom of proclaiming a day of general thanksgiving, and the occasional

<sup>3</sup> *Zelsweiss v. James*, 63 Pa. St. 465; *Shover v. State*, 10 Ark. 259; *Vidal v. Girard*, 2 How. 127; *Andrew v. New York Bible Soc.*, 4 Sandf. 156; *Hale v. Everett*, 53 N. H. 9; *State v. Chandler*, 2 Har. (Del.) 553; *People v. Ruggles*, 8 Johns. 290; *Rex v. Tayler*, 3 Keb. 607.

appointment of a day of fasting and public humiliation. On the same principle, there is no violation of religious liberty in including in the class of "legal holidays" such days as are regarded by a great portion of the people as sacred anniversaries, if no person is required by law to observe them according to any particular religious rites. So also, there is no valid objection on this ground to the appointment by congress of chaplains for the army and navy, with authority to hold religious services. And the same is true of the almost universal custom of American legislative bodies to appoint chaplains and to have their sessions opened with prayers or other religious exercises.<sup>4</sup>

*Bible in the Schools.*

It has been held by some authorities that the laws of the state may imperatively require the reading of the Bible in the public schools, even when the attendance of the pupils at such reading is compulsory.<sup>5</sup> But it is difficult to see why this may not be an infraction of due religious liberty in particular cases, and the answer that no one is compelled to send his children to the public schools is not satisfactory, because the practical exclusion of some, on account of religious beliefs, is equally inconsistent with our constitutions.<sup>6</sup> It is ruled, however, and with irrefragable reason, that a law providing that the Bible shall not be excluded from the public schools, but that no pupil shall be required to read it contrary to the wishes of his parent or guardian, is constitutional.<sup>7</sup>

*Sunday Laws.*

Laws requiring the observance of the first day of the week as a holiday, at least to the extent of forbidding all ordinary labor, trade, and traffic on that day, enforcing quiet upon the public streets, and directing the cessation of public amusements, such as theatrical exhibitions, and the closing of saloons and grog-shops, are universally in force in the states, and their constitutional va-

<sup>4</sup> Cooley, Const. Lim. 471.

<sup>5</sup> Spiller v. Woburn, 12 Allen, 127; Donahoe v. Richards, 38 Me. 379.

<sup>6</sup> Tied. Police Power, 161.

<sup>7</sup> Moore v. Monroe, 64 Iowa, 367, 20 N. W. 475; Board of Education v. Minor, 23 Ohio St. 211.

lidity is sustained by the decisions of the courts.\* The grounds on which the validity of Sunday laws may be sustained have been the subject of extended and earnest discussion. The subject is too large to be entered upon here. But we may briefly remark that the requirement of the observance of Sunday, if it is distinctly as a matter of religious principle, violates the religious liberty of the Jews and perhaps others. And if the physical necessity of an interval of rest at stated periods is urged as the ground (thus making Sunday laws a species of sanitary regulations), it must be answered that this does not justify the imposition of such a day of rest upon those who observe Saturday in that manner or any other day of the week. The fact is that the great majority of the American people are Christians, and the laws are made with reference to this fact. And although others may be put to inconvenience by laws of this kind, it is but an application of the principle that the wishes and preferences of the majority must govern. "The view must be that such laws only require the proper deference and regard which those not accepting the common belief may justly be required to pay to the public conscience."<sup>o</sup>

#### *Blasphemy a Crime.*

Laws defining and punishing blasphemy as a crime are not an unconstitutional interference with the freedom of the conscience and religious liberty. For the legal conception of this crime includes not only the use of impious language, but also a wanton and malicious intention on the part of the speaker to offend and affront Christian people and wound their susceptibilities. It is therefore not merely, nor mainly, an offense against religion, but an offense against individuals or a considerable portion of the entire community. And it is, for this reason, as much within the rightful cognizance of the criminal laws as is libel, or malicious injuries to property. All the best authorities sustain the validity of

\* *Com. v. Colton*, 8 Gray, 488; *Specht v. Com.*, 8 Pa. St. 312; *Neuendorff v. Duryea*, 69 N. Y. 557; *Voglesong v. State*, 9 Ind. 112; *State v. Ambbs*, 20 Mo. 214; *Ex parte Bird*, 19 Cal. 130; *Ex parte Burke*, 59 Cal. 6; *Com. v. Wolf*, 3 Serg. & R. 48; *Frollickstein v. Mayor of Mobile*, 40 Ala. 725; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730.

<sup>o</sup> *Cooley*, Const. Lim. 477.

laws for the punishment of blasphemy.<sup>10</sup> But of course the laws against blasphemy do not interfere with the rightful liberty of speech or of the press, any more than with the freedom of conscience. That is to say, they do not include the candid and honest criticism of systems of religion, or of grounds, objects, or articles of religious faith, or the honest discussion of such subjects, when undertaken with sincere and justifiable motives and for proper ends.<sup>11</sup>

*Establishment of Religion Forbidden.*

In many of the states the constitutions provide that no man shall be compelled, against his consent, to support or attend any church; in some, that there shall be no established church; and in several, that there shall be no preference shown to any one sect.<sup>12</sup> These provisions, together with the prohibition laid upon congress, furnish the guaranty against the establishment of a church or religion. "The legislatures have not been left at liberty to effect a union of church and state, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete religious liberty where any one sect is favored by the state and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution, and, if based on religious grounds, a religious persecution."<sup>13</sup>

*Taxation in Aid of Religion.*

In a considerable proportion of the states, the constitutions provide that no money can be taken from the public treasury in aid of any church, sect, or sectarian institution. And in general, and even without constitutional prohibitions, the compulsory support, by taxation or the appropriation of public funds, of religious establishments or religious instruction, would be contrary to the principles of religious freedom and the rules of taxation.

<sup>10</sup> *Com. v. Kneeland*, 20 Pick. 206; *State v. Chandler*, 2 Har. (Del.) 553; *People v. Ruggles*, 8 Johns. 290.

<sup>11</sup> *Updegraph v. Com.*, 11 Serg. & R. 394; *People v. Ruggles*, 8 Johns. 290; *Cooley*, Const. Lim. 474.

<sup>12</sup> *Stim. Am. St. Law*, p. 8, §§ 42, 43.

<sup>13</sup> *Cooley*, Const. Lim. 469.

*Exemption from Taxation.*

Although the state may not lawfully appropriate money to the support of religious institutions, it may lawfully exempt from all ordinary taxation the property of religious societies used by them for purposes of public worship. This may be done in the interests of religion and for the encouragement of it, as a factor in the inculcation of morality, just as a similar exemption may be granted to schools and colleges, in the interests of the spread of education, or to hospitals and asylums, in the interests of humanity. But there must be no discrimination in such exemption, either in favor of or against any sect or religious body.

*Legal Status of Religious Societies.*

No principle of the constitution is infringed by the incorporation of religious societies under general laws, and without discrimination, and the investing them with power to hold and possess property and otherwise to manage their business affairs. By such incorporation the society acquires a legal status, and in respect to its property and its business dealings with others, and to the rights of its members, considered as property rights, the courts may deal with it as with any other corporation. But the church, the spiritual organization, is not thereby incorporated. It is left to make its own rules, as to its membership and otherwise, and with its purely ecclesiastical affairs, and such matters as church discipline and forms of worship, the state and its courts have no concern whatever.<sup>14</sup>

*Religion No Excuse for Crime.*

In several of the states the constitutions provide that the guaranties of religious freedom are not to be held to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state. Even without such provisions in the organic law, it would be clearly competent for the state to condemn and punish acts which are contrary to its policy and the established laws regulating the conduct of citizens, notwithstanding that a minority of the people professed a religion which tolerated or even commanded such acts. In other words, peculiarities of religious belief cannot be made a defense to prosecutions for breaches of the criminal laws. As a

<sup>14</sup> Feizel v. Trustees, 9 Kan. 592; Baptist Church v. Witherell, 3 Paige, 296.

conspicuous illustration of this rule, we may cite the decisions of the federal supreme court in the Mormon cases, to the effect that, although the practice of polygamy was sanctioned by the religion of that people, yet that fact did not prevent congress from prohibiting and punishing it, as well as any other open offense against the enlightened sentiment of mankind.<sup>15</sup>

*Respect for Conscientious Scruples.*

“Whatever deference the constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy always is to avoid with care any compulsion which infringes on the religious scruples of any, however little reason may seem to others to underlie them.”<sup>16</sup> Illustrations of this principle are seen in the almost universal rule which allows the substitution of a solemn affirmation, instead of an oath, where one is required to be taken, and also in those provisions in the constitutions of several of the states which exempt all persons from bearing arms in the public defense, or serving in the militia, who have conscientious scruples on the subject of the morality of war. Under a provision of this kind, a fine for not attending a militia muster cannot lawfully be imposed on such persons.<sup>17</sup>

*Competency of Witnesses.*

At the common law those persons only were competent to give evidence as witnesses in a court of law who believed in the existence of a Supreme Being who would punish false swearing. Without such belief, it was considered, there was no way of making the oath obligatory on the conscience of the witness.<sup>18</sup> In a considerable number of the states, this rule has been done away with by constitutional provisions that no religious test shall be required as a qualification of a witness. But in some the common law rule still remains in force. In those jurisdictions, it is held by the courts that the rejection of a

<sup>15</sup> *Mormon Church v. U. S.*, 136 U. S. 1, 10 Sup. Ct. 792; *Reynolds v. U. S.*, 98 U. S. 145; *Murphy v. Ramsey*, 114 U. S. 15, 5 Sup. Ct. 747; *Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. 299.

<sup>16</sup> *Cooley*, Const. Lim. 477.

<sup>17</sup> *White v. McBride*, 4 Bibb, 61.

<sup>18</sup> *Omichund v. Barker*, Willes, 538; *Atwood v. Welton*, 7 Conn. 66; *Arnold v. Arnold*, 13 Vt. 362.

witness as incompetent, by reason of his want of religious belief, is not a violation of the principle of religious freedom.<sup>19</sup>

*Religious Test as Qualification for Office.*

In a majority of the states, the constitutions ordain that no religious test shall be required as a qualification, or condition of eligibility, for the holding of public office or any trust under the state. So also by the constitution of the United States, "no religious test shall ever be required as a qualification to any office or public trust under the United States." But this principle has not been universally adopted. It is still the constitutional rule in some of the states that no man can hold office who denies the existence of a Supreme Being. And on the other hand, in some few of the states, the fundamental law ordains that no minister or preacher of any religious denomination can be a member of the legislature, or (in Kentucky) hold the office of governor, or (in Delaware) hold any civil office.<sup>20</sup>

**PERSONAL LIBERTY.**

**142. Personal liberty consists in the power of locomotion, of changing situation, of removing one's person to whatever place one's inclination may direct, without imprisonment or restraint unless by due course of law.<sup>21</sup> This right is amply secured by guaranties in both the federal and the state constitutions. No one can be deprived of it except by due process of law. But it is limited, in accordance with law, in so far as may be necessary for the preservation of the state and the due discharge of its functions, and so far as may be required for the securing of the rights of each member of the community against the others, and so far as is needful for the due regulation of the domestic relations.**

*Guaranties.*

The fourteenth amendment to the federal constitution provides that no state shall deprive any person of life, liberty, or property

<sup>19</sup> *Thurston v. Whitney*, 2 Cush. 104.      <sup>20</sup> *Stim. Am. St. Law*, p. 54, § 223.

<sup>21</sup> 1 Bl. Comm. 134.

without due process of law. And similar provisions are found in most of the state constitutions. Beside these specific guaranties, there are many which are designed to guard the right of personal liberty in particular aspects of it, or in particular relations, or against particular forms of aggression. For instance, the abolition of slavery and involuntary servitude is a provision which makes for personal liberty. So also is the prohibition against the passage of bills of attainder and that against *ex post facto* laws. Of the same nature is the humane provision of the constitutions admitting accused persons to bail in proper cases, and requiring that bail, when exacted, shall not be excessive. The same remark is true, though less directly, of those regulations of the mode of trial in criminal cases which give to the accused the benefit of the presumption of innocence and the right to be presented or indicted by a grand jury and to be tried by a petit jury of the vicinage. And the great safeguard of the right of personal liberty is the privilege of the writ of habeas corpus. All these guaranties are considered at large in other parts of this work.

#### *Limitations.*

The limitations upon the right of personal liberty to be first considered are those having relation to the duties and needs of the state and the obligations of the citizen to the government and to other citizens. And first, the citizen may be restrained of his liberty by being put under arrest, in a lawful manner and by a person duly authorized, in order to prevent the commission of a public offense, or in order to bring him to trial for a crime with which he is charged. But the law requires as an almost invariable rule that the arrest shall be made upon a warrant duly issued by a lawful magistrate, and that it shall be served by an officer of the law. Any person found in the act of committing a felony or a breach of the peace with force may be arrested by any citizen without a warrant. An officer of the law may, without a warrant, arrest a person violating municipal ordinances in his presence, or on reasonable grounds of suspicion of felony.<sup>22</sup> But ar-

<sup>22</sup> 1 East, P. C. 298; *Holley v. Mix*, 3 Wend. 350; *Wade v. Chaffee*, 8 R. I. 224; *State v. Underwood*, 75 Mo. 230; *Mitchell v. Lemon*, 34 Md. 176; *Griffin v. Coleman*, 4 Hurl. & N. 265. A peace officer may arrest for a breach of

rests without warrant are not by any means favored in the law, and any person making an arrest under such circumstances must at once take the person arrested before some magistrate or court of competent jurisdiction to inquire into the alleged offense, and must also show that the actual state of the case was such as to justify his action.

In the next place, a man may be restrained of his liberty as a consequence of crime committed by him. But the principle of protection to personal liberty demands that imprisonment shall be decreed only after a fair and impartial trial, conducted according to the regular forms of judicial procedure, and a proper conviction. And even then the terms of the sentence must be strictly observed. Any detention of the prisoner after the expiration of the term for which he was sentenced, whether for breaches of prison discipline or other cause, is illegal.<sup>23</sup> Under this head we must also include imprisonment or detention as a punishment for contempts of court or of legislative bodies, or for contumacy defeating the operation of their lawful powers and jurisdiction.

In the next place, certain classes of persons may be restrained of their liberty, by due process of law, whose power to go at large, without restraint, would threaten the peace, security, or health of the community. These include maniacs and dangerous lunatics, persons affected with dangerous infectious diseases, vagabonds, and possibly some other classes. But these, no less than others, are protected by the requirement of due process of law. For example, it is held that a person supposed to be insane may not lawfully be committed to an asylum, at the instance of public authorities, against his will, without some sort of judicial investigation into the question of his sanity.<sup>24</sup> Vagabonds and paupers may be committed, by those duly authorized, to public work-houses, infirmaries, and other similar institutions. Due process of law in such cases does not always require a trial by jury. But in

the peace committed against himself as well as for those committed against others. *Davis v. Burgess*, 54 Mich. 514, 20 N. W. 540.

<sup>23</sup> *Gross v. Rice*, 71 Me. 241; *Knox v. State*, 9 Baxt. 202.

<sup>24</sup> *State v. Billings* (Minn.) 57 N. W. 794; *Van Deusen v. Newcomer*, 40 Mich. 90.

some form due process of law must be employed, or such commitments are illegal.<sup>25</sup> Another ground of limitation upon the right of personal freedom is that which is described as being necessary to enforce the duty which citizens owe in defense of the state. This power of the state can have but few applications in practice, but those are highly important. The most conspicuous is the right to compel citizens, by draft or conscription, to serve in its armies in time of war.<sup>26</sup>

The second class of limitations upon the right of personal liberty includes such as are rendered necessary by the helpless, dependent, or immature condition of those persons to whom they apply. These limitations are not imposed by the state, but are recognized and allowed by its laws. They depend, as a rule, on the constitution of the family, or on relations analogous thereto. This class includes the lawful control of a parent over the liberty of his children, of a guardian over that of his ward, of a master over his apprentice, of a teacher over his pupil. In this category belongs also the common law power of a husband over his wife. But as this has been reduced, by the progress of enlightened opinion and the gradual emancipation of women, to a minimum, it scarcely requires mention in this connection. There are some few anomalous conditions in which one person has the right to put restraint upon the liberty of another, which belong in this class of limitations, but do not depend on the domestic relations. Thus, parties who have become bail for another in legal proceedings are regarded in law as his friendly jailers, and they have a legal right to have the custody of him, for the purpose of delivering him up to the officers of justice in due time. Creditors had the power to put restraint upon the liberty of their debtors so long as laws authorizing imprisonment for debt remained upon our statute books. But these laws have been now almost universally abolished, and except in a few states, in cases of fraud, no such deprivation of personal liberty can be used as a means of collecting a mere civil debt.

<sup>25</sup> Portland v. Bangor, 65 Me. 120.

<sup>26</sup> See Cooley, Const. Lim. 339.

## ABOLITION OF SLAVERY.

143. The constitution of the United States, in the thirteenth amendment, forever abolishes and prohibits slavery, or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, throughout the United States and all places subject to their jurisdiction.

The constitution originally recognized the existence of slavery as a fact, though referring to it in obscure and guarded terms. Congress was authorized to forbid the further importation of slaves after the year 1808, and provision was made for the surrender of fugitive slaves. In this respect, the constitution differed from the contemporary law of England, where it had been recently declared from the bench that slavery was repugnant to the common law, that a slave brought into England by his master was by that mere fact emancipated, and that a person forcibly detained on English soil as a slave was entitled to be discharged on habeas corpus.<sup>27</sup> It is true that some of the state constitutions then contained a declaration that "all men are created free and equal" (to say nothing of a similar assertion in the Declaration of Independence) but it is not known that a slave ever obtained his freedom by invoking such a constitutional principle, except in the state of Massachusetts.<sup>28</sup> It was not considered that the federal government had any power to interfere with the institution of slavery. It was regarded as a matter wholly of domestic concern within each state. As to the status of the slave, he was regarded as a chattel and the absolute property of his master. "The power of the master," said the court in North Carolina, "must be absolute, to render the submission of the slave perfect. We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his power is

<sup>27</sup> *Sommersett's Case*, 20 How. St. Tr. 1, Broom, Const. Law, 59.

<sup>28</sup> *Cooley*, Const. Law (2d Ed.) 222.

in no instance usurped, but is conferred by the laws of man at least, if not by the law of God.”<sup>29</sup>

But the emancipation of the slaves was effected by executive proclamation, during the continuance of the civil war, and was made real by the armies of the north in their progress through the insurgent territory. Then came the thirteenth amendment, which assured its perpetual abolition throughout all the domain of the United States.

The language of the amendment is plain, and has called for but little interpretation at the hands of the courts. The only controversy has been as to the meaning of the phrase “involuntary servitude.” It was probably added to guard against the establishment of any species of compulsory service, which might differ from perpetual slavery only in its restriction to a term of years. But it was then necessary to make an exception, allowing such involuntary servitude as a punishment for crime, in order not to deprive the states of the power to sentence convicts to labor in the penitentiaries. In this connection, doubt may arise as to the validity of what is known as the “convict lease system,” in vogue in some of the states, by which the labor of convicts is let out to private contractors who are to employ them in or near the prison and under the superintendence of its officers. “It might well be doubted,” says Judge Cooley, “if a regulation which should suffer the convict to be placed upon the auction block and sold to the highest bidder, either for life or for a term of years, would be in harmony with the constitutional prohibition.”<sup>30</sup> The importance of the prohibition against involuntary servitude became apparent, soon after the adoption of the amendment, when several of the states passed laws providing for a system of compulsory apprenticeship, which were applicable to colored persons alone, and manifested a disposition to keep them in the degraded and servile condition in which their emancipation found them. It was held by the courts that such a system was in effect involuntary servitude, and was inconsistent with the terms of the amendment.<sup>31</sup> It should be noticed that the thirteenth amendment is not restricted in its prohibitions to any race or class of people. Its terms are general. “Neither slavery nor involuntary servitude” shall exist. And conse-

<sup>29</sup> State v. Mann, 2 Dev. 263.

<sup>30</sup> Cooley, Const. Lim. 299.

<sup>31</sup> In re Turner. 1 Abb. (U. S.) 84, Fed. Cas. No. 14,247.

quently, as remarked by the supreme court, "while negro slavery alone was in the mind of the congress which proposed the thirteenth article [amendment] it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese cooly labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void."<sup>32</sup>

#### RIGHT TO BEAR ARMS.

**144. The second amendment to the federal constitution, as well as the constitutions of many of the states, guaranty to the people the right to bear arms.**

This is a natural right, not created or granted by the constitutions. The second amendment means no more than that it shall not be denied or infringed by congress or the other departments of the national government. The amendment is no restriction upon the power of the several states.<sup>33</sup> Hence, unless restrained by their own constitutions, the state legislatures may enact laws to control and regulate all military organizations, and the drilling and parading of military bodies and associations, except those which are authorized by the militia laws or the laws of the United States.<sup>34</sup> The "arms" here meant are those of a soldier. They do not include dirks, bowie knives, and such other weapons as are used in brawls, fights, and riots. The citizen has at all times the right to keep arms of modern warfare, if without danger to others, and for purposes of training and efficiency in their use, but not such weapons as are only intended to be the instruments of private feuds or vengeance.<sup>35</sup> And a statute providing that a homicide which would ordinarily be manslaughter shall be deemed murder if committed with a bowie knife or a dagger, is valid. It does not tend to restrict the right of the citizen to bear arms for lawful purposes, but only punishes a particular abuse of that right.<sup>36</sup> This right is not infringed by a state law prohibiting the

<sup>32</sup> Slaughterhouse Cases, 16 Wall. 36, Miller, J.

<sup>33</sup> *U. S. v. Cruikshank*, 92 U. S. 542; *Andrews v. State*, 3 Heisk. 165.

<sup>34</sup> *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. 580.

<sup>35</sup> *English v. State*, 35 Tex. 473.

<sup>36</sup> *Cockrum v. State*, 24 Tex. 394.

carrying of concealed deadly weapons. Such a law is a police regulation, and is justified by the fact that the practice forbidden endangers the peace of society and the safety of individuals.<sup>37</sup> But a law which should prohibit the wearing of military weapons openly upon the person, would be unconstitutional.<sup>38</sup>

### THE PURSUIT OF HAPPINESS.

**145. All men are invested with a natural, inherent, and inalienable right to the pursuit of happiness.**

This principle is formally declared in the constitutions of many of the states. And moreover the framers of the Declaration of Independence announced that they "held these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." This latter expression is one of a general nature, and the right thus secured is not capable of specific definition or limitation, but is really the aggregate of many particular rights, some of which are enumerated in the constitutions, and others included in the general guaranty of "liberty." The happiness of men may consist in many things or depend on many circumstances. But in so far as it is likely to be acted upon by the operations of government, it is clear that it must comprise personal freedom, exemption from oppression or invidious discrimination, the right to follow one's individual preference in the choice of an occupation and the application of his energies, liberty of conscience, and the right to enjoy the domestic relations and the privileges of the family and the home. The search for happiness is the mainspring of human activity. And a guarantied constitutional right to pursue happiness can mean no less than the right to devote the mental and physical powers to the attainment of this end, without restriction or obstruction, in respect to any of the particulars just mentioned, except in so far as may be necessary to secure the equal rights of others. Thus it appears that this guaranty, though one of the most

<sup>37</sup> State v. Wilforth, 74 Mo. 528; Halle v. State, 38 Ark. 564; Wright v. Com., 77 Pa. St. 470; State v. Speller, 86 N. C. 697.

<sup>38</sup> Nunn v. State, 1 Kelly (Ga.) 243.

indefinite, is also one of the most comprehensive to be found in the constitutions.

### EQUAL PROTECTION OF THE LAWS.

146. By the terms of the fourteenth amendment to the federal constitution, the states are forbidden to deny to any person within their jurisdiction the equal protection of the laws.

#### *Meaning of the Phrase.*

If the word "protection" were to be taken in a strict sense, it could mean no more than the right to call to one's aid the laws of the state, attended by all their machinery of justice, for the averting or redress of injuries or oppressions. It would confer no rights, but only guaranty remedies. But it is held that the amendment must be liberally construed, according to its spirit and purpose. The supreme court, quoting the words of the amendment, says: "What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, the right to exemption from unfriendly legislation against them distinctively as colored, exemption from legal discriminations implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."<sup>39</sup>

#### *What Persons Protected.*

While it is true that the fourteenth amendment was primarily intended to secure the rights, and the equality before the law, of the colored race, yet its terms are so broad as to guaranty these advantages to any person, of any class or race, against whom the

<sup>39</sup> *Strauder v. West Virginia*, 100 U. S. 303.

laws of a state may make invidious discriminations. No state shall deny to "any person within its jurisdiction" the equal protection of the laws. Hence it may be invoked by whites as well as blacks, by Chinese or Japanese, or by any other persons within the jurisdiction of the state, without regard to color or place of original nationality. It is not even restricted to American citizens. It may be claimed as a protection by aliens lawfully resident within the state, if "within its jurisdiction."<sup>40</sup> And moreover it is held that the word "person," as here used, includes corporations.<sup>41</sup>

*Civil Rights Acts.*

The fourteenth amendment gives to congress the power to enforce its provisions by appropriate legislation. In pursuance of this authority, congress, in 1875, passed an act, commonly called the "Civil Rights Act," whereby it was provided that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." But this statute was adjudged unconstitutional and void, in so far as it applied to the states generally, and was not restricted to the places over which congress has the power of direct legislation. The reason of this decision was this: The legislation authorized to be adopted by congress for enforcing the fourteenth amendment is not direct and primary legislation on the matters respecting which the states are prohibited from making or enforcing certain laws, or doing certain acts, but is corrective legislation, such as may be necessary or proper for counteracting or redressing the effect of such laws or acts. The amendment simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the state, and it still remains

<sup>40</sup> Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064.

<sup>41</sup> Santa Clara Co. v. Southern Pac. R. Co., 118 U. S. 394, 6 Sup. Ct. 1132.

there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guaranties, but no more. The power of the national government is limited to the enforcement of this guaranty.<sup>42</sup>

Civil rights statutes have also been enacted in several of the states. They provide generally that there shall be no exclusion or discrimination against citizens of the state, on account of race, color, or previous condition of servitude, in respect to their equal enjoyment of the accommodations, privileges, or facilities furnished by railroads or other carriers, inn-keepers, proprietors of theatres and other places of amusement, teachers and officers of public schools, etc. These laws are sustained as valid and constitutional enactments. They are not regarded as unlawfully interfering with private rights of property.<sup>43</sup>

*Local or Special Laws not Prohibited.*

A state may establish one system of law in one portion of its territory, and another system in another, and regulate the constitution and jurisdiction of its courts, without any necessary violation of this prohibition. The laws of a state are framed, and its courts organized and their jurisdiction apportioned, with some reference to local conditions and needs, and there is nothing unconstitutional in this. The citizen is not entitled to claim the protection of the same laws, but that he shall not be denied the same protection of the laws which is accorded to other persons in the same place and in like circumstances.<sup>44</sup> "When legislation applies

<sup>42</sup> Civil Rights Cases, 100 U. S. 3, 3 Sup. Ct. 18; U. S. v. Cruikshank, 92 U. S. 542. See, also, U. S. v. Newcomer, 11 Phila. 519, Fed. Cas. No. 15,868; U. S. v. Rhodes, 1 Abb. (U. S.) 28, Fed. Cas. No. 16,151; Ex parte Turner, Chase 157, Fed. Cas. No. 14,247.

<sup>43</sup> People v. King, 110 N. Y. 418, 18 N. E. 245; Donnell v. State, 48 Miss. 661; Joseph v. Bidwell, 28 La. Ann. 382; Ferguson v. Gies, 82 Mich. 358, 46 N. W. 718; Baylies v. Curry, 128 Ill. 287, 21 N. E. 595.

<sup>44</sup> Missouri v. Lewis, 101 U. S. 22. A statute providing that in all capital criminal cases, except in cities having a population of over 100,000, the state shall be allowed eight peremptory challenges to jurors, and in such cities shall be allowed fifteen, is not unconstitutional as denying to persons charged with capital crimes in such cities the equal protection of the laws. All persons in those cities are treated alike, and all persons out of those cities are treated alike, and this is all the constitutional provision requires. Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350.

to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."<sup>45</sup> Hence this provision is not violated by regulations regarding railroads, designed to promote the public safety and comfort, if such regulations apply to all railroads alike which are subject to the laws of that state.<sup>46</sup>

#### *Tax Laws.*

A state law for the valuation and assessment of property for taxation, which provides for the classification of property subject to its provisions into different classes, which makes for one class one set of provisions as to the modes and methods of ascertaining the value and as to the right of appeal, and different provisions for another class as to these subjects, but which provides for the impartial application of the same means and methods to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, cannot be said to deny to any person affected by it the equal protection of the laws.<sup>47</sup> The imposition of a special tax upon railroad companies exclusively, the proceeds of which are to pay the salaries and expenses of the state board of railroad commissioners, does not deprive such companies of the equal protection of the laws.<sup>48</sup>

#### *Competency of Witnesses.*

It has been held that a state statute providing that no Indian, Mongolian, or Chinese shall be permitted to give evidence in the courts of the state in favor of or against a white man is not in violation of the federal constitution, even since the thirteenth and fourteenth amendments. To declare who shall be competent to testify in the state courts was always considered, prior to those amendments, a subject within the legitimate sphere of the state legislatures, and the restrictions which they impose upon the states

<sup>45</sup> Missouri Pac. R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161.

<sup>46</sup> New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437.

<sup>47</sup> Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533; Columbus Southern R. Co. v. Wright, 151 U. S. 470, 14 Sup. Ct. 396.

<sup>48</sup> Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255.

relate to substantial personal rights of liberty and property, and do not extend to mere rules of evidence.<sup>49</sup>

*Right to Labor.*

But a state statute providing that no corporation organized under its laws shall directly or indirectly, in any capacity, employ any Chinese or Mongolian laborer, is unconstitutional. For the right to labor is clearly included within the scope of those rights which the amendment is designed to secure.<sup>50</sup>

*Privilege of Public Schools.*

By reason of the provisions of the fourteenth amendment, it is not competent for the legislature of a state, in establishing and prescribing regulations for the public schools, to exclude negro children from the benefit of the public school system on account of their color only. At the same time, it is not identity of rights and privileges which the amendment guaranties, but equality. And consequently the state may establish separate public schools for colored children, and require them to attend those schools or none, provided the accommodations, advantages, and opportunities, and the relative appropriation of the public funds for their support, are in all respects equal to those provided for white children.<sup>51</sup>

*Jury Service.*

Any state statute which denies to colored citizens the right or privilege of participating in the administration of the laws by serving on grand or petit juries, because of their race or color, is a discrimination against them which is forbidden by the fourteenth amendment.<sup>52</sup> But a mixed jury in any particular case is not essential to the equal protection of the laws. It is a right to which any colored man is entitled that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race and no discrimina-

<sup>49</sup> *People v. Brady*, 40 Cal. 198.

<sup>50</sup> *In re Parrott*, 6 Sawy. 349, 1 Fed. 481.

<sup>51</sup> *Ward v. Flood*, 48 Cal. 36; *People v. Gallagher*, 93 N. Y. 438; *Cory v. Carter*, 48 Ind. 327; *State v. McCann*, 21 Ohio St. 198; *County Court v. Robinson*, 27 Ark. 116; *Lehew v. Brummell*, 103 Mo. 546, 15 S. W. 765; *Roberts v. Boston*, 5 Cush. 198; *Chrisman v. Brookhaven*, 70 Miss. 477, 12 South. 458; *Claybrook v. Owensboro*, 16 Fed. 297.

<sup>52</sup> *Strauder v. West Virginia*, 100 U. S. 303; *Ex parte Virginia*, Id. 339; *Com. v. Johnson*, 78 Ky. 509.

tion against them because of his color. But that is a different thing from a right to have a jury composed in part of colored men.<sup>53</sup>

*Discriminations by Carriers.*

It is lawful for a railroad company, or other common carrier, to provide separate carriages or other separate accommodations for different classes of patrons, where the distinction is founded on some reasonable ground and there is no invidious discrimination against any, and there are equally desirable accommodations for all who pay at the same rate. Thus a distinction may be made, in railroad cars and waiting rooms, between men and women or between negroes and white people.<sup>54</sup>

*Miscegenation.*

A statute declaring the intermarriage of a negro and a white person illegal, or a nullity, or a felony, is not inconsistent with, or repugnant to, the provisions of the fourteenth amendment. Such a law cannot be said to deny to any person the equal protection of the laws.<sup>55</sup> And the same is true of an act providing a greater punishment for adultery between a white person and a negro than for adultery between those of the same race. This is not a discrimination against any particular race, but simply provides a penalty for an offense which could only exist when the parties were of different races.<sup>56</sup>

*Foreign Corporations.*

This provision does not prohibit a state from imposing an annual license tax, or other conditions, upon the admission of foreign corporations to do business within its limits. The reason is that the "person" to whom the equal protection of the laws is guaranteed must be "within the jurisdiction" of the state. A corporation is a

<sup>53</sup> *Virginia v. Rives*, 100 U. S. 313; *Neal v. Delaware*, 103 U. S. 370; *Bush v. Kentucky*, 107 U. S. 110, 1 Sup. Ct. 625.

<sup>54</sup> *Westchester & P. R. Co. v. Miles*, 55 Pa. St. 209; *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185; *Green v. Bridgeton*, 9 Cent. Law J. 206, Fed. Cas. No. 5,754; *The Sue*, 22 Fed. 843; *Logwood v. Memphis & C. R. Co.*, 23 Fed. Rep. 318; *Murphy v. Western & A. R. Co.*, Id. 637.

<sup>55</sup> *State v. Gibson*, 36 Ind. 389; *Lonas v. State*, 3 Helsk. 287; *State v. Hairston*, 63 N. C. 451; *In re Hobbs*, 1 Woods, 537, Fed. Cas. No. 6,550; *Ex parte Kinney*, 3 Hughes, 9, Fed. Cas. No. 7,825; *Green v. State*, 58 Ala. 190.

<sup>56</sup> *Pace v. Alabama*, 106 U. S. 583, 1 Sup. Ct. 637; *Ellis v. State*, 42 Ala. 523.

person and may fulfill this requisite. But a foreign corporation, seeking to do business within the state, is not "within the jurisdiction" until it has complied with the conditions imposed by the state as a pre-requisite to the right of such corporations to enter its field. Until this is done, therefore, the corporation cannot claim the benefit of the equal protection of the state's laws.<sup>57</sup>

#### RIGHT TO CHOOSE OCCUPATION.

**147. The right of every man to choose his own occupation, profession, or employment, though not expressly guarantied by the constitutions, is included in the right to the pursuit of happiness. But, for the welfare of society, the conduct of certain kinds of business, or the qualifications of those who shall be allowed to pursue them, may be regulated by the state in the exercise of the police power.**

"Among these inalienable rights, as proclaimed in that great document [the Declaration of Independence] is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."<sup>58</sup> To secure this right, it is necessary that there should be no distinction or discrimination, in the laws of the state, as to the persons who may pursue given

<sup>57</sup> *Pembina C. S. M. & M. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 7 Sup. Ct. 108.

<sup>58</sup> *Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746, 4 Sup. Ct. 652, opinion of Field, J.

callings, except such as may be founded on and justified by the power of police. The rights of all citizens in this matter are equal. No discrimination, for instance, could lawfully be made between citizens founded solely on race or color. And if the United States, by treaty with a foreign power, has given its subjects the right to come to this country and take up their residence here, they are so far within the equal protection of our laws that they are entitled, as all others are, to engage in business or hire out their services. And consequently the state would have no right to prohibit its citizens from giving them employment.<sup>59</sup> But the state, as above remarked, may limit the right of employment so far as may be necessary in the exercise of the police power. This principle has been fully explained in the chapter specially devoted to that power of the government, and the reader is referred thereto for more specific details.

A part of the right to choose one's occupation is the right to be free from unlawful interference or control in the conduct of it. But here, as before, we find the state invested with a certain regulative power which is to be exercised for the benefit of the whole community. This also has been explained in the chapter just referred to. Moreover, in respect to some few occupations, either immemorial custom or the necessities of society have given to the state the right to regulate them in respect to other matters than the right to engage in them and the fixing of charges. Thus, common carriers, and particularly railroad companies, are so far under the control of the state that it may not only fix their rates for transportation, but also subject them to the supervision of a commission, fix their liability for damages done, regulate the acquisition and management of their right of way, the grade and crossings of their road, and the speed of their trains, and require them to furnish equal and impartial accommodations for all their patrons.<sup>60</sup> And the business of an inn-keeper is one where the public nature of the occupation prevents the individual from enjoying the same liberty in the conduct of his business which is accorded to other trades more private in their character. At common law, one who keeps an inn or house of public entertain-

<sup>59</sup> *Baker v. Portland*, 5 Sawy. 566, Fed. Cas. No. 777; *Chapman v. Toy Long*, 4 Sawy. 28, Fed. Cas. No. 2,610.

<sup>60</sup> *Decuir v. Benson*, 27 La. Ann. 1; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155.

ment may not choose his guests, but so long as he has accommodations he must receive and entertain impartially all orderly, decent, and proper persons who may come and who are able to pay his charges.<sup>61</sup> It is difficult to define the exact ground on which the liberty of contract is allowed to be interfered with by statutes fixing the legal rate of interest on money loaned and the penalties of usury. But this power "has been employed from the earliest days, and has been too long acquiesced in to be questioned now."<sup>62</sup>

Monopolies were illegal at common law.<sup>63</sup> And the grant of exclusive privileges with respect to any business or occupation to one man or set of men is necessarily in conflict with the constitutional right of all others to choose their own pursuits. And in many of the states, the constitutions expressly forbid the grant of monopolies or of special or exclusive privileges. But yet there are reasons of public policy which will justify the grant of monopolies (unless specifically prohibited by the constitution) in many cases. Certain kinds of enterprise can be undertaken only by those who are able to command large capital. Certain others can be effectively managed only when the privileges are exclusive. Others again are of little value to the originator unless he may possess a monopoly. If in these cases the business is of such a nature that the community has an interest in its existence, and if the interests of the public can be best subserved by placing the business exclusively in the hands of an individual or corporation, these considerations will justify the closing of that business to all others. Familiar illustrations of such kinds of business are to be seen in the works of companies furnishing gas or water to a city, or operating street-cars on its highways, or controlling the business of slaughtering cattle for its markets. The grant of patents for inventions and of copyrights is also a case of a lawful monopoly.<sup>64</sup>

<sup>61</sup> *Howell v. Jackson*, 6 Car. & P. 723; *Markham v. Brown*, 8 N. H. 523.

<sup>62</sup> *Cooley*, Const. Law, 235.

<sup>63</sup> *Case of Monopolies (Darcy v. Allein)*, 11 Coke, 84.

<sup>64</sup> 1 *Hare*, Am. Const. Law, 778-782; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co.*, 115 U. S. 650, 6 Sup. Ct. 252; *Slaughterhouse Cases*, 16 Wall. 36; *State v. Milwaukee Gaslight Co.*, 29 Wis. 454.

### MARRIAGE AND DIVORCE.

148. The right to enter into the relation of marriage is a natural right. But in the interests of society, it may be regulated, and to a proper extent limited, by law. For the same reason, the dissolution of the marriage relation, during the life of the parties, can take place only in accordance with general public laws.

Marriage is not a mere contract, but it creates a status. It is for the interest of the state that marriages should take place and be fruitful, but not that they should be had between unfit persons or those who would be likely to inflict upon the community a helpless, feeble, or demoralized progeny. For this reason, it is competent for the state to prohibit the intermarriage of persons standing in a near degree of consanguinity, persons who have not attained a sufficient age, and those who are mentally afflicted or diseased. Moreover, while it would probably not be competent for the state to require any particular religious form or ceremony to be observed in the formation of the marriage relation, it is undoubtedly proper to establish such rules (as to the obtaining of a license, the registration of marriages, and the like.) as will tend to guard against improvidence in assuming the responsibilities of that estate, and against fraud, and also to secure publicity, certainty, and official evidence. And since marriage is not a mere civil contract, it follows that it cannot be dissolved at the will of the parties. The interest which the state has in this status, and in its preservation, gives it the right to prescribe general and uniform laws enumerating the causes for which divorces may be granted and regulating the procedure thereon.

### SUMPTUARY LAWS.

149. Sumptuary laws, in general, are not only utterly foreign to the spirit of our institutions, but they are inconsistent with the guaranties of personal liberty and the right of property. Laws partaking of the nature of sump-

**tuary laws, however, may be passed in the lawful exercise of the police power of the state.**

Sumptuary laws are laws made for the purpose of restraining luxury or extravagance, particularly against inordinate expenditures in the matter of apparel, food, furniture, etc. They are odious in character, and contrary to the principle of liberty which assures to each the right to so use and dispose of his own property as shall seem best to him, provided he does not infringe upon the rights of others. Very few instances of an attempt to make or enforce such laws are recorded in our judicial annals. Almost the only example is that of an early statute of Kentucky, which required the owners of wild lands to improve them within a specified time, on pain of forfeiture. The act was held unconstitutional.<sup>65</sup> But the police power of the state authorizes it to enact laws which shall restrain the citizen from making such use of his property or his liberty as may be injurious to the public safety, health, or morals. For instance, the restrictions upon the manufacture and sale of intoxicants, if they are to be regarded as in any sense sumptuary laws, are nevertheless valid as made in the exercise of this power. So also it is said that women may be forbidden to go about dressed in men's attire, as a necessary regulation against immorality and indecency.<sup>66</sup>

#### EDUCATION.

**150. In most of the American states, the right to acquire education is recognized by the constitutions as a civil right, which it is the duty of the state to preserve and protect.**

This recognition of the right of education is effected by provisions in the constitutions declaring that, as the general diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people, it shall be the duty of the legislature to encourage the promotion of learning, or by similar provisions. Almost without exception, the state constitutions re-

<sup>65</sup> *Gaines v. Buford*, 1 Dana, 481; *Violet v. Violet*, 2 Dana, 323.

<sup>66</sup> *Cooley*, Const. Law (2d Ed.) 246.

quire the legislature to provide a system of free schools, and in many of the states a school fund is provided by the constitution to be used for that purpose. In eighteen of the states, the constitution provides for a state university.<sup>67</sup> But as a rule, these instruments also provide that no public money shall ever be appropriated for the support of any sectarian or denominational school. In some cases the constitution authorizes the legislature to make laws for the compulsory attendance of children at the public schools. But this would clearly be within the competence of a state legislature, even without direct authorization, at least in so far as to enforce attendance at such schools upon all children whose education was not otherwise provided for. To what extent the legislature shall go in making provision for public education, is a question which, except in so far as it may be regulated by the constitution, is for the legislative discretion solely. Not only the common English branches may be taught, but provision may be made for high schools and normal schools.<sup>68</sup> Since the public schools are established by the public and for the benefit of the public, the system must be equal and impartial and provide the same accommodations and opportunities for all who may be entitled to take the benefit of them, without any distinction or discrimination, except such as may be founded on age or degree of advancement.

A part of the public school system, in this country, consists in the division of the state into separate "school districts," which are invested, to a considerable extent, with powers of local self-government, and are regarded as quasi municipal corporations. Money for the support of the schools is raised by general taxation in the several districts, or throughout the state. To such taxation all property owners are liable, whether or not they have children to be educated at the public expense. The benefit of the public schools is for the state, and not for the individual, and no one can say that he is not benefited thereby, although one may be benefited more directly than another. Sometimes also the state will lend its aid to educational institutions which are not directly under

<sup>67</sup> Stim. Am. St. Law, p. 11.

<sup>68</sup> Com. v. Hartman, 17 Pa. St. 118; *Stuart v. School Dist.*, 30 Mich. 63; *Powell v. Board of Education*, 97 Ill. 375.

its control, by exempting their property from taxation. In view of the importance to the state of a general diffusion of education, it cannot be said that such exemptions from taxation are an unlawful partiality shown to individuals.

### DUE PROCESS OF LAW.

**151. By the provisions of the federal constitution, both the United States and the several states are prohibited from depriving any person of his life, liberty, or property without due process of law.**

The forty-sixth article of Magna Charta declares that "no freeman shall be taken, or imprisoned, or disseised, or outlawed, or banished, or anyways destroyed, nor will we [the king] pass upon him or commit him to prison, unless by the legal judgment of his peers, or by the law of the land." This has always been regarded as one of the great safeguards of liberty, and it has been incorporated, as a matter of course, in every American constitution. The language of the clause, as found in these instruments, is not always the same. It is more usual to employ the phrase "due process of law" than that which appears in Magna Charta. But it is well settled, by repeated decisions of the courts, that the two terms, "due process of law" and "the law of the land," are of exactly equivalent import.<sup>69</sup>

#### *Meaning of the Term; Method of Interpretation.*

In view of the rule that words and phrases, used in constitutions, which had acquired a settled meaning at common law, are to be understood in their ancient and fixed signification, it is important to inquire what was the meaning of the phrase "law of the land" in the old English law. At the same time, while the historical interpretation of these words is of value, it is not to be relied on exclusively. Regard must be had to the principles of liberty which it was intended to perpetuate. It is true, as stated in *Murray v. Hoboken Land Imp.*

<sup>69</sup> *Murray v. Hoboken Land & Imp. Co.*, 18 How. 272; *Davidson v. New Orleans*, 96 U. S. 97; *Greene v. Briggs*, 1 Curt. 311, Fed. Cas. No. 5,764; *Ervine's Appeal*, 16 Pa. St. 256; *Parsons v. Russell*, 11 Mich. 129.

Co.,<sup>70</sup> that any process, not otherwise forbidden, must be taken to be due process of law if it can show the sanction of settled usage both in England and this country. But this does not mean that everything known to the common law is due process of law. Neither does it mean that nothing can be held to answer this description unless it was a part of the common law or established by immemorial usage. "To hold that such a characteristic is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress and improvement." The constitutional guaranty does not deprive the state of the power to devise new remedies or processes, and to adapt them to the changing conditions of business and society. That which the provision is intended to perpetuate is not remedies or forms of procedure, but the established principles of private right and distributive justice, the very substance of individual rights to life, liberty, and property. "There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and varied experiences of our own situation and system will mould and shape it into new and not less useful forms."<sup>71</sup> "When the government, through its established agencies, interferes with the title to one's property or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely."<sup>72</sup>

<sup>70</sup> 18 How. 272.

<sup>71</sup> *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 292. See *Brown v. Levee Com'rs*, 50 Miss. 468; *People v. Board of Supervisors*, 70 N. Y. 228. In the case first cited it was held that a presentment or indictment by a grand jury, in cases of felony, is not essential to due process of law, where there is substituted for it a proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel and to the cross-examination of the witnesses produced on the part of the prosecution.

<sup>72</sup> *Cooley*, Const. Lim. 356.

*Definitions of Due Process of Law.*

In the first place, it must be evident that "due process of law" means something more than a statute. An act of the legislature may be process of law, but it is not "due process" unless it conforms to the requirements of the constitution and to the settled principles of right and justice. "Everything which may pass under the forms of an enactment is not to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all the powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."<sup>73</sup> The law of the land means the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.<sup>74</sup> It means, in each particular case, such an exertion of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.<sup>75</sup> "As to the words from Magna Charta incorporated in the constitution, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."<sup>76</sup>

<sup>73</sup> Daniel Webster, in his argument in the Dartmouth College Case, 4 Wheat. 518. See, also, *In re Ziebold*, 23 Fed. 792; *Hoke v. Henderson*, 4 Dev. (N. C.) 15; *Norman v. Heist*, 5 Watts & S. 171.

<sup>74</sup> *Clark v. Mitchell*, 64 Mo. 564; *Taylor v. Porter*, 4 Hill (N. Y.) 140, 145.

<sup>75</sup> *Cooley*, Const. Lim. 356; *Wynchamer v. People*, 13 N. Y. 378; *Ex parte Ah Fook*, 49 Cal. 402.

<sup>76</sup> *Bank of Columbia v. Okely*, 4 Wheat. 235, 244. See, also, *Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. 577.

It should be observed that the constitutional requirement of due process of law extends to administrative and executive proceedings as well as to judicial action.<sup>77</sup> But when the property of the citizen is taken or injured by the public, either under the power of eminent domain or that of police or taxation, it cannot be said that he is deprived of it without due process of law. On the contrary, if the exercise of any of these powers is conducted in strict accordance with the rules of the constitution and the laws, the requirement of due process of law is fully complied with. But if there be any other lawful way in which the property of the individual can be taken from him by authority of the state, it must be according to the law of the land, or the exaction will be unwarranted.<sup>78</sup> We should also notice that a state cannot deprive an owner of his property without due process of law through the medium of a constitutional convention any more than it can through an act of legislation.<sup>79</sup> And whoever, by virtue of his public position under a state government, deprives another of life, liberty, or property without due process of law, violates the prohibition of the constitution; and as he acts in the name of the state and for the state, and is clothed with her power, his act is the act of the state. If this were not so, the prohibition would have no meaning, and it would follow that the state had clothed one of her agents with power to annul or evade it.<sup>80</sup>

*Confiscation and Forfeiture Acts.*

Forfeitures of rights and property cannot be adjudged by legislative acts, and confiscations without a judicial hearing, after due notice, would be void as not being due process of law.<sup>81</sup> This was the decision made in regard to the act of congress, passed in 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, and to seize and confiscate the property of rebels." This statute declared that all the estate and property, money, stocks, and credits of certain officers of the "Confederate States," and of certain other persons therein mentioned, should be seized and confiscated by proceedings in rem in the federal courts, and that "it shall be a sufficient bar to any suit brought by such persons for the possession

<sup>77</sup> *Stuart v. Palmer*, 74 N. Y. 183.

<sup>79</sup> *Clark v. Mitchell*, 69 Mo. 627.

<sup>78</sup> *Sweet v. Hurlbert*, 51 Barb. 312.

<sup>80</sup> *Ex parte Virginia*, 100 U. S. 339.

<sup>81</sup> *Cooley*, Const. Lim. 362.

or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section." It was held that this act was unconstitutional, because it attempted to authorize the confiscation of the property of citizens, as a punishment for treason and other crimes, without due process of law, by proceedings in rem in any district in which the property might be, without presentment or indictment by a grand jury, without arrest or summons of the owner, and upon such evidence of his guilt as would be proof of any fact in admiralty or revenue cases.<sup>82</sup> But on the other hand, forfeitures of property for violations of the United States internal revenue laws, when judicially ascertained and declared, are in conformity with the requirement of due process of law.<sup>83</sup> While property may be forfeited to the state for default in the payment of taxes duly assessed upon it, yet it is not competent, by such a proceeding, to vest in the state an absolute and indefeasible title, unless the owner shall first have been afforded an opportunity to appear and be heard before some tribunal or board, empowered to grant relief, and to make good any defenses which he may have against the legality of the tax or the liability of his estate therefor.<sup>84</sup>

*Eminent Domain Proceedings.*

The requirement of due process of law applies no less to proceedings under the power of eminent domain than to any others. But here there are special rules in force, owing to the peculiar nature of the proceeding, which have been sufficiently explained in the chapter devoted to that subject. It should be added that the necessities of the case will sometimes justify a merely constructive notice to the owner of the property to be affected. Thus, in proceedings for the condemnation of land for a railroad, a published notice in compliance with the terms of the statute, specifying the section, township, range, county and state in which it is proposed to locate the road, is a sufficient notice to a non-resident owner of land therein, and such publication is due process of law as applied to such a case.<sup>85</sup>

<sup>82</sup> *Norris v. Doniphan*, 4 Metc. (Ky.) 385.

<sup>83</sup> *Henderson's Distilled Spirits*, 14 Wall. 44; *U. S. v. The Reindeer*, 2 Cliff. 57, Fed. Cas. No. 16,144.

<sup>84</sup> *Griffin v. Mixon*, 38 Miss. 424; *Kinney v. Beverley*, 2 Hen. & M. 318; *Cooley, Tax'n*, 465; *Black, Tax Titles*, § 195.

<sup>85</sup> *Huling v. Kaw Val. Ry. & Imp. Co.*, 130 U. S. 559, 9 Sup. Ct. 603.

*Regulation of Property.*

"The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."<sup>86</sup> But while the deterioration of property, or the imposition of new restrictions upon its use (as, for instance, by a law prohibiting the business for which the property was specially adapted) may amount to a deprivation of it, yet if this is done in the lawful exercise of the police power, such deprivation is not without "due process of law."<sup>87</sup>

*Abatement of Nuisances.*

A statute or ordinance authorizing or requiring the destruction of private property, on the ground of its being a public nuisance, without any investigation or hearing, is void.<sup>88</sup> But a law giving to the courts of equity power to proceed by injunction for the abatement of a public nuisance, is not objectionable as depriving persons of their property without due process of law.<sup>89</sup>

## DUE PROCESS OF LAW IN REVENUE AND TAX PROCEEDINGS.

**152. Summary processes are not necessarily unjust or unconstitutional, or open to the objection that they deprive persons of their property without due process of law.<sup>90</sup> And proceedings for the collection of the public revenue**

<sup>86</sup> In re Jacobs, 98 N. Y. 98.

<sup>87</sup> Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273; Munn v. People, 69 Ill. 80. And see Minneapolis & St. L. Ry. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207.

<sup>88</sup> Darst v. People, 51 Ill. 286; Miller v. Burch, 32 Tex. 208.

<sup>89</sup> Carleton v. Rugg, 149 Mass. 550, 22 N. E. 55.

<sup>90</sup> McMillen v. Anderson, 95 U. S. 37.

**do not always require the intervention of a court or a jury, provided the property owner is afforded an adequate opportunity to contest the legality of the demand made upon his estate.**

The power of the state to levy and collect taxes is inherent in the very notion of sovereignty. And the efficient exercise of this power (and hence the very maintenance of government) is entirely inconsistent with the idea that a jury, or the courts, must in all cases lend their aid in the proceedings. It is competent for the legislature, not only to determine what taxes shall be raised, but also to prescribe the means of their assessment and of their collection. And as a necessary consequence, it has the right to enact that payment of taxes shall be enforced by the sale or forfeiture of the delinquent land. And all this may be done without providing for any judicial trial of the right to lay the taxes or of the liability of the person upon whom they are charged. But still, it is not competent for the legislature to proceed to the final and absolute divestiture of title without affording the tax payer an opportunity to be heard in opposition to it. "Due process of law" requires that he shall have a chance to interpose objections to the validity of the tax, or to the contention that his land is liable for it, or to the manner of assessing or collecting it, at some stage of the proceedings before his property is irrevocably gone, and before some authority competent to afford relief in case of invalidity or injustice. But this authority may be a board of assessors, or a board of equalization or of commissioners of forfeited lands.<sup>91</sup>

<sup>91</sup> See *Kelly v. Pittsburgh*, 104 U. S. 78; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663; *Weimer v. Bunbury*, 30 Mich. 201; *Astor v. Mayor, etc., of New York*, 37 N. Y. Super. Ct. 539; *Cruikshanks v. City Council*, 1 McCord, 360; *State v. Allen*, 2 McCord, 55; *Albany City Nat. Bank v. Maher*, 20 Blatchf. 341, 9 Fed. 884; *Griswold College v. Davenport*, 65 Iowa, 633, 22 N. W. 904; *Santa Clara Co. v. Southern Pac. R. Co.*, 18 Fed. 385; *San Mateo Co. v. Southern Pac. R. Co.*, 13 Fed. 722; *Gatch v. Des Moines*, 63 Iowa, 718, 18 N. W. 310; *In re McMahon*, 102 N. Y. 176, 6 N. E. 400; *Cincinnati, N. O. & T. P. R. Co. v. Com.*, 81 Ky. 492; *Id.*, 115 U. S. 321, 6 Sup. Ct. 57; *Bartlett v. Wilson*, 59 Vt. 23. In the case last cited, it was said: "Government must have the public revenues, and obviously cannot postpone their collection to await the determination of a common law trial to see if it is entitled to

Thus, a state tax law which gives notice of the proposed assessment to the property owner, by requiring him to hand in a list of his taxable property at a time named to a proper officer, and which gives him notice of the meeting of a board of equalization and review, and a right and opportunity to appear before such board and be heard on his objections to the assessment, and which affords him an opportunity, in a suit at law for the collection of the tax, to judicially contest the validity of the proceedings, does not necessarily deprive him of his property without due process of law, within the meaning of the fourteenth amendment.<sup>92</sup> Again, a statute by which the legislature validates a void assessment of taxes for local improvements is not open to this objection, although it gives the property owners no opportunity to be heard upon the whole amount of the assessment, if it does afford them notice and a hearing upon the question of the equitable apportionment among them of the total sum directed to be levied, and thus enables them to contest the constitutionality of the statute.<sup>93</sup> And a statute which authorizes a city to open and improve streets, and to assess the cost thereof on the owners of adjoining lots, does not deprive such owners of their property without due process of law nor deny to them the equal protection of the laws.<sup>94</sup>

#### DUE PROCESS OF LAW IN JUDICIAL ACTION.

**153. Due process of law in judicial action implies a regular proceeding before a competent court, possessing jurisdiction, with an opportunity to the party to appear and be heard in his own defense or in rebuttal of the claim made against his property.**

them. It must from necessity proceed in a summary way, not omitting, however, those safeguards that protect individual rights. Its right to levy taxes is determined the moment the individual comes under the protection of its laws, and the only question open between it and its citizens is one of method in the enforcement of such right. If its method is one that in its intended and normal workings will result in equal and uniform taxation, as between all its citizens, and the right of hearing upon alleged errors is preserved, such method is due process of law.

<sup>92</sup> Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57.

<sup>93</sup> Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921.

<sup>94</sup> Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192.

“When life and liberty are in question, there must in every instance be judicial proceedings, and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment, before the punishment can be inflicted.”<sup>95</sup> In judicial proceedings, due process of law requires that the party shall be properly brought into court, and when there, shall have the right to set up any lawful defense to any proceeding against him.<sup>96</sup> But, as was explained in regard to tax and revenue proceedings, this requirement does not invariably demand the intervention of a jury or the forms of a suit or action. It is enough if the owner has notice and a full and fair opportunity to appear before a tribunal or board of officers, empowered to grant relief, and there to contest the proceedings.<sup>97</sup> But when the proceedings are had in a court of justice, and are based upon full jurisdiction lawfully acquired, and are conducted with a due regard to all the rights of the defendant, it must in general be held that the judgment arrived at is due process of law.<sup>98</sup>

#### *Jurisdiction.*

The validity of judicial action, as tested by this requirement of the constitution, is primarily dependent upon jurisdiction. Jurisdiction is the power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a res) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient. Jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the court must have jurisdiction of the persons, of the subject matter, and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it. It cannot adjudicate upon a subject which does not fall within its province

<sup>95</sup> 2 Story, Const. § 1946.

<sup>96</sup> Wright v. Cradlebaugh, 3 Nev. 341.

<sup>97</sup> Davidson v. New Orleans, 96 U. S. 97; Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825.

<sup>98</sup> Morley v. Lake Shore & M. S. R. Co., 146 U. S. 162, 13 Sup. Ct. 54.

as defined or limited by law. Neither can it go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit for its determination.<sup>99</sup> Jurisdiction of a particular controversy cannot be conferred on a court, which would not otherwise possess it, by the consent of the parties. Consent once given may be revoked, and want of jurisdiction may be alleged at any time.<sup>100</sup> But the provisions of a statute, that where two or more persons are sued in the same action, on a joint contract, and process is served on either, judgment may be entered against all, and execution may be levied on the partnership property, do not operate to deprive them of their property without due process of law.<sup>101</sup> And state legislation, simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property, and his rights against any attempt to enforce a judgment rendered without due process of law, is not in violation of the fourteenth amendment.<sup>102</sup>

*Proceedings in Personam and in Rem.*

These two classes of proceedings are distinguished as follows: A proceeding in personam is one whereby it is sought to obtain an adjudication against an individual fixing upon him a personal responsibility, liability, or duty; a proceeding in rem is one which seeks to determine the liability of a particular estate or article of property to the satisfaction of a specific claim made against it, or to determine a question of status. In actions in personam, jurisdiction of the person must be obtained by the service of process upon him within

<sup>99</sup> 1 Black, Judgm. § 215.

<sup>100</sup> *Mordecai v. Lindsay*, 19 How. 199; *Montgomery v. Anderson*, 21 How. 386; *Green v. Collins*, 6 Ired. 139; *Bostwick v. Perkins*, 4 Ga. 47; *Ginn v. Rogers*, 9 Ill. 131; *White v. Buchanan*, 6 Cold. 32. For the reason that consent cannot confer jurisdiction, if parties who are both domiciled in one state go into another and there collusively carry on divorce proceedings in the courts of the latter state, any decree which may be made will be null and void. *Hoffman v. Hoffman*, 46 N. Y. 30; *People v. Dawell*, 25 Mich. 247; *Leith v. Leith*, 39 N. H. 20; *Hanover v. Turner*, 14 Mass. 227; *Reel v. Elder*, 62 Pa. St. 308.

<sup>101</sup> *Brooks v. McIntyre*, 4 Mich. 316.

<sup>102</sup> *Kauffman v. Wootters*, 138 U. S. 285, 11 Sup. Ct. 298.

the territorial jurisdiction; otherwise no personal judgment can be rendered against him which will answer the requirement of due process of law. In proceedings in rem, jurisdiction is obtained by the seizure or attachment of the property, or (in cases of status) by the jurisdiction of the person whose status is to be passed upon. Examples of proceedings in rem are libels in admiralty or prize cases, forfeitures under the revenue laws, actions begun by the attachment of property of non-residents, and inquisitions of lunacy and actions in divorce. In all these cases, the constitutional requirement is fully satisfied if there is such jurisdiction as may be obtained by the corporal subjection of the property in question to the control of the court, or, in divorce and lunacy cases, jurisdiction of the person whose status is in question. No personal notice need be served on the owner of the property or on the defendant in divorce, if he is beyond the territorial jurisdiction of the court; but it is sufficient if a reasonable constructive notice is given to him, as by the publication of an advertisement.<sup>103</sup> As regards proceedings against non-residents, the distinctions between the two kinds of actions, and the requisites of jurisdiction in each, have been clearly stated by the United States supreme court in the important case of *Pennoyer v. Neff*.<sup>104</sup> Herein it was held that if the proceeding involves merely a determination of the personal liability of the defendant, he must be brought within the jurisdiction of the court by the service of process within the state, or by his voluntary appearance. And hence a personal judgment is without any validity if it is rendered by a state court in an action upon a money demand against a non-resident of the state who was served by a publication of the summons, but upon whom no personal service of process within the state was made, and who did not appear. But the state, having within its territory property of a non-resident, may hold and appropriate it to satisfy the claims of its own citizens against him, and its tribunals may inquire into his obligations to the extent necessary to control the disposition of that property. And substituted service by publication is sufficient to inform a non-resident of the object of proceedings taken, when property is once brought under the control of the court by seizure or some equivalent act.

<sup>103</sup> *Happy v. Mosher*, 48 N. Y. 313; *Gray v. Kimball*, 42 Me. 290.

<sup>104</sup> 95 U. S. 714.

*Summary Proceedings.*

Summary proceedings against sheriffs, constables, sureties on bail and appeal bonds, collectors of the public revenue, and the like, are not inconsistent with the constitutional guaranty of due process of law. Thus, the auditing of the accounts of a collector of the customs, and ascertainment of the balance due from him at the treasury department, the issue of a distress warrant therefor, and a levy on his property under the warrant, do not conflict with this provision of the constitution. "We apprehend that there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenue."<sup>105</sup>

*Punishment of Contempts.*

A person who is imprisoned or fined for a contempt of a court or legislature is not deprived of his liberty or property without due process of law, if the proceedings were regular, although he was not tried by a jury, and although the authority which inflicts the punishment is the same to which the wrong was done. But in order that the proceedings shall be valid, it is necessary that the party accused shall have notice and a full and fair opportunity to defend or excuse himself.<sup>106</sup> The power to punish such contempts is possessed by all courts of record, and by the state legislatures, and, for limited purposes, by congress. But it does not generally belong to inferior magistrates, boards of municipal officers, city councils, and other such bodies.<sup>107</sup> Proceedings of this sort may be reviewed by the appellate courts. And on such reviews, the distinctions between the records of courts of general jurisdiction and those of courts of inferior jurisdiction will be observed, with regard to the presumptions which respectively attend them. That is, if the proceeding was had in a court of general jurisdiction, it will be presumed that jurisdiction attached and that the judgment of the court was justified

<sup>105</sup> *Murray v. Hoboken Land Imp. Co.*, 18 How. 272.

<sup>106</sup> *Ex parte Bradley*, 7 Wall. 364; *Eilenbecker v. District Court of Plymouth Co.*, 134 U. S. 31, 10 Sup. Ct. 424; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77.

<sup>107</sup> *Whitcomb's Case*, 120 Mass. 118.

by the facts, unless the record shows the contrary.<sup>108</sup> But if the record comes from an inferior court, it must set out the facts, and the facts set out must show that a contempt was actually committed, otherwise the proceedings will be void.<sup>109</sup>

*Erroneous Judgments.*

The mere fact that a judgment rendered against a person, when the court had jurisdiction, is irregular (without being void) or is erroneous in point of law, will not justify him in asserting that due process of law has been denied to him. When the legislature of a state enacts laws for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish parties the necessary constitutional protection of life, liberty, and property, it has performed its constitutional duty. And if one of its courts, acting within its jurisdiction, makes an erroneous decision in this respect, the state cannot be deemed guilty of violating the constitutional provision.<sup>110</sup>

PROTECTION OF VESTED RIGHTS.

**154. Vested rights are to be secured and protected by the law, and a statute which divests or destroys such rights, unless it be by due process of law, is unconstitutional and void.**

*Definition of Vested Rights.*

Vested rights are rights which have so completely and definitively accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the

<sup>108</sup> *Bradley v. Fisher*, 13 Wall. 335.

<sup>109</sup> *Batchelder v. Moore*, 42 Cal. 412; *Turner v. Com.*, 2 Metc. (Ky.) 619.

<sup>110</sup> *Arrowsmith v. Harmoning*, 118 U. S. 194, 6 Sup. Ct. 1023; *In re Converse*, 137 U. S. 624, 11 Sup. Ct. 191; *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224.

established methods of procedure and for the public welfare.<sup>111</sup> A vested right, as distinguished from an interest in expectancy or a contingent interest, is a right of action or property immediately fixed in some particular person or persons. A right, to be considered as vested, must be something more than a mere expectation based upon the anticipated continuance of existing laws. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to a present or future enforcement of a demand, or a legal exemption from a demand made by another.<sup>112</sup> It must be observed that, with and by means of due process of law, vested rights may lawfully be divested. This happens when the individual is compelled to pay taxes lawfully levied and assessed, when his property is taken by the public authorities for a public purpose, under the power of eminent domain, when the free use and enjoyment of his property is interfered with by law in the enforcement of lawful police regulations, and also when his lands or goods are seized and sold for the satisfaction of an execution duly issued upon a judgment recovered against him in a suit at law.

#### *Nature of Estates.*

The nature of estates is to a considerable degree subject to the control of the legislature, and may be changed as the public policy or interests may require, provided only that vested interests in property be not made less beneficial by such changes. It is on this ground that the courts have sustained laws changing estates tail into estates in fee simple and joint tenancy into tenancy in common.<sup>113</sup>

#### *Rules of Descent.*

It is an ancient maxim of the law that no man is heir to the living. So long, therefore, as a man retains the power to dispose of his property as he chooses, the expectation which any other per-

<sup>111</sup> Black, Law Dict. s. v.

<sup>112</sup> Weidenger v. Spruance, 101 Ill. 278.

<sup>113</sup> Holbrook v. Finney, 4 Mass. 566; Burghardt v. Turner, 12 Pick. 534. In undertaking to administer or settle trusts, the legislature cannot assume to decide upon the rights of adverse claimants; this must be left to the courts. Cash, Appellant, 6 Mich. 193.

son may have of succeeding to his estate, should he die intestate, is not a vested right, but a mere anticipation. Hence it is in the power of the legislature to change the rules of descent, in respect to all estates which have not already passed to heirs or devisees.<sup>114</sup>

*Dower and Curtesy.*

A wife's right of dower does not become vested by the marriage, but remains an interest in expectancy until the death of the husband. Until that time, therefore, it is not protected by the constitution, but may be abolished by statute. And the same is true of a husband's inchoate right of curtesy, after the marriage but before the birth of issue. These expectant rights are not property or vested interests in such sense as to secure them against legislative interference.<sup>115</sup>

*Forfeitures.*

No person can have a vested right in a forfeiture until the forfeiture has been judicially ascertained and declared. Hence a right of action for a statutory forfeiture may be destroyed by statute at any time before a recovery is had, and no vested right will be disturbed thereby.<sup>116</sup>

*Betterment Laws.*

These are statutes which allow to a person who has held land adversely in good faith the value of the improvements which he has put upon it, and grant him a lien therefor, when his supposed title is overthrown by the real owner. They are not unconstitutional as divesting rights or lacking the essentials of due process of law, since they merely enforce an equitable right.<sup>117</sup>

<sup>114</sup> Cooley, Const. Lim. 359.

<sup>115</sup> Lucas v. Sawyer, 17 Iowa, 517; Noel v. Ewing, 9 Ind. 37; Pratt v. Tefft, 14 Mich. 191; Westervelt v. Gregg, 12 N. Y. 202. Vested rights acquired in the property of a wife by virtue of the law existing at the time of the marriage cannot be disturbed by subsequent legislation, but the legislature may pass a law regulating the title of property acquired by the wife after the passage of the act. Kelly v. McCarthy, 3 Bradf. Sur. (N. Y.) 7.

<sup>116</sup> Breitung v. Lindauer, 37 Mich. 217.

<sup>117</sup> Whitney v. Richardson, 31 Vt. 300; Childs v. Shower, 18 Iowa, 261; McCoy v. Grandy, 3 Ohio St. 463.

*Causes of Action.*

A cause of action, accruing at common law or by a contract, which is fixed and settled in a particular person, and continues in force, is a vested right within the protection of the constitutions. It is property, and it cannot lawfully be divested by legislative interference, or by taking away the legal means of making it effective, or by so hampering it with conditions or restrictions as to render it practically worthless.<sup>118</sup>

*Remedies.*

No one can be said to have a vested right in any particular remedy for the enforcement of his rights or the redress of injuries done him. Remedies and remedial rights and process are always subject to the control of the legislature. It would not be competent to deny all remedy. But subject to this limitation, the state may substitute one remedy for another, or change modes of procedure, or alter the system of courts, as public policy may seem to require. A man with a fixed right of action may be said to have a vested right to a remedy, but not to that particular form of remedy which was available when his cause of action accrued.<sup>119</sup> Of course it should be remembered that the right of trial by jury cannot be taken away in cases where it is guaranteed by the constitution. Nor, if the obligation of a contract is involved, can it lawfully be impaired by any changes in the remedy. And the converse of this rule is equally true. That is, if there is a right or cause of action in existence, for which the law has provided no remedy or an inadequate remedy, the party against whom the right or cause of action avails has no vested right to have the law continue as it is, and he cannot complain if a subsequent statute provides a new, additional, or more effective remedy.<sup>120</sup>

*Statutes of Limitation.*

Vested rights may be lost by the negligence or indifference of the owner. All the states have enacted statutes of limitation,

<sup>118</sup> Johnson v. Jones, 44 Ill. 142; Griffin v. Wilcox, 21 Ind. 370; Hubbard v. Brainard, 35 Conn. 563.

<sup>119</sup> Railroad Co. v. Hecht, 95 U. S. 168; Tennessee v. Sneed, 96 U. S. 69; Oatman v. Bond, 15 Wis. 20.

<sup>120</sup> Hope v. Johnson, 2 Yerg. 123; Town of Danville v. Pace, 25 Grat. 1; Bartlett v. Lang, 2 Ala. 401.

by which it is provided that actions for the enforcement of rights or the redress of injuries must be instituted within a certain time or else be forever barred. It is reasonable to presume that after a certain lapse of time the plaintiff has abandoned his claim or has received satisfaction for it. And it would be unjust to allow him to delay until the defendant shall have lost the means of disproving the claim. Moreover, it is for the interest of the state that there should be an end of litigation. Hence while the state must provide a remedy for all rights of action, it is under no obligation to allow the suitor an indefinite right of access to the courts. Any statute of limitations must afford an opportunity to bring an action within a reasonable time. Rights cannot be cut off arbitrarily.<sup>121</sup> But if this condition is satisfied, the negligent or slothful suitor, when confronted with the bar of the statute of limitations, cannot complain that he is unjustly deprived of his vested rights.<sup>122</sup> When the period prescribed by the statute of limitations has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect so as to disturb this title.<sup>123</sup> But it is held that the repeal of a statute of limitations of actions on personal debts does not, as applied to a debtor the right of action against whom is already barred, deprive him of his property without due process of law.<sup>124</sup> It is a rule of law that statutes of

<sup>121</sup> *Chapman v. Douglas Co.*, 107 U. S. 348, 2 Sup. Ct. 62; *Pereles v. Watertown*, 6 Biss. 79, Fed. Cas. No. 10,980; *Hart v. Bostwick*, 14 Fla. 162; *Berry v. Ransdall*, 4 Metc. (Ky.) 292; *Ludwig v. Stewart*, 32 Mich. 27.

<sup>122</sup> *Bell v. Morrison*, 1 Pet. 351; *State v. Jones*, 21 Md. 432; *Pitman v. Bump*, 5 Or. 17.

<sup>123</sup> *Cooley*, Const. Lim. 365, citing *Brent v. Chapman*, 5 Cranch, 358; *Lockhart v. Horn*, 1 Woods, 628, Fed. Cas. No. 8,445; *Reformed Church of Gallupville v. Schoolcraft*, 65 N. Y. 134; *Atkinson v. Dunlap*, 50 Me. 111; *Yancy v. Yancy*, 5 Heisk. 353; *Thompson v. Read*, 41 Iowa, 48; *Lockport v. Walden*, 54 N. H. 167; *Hicks v. Steigleman*, 49 Miss. 377; *Horbach v. Miller*, 4 Neb. 31; *Bradford v. Shine*, 13 Fla. 393.

<sup>124</sup> *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209.

limitation do not run against the sovereign unless by their express terms. Hence rights of action vested in the state itself will not be barred by lapse of time, unless the law specifically so declares.<sup>125</sup> And as no state can hinder the federal government in the enforcement of its rights or the prosecution of its claims, the statutes of limitation enacted by the states have no applicability to the United States.<sup>126</sup>

*Rules of Evidence.*

The rules of evidence are a part of the machinery of judicial administration, and not property in which any person can have a vested right. No litigant can claim a right to have his controversy determined according to the rules of evidence existing at the time the cause of action accrued. Hence if a statute modifies or changes the rules of evidence,—as by allowing parol evidence to vary the terms of a written document, or making husband and wife competent to testify against each other, or shifting the burden of proof in certain cases, or making defective records competent evidence of their contents, or making the protest of a note evidence of the facts which it recites,—the new rule may be made applicable to existing controversies, and no vested rights are impaired thereby.<sup>127</sup> But still the legislature has no power, under the pretense of changing the rules of evidence, to establish such regulations or limitations as will altogether preclude a party from establishing or defending his rights.<sup>128</sup> A good illustration of these rules is found in the statutory regulation of the evidential force of tax deeds. A deed of this kind may be made prima facie evidence of title in the grantee. And it may be made conclusive evidence of regularity in all such non-essential matters of practice as might have been cured by a retroactive statute. But it cannot be made conclusive evidence of the lawful devolution of title to the tax purchaser. For this would entirely preclude the owner of the property from showing any defenses which he might have against either the validity of the tax or the legality

<sup>125</sup> *Gibson v. Chouteau*, 13 Wall. 92.

<sup>126</sup> *U. S. v. Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373.

<sup>127</sup> *Webb v. Den*, 17 How. 577; *Gibbs v. Gale*, 7 Md. 76; *Rich v. Flanders*, 39 N. H. 304.

<sup>128</sup> *Case v. Dean*, 16 Mich. 12; *Wright v. Cradlebaugh*, 3 Nev. 341; *East Kingston v. Towle*, 48 N. H. 57.

of the proceedings against his land. Any statute, therefore, is unconstitutional which attempts to make a tax deed conclusive evidence as to jurisdictional facts, or facts vital to the exercise of the power of taxation or sale, as distinguished from such facts as are merely formal, or of routine, or pertaining to the regularity or the manner of the exercise of such power.<sup>129</sup>

#### SEARCHES AND SEIZURES.

155. The fourth amendment to the federal constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." And in all the states a similar guaranty has been made a part of the organic law.

##### *Security of the Dwelling.*

It was the boast of the English common law that "every man's house is his castle." In the familiar words of Chatham, "the poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement." Nor was this conception of the sanctity of the private dwelling known only to the ancient law of our parent country. In the imperial law of Rome it was expressed in the noble maxim, "Domus sua cuique est tutissimum refugium," and in the correlative rule, "Nemo de domo sua extrahi potest." Such, therefore, is the jealous care with which the law protects the privacy of the home, that the owner may close his doors against all unlicensed entry and defend the possession and occupancy of his house against

<sup>129</sup> Callanan v. Hurley, 93 U. S. 387; McCready v. Sexton, 29 Iowa, 356; Abbott v. Lindenbower, 42 Mo. 162; Kelly v. Herrall, 20 Fed. 364; Ensign v. Barse, 107 N. Y. 329, 14 N. E. 460, and 15 N. E. 401; Sprague v. Pitt, McCahon, 212, Fed. Cas. No. 13,254; Hand v. Ballou, 12 N. Y. 541.

the intruder by the employment of whatever force may be needed to secure his privacy, even, in extreme cases, to the taking of life itself. A man assaulted in his own dwelling is not obliged to "flee to the wall," but he may defend his home, which is his castle of refuge, to any and all extremities.<sup>130</sup> It will therefore be seen that the right of security in the dwelling, justly esteemed one of the most important of civil rights, was not created by and did not depend upon the constitution, but existed long before, and was merely guarantied and secured by that instrument.<sup>131</sup> And although the constitutional provisions relate only to the privilege of the domicile against unreasonable searches and seizures, yet, if there be any other way in which the lawful rights of the dwelling may be invaded, it is adequately forbidden and punished by the common law. It should be added that the fourth amendment to the constitution of the United States does not extend to the state governments, but is a restriction only upon the legislature and judiciary of the Union.<sup>132</sup>

#### *General Warrants.*

The proximate cause for the introduction of this provision into the federal bill of rights was the apprehension that there might be an abuse of official power similar to that which had disgraced the reign of more than one English sovereign, under the system of inquisitorial proceedings called the issue of "general warrants." These warrants were used principally in the case of political offenses, and directed the arrest of the authors, printers, and publishers of obscene and seditious libels, and the seizure of their papers. They were issued by the secretaries of state, and authorized the officers to search all suspected places and seize all suspected persons. But their illegality consisted in the fact that no individual was specially named or described, or that no specific description of the place to be searched was given. The execution of the warrant was therefore left very much to the caprice of the officer. These warrants were plainly contrary to the spirit of the common law, and in violation of private rights. And they were liable to be wielded as instruments of tyranny in the hands of corrupt officials. Yet they continued in

<sup>130</sup> *Pond v. People*, 8 Mich. 150; *Patten v. People*, 18 Mich. 314; *Shorter v. People*, 2 N. Y. 193; *Bohanon v. Com.*, 8 Bush, 481; *Cooley*, Const. Lim. 308.

<sup>131</sup> *U. S. v. Crosby*, 1 Hughes, 448, Fed. Cas. No. 14,893.

<sup>132</sup> *Reed v. Rice*, 2 J. J. Marsh. 45.

use until 1763, at which time the court of King's Bench declared that they were illegal, and allowed the recovery of damages by those whose rights had been invaded under such warrants.<sup>133</sup>

*When an Entry may be Forced.*

The privacy of the dwelling is not to stand in the way of the due execution of the laws, nor is a man's house a sanctuary for those who are amenable to the criminal justice of the state. An entry into a private house may be forced by the officers of the law for the purpose of capturing a felon, or in order to arrest a person, known to be in hiding there, for treason, felony, or breach of the peace. Again, the house may be entered, and the owner evicted, when a court of competent jurisdiction has awarded the possession to another person. And in some few cases, in the enforcement of proper sanitary or police regulations, an entry may be justified without a warrant. But with these exceptions, the only manner in which officers can force their way into a dwelling house against the will of the proprietor, is by the sanction and command of a search warrant, the requisites of which we shall presently consider. With regard to the service of mere civil process, the rule is that the officer may not break or force open the outer door; but if he has lawfully gained an entry into the tenement, without force, he may then break open an inner door if he must do so in order to execute his writ.<sup>134</sup>

*Search Warrants.*

The constitutions do not forbid the issue of search warrants. They only prohibit "unreasonable" searches. The requisites of a lawful search warrant may be thus summarized: First, there must be a general public law authorizing it. It cannot be issued under special legislative act or at the mere pleasure or discretion of the magistrate. Second, it must issue from a court or magistrate of competent jurisdiction, empowered by law to grant it. Third, the application must be supported by a showing of probable cause, that is, by the production of evidence, satisfactory to the court or magistrate,

<sup>133</sup> *Wilkes v. Wood*, 19 How. St. Tr. 1153, Broom, Const. Law, 544; *Leach v. Money*, 19 How. St. Tr. 1001, Broom, Const. Law, 522; *Entick v. Carrington*, 19 How. St. Tr. 1030; Broom, Const. Law, 555; 2 Story, Const. § 1902; Pom. Const. Law, § 241.

<sup>134</sup> *Semayne's Case*, 5 Coke, 91. See, also, *Weimer v. Bunbury*, 30 Mich. 201.

that a case exists such as the law contemplates as proper for the use of this process. Fourth, the application must be verified by oath or affirmation. Fifth, the warrant must be issued to an officer authorized by law to execute it, not to any private person. Sixth, the warrant must contain a particular description of the place to be searched and of the persons or things to be apprehended or seized. Seventh, the warrant must provide for the bringing of the persons or things seized before the court or magistrate issuing it, in order that there may be a lawful examination into the causes alleged and a judicial investigation of the facts. Eighth, if it is intended that there shall be a condemnation or confiscation of property seized under a search warrant, notice must be given to the owner of the nature of the charge against him, and of the time, place, and manner in which he may make a defense and vindicate his rights.<sup>135</sup>

As a general rule, search warrants are to be employed only as an aid in the enforcement of the criminal laws. They may be issued for the recovery of stolen property and the arrest of the suspected thief, for the seizure of counterfeit money or forged documents, for smuggled goods and contraband articles, for the recovery of public documents and records unlawfully retained in private custody, for obscene publications authorized by law to be suppressed, for gambling devices and machines similarly under the condemnation of the law, for liquors illegally kept, for lottery tickets, for dynamite, gunpowder, and other dangerous materials. And there are also certain cases in which search warrants may be employed to deliver human beings from unlawful custody, particularly where the writ of habeas corpus could not be effectually used. Such would be the case of women suspected to be concealed in bawdy-houses, and of children abducted or kept away from their lawful guardians. In none of these cases, if the requisites above enumerated were complied with, could the execution of the search warrant be considered an "unreasonable" search.<sup>136</sup> But the warrant is never allowed to be used solely as the means of obtaining evidence against a person accused of crime. It is true that in some few cases, as in the search for stolen goods, the discovery of the article in question may furnish an item of evidence

<sup>135</sup> Bish. Crim. Pr. §§ 240-246; Cooley, Const. Lim. 304; *Greene v. Briggs*, 1 Curt. 311, Fed. Cas. No. 5,764.

<sup>136</sup> Cooley, Const. Lim. 306.

against the possessor of it. But in all such cases, either the complainant or the public has some interest in the property or in its destruction, and the finding of evidence is not the immediate reason for issuing the warrant.<sup>137</sup> But it was settled by the common law, in the cases of the "general warrants," and has always been the understanding of the American people, that this process could not be employed as a means of gaining access to a man's house or his letters and papers for the mere and sole purpose of securing evidence to be used against him in a criminal or penal proceeding. Such methods would also be inconsistent with the great principle of constitutional law in criminal cases that no man shall be compelled to furnish evidence against himself. Both of these provisions relate to the personal security of the citizen. And when the compelling a man to be a witness against himself is the very object of a search and seizure of his private papers, it is an "unreasonable" search and seizure within the meaning of the constitutional prohibition.<sup>138</sup>

*Search Warrants in Aid of Police Regulations.*

It is within the power of a state legislature, in the exercise of its powers of police, to declare the possession of certain articles of property (such as intoxicating liquors, explosives, obscene publications, or gambling devices) either absolutely or in particular places and under particular circumstances, to be unlawful, because they would be injurious, dangerous, or noxious, and it may authorize the issue of search warrants and the seizure and confiscation or destruction of such articles, so it be by due process of law.<sup>139</sup> But a law authorizing the search for and seizure of liquor, which does not require any notice of the nature and cause of the accusation to be given to the accused, nor provide any means by which he is to be informed when, or before whom, or where the search warrant is returnable, or for a trial of the question of the violation of the law, is in conflict with the constitutional guaranty and therefore void.<sup>140</sup> And of course the

<sup>137</sup> Cooley, Const. Lim. 306.

<sup>138</sup> Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524.

<sup>139</sup> Fisher v. McGirr, 1 Gray, 1; State v. Brennan, 25 Conn. 278; Allen v. Staples, 6 Gray, 491; Gray v. Kimball, 42 Me. 299; Santo v. State, 2 Iowa, 165; State v. O'Neill, 58 Vt. 140; Jones v. Root, 6 Gray, 435.

<sup>140</sup> Hibbard v. People, 4 Mich. 125; Fisher v. McGirr, 1 Gray, 1; Greene v. James, 2 Curt. 187, Fed. Cas. No. 5,766; State v. Snow, 3 R. I. 64.

same principle, in regard to the requirement of notice and a judicial investigation, applies equally to all other cases in which search warrants may be authorized in pursuance of the power of police. Whether the object to be found and seized is intoxicating liquor, or gambling devices, or obscene prints or books, or explosives, or seines and nets used in the unlawful taking of fish from public waters, there is no difference in principle. If any punishment is to be inflicted on the offender, or if there is to be a forfeiture of the property seized, there must be notice and an opportunity to make defense before a competent tribunal.<sup>141</sup>

*Search Warrants in Aid of Sanitary Regulations.*

There are some cases in which the privacy of the dwelling must be subordinated to the enforcement of necessary police regulations for the preservation of the public health, particularly in populous cities. Thus, it may be necessary to search private houses for the purpose of inspecting their sanitary condition, or to ascertain the existence of a nuisance detrimental to health, or to discover persons who are affected with a dangerous disease such as threatens an epidemic. Such inspections are usually conducted under the orders of the health officers, and are so seldom resisted that the question of their legality does not appear to have come before the courts. But if an entry into a private house could not be obtained, for such purposes, without the employment of force, it is probable that the case would justify the issue of a search warrant.<sup>142</sup>

*Time of Execution of Warrant.*

At common law, a search warrant was always directed to be executed by day, and it was doubtful whether it could be lawfully executed in the night time, even if no time was limited in the direction.<sup>143</sup> But search warrants issued in aid of the enforcement of the police or sanitary regulations of the state are not common law warrants, but rest entirely on statute. Consequently, it is not necessary to their validity that they should limit the service to the day time.<sup>144</sup>

<sup>141</sup> Lowry v. Rainwater, 70 Mo. 152; Ieck v. Anderson, 57 Cal. 251.

<sup>142</sup> Tied. Police Power, 464.

<sup>143</sup> 2 Hale, P. C. 150.

<sup>144</sup> Com. v. Hinds, 145 Mass. 182, 13 N. E. 397; State v. Brennan, 25 Conn. 278.

*Compulsory Production of Papers.*

It will be observed that the constitutional provisions against unreasonable searches and seizures apply not merely to a man's house, but also to his person and his papers. The force and effect of this part of the provision was fully considered in a case before the supreme court of the United States, in regard to a clause of the customs revenue law which authorized a federal court, in revenue cases, on motion of the government's attorney, to require the defendant to produce in court his private books, invoices, and papers, and directed that, if he refused to do so, the allegations of the government might be taken as confessed. It was held that it does not require an actual entry upon premises and a physical search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the fourth amendment. A compulsory production of a party's private books and papers, to be used against himself or his property in a criminal or penal proceeding or for a forfeiture, is within the spirit and meaning of that amendment. And it is equivalent to such compulsory production to make the non-production of the papers a confession of the allegations which it is pretended they would prove.<sup>145</sup>

*Inviolability of the Mails.*

The same principle which protects a man's private papers in his own house from unreasonable search and seizure should also secure their inviolability when he confides them to the custody of the government for the purpose of transmission through the mails. "In England," says Judge Cooley, "the secretary of state sometimes issues his warrant for opening a particular letter, where he is possessed of such facts as he is satisfied would justify him with the public; but no American officer or body possesses such authority, and its usurpation should not be tolerated. Letters, and sealed packages subject to letter postage, in the mail, can be opened and examined only under like warrant, issued upon a similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household."<sup>146</sup>

<sup>145</sup> *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524.

<sup>146</sup> Cooley, *Const. Lim.* 307, note; *Ex parte Jackson*, 96 U. S. 727.

*Military Orders.*

The constitutional provision against unreasonable searches and seizures cannot be understood to prohibit a search or seizure made in attempting to execute a military order authorized by the constitution and a law of congress, where the jury have found that the seizure was proper and reasonable.<sup>147</sup>

**QUARTERING OF SOLDIERS.**

**156.** The third amendment to the federal constitution provides that "no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." And similar provisions are found in the constitutions of many of the states.

This provision was probably-suggested by a clause of the Petition of Rights presented to Charles I., wherein it was stated that "great companies of soldiers and mariners have been dispersed into diverse counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses and there to suffer them to sojourn, against the laws and customs of this realm, and to the great grievance and vexation of the people." Also, one of the grievances set forth in the Declaration of Independence was the "quartering of large bodies of armed troops among us." There has never been any necessity for the courts to extend to individuals the protection guaranteed by this provision, and the clause is of historical interest only. It is but a branch of the constitutional principle that the military shall, in time of peace, be in strict subordination to the civil power.<sup>148</sup> And it is also an additional guaranty of the security and privacy of a man's dwelling house. "Its plain object," says Story, "is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion."<sup>149</sup>

<sup>147</sup> Allen v. Colby, 47 N. H. 544.

<sup>148</sup> Cooley, Const. Llm. 309.

<sup>149</sup> 2 Story, Const. § 1900.

**RIGHT TO OBTAIN JUSTICE FREELY.**

157. In many of the states, the constitutions provide that every person ought to obtain justice freely, without being obliged to purchase it, completely and without denial, promptly and without delay.

This provision is founded on the forty-seventh article of Magna Charta, wherein the king declares: "We will sell to no man, we will deny to no man, nor defer, right or justice." The guaranty of free, prompt, and effectual justice, although it is but seldom violated by the legislature or the courts, is one of the most important and valuable principles of freedom. Of course this constitutional provision does not mean that the laws shall be perfect, or their administration unerring. It means that the courts shall always be open to every suitor, be he high or low, rich or poor; that justice shall not be bought or sold, nor made a luxury available only to the wealthy; that for every infraction of the rights of the individual the law should provide a practical and adequate remedy; and that justice should not be deferred by vexatious and unnecessary delays, nor withheld during a longer time than is required for the regular and orderly course of judicial proceedings. But this provision does not have the effect to prohibit the taxation of fees and costs in legal proceedings.<sup>150</sup> Neither does it debar the legislature from authorizing the courts to require suitors to furnish security for the costs, in proper cases.<sup>151</sup> To the same category belong statutes requiring a person who seeks to have a tax sale of land set aside to deposit in court the amount of the purchase money, together with all taxes and costs accruing since the sale. Such laws are not in conflict with this provision of the constitution, at least when the ground of attack consists in irregularities or omissions in the tax proceedings, though it is probably otherwise when objection is taken to the legality of the tax itself.<sup>152</sup>

<sup>150</sup> *Perce v. Hallett*, 13 R. I. 363; *Walker v. Whitehead*, 43 Ga. 538.

<sup>151</sup> *Conley v. Woonsocket Inst.*, 11 R. I. 147.

<sup>152</sup> *Black, Tax Titles*, § 438; *Craig v. Flanagan*, 21 Ark. 319; *Pope v. Macon*, 23 Ark. 644; *Coonradt v. Myers*, 31 Kan. 30, 2 Pac. 858.

### TRIAL BY JURY.

158. The constitution of the United States provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." And in all the states there are constitutional provisions guarantying the preservation of trial by jury in all civil issues for the ascertainment and vindication of legal rights, where that right existed at the time of the adoption of the particular constitution.

#### *Meaning of Trial by Jury.*

"The terms 'jury' and 'trial by jury' are, and for ages have been, well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men, described as upright, well-qualified, and lawful men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impannelled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them, who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them."<sup>153</sup>

#### *Province of Court and Jury.*

In a trial by jury the judge and jury have different though related duties and provinces. The facts are for the jury, the law for the court. The judge will decide questions of law arising in the course of the trial, and will instruct the jury as to the law which should

<sup>153</sup> State v. McClear, 11 Nev. 39, 69.

govern the controversy. And the judge may express to the jury his own opinion upon the facts. His doing so does not rob the trial of its character as a trial by jury. But the jury are not bound by such expressions of opinion; they may regard them or disregard them, as their own judgment shall dictate.<sup>154</sup> But the verdict of the jury should be based not alone upon their opinion of the evidence, but also upon the legal consequences of the facts proven, as the same are laid down for them by the court. But they cannot be coerced in respect to their finding. If they refuse to be guided by the instructions of the court, and return a verdict which is contrary to the law of the case, the remedy is to grant a new trial.<sup>155</sup> The same action may be taken when the verdict is contrary to the evidence, that is, when the jury must be understood to have based it upon a state of facts not consistent with the evidence given. If, giving to all the evidence adduced the full effect claimed for it, there still remains no proof in the case sufficient to justify the jury in finding as they did, the verdict is erroneous in law and must be set aside. The trial court may grant a new trial, in such a case, or, if it refuses to do so, the fault may be corrected on error or appeal.<sup>156</sup> But if the evidence is conflicting, or the facts as shown by the proof are left uncertain, or questionable, it is the peculiar province of the jury to decide upon them and give their verdict accordingly. In this they cannot rightfully be interfered with by the court. If the evidence, though uncertain, may fairly tend to support the conclusion reached by the jury, the verdict cannot be set aside.<sup>157</sup>

#### *The Seventh Amendment.*

This amendment to the federal constitution, although it provides in general terms that the right of trial by jury shall be preserved, was intended to apply, and does apply, only to proceedings in the courts of the United States, and it does not affect proceedings in the state courts, nor the power of the states to regulate the form and

<sup>154</sup> *Consequa v. Willings*, Pet. C. C. 225, Fed. Cas. No. 3,128; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1.

<sup>155</sup> *Wilkinson v. Greely*, 1 Curt. C. C. 63, Fed. Cas. No. 17,671.

<sup>156</sup> *Insurance Co. v. Rodel*, 95 U. S. 232.

<sup>157</sup> *Stanley v. Whipple*, 2 McLean, 35, Fed. Cas. No. 13,286; *Carr v. Gale*, 3 Woodb. & M. 38, Fed. Cas. No. 2,435.

method of trials in their own tribunals.<sup>158</sup> Neither this clause nor the provisions of the fourteenth amendment forbid the states to abolish or deny the right of trial by jury. Such prohibition, if any, must be found in the constitution of the particular state.<sup>159</sup> The language of the seventh amendment is to be taken broadly and liberally, as preserving an important right. Thus it is said that it may, in a just sense, be construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever peculiar form they may assume to settle legal rights.<sup>160</sup> But the provisions of the seventh amendment did not apply to a preliminary examination under the fugitive slave law, such a proceeding not being according to the course of the common law, but constitutional and statutory.<sup>161</sup>

*Provisions in the State Constitutions.*

The provisions in the various state constitutions relative to trial by jury generally declare that this right "shall remain inviolate," or "shall be preserved," or "shall be as heretofore." But in some, the right is expressly limited to civil cases or civil issues, or even to civil cases wherein an issue of fact proper for a jury is joined in a court of law. In several states, also, cases of minor cognizance or where only a small amount is involved are, for reasons of obvious propriety, excepted from the right of trial by jury. And in several, this right is denied "in cases heretofore used and practised," which means that cases which were tried without a jury according to the established practice at the time of the adoption of the constitution are not to be included in the general guaranty of that right.<sup>162</sup>

*In What Proceedings Trial by Jury May be Claimed.*

In view of the way in which the guaranty of trial by jury is expressed in the seventh amendment and in the state constitutions, as adverted to above, it is settled by the courts that the guaranty merely preserves this right and does not extend it. Consequently, a trial after this method may be claimed as a matter of constitutional right only in those cases where it could have been demanded, as of right,

<sup>158</sup> *Edwards v. Elliott*, 21 Wall. 532; *Livingston v. Mayor of New York*, 8 Wend. 85.

<sup>159</sup> *Walker v. Sauvinet*, 92 U. S. 90.

<sup>160</sup> *Parsons v. Bedford*, 3 Pet. 433, 447.

<sup>161</sup> *Miller v. McQuerry*, 5 McLean, 469, Fed. Cas. No. 9,583.

<sup>162</sup> *Stim. Am. St. Law*, §§ 72, 73.

under the common or statutory law which was in force at the time the constitution was adopted.<sup>163</sup> The right of trial by jury, it is said, is secured by the guaranties of the various state constitutions in and for the various proceedings of legal cognizance in which that mode of trial was employed when the several constitutions were adopted, having regard always to the nature and character of the controversy, and not to the mere form of the action or proceeding. But it is not imposed upon substantially new rights and proceedings arising after the constitution.<sup>164</sup> And not every case which is not a criminal case is a civil one, wherein, by the constitution, the right of trial by jury shall remain inviolate; but that term embraces such as were treated as civil cases when the constitution went into effect.<sup>165</sup> At the same time, it is important to remember that it is not the form of the proceeding which governs here, but the question whether the case is of that general description to which trial by jury was anciently considered applicable. It is immaterial what changes may be made in the forms of actions or in the rules of pleading. For it is the nature of the controversy and the right in dispute which must determine the privilege, and not the form of the remedy provided.<sup>166</sup> Consequently it may be said with propriety that the constitutional provisions apply to all controversies fit to be tried by a jury according to the rules of the common law, notwithstanding the particular right for the violation of which the action is brought did not exist at common law, but was created by a statute passed after the adoption of the constitution.<sup>167</sup> In the courts of the United States it is held, with regard to suits for penalties for smuggling, that if the action is against the master, it is triable by jury, but if against the vessel, it need not be so tried.<sup>168</sup>

<sup>163</sup> *Trigally v. Mayor, etc., of Memphis*, 6 Cold. 382; *Rhines v. Clark*, 51 Pa. St. 96; *Copp v. Henniker*, 55 N. H. 179; *Harper v. Commissioners*, 23 Ga. 566; *People v. Phillips*, 1 Edm. Sel. Cas. 386; *Mead v. Walker*, 17 Wis. 189; *Ross v. Irving*, 14 Ill. 171; *Commissioners of New Town Cut v. Seabrook*, 2 Strob. 560.

<sup>164</sup> *Commissioners of Mille Lacs Co. v. Morrison*, 22 Minn. 178.

<sup>165</sup> *Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 558.

<sup>166</sup> *Cooley, Const. Law* (2d Ed.) 249; *Backus v. Lebanon*, 11 N. H. 19; *Tabor v. Cook*, 15 Mich. 322; *Parsons v. Bedford*, 3 Pet. 433.

<sup>167</sup> *Plimpton v. Somerset*, 33 Vt. 283.

<sup>168</sup> *U. S. v. The Queen*, 4 Ben. 237, Fed. Cas. No. 16,107.

*Proceedings in Which the Privilege is not Claimable.*

There are many varieties of proceedings or controversies in which, for the reasons just stated, a trial by jury cannot be claimed as a matter of constitutional right. For example, in the trial of claims against the government, the claimant has no constitutional right to a trial by jury. The government cannot be sued without its own consent. If it permits the judicial ascertainment and enforcement of claims against it, the proceedings thereon are not suits at common law. It may establish tribunals for the hearing of such claims and regulate their procedure as it may see fit. And the party has no other mode of establishing his claim than that pointed out by the statute. The allowance of such actions is an act of grace, and the government is under no obligation to accord him a trial by jury.<sup>169</sup> Again, the power to punish for contempts is incident to all courts of record. Cases of contempt of court were never triable by jury, but long before the adoption of the constitutions it was within the power of the court to proceed summarily in such cases. Moreover, the very object of such proceedings would be defeated in many instances if it were necessary to invoke the judgment of a jury. Consequently the summary punishment of contempts is no violation of the constitutional right of trial by jury.<sup>170</sup> So also, in the assessment and collection of taxes, the constitutional provisions relating to trial by jury do not apply; and the tax payer cannot complain of the mode of proceeding if he is given an opportunity to defend against the legality of the tax or the liability of his property before some competent board or tribunal.<sup>171</sup> In quo warranto proceedings, according to the opinion prevailing in some of the states, there is no constitutional right of trial by jury, although this is not everywhere admitted.<sup>172</sup> Neither is this mode of trial claimable as of right in divorce proceedings, unless especially made applicable thereto by law.<sup>173</sup> In proceedings for the appropriation of private property for

<sup>169</sup> *McElrath v. U. S.*, 102 U. S. 426.

<sup>170</sup> *U. S. v. Hudson*, 7 Cranch. 32; *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569; *Garrigus v. State*, 93 Ind. 239; *State v. Doty*, 32 N. J. Law, 403.

<sup>171</sup> *Cochecho Manuf'g Co. v. Strafford*, 51 N. H. 455; *Commissioners of Mille Laes Co. v. Morrison*, 22 Minn. 178; *Harper v. Commissioners*, 23 Ga. 566.

<sup>172</sup> See *State v. Lupton*, 64 Mo. 415; *State v. Vail*, 53 Mo. 97; *People v. Albany & S. R. Co.*, 57 N. Y. 161; *People v. Doesburg*, 16 Mich. 133.

<sup>173</sup> *Coffin v. Coffin*, 55 Me. 361; *Cassidy v. Sullivan*, 64 Cal. 266, 28 Pac. 234.

public use, under the power of eminent domain, the owner has no constitutional right to a trial by jury, unless, as is the case in some of the states, the constitution expressly gives it. The proceeding is in the nature of an appraisal or arbitration, rather than a suit.<sup>174</sup> So again, the appointment of a guardian or committee for an insane person, a spendthrift, or an habitual drunkard, is not regarded as one of the cases in which a jury trial is preserved by the constitution.<sup>175</sup> And a statute authorizing the commitment of infants to the house of refuge, without a trial by jury, is constitutional.<sup>176</sup> So also, in proceedings supplementary to execution, the debtor is not entitled, under the constitutional guaranty, to a trial by jury.<sup>177</sup> Whether or not the trial by jury may be claimed as of right in proceedings to determine a contested election is still an unsettled question. In some of the states, the courts hold that such an issue may be determined without a jury; in others, a contrary opinion prevails.<sup>178</sup>

#### *Equity Cases.*

The distinction between actions at law and suits in equity was established in this country before the adoption of the constitutions, and in equity proceedings a jury was not employed. It results that those constitutional provisions which preserve the right of trial by jury, or declare that it shall remain "inviolable," do not extend the guaranty to equitable proceedings such as were used to be tried without a jury before the constitutions went into effect.<sup>179</sup> For example, the practice of uniting the legal cause of action for the mortgage debt with the equitable remedy in foreclosure, rendering the whole an equitable proceeding, existed in many of the states before the adoption of the constitutions, and hence the parties in such a pro-

<sup>174</sup> *Pennsylvania R. Co. v. First German Congregation*, 53 Pa. St. 445; *Livingston v. Mayor of New York*, 8 Wend. 85; *Butler v. Worcester*, 112 Mass. 541.

<sup>175</sup> *Gaston v. Babcock*, 6 Wis. 503; *Hagany v. Cohnen*, 29 Ohio St. 83; *Black Hawk Co. v. Springer*, 58 Iowa, 417, 10 N. W. 791.

<sup>176</sup> *Ex parte Crouse*, 4 Whart. 9.

<sup>177</sup> *Kennesaw Mills Co. v. Walker*, 19 S. C. 104.

<sup>178</sup> Compare *Ewing v. Filley*, 43 Pa. St. 384; *State v. Lewis*, 51 Conn. 113; *State v. Gleason*, 12 Fla. 190; *People v. Cicotte*, 16 Mich. 283.

<sup>179</sup> *Goodyear v. Providence Rubber Co.*, 2 Cliff. 351, Fed. Cas. No. 5,583; *Wyntkoop v. Cooch*, 89 Pa. St. 450; *Bellows v. Bellows*, 58 N. H. 60.

ceeding cannot now claim a jury trial of the issue upon the debt.<sup>180</sup> But still, the legislature cannot convert a legal right into an equitable right, so as to infringe upon the right of trial by jury.<sup>181</sup> For instance, the constitutional right to trial by jury applies to an action to abate a nuisance and recover the damage occasioned thereby, although the complaint is in form as for equitable relief and the prayer for damages may be regarded as incidental thereto.<sup>182</sup>

*Admiralty Jurisdiction.*

The judicial power of the United States is extended by the constitution to all cases of admiralty and maritime jurisdiction. But cases arising in the admiralty are not "suits at common law" within the meaning of the seventh amendment, and consequently the admiralty courts may proceed to the determination of causes properly before them without the aid of a jury; and this is the case even where the jurisdiction is extended to controversies which were not originally within the scope of the admiralty.<sup>183</sup>

*Summary Proceedings.*

There are certain kinds of proceedings (usually described as "summary") in which, by the ancient practice of the courts, a liability could be fixed upon persons connected with the court or with the course of proceedings therein, without the intervention of a jury. And these proceedings still remain lawful, notwithstanding the guaranties in the constitutions. Thus, a law authorizing summary proceedings by motion against a sheriff and his sureties for official misconduct, is no violation of the constitution.<sup>184</sup> So the sureties on bonds given in the course of judicial proceedings, such as appeal bonds, writ of error bonds, and bonds for costs, are liable to have judgment entered against them on such bonds without a trial by jury.<sup>185</sup>

<sup>180</sup> *Stillwell v. Kellogg*, 14 Wis. 461; *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513; *Carmichael v. Adams*, 91 Ind. 526.

<sup>181</sup> *Norris's Appeal*, 64 Pa. St. 275.

<sup>182</sup> *Hudson v. Caryl*, 44 N. Y. 553; *Hyatt v. Myers*, 73 N. C. 232.

<sup>183</sup> *Insurance Co. v. Dunham*, 11 Wall. 1; *Sheppard v. Steele*, 43 N. Y. 52.

<sup>184</sup> *Lewis v. Garrett*, 5 How. (Miss.) 434.

<sup>185</sup> *Bank of Columbia v. Okely*, 4 Wheat. 235; *Whitehurst v. Coleen*, 53 Ill. 247; *Gildersleeve v. People*, 10 Barb. 35; *Young v. Wise*, 45 Ga. 81.

*Peremptory Nonsuits.*

Notwithstanding some difference of opinion, it is now generally agreed that the right of trial by jury does not include the right to have the jury render a verdict in cases where the law is clearly against the plaintiff. The jury are to try and determine the facts, but it is the court which must declare the law applicable to the facts. Consequently, when the judge, at the close of the plaintiff's evidence, orders a peremptory nonsuit, on the ground that, conceding all the facts which the jury could find from the evidence, those facts are not sufficient to establish a liability against the defendant, such action is no violation of the plaintiff's constitutional rights.<sup>186</sup>

*Compulsory References.*

In some of the states, before the adoption of the constitutions, the practice of ordering references, especially in cases involving the examination of a long account, was in use and sanctioned by law. In those jurisdictions, therefore, such a practice is still permissible, and a compulsory reference, in suitable cases, is no infringement of the constitutional rights of suitors.<sup>187</sup> But in the courts of some of the other states, as also in those of the United States, it is not lawful to deprive a party of his right to a trial by jury by compelling him, against his will, to submit his cause to the decision of arbitrators or referees.<sup>188</sup>

*Number and Composition of the Jury.*

Wherever the right of trial by jury is preserved and guaranteed by the constitutions, a common law jury is meant; and at common law a jury was always composed of twelve men, no more and no less. Therefore it is not lawful for the legislature (unless specially empowered by the constitution) to provide that a jury for the trial of civil issues in cases which required a jury at common law may be composed of a less or greater number than twelve.<sup>189</sup> But wherever

<sup>186</sup> *Munn v. Mayor, etc., of Pittsburgh*, 40 Pa. St. 364; *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468. See *Baylis v. Travelers' Ins. Co.*, 113 U. S. 316, 5 Sup. Ct. 494.

<sup>187</sup> *Lee v. Tillotson*, 24 Wend. 337; *Mead v. Walker*, 17 Wis. 189.

<sup>188</sup> *U. S. v. Rathbone*, 2 Paine, 578, Fed. Case No. 16,121; *Rhines v. Clark*, 51 Pa. St. 96; *Bernheim v. Waring*, 79 N. C. 56.

<sup>189</sup> *Dowling v. State*, 5 Smedes & M. 664; *People v. Kennedy*, 2 Parker, Cr. R. 312; *Vaughn v. Seade*, 30 Mo. 600; *Lamb v. Lane*, 4 Ohio St. 167; *People v. Justices*, 74 N. Y. 406.

facts are to be found in any proceeding in which a jury was not required by the common law, a jury of any number may be authorized in the discretion of the legislature; and as juries did not belong to courts held by justices of the peace, the legislature, if it authorizes juries in such courts at all, may provide that they shall consist of a different number of men.<sup>190</sup> It was also a part of the trial by jury at common law that the jurors should render a unanimous verdict. Consequently, to provide by law that a majority of a petit jury, or less than the whole number, may render a verdict in any case where the constitution accords the party the right to a jury trial, would be unconstitutional.<sup>191</sup> It is said, however, that the constitutional provision that the right of trial by jury shall remain inviolate does not necessarily mean trial by a jury of the vicinage. Juries were originally selected from the vicinage because, being so selected, they were more likely to have some independent knowledge of the matter to be tried. But this reason no longer exists, and at present the only reason for drawing a jury from the vicinage is found in the convenience of parties and witnesses.<sup>192</sup> But an act which prohibits those who are not tax-payers from serving on juries is understood to conflict with the provisions of the seventh amendment to the federal constitution.<sup>193</sup> And it is clearly a part of the right of trial by jury, as the same existed at common law, that the parties should have the right to inquire into the qualifications and impartiality of the jurors, and be permitted to challenge such as are unfit to serve or are biased against them.<sup>194</sup>

*Restrictions on the Right.*

The constitutions were intended not merely to secure the right of trial by jury, but also to insure that it should be continued in existence as a substantial and valuable protective right to private suitors. Now it is evident that it would be entirely feasible for a state legislature, if so minded, to impose such onerous and oppressive restrictions or conditions upon this right as to make it practically un-

<sup>190</sup> *Work v. State*, 2 Ohio St. 296.

<sup>191</sup> *Opinion of Justices*, 41 N. H. 550; *Kleinschmidt v. Dunphy*, 1 Mont. 118.

<sup>192</sup> *Taylor v. Gardiner*, 11 R. I. 182. But compare *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635.

<sup>193</sup> *Reece v. Knott*, 3 Utah, 451, 24 Pac. 757.

<sup>194</sup> *Palmore v. State*, 29 Ark. 248; *Paul v. Detroit*, 32 Mich. 108.

availing to a party for his protection, yet without denying it in express terms. But this would be a palpable violation of the spirit and intent of the constitutional provision, and the courts would hold any such restrictions upon the right as not less unconstitutional than the total denial of it.<sup>195</sup> But such a result could not be predicated of any provisions which imposed conditions to the exercise of the right which were merely reasonable and not prohibitive limitations, and did not clog it unduly. For instance, there is no valid objection to a law requiring that a party who demands a trial by jury shall pay a reasonable jury fee.<sup>196</sup> And so a statute authorizing a judgment by default to be entered in case the defendant does not within a reasonable limited time file a sufficient affidavit of defense, is not an unreasonable restriction upon the right of trial by jury.<sup>197</sup> But on the other hand, it is held that an act making an auditor's report prima facie evidence of the facts found by him on the trial before the jury impairs the constitutional right of trial by jury. "If the jury can be compelled to give their verdict, not upon the issue between the parties, but upon the question whether an auxiliary decision of that issue is right, giving to that auxiliary decision as evidence of its own correctness such weight as the legislature chooses to prescribe, the constitutional guaranty of trial by jury is a delusion; and if that guaranty can be repealed by legislative circumlocution, every other constitutional guaranty is a constitutional farce."<sup>198</sup>

*Jury Trial Allowed on Appeal.*

It is generally considered that there is no impairment of the right of trial by jury, although the statute authorizes a justice of the peace or other inferior court or magistrate to decide causes without a jury, provided that the party who is compelled to submit his cause to the judgment of such a court is allowed an unrestricted right of appeal to a court which proceeds with the aid of a jury.<sup>199</sup> But the better opinion, in regard to criminal cases, is that the right of trial

<sup>195</sup> Flint River Steamboat Co. v. Foster, 5 Ga. 194.

<sup>196</sup> Adams v. Corrison, 7 Minn. 456 (Gil. 365).

<sup>197</sup> Lawrence v. Borm, 86 Pa. St. 225; Dortic v. Lockwood, 61 Ga. 293.

<sup>198</sup> King v. Hopkins, 57 N. H. 334; Plimpton v. Somerset, 33 Vt. 283.

<sup>199</sup> Com. v. Whitney, 108 Mass. 5; Reckner v. Warner, 22 Ohio St. 275; State v. Brennan's Liquors, 25 Conn. 278; Steuart v. Mayor, etc., of Baltimore, 7 Md. 500; State v. Beneke, 9 Iowa, 203; Emerick v. Harris, 1 Bin. 410.

by jury means the right to such a trial in the first instance, and not a right to appeal from a conviction by a magistrate.<sup>200</sup> And it is not easy to discover the difference in principle between civil and criminal cases, in respect to the exercise of this right.

*Waiver of the Right.*

By the constitutions of several of the states it is provided that the right of trial by jury may be waived by the parties in all civil issues. But even without this clause it would be entirely competent for those interested to agree that the court should proceed to determine the cause without a jury.<sup>201</sup> Accordingly, when the defendant has an opportunity to demand a trial by jury, and omits to do so, he cannot complain that his constitutional rights are denied him if the trial proceeds without a jury.<sup>202</sup> And so, where a default is suffered in an action for damages, the court may proceed to assess the damages. The defendant has no constitutional right to have them assessed by a jury.<sup>203</sup>

*Re-Examination of Facts.*

"The rule that the facts shall not be otherwise re-examined than according to the rules of the common law is essential to a preservation of the right. It could be of no importance that one should have a jury trial in the first instance, if his adversary might then remove the case to another court to be tried by the judge himself."<sup>204</sup> The common law admitted of but two modes of re-examining the verdict of a jury. One of these was by a motion for a new trial in the same proceeding and usually in the same court in which the verdict was rendered. The other was by some supervisory or appellate court which had jurisdiction upon a writ of error in certain classes of cases to set aside the verdict and grant a new trial.<sup>205</sup> And an ap-

<sup>200</sup> Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301; In re Dana, 7 Ben. 1, Fed. Cas. No. 3,554.

<sup>201</sup> Greason v. Keteltas, 17 N. Y. 491; Baird v. Mayor, etc., 74 N. Y. 382; Garrison v. Hollins, 2 Lea, 684.

<sup>202</sup> Flint River Steamboat Co. v. Foster, 5 Ga. 194; Leahy v. Dunlap, 6 Colo. 552; Foster v. Morse, 132 Mass. 354.

<sup>203</sup> Raymond v. Railroad Co., 43 Conn. 596; Hopkins v. Ladd, 35 Ill. 178.

<sup>204</sup> Cooley, Const. Law (2d Ed.) 251.

<sup>205</sup> Miller, Const. 495; Parsons v. Bedford, 3 Pet. 433, 448; Insurance Co. v. Comstock, 16 Wall. 258, 269.

pellate court examines the facts only so far as may be necessary to ascertain whether any error of law has been committed to the prejudice of the party complaining of the verdict.<sup>206</sup> This provision of the seventh amendment applies to facts tried by a jury in a cause in a state court and afterwards removed to the United States supreme court for review under its appellate jurisdiction.<sup>207</sup>

<sup>206</sup> *Hickman v. Jones*, 9 Wall. 197.

<sup>207</sup> *The Justices v. Murray*, 9 Wall. 274.

**CHAPTER XIX.****POLITICAL AND PUBLIC RIGHTS.**

- 159. Citizenship.
- 160. Double Citizenship in the United States.
- 161. Privileges of Citizens of United States.
- 162, 163. The Right of Suffrage.
- 164. Freedom of Speech and of the Press.
- 165. The Right of Assembly and Petition.
- 166. Disfranchisement.

**CITIZENSHIP.**

**159. The fourteenth amendment to the federal constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."**

Before the adoption of this amendment, the rights and status of a citizen of the United States were very doubtful. It was even uncertain whether there was anything under the federal system corresponding to citizenship in the several states. Many publicists contended that if there was a citizenship of the United States, it was possessed by virtue of, and resulted from, citizenship in a state. This of course excluded from the definition of citizenship all the residents of the United States who were not citizens of some state, including the inhabitants of the territories and of the District of Columbia, Indians, and negroes. These persons, it was thought by some, were not citizens at all. The supreme court of the United States ruled that a negro, whose ancestors were imported into this country and sold as slaves, could not become a member of the political community brought into existence by the constitution of the United States, and be as such entitled to the rights, privileges, and immunities guaranteed by that instrument to citizens, and hence that he could not sue as a citizen in the federal courts.<sup>1</sup>

<sup>1</sup> *Dred Scott v. Sandford*, 19 How. 393. See, also, *Marshall v. Donovan*, 10 Bush, 681.

The purpose of the fourteenth amendment was to secure to the newly emancipated colored race the rights and privileges which belonged to them, since the abolition of slavery by the thirteenth amendment, in common with all others living under the protection of federal law. It conferred upon them citizenship in the United States, with all its privileges. It did not make them citizens of the states. But it gave them the right to acquire citizenship in a state, in addition to their federal citizenship, by residence therein. Though necessarily general in its terms, this amendment applies especially and peculiarly to these people. There have been very few cases in which its benefits have been invoked by any others. It is held that no white person born within the limits of the United States and subject to their jurisdiction, or born without those limits and subsequently naturalized, owes his status of citizenship to the amendment.<sup>2</sup> The promotion of colored persons to citizenship, by this provision, is an admission of them to all the rights and privileges of white citizens in the same manner and to the same extent. They cannot be distinguished from other citizens, by legislation, for any of the causes which previously characterized their want of citizenship.<sup>3</sup> But at the same time, it must be remembered that the fourteenth amendment does not add to the privileges or immunities of citizens, but only furnishes additional protection for the privileges already existing.<sup>4</sup>

*Definition of Citizenship.*

Citizenship is the status or character of being a citizen. And a citizen of a given state or country is one who owes it allegiance and is entitled to its protection.<sup>5</sup> The two correlative ideas of allegiance and protection form the basis of the legal and political conception of citizenship. The citizen is subject to the jurisdiction of his country and to its laws. He owes it loyalty, his services at need, and his money to defray its expenses. In return he is entitled to

<sup>2</sup> Van Valkenburg v. Brown, 43 Cal. 43.

<sup>3</sup> Burns v. State, 48 Ala. 195.

<sup>4</sup> Minor v. Happersett, 21 Wall. 162.

<sup>5</sup> Allegiance is the obedience due to the sovereign; and persons born in the allegiance of the king are his natural subjects and no aliens. The allegiance is not limited to any spot, and is due to the king in his natural capacity, rather than his political capacity. Calvin's Case, 2 How. St. Tr. 539.

claim its protection against domestic violence and foreign oppression. The possession of civic rights is not the test of citizenship. There are many who are legally incapable of voting for public officers or of filling the offices themselves, who are none the less citizens. Neither is mere inhabitancy of a country a test of citizenship. For resident aliens owe a local and temporary allegiance to the state wherein they live and are amenable to its ordinary laws. But where the two characteristics of allegiance and protection are found in their completeness and together, there citizenship exists.

*Native Born Citizens.*

The fourteenth amendment divides the citizens of the United States into two classes. First, those who are born in the United States and subject to the jurisdiction thereof. Second, those who are naturalized in the United States and subject to the jurisdiction thereof. In order to belong to the first class two things must concur. The person must have been born within the United States and subject to the jurisdiction thereof. This jurisdiction "must at the time be both actual and exclusive. The words mentioned except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as a part of their own country. This extra-territoriality of their residence secures to their children born here all the rights and privileges which would inure to them had they been born in the country of their parents. Persons born on a public vessel of a foreign country, whilst within the waters of the United States and consequently within their territorial jurisdiction, are also excepted. They are considered as born within the country to which the vessel belongs. In the sense of public law, they are not born within the jurisdiction of the United States."<sup>6</sup> So if a stranger or traveler passing through the country, or temporarily residing here, but who has not himself been naturalized and who claims to owe no allegiance to our government, has a child born here, who goes out of the country with his father, such child is not a citizen of the United States, because he was not subject to its jurisdiction.<sup>7</sup> But the children, born within the United States, of permanently resident aliens,

<sup>6</sup> In re Look Tin Sing, 21 Fed. 905.

<sup>7</sup> Miller, Const. 279.

who are not diplomatic agents or otherwise within the excepted classes, are citizens. And this is true even where the parents belong to a race of persons (such as the Chinese) who cannot acquire citizenship for themselves by naturalization.<sup>8</sup> Children of American parents born abroad are also considered as within the privilege of citizenship, if the residence of their parents abroad was only temporary. An act of congress, passed before the fourteenth amendment, but probably not repealed by it, provides that persons born out of the limits and jurisdiction of the United States, whose fathers are, at the time of such birth, citizens of the United States, shall be deemed and considered citizens of the United States; provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States.<sup>9</sup>

*Women and Children.*

We have said that citizenship does not necessarily include the right of voting. This is apparent from the language of the fourteenth amendment, which does not declare that "all adult males" are citizens, but that "all persons" born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States. It follows from this that females and minors are equally citizens of the United States, if they fulfill the conditions as to birth or naturalization, as are those invested with the suffrage.<sup>10</sup>

*Corporations.*

Although a private corporation is regarded as a "person" for many legal purposes, yet as it can neither be born nor naturalized, it cannot be considered as a citizen of the United States, under the provisions of the amendment.<sup>11</sup>

<sup>8</sup> In re Look Tin Sing, 21 Fed. 905.

<sup>9</sup> Rev. St. U. S. § 1993. But one who was born in Canada, of parents of African blood born in Virginia and held there as slaves until they emigrated to Canada, does not, by removing to the United States, become a citizen. The case of such a person is not covered either by the fourteenth amendment or by the act of congress mentioned. *Hedgman v. Board of Registration*, 26 Mich. 51.

<sup>10</sup> *Minor v. Happersett*, 21 Wall. 162.

<sup>11</sup> *Paul v. Virginia*, 8 Wall. 168; *Insurance Co. v. New Orleans*, 1 Woods, 85, Fed. Cas. No. 7,052.

*Indians.*

In regard to the Indians, it has been said: "Neither are the original inhabitants of the country citizens so long as they preserve their tribal relations and recognize the headship of their chiefs, notwithstanding that, as against the action of our own people, they are under the protection of the laws, and may be said to owe a qualified allegiance to the government. When living within territory over which the laws, either state or territorial, are extended, they are protected by and at the same time held amenable to those laws in all their intercourse with the body politic and with the individuals composing it. But they are also, as a quasi foreign people, regarded as being under the direction and tutelage of the general government, and subjected to peculiar regulations as dependent communities. They are 'subject to the jurisdiction' of the United States only in a much qualified sense, and it would obviously be inconsistent with the semi-independent character of such a tribe, and with the obedience they are expected to render to their tribal head, that they should be vested with the complete rights, or, on the other hand, subjected to the full responsibilities, of American citizens."<sup>12</sup> And it is held that an Indian, born in the United States and a member of a tribe, cannot, by merely separating himself from his tribe and taking up his residence among white citizens, become a citizen and claim the right to vote. Said the court: "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien though dependent power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children, born within the United States, of ambassadors or other public ministers of foreign nations. Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the fourteenth amendment, by be-

<sup>12</sup> 2 Story, Const. § 1933; *Goodell v. Jackson*, 20 Johns. 693; *Ex parte Reynolds*, 5 Dill. 394, Fed. Cas. No. 11,719; *McKay v. Campbell*, 2 Sawy. 118, Fed. Cas. No. 8,840.

ing 'naturalized in the United States,' by or under some treaty or statute."<sup>13</sup>

*Naturalization.*

This is the act or process by which an alien, renouncing his allegiance to his former sovereign, is accepted as a citizen and invested with all the rights and privileges attaching to that status, the same as if he were a natural born subject of the government. The power to establish a uniform rule of naturalization is vested in congress by the constitution, and this power is exclusive of any like power in the states. This subject has been fully discussed in connection with the powers of congress.

*Expatriation.*

This is a correlative to naturalization, or rather, it is a pre-requisite to it. The right of expatriation is the right of a man to change his country and allegiance at will. It is the right, on removing from one land to another, to sever his political connection with the former, and be exempt from personal or political duties toward it, and to acquire the rights and standing of a citizen in the latter. An act of congress declares that "expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;" and "any declaration, instruction, opinion, order, or decision of any officer of the United States, which denies, restricts, impairs, or questions the right of expatriation, is inconsistent with the fundamental principles of the republic."<sup>14</sup> And the decisions of the courts are in accordance with this declaration.<sup>15</sup>

## DOUBLE CITIZENSHIP IN THE UNITED STATES.

160. We have, in our political system, a government of the United States and a government of each of the several states. Each of these governments is distinct from the others, and each has citizens of its own, who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a cit-

<sup>13</sup> Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41.

<sup>14</sup> Rev. St. U. S. § 1999.

<sup>15</sup> In re Look Tin Sing, 21 Fed. 905.

izen of the United States and a citizen of a state. But his rights of citizenship under one of these governments will be different from those which belong to him under the other.<sup>16</sup>

“The distinction between citizenship of the United States and citizenship of a state is clearly recognized and established [by the fourteenth amendment.] Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within a state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual.”<sup>17</sup> A person, therefore, may be a citizen of the United States without being a citizen of any particular state. And this is the condition of citizens permanently resident in the District of Columbia and in the territories.<sup>18</sup> Since the power of naturalization is exclusively vested in congress, the states cannot convert aliens into citizens of the United States. Whether the state can clothe an alien with the privileges of its own citizenship, in advance of his naturalization by federal law, is uncertain. But there is nothing to prevent the state from giving him the right of suffrage, the right to inherit and transmit property, and all other rights generally deemed to be appurtenant to citizenship, except the right to be subject to the federal jurisdiction and to claim the benefit of federal law as a citizen of the United States. On the other hand, the United States can naturalize a foreigner, but cannot make him a citizen of any particular state. That depends upon his own choice. He becomes a citizen of that state in which he shall reside. But the state cannot withhold the privileges of its citizenship from any person born or naturalized in the United States and subject to the

<sup>16</sup> U. S. v. Cruikshank, 92 U. S. 542.

<sup>17</sup> Slaughterhouse Cases, 16 Wall. 36.

<sup>18</sup> Prentiss v. Brennan, 2 Blatchf. 162, Fed. Cas. No. 11,385; Picquet v. Swan, 5 Mason, 35, Fed. Cas. No. 11,134.

jurisdiction thereof who shall choose to dwell within its domain. The most that the state can require is a bona fide intention to become one of its residents. And perhaps it is within the competence of the state to fix a term of residence within its limits before the rights of citizenship shall attach.

#### PRIVILEGES OF CITIZENS OF UNITED STATES.

**161. The fourteenth amendment also declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.**

In this connection, it is important to observe that the privileges and immunities here protected are those of citizens of the United States (not of citizens of a state) and that they are such only as belong to those citizens in virtue of their citizenship. Another part of the constitution guaranties to the citizens of each state the privileges and immunities of citizens in the several states. But the fourteenth amendment is not supplementary to that clause and has no relation to it. It deals with a different matter, viz., the rights of citizens of the United States as such. It would perhaps be too narrow a construction to say that these rights must all be political in their character, or related to the status of citizenship. But it is clear that they must have some relation to the legitimate operations of the general government, to the purposes for which it was created, or to the powers which are committed to it.<sup>19</sup> The right of marriage, the right of the descent of property, the right to the control of children, the right to sue for property and to have it protected, and, in general, the protection of life, liberty, and the pursuit of happiness, are all founded in the relation between the state and its citizens, and are not rights which belong to the citizens of the United States as such. But the rights which they do possess in that character are also numerous and important. For example, in a case in which a state tax on interstate travel was held void, it was said to be the right of a citizen of the United States "to come to the seat of government to assert any claim he may have upon that government, to transact any busi-

<sup>19</sup> Kirtland v. Hotchkiss, 100 U. S. 491.

ness he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several states."<sup>20</sup> So it was said in another case: "Another privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. The right to peaceably assemble and petition for a redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the federal constitution. The right to use the navigable waters of the United States however they may penetrate the territory of the several states, and all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States and not citizenship of a state. One of these privileges is conferred by the very article under consideration. It is, that a citizen of the United States can, of his own volition, become a citizen of any state, by a bona fide residence therein."<sup>21</sup> Without attempting a complete enumeration, we may add several to the catalogue of rights herein given. Thus, it is undoubtedly a right of a citizen of the United States as such to share with others in the benefit of the postal system, to have access to the courts of the United States without let or hindrance by the states, to inspect the records of those courts, to take advantage of the laws opening the public lands to settlement or purchase, to take out patents or copyrights, to buy, sell, or devise United States securities, to take the benefit of national bankrupt laws, and all this without any abridgement, hindrance, or taxation by the states.<sup>22</sup>

<sup>20</sup> *Crandall v. Nevada*, 6 Wall. 35.

<sup>21</sup> *Slaughterhouse Cases*, 16 Wall. 36.

<sup>22</sup> The exercise by a citizen of the United States of the right to make a homestead entry upon unoccupied public lands, conferred by act of congress, is the exercise of a right secured by the constitution and laws of the United States. *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. 36. In the case of *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617, the fact is brought out that there are rights of citizens of the Union, as such, not specifically created by any clause of the constitution, but derivable from the supremacy of the federal government within its own sphere. Gray, J., observed: "Every right created by, arising under, or dependent upon the constitution of the United States

But the right to be admitted to practise law as a member of the bar is not one of the privileges or immunities of citizens of the United States. It is a special right, or privilege, conferred or withheld at the option of the state legislatures, and has not any necessary connection with citizenship.<sup>23</sup> Nor is the right to engage in the sale of any articles which, in consequence of their effect upon the public safety, the public health, or the public morals, are fit subjects for the exercise of the police power of the states. Thus, it is not one of the privileges of national citizenship to traffic in intoxicating liquors free from all regulation or restriction by the states.<sup>24</sup> And so a "trial by jury in suits at common law pending in the state courts is not a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings."<sup>25</sup> Neither, as we shall presently see, is the right of suffrage a privilege of citizens of the United States.

#### THE RIGHT OF SUFFRAGE.

**162. The right of suffrage is a political right, and is regulated by each government in accordance with its own views of policy and expediency. In this country the right**

may be protected and enforced by congress by such means and in such manner as congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the constitution, may in its discretion deem most eligible and best adapted to attain the object. .... In the case at bar, the right in question does not depend upon any of the amendments to the constitution, but arises out of the creation and establishment, by the constitution itself, of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try, and punish for crime, and to arrest the accused and hold them in safekeeping until trial, must have the power and the duty to protect against unlawful interferences its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them."

<sup>23</sup> *Bradwell v. State*, 16 Wall. 130.

<sup>24</sup> *Bartemeyer v. Iowa*, 18 Wall. 129.

<sup>25</sup> *Walker v. Sauvinet*, 92 U. S. 90.

to vote is not conferred or guaranteed by the federal constitution, but is left to be fixed and regulated by the several states, subject, however, to the limitations contained in the fourteenth and fifteenth amendments.

163. Where the constitution of the state defines the qualifications of those who shall be vested with the elective franchise, such qualifications cannot be altered by the legislature. But this does not deprive the legislature of the power to regulate the exercise of the right or the manner of conducting elections.

“Suffrage” means a vote, the act of voting, or the right or privilege of casting a vote at public elections. The term is not usually applied to the prerogative of voting at elections held by corporations or other private associations, but is restricted to such elections as are held under authority of government, general or local. The right of suffrage is also popularly called “the elective franchise.”

It has sometimes been contended that the right to take part in the administration of government or in the choice of those who are to make and execute the laws, by means of the ballot, is a natural right, standing in the same category with the rights of life, liberty, and property. It is perhaps true that those who are affected by the operations of government, and who are capable of exercising an independent and intelligent will in the choice of means or agents for carrying on its functions, should be admitted, without distinction as to sex, age, or race, to the privilege of expressing that will at the polls, and that this universality of suffrage is implied in the theory of a representative government. But it remains not less true that the right of suffrage is not a natural right, but a political right; not a personal right, but a civil right. It does not owe its existence to the mere fact of the personality of the individual, but to the constitution of civil government. Nor is it even a necessary attribute of citizenship. These principles are established by the following considerations. First, the exercise of an absolutely universal suffrage would imperil the very continuance of government. Second, the right of suffrage does not exist for the benefit of the individual, but for the benefit of the state itself. Third, there have been restric-

tions upon the suffrage in all democratic or republican governments known to history, even the most free.<sup>26</sup>

*Federal Constitution does not Confer Right of Suffrage.*

As a general rule, and except in some few details, the constitution of the United States does not regulate the right of suffrage, even as regards the choice of its own officers. The matter is left to the states. They grant or withhold the right of voting and determine the qualifications of those who shall possess it. In the case of *Minor v. Happersett*,<sup>27</sup> the supreme court of the United States declared that they were "unanimously of the opinion that the constitution of the United States does not confer the right of suffrage upon any one." But in a later decision the court explained that it did not intend thereby to say that when the class or the person entitled to vote at federal elections was ascertained by state laws, his right to vote for a member of congress was not fundamentally based upon the constitution, which created the office of member of congress, and declared that it should be elective, and pointed to the means of ascertaining who should be the electors. In the earlier case, the court was merely combating the argument that the right of suffrage was conferred by the constitution upon all citizens, and therefore upon women as well as men.<sup>28</sup>

*Qualifications Determined by the States.*

The federal constitution, in providing that "the house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature," simply adopts, with reference to congressional elections, the qualifications which each state may prescribe for its own electors. The state, if it admits given persons to vote for the members of its own lower house, cannot exclude the same persons from voting for members of congress. But, subject only to the limitations of the fourteenth and fifteenth amendments,

<sup>26</sup> Cooley, *Const. Law* (2d Ed.) 259; 1 Story, *Const.* §§ 579-582; *Spencer v. Board of Registration*, 1 MacArthur, 169; *U. S. v. Anthony*, 11 Blatchf. 200, Fed. Cas. No. 14,459.

<sup>27</sup> 21 Wall. 162.

<sup>28</sup> *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152.

to be hereafter noticed, it rests entirely in the discretion of the state to prescribe the qualifications of such persons. The result is that there is a singular and anomalous lack of uniformity in the qualifications of those persons who elect the federal house of representatives, and, indirectly, the senate and the President. In several of the states, unnaturalized foreigners, after they have resided a certain time within the state, are given the right to vote. In some states, the privilege of the ballot is extended to women. In some, there is a property qualification. In others, there is an educational qualification. But the constitution has not given to the national government the power to establish a uniform rule as to the qualifications of its own electors. Congress may indeed make regulations as to the time, place, or manner of holding elections for senators or representatives, or alter those directed to be made by the states. (Const. art. 1, § 4.) But this does not touch the qualifications of the voters.<sup>29</sup>

One more clause of the federal constitution requires notice in this connection. It is the second section of the fourteenth amendment, which provides that when the right to vote is denied by any state to any of its male inhabitants who are twenty one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, then the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty one years of age in such state. The purpose of this clause was of course to induce the states to extend the elective franchise to the colored race. But this was made obligatory by the fifteenth amendment. Still, the language of the clause under consideration is general. And it is possible to conceive of cases where, without any reference to race or color, the states might so restrict the right of suffrage as to render themselves liable to have their representation reduced. But it has never been con-

<sup>29</sup> In this connection, we should notice the curious result of the direction of the constitution that the time, etc., shall be fixed by the legislature of the state. If the constitution of the state and the statutes of the state, on this subject, are in conflict, then, so far as concerns the election of federal representatives, it is the constitution which must give way, and the statute which must control. *Baldwin v. Trowbridge*, 2 Bart. El. Cas. 46.

sidered that the imposition of a reasonable educational qualification, or the requirement of the payment of a poll tax, was such an abridgment or denial of the right as is here contemplated.<sup>30</sup>

The right to fix the qualifications of its electors being thus vested in the state, subject to the few limitations above considered, it may proceed to determine what persons shall be excluded from this privilege, according to its own views of justice and policy. For the most part, aliens and non-residents are excluded. But, as already observed, the state may, if it chooses, confer the right to vote upon resident unnaturalized foreigners. And since suffrage is not a necessary attribute of federal citizenship, it would be competent for the state to withhold the elective franchise from naturalized persons until they have resided a certain time within its limits. Naturalization makes a man a citizen both of the United States and of the state where he resides. But many other persons who are citizens have not the right to vote. "Each state has the undoubted right to prescribe the qualifications of its own voters. And it is equally clear that the act of naturalization does not confer on the individual naturalized the right to exercise the elective franchise. While other civil rights are conferred by it, that of voting at elections for officers of the state is not one, unless the party possess the other requisite qualifications, defined by the state law, where citizenship is one of the necessary requisites to its exercise."<sup>31</sup> In most of the states, women are not invested with this privilege, and in all, minors are excluded. Persons mentally incapable of exercising a choice are generally excluded. And it is held that even where the law gives the right generally to persons possessing certain qualifications, this must be understood as excluding idiots and insane persons, though not expressly mentioning them as exceptions.<sup>32</sup> In many states also, it is provided that conviction of an infamous crime shall deprive the offender of the right of suffrage. But such a punishment can be imposed only after trial and conviction. The election judges cannot be authorized for supposed guilt to inflict the forfeiture of civil rights.<sup>33</sup>

<sup>30</sup> Cooley, Const. Law (2d Ed.) 273-275.

<sup>31</sup> Spragins v. Houghton, 3 Ill. 377.

<sup>32</sup> McCrary, Elect. §§ 4, 50, 73.

<sup>33</sup> Cooley, Const. Law (2d Ed.) 262; Huber v. Riley, 53 Pa. St. 112; State v. Symonds, 57 Me. 148; Burket v. McCarty, 10 Bush, 758.

*Fifteenth Amendment.*

The fifteenth amendment to the constitution of the United States provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Of this provision it has been said: "The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the states or the United States, however, from giving preference in this particular to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race, having certain qualifications, are permitted by law to vote, those of another, having the same qualifications, must be. Previous to this amendment there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of congress. This right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude."<sup>34</sup> But it will be observed that it remains within the power of the state to prescribe such qualifications for the suffrage as it may please, provided that they apply equally to persons of all races and colors.<sup>35</sup> Thus the amendment does not give to negroes the right to vote independently of such restrictions and regulations (for example, as to age and residence) as are imposed by the state constitution on white citizens.<sup>36</sup> But the amendment, being a part of the supreme law of the land, had the effect to annul those provisions of the constitutions of several of the states which restricted the exercise of the right of suffrage to white persons.<sup>37</sup>

<sup>34</sup> U. S. v. Reese, 92 U. S. 214; U. S. v. Harris, 106 U. S. 629, 637, 1 Sup. Ct. 601; U. S. v. Crosby, 1 Hughes, 448, Fed. Cas. No. 14,893.

<sup>35</sup> Narr, Suffrage & Elections, 1; Morse, Citizenship, § 143.

<sup>36</sup> Anthony v. Halderman, 7 Kan. 50.

<sup>37</sup> Wood v. Fitzgerald, 3 Or. 568.

*Qualifications Fixed by State Constitution.*

Where the constitution of a state (as is usually the case) fixes the qualifications of those who are to enjoy the right of suffrage, it is the intention that the standards so set up shall remain unalterable until the popular will changes to such an extent as to involve an alteration of the organic law. In this case, it is not within the constitutional power of the state legislature to alter, modify, or dispense with the qualifications determined by the constitution. It is not lawful to enact statutes which would either exclude persons admitted by the constitution, or admit persons whom the constitution would shut out. No new or different qualifications can be prescribed, nor can any of those named by the constitution be abrogated.<sup>38</sup>

*Regulation of Elections.*

While the state constitution will generally be found to prescribe the qualifications of voters, the regulation of elections is usually left to the discretion of the legislature. It is competent for the legislature, without abridging the right to vote, to make the elective franchise dependent on such reasonable conditions and preliminaries as may be deemed necessary to prevent fraud and secure the freedom as well as the purity of elections. Thus, the laws requiring the registration of voters are undoubtedly constitutional.<sup>39</sup> So also the legislature may make rules relating to the method of voting, the giving of notice of elections, the creation and functions of election officers, the sufficiency of ballots, the powers and duties of canvassing boards, and to punish fraud, violence, intimidation, bribery, and similar offenses. The statutes enacting what is commonly called the "Australian ballot law" or system of secret voting, have been generally sustained as constitutional in all their leading particulars.<sup>40</sup>

<sup>38</sup> *Green v. Shumway*, 39 N. Y. 418; *McCafferty v. Guyer*, 59 Pa. St. 109; *Quinn v. State*, 35 Ind. 485; *People v. Canaday*, 73 N. C. 198; *Monroe v. Collins*, 17 Ohio St. 665; *Rison v. Farr*, 24 Ark. 161; *Randolph v. Good*, 3 W. Va. 551; *Brown v. Grover*, 6 Bush, 1; *State v. Williams*, 5 Wis. 308; *State v. Baker*, 38 Wis. 71; *Davies v. McKeeby*, 5 Nev. 369.

<sup>39</sup> *Hyde v. Brush*, 34 Conn. 454.

<sup>40</sup> See *De Walt v. Bartley*, 146 Pa. St. 529, 24 Atl. 185; *Rogers v. Jacob*, 88 Ky. 502, 11 S. W. 513; *Common Council of Detroit v. Rush*, 82 Mich. 532, 46 N. W. 951; *Cook v. State*, 90 Tenn. 407, 16 S. W. 471.

The federal constitution provides that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may at any time make or alter such regulations, except as to the place of choosing senators." It is held that this section gives congress a supervising power over the subject, and it may either make new regulations, or add to or modify those made by the state law; and any regulations made by it which are inconsistent with those of the state will necessarily supersede the state regulations.<sup>41</sup> While this provision adopts the state qualification as the federal qualification for the voter, his right to vote is based upon the constitution, and not upon the state law; and congress has the constitutional power to pass laws for the free, pure, and safe exercise of this right.<sup>42</sup>

#### FREEDOM OF SPEECH AND OF THE PRESS.

**164.** The first amendment to the constitution of the United States provides that congress shall make no law abridging the freedom of speech or of the press. And similar guaranties of liberty of speech and publication have been incorporated in the constitutions of the several states. Liberty does not mean unrestrained license. This freedom is limited by police laws and by the common law of libel. But it protects the individual against governmental oppression on account of his honest criticism of public men, measures, or affairs.

In respect to the privileges secured by this guaranty, and with regard to responsibility for its abuse, there is no difference between "speech" and "the press." It is a mistake to suppose that there is a liberty of speech and a liberty of the press which are in any way different or distinct. The constitutional provision is designed to insure freedom for the expression of opinion. And it makes no difference whatever whether the opinion be expressed orally or in print. It is to be noticed that the constitutional guaranty here considered does not create any new right not previously understood to belong

<sup>41</sup> Ex parte Siebold, 100 U. S. 371; Ex parte Clarke, Id. 399.

<sup>42</sup> Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152.

to the people. The language of the federal constitution, in declaring that congress shall make no law "abridging" the freedom of speech and of the press, implies that such freedom already existed, and only intends that it shall not be impaired by any federal legislation. The same construction is also to be put upon the similar provisions in the state constitutions. It follows that, in determining the nature of this freedom and its limitations, we are to have recourse to the law as it existed at the time of the adoption of the constitutions, and that contemporary history may be consulted in order to ascertain the meaning of the language employed.

It is quite generally understood in England, and has been thought by some of our best writers, that freedom of the press means only an exemption from censorship; that is, that it secures to the individual the right to print whatsoever he may choose, without being required to obtain previous permission or authorization from any one, and without liability for any matters which are merely intended for publication, leaving him to be held accountable to any laws which may be enacted, for his statements or assertions after their publication.<sup>43</sup> But it has been clearly shown by Judge Cooley that this construction of the clause is much too narrow. In the first place, there can be no such thing as a censorship of spoken words, and hence if the guaranty meant no more than this, the half of it would be without any meaning. Again, the privilege of printing whatever one chose would be of but little value if the authorities were then at liberty to make laws for the punishment of utterances or publications inherently harmless but displeasing to them. The ordinary civil and criminal law of libel is amply sufficient to protect the citizen against punishment for the rightful publication of matters affecting other citizens only. But without this guaranty of free speech and printing, there would be no security against such measures as the government or any of its departments or agencies might choose to adopt for the muzzling of public opinion or the stifling of just criticism.<sup>44</sup>

But the freedom of speech and of the press does not mean unrestrained license. It cannot for a moment be supposed that this guar-

<sup>43</sup> Rawle, Const. 123; 2 Story, Const. § 1889; 2 Kent, Comm. 17; Com. v. Blanding, 3 Pick. 304; 4 Bl. Comm. 151.

<sup>44</sup> Cooley, Const. Lim. 422.

anty gives to every man the right to speak or print whatever he may choose, no matter how false, malicious, or injurious, without any responsibility for the damage he may cause. The guaranty does not do away with the law of liability for defamation of character. On the contrary, that law is not only consistent with liberty of speech and of the press, but is also one of the safeguards of those who may use, but do not abuse, this liberty. By the common law, and by statute law in the states, one who published libelous attacks upon another, with malicious intent to do him injury, was amenable to the criminal law. And there is also a liability in damages to the party injured. Exceptions to this rule are found in the case of what are called "privileged communications." These will be noticed later.<sup>45</sup>

The liberty of the press is also limited, but not abridged, by laws passed in the exercise of the police power, for the protection of the moral health of the community. At common law, blasphemous publications, and also all such as tended, by their obscenity or indecency, to debauch the minds of the public and corrupt their morals, were punishable. And it is undoubtedly within the competence of the several states to enact laws for the punishment of such offenses, without infringing upon private rights secured by the guaranty of free speech. Similar laws may be passed by congress, to operate within the territory subject to its exclusive legislation, notwithstanding the first amendment. And in consequence of the control of congress over the postal system, it may make provision for excluding from the mails all matter of an indecent character, and also such matter as tends in other ways to affect the public morals injuriously, such as advertisements of lotteries.<sup>46</sup>

#### *Libels on Government.*

By the common law of England, it was not allowable to publish any criticism of the constitution or any strictures on the established order of government, at least where the tendency of the publication was to stir up disaffection against the government, and thus

<sup>45</sup> If the publication was not privileged and is of such a nature as to be libellous, it is no defense to a proceeding against the publisher that he did not originate the libel, but merely copied it from another source. *Queen v. Newman*, 1 El. & Bl. 268.

<sup>46</sup> *Ex parte Jackson*, 96 U. S. 727.

directly or indirectly to excite a spirit of revolution.<sup>47</sup> It is true that a "calm and temperate" discussion of public affairs or events was permitted. But the party injured by such publications, namely, the government, was both prosecutor and judge of the temperateness and propriety of the article complained of. And in practice, prosecutions for this species of offense were conducted with so much harshness and injustice as to excite a revulsion of popular feeling, to make convictions almost impossible, and finally to cause the entire cessation of all such proceedings. It is probable that this kind of oppression was one of the things which the framers of our constitution had principally in view in providing for the freedom of the press. No prosecution for a libel upon the government could be maintained anywhere within the United States, except it were under a statute. For the United States as such has no common law, and its courts have no common law jurisdiction of crimes.<sup>48</sup> And as for the several states, the English common law was adopted by them as a substantive part of their law only in so far as it was suited to their conditions and circumstances. And it could not be contended, with any plausibility, that the common law in relation to libels upon the government was suited to the spirit of our institutions or to the genius or character of the people or their political ideas, in any of the American states.<sup>49</sup> Whether it would be within the constitutional power of either the United States or one of the states to enact laws prohibiting libels upon the constitution or system of government, is a different question. But, as it has been pointed out by a learned writer, the right of the people to change their institutions at their own will is a fundamental principle of all our constitutions. And this must imply a right to criticise institutions and governmental arrangements, to discuss them, to condemn them, and to endeavor to bring the people to a sense of their unsatisfactoriness and to consenting to change them.<sup>50</sup> There may, however, be a limitation upon this freedom in consideration of the fact that any attempt to overthrow republican government in America would be outside the pale of privilege. And publications which relate to conspiracies to subvert the government or to incite treason, or which are otherwise seditious, are not within the reason

<sup>47</sup> Cooley, Const. Lim. 426.

<sup>49</sup> Cooley, Const. Lim. 429.

<sup>48</sup> U. S. v. Hudson, 7 Cranch, 32.

<sup>50</sup> Cooley, Const. Law (2d Ed.) 288.

which protects the freedom of the press. Only one attempt to restrain seditious publications has ever been made in this country, and that was attended by such results as to make its repetition extremely unlikely. We refer to the Sedition Law of 1798. This act of congress provided for the punishment of all unlawful combinations and conspiracies to oppose the measures of the government, or to impede the operation of the laws, or to intimidate and prevent any officer of the United States from undertaking or executing his duty. It also provided for a public presentation and punishment, by fine and imprisonment, of all persons who should write, print, utter, or publish any false, scandalous, and malicious writing or writings against the government of the United States, or of either house of congress, or of the President, with an intent to defame them or bring them into contempt or disrepute, or to excite against them the hatred of the good people of the United States, or to excite the people to oppose any law or act of the President in pursuance of law or his constitutional powers, or to resist, or oppose, or defeat any law, or to aid, encourage, or abet any hostile designs of any foreign nation against the United States.<sup>51</sup> Several prosecutions were had under this law, and the courts sustained its validity.<sup>52</sup> But the act was extremely unpopular, and tended to bring about the very abuses which it was designed to prevent, and it was largely instrumental in causing the downfall of the Federalist party which had passed it. It was temporary, and soon expired.

*Privileged Communications.*

In the law of libel and slander, "privilege" means the exemption of the person uttering or publishing the matter complained of, from responsibility, civil or criminal, although the words may have caused damage and may be in fact false. Privilege is of two kinds, absolute and conditional. It is of the first kind where it exempts from all responsibility without any consideration of motive or design. It is of the second kind where it protects the person in case his statement, though unfounded, was made for proper ends and from justifiable motives. Several examples of privilege of both kinds be-

<sup>51</sup> 2 Story, Const. § 1891.

<sup>52</sup> Haswell's Case, Whart. St. Tr. 684, Fed. Cas. No. 15,324; Callender's Case, Whart. St. Tr. 688, Fed. Cas. No. 14,709.

long to the domain of public law, and should be considered in connection with the freedom of the press.

*Absolute Privilege.*

One of the highest kinds of privilege known to the law is that of the members of legislative bodies, in respect to utterances or publications made by them in the discharge of their public duties. The federal constitution provides that senators and representatives "for any speech or debate in either house, shall not be questioned in any other place." (Article 1, § 6.) And similar provisions are found in the constitutions of most, if not all, of the states. This privilege ought not to be construed strictly, but liberally. It should not be confined to delivering an opinion, uttering a speech, or haranguing in debate, but extended to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And it is also considered that the privilege is not confined to the floor of the house, but follows the member into committees and joint sessions.<sup>53</sup> In England it appears to be the rule that while proceedings had, or speeches made, in parliament, are thus privileged, and while a member may cause his speech to be published in the public press, yet, when so published, the parliamentary privilege does not follow it. That is, injurious reflections upon individuals, made in the course of the speech as it was delivered, will give them no right of action against the member, but if printed and published, they are libellous.<sup>54</sup> In this country, however, the privilege would at least follow the speech in its official publication by authority of law.

Another example of absolute privilege is that of the chief executive officers of the nation and the states, who are not to be held responsible for anything said or published by them in their official capacity and in the line of their official duty. And the same exemption belongs to judges and judicial officers of all kinds when acting within the limits of their jurisdiction.<sup>55</sup> Moreover, all statements legitimately made in the course of judicial proceedings are

<sup>53</sup> Coffin v. Coffin, 4 Mass. 1, 27.

<sup>54</sup> Rex v. Lord Abingdon, 1 Esp. 226; Rex v. Creevey, 1 Maule & S. 273. But compare Davison v. Duncan, 7 El. & Bl. 229, 233. And see Wason v. Walter, L. R. 4 Q. B. 73; Kinyon v. Palmer, 18 Iowa, 377.

<sup>55</sup> Cooley, Const. Law (2d Ed.) 287.

privileged. Thus, the statements made by a witness under oath cannot be made the basis of an action even though false and malicious; and the same is true of statements made by one jurymen to another while they are considering the verdict.<sup>56</sup> And in regard to the statements made in affidavits, or otherwise, as a basis for setting in motion the criminal machinery of the law, it may be stated that they are so far privileged that it will require proof of actual malice in order to sustain an action of libel.<sup>57</sup> Another and very important case of absolute privilege is that of a lawyer addressing the court or jury on his client's case. He is allowed great latitude in his comments upon the evidence, the witnesses, or the adverse party, or his character and motives, and for what he may say in the discharge of his duty to his client he is not to be held accountable in any other place or proceeding.<sup>58</sup>

*Conditional Privilege.*

A publication is said to be conditionally privileged when the author of it is not to be held accountable for its falsity if it was made for good ends and from justifiable motives, but otherwise if it was made with a malicious intent to injure individuals. For example, it is always permissible to publish the proceedings of the courts. But the report must be full, and not merely a statement of the conclusions drawn by the publisher from the proceedings; and it must be fair, and not calculated to mislead the reader to the prejudice of a party concerned; and it must also be impartial, and it is not admissible to add slanderous comments, innuendoes, or observations, or defamatory headings. Further, the privilege does not extend to the reporting of such proceedings as are merely *ex parte* or pre-

<sup>56</sup> *Seaman v. Netherelift*, 2 C. P. Div. 53; *Allen v. Crofoot*, 2 Wend. 515; *Marsh v. Ellsworth*, 50 N. Y. 309; *Terry v. Fellows*, 21 La. Ann. 375; *Dunham v. Powers*, 42 Vt. 1.

<sup>57</sup> *Astley v. Younge*, 2 Burrows. 807; *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94; *Padmore v. Lawrence*, 11 Adol. & E. 380; *Strauss v. Meyer*, 48 Ill. 385; *Garr v. Selden*, 4 N. Y. 91. A communication made to a prosecuting attorney, by a person who inquires of him whether the facts communicated make out a case of larceny for a criminal prosecution, is an absolutely privileged communication, and cannot be made the foundation of an action against such person for slander. *Vogel v. Gruaz*, 110 U. S. 311, 4 Sup. Ct. 12.

<sup>58</sup> *Munster v. Lamb*, 11 Q. B. Div. 588; *Hoar v. Wood*, 3 Metc. (Mass.) 193.

liminary. In regard to these, if any statement is false, and proves injurious to a private person, he will have an action in damages.<sup>59</sup>

To this category also belongs the case of criticisms upon the character, history, or fitness of a candidate for public office, or upon the official character or conduct of one in office. Such criticisms are privileged if made with an honest design to enlighten the public and for their interest and benefit, but not when made with a malicious design to injure or degrade the individual. In some jurisdictions it seems to be the rule that the charges, if false, are presumed to be malicious, and the author or publisher must prove his motives to have been justifiable.<sup>60</sup> But it is believed that public sentiment and the understanding of the people does not restrict the privilege of discussion to such narrow limits as are here indicated.<sup>61</sup> The English authorities limit the privilege of publication to matters of general interest, as distinguished from such as are of merely local interest. Thus the public press, keeping within the bounds of good faith, is privileged in any comments it may make on the public conduct of a public officer, such as a judge; but it is not privileged in like manner in the case of an officer charged with purely local duties, such as the physician to a local public charity.<sup>62</sup> But the American courts recognize no such distinction. The officers of private corporations are not public functionaries in any such sense as to give the press the privilege of commenting on their conduct or character with impunity.<sup>63</sup> Criticisms of books and other literature offered to the public are privileged provided they are honest and fair, made in good faith, and not used as a cloak to cover an injurious personal attack upon the writer.<sup>64</sup> A statement made in a published report of a corporation, that a person who had formerly been authorized to collect subscriptions for them is no longer

<sup>59</sup> In support of these rules, see *Cooley*, Const. Lim. 448; *Hoare v. Silverlock*, 9 C. B. 20; *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548; *Pittock v. O'Neill*, 63 Pa. St. 253; *Usher v. Severance*, 20 Me. 9; *Stiles v. Nokes*, 7 East, 493; *Rex v. Fisher*, 2 Camp. 563; *Storey v. Wallace*, 60 Ill. 51.

<sup>60</sup> *King v. Root*, 4 Wend. 113; *Lewis v. Fero*, 5 Johns. 1.

<sup>61</sup> See an excellent discussion of the whole subject in *Cooley*, Const. Lim. 431-441.

<sup>62</sup> *Purcell v. Sowler*, 1 C. P. Div. 781.

<sup>63</sup> *Wilson v. Fitch*, 41 Cal. 363.

<sup>64</sup> *Reade v. Sweetzer*, 6 Abb. Pr. (N. S.) 9, note.

in' their employ, and cautioning all persons not to trust him on their account, is privileged in so far as it is made in good faith and is required to protect the corporation and the public against false representations of that person.<sup>65</sup>

It has often been claimed that the publishers of newspapers, in view of the peculiar nature of their business of gathering and disseminating news, should have a more liberal exemption from liability to the law of libel than persons engaged in other occupations. But this claim has never been conceded by the courts. The established rule is that when the publication is made in good faith, in the ordinary course of the publisher's business, and without any intention to work injury to the reputation of the subject of it, the party injured by the false statement will not be allowed to recover anything more than his actual damages.<sup>66</sup>

*Jury as Judges of the Law.*

In the constitutions of many of the states, it is provided that in prosecutions for libel, the jury shall be the judges of the law. This provision is in furtherance of the right of free speech, or was intended to be so. For it is historically due to the early disposition of the courts, especially in England, to limit the province of the jury strictly to the fact of publication and to require them to receive the opinion of the court on the character of the publication, as libellous or not, as binding upon them.

#### THE RIGHT OF ASSEMBLY AND PETITION.

165. The first amendment to the federal constitution provides that "congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances."

This clause was probably suggested by the fifth declaration of the English Bill of Rights, passed in the first year of William and Mary, after the revolution of 1688, wherein the right of the subject to

<sup>65</sup> Gassett v. Gilbert, 6 Gray, 94.

<sup>66</sup> Cooley, Const. Law (2d Ed.) 293; Detroit Daily Post & Tribune Co. v. McArthur, 16 Mich. 447; Ferret v. New Orleans Times Newspaper, 25 La. Ann. 170.

petition the king is set forth. But the right secured is so essential to a free government that it would probably be regarded as inherent in the nature of our republican systems, even if it were not expressly placed under the protection of the constitution. The prohibition, however, is here laid only upon congress. It is intended as a protection against federal action alone. But the right of the people peaceably to assemble for the purpose of petitioning congress for a redress of grievances, or for anything else connected with the powers or duties of the national government, is an attribute of national citizenship, and as such under the protection of and guaranteed by the United States. The very idea of a government republican in form implies that right, and an invasion of it presents a case within the sovereignty of the United States.<sup>67</sup>

It will be noticed that two separate, though related, rights are here secured. It is not that the right to assemble for the purpose of framing or presenting petitions is guaranteed. But the people have the right to assemble for lawful purposes, though no petition is included within the scope of those purposes. But since assemblages for commercial, social, religious, or commemorative purposes are sufficiently cared for in other provisions of the various constitutions, the importance of the clause under consideration will principally be apparent in connection with political meetings. And here the right of assembly will include not only the meetings and conventions familiar in our political methods, but also the assemblage of those who have no standing as voters, when held with a view to secure political recognition or urge the repeal of oppressive laws.

But the right of assembly and petition is not absolutely unrestricted. It must be exercised "peaceably." By this is meant that assemblies must be for lawful purposes and must not be tumultuous or riotous in their character, and that petitions must not be of a seditious nature, nor accompanied by any parade of force or show of intimidation or threats. If these conditions are violated, the participants become amenable to the criminal laws, and cannot complain that their lawful rights are abridged. This principle may be illustrated by certain facts from English constitutional history which preceded the adoption of our own constitution. It is a maxim of

<sup>67</sup> U. S. v. Cruikshank, 92 U. S. 542.

the law of England that the subject has a right to prefer petitions for the redress of grievances. This right was fully and triumphantly vindicated upon the trial and acquittal of the seven bishops, in the fourth year of James II., and the result of that trial has always been regarded as one of the most notable victories of the law against attempts at tyrannical oppression of the people.<sup>68</sup> Yet at that very time there was on the statute book an act against "tumultuous petitioning," wherein it was provided that not more than twenty names should be signed to any petition to the king or either house of parliament for any alteration of matters established by law in church or state, unless the contents thereof were previously approved, in the country, by three justices or the majority of the grand jury at the assizes or quarter sessions, and in London, by the lord mayor, aldermen, and common council, and that no petition should be delivered by a company of more than ten persons.<sup>69</sup> Afterwards came the Bill of Rights, wherein it was declared "that it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal." But the statute referred to was not repealed by this declaration, and it is still in force in England, though probably entirely a dead letter. The distinction which it introduced, between lawful and peaceable petitioning and such proceedings as are riotous or tumultuous, has become a recognized part of the English law, though the specific provisions of the statute are no longer regarded. This was made apparent upon the trial of Lord George Gordon for high treason, in 1781. The followers of this nobleman, in immense numbers, presenting the petition of the Protestant Association, had besieged parliament in its very house with threats, violence, and rioting. On this trial, Lord Mansfield charged the grand jury that "to petition for the passing or repeal of any act is the undoubted inherent birthright of every British subject, but under the name and color of petitioning to assume command, and to dictate to the legislature, is the annihilation of all order and government. Fatal experience had shown the mischief of tumultuous petitioning, in the course of that contest, in the reign of Charles I., which ended in the overthrow of the monarchy, and the destruction of the consti-

<sup>68</sup> Case of the Seven Bishops, 12 How. St. Tr. 183, Broom, Const. Law, 406.

<sup>69</sup> St. 13 Car. II. St. 1, c. 5.

tution; and one of the first laws after the restoration of legal government was a statute passed in the 13th year of Charles II., enacting that no petition to the king or either house of parliament for alteration of matters established by law in church or state, shall be signed by more than twenty names or delivered by more than ten persons. In opposition to this law, the petition in question was signed and delivered by many thousands, and in defiance of principles more ancient and more important than any regulations upon the subject of petitioning. The desire of that petition was to be effected by the terror of the multitude that accompanied it through the streets, classed, arranged, and distinguished as directed by the advertisements."<sup>70</sup>

The meaning of this clause in the first amendment to the federal constitution was brought into prominent light, and its effect earnestly debated, in 1836 and 1837, when the house of representatives adopted a resolution that all petitions relating in any manner to the subject of slavery or the question of its abolition should be laid on the table, without being either printed or referred, and that no further action whatever should be had upon them. But no important rule or principle was established, and the resolution itself, with the debates which accompanied it, are now of historical interest only.<sup>71</sup>

The right of petition also includes the right to be exempt from all liability, civil or criminal, for statements made in the petition which may reflect injuriously upon an individual, provided the petition was made in good faith and upon a proper occasion, and the injurious statements were not made maliciously and with intent to injure the person reflected upon, but with probable cause to believe in their truth, and for a proper purpose. Even though false and injurious aspersions upon private character or public conduct are found in the petition, this will not make out a *prima facie* case of libel, but the plaintiff in such an action must assume the burden of proving that the defendant was actuated by malice and that there was a want of probable cause for his believing the charges.<sup>72</sup>

<sup>70</sup> 21 How. St. Tr. 487.

<sup>71</sup> See Von Holst, *Const. Hist. U. S.*, vol. 2, pp. 245-262.

<sup>72</sup> *Thorn v. Blanchard*, 5 Johns. 528; *Gray v. Pentland*, 2 Serg. & R. 23; *Howard v. Thompson*, 21 Wend. 319; *Vanderzee v. McGregor*, 12 Wend. 545; *State v. Burnham*, 9 N. H. 34; *Fairman v. Ives*, 5 Barn. & Ald. 642.

The right secured by the constitution extends only to petitions "for the redress of grievances." In respect, however, to the privilege which attends petitions made in good faith and in a proper manner, the term is one of wide import. It includes not only requests for the passage or repeal of laws, and for the removal of officers who have abused their authority, but also recommendations to office, remonstrances against proposed appointments or the grant of licenses and privileges, and demands for any sort of official action or forbearance.<sup>73</sup>

#### DISFRANCHISEMENT.

166. Disfranchisement is the act of depriving a person of franchises formerly held by him. In public law, it is applied especially to the taking away from an individual of his political rights and privileges, or of his rights as a free citizen. In a still narrower sense, it means the disqualification of an individual to exercise the elective franchise. In the United States, disfranchisement exists only as a punishment for crime or as a consequence of conviction thereof.

In old English law, a person who was outlawed, excommunicated, or convicted of an infamous crime, was said to "lose his law," (*legem amittere*), which included the loss of his civil rights or the benefit and protection of the law, and in a more restricted sense, the deprivation of the right to give his evidence as a witness in a court of law. On the other hand, a man who stood "*rectus in curia*," that is, possessed of all his civil rights, and not outlawed, excommunicated, or infamous, was called "*legalis homo*," or a "good and lawful man." Something similar to this was found in the Roman law, where the lesser or medium loss of status (*capitis diminutio media*) occurred when a man lost his rights of citizenship, and his family rights, but without losing his liberty.

In the United States, the deprivation of civil rights can be inflicted by the government only as a punishment for crime, or it may be decreed to follow as a consequence of the infamy supposed to characterize one convicted of crime. Citizenship, as such, can never be

<sup>73</sup> *Kershaw v. Bailey*, 1 Exch. 743; *Bradley v. Heath*, 12 Pick. 163.

forfeited save by the voluntary renunciation of the party. That is to say, there is no constitutional way in which the United States or a state could reduce a person, enjoying the character of a citizen, to the standing of an alien. But several of the privileges attached to the status of citizenship may be stripped off, by way of punishment for an offense duly proven in the courts. This power, however, cannot be exercised in any arbitrary manner, nor by laws framed against particular individuals or classes of citizens. An act inflicting such disqualifications, if aimed at a particular person or class, and having relation to past acts only, would amount to a bill of attainder or an *ex post facto* law, or partake of the character of both.<sup>74</sup> And the power to discriminate against individuals or classes, in the distribution of civic rights or the infliction of civil disqualifications, is entirely denied to the states by the last three amendments to the federal constitution.

*Right of Suffrage.*

In most of the states, as already remarked, many persons who are entitled to be denominated citizens are not allowed the privilege of the ballot. Such are women, minors, insane persons, the illiterate, and in some states the proletarian classes. But the denial of the right of suffrage to these persons cannot properly be called a disfranchisement of them, because that term is correctly applied only to the deprivation of a privilege heretofore enjoyed. But disfranchisement, in the sense of a taking away of the elective franchise from persons who formerly possessed it, exists in most of the states as a punishment for crime. Several of the state constitutions contain provisions denying the right of voting at public elections to those who shall be convicted of an "infamous crime," or of "high crimes," or of "felony." And in some of the constitutions, various crimes are specified, a conviction of which shall work the deprivation of this right, such as treason, bribery, duelling, betting on elections, perjury, embezzlement of public money, larceny, and forgery.<sup>75</sup>

*Disqualification to be a Witness.*

By the English common law, a person who was convicted of an infamous crime was thereby rendered incompetent as a witness, on the

<sup>74</sup> *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, Id. 333.

<sup>75</sup> *Stim. Am. St. Law*, pp. 62, 63.

theory that a person who would commit so heinous a crime must necessarily be so depraved as to be unworthy of credit. These crimes were treason, felony, and the *crimen falsi*. But at present, the disqualification of infamy has been done away with by statute in England and in most of the United States, and the rule has been substituted that a conviction for crime may be adduced in evidence to affect the credibility of the witness.<sup>76</sup>

*Ineligibility to Office.*

If a convict is considered unworthy to exercise the elective franchise, much more should he be deemed unfit to hold office in the government. Accordingly, we find that the constitutions of many of the states declare that no person who has been convicted of certain crimes shall be eligible to hold public office. These provisions vary greatly in respect to the specific crimes which are to be attended with this consequence. But those most frequently enumerated are treason, bribery, duelling, malfeasance in office, public defalcation or embezzlement of the public funds, perjury, offenses against the election laws, and murder. In a number of the states, the disqualification attaches to the conviction of any infamous crime. This consequence of a conviction is strictly and properly a punishment. It cannot be inflicted except by due process of law. And this involves a judicial inquiry, by a competent tribunal, into the fact of the commission of the offense, and a regular adjudication of the disqualification. The determination cannot be left to an election board or to mere ministerial officers.<sup>77</sup>

The federal constitution also contains certain provisions of this character. Thus, in article 1, § 3, we read: "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." And the third section of the fourteenth amendment provides that no person shall hold any office, civil or military, under the United States or under any state, who, having previously taken an oath, as a member of congress or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution

<sup>76</sup> 1 Whart. Ev. § 397.

<sup>77</sup> Cooley, Const. Law (2d Ed.) 269; *Com. v. Jones*, 10 Bush, 725.

of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress, by a two-thirds vote of each house, may remove such disability. Congress has been very liberal in the exercise of the power to remove this disability, and it is believed that there are now very few persons, if any, who still remain under its burden.

**CHAPTER XX.****CONSTITUTIONAL GUARANTIES IN CRIMINAL CASES.**

- 167-168. Provisions in the Constitutions.
- 169. Presentment or Indictment.
- 170-171. Trial by Jury.
  - 172. Privilege against Self-criminating Evidence.
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  - 185. Suspension of Habeas Corpus.
  - 186. Definition of Treason.
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**PROVISIONS IN THE CONSTITUTIONS.**

167. Under the American systems, every person charged with crime and brought to trial therefor is secured, by constitutional guaranties, in the enjoyment of certain rights which are generally deemed essential to the due administration of justice under a free government. Some of these rights are secured by the constitution of the United States, others by the constitutions of the individual states, and others by both concurrently.

168. The most important of these rights are as follows:

- (a) The right to a presentment or indictment by a grand jury.
- (b) The right to be tried by a petit jury.
- (c) The exemption of the prisoner from being compelled to testify against himself.

- (d) The right to be confronted with the witnesses against him.
- (e) The right to compulsory process for obtaining witnesses in his favor.
- (f) The right to be present at the trial.
- (g) The right to be heard in person or by attorney and to have the assistance of counsel for his defense.
- (h) The right to a speedy, fair, and public trial.
- (i) The privilege against being deprived of life, liberty, or property without due process of law.
- (j) The guaranty that the prisoner shall not be twice put in jeopardy of life or limb for the same offense.
- (k) The guaranty that excessive bail shall not be required.
- (l) The guaranty that excessive fines shall not be imposed nor cruel and unusual punishments inflicted.
- (m) The provision that no person shall be punished by a bill of attainder or an ex post facto law.
- (n) The privilege of the writ of habeas corpus, except when it may be lawfully suspended in emergencies provided for by the constitution.

The fifth, sixth, and eighth amendments to the federal constitution, wherein many of the above mentioned rights are guaranteed to person accused of crime, are now conceded to be applicable only to the courts of the United States and proceedings therein. They were not intended to operate, and do not operate, to restrict the power of a state in its dealings with persons offending against its own laws, but were designed merely as limitations upon the power of the national government.<sup>1</sup> But the same rights are secured by

<sup>1</sup> Twitchell v. Com., 7 Wall. 321; State v. Paul, 5 R. I. 185; Murphy v. Peo-

the constitutions of nearly all the states, not always in the same language, but to practically the same effect. And there are certain provisions of the federal constitution, relating to criminal procedure, which are binding, not upon the national government and its courts, but primarily upon the several states and their judges and legislatures. These are the provisions that no state shall pass any bill of attainder or *ex post facto* law, and that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

*Waiver of Rights.*

Some of these rights are merely personal to the defendant and may be waived by him. Others, according to the prevalent doctrine, are inalienable and cannot be taken away even with the free consent of the accused. Thus, he cannot be compelled to furnish evidence against himself; but a statute allowing him to testify at his own trial if he elects to do so is constitutional, and if he takes the stand in his own behalf, he may then be cross-examined the same as any other witness.<sup>2</sup> So, he has the right to be confronted with the witnesses against him. But a law providing that he may take depositions of witnesses in a foreign jurisdiction on condition that he consents to the prosecution doing the same, is constitutional, and if he takes advantage of this act, he thereby waives his guaranteed rights to that extent.<sup>3</sup> On the other hand, it is held (in a majority of the states, though not in all) that the right to be tried by a jury of his peers is an inalienable right, which the accused cannot give up, unless, it may be, by express statutory authority, or in cases of mere misdemeanors.<sup>4</sup> Again, it is generally held that the prisoner cannot waive his right to be present at the trial. If he is absent, there is a want of jurisdiction, and the court cannot proceed with the trial, nor receive a verdict, nor pronounce sentence.<sup>5</sup> But

ple, 2 Cow. 815; *Pervear v. Com.*, 5 Wall. 475; *O'Neil v. Vermont*, 144 U. S. 323, 12 Sup. Ct. 693.

<sup>2</sup> *Boyle v. State*, 105 Ind. 469, 5 N. E. 203.

<sup>3</sup> *Butler v. State*, 97 Ind. 378.

<sup>4</sup> *Williams v. State*, 12 Ohio St. 622; *State v. Maine*, 27 Conn. 281; *Hill v. People*, 16 Mich. 351; *State v. Lockwood*, 43 Wis. 403.

<sup>5</sup> *Andrews v. State*, 2 Sneed. 549; *Jacobs v. Com.*, 5 Serg. & R. 315; *Wit*

this rule is not applicable to the trial of a misdemeanor or a breach of a municipal ordinance; such a trial may proceed in the absence of the accused, if he was legally arrested.<sup>6</sup>

#### PRESENTMENT OR INDICTMENT.

169. The fifth amendment to the constitution of the United States provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." And the same provision is to be found in the constitutions of most of the states, except that, in some, it is extended to all criminal offenses, and that, in some others, it is provided that no person, for any indictable offense, shall be proceeded against criminally by information.

The object of this guaranty is to secure to persons charged with high crimes the intervention of a grand jury, which safeguard against tyranny and oppression is generally regarded as no less important than the right to a trial by jury after indictment found. A presentment, properly speaking, is an accusation made *ex mero motu*, by a grand jury, of an offense, upon their own observation and knowledge, or upon evidence before them, without any bill of indictment laid before them at the suit of the government. An indictment is a written accusation of an offense preferred to a grand jury and presented upon oath by them as true, at the suit of the government. Upon a presentment, the proper officer of the court must frame an indictment before the party accused can be put to answer it. But an indictment is usually, in the first instance, framed by the officers of the government and laid before the grand jury.<sup>7</sup> An information is an accusation in the nature of an indictment,

v. State, 5 Cold. 11; State v. Alman, 64 N. C. 364; Gladden v. State, 12 Fla. 562, 577; Maurer v. People, 43 N. Y. 1. Compare *Fight v. State*, 7 Ohio, pt. 1, p. 180; *McCorkle v. State*, 14 Ind. 39.

<sup>6</sup> *City of Bloomington v. Heiland*, 67 Ill. 278.

<sup>7</sup> 2 Story, Const. § 1784.

but differs from it in that it is presented by a competent public officer on his own oath of office, instead of by a grand jury on their oath.<sup>8</sup> The constitutional provision in question is therefore designed to interpose a barrier against vindictive or tyrannical prosecutions either by the government or by political partisans or private enemies. Such a provision is jurisdictional. And where it is found, no court has authority to try a prisoner without indictment or presentment for such a crime as is covered by it.<sup>9</sup> It is scarcely necessary to add that the right to a presentment or indictment was not created by the American constitutions. The grand jury was an established institution of English law long before the Norman conquest.

What is an "infamous crime"? This question has been much debated, and opinions differ as to just what is included in this term. But the courts of the United States have determined that any crime which is punishable by imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous crime within the meaning of the fifth amendment.<sup>10</sup> But as regards mere misdemeanors, which involve neither infamy in the offender nor in the punishment, it is agreed that congress or a state legislature has the power to provide that they shall be proceeded against either by indictment or by information.<sup>11</sup>

The cases excepted from the provision are such as arise in the army or navy, or in the militia when in service or organized on a war footing. By the Articles of War, courts martial have jurisdiction to punish larceny when committed by persons in the military service to the prejudice of good order and military discipline; and it was not intended that proceedings thereon should be in the technical form of criminal proceedings founded on indictments.<sup>12</sup> Furthermore, there are certain kinds of proceedings which resemble criminal proceedings in their form, or in the nature of the judgment to be pronounced, but yet are not trials for "criminal offenses," and therefore not within this constitutional guaranty. Thus, an in-

<sup>8</sup> 1 Bishop, Cr. Proc. § 141.

<sup>9</sup> Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781.

<sup>10</sup> Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935; Mackin v. U. S., 117 U. S. 348, 6 Sup. Ct. 777; U. S. v. De Walt, 128 U. S. 393, 9 Sup. Ct. 111.

<sup>11</sup> State v. Ebert, 40 Mo. 186; King v. State, 17 Fla. 183.

<sup>12</sup> In re Esmond, 5 Mackey (D. C.) 64.

formation in the nature of a quo warranto, brought to try the right to an office or franchise, though in form a criminal proceeding, is in the nature of a civil remedy, and hence is not within the constitutional requirement of presentment or indictment.<sup>13</sup>

The provision in the sixth amendment, and the constitutional provisions in many of the states, that persons charged with crime shall have the right to hear the nature and cause of the accusation against them, or that the indictment shall "fully and plainly, substantially and formally, describe the offense with which the prisoner is charged," are peremptory and cannot be violated, though they do not change the rules of the common law.<sup>14</sup> But such a provision does not prohibit the simplification of criminal pleadings by the abolition of verbiage and the technical forms of the ancient law.<sup>15</sup> In regulating the forms of indictments, the legislature could not authorize the omission of allegations necessary to describe a specific offense; but it may dispense with a purely formal averment, which would give the defendant no additional information, and the omission of which would not prejudice him, such as that the act charged was "against the peace of the commonwealth."<sup>16</sup> But an indictment for murder must allege both the time and the place of the death of the victim; and if it omits either of these, it is fatally defective.<sup>17</sup>

#### TRIAL BY JURY.

**170. The right of trial by jury, guarantied to all persons charged with crime, includes the right to be tried by a jury of twelve men, drawn from the vicinage, who shall be impartially selected and not objectionable on account of any disqualifying causes, and who must unanimously agree upon a verdict of guilty before the prisoner can be sentenced and punished.**

<sup>13</sup> State v. Hardie, 1 Ired. 42; Bank of Vincennes v. State, 1 Blackf. 267.

<sup>14</sup> Com. v. Davis, 11 Pick. 438; State v. Learned, 47 Me. 426; Murphy v. State, 28 Miss. 637; State v. O'Flaherty, 7 Nev. 153.

<sup>15</sup> People v. Mortimer, 46 Cal. 114.

<sup>16</sup> Com. v. Freelove, 150 Mass. 66, 22 N. E. 435.

<sup>17</sup> Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761.

171. This privilege may be claimed, as a matter of constitutional right, in all prosecutions for indictable offenses or for such crimes as were triable by jury at common law. And where it is provided (as it is in many of the state constitutions) that the right of trial by jury shall "be preserved," or shall "remain inviolate," it is meant that this right shall continue as it existed at the adoption of the constitution. And the guaranty of the right of trial by jury prohibits the legislature and the courts from imposing such restrictions or impediments upon it as would unreasonably impair it.

The right of a person charged with crime to be tried by a "jury of his peers" is not a right created by the constitutions. It is a common law right of great antiquity, and was expressly recognized and secured by Magna Charta. All that the constitutions do is to reaffirm it and place its continuance beyond the hazard of ephemeral changes of public opinion. But even if this right were not mentioned in our constitutions, the abolition of it would be universally regarded as a revolutionary measure. Whether the trial by jury (and particularly the requirement of unanimity) is a help or a hindrance to the effective administration of criminal justice, is a question much debated by publicists, of late years, but one with which we are not at present concerned.

Trial by jury always means a trial by a jury of twelve men, in accordance with the ancient common law composition of the petit jury. Unless the constitution expressly permits it, there is no power in the legislature to require or authorize a trial for an indictable offense by a jury of less or more than twelve members.<sup>18</sup> The jury must be impartial. And to secure this, the prisoner must have the right to challenge or object to such jurors as are disqualified for any cause. The legislature may prescribe the time and manner of determining the objections to the qualifications of jurors, but it cannot take away the right of objecting.<sup>19</sup> But laws limiting the number of peremptory challenges to be allowed to the defendant, or granting peremp-

<sup>18</sup> *Work v. State*, 2 Ohio St. 206; *Cancemi v. People*, 18 N. Y. 128; *People v. O'Neill*, 48 Cal. 257; *Brown v. State*, 8 Blackf. 561.

<sup>19</sup> *Palmore v. State*, 20 Ark. 248.

tory challenges to the prosecution, are not unconstitutional.<sup>20</sup> Neither is a statute allowing the court to admit a juror as competent, although he has formed and expressed an opinion of the guilt or innocence of the accused, if the court is satisfied that he will render an impartial verdict.<sup>21</sup> The jury must be drawn from the vicinage. This is provided in the sixth amendment to the federal constitution (which relates, however, only to the United States courts) and in the constitutions of many of the states. But even if this requirement is not mentioned, still it is a necessary ingredient of trial by jury, as the same was understood and practised at common law, and therefore is to be understood as secured by constitutional provisions which, reaffirming the common law on this subject, guaranty the right of jury trial in general terms.<sup>22</sup> And the right to a jury of the vicinage imports that not only the traverse jury trying a person, but also the grand jury indicting him, shall be drawn from the neighborhood.<sup>23</sup> But an act authorizing the trial of a person guilty of larceny committed on board of a vessel in the course of a voyage to be had in any county through which such vessel shall pass, or at which such voyage shall terminate, is constitutional.<sup>24</sup> The provision in the sixth amendment that "the district shall have been previously ascertained by law," means that it shall be so ascertained before the commission of the offense for which a party is held for trial in such district, and not merely before the trial.<sup>25</sup> But this amendment does not apply to crimes committed outside the limits of states.<sup>26</sup>

The right of trial by jury also includes the right to have the jury render a verdict, or at least to have their service continue until there occurs some sufficient legal reason for their discharge. Hence the unauthorized discharge of the jury is equivalent to an acquittal.<sup>27</sup> And hence, also, after the jury has been impanelled, the state cannot

<sup>20</sup> *Dowling v. State*, 5 Smedes & M. 664; *Walter v. People*, 32 N. Y. 147; *Hartzell v. Com.*, 40 Pa. St. 462.

<sup>21</sup> *Palmer v. State*, 42 Ohio St. 596.

<sup>22</sup> *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635.

<sup>23</sup> *Weyrich v. People*, 89 Ill. 90.

<sup>24</sup> *Steerman v. State*, 10 Mo. 503.

<sup>25</sup> *U. S. v. Maxon*, 5 Blatchf. 360, Fed. Cas. No. 15,748.

<sup>26</sup> *U. S. v. Dawson*, 15 How. 467.

<sup>27</sup> *McCauley v. State*, 26 Ala. 135.

enter a *nolle prosequi* without the consent of the accused.<sup>28</sup> Another important safeguard to the accused, in this connection, is the independence of the jury. That is, the jury cannot be coerced in respect to the verdict which they shall render, nor are they bound to assign reasons for their conclusion. It is their duty to follow the instructions of the court upon the law of the case. But if they will not do so, but render a verdict incompatible with the instructions, they cannot be punished for so doing.<sup>29</sup>

In nearly all the states, it is the understanding that the right of trial by jury was not intended to be secured except in the prosecution of indictable offenses, or of such crimes as were triable by jury at common law. It has not been usual to grant this right in cases where the offense charged is a trivial or minor misdemeanor, such as comes under the cognizance of police magistrates or other like judicial officers. Thus, trials for vagrancy, disorderly conduct, the violation of police ordinances of cities, disturbing religious meetings, and ordinary breaches of the peace, are not held to be within the class of prosecutions where trial by jury is claimable as of right.<sup>30</sup> Again, it is necessary to remember that not all proceedings which may result in punishment or restraint of liberty are "criminal prosecutions," within the meaning of the constitutional clause under consideration. Thus, a person guilty of contempt of court may be committed to jail or fined without a trial by jury.<sup>31</sup> So, also, the action of a police magistrate, in committing a minor child to the industrial school, does not amount to a criminal prosecution, nor to procedure according to the course of the common law, and hence the minor is not entitled to a trial by jury.<sup>32</sup> So the power given to courts martial to punish by fine is not within the provision of the federal constitution securing trial by jury.<sup>33</sup>

<sup>28</sup> *State v. Thompson*, 95 N. C. 596.

<sup>29</sup> *Penn's Case*, 6 How. St. Tr. 951; *Bushell's Case*, Vaughan, 135.

<sup>30</sup> *Wong v. Astoria*, 13 Or. 538, 11 Pac. 295; *People v. Justices*, 74 N. Y. 406; *Byers v. Com.*, 42 Pa. St. 89; *State v. Glenn*, 54 Md. 572; *Inwood v. State*, 42 Ohio St. 186.

<sup>31</sup> *Ex parte Grace*, 12 Iowa, 208; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77.

<sup>32</sup> *Ex parte Ah Peen*, 51 Cal. 280.

<sup>33</sup> *Rawson v. Brown*, 18 Me. 216.

Although the statute may authorize a trial without a jury in the first instance, yet if, at the same time, the defendant is granted an unfettered and unqualified right of appeal, by a simple and reasonable procedure, and can claim a jury trial in the appellate court as of right, it cannot be said that he is deprived of his constitutional right in this regard.<sup>34</sup> But this doctrine has been repudiated and denied, so far as concerns the courts of the United States.<sup>35</sup>

Where a prisoner pleads guilty to an indictment for murder, the court, if the laws of the state permit, may proceed to inquire on evidence, without the intervention of a jury, in what degree of murder the accused is guilty, and may find him guilty of murder in the first degree, and sentence him to death, without violating the constitutional requirement of due process of law.<sup>36</sup>

#### PRIVILEGE AGAINST SELF-CRIMINATING EVIDENCE.

**172.** The provision that no person shall be compelled, in any criminal case, to be a witness against himself, or to furnish evidence against himself, merely reaffirms a common law privilege. It is directed against the extraction of confessions by torture or otherwise, and against the inquisitorial method of trial.<sup>37</sup>

The seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and in a prosecution for a crime, penalty, or forfeiture, is equally within the constitutional prohibition.<sup>38</sup> But upon a criminal trial it is proper to ask a witness to look around the court-room and point out the person who committed the offense. This does not involve compelling the accused to furnish evidence against himself.<sup>39</sup> In Massachusetts, it is held that the privilege applies to investigations ordered or conducted by the legislature or

<sup>34</sup> *Jones v. Robbins*, 8 Gray, 329; *Emporia v. Volmer*, 12 Kan. 622; *Wong v. Astoria*, 13 Or. 538, 11 Pac. 295.

<sup>35</sup> *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301.

<sup>36</sup> *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105.

<sup>37</sup> 2 Story, Const. § 1788.

<sup>38</sup> *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524.

<sup>39</sup> *State v. Johnson*, 67 N. C. 55.

either of its branches, and such investigations are regulated, in this respect, by the same rules as are judicial inquiries. No statute which fails to secure the subject from future liability and exposure to prejudice in any criminal proceeding against him as fully and extensively as he would be secured by availing himself of the constitutional privilege, can be sustained against it.<sup>40</sup> But the privilege does not extend to cases involving questions of property only, but relates solely to criminal cases.<sup>41</sup> In those cases, it prevents the court from compelling the defendant to submit to an examination of his person, or from compelling him to exhibit to the jury marks, scars, deformities, or other physical peculiarities, or to try on articles of clothing or foot-wear, or to insert his feet into foot-prints or casts of the same, or from compelling a female prisoner to undergo a surgical examination to determine whether she has borne a child, and other such tests, when the object thereof is to acquire evidence, as to identity or otherwise, which may aid in the conviction of the prisoner.<sup>42</sup>

In many of the states, it is the privilege of the prisoner to testify in his own behalf if he chooses to do so, and if he does, he may be cross-examined like any other witness. But if he prefers not to take the stand, it would not be right that he should be exposed to any prejudice in consequence of his omission to do so, for in that case, he would not receive the full benefit of his constitutional privilege. Consequently, in these states, it is usually forbidden to the court and counsel to make any comment on the prisoner's omission to testify, or to draw any inferences therefrom with a view to influencing the jury.<sup>43</sup>

<sup>40</sup> Emery's Case, 107 Mass. 172.

<sup>41</sup> Devoll v. Brownell, 5 Pick. 448; Kelth v. Woombell, 8 Pick. 217.

<sup>42</sup> People v. McCoy, 45 How. Pr. 216; State v. Jacobs, 5 Jones (N. C.) 259; Blackwell v. State, 67 Ga. 76; People v. Mead, 50 Mich. 228, 15 N. W. 95; Stokes v. State, 5 Baxt. 619; Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000. But this rule is not universally admitted. See State v. Ah Chuey, 14 Nev. 79; State v. Johnson, 67 N. C. 55.

<sup>43</sup> People v. Tyler, 36 Cal. 522; State v. Cameron, 40 Vt. 555; Bird v. State, 50 Ga. 585.

## CONFRONTING WITH WITNESSES.

**173. It is a constitutional right of a person on trial for a criminal offense to be confronted with the witnesses against him, or to "meet the witnesses face to face." This was intended as a safeguard against secret and inquisitorial methods of trial, and to secure to the defendant the privilege of sifting and trying the evidence adduced against him, by cross-examination.<sup>44</sup>**

The admission of dying declarations as evidence in a murder trial is not repugnant to the constitutional provision giving to the accused the right to be confronted with the witnesses against him. The reason is that the "witness against him," in this case, is the person who narrates the declaration made by the decedent, or who produces and identifies the same, if it was reduced to writing.<sup>45</sup> Neither does this provision of the constitution apply to the proof of facts which are in their nature documentary, and which can be proved only by the original or by a copy officially authenticated in some way.<sup>46</sup> And the admission of testimony in a criminal trial before a jury to prove what a deceased witness testified at the preliminary examination of the accused before a magistrate, is not unconstitutional.<sup>47</sup> And if the defendant consents, the court may properly send the jury, unaccompanied by the defendant, to inspect the premises where the crime was committed, as such view does not constitute evidence in the case, but is merely intended to enable the jury to understand and apply the evidence.<sup>48</sup>

Although the accused has the right to be confronted with the witnesses against him, yet if they are absent by his wrongful procurement, or when enough has been proved to cast upon him the burden

<sup>44</sup> Jackson v. Com., 19 Grat. 656; State v. Thomas, 64 N. C. 74.

<sup>45</sup> Green v. State, 66 Ala. 40; Robbins v. State, 8 Ohio St. 131; Walston v. Com., 16 B. Mon. 15; State v. Dickinson. 41 Wis. 299; People v. Green, 1 Denio, 614.

<sup>46</sup> People v. Jones, 24 Mich. 215.

<sup>47</sup> Com. v. Richards, 18 Pick. 434; State v. Harman, 27 Mo. 129.

<sup>48</sup> Shular v. State, 105 Ind. 289, 4 N. E. 870. Compare State v. Bertin, 24 La. Ann. 46.

of showing that he has not been instrumental in concealing them or keeping them away, and he, having full opportunity therefor, fails to show this, then he is in no condition to assert that his constitutional right has been violated if the court allows competent evidence of the testimony which they gave on a previous trial between the government and him on the same issue; such evidence is admissible.<sup>49</sup>

#### COMPELLING ATTENDANCE OF WITNESSES.

**174.** The constitutional right of the defendant in a criminal prosecution to have compulsory process for securing the attendance of witnesses in his behalf grows out of the right of such defendant to rebut the charge brought against him, by the testimony of witnesses, and includes the right to examine such witnesses and to compel them to answer admissible questions under oath.

The right of a person accused of crime to adduce testimony in his own behalf was not a common law right, at least in cases of treason or felony, nor, comparatively speaking, was it of very early origin in English law. The privilege of having witnesses speak to exculpatory facts was grudgingly accorded, but they were not put under oath, and their statements were consequently not regarded as evidence which the jury must take into account. It was not until the first year of the reign of Anne that the same privilege in this respect was granted to the prisoner as to the crown. But the recognition of this right was regarded as one of the most important of the reforms in the law of criminal procedure, and the right itself was justly considered by the framers of our constitutions as one of the most valuable guaranties of liberty.<sup>50</sup>

A statute which permits the prosecuting attorney to admit that an absent witness would testify to the facts as set forth in the affidavit on motion by the defendant for a continuance, if he were personally present, and thereby compel the defendant to go to trial without the benefit of his testimony, is unconstitutional.<sup>51</sup> But this

<sup>49</sup> Reynolds v. U. S., 98 U. S. 145.

<sup>50</sup> See 4 Bl. Comm. 360, 441.

<sup>51</sup> State v. Berkley, 92 Mo. 41, 4 S. W. 24.

right does not give the accused a claim against the state for payment of the fees of the witnesses summoned in his defense.<sup>52</sup>

#### RIGHT TO BE PRESENT AT TRIAL.

175. The right of the defendant in a criminal prosecution to be present at his trial, though not usually specifically granted by the constitutions, follows necessarily from his right to be heard and to be confronted with the witnesses against him, and from the prohibition against depriving him of his life, liberty, or property without due process of law. It is claimable in all cases of felony where his life or liberty is put in jeopardy, and it includes the right to be personally present in court at each and every material step which affects the substantive question of his guilt or innocence.

The prisoner must be present at each stage of the trial, from the impanelling of the jury to the sentence. But matters of routine or motions not affecting the merits may be determined in his absence, unless it is shown that he was prejudiced thereby. He may also forfeit his right to be present by his own misconduct. If he is so boisterous, unruly, or disorderly that it becomes necessary to remove him from the court-room in order to allow the trial to proceed, this may be done, without infringing upon his constitutional rights, except, perhaps, in capital cases.<sup>53</sup> A charge of a mere misdemeanor, or breach of a police ordinance, may lawfully be tried in the absence of the accused, if he was legally arrested.<sup>54</sup>

While the prisoner must be present in the trial court when sentence is passed upon him, yet it is not essential that he should be present in an appellate court when the latter affirms the judgment of the trial court, without passing any new judgment. He has no constitutional right in that regard, and the sentence, thus affirmed, is not invalid because of his absence.<sup>55</sup>

<sup>52</sup> *State v. Waters*, 39 Me. 54.

<sup>53</sup> *U. S. v. Davis*, 6 Blatchf. 404, Fed. Cas. No. 14,923.

<sup>54</sup> *City of Bloomington v. Heiland*, 67 Ill. 278.

<sup>55</sup> *Schwab v. Berggren*, 143 U. S. 442, 12 Sup. Ct. 525.

### ASSISTANCE OF COUNSEL.

**176. The constitution of the United States, and the constitutions of many of the states, provide that the accused shall have the assistance of counsel for his defense.**

Although it was permitted by the common law that an accused person should have the benefit of the advice and assistance of counsel, it was not until a comparatively recent period in English law that counsel for the prisoner were allowed to address the jury in his behalf. The provisions in our constitutions secure to the prisoner's counsel freedom and independence in his management of the case and in his examination of witnesses and his comments and arguments. Subject to such restrictions as are necessary to secure the dignity of the court, and to the ordinary rules of propriety, he may say and do all that he deems necessary for the defense of his client, and for what he may utter in the course of the trial he is not to be held to account elsewhere.<sup>56</sup> Further, in order that the accused may be safe in confiding freely in his counsel, it is a rule that communications passing between them, made with a view to the expected or pending trial, are "privileged," and counsel will neither be forced nor allowed to divulge such communications even in the interests of justice.<sup>57</sup>

### RIGHT TO BE HEARD.

**177. The constitutional right of a person on trial for a criminal offense to be heard in person and by counsel means only that he shall have a hearing upon the facts duly presented in evidence.**

Where a witness was fully cross-examined by the prisoner's counsel, and then permission was asked for the defendant to examine the witness himself, but was refused, it was adjudged that the court did not therein infringe or deny the prisoner's constitutional right of defense by himself, his counsel, or both.<sup>58</sup> As a general rule in crim-

<sup>56</sup> *Munster v. Lamb*, 11 Q. B. Div. 588.

<sup>57</sup> *Whiting v. Barney*, 30 N. Y. 330; *Dixon v. Parmelee*, 2 Vt. 185.

<sup>58</sup> *Roberts v. State*, 14 Ga. 18.

inal cases, the jury are to judge of the facts only, and not the law. Hence the argument of counsel should be addressed to the jury so far as it deals with matters of fact. But the argument upon points of law should be made to the court. In some few cases, however, the jury are made judges of both law and fact, and in such cases the whole argument, upon the law and the facts, may be addressed directly to them.<sup>59</sup>

### SPEEDY AND PUBLIC TRIAL.

**178. Another protection to those charged with crime is found in the constitutional guaranty that they shall have the benefit of a speedy and public trial.**

#### *Speedy Trial.*

By a speedy trial is meant a trial conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays manufactured by the ministers of justice.<sup>60</sup> "The speedy trial to which a person charged with crime is entitled under the constitution is a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for a trial; and if the trial is delayed or postponed beyond such period, when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial," and he is entitled to be discharged from imprisonment on habeas corpus.<sup>61</sup> But if the defendant demands a jury trial after the panel of jurors has been discharged, it is no violation of this right for the court to continue the cause on its own motion until such time as a jury can be lawfully impanelled.<sup>62</sup>

<sup>59</sup> U. S. v. Morris, 1 Curt. 23, Fed. Cas. No. 13,815; U. S. v. Riley, 5 Blatchf. 204, Fed. Cas. No. 16,164; Lynch v. State, 9 Ind. 541; Com. v. Porter, 10 Metc. (Mass.) 263. And see Wilson v. State, 3 Heisk. 232.

<sup>60</sup> Stewart v. State, 13 Ark. 720; Nixon v. State, 2 Smedes & M. 497, 507; Ex parte Stanley, 4 Nev. 113, 116.

<sup>61</sup> U. S. v. Fox, 3 Mont. 512, 517.

<sup>62</sup> City of Creston v. Nye, 74 Iowa, 369, 37 N. W. 777.

*Public Trial.*

The guaranty of a "public" trial is intended to secure to the accused the help and countenance of his friends and counsel and of those who could assist him in his defense. This right does not abridge the power of the trial court, in certain emergencies, as when it becomes necessary to clear the court-room in the interests of the public morals, or to expel a boisterous and unruly audience, to protect an embarrassed or intimidated witness, or to exclude, for other good reasons, all but a reasonable and respectable number of the public, allowing those only to remain who are in attendance on the court or are its officers and members of its bar and those who can be of help or service to the prisoner.<sup>63</sup>

**TWICE IN JEOPARDY.**

179. By the constitution of the United States, as well as the constitutions of most of the several states, it is provided that no man shall, for the same offense, be twice put in jeopardy.

180. Jeopardy means danger of punishment. And a man is considered to have been put in jeopardy when a valid and sufficient indictment or information has been legally found against him and duly presented to a court of competent jurisdiction over both the person and the offense, and thereupon he has been arraigned and has pleaded, and a lawful jury has been impanelled and sworn and charged to try the case and render a verdict.

This privilege, like many other valuable guaranties in criminal cases, is not the creature of the constitutions, but has its roots deeply imbedded in the universal principles of reason and justice, and derives its substance from the ancient and uninterrupted rules and practices of the common law.<sup>64</sup> It is true that at common law the right was restricted to the highest grades of crimes, and the reten-

<sup>63</sup> *Grimmett v. State*, 22 Tex. App. 36, 2 S. W. 631; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849.

<sup>64</sup> 4 Bl. Comm. 335.

tion, in many of the constitutions, of the ancient phrase "jeopardy of life or limb" would seem to indicate that, in this respect, the common law was to be adopted and followed. But numerous states, in incorporating the provision in their constitutions, have omitted the limiting words. And in all, it is believed, the process of judicial construction, proceeding on the rule that a remedial provision and one making in favor of liberty is to be liberally interpreted, has extended the right so as to make it apply to all indictable offenses, including misdemeanors. This provision, it is said, extends the common law maxim, *nemo debet bis puniri pro uno delicto*, which was limited to felonies, to all grades of offenses. And it is but the application to criminal jurisprudence of a more general maxim, namely, that no one shall be twice vexed for one and the same cause. The object of incorporating it in the fundamental law was to render it, as respects criminal causes, inviolable by any department of the government.<sup>65</sup>

*Elements.*

In order to constitute legal jeopardy, all the elements enumerated in the text above must concur. And in the first place, there must be a valid indictment. If the indictment is so defective in form or substance that a conviction founded upon it would be at once set aside, for that cause alone, there is no legal jeopardy. Thus, it must be found by a legally constituted grand jury.<sup>66</sup> And it must charge an offense recognized and denounced by the law under which the trial is to be had, and must set forth the charge formally and sufficiently. It must not only state all the facts which constitute the offense intended to be charged, but must state them with such certainty and precision that the defendant may judge whether they constitute an indictable offense or not, and may demur or plead accordingly, and may be able to plead his conviction or acquittal in bar of another prosecution for the same offense.<sup>67</sup>

In the next place, the proceeding must be had before a court of competent jurisdiction. That is, the court must have jurisdiction of the person, by his being legally before it, and it must have juris-

<sup>65</sup> *State v. Behlmer*, 20 Ohio St. 572.

<sup>66</sup> *Finley v. State*, 61 Ala. 201; *Kolhelmer v. State*, 39 Miss. 548.

<sup>67</sup> *State v. Taylor*, 34 La. Ann. 978; *Davidson v. State*, 99 Ind. 366; *Fink v. Milwaukee*, 17 Wis. 26; *Gerard v. People*, 4 Scam. 363.

diction of the offense. And in order to comply with the latter requisite, the crime charged must be one which is defined and made punishable by the law under which the court acts, and which the same law has committed to the jurisdiction of the particular court, or to courts of the grade or character of the particular court, and further, the offense must have been committed within the territorial limits to which the jurisdiction of the court extends. Thus, an acquittal by a jury in a court of the United States of a defendant who is there indicted for an offense of which that court has no jurisdiction, is no bar to an indictment against him for the same offense in a state court having jurisdiction.<sup>68</sup> And again, the court must be a competent and lawful court. For if it is organized and acting under an unconstitutional statute, it is no court, and its judgments are nullities, and no legal jeopardy can arise from a trial before it.<sup>69</sup>

In the next place, jeopardy does not arise until there has been an arraignment and plea. If there is no arraignment, or a waiver of it, the trial is a nullity, and jeopardy does not attach.<sup>70</sup> And until the defendant has entered his plea, or it has been entered for him upon his refusal to plead, he cannot be put in jeopardy.<sup>71</sup>

Finally, the jury must be sworn and impanelled and charged with the prisoner's deliverance. (The last phrase means that they are charged to try the case and render a true verdict upon the law and evidence.) At this point, according to the general consensus of judicial opinion, jeopardy attaches, and whatever proceedings may thereafter be had in the case, the prisoner cannot be again tried for the same offense. It seems to be conceded, however, that if the jury are discharged without a verdict on account of some imperative necessity, such as the sickness of the judge, or the sickness, insanity, or misconduct of a juror, a second trial may lawfully be had. And some very respectable authorities hold that if the jury are discharged because they cannot agree upon a verdict, or if judgment upon the verdict has been arrested, or even if there is a failure to obtain a verdict for any cause, there is no legal jeopardy. The discussion

<sup>68</sup> *People v. Tyler*, 7 Mich. 161; *Com. v. Peters*, 12 Metc. (Mass.) 387.

<sup>69</sup> *Rector v. State*, 6 Ark. 187; *McGinnis v. State*, 9 Humph. 43.

<sup>70</sup> *Newsom v. State*, 2 Ga. 60; *Davis v. State*, 38 Wis. 487; *Douglass v. State*, 3 Wis. 820.

<sup>71</sup> *Douglass v. State*, 3 Wis. 820.

of this question does not fall within the scope of this work, but some of the principal cases are referred to in the margin.<sup>72</sup>

The second prosecution must be for the same offense. The offenses charged in the two indictments must be the same both in law and fact. The test for determining their identity is said to be the question whether or not the facts set forth in the second indictment, if proved to be true, would have warranted a conviction under the first indictment, or whether or not the facts charged in the second constitute one and the same transaction with that alleged in the first.<sup>73</sup> Where an indictment contains several counts, and the prisoner is acquitted on some counts and convicted on others, he cannot be again tried on those counts on which he was acquitted, though, if the conviction is set aside, he may be tried a second time on those counts on which he was at first convicted.<sup>74</sup> And where a greater offense includes a lesser one, if the defendant is indicted for the lesser offense and put in jeopardy under such indictment, this will prevent his being afterwards indicted and tried for the major crime.<sup>75</sup> Thus, where defendant was charged with robbery, committed by taking money from a dwelling house, a former acquittal on an indictment for the larceny of the same money is a bar to the prosecution for robbery, because the crime of robbery, as charged, could not have been committed without the commission of larceny, as an included, but inferior, offense.<sup>76</sup> In the case of a single criminal act, producing several different results, each of which, standing alone and dissociated from the others, would be an indictable offense, the general rule is that each result cannot be considered a distinct crime, but that all are the consequences of one criminal act; and hence a conviction or acquittal of the crime, founded upon one of such results, will bar a prosecution for the same crime, founded upon

<sup>72</sup> *Nugent v. State*, 4 Stew. & P. 72; *Hector v. State*, 2 Mo. 166; *McFadden v. Com.*, 23 Pa. St. 12; *O'Brien v. Com.*, 9 Bush, 333; *People v. Barrett*, 2 Caines, 304; *Nolan v. State*, 55 Ga. 521; *Kendall v. State*, 65 Ala. 492; *In re Speir*, 1 Dev. (N. C.) 491; *U. S. v. Perez*, 9 Wheat. 579; *U. S. v. Haskell*, 4 Wash. C. C. 402, Fed. Cas. No. 15,321; *People v. Cook*, 10 Mich. 164; 2 Story, Const. § 1787.

<sup>73</sup> *McCoy v. State*, 46 Ark. 141; *Roberts v. State*, 14 Ga. 8.

<sup>74</sup> *Campbell v. State*, 9 Yerg. 333; *Barnett v. People*, 54 Ill. 325.

<sup>75</sup> *Roberts v. State*, 14 Ga. 8.

<sup>76</sup> *State v. Mikesell*, 70 Iowa, 176, 30 N. W. 474.

another of such results.<sup>77</sup> If a verdict against the prisoner is set aside on his motion, or on an appeal or writ of error taken by him, or is arrested for fatal errors in the indictment, the protection of former jeopardy does not attach.<sup>78</sup>

*Practical Effect.*

The practical effect of the provision against second jeopardy is not only to save a person from being twice tried for the same offense in distinct proceedings,<sup>79</sup> but also to deny to the prosecution, in criminal cases, the right to take an appeal or to move for a new trial, unless, in the particular state, the constitutional rule has been relaxed so far as to allow this.<sup>80</sup> And except in cases where the prisoner himself appeals and a new trial is thereupon ordered, there is no redress for errors or mistakes made in the course of the trial which tell in favor of the defendant, nor any opportunity to correct them. The propriety of allowing to the state the same right of appeal, in these cases, which already exists in favor of the defendant, has been of late years much discussed. Where a court has imposed a sentence of fine and imprisonment, in a case where the statute authorized only a sentence of fine or imprisonment, and the fine has been paid, the court cannot, even during the same term, modify the judgment by imposing imprisonment instead of the former punishment; for this would amount to punishing the defendant twice for the same offense.<sup>81</sup>

### BAIL.

**181. By the eighth amendment to the federal constitution, and by similar provisions in the constitutions of many of the states, it is provided that excessive bail shall not be required.**

<sup>77</sup> Hurst v. State, 86 Ala. 604, 6 South. 120. But contrast *People v. Majors*, 65 Cal. 138, 3 Pac. 597, where it was held that the murder of two persons by the same act constituted two offenses, for each of which a separate prosecution would lie, and a conviction or acquittal in one case would not bar a prosecution in the other.

<sup>78</sup> *People v. Casborus*, 13 Johns. 351.

<sup>79</sup> *Barker v. People*, 3 Cow. 686.

<sup>80</sup> *State v. Tait*, 22 Iowa, 140.

<sup>81</sup> *Ex parte Lange*, 18 Wall. 163.

The bail here meant is that which is demanded of persons who are held to answer an accusation of crime or are bound over to keep the peace. The object of bail is to enable such persons to regain their liberty, and at the same time to secure their attendance when they are wanted for trial. To require bail in such a great amount that it would be impossible for the prisoner to obtain it, and thereby to keep him in captivity for perhaps a long time, before his guilt was established, would be a gross abuse of justice and a grievous oppression. It was to prevent this that the constitutional provision above quoted was adopted. But it will be observed that the provision does not require that all persons, in all circumstances, shall be admitted to bail; but only that if they are allowed to go at large upon bail, the bail required shall not be excessive. There are obviously cases in which bail must be refused, if justice is to be done. And it is usually considered that where the offense charged is capital, and there is a strong array of evidence, or a strong presumption, against the prisoner, the magistrate may, in his discretion, refuse to admit him to bail.<sup>82</sup> But in all other cases, bail is generally considered a matter of right, and in several of the states, it is made so by the constitution. The amount of bail to be required is left to the discretion of the court or magistrate. But if the amount required is excessive, or if an offer of reasonable bail is refused, there is such a violation of the prisoner's constitutional rights as may be inquired into on a writ of habeas corpus or certiorari. In fixing the amount of bail, though no definite rules can be laid down for all cases, there are four considerations which should influence the action of the court. First, the nature of the crime charged. Second, the penalty which the law affixes to it. Third, the nature and extent of the evidence offered at the preliminary examination, and the probability of a conviction. Fourth, the circumstances of the prisoner, as to wealth or indigence, and the likelihood of his being able to procure bondsmen in the amount required.

<sup>82</sup> U. S. v. Hamilton, 3 Dall. 17; U. S. v. Jones, 3 Wash. C. C. 224, Fed. Cas. No. 15,495.

### CRUEL AND UNUSUAL PUNISHMENTS.

**182. The constitutional prohibition against the infliction of cruel and unusual punishments is to be understood as forbidding any cruel or degrading punishment not known to the common law, and probably also any degrading punishments which, in the particular state, had become obsolete when its constitution was adopted, and also all punishments which are so disproportioned to the offense as to shock the moral sense of the community.<sup>83</sup>**

This prohibition, in the eighth amendment to the federal constitution, applies only to the United States and its courts. But most of the states, if not all, have incorporated a similar inhibition in their organic law.<sup>84</sup> It was intended to exclude all such barbarous punishments as torture, disembowelling, burning, branding, mutilation, the pillory, and the ducking-stool. But it does not apply to the ordinary methods of punishment, such as death by hanging, pecuniary fines, imprisonment, disfranchisement, or forfeiture of civil rights. • As to the infliction of stripes, the case is not very clear. It has been held in several cases that whipping is not a cruel or unusual punishment.<sup>85</sup> But a learned text-writer says that "we may well doubt the right to establish the whipping-post and the pillory in states where they were never recognized as instruments of punishment, or in states whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishments."<sup>86</sup> A law providing that execution of the sentence of death shall be by "causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death," is not obnoxious to this constitutional prohibition. The punishment, death, remains the same; and the only change is in the manner of its infliction, and this manner, though certainly at present "unusual," is not "cruel"

<sup>83</sup> In re Bayard, 25 Hun, 546; Cooley, Const. Lim. 329.

<sup>84</sup> Pervear v. Com., 5 Wall. 475; Barker v. People, 3 Cow. 686.

<sup>85</sup> Com. v. Wyatt, 6 Rand. (Va.) 694; Foote v. State, 59 Md. 264; Garcia v. Territory, 1 N. M. 415.

<sup>86</sup> Cooley, Const. Lim. 329.

within the meaning of the constitution.<sup>87</sup> And in a case where a territorial law enacted that every person guilty of murder should suffer death, but did not prescribe the mode of executing the sentence, and the prisoner was sentenced to be shot, it was held that this was not a cruel or unusual punishment.<sup>88</sup> And the same decision was made in regard to a statute which required that a prisoner sentenced to death should be kept in solitary confinement between the time of his sentence and the execution.<sup>89</sup> But where cutting off the prisoner's hair is a part of the punishment prescribed for particular offenses, and this sentence is imposed upon a Chinaman, it may be a cruel punishment as to him, on account of the peculiar social and religious beliefs of the people of that race.<sup>90</sup> But a sentence, imposed upon a prisoner for a violation of a city ordinance, requiring him, on default of payment of his fine, to be put to labor on the public streets or other public works of the city, is not in conflict with the constitution.<sup>91</sup> In an interesting case in Missouri, the prisoner was convicted of obtaining \$3 under false pretenses, and was sentenced to imprisonment for two years, which was the minimum penalty set by the statute for that offense. But the statute omitted to prescribe any maximum penalty. And it was argued that, under this law, the prisoner might have been sentenced to imprisonment for life, and that such a punishment would have been cruel and unusual. But the court refused to interfere with the sentence on this ground.<sup>92</sup> If the sentence of the court imposes a different punishment, or a greater punishment, than that which the statute affixes to the particular offense of which the prisoner was convicted, it is unlawful.<sup>93</sup>

<sup>87</sup> *People v. Kemmler*, 119 N. Y. 580, 24 N. E. 9; *In re Kemmler*, 136 U. S. 436, 10 Sup. Ct. 930.

<sup>88</sup> *Wilkerson v. Utah*, 99 U. S. 130.

<sup>89</sup> *McElvaine v. Brush*, 142 U. S. 155, 12 Sup. Ct. 156.

<sup>90</sup> *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546.

<sup>91</sup> *Ex parte Bedell*, 20 Mo. App. 125.

<sup>92</sup> *State v. Williams*, 77 Mo. 310.

<sup>93</sup> *King v. Bourne*, 7 Adol. & E. 58; *Ex parte Lange*, 18 Wall. 163.

### BILLS OF ATTAINDER.

**183. By the provisions of the federal constitution, bills of attainder are forbidden to be passed either by congress or by the several states.**

In its strict signification, the word "attainder" means an extinction of civil and political rights; and its two incidents, forfeiture and corruption of the blood, followed as a necessary consequence, at common law, upon a conviction of a capital crime. A bill of attainder is a legislative decree, directed against a designated person, pronouncing him guilty of an alleged crime (usually treason) and passing sentence of death and attainder upon him.<sup>94</sup> In some cases, where this method of procedure was in use, the sentence pronounced was less severe than the death penalty, and in that case the judgment was denominated a "bill of pains and penalties." But the phrase "bill of attainder" has come to be used in a generic sense, including also a bill of pains and penalties, and it is in this comprehensive signification that it is used in the federal constitution.<sup>95</sup> Legislative enactments of this character were not at all uncommon in the early days of this country, before the adoption of the constitution. In several cases, during the Revolution, the states enacted statutes which were directed against particular persons by name, and which adjudged them guilty of aiding and adhering to the enemies of the state, and proceeded to a confiscation of such property of theirs as might be found within the limits of the state.<sup>96</sup> But the prohibition received its most attentive consideration in a group of cases which arose out of a certain act of congress and certain acts of the state legislatures, passed at the close of the civil war, which imposed a test oath of past loyalty to the national government as a condition precedent to the right to enjoy certain civil and political privileges. These statutes were held to be *ex post facto* laws and unconstitutional. And they were also adjudged to be bills of attainder, on the following ground: Since it was certain that there were individuals who would

<sup>94</sup> *Cummings v. Missouri*, 4 Wall. 277.

<sup>95</sup> *Fletcher v. Peck*, 6 Cranch, 138; *Cummings v. Missouri*, 4 Wall. 277.

<sup>96</sup> See *Thompson v. Carr*, 5 N. H. 510.

be unable to take the oath prescribed, the legislative action in question was tantamount to a declaration that those persons were guilty of the crimes alleged, and to a sentence, passed upon them without trial, imposing heavy penalties for their past conduct.<sup>97</sup>

#### EX POST FACTO LAWS.

**184. The enactment of ex post facto laws is prohibited both to congress and to the legislatures of the several states. The term is a technical one, and applies only to penal and criminal proceedings. An ex post facto law is one**

- (a) **Which makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action, or**
- (b) **Which aggravates a crime, or makes it greater than it was when committed, or**
- (c) **Which changes the punishment and inflicts a greater punishment than the law annexed to the crime when it was committed, or**
- (d) **Which 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.<sup>98</sup>**

An ex post facto law is necessarily, as the words imply, a retroactive law. If any law is intended to operate only upon future actions or future trials, it cannot be called ex post facto.<sup>99</sup> And again, the term is restricted to penal and criminal proceedings which affect life or liberty or may impose punishments or forfeitures. It has no applicability to purely civil proceedings which affect private rights only, although such proceedings, for their retroactive effect, may be unlawful.<sup>100</sup> Statutes which are confined in their operation to

<sup>97</sup> *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, Id. 333; *Pierce v. Carskadon*, 16 Wall. 234.

<sup>98</sup> *Calder v. Bull*, 3 Dall. 390.

<sup>99</sup> *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. 443.

<sup>100</sup> *Boston v. Cummins*, 16 Ga. 102; *Watson v. Mercer*, 8 Pet. 88; *Baltimore & S. R. Co. v. Nesbitt*, 10 How. 395.

the regulation of courts, their jurisdiction, and criminal procedure, are not generally obnoxious to this constitutional prohibition, although retrospective, unless they plainly alter the situation of the prisoner to his disadvantage. This is the case, for example, with a law creating a new court, or giving jurisdiction to an existing court to try past offenses;<sup>101</sup> or an act reviving the jurisdiction of a superior court, so as to enable it to try persons for offenses committed during a period when an inferior court had exclusive jurisdiction to try them;<sup>102</sup> or an act changing the venue in a criminal case;<sup>103</sup> or an act allowing an amendment to a pending indictment;<sup>104</sup> or allowing the correction of an erroneous sentence;<sup>105</sup> or a statute allowing to the state a reasonable number of peremptory challenges to petit jurors, although expressly retroactive;<sup>106</sup> or limiting the number of peremptory challenges allowed to the prisoner;<sup>107</sup> or one which takes from the accused the privilege of interposing objections which are merely technical and do not go to the merits;<sup>108</sup> or one which makes reasonable modifications in the grounds of challenging jurors for cause.<sup>109</sup> None of these statutes can properly be called *ex post facto*. But a law providing that the rule of law prohibiting a conviction in a criminal case on the uncorroborated evidence of an accomplice shall not apply to misdemeanors, is inoperative in a trial for a misdemeanor committed before its passage.<sup>110</sup> On the other hand, statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.<sup>111</sup>

<sup>101</sup> *Cook v. U. S.*, 138 U. S. 157, 11 Sup. Ct. 268; *Com. v. Phillips*, 11 Pick. 28.

<sup>102</sup> *State v. Sullivan*, 14 Rich. 281.

<sup>103</sup> *Gut v. State*, 9 Wall. 35.

<sup>104</sup> *State v. Manning*, 14 Tex. 402; *State v. Corson*, 59 Me. 137.

<sup>105</sup> *Ex parte Bethurum*, 66 Mo. 545.

<sup>106</sup> *State v. Ryan*, 13 Minn. 370 (Gil. 343).

<sup>107</sup> *Dowling v. State*, 5 Smedes & M. 664.

<sup>108</sup> *Com. v. Hall*, 97 Mass. 570.

<sup>109</sup> *Stokes v. People*, 53 N. Y. 164.

<sup>110</sup> *Hart v. State*, 40 Ala. 32.

<sup>111</sup> *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202.

If the legislature repeals the statute of limitations with respect to criminal prosecutions, or extends the time previously limited for such prosecutions, the new rule cannot constitutionally apply to any offense previously committed and as to which the period prescribed by the law in force at the time of its commission has already run. This would be, in such application, an *ex post facto* law; because an act condoned by the expiration of the statute of limitations is no longer a punishable offense.<sup>112</sup>

A law which aggravates the punishment for an act already committed is *ex post facto*; but one which changes the punishment in such a manner that the new penalty is equal to or less than that prescribed when the act was done, but not greater, is not thus objectionable. Any change in the law which remits a separable portion of the former penalty, or substitutes a punishment which is clearly less severe, or otherwise reduces or mitigates the consequences of a conviction, or which introduces a change in those matters which are referable only to prison discipline or penal administration, may validly have a retrospective operation.<sup>113</sup> Since the penalty of death is almost universally regarded as the extreme limit of punishment, it is generally conceded that a law which substitutes any other degree or kind of punishment, even in relation to past offenses, is not *ex post facto*.<sup>114</sup> But even the death penalty can be added to. Thus, a statute was enacted providing that a person sentenced to death should be kept in solitary confinement until the time of execution, and also that he should not be apprised of the time when the execution was to take place. This law was adjudged *ex post facto* and unconstitutional as applied to a murderer whose crime was committed before the passage of the act.<sup>115</sup> But a statute is not unconstitutional which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into ac-

<sup>112</sup> *State v. Keith*, 63 N. C. 140; *Com. v. Duffy*, 96 Pa. St. 506. Compare *State v. Moore*, 42 N. J. Law, 208.

<sup>113</sup> *Hartung v. People*, 22 N. Y. 95, 105; *State v. Arlin*, 39 N. H. 179; *Hair v. State*, 16 Neb. 601, 21 N. W. 464; *Clarke v. State*, 23 Miss. 261; *Ratzky v. People*, 29 N. Y. 124.

<sup>114</sup> *Com. v. Gardner*, 11 Gray, 438; *Com. v. Wyman*, 12 Cush. 237; *Black, Const. Prohib. § 240*. Compare *Shepherd v. People*, 25 N. Y. 406.

<sup>115</sup> *Ex parte Medley*, 134 U. S. 160, 10 Sup. Ct. 384.

count, and the punishment to be graduated accordingly; that is, imposing a more severe sentence upon a second conviction for the same kind of offense.<sup>116</sup> But where the law, in force at the time of the commission of the offense, imposed upon the jury the duty of fixing the penalty, within certain limits, by their verdict, this confers upon the prisoner a valuable right, which cannot constitutionally be taken away by retroactive legislation.<sup>117</sup>

A statute establishing a test oath of past loyalty to the government, and making the taking of it a condition precedent to the right to hold public office, serve as a juror, practise as an attorney, or act as a professor, teacher, or clergyman, is unconstitutional and void, as partaking of the nature both of bills of attainder and *ex post facto* laws. The reason is that such acts impose a punishment without trial; they make that a crime which was not so before; and they change the rules of evidence by shifting the burden of proof upon the person accused.<sup>118</sup> If an extradition treaty is given a retroactive effect, so as to allow of the extradition of a criminal who had taken refuge in this country before the treaty, he cannot object to it on the ground of its being *ex post facto*.<sup>119</sup>

#### SUSPENSION OF HABEAS CORPUS.

**185.** By the constitution of the United States, as well as by the constitutions of nearly all the states, it is provided that the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

The writ here referred to is the writ of "habeas corpus ad subjiciendum," which is directed to any person detaining another, and com-

<sup>116</sup> *Ross's Case*, 2 Pick. 165; *Rand v. Com.*, 9 Grat. 738; *People v. Butler*, 3 Cow. 347; *Cooley*, Const. Lim. 273.

<sup>117</sup> *Marion v. State*, 16 Neb. 349, 20 N. W. 289. But where the statute, at the time the crime was committed, provided that juries should be judges of the law, and this is repealed before the trial, there is no constitutional wrong in applying the new rule to the case at bar. *Marion v. State*, 20 Neb. 233, 29 N. W. 911.

<sup>118</sup> *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, *Id.* 333; *Pierce v. Carskadon*, 16 Wall. 234.

<sup>119</sup> *In re De Giacomo*, 12 Blatchf. 391, Fed. Cas. No. 3,747.

manding him to produce the body of the prisoner (or person detained) with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the judge or court awarding the writ shall consider in that behalf.<sup>120</sup> This writ, says Story, "is justly esteemed the great bulwark of personal liberty, since it is the appropriate remedy to ascertain whether any person is rightfully in confinement or not, and the cause of his confinement, and if no sufficient ground of detention appears, the party is entitled to his immediate discharge."<sup>121</sup> "In England, the benefit of it was often eluded prior to the reign of Charles the Second, and especially during the reign of Charles the First. These pitiful evasions gave rise to the famous Habeas Corpus Act of 31 Car. II. c. 2, which has been frequently considered as another Magna Charta in that kingdom, and has reduced the general method of proceedings on these writs to the true standard of law and liberty. That statute has been, in substance, incorporated into the jurisprudence of every state in the Union, and the right to it has been secured in most, if not all, of the state constitutions by a provision similar to that existing in the constitution of the United States."<sup>122</sup>

The privilege of the writ is not usually suspended except when martial law has been declared in a particular place or district. The effect of its suspension is to make it possible for military commanders or other officers to cause the arrest and detention of obnoxious or suspected persons, without any regular process of law, and to deprive those persons of the right to an immediate hearing and to be discharged if the cause of their arrest is found to be unwarranted by law.

It seems to be now settled (though not without disputes which are of considerable historical interest) that the power to suspend the writ, under the federal constitution, in the case of rebellion or invasion, is confided to congress alone; that it is the right and duty of that body to judge when the exigency has arisen to justify this step; and that it does not belong to the executive branch of the government either to so judge or to take the responsibility of suspending the writ, unless under an authorization from congress.<sup>123</sup>

<sup>120</sup> 3 Bl. Comm. 131.

<sup>121</sup> 2 Story, Const. § 1339.

<sup>122</sup> 2 Story, Const. § 1341.

<sup>123</sup> See *Ex parte Merryman*, Taney, 246, Fed. Cas. No. 9487; *McCall v.*

In several of the states, at the close of the civil war, laws were passed for the indemnification of those who had caused the arrest or detention of suspected persons while the writ of habeas corpus was suspended. These acts provided that no civil or criminal proceedings should be had against such persons on account of such action taken by them. An act or constitutional provision of this character, it is held, is not unconstitutional as being a bill of attainder, or an *ex post facto* law, or otherwise.<sup>124</sup>

#### DEFINITION OF TREASON.

**186.** As an additional safeguard against tyranny and injustice, the federal constitution has defined the crime of treason, and prescribed the proof which shall be required to sustain a conviction, in the following terms: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." And the same provision has been adopted into the constitutions of many of the states.

"By the ancient common law, it was left very much to discretion to determine what acts were and were not treason; and the judges of those times, holding office at the pleasure of the crown, became but too often instruments in its hands of foul injustice. At the instance of tyrannical princes, they had abundant opportunities to create constructive treasons; that is, by forced and arbitrary constructions, to raise offenses into the guilt and punishment of treason which were not suspected to be such. The grievance of these constructive treasons was so enormous, and so often weighed down the innocent and the patriotic, that it was found necessary, as early as the reign of Edward III., for parliament to interfere and arrest it, by declaring and defining all the different branches of treason. This statute has ever since remained the pole-star of English jurisprudence on

McDowell, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,673; *Ex parte Field*, 5 Blatchf. 63, Fed. Cas. No. 4,761; *Martin v. Mott*, 12 Wheat. 19.

<sup>124</sup> *Drehman v. Stifle*, 8 Wall. 595; *Hess v. Johnson*, 3 W. Va. 645.

this subject. \* \* \* It was under the influence of these admonitions, furnished by history and human experience, that the convention deemed it necessary to interpose an impassable barrier against arbitrary constructions, either by the courts or by congress, upon the crime of treason."<sup>125</sup>

To constitute this specific crime, "war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war and actually to levy war are distinct offenses. The first must be brought into open action by an assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. The actual enlistment of men to serve against the government does not amount to levying war. It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."<sup>126</sup>

There may also be treason against a particular state, defined and punished as a crime by its laws. And treason against a state is not necessarily at the same time treason against the United States. Treason may be committed against a state by opposing its laws and forcibly attempting to overturn or usurp the government. And conversely, treason against the United States is not an offense against the laws of a particular state. It is a crime which is exclusively directed against the national government and exclusively cognizable in its courts.<sup>127</sup>

<sup>125</sup> 2 Story, Const. § 1799. See *Sidney's Case*, 9 How. St. Tr. 817.

<sup>126</sup> *Ex parte Bollman*, 4 Cranch, 75, 126. See, also, *U. S. v. Burr*, 4 Cranch, 469, Fed. Cas. No. 14,693; *U. S. v. Hoxie*, 1 Paine, 265, Fed. Cas. No. 15,407; *U. S. v. Hanway*, 2 Wall. Jr. 139, Fed. Cas. No. 15,299; *U. S. v. Insurgents*, 2 Dall. 335, Fed. Cas. No. 15,443; *U. S. v. Mitchell*, 2 Dall. 348, Fed. Cas. No. 15,788; *Fries's Case*, Whart. St. Tr. 610, 634, Fed. Cas. No. 5,127; *U. S. v. Pryor*, 3 Wash. C. C. 234, Fed. Cas. No. 16,096.

<sup>127</sup> *People v. Lynch*, 11 Johns. 549; *Republica v. Carlisle*, 1 Dall. 35.

**CORRUPTION OF BLOOD AND FORFEITURE.**

**187. The constitution of the United States provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." And the constitutions of nearly all the states provide generally that no conviction shall work corruption of blood or forfeiture of estates, though in a few, it seems, there may still be a forfeiture during the life of the person convicted.**

Soon after the adoption of the federal constitution, congress passed an act declaring that no conviction or judgment, for any capital or other offense, should work corruption of blood or any forfeiture of estate.<sup>128</sup> But in 1861, at the beginning of the civil war, new statutes for the punishment of treason were enacted, and these provided for the confiscation of the property of persons in rebellion against the government. But a question having been made, as to whether the fee in the realty of such persons might not be confiscated, it was expressly provided in the confiscation acts that no punishment or proceedings should be construed to work a forfeiture of the real estate of the offender, longer than for the term of his natural life.<sup>129</sup>

In English law, corruption of blood was the consequence of attainder. It meant that the attainted person could neither inherit lands or other hereditaments from his ancestor, nor retain those he already had, nor transmit them to any heir by descent, because his blood was considered in law to be corrupted. This was abolished by St. 33 & 34 Vict. c. 23, and is unknown in America.

In England, if a person is outlawed for treason, his lands are forfeited to the crown. If he is outlawed for felony, he forfeits to the crown all his goods and chattels, real and personal, and also the profits of his freeholds during his life, and after his death, the crown is entitled to his freeholds for a year and a day, with the right of com-

<sup>128</sup> Rev. St. U. S. § 5326 (Act April 30, 1790).

<sup>129</sup> See 2 Story, Const. § 1300, note; *Bigelow v. Forrest*, 9 Wall. 339; *Day v. Micon*, 18 Wall. 156; *Wallach v. Van Risiwick*, 92 U. S. 202; *Fire Department v. Kip*, 10 Wend. 266.

mitting waste. Formerly, a conviction for any kind of felony caused a forfeiture of goods and chattels, both real and personal, but this has been abolished by the St. 33 & 34 Vict. c. 23. This statute provides that no conviction, judgment, or sentence for treason or felony shall work corruption of blood or forfeiture. But it leaves the old law of outlawry for treason and felony, with its consequences, untouched.<sup>130</sup>

<sup>130</sup> See 4 Steph. Comm. (10th Ed.) 477; Williams, Real Prop. 126.

## CHAPTER XXI.

### LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.

188. Constitutional Provisions.
189. The Law Impairing the Contract.
190. The Obligation.
191. The Impairment of the Contract.
192. What Contracts are Protected.
193. Limitations on Power of Legislature to Contract.
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### CONSTITUTIONAL PROVISIONS.

**188.** The federal constitution provides that no state shall pass any law impairing the obligation of contracts. And the constitutions of many of the states impose the same restraint upon their legislatures.

The causes for the introduction of this clause into the constitution of the United States are to be found in the financial condition of the country at the close of the revolutionary war, and the disposition of the states, at that time, with reference to the enforcement of public and private obligations. It was much to be apprehended that they would repudiate their debts, unless restrained by some such provision of the paramount law. There was also a strong desire to issue paper money and make it circulate, even when that involved the discharge of previous contracts in an almost worthless currency. Further, the various states were much inclined to make such liberal provision for the relief and encouragement of the debtor class as would result in great injury and detriment to the class of creditors, and to the serious impairment of public and private credit. The means adopted to check these tendencies was the prohibition upon state action which we are about to consider. That it has been beneficent in its effects cannot be doubted. But it has given rise to an amount of litigation, and has involved the courts in a succession of adjudications, which are not equalled by those growing out

of any other clause of the constitution, unless it may be that which gives to congress the power to regulate commerce. This prohibition, it will be noticed, is directed only against the states, and there is no other clause in the constitution laying a like inhibition upon congress. It follows, therefore, that if congress should pass a law, falling within the scope of its jurisdiction, and not obnoxious to any other prohibition of the constitution, the courts would be obliged to sustain it, notwithstanding its effect might be to impair the obligation of existing public or private contracts. The injustice of such an act would not be sufficient ground for adjudging it unconstitutional. And in fact, such consequences have attended several of the acts of congress, such as the legal tender law and the various statutes of bankruptcy, but their constitutionality has not been questioned on that ground.<sup>1</sup> But it has been held that the legislature of a territory has no more power to pass a law impairing the obligation of contracts than is possessed by the legislature of a state.<sup>2</sup>

#### THE LAW IMPAIRING THE CONTRACT.

**189. The prohibition against impairing the obligation of contracts applies not only to the ordinary statutes of the state, and the ordinances of its municipalities, but also to any clause in its constitution, or any amendment thereto, which produces the forbidden effect.**

A provision in a state constitution, or an amendment thereto, is a "law" within the meaning of this clause. The federal constitution is the supreme law of the land, and its prohibitions upon state action apply just as much to the people of the state, when making or amending their constitution, as to their representatives sitting in the legislature to make ordinary laws. Hence if a constitutional provision or amendment impairs the obligation of contracts, it is void.<sup>3</sup> But the prohibition is directed against the legis-

<sup>1</sup> *Evans v. Eaton*, 1 Pet. C. C. 322, 337, Fed. Cas. No. 4,559; *Hepburn v. Griswold*, 8 Wall. 637; *Gunn v. Barry*, 15 Wall. 610.

<sup>2</sup> *Morton v. Sharkey*, *McCahon* (Kan.) 535.

<sup>3</sup> *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co.*, 115 U. S. 650, 6 Sup. Ct. 252; *Delmas v. Insurance Co.*, 14 Wall. 661; *Dodge v. Woolsey*, 18 How. 331; *Gunn v. Barry*, 15 Wall. 610.

lative action of the state (whether by the legislature or by a constitutional convention) and not against the determinations of its judicial department. The obligation of the contract must have been impaired by some law, that is, some constitutional provision or statute. A judgment of the supreme court of a state will not be reviewed by the supreme court of the United States, on a writ of error, on the ground that the obligation of a contract has been impaired, unless some legislative act or constitutional provision has been sustained by the judgment. It is not enough that the judgment itself decides against the validity of the contract or has the effect to make it different from that which the parties intended.<sup>4</sup> The prohibition against "passing" any law impairing the obligation of contracts equally forbids a state to enforce as a law any enactment of that character, from whatever source originating. Hence an enactment of the "Confederate States," enforced as a law of one of the states composing that confederation, sequestering a debt owing by one of its citizens to a citizen of a loyal state as an alien enemy, is void for this reason.<sup>5</sup>

#### THE OBLIGATION.

**190. The obligation of a contract is that duty of performing the contract, according to its terms and intent, which the law recognizes and enforces.**

The obligation of a contract involves, first, the promise or assurance of the party, and, second, the sanction of the law, whereby the promise or assurance becomes an effectual contract.<sup>6</sup> "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, and by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."<sup>7</sup> In illustration of

<sup>4</sup> *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 7 Sup. Ct. 741; *Railroad Co. v. McClure*, 10 Wall. 511.

<sup>5</sup> *Williams v. Bruffy*, 96 U. S. 176.

<sup>6</sup> *Cooley*, *Const. Law* (2d Ed.) 313; *Bronson v. Kinzie*, 1 How. 311.

<sup>7</sup> *Louisiana v. New Orleans*, 102 U. S. 203.

this rule, it is held that a state statute repealing a former law, which made the stock of stockholders in a corporation liable to its debts, is, as respects creditors of the corporation existing at the time of the repeal, a law impairing the obligation of contracts and therefore void.<sup>8</sup>

#### THE IMPAIRMENT OF THE CONTRACT.

**191. Any law which precludes a recovery for breach of the contract, or excuses one of the parties from performing it, or renders it invalid, or puts new terms into it, or enlarges or abridges the intention of the parties, or postpones or accelerates the time for its performance, or interposes such obstacles to its enforcement as practically to annul it, impairs its obligation and is void.**

Any statute is unconstitutional, as impairing the obligation of contracts, which introduces a change into the express terms of the contract, or its legal construction, or its validity, or its discharge, or (within certain limits to be presently noticed) the remedy for its enforcement. The extent of the change is not material; any impairment of the contract is unlawful. "This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."<sup>9</sup>

#### WHAT CONTRACTS ARE PROTECTED.

**192. The "contracts" intended to be secured by this clause of the constitution are all such as might be injuriously affected by the legislative action of the state if not thus protected. They include contracts between two states, contracts of a state with corporations or individuals, and contracts between private persons. They include executory contracts as well as executed, and express as well as implied contracts. But mere licenses, or statutory privileges, and public offices, are not included.**

<sup>8</sup> Hawthorne v. Calef, 2 Wall. 10; Ochiltree v. Railroad Co., 21 Wall. 249.

<sup>9</sup> Planters' Bank v. Sharp, 6 How. 301, 327.

The protection furnished by this clause extends not only to such contracts as remain executory, but also to such as have been fully executed. And it includes such contracts as the law implies from the relations or dealings of the parties, as well as those which they have put into express terms.<sup>10</sup>

*Contracts between States.*

Agreements or compacts between two states of the Union, such as they are authorized to make with the consent of congress, are secured against impairment by this clause of the constitution, and any person who is injured by a legislative action of either state, amounting to a violation of the agreement, has a standing to complain of its unconstitutionality.<sup>11</sup>

*Statutes.*

A statute may contain a contract, or the offer of a contract, or be the evidence of a contract, or be essential to the obligation of a contract made on the faith of its continuance in force; but a statute is not a contract purely and solely per se. The mere enactment of a law on any subject does not amount to a contract between the legislature and the people that such law shall remain in force, nor does it abridge the power of the legislature to amend or repeal it. The case is different if the act makes a grant or an engagement of the state, or provides remedies which enter into the composition of future contracts.

*Contracts of a State with Individuals.*

The bonds or other evidences of debt issued by a state or municipality are in the nature of contracts with the lawful holders thereof. And this contract includes such provisions of law, with regard to the receivability of the bonds or coupons for taxes, or the exemption of the securities from taxation, as existed when they came into the hands of the holders, and were intended to promote their credit or their circulation. Thus, when such public securities are held by non-residents, who are not subject to taxation by the state, a subsequent statute taxing the securities and directing that the amount of the tax shall be deducted from the stipulated periodical payments, impairs the obligation of the contract and is void.<sup>12</sup> The same principle

<sup>10</sup> Holmes v. Holmes, 4 Barb. 295.

<sup>11</sup> Green v. Biddle, 8 Wheat. 1.

<sup>12</sup> State Tax on Foreign-Held Bonds, 15 Wall. 300; Murray v. Charleston, 96 U. S. 432.

governed the celebrated "Virginia coupon cases," which were long and earnestly contested in the supreme court, but resulted in holding the state firmly to the agreement which it had made with its creditors. This litigation grew out of the funding act of 1871, in that state, which provided that the coupons on the bonds then issued should be receivable in payment of all taxes and debts to the state. This privilege the legislature afterwards attempted to rescind, on the ground of frauds in the manipulation of the securities. But it was held that the contract made with the holders of the securities could not be thus impaired, and that the state must abide by its original agreement.<sup>13</sup> So when a state establishes a banking institution, of which it owns the entire capital stock, and provides by law that the bills of the bank shall be receivable in payment of taxes and debts due the state, this constitutes a contract with those who become holders of the bills, and a subsequent statute, revoking this privilege of paying taxes in such bills, is void, as to holders of the bills, for impairing the obligation of the contract.<sup>14</sup>

A law of the state offering a bounty for any particular kind of services to be rendered is an offer of a contract to any person who will accept its terms. But a contract of this sort does not become complete and binding until it is accepted by an individual and the work begun or the services rendered. Until that is done, the mere offer on the part of the state may be withdrawn; but not so after it has been acted on in a specific instance.<sup>15</sup> On the same principle, a grant of a penalty, or of a share in a forfeiture, to any person who will give information and sue for it, may be considered in the nature of a contract by the state. But such penalties and forfeitures may be released by statute at any time before an actual recovery has been had.<sup>16</sup> But a mere gratuitous concession on the part of the state, not founded upon any consideration or advantage moving to it, does not amount to a contract.<sup>17</sup>

<sup>13</sup> *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91; *Virginia Coupon Cases*, 114 U. S. 270, 5 Sup. Ct. 903-923; *McGahay v. Virginia*, 135 U. S. 662, 10 Sup. Ct. 972.

<sup>14</sup> *Woodruff v. Trapnall*, 10 How. 190; *Furman v. Nichol*, 8 Wall. 44; *Keith v. Clark*, 97 U. S. 454.

<sup>15</sup> *Welch v. Cook*, 97 U. S. 541.

<sup>16</sup> *Confiscation Cases*, 7 Wall. 454; *U. S. v. Tynen*, 11 Wall. 88.

<sup>17</sup> *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 11 Sup. Ct. 301.

*Grants by a State.*

Grants of property or franchises, made by a state to a private person or corporation, are contracts within the meaning of this clause of the constitution. Thus, at an early day, the state of Georgia sold to certain individuals a tract of the public lands, received the purchase money, and issued a patent. Afterwards it was alleged that the sale had been procured by fraud and misrepresentation on the part of the purchasers, and a statute was passed annulling the grant, setting aside the patent, and authorizing the sale of the same land to other persons. It was held that this statute impaired the obligation of the contract made with the first purchasers, and was void.<sup>18</sup>

*Grants of Exclusive Privileges.*

The legislature of a state, if the public interests may seem to make it desirable, may grant to a person or corporation a monopoly or exclusive franchise or privilege, and the grant may assume the form of a contract, the obligation of which must not thereafter be impaired. But monopolies are not favored in law, and grants of this kind are subject to the following four limitations:

(1) The grant is to be construed strictly against the grantee and in favor of the public. Nothing will pass by implication, and the extent of the privileges granted will not be enlarged by inference or construction. Thus, the grant will not be understood to prevent the legislature from according rival or competing franchises to other persons, unless its plain terms convey that meaning.<sup>19</sup>

(2) The intention to grant a monopoly will never be presumed, but on the contrary it will be presumed that the legislature did not intend thus to limit its own power or that of its successors. And this presumption can be overcome only by clear and satisfactory inferences from the terms of the grant.<sup>20</sup>

(3) The rights or franchises granted may be revoked or annulled by the state, in the exercise of the power of eminent domain, or their

<sup>18</sup> Fletcher v. Peck, 6 Cranch, 87. See, also, Vanhorn v. Dorrance, 2 Dall. 304, Fed. Cas. No. 16,857; Huidekoper v. Douglass, 3 Cranch, 1.

<sup>19</sup> Charles River Bridge v. Warren Bridge, 11 Pet. 420; Turnpike Co. v. Maryland, 3 Wall. 210.

<sup>20</sup> Pennsylvania R. Co. v. Canal Commissioners, 21 Pa. St. 9; Detroit v. Detroit & H. P. R. Co., 43 Mich. 140, 5 N. W. 275.

value may be impaired by the grant of similar privileges to others. But in this case, due compensation must be made.<sup>21</sup>

(4) The owner of the privilege or franchise may be regulated in the use of his property and the enjoyment of the privilege, by all such laws and ordinances as are established in the lawful exercise of the police power, even though its value may be thereby impaired, or the exclusive features of the grant be infringed. To illustrate these rules, we may refer to a case wherein it was held that a legislative grant of an exclusive right to supply water to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the federal constitution against state legislation, and against provisions in state constitutions, to impair it.<sup>22</sup>

#### *Licenses and Exemptions.*

A license is a permission granted to an individual to do some act or engage in some occupation which, without such permission, would be unlawful. A license is not a contract. For instance, a license to sell liquor at retail may be revoked, or rendered nugatory by a change in the law of the state, or subjected to the payment of a heavier fee, or hedged about with more severe restrictions, before the expiration of the term for which it was granted. And in all this there is no impairment of contract obligations.<sup>23</sup> So a

<sup>21</sup> West River Bridge Co. v. Dix, 6 How. 507; Eastern R. Co. v. Boston & M. R. Co., 111 Mass. 125; Alabama & F. R. Co. v. Kenney, 39 Ala. 307; Binghamton Bridge Case, 3 Wall. 51.

<sup>22</sup> St. Tammany Waterworks Co. v. New Orleans Waterworks, 120 U. S. 64, 7 Sup. Ct. 405. But a contract with a municipal corporation, whereby the corporation grants to the contractor the sole privilege of supplying the municipality with water from a designated source for a term of years, is not impaired, within the meaning of this clause of the constitution, by a grant to another party of a privilege to supply it with water from a different source. Stein v. Bienville Water Supply Co., 141 U. S. 67, 11 Sup. Ct. 892. See, also, Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90.

<sup>23</sup> Calder v. Kurby, 5 Gray, 597; Fell v. State, 42 Md. 71; Metropolitan Board of Excise v. Barrie, 34 N. Y. 659; Moore v. Indianapolis, 120 Ind. 483, 22 N. E. 424.

license to maintain a lottery is a mere privilege, revocable at will, and not a contract, even though founded on a consideration.<sup>24</sup> And a permission granted to a foreign insurance company to do business within the state, upon complying with certain conditions, does not raise a contract between the state and the company, when it complies with the requirements, in any such sense as will prevent the state from afterwards imposing an annual license tax upon it for the same privilege.<sup>25</sup> And as a general rule, any privilege obtained under a general law of the state may be taken away by the amendment or repeal of the law.<sup>26</sup>

A statute exempting persons or property from public duties or burdens, as a mere matter of favor, or for reasons of public policy, grants a revocable privilege, but does not constitute a contract with any individual. This remark applies to the exemption of property from sale on execution;<sup>27</sup> to the exemption from military service of persons who have served a certain time in the armed forces of the state, or of persons who have conscientious scruples against bearing arms; to the exemption of certain classes of persons from service on juries, and to other similar cases.<sup>28</sup>

#### *Offices.*

The election or appointment of a public officer, and his acceptance of the office, do not constitute a contract between the state or municipality and himself. Such an officer is a public agent or trustee, but he does not hold his office by virtue of any contract. The constitution may protect him in his office or his compensation, and if so, he is beyond legislative interference. But so far as concerns the clause we are now considering, it is entirely competent for the legislature to abolish the office, remove the incumbent, change the scope of his jurisdiction or duties, or reduce or alter his salary, emoluments, or fees, and this without impairing any contract which the constitution protects.<sup>29</sup> But when services have been rendered

<sup>24</sup> *Stone v. Mississippi*, 101 U. S. 814; *Boyd v. Alabama*, 94 U. S. 645.

<sup>25</sup> *Home Ins. Co. v. City Council of Augusta*, 93 U. S. 116

<sup>26</sup> *Beers v. Arkansas*, 20 How. 527.

<sup>27</sup> *Bull v. Conroe*, 13 Wis. 233.

<sup>28</sup> *Dunlap v. State*, 76 Ala. 460; *State v. Wright*, 53 Me. 328; *Murphy v. People*, 37 Ill. 447; *Com. v. Bird*, 12 Mass. 443; *Swindle v. Brooks*, 34 Ga. 67.

<sup>29</sup> *Butler v. Pennsylvania*, 10 How. 402; *Head v. University*, 19 Wall. 526;

by a public officer, under a statute or ordinance which fixes his compensation therefor, there arises an implied contract to pay for such services at that rate, and hence a law fixing a different or less compensation for such past services would impair the obligation of the contract and be unconstitutional.<sup>30</sup>

*Illegal and Immoral Contracts.*

If the consideration on which a contract is based is illegal, contrary to public policy, or immoral, it has no legal obligation entitled to protection and respect.<sup>31</sup> But if the consideration was recognized as lawful and sufficient, at the time the contract was made, it must not be impaired by subsequent legislation, even though changes in the law or public sentiment have now branded the consideration as illegal or immoral. It was on this ground that the courts declared against the validity of statutes prohibiting recovery on contracts for the sale of slaves, passed after emancipation, so far as regards contracts entered into when slavery was a recognized lawful institution.<sup>32</sup> If a contract entered into by a municipal corporation was void, because ultra vires, a subsequent statute of the state, inconsistent with it, cannot be said to impair its obligation.<sup>33</sup>

*Judgments.*

A judgment is not a contract within the meaning of this prohibitory clause. There are some few cases in which it has been held that the clause might be made to include the ordinary judgments of the courts, but they proceeded upon a misapprehension of the constitutional principle. It is true that statutes have been declared invalid, as obnoxious to this inhibition, which vacated judgments, granted new trials, enacted shorter statutes of limitation, exempted the debtor's property, gave stay of execution, and so on. But it was not because they attacked the judgment, but because they destroyed or desiccated the remedy on the original contract, which, as

Crenshaw v. U. S., 134 U. S. 99, 10 Sup. Ct. 431; Love v. Mayor, etc., of Jersey City, 40 N. J. Law, 456.

<sup>30</sup> Fisk v. Police Jury, 116 U. S. 131, 6 Sup. Ct. 329.

<sup>31</sup> 2 Kent, Comm. 466; Bishop, Cont. § 467 et seq.; Meacham v. Dow, 32 Vt. 721; Marshall v. Baltimore & O. R. Co., 16 How. 314; Piatt v. People, 29 Ill. 54.

<sup>32</sup> White v. Hart, 13 Wall. 646.

<sup>33</sup> New Orleans v. New Orleans Waterworks, 142 U. S. 79, 12 Sup. Ct. 142.

we shall see, is vital to the maintenance of its obligation. And if the cause of action was in tort, it is very evident that the constitutional clause does not apply.<sup>34</sup>

*Marriage.*

Marriage is not a contract within the meaning of this clause. While it includes some contractual elements, it is much more than a contract, since it is to be regarded as an institution of society, and as establishing a status of the married parties which is not dissoluble at their pleasure. Consequently, a divorce, whether granted directly by the legislature, or by the courts under the authorization of a general law, cannot be said to impair the obligation of a contract.<sup>35</sup>

**LIMITATIONS ON POWER OF LEGISLATURE TO CONTRACT.**

**193.** The power of a state legislature, in making contracts with individuals or corporations, is limited by the rule that it is not competent to relinquish any of the essential powers of sovereignty by an irrevocable bargain or grant. Hence if any statute is passed in the exercise of the police power or the power of eminent domain, it cannot be objected to it that it violates the obligation of prior legislative contracts, because such contracts will never be understood as involving a surrender of these powers, or, if they do, they are to that extent beyond the legislative power and void.

The rule just stated is of the utmost importance, and cannot be too strongly commended to the reader's attention. It is obvious that if it were in the power of any state legislature to fetter the

<sup>34</sup> *Garrison v. City of New York*, 21 Wall. 196; *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211; *Freeland v. Williams*, 131 U. S. 405, 9 Sup. Ct. 763; *Nelson v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. 648; *McAfee v. Covington*, 71 Ga. 272; *Morley v. Lake Shore & M. S. R. Co.*, 146 U. S. 162, 13 Sup. Ct. 54.

<sup>35</sup> *Cronise v. Cronise*, 54 Pa. St. 255; *Maguire v. Maguire*, 7 Dana, 181; *Carson v. Carson*, 40 Miss. 349; *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723.

hands of its successors by bargaining away the essential powers of sovereignty, government would pass from its legitimate repositories into private hands. All legislative grants and contracts are therefore to be taken subject to this limitation, that they do not involve any surrender of these high powers, in any such sense that the same or a succeeding legislature may not exercise them, though it be to the detriment of rights or privileges secured by contract. All property, for instance, and all rights and franchises, whether derived from legislative grant, charter, or otherwise, are held subject to lawful police regulations. This principle is more fully developed in the chapter specially relating to that subject. So also, franchises granted to corporations, or property or rights granted to individuals, may be resumed by the state in the exercise of the power of eminent domain. And no objection thereto can be based on the contract clause of the constitution, because these are powers inalienable by the legislature.<sup>36</sup> But, as we shall presently see, the legislature may relinquish the power of taxation, with respect to particular property, either for a limited time or in perpetuity, by an explicit contract founded upon a consideration.

#### CHARTERS AS CONTRACTS.

**194.** The charter of a private corporation is a contract between the legislature and the corporation, and it cannot be repealed, altered, or materially modified by the legislature, without the consent of the corporation, unless power to do so has been reserved. But this does not relieve the company from regulation, under the police power, in the use of its franchises. And the rule is not applicable to municipal corporations.

This doctrine was first established in the celebrated case of *Dartmouth College v. Woodward*,<sup>37</sup> wherein it appeared that the leg-

<sup>36</sup> See *Stone v. Mississippi*, 101 U. S. 814; *Beer Co. v. Massachusetts*, 97 U. S. 25; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co.*, 115 U. S. 650, 6 Sup. Ct. 252; *Reynolds v. Geary*, 26 Conn. 179; *West River Bridge Co. v. Dix*, 6 How. 507.

<sup>37</sup> 4 Wheat. 518. And see *Planters' Bank v. Sharp*, 6 How. 301; *Binghamton Bridge Case*, 3 Wall. 51; *Farrington v. Tennessee*, 95 U. S. 679.

islature of New Hampshire had undertaken to make certain radical changes in the government of the college, contrary to its charter and without its consent. It was decided that the charter was a contract, that it was based upon a supposed consideration of public services or public benefits, that it protected the corporation in the enjoyment of all its charter rights, privileges, and franchises against legislative interference, and that the act of the legislature of New Hampshire was void as impairing the obligation of this contract. It was soon seen that this doctrine was applicable to business and manufacturing companies, and in fact to every species of private corporations holding their charters under legislative grant or general law. The protection afforded them by the doctrine of this case is usually assigned as the cause of the enormous influence and power of corporations in modern business and industrial life, and many efforts have been made to escape from its sway. The Dartmouth College Case has often been assailed with the severest criticism. And indeed it is probable that the decision, though it was right enough on the particular facts, set up a general rule which is indefensible in law. Yet it has never been directly overruled, and it still stands as the leading authority on this branch of the subject. But the courts have been careful to restrict the doctrine to the narrowest possible bounds, and the legislatures of the states have generally seen the wisdom of retaining control over the franchises or powers of new corporations.

So far as regards exemption from legislative control, charters of incorporation are to be construed strictly against the corporators.<sup>38</sup> A charter will not be held to grant a monopoly, for instance, unless the plain language requires that interpretation. Where a corporation, by its charter, is given the right to "take" property for the construction of its works, upon making just compensation, this does not constitute a contract with the state such as to prevent the legislature from afterwards enacting that the company shall be liable for indirect or consequential injuries to the property of private persons caused by its constructions or operations.<sup>39</sup> It should also be noticed that a statutory provision, merely authorizing the forma-

<sup>38</sup> *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How. 172; *Georgia R. Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47.

<sup>39</sup> *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 10 Sup. Ct. 34.

tion of a corporation in the future, cannot become a contract, in any such sense as to be protected by the federal constitution, until it has become vested as a right by an actual organization under it, and then it takes effect as of that date, and subject to such laws as may then be in force.<sup>40</sup> Moreover, rights or privileges granted to corporations by statute, after their incorporation, do not constitute any part of the contract embodied in the charter, and consequently they may be revoked or modified by the legislature at will, unless the statute itself amounts to a charter.<sup>41</sup> And where two corporations are consolidated, under a state statute which has the effect of dissolving both of them and creating a new corporation, the charter of the new company may be subject to alteration or amendment by the legislature, although those of the old companies were not so liable.<sup>42</sup>

In granting a charter of incorporation, the state may reserve the right to repeal, alter, or amend it. And when this is done, the repeal or amendment of the charter is no impairment of the contract which it embodies, but is rather the enforcement of one of its terms. This power may be reserved in the particular charter itself; but it is equally effective if the state constitution or a statute, in force when the charter is granted, reserves to the legislature the right to revoke or modify it. In the latter case, the reservation becomes a part of the contract.<sup>43</sup> But the exercise of this power must be reasonable, and must have relation to the original nature and scope of the charter. It cannot be employed as a means of forcing the corporation into enterprises not contemplated by the charter, nor to deprive the corporators of their property, nor to abridge the lawful rights of the stockholders.<sup>44</sup>

Rights, privileges, or franchises granted to a corporation by its charter may be resumed by the state, when the exigencies of the

<sup>40</sup> *People v. Cook*, 148 U. S. 397, 13 Sup. Ct. 645.

<sup>41</sup> *South Carolina v. Gaillard*, 101 U. S. 433.

<sup>42</sup> *Shields v. Ohio*, 95 U. S. 319.

<sup>43</sup> *Railroad Co. v. Georgia*, 98 U. S. 359; *Railroad Co. v. Gaines*, 97 U. S. 697; *Sinking Fund Cases*, 99 U. S. 700; *Greenwood v. Freight Co.*, 105 U. S. 13.

<sup>44</sup> *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437.

public require it, under the power of eminent domain, upon the payment of due compensation.<sup>45</sup>

And notwithstanding the protection afforded to charter rights and privileges by the doctrine under consideration, a corporation, like any individual, is subject to regulation, by legislative authority, to the end that the use of its franchises or property may not endanger the public health, safety, or comfort, or be made the means of oppression or fraud. That is, it is subject to regulation under the police power. This subject has been considered in an earlier chapter. At present it is only necessary to add that the limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; they must not, under the pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchises.<sup>46</sup> If, for instance, the charter expressly gives the company the right to take toll, the revocation of this right, although a pretended police regulation, would be void as impairing the obligation of the contract.<sup>47</sup>

*Charters of Municipal Corporations.*

The charter of a municipal corporation is not a contract within the meaning of this clause of the constitution. It is a grant or delegation of governmental powers, for public purposes, to a subordinate agency of government. All rights, powers, privileges, and franchises granted to such corporations are held subject to legislative modification or recall. And therefore a statute revoking or

<sup>45</sup> *West River Bridge Co. v. Dix*, 6 How. 507.

<sup>46</sup> *Cooley*, Const. Lim. 577; *Bailey v. Philadelphia, etc., R. Co.*, 4 Har. (Del.) 389; *Washington Bridge Co. v. State*, 18 Conn. 53; *Philadelphia, etc., R. Co. v. Bowers*, 4 Houst. 506; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co.*, 115 U. S. 650, 6 Sup. Ct. 252; *Stone v. Farmers' Loan & T. Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191; *Toledo, W. & W. R. Co. v. City of Jacksonville*, 67 Ill. 37; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 5 Sup. Ct. 681.

<sup>47</sup> *Pingry v. Washburn*, 1 Aik. 264.

changing the public powers or rights of a municipality, altering its boundaries, or modifying its government, does not impair the obligation of any contract.<sup>48</sup> And on the same principle, legislative grants to municipal corporations, which do not pertain to the functions of government, but to the convenience or business advantages of the community, are not protected from subsequent revocation by this constitutional provision, as they would be if granted to private persons or corporations. Thus, the legislature may revoke a right previously granted to a municipality to maintain a ferry across a navigable river.<sup>49</sup>

#### EXEMPTION FROM TAXATION.

195. It is well settled that the legislature of a state may agree, by an explicit grant founded upon a consideration, to exempt specified property from taxation, either for a limited period or indefinitely, or that taxation of the property in question shall be had only on a certain basis, and not otherwise, or shall not exceed a certain rate; and this will constitute a contract with the grantee which succeeding legislatures may not impair by imposing taxes contrary to the grant.<sup>50</sup>

But a contract to exempt property from taxation will never be presumed. On the contrary, the presumption is always strongly against the intention of the legislature to surrender this important power, or to restrict or limit it in any way. All doubts will be re-

<sup>48</sup> *Barnes v. District of Columbia*, 91 U. S. 540; *Laramie Co. v. Commissioners of Albany Co.*, 92 U. S. 307; *Williamson v. New Jersey*, 130 U. S. 189, 9 Sup. Ct. 453; *Marietta v. Fearing*, 4 Ohio. 427; *Berlin v. Gorham*, 34 N. H. 266.

<sup>49</sup> *East Hartford v. Hartford Bridge Co.*, 10 How. 511.

<sup>50</sup> *New Jersey v. Wilson*, 7 Cranch, 164; *Pacific R. Co. v. Maguire*, 20 Wall. 36; *Northwestern University v. People*, 99 U. S. 309; *New Jersey v. Yard*, 95 U. S. 104; *Gordon v. Appeal Tax Court*, 3 How. 133; *Farrington v. Tennessee*, 95 U. S. 679; *Piqua Branch of Bank of Ohio v. Knoop*, 16 How. 369; *Wilmington R. Co. v. Reid*, 13 Wall. 264; *New Orleans v. Houston*, 119 U. S. 265, 7 Sup. Ct. 198; *Yazoo & M. V. R. Co. v. Thomas*, 132 U. S. 174, 10 Sup. Ct. 68.

solved against the exemption claimed. Nothing but the clearest and plainest terms, manifesting such an intention, will be sufficient to establish a contract relieving property from its due share of the public burdens.<sup>51</sup> And furthermore, a grant of this special privilege must be founded upon a consideration, such as the imposition of some further burden or public duty upon the recipient of the grant, or the payment of a bonus or commutation to the state, or the surrender of some right or franchise previously held. If there is no such consideration, the grant of exemption is a mere act of grace or favor and is revocable at will.<sup>52</sup> And if it appears that the exemption was made without any consideration moving to the public, as is usually the case with the exemption of the property of religious societies and charitable institutions, then there is nothing to prevent its repeal at any time, for there is no contract to stand in the way.<sup>53</sup>

#### LAWS AFFECTING REMEDIES ON CONTRACTS.

**196. There is a distinction between the obligation of a contract and the remedy for its enforcement. Whatever pertains merely to the remedy may be changed or modified, at the discretion of the legislature, without impairing the obligation of the contract, provided the remedy be not wholly taken away nor so hampered or reduced in effectiveness as to render the contract practically incapable of enforcement.**

The remedy cannot be wholly abolished or denied to the parties. For to withdraw all legal means of enforcing a contract, or obtaining satisfaction for a breach of its terms, is to withdraw that sanction of the law which constitutes a part of the obligation of the contract. The state is bound to provide a remedy for such cases. But it is not

<sup>51</sup> *Gilman v. City of Sheboygan*, 2 Black (U. S.) 510; *Providence Bank v. Billings*, 4 Pet. 514; *Delaware Railroad Tax*, 18 Wall. 206.

<sup>52</sup> *Rector, etc., of Christ Church v. Philadelphia Co.*, 24 How. 300; *Home of the Friendless v. Rouse*, 8 Wall. 430; *Tucker v. Ferguson*, 22 Wall. 527.

<sup>53</sup> *East Saginaw v. East Saginaw Salt Co.*, 13 Wall. 373; *Home Ins. Co. v. City Council*, 93 U. S. 116; *In re Mayor, etc., of New York*, 11 Johns. 77; *Broadway Baptist Church v. McAtee*, 8 Bush, 508.

of the obligation of the contract that the remedy shall remain the same as it was when the contract was made.<sup>54</sup> But if the parties to a contract include in it, in express terms, the remedy to be sought upon its breach, or the means to be used for securing its performance, subsequent legislation changing the remedial process they have agreed upon is, as to them, inoperative. But the repeal of a usury law, operating retrospectively upon contracts previously made, and which, at the time, would have been voidable for usury, cannot be said to impair their obligation.<sup>55</sup>

#### *Insolvency Laws.*

Bankruptcy or insolvency laws may be passed by the states, authorizing the discharge of debtors from their obligations and liabilities on just and reasonable terms. But these laws are subject to three important limitations. First, there must be no national bankrupt law in existence at the time, for such a law suspends all state laws on the same subject while it continues in force. Second, state laws of this kind cannot apply to citizens of other states having claims against the debtor, for the state has no jurisdiction over them. Third, such laws cannot apply to contracts entered into before their enactment, for that would impair their obligation.<sup>56</sup>

#### *Limitation Laws.*

The legislature may enact new or different statutes of limitation, prescribing the period within which actions on contracts must be brought, and may make them applicable to existing contracts, provided the remedy of the creditor is not thereby taken away or unreasonably restricted. That is to say, a statute of limitations cutting off all remedy on a particular contract, by prescribing a period which, as to that contract, had already expired, would be unconstitutional.

<sup>54</sup> *Gantly v. Ewing*, 3 How. 707; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91.

<sup>55</sup> *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408.

<sup>56</sup> *Ogden v. Saunders*, 12 Wheat. 213; *Baldwin v. Hale*, 1 Wall. 223. These limitations on state insolvent laws constitute the difference between their effectiveness and that of an act of congress. And it cannot be doubted that if congress were restrained, as the states are, from passing laws impairing the obligation of contracts, the value to trade and commerce of a national bankrupt law would be almost minimized, for, in that case, it would be restricted, as state laws are, to future contracts.

But if it leaves a reasonable time to the creditor to begin his proceedings, he cannot complain, although the time is less than it would have been if the former statute had remained in force.<sup>57</sup>

*Stay Laws.*

A law granting a stay of execution upon judgments, in effect withholds for a time the means of their enforcement. And in respect to judgments founded on contracts entered into before the law was enacted, it is void as impairing their obligations, if it restrains the issue of execution for an indefinite or unreasonable length of time.<sup>58</sup>

*Exemption Laws.*

A law granting exemptions from execution where none before existed, or increasing the exemption already granted, may apply to the enforcement of contracts made before its enactment if the increase of the exemption is not unreasonable. But if it is so great as to make the creditor's remedy of no value, or seriously to impair his prospect of making a collection, then it interferes with the obligation of such contracts, and, as to them, is invalid.<sup>59</sup>

*Imprisonment for Debt.*

It is held that a law abolishing imprisonment for debt is not unconstitutional in its application to the enforcement of contracts which were made at a time when that means of compelling payment was a remedy available to the creditor.<sup>60</sup>

<sup>57</sup> *Bell v. Morrison*, 1 Pet. 351; *Terry v. Anderson*, 95 U. S. 628; *Sturges v. Crowninshield*, 4 Wheat. 122; *Mitchell v. Clark*, 110 U. S. 633, 4 Sup. Ct. 170, 312; *Vance v. Vance*, 108 U. S. 514, 2 Sup. Ct. 854; *Osborn v. Jaines*, 17 Wis. 573.

<sup>58</sup> *Chadwick v. Moore*, 8 Watts & S. 50; *Johnson v. Duncan*, 3 Mart. (La.) 530; *Webster v. Rose*, 6 Heisk. 93. In *Breitenbach v. Bush*, 44 Pa. St. 313, it was held that a statute staying all civil process against volunteers who had enlisted in the service of the United States for three years "or during the war," was valid. The phrase quoted was construed to mean unless the war should sooner terminate. See, also, *McCormick v. Rusch*, 15 Iowa, 127.

<sup>59</sup> *Edwards v. Kearney*, 96 U. S. 595; *Quackenbush v. Danks*, 1 Denio, 128; *Penrose v. Erie Canal Co.*, 56 Pa. St. 46.

<sup>60</sup> *Mason v. Halle*, 12 Wheat. 370; *Beers v. Haughton*, 9 Pet. 329; *Penniman's Case*, 103 U. S. 714.

*Appraisal Laws.*

A statute providing that property shall not be sold on execution or foreclosure of a mortgage, unless it will bring one-half or two-thirds of the value put upon it by appraisers, is invalid in respect to contracts made before its passage which could have been enforced, by the law at the time they were made, by a judgment and the seizure and sale of property to satisfy it. For such a law, though professing to act only on the remedy, really withdraws from the creditor the effective means of enforcing it upon the basis of which he may be supposed to have made the contract.<sup>61</sup>

*Possession of Mortgaged Property.*

A mortgage is a contract. And if it stipulates that the creditor may take and retain possession of the mortgaged property until the debt is paid, this is a valuable and substantial part of the contract. Hence a law which gives the right of possession to the mortgagor cannot constitutionally apply to mortgages made before its enactment.<sup>62</sup>

*Redemption Laws.*

A statute extending the period allowed for the redemption of real estate sold on execution or upon the foreclosure of a mortgage, cannot constitutionally apply to sales made before its passage.<sup>63</sup>

*Preference of Creditors.*

A law which gives a preference to certain creditors (as, the state itself) in the way of a superior lien or claim on the debtor's property, cannot stand in the way of the enforcement of a contract which was made at a time when no such preference was allowed.<sup>64</sup>

*Municipal Taxation.*

The legislature cannot constitutionally deprive municipal corporations of the power of taxation, in such a manner or to such an extent as to leave them without the means of raising money for the payment of existing debts, which were contracted at a time when they possessed the power to levy taxes and on the faith of the continuance

<sup>61</sup> *McCracken v. Hayward*, 2 How. 608; *Gantly v. Ewing*, 3 How. 707.

<sup>62</sup> *Mundy v. Monroe*, 1 Mich. 68.

<sup>63</sup> *Bronson v. Kinzie*, 1 How. 311.

<sup>64</sup> *Barings v. Dabney*, 19 Wall. 1.

of such power. To do so would be to impair the obligation of the contracts out of which the debts arose, by abolishing the means of their enforcement.<sup>65</sup> Thus, when municipal bonds are taken by the holders on the faith of a promise to levy an annual tax to pay the interest on them, this constitutes a part of the contract; and the municipality cannot lawfully be deprived of the power to levy such taxes.<sup>66</sup>

<sup>65</sup> *Von Hoffman v. City of Quincy*, 4 Wall. 535; *City of Galena v. Amy*, 5 Wall. 705; *Broughton v. Pensacola*, 93 U. S. 266; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190; *Louisiana v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. 648.

<sup>66</sup> *Louisiana v. Pilsbury*, 105 U. S. 278; *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398.

**CHAPTER XXII.****RETROACTIVE LAWS.**

- 197. Validity of Retroactive Statutes.
- 198. Retroactive Effect Avoided by Construction.
- 199. Curative Statutes.
- 200. Statutes Curing Administrative Action.
- 201. Curing Defective Judicial Proceedings.

**VALIDITY OF RETROACTIVE STATUTES.**

**197. Retroactive laws are not unconstitutional, unless they are in the nature of ex post facto laws or bills of attainder, or unless they impair the obligation of contracts, or divest vested rights, or unless they are specifically forbidden by the constitution of the particular state.**

A retroactive (or retrospective) law is one which looks backward or contemplates the past; one which is made to affect acts or transactions occurring before it came into effect, or rights already accrued, and which imparts to them characteristics, or ascribes to them effects, which were not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence. Bills of attainder and ex post facto laws are both included in this class. A bill of attainder or an ex post facto law is always retroactive; but not all retroactive laws are bills of attainder or ex post facto laws. The latter terms, as we have already seen, relate only to the imposition of pains or penalties or the conduct of criminal trials. Again, all laws which impair the obligations of contracts are retroactive. For if they related only to future contracts, they could not be said to have this effect, because contracts are made with reference to existing laws. Laws which have the effect of divesting vested rights are also of this character; for the phrase "vested right" implies something settled or accrued in the past, on which the new statute is to operate. There are also numerous classes of retroactive laws which are constitutionally objectionable for the reason that they exceed the powers of the legislature or

invade the province of one of the other departments of the government. But unless the law in question belongs to one of the classes mentioned above, or is open to some one of the objections described, the mere fact that it is retroactive in its operation will not suffice to justify the courts in declaring it unconstitutional, unless all laws of that character are prohibited by the constitution of the state.<sup>1</sup> No such prohibition is found in the federal constitution. If a state statute does not impair the obligation of contracts or partake of the nature of a bill of attainder or an *ex post facto* law, its retrospective character does not make it inconsistent with the national constitution.<sup>2</sup> But in the constitutions of some few of the states, we find a specific prohibition against retroactive legislation, *eo nomine*.

#### RETROACTIVE EFFECT AVOIDED BY CONSTRUCTION.

**198. A statute will be construed to operate in futuro only, (that is, it will not be given a retroactive effect by construction), unless the legislature has so explicitly expressed its intention to make the act retrospective that there is no place for a reasonable doubt on the subject.<sup>3</sup>**

The reason for this rule is the general tendency to regard retroactive laws as dangerous to liberty and private rights, on account of their liability to unsettle vested rights or disturb the legal effect of prior transactions. "Retrospective laws being in their nature odious, it ought never to be presumed the legislature intended to pass them, where the words will admit of any other meaning."<sup>4</sup> And where the law is clearly and explicitly retrospective, it will

<sup>1</sup> The legislature cannot, by a retroactive statute, impose a civil liability upon a man, created out of facts or transactions which, at the time of their occurrence, founded no claim or demand against him which he was legally or morally bound to satisfy, or which he has already satisfied, or from which he has been discharged by operation of law. This would be a parallel, on the civil side, to that kind of legislation which, on the criminal side, is known as *ex post facto*. *Albertson v. Landon*, 42 Conn. 209; *Medford v. Learned*, 16 Mass. 215; *People v. Supervisors of Columbia County*, 43 N. Y. 130.

<sup>2</sup> *Satterlee v. Matthewson*, 2 Pet. 380.

<sup>3</sup> *Auffmordt v. Rasin*, 102 U. S. 620.

<sup>4</sup> *Underwood v. Lilly*, 10 Serg. & R. 97, 101.

still be subjected, in this respect, to a rigid interpretation, so that its retrospective features may not be further extended than is absolutely required by the language of the act.<sup>5</sup>

#### CURATIVE STATUTES.

**199.** The legislature may retrospectively validate transactions between private persons, which would otherwise fail to have the effect which the parties intended to give them, either in consequence of a want of capacity, or of a failure to observe formalities which the law imposed and which it might dispense with.

It is first to be noticed that the object of curative and confirmatory acts is to give effect to the intention of the parties, to enable them to carry into effect some transaction which they have designed and attempted, but which fails of its expected legal consequences only by reason of some statutory disability or some irregularity in their action. Hence it would not be competent, by an act of this kind, to make the transaction carry a legal effect which the parties did not contemplate, e. g., to turn an attempted mortgage into a deed absolute.

In the next place, statutes of this kind are intended to do justice, and they cannot be objected to by the party whose invalid contract or conveyance they validate. Such a party cannot claim that he has a vested right to insist upon the ineffectualness of the contract or conveyance. On the contrary, the law recognizes an equity in the other party to the transaction, and it is to this that the curative act gives effect.<sup>6</sup>

But retrospective curative statutes cannot be allowed to operate to the detriment of the intervening rights of third persons. Thus if, after the execution of an invalid contract or conveyance, the person who made it deals with a third person, in good faith, in respect to the same subject matter, the rights thus acquired by such third

<sup>5</sup> *Thames Manuf'g Co. v. Lathrop*, 7 Conn. 550.

<sup>6</sup> *State v. Mayor, etc., of Newark*, 27 N. J. Law. 185; *Foster v. Essex Bank*, 16 Mass. 245; *Brown v. Mayor, etc., of New York*, 63 N. Y. 239; *Chesnut v. Shane*, 16 Ohio, 599.

person cannot be cut out by the validation of the prior contract or conveyance.<sup>7</sup> And for a similar reason, it is not competent to give retroactive validity to a bequest, devise, or trust in a will. To do so would amount to divesting the rights which vested in the testator's heirs immediately upon his death.<sup>8</sup>

The invalidity of the transaction may arise from the want of authority or capacity in the person who attempted to transfer rights to another. And this may be of two kinds, natural or legal. If it is of the former sort, the legislature cannot supply the lack of capacity; if of the latter description, it may be remedied. For example, if one undertakes to transfer property which he does not own, or, by such a transfer, to effect a fraud upon the rights of third persons, his want of capacity to make a title is not such as the legislature may dispense with retroactively.<sup>9</sup> And for a like reason, it could not give effect to a deed made by a lunatic.<sup>10</sup> But on the other hand, legal disabilities, whether existing at common law or by statute, such as the disability of a married woman, a minor, or a spendthrift, could be removed at any time by an act of the legislature, and therefore their invalidating effect may be taken away, in particular cases, by a curative statute, when it is necessary to do justice and carry into effect the intention of the parties. When the invalidity of the transaction arises from irregularity in the action of the parties, or failure to observe technical requirements, it may be cured, provided the formalities neglected were such as the law established and might dispense with, and the defects were not jurisdictional.<sup>11</sup>

As illustrations of invalid transactions between parties which may be made good by retrospective curative acts, subject to the limitations noted above, we may mention the following: Deeds made by married women, which were invalid only by reason of the coverture,

<sup>7</sup> *Thompson v. Morgan*, 6 Minn. 292 (Gil. 190); *Brinton v. Seevers*, 12 Iowa, 389; *Les Bois v. Brammell*, 4 How. 449; *Sherwood v. Fleming*, 25 Tex. Supp. 408.

<sup>8</sup> *Hillyard v. Miller*, 10 Pa. St. 326; *Alter's Appeal*, 67 Pa. St. 341; *State v. Warren*, 28 Md. 338.

<sup>9</sup> *Shonk v. Brown*, 61 Pa. St. 320.

<sup>10</sup> *Routsong v. Wolf*, 35 Mo. 174.

<sup>11</sup> *Single v. Marathon Co.*, 38 Wis. 363.

or because of a defect in the acknowledgment;<sup>12</sup> marriages performed without the required license, or otherwise defectively executed;<sup>13</sup> bonds, notes, and bills issued by, or made payable at, or discounted by, an unauthorized bank;<sup>14</sup> notes or contracts tainted with usury, and which, for that reason, would be void by the law as it stood at the time they were made;<sup>15</sup> contracts made by municipal corporations, which would be void, either because beyond the charter powers of the municipality or for lack of observance of some statutory formality in their inception.<sup>16</sup> Thus, in a case where the legislature might authorize a municipal corporation to subscribe to the stock of a railroad company or other work of internal improvement, but has not done so, subscriptions so made by such municipality may be ratified by a subsequent statute.<sup>17</sup> And again, the legislature has the same power to ratify and confirm an illegally appointed corporate body that it has to create a new one.<sup>18</sup>

#### STATUTES CURING ADMINISTRATIVE ACTION.

**200. Defective legal proceedings, involving administrative or executive action, may be validated by retrospective statute in all cases where the legislature would have power to declare that the same acts, or the same manner of doing them, should in the future be valid and effectual, but not where the defects are jurisdictional.**

“If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for

<sup>12</sup> *Watson v. Mercer*, 8 Pet. 88; *Dentzel v. Waldie*, 30 Cal. 138; *Goshorn v. Purcell*, 11 Ohio St. 641.

<sup>13</sup> *Goshen v. Stonington*, 4 Conn. 209.

<sup>14</sup> *Lewis v. McElvain*, 16 Ohio, 347; *Trustees of Cuyahoga Falls Real Estate Ass'n v. McCaughy*, 2 Ohio St. 152.

<sup>15</sup> *Mechanics' & Workingmen's Mut. Sav. Bank & Building Ass'n v. Allen*, 28 Conn. 97; *Parmelee v. Lawrence*, 48 Ill. 331; *Woodruff v. Scruggs*, 27 Ark. 26.

<sup>16</sup> *Allen v. Archer*, 49 Me. 346; *Ahl v. Gleim*, 52 Pa. St. 432; *State v. Demarest*, 32 N. J. Law, 528; *Coffman v. Keightley*, 24 Ind. 509; *Mills v. Charleston*, 29 Wis. 400; *Mattingly v. District of Columbia*, 97 U. S. 687; *State v. Town of Guttenberg*, 38 N. J. Law, 419; *Com. v. Marshall*, 69 Pa. St. 328.

<sup>17</sup> *Thomson v. Lee Co.*, 3 Wall. 327.

<sup>18</sup> *Mitchell v. Deeds*, 49 Ill. 416.

which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."<sup>19</sup>

*Tax Proceedings.*

It is within the constitutional power of the legislature, under proper limitations, to pass general or special acts curing or validating irregular and defective proceedings in the assessment and collection of taxes. But this power is bounded by the general rule above stated. Proceedings in the assessment and collection of taxes which the legislature might have dispensed with, or made immaterial, in the statute under which the proceedings are taken, may be dispensed with or made immaterial by a statute passed after the proceedings have been taken and acting retrospectively, and thus defects in those proceedings, or the omission altogether of proceedings which might have been originally dispensed with, may be cured. But if the defect is jurisdictional, that is to say, if it goes to the root of the authority to act, if it involves the omission of a step which the legislature could not have dispensed with, or if it consists in an irregularity which the legislature had no power to declare immaterial, then it is beyond the reach of a curative statute.<sup>20</sup> For instance, if the tax itself was void, because levied for an unlawful purpose, or for any other reason, this is a defect which cannot be cured retrospectively.<sup>21</sup> So where power was conferred by the legislature to make an assessment, which actually was made, it is competent for the legislature by a retroactive law to cure any irregularity or defect in the form in which the power was exercised. But the total lack of any assessment of the taxes cannot be cured, for this would be a jurisdictional defect. Nor can curative laws be employed to legalize an assessment which is

<sup>19</sup> Cooley, Const. Lim. 371; Underwood v. Lilly, 10 Serg. & R. 97.

<sup>20</sup> Exchange Bank Tax Cases. 21 Fed. 99; Forster v. Forster, 129 Mass. 559; Butler v. Toledo, 5 Ohio St. 225; Astor v. Mayor, etc., of New York, 62 N. Y. 580.

<sup>21</sup> Conway v. Cable, 37 Ill. 82; Iowa R. R. Land Co. v. Soper, 39 Iowa, 112; Hart v. Henderson, 17 Mich. 218.

so fatally defective as to be entirely void, whether for want of jurisdiction or want of authority to make it.<sup>22</sup> It must also be remembered that notice to the tax payer and an opportunity for him to be heard in opposition to the assessment, or to its amount, is a jurisdictional requisite. No retrospective statute can waive such notice or cure the want of it, because the legislature could not have dispensed with it in advance.<sup>23</sup>

#### *Public Sales.*

Sales made by public officers or under legal authority or in pursuance of legal proceedings, such as sales on execution, or on foreclosure of a mortgage, or under a decree of partition, or by executors or guardians under orders of the probate court, which are ineffectual only in consequence of some defect or irregularity which the legislature might have rendered immaterial in advance, and which does not affect the substantial rights of parties interested, may be made good by retrospective legislation.<sup>24</sup>

### CURING DEFECTIVE JUDICIAL PROCEEDINGS.

**201. Retrospective curative statutes may be employed to remedy such defects in judicial proceedings as amount to mere irregularities, but not to supply want of jurisdiction.**

Where there is a want of jurisdiction, all proceedings had in the case are utterly void. If a statute should give them validity and effect, it would amount to a usurpation of judicial power by the legislature. For the rights of parties would in that case be determined, not by the judgment of the court, but by the statute alone.<sup>25</sup> But in the case of merely irregular or defective proceedings, it is

<sup>22</sup> *Reis v. Graff*, 51 Cal. 86; *Hart v. Henderson*, 17 Mich. 218; *People v. Lynch*, 51 Cal. 15.

<sup>23</sup> *Breaux v. Negrotto*, 43 La. Ann. 426, 9 South. 502.

<sup>24</sup> *Kearney v. Taylor*, 15 How. 494; *Boyce v. Sinclair*, 3 Bush, 261; *Beach v. Walker*, 6 Conn. 190; *Davis v. State Bank*, 7 Ind. 316; *Lucas v. Tucker*, 17 Ind. 41; *Toll v. Wright*, 37 Mich. 93.

<sup>25</sup> See *McDaniel v. Correll*, 19 Ill. 226; *Denny v. Mattoon*, 2 Allen, 361; *State v. Dougherty*, 60 Me. 504.

otherwise. For here the fault lies in some particular which the legislature might have rendered immaterial or dispensed with in advance. Thus, in cases where the jurisdiction has attached, and there has been a formal defect in the proceedings, where the equity of the party is complete, and all that is wanted is legal form, it is within the recognized power of the legislature to correct such defect and to provide a remedy for the legal right.<sup>26</sup>

<sup>26</sup> Lane v. Nelson, 79 Pa. St. 407.

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