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COMMENTARIES

ON THE

Constitution of Pennsylvania

BY

THOMAS RAEBURN WHITE

OF THE PHILADELPHIA BAR

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PREFACE.

I have endeavored in this book to present a comprehensive discussion of the construction of the Constitution of Pennsylvania, as developed in our courts. In order to bring it within as small a compass as is consistent with an intelligent understanding of the subject, I have excluded from consideration all cases except those which tend to make clear the meaning of the constitution. I make this explanation lest it should be supposed that chapters dealing, for example, with the power to tax or with eminent domain, purport to be general discussions of those subjects. No subject is treated generally save by way of necessary introduction to the consideration of some clause in the constitution; the single purpose of the volume is to supply a convenient means of obtaining a comprehensive knowledge of our fundamental law.

Although it has been more than one hundred and forty years since the first constitution of the state, and two hundred and thirty years since the first charter of William Penn, no publication treating of this great body of law as interpreted by the courts has hitherto appeared. Mr. Buckalew's excellent book is the only one relating to the subject, and it does not deal with construction except in an incidental way. It is therefore perhaps not too much to hope that this work, imperfect as it is, may prove useful to those members of the bar who have not been able to give special attention to the constitutional law of the state. It

has been prepared with that end in view, although principally written while I was Assistant Professor of Law at the University of Pennsylvania, and was assigned to the duty of teaching that subject.

I have printed the constitution as a whole in the Appendix, together with a reference to the page where each clause is quoted. This is followed by a Table of Cases and an Index, which, together with the Table of Contents, will furnish a ready means of ascertaining the page where each topic is considered.

Without making them in the least responsible for my sins of omission or commission, I wish in this public manner to express my thanks to Mr. Chief Justice Mitchell, and Justices Brown and Potter, of the Supreme Court of Pennsylvania; former Governor Samuel W. Pennypacker, Samuel Dickson, Esq., R. L. Ashhurst, Esq., S. Davis Page, Esq., Alexander Simpson, Jr., Esq., Howard W. Page, Esq., William W. Smithers, Esq., and George Wharton Pepper, Esq., each of whom has kindly and generously read and criticised a portion of the proof; to William Draper Lewis, Esq., Dean of the Law Department of the University of Pennsylvania, for the loan of a large number of indispensable books, and to Richard Warren Barrett, Esq., and Paxson Deeter, Esq., who rendered invaluable assistance in preparing the manuscript for the press.

T. R. W.

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HISTORICAL INTRODUCTION

The following historical note traces briefly the steps leading up to the adoption of the present Constitution of Pennsylvania. It is a mere outline, and contains nothing not familiar to a student of our history, but may prove useful as a convenient reference in connection with the discussion of the Constitution which follows.

In the year 1681 the Province of Pennsylvania was by Royal Charter of Charles II granted to William Penn. He obtained deeds from the Duke of York and from the Indians to further secure him in his title to the territory, and from the Duke of York he also obtained a deed to the three lower counties on the Delaware, now included in the State of Delaware.

The Royal Charter to Penn designated him Proprietor of the Province of Pennsylvania. Absolute power was granted to him, his heirs and his deputies, to make laws, either public or private, by and with the advice and assent of the freemen of the country, who were to be assembled in any manner that he saw fit for the purpose of assisting in the government.

Power was also granted to the Proprietor to appoint judges, magistrates and other officers. He could pardon all offenses except murder and treason. In these cases he could grant reprieves until the royal assent to a pardon could be obtained. The laws enacted in the province were to be consistent with the laws of England, saving to the king an appeal from the provincial courts. All the laws which were enacted by the Proprietor and representatives of the people were to be sent to England for approval or rejection within five years from the time of their enactment, and within six months were to be returned either approved or rejected. The Proprietor also had the power to make such political divisions of the country into counties, cities, etc., as he saw fit. He could declare war, levy troops, etc., etc.

It is thus seen that William Penn had, perhaps, as great power over the people of the province of which he was made Proprietor as the King of England at that time had over his subjects. But so far from exhibiting any disposition to make an improper use of the authority placed in his hands, he established, perhaps, the wisest and freest government then known either in this country or any other. He had a wide knowledge of men and affairs, coupled with the deepest religious convictions.

He started out with the express purpose of establishing a free government, and he succeeded far beyond any other person of his time.

Having gathered together a number of persons who were willing to embark with him in the new venture, William Penn published "Certain conditions or concessions agreed upon by William Penn, Proprietor and Governor of the Province of Pennsylvania, and those who are the adventurers and purchasers in the said province." the 11th day of July, 1681.

These concessions provided in the most liberal manner for the allotment of land to purchasers, laid down rules concerning the building of cities and the opening of highways, and contained a number of provisions intended to secure the friendship of the Indians; expressly forbidding that they should be wronged, affronted or cheated in any way, and providing that they should have as much liberty in the province as any of the planters enjoyed.

Before he arrived in this country Penn published a constitution or frame of government together with a number of laws which he had taken largely from English statutes and which it had been agreed by the prospective colonists should be enforced in the new country. This frame of government begins with a preface in which William Penn sets forth his ideas of government. It is referred to in the Duke of York's Book of Laws as a "tedious argument," but it contains some of the most lofty sentiments that ever influenced the founder of a state. It shows clearly that Penn intended to carry his religion into his government and to give the greatest possible measure of freedom to the people.

The constitution provided that the government of the province should consist of the governor, a provincial council and a general assembly, by whom all laws were to be made and officers chosen and public affairs transacted. At the very outset, Penn gave up voluntarily many of the powers vested in him alone. The provincial council over whom the governor was to preside was to consist of seventy-two persons to be elected by the people. The members were to serve three years, one-third retiring at the end of each year. The provincial council and the governor (who was to have a "treble voice" in its deliberations) were to propose laws for enactment by the general assembly, to act as executive and to have a general oversight over the peace and safety of the province. This council had power to erect cities, ports, market towns and public buildings, and to build streets, highways, school-houses, etc., etc. For the better performance of its duties it was to divide itself into four committees, comprising eighteen persons each. First, a committee of plantations, to have oversight of cities, ports, market towns, highways, market places, etc.; second, a committee of justice and safety, to preserve the peace of the province; third, a committee of trade and treasury, and fourth, a committee on manners, education and arts. The last named was intended to look after the religious and moral affairs of the community and the proper training of youth. The governor's power

was thus seen to have been practically all delegated to the freemen of the province in a manner which was, as he believed, best calculated to promote both the spiritual and temporal welfare of the inhabitants.

The general assembly was to consist of not more than two hundred persons, to be elected by the people, and was to have power to approve or disapprove laws proposed by the provincial council. The erection of courts was delegated to the governor and the council, and the nomination of judges and other officers was to be made in the first instance by the council, subject to the approval of the governor. The general assembly was to continue in session only for such time as was agreeable to the council. Its members were to be chosen for one year.

At the same time that this constitution was adopted Penn adopted forty laws which had been agreed upon and which were immediately to become operative. Most of them were laws already in force in England, and many of them are identical with certain sections of the Bill of Rights in force in Pennsylvania at the present day. There were provisions guaranteeing trial by jury, providing that all prisoners shall be bailable, that the courts shall be open, etc., etc. William Penn was a member of the Society of Friends, whose principles do not permit them to take oaths. It was therefore provided that witnesses should affirm instead of swear, with the ordinary penalties for falsifying. Freedom of worship was guaranteed, and all immoralities, looseness of conduct and pleasures which tend to produce irreligion were discouraged.

William Penn arrived on the 27th of October, 1682, having sent his cousin, William Markham, a year before, who had temporarily been in charge of the provincial government. After Penn's arrival an assembly was called, which met at Upland the 4th of December, 1682, and ratified the frame of government and the laws proposed by him. It also agreed to an act annexing to Pennsylvania the three lower counties on the Delaware. The first assembly under the constitution was elected in February, 1683, and assembled in March of the same year. 1 Colonial Records, 1. Owing to the small number of inhabitants only seventy-two members altogether had been elected, and Penn was requested to allow this number to be divided into two bodies and to serve both as members of the council and general assembly. This he agreed to, so that the first provincial council consisted of but eighteen persons and the first assembly of but fifty-four. This council met in Philadelphia on the 20th of March, 1683. 1 Colonial Records, 7.

It was decided that a new constitution or charter should be drawn up incorporating the changes already agreed to concerning the number of representatives and a few others of minor importance. This was accordingly done, and the new frame of government was duly published, April 2, 1683.

In this the number of the provincial council was reduced from seventy-two to eighteen, three to be chosen from each county, and the number of the assembly was reduced to thirty-six, six to be chosen

from each county. The division of the council into committees was abolished, as it had proved somewhat cumbersome in practice, and the governor was deprived of his "treble" vote in the council. The remainder of the frame was substantially as it was first drafted.

On the 14th of August, 1684, Penn was compelled to return to England. When his personal influence was removed, it was seen that there were some serious defects in the government. One was the lack of a single executive, who should be responsible for the execution of the laws. Upon his departure the Proprietor commissioned the provincial council to act as governor in his stead, thus giving all of the executive power to that body. During the next few years there was continuous friction between the assembly and council, and the government fell into serious disorder. In February, 1687, Penn commissioned five individuals, or any three of them, to act as governor instead of the provincial council. In writing to these gentlemen he expressed his displeasure at the conduct of the government, and threatened to dissolve it. The five-headed executive not proving successful, John Blackwell was appointed governor in 1689. Not being a member of the Society of Friends, he was violently opposed by a number of influential persons in the colony, and as a natural result life was something of a burden to him while he was governor. In 1691, by reason of a quarrel between the lower counties on the Delaware and the Province of Pennsylvania, a temporary separation was effected. Thomas Lloyd was commissioned to be governor of the province and William Markham to be governor of the lower counties.

In 1692 William and Mary, who had in the meantime succeeded James II on the throne of England, deprived Penn of the control of the government of Pennsylvania. The ostensible reason was because of the confusion and disorder into which the government of the colony had fallen, rendering its loss to the enemies of the king probable. It is thought, however, that Penn was disliked by William and Mary owing to his intimacy with the Stuarts. For a time Pennsylvania was governed by Benjamin Fletcher, who was also governor of New York. He resided but a short time in the province, commissioning William Markham to be lieutenant governor under him. The paths of both of them were very thorny, as the Quaker legislature made a most determined stand for their rights under the old charter, which they claimed could not be repealed.

In 1694 Penn was again in favor at court, and the province was restored to him. He commissioned Markham to continue to act as deputy governor until he was able to return. Markham was in continual difficulty owing to the fact that Fletcher, the governor of New York, was, by the authority of the crown, demanding supplies and money for the purpose of prosecuting the wars against the Indians on the frontiers of New York and also in Pennsylvania. The majority of the members of the assembly were Quakers, and, in accordance with their religious principles, they refused to vote supplies for the support of

military operations. The only manner in which any of this money was ever obtained was under the representation that it was to be used for purchasing food and raiment to be given to the Indians who had suffered, it was said, by reason of the ravages of the French.

Immediately after the restoration of Penn as proprietor the people expressed a strong desire for a further revision of the frame of government. Such a revision accordingly was published by Governor Markham in 1696, with the consent of the proprietor. This is usually known as Markham's frame of government. Under it each county was to elect two members of the council and four members of the general assembly. The principal changes, aside from the one mentioned, were provisions excusing the Quakers from taking oaths (which had been required by action of the government of Great Britain), allowing compensation to the members of the assembly and council, and providing that the general assembly was to have the power to originate bills, which power had formerly been vested solely in the governor and council. The latter were still to act as the executive, but it was expressly provided that the governor should not at any time perform any public act relating to the departments of justice, treasury or trade of the province, except by and with the consent of the council. The governor and the council still had the power to propose bills should they see fit to do so, but the power of the assembly was materially increased. The frame concluded with a provision stating that it could not be altered except by the consent of the governor and six-sevenths of the inhabitants, and that nothing contained in it should diminish the rights of the inhabitants which had been granted to them by the former charters.

In 1699 Penn again returned to the colony and personally took charge of the government. Two years later, in 1701, he published a final charter of privileges, as it was called, under which the government was conducted until the revolution. This frame of government was briefer than any of the others, and embodied the ideas of the leading men of the province. The most important change was the abolition of the old council, thus vesting the power of legislation in the assembly alone. The Proprietor, however, appointed a council to assist himself and after his departure his deputy, to act as executive, and the custom continued so that there were in reality the two houses during the remainder of Pennsylvania's history as a colony. Freedom of religion was guaranteed and a number of wholesome regulations were made concerning the conduct of individuals and the suppression of vice. Many of the provisions in the present Constitution of Pennsylvania and in those of many other states can be traced directly to the various constitutions and charters of William Penn.

Just after publishing the new frame of government Penn was again compelled to return to England, and he never afterwards came back to Pennsylvania. He died in the year 1718. Until the Revolution the various governors appointed by Penn and his heirs were nominally in charge of the government.

On May 15, 1776, the Continental Congress adopted the following resolution:

"Resolved, That it be recommended to the respective conventions of the united colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and America in general."

In consequence of this resolution a number of gentlemen met at Carpenter's Hall, in Philadelphia, on June 18, 1776, having been appointed by committees of safety of the various counties of the province for that purpose, and issued an address to the inhabitants of Pennsylvania as follows:

"TO THE PEOPLE OF PENNSYLVANIA:

"Friends and Countrymen—In obedience to the power we derived from you, we have fixed upon a mode of electing a convention, to form a government for the Province of Pennsylvania, under the authority of the people.

"Divine Providence is about to grant you a favor, which few people have ever enjoyed before, the privilege of choosing deputies to form a government under which you are to live. We need not inform you of the importance of the trust you are about to commit to them; your liberty, safety, happiness and everything that posterity will hold dear to them to the end of time will depend upon their deliberations. It becomes you, therefore, to choose such persons only, to act for you in the ensuing convention, as are distinguished for wisdom, integrity and a firm attachment to the liberties of this province, as well as to the liberties of the united colonies in general.

"In order that your deputies may know your sentiments as fully as possible, upon the subject of government, we beg that you would convey to them your wishes and opinions upon that head, immediately after their election.

"We have experienced an unexpected unanimity in our councils, and we have the pleasure of observing a growing unanimity among the people of the province. We beg that this brotherly spirit may be cultivated, and that you would remember that the present unsettled state of the province requires that you should show forbearance, charity and moderation to each other. We beg that you would endeavor to remove the prejudices of the weak and ignorant respecting the proposed change in our government, and assure them that it is absolutely necessary, to secure property, liberty and the sacred rights of conscience, to every individual in the province.

"The season of the year, and the exigencies of our colony, require dispatch in the formation of a regular government. You will not therefore be surprised at our fixing the day for the election of deputies so early as the 8th of next July.

"We wish you success in your attempts to establish and perpetuate your liberties, and pray God to take you under his special protection.

"Signed by unanimous order of the conference.

"THOMAS MCKEAN, *President.*"

The committee also issued a declaration of their willingness to separate from Great Britain.

On the 15th day of July, 1776, shortly after the declaration of independence, the convention thus called met in the state house at Philadelphia. Benjamin Franklin was unanimously chosen president, George Ross vice-president and John Morris secretary. All the members of the convention were required to take the following oath or affirmation:

"I do declare, that I do not hold myself bound to bear allegiance to George the Third, King of Great Britain, etc., and that I will steadily and firmly, at all times, promote the most effectual means, according to the best of my skill and knowledge, to oppose the tyrannical proceedings of the king and parliament of Great Britain against the American colonies, and to establish and support a government in this province, on the authority of the people only, etc. That I will oppose any measure that shall, or may, in the least, interfere with or obstruct the religious principles or practices of any of the good people of the province, as heretofore enjoyed.

"I do profess faith in God, the Father, and in Jesus Christ, his eternal son, the true God, and in the Holy Spirit, one God blessed for evermore: and do acknowledge the Holy Scriptures of the Old and New Testament, to be given by divine inspiration."

The Constitution of 1776 was enacted by this convention, **not being** submitted to the people. It consisted of two parts:

Chapter I. The Declaration of Rights.

Chapter II. The Frame of Government.

The declaration of rights commenced with a statement of the natural and inalienable rights of mankind. It was the product of long and severe experience, and has remained practically unchanged until the present day. The plan or frame of government which was inaugurated was, however, materially different from the government as now constituted in this state. Legislative power was vested in a single house called the house of representatives. Owing doubtless to their experience with the proprietors no governor was provided for. The executive power was to be vested in a council and its president. The council had no power whatever over the acts of the legislature, but was strictly confined to the duty of executing the laws, thus leaving the house of representatives entirely unlimited in its power, except as it was restrained by the constitution. The members of the house were to be elected annually and, among other things, were required to take the following oath: "I do believe in one God the Creator and Governor of the Universe, the rewarder of the good and the punisher of the wicked, and I do acknowledge the Scriptures of the Old and New Testament to be given by divine

inspiration." Franklin objected to such a religious test, and at his suggestion it was further provided "and no further or other religious test shall ever hereafter be required of any civil officer or magistrate in this state." Delegates to represent the state in congress were to be elected by the general assembly and "annually forever afterwards as long as such representation shall be necessary." The number of the representatives to the general assembly were, as soon as practicable, to be chosen according to the number of the inhabitants.

The executive council was to consist of twelve persons, who were to be elected by the people in a manner provided. The president and vice-president of the council were to be chosen from the members of the council by the general assembly and council in joint ballot. The duty of the council was to act as executive, with power to appoint officers, grant pardons, execute the laws, grant licenses, etc., etc. The president of the council was to be commander-in-chief of the army of the state. The constitution also provided for a system of judicature.

It was provided by the last section of it that a council of censors should be chosen by ballot, who should meet once in seven years. Their duties were to inquire whether the constitution had been infringed, to determine whether changes in it were necessary, and they had power to call a convention for the amendment of the constitution if they thought proper.

It is apparent to any student of constitutional history that grave defects existed in this constitution. The most serious were that the legislative power was granted to a single house composed of members who were elected each year, with no check upon its authority, and that the government had not a single executive head. The only restraint on the power of the legislative body was that it could not change the constitution. These defects were recognized by the committee of censors, which met for the first time on November 10, 1783. A long debate ensued as to the advisability of calling a convention to adopt a new constitution. The motion to call a convention was finally determined adversely, with a vigorous dissent by those of the censors who favored an immediate change.

The intrinsic evil of the system of government, however, soon began to be felt, and so much pressure was brought to bear on the general assembly that, on September 15, 1789, an act was passed calling for a convention to revise the constitution.

The convention met on November 24, 1789, and continued in session until the 5th of February, 1790. Its work can be summarized by quoting the resolutions of the committee of the whole, determining what revision ought to be made in the constitution. These resolutions were as follows:

"I. That the legislative department of the constitution of this commonwealth requires alterations and amendments, so as to consist of more than one branch, and in such of the arrangements as may be necessary for the complete organization thereof.

II. That the executive department of the constitution of this commonwealth should be altered and amended, so as that the supreme executive power be vested in a single person, subject, however, to proper exceptions.

III. That the judicial department of the constitution of this commonwealth should be altered and amended, so as that the judges of the supreme court should hold their commissions during good behavior, and be independent as to their salaries, subject, however, to such restrictions as may hereafter be thought proper.

IV. That the constitution of this commonwealth should be so amended as that the supreme executive department should have a qualified negative upon the legislature.

V. That that part of the constitution of this commonwealth called "A declaration of the rights of the inhabitants of the Commonwealth or State of Pennsylvania," requires alterations and amendments, in such manner as that the rights of the people, reserved and excepted out of the general powers of government, may be more accurately defined and secured, and the same and such other alterations and amendments in the said constitution as may be agreed on, be made to correspond with each other."

The amendments were made substantially as indicated by the resolutions. The Constitution of 1790 established a frame of government almost identical in its general outline with the one under which we now live.

In 1835 an act was passed submitting to the voters the question whether a convention should be called to propose amendments to the Constitution to be submitted to the people for adoption. The vote being in favor of it, a convention was called and met in 1838. The reasons which led to its assembling were extravagant expenditures authorized by the legislature and promiscuous and ill-advised granting of charters of incorporation, as is shown in the address of Samuel Dickson, Esq., president of the Pennsylvania Bar Association (1896). The changes made in the old constitution were but slight. This was partly owing to the fact that the panic of 1837 had intervened and there seemed no more danger of extravagant expenditures, and partly owing to the fact that the Constitution of 1790 was looked upon with much reverence by the members of the convention and they were very loath to make any changes. The only alterations of importance were a reduction of the terms of senators from four to three years, a limitation of the power of the legislature to grant charters of incorporation in certain cases, a prohibition of the legislature to invest any corporate body or individual with the power of eminent domain without requiring such corporation or individual to make or secure compensation for private property before actually taking it, a prohibition of legislative divorces in cases where the courts could grant relief, and, curiously enough, the introduction for the first time of a provision requir-

ing voters to be white. These amendments, slight as they were, barely succeeded in receiving the sanction of the people. The question of their ratification was submitted to the voters, and the result was 113,971 for the amendments and 112,759 against them.

In 1850 an amendment was ratified by the people providing that judges should be elected instead of appointed, as theretofore.

In 1857 several minor amendments were adopted directing the method of apportionment of representatives and limiting the amount of indebtedness which could be contracted by the state.

It will be seen by the character of these amendments that the power of the legislature was again becoming dangerous. This was due largely to the deterioration in the character of men who were members of it. In 1864 a further limitation was placed upon its power by an amendment providing that no bill should be passed containing more than one subject, which should be clearly expressed in its title.

In the period between 1864 and 1873 complaints concerning the legislature became more insistent than ever before, and an agitation was started which had for its object the calling of a convention to further limit its power. The condition of affairs was due partly to the inferior character of some of the members of the legislature and partly to the unscrupulous behavior of certain rich corporations which made a business of appealing to the cupidity of the more dishonest members for the purpose of obtaining legislation beneficial to their purposes. The usual method of conferring such benefits was the enactment of laws which are known as local or special laws, as distinguished from those that are general in character. A local law is one applying only to a particular locality, a special law one relating to a particular individual or group. In the seven years preceding the constitutional convention of 1873, 475 general laws had been passed and 8,755 private acts, many of which were intended to confer some direct benefit upon some individual or corporation. It was for the avowed purpose of prohibiting local and special legislation that the convention of 1873 was convened.

The General Assembly having previously ascertained the sentiment of the people by a popular vote, called a convention by the act of April 11, 1872, P. L. 53, which should have power to propose alterations in the Constitution, except the Bill of Rights, which was not to be changed, but "remain inviolate forever." The convention met November 12, 1872, and adjourned December 27, 1873. Its proceedings are very fully reported in a series of seven volumes, and they throw light upon the history of the times, although, as will be seen, they are little regarded by the courts as an aid to interpretation. The changes made in the constitution by that convention were for the most part directed to the purpose of constraining the legislature within bounds. It transcended its delegated authority and proposed alterations in the Declaration of Rights as well as in the body of the Constitution. The lack of power of the convention to do this is discussed in the

chapter entitled "Right of Self Government," page 32. The changes made will be more particularly treated hereafter. The work of the convention was ratified as a whole, and the New Constitution became the fundamental law of the Commonwealth on January 1, 1874.

In 1901, the elections having become very corrupt, particularly in large cities, amendments were adopted which made it possible to have personal registration laws and for the legislature to provide a system of voting other than by ballot.

COMMENTARIES

ON THE

CONSTITUTION OF PENNSYLVANIA

CHAPTER I.

CONSTRUCTION OF THE CONSTITUTION.

§1. *Definition.*—Whatever may be the definition of “constitution” in its broad sense, in America it is understood to mean a written instrument, enacted by the people acting directly in their sovereign capacity.

Constitutions were adopted by the people of the various states soon after or at the time of the declaration of independence. They consisted of bills of right and of provisions establishing systems of government under which the people were to live. They were enacted within the shadow of the Revolution, and reflect the ideas of the times; that a representative body is the natural conservator of the liberties of the people, and should be given full legislative power, with few, if any, limitations; that the authority of the executive should be as little as is consistent with a proper execution of the laws, and that the liberties of the individual must be protected against the government by elaborate bills of right. With one or two exceptions, these early constitutions have given place to others, which, while retaining for the most part the bills of right, have in practically all cases altered the frames of government by strengthening the executive and limiting the power of the Legislature. Many of them, and the Constitution of Pennsylvania is among the number, restrict the power of the legislative departments by numerous provisions which properly belong in the domain of statute law. Their presence in a constitution exhibits

profound distrust of the Legislature. The disposition of the people to withdraw power from the legislative department of government, and either to place it beyond reach or to exercise it themselves, has steadily grown from the foundation of the nation. Such changes in a constitution have an important bearing upon its construction, for the attitude of the courts toward a mere frame of government is somewhat different from that toward an instrument bristling with prohibitions laid upon the Legislature.¹

§2. *Relative Powers of Federal and State Governments.*—It is important at the very outset of a discussion of the constitution of a state that consideration be given to the relative powers possessed by the state and national governments. When the declaration of independence severed the bonds which joined the American colonies to the government of Great Britain, the sovereignty, formerly exercised by the king and parliament, descended upon the American people. As the ordinary governmental functions could not be exercised by the people acting directly, it became necessary for them to establish governments to which they should delegate certain of their powers. Such governments were speedily created in the various states by means of written constitutions, enacted by the people through conventions or otherwise. At a later period, the articles of confederation having proved inadequate, a national government was created by a written constitution which was framed by a convention in the name of the “people of the United States,” and was afterwards adopted by the several states.

The people of the United States as a whole possess the supreme power as to all matters pertaining to the nation at large, and the government created by them is supreme within the limits of the power conferred upon it by the constitution. The people of the various states are supreme as to all matters of purely local concern, and the state governments are sovereign within the limits of their authority. They are bound, however, by the terms of both the state and federal constitutions. They cannot invade the federal field, and must give way if their acts conflict with federal authority in the limited territory where state and nation have concurrent jurisdiction.

¹See Historical Introduction.

§3. *Interpreters of the Constitution.*—The constitution of a state, being the expressed will of the sovereign people, is superior to all other laws or commands, whether they issue from the legislative, executive or judicial departments of the government. When, therefore, there is a conflict between some action taken by one of these three departments and the constitution, the act in question is void and of no effect, being beyond the power of the doer. But who is to judge when the constitution has been infringed? Who is to determine that the mandate in question need not be obeyed? If the meaning of human language were always clear there would perhaps be little need for an interpreter, as a department of government would scarcely be so bold as knowingly and deliberately to violate the **fundamental law**. But, inasmuch as written instruments are often ambiguous and difficult of interpretation, and in view of the fact that situations continually arise not contemplated by the authors of such instruments, and not covered by their provisions except by implication, a final interpreter of their meaning is an absolute necessity.

The officer or department which is to perform the act or pass the law in question must necessarily in the first instance decide as to its constitutionality. Thus the governor of the state when he calls out the troops for the purpose of suppressing riots must necessarily decide in his own mind that the situation contemplated by the constitution has arisen empowering him to take such action. Whenever the Legislature enacts a law, it thereby declares its interpretation to be in favor of its constitutionality. In some matters concerning which the departments or officials of the government are called upon to pass judgment their decision is final. Thus, if the constitution has vested a particular discretion in an executive officer, his interpretation of that discretion is conclusive. If the governor is given power to convene the Legislature on extraordinary occasions, he alone is competent to judge whether the occasion is extraordinary. If a court is required to try an accused person at the first term under an indictment, unless good cause be shown to the contrary, the court alone is the judge of the sufficiency of the cause.

There are instances, however, in which one department of the government may be called upon to review the judgment of

another department. The governor has the power to veto an act of legislation. If he does so, as is frequently the case, because he believes it to be unconstitutional, he thereby reviews the judgment of the Legislature. In the great majority of cases, however, the question of a conflict between the constitution and an act of the Legislature or other department of government is left to the courts to determine. When, in a case properly brought before them, they are called upon to enforce or protect rights alleged to exist under such an act, they will decide the question of its constitutionality, and if it is determined to be unconstitutional will refuse to admit it as a rule of action.

The power of a court to declare an act of Legislature void, if in their opinion it is contrary to the constitution, is peculiar to the American system of jurisprudence. In other countries it has always been deemed to be the exclusive function of the Legislature to decide whether the written law is conformable to the constitution. It is so in England, France, Germany, Switzerland and Japan, as well as in other countries of Europe and Asia. When the legislator declares that a certain rule of action shall be law, it at the same time authoritatively determines that the law is constitutional, and this decision is not reviewable by the courts. They are bound to administer the law as they find it. "The legislator is he (not by whose authority the law was first made, but) by whose authority it continues to be law."²

The essential principle in which the American governments differ from others is that here the sovereign power resides, not in the Legislature, but in the people. It follows necessarily that any act done in excess of the authority of the Legislature is null and void. When a law is alleged to be unconstitutional, the question is whether a conflict exists between the constitution and law. The determination of this question naturally belongs to the courts. The power to construe the Constitution of the United States is expressly given to the courts in the instrument itself,³ and, while there is no such provision in the state constitutions, the power of the state

²Hobbes, cited in Austin's Jurisprudence, Vol. I, p. 201.

³Const. of U. S., Art. III, §2.

courts in this regard has been freely exercised from the very beginning.⁴

§4. *State Legislature has all Powers Not Prohibited.*—It thus appears that a court in determining the constitutionality of a law must first interpret the constitution, and, second, decide whether the law is in conflict with it. It might be supposed that a further question would be presented as to whether the power of the Legislature to enact the law has been conferred upon it by the constitution. This does arise when an act of the National Congress is under consideration, for it is a familiar doctrine that the federal government is one of enumerated powers, and Congress has no power except that which has been conferred upon it by the constitution, either expressly or by implication; the inquiry is, therefore, whether the power claimed by Congress has been conferred upon it. But no such question arises when an act of the State Legislature is under consideration, because the people of the state (and particular reference is here made to Pennsylvania) have delegated in general terms all their legislative power to the legislative department of government. The Constitution of Pennsylvania provides: "The legislative power of this commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives."⁵ The General Assembly, therefore, has full power to pass any law not forbidden either expressly or by necessary implication, and this is a well settled rule for the guidance of the courts. "The Legislature possesses all legislative power except such as is prohibited by express words or necessary implication."⁶ The "necessary implication" is such as arises from the nature of the power sought to be exercised or from absolutely repugnant provisions in the constitu-

⁴See *Van Horne's Lessee v. Dorrance*, 2 Dall. 304 (1795); *Emertick v. Harris*, 1 Binn. 416 (1808). In *Eakin v. Raub*, 12 Sergeant and Rawle, 330 (1825), Mr. Chief Justice Gibson dissented, because he thought the court had not the power to declare void an act of legislature. He subsequently changed his opinion, however, partly by reason of the intervention of a constitutional convention, at which the people, by their silence on the subject, had impliedly assented to the exercise of the power. See *Norris v. Clymer*, 2 Pa. 277 (1845).

⁵Art. II, §1.

⁶Mr. Justice Sharswood, in *Lewis & Nelson's Appeal*, 67 Pa. 153 (1870). See also opinion of Mr. Justice Black in *Sharpless v. Mayor*, 21 Pa. 147 (1853); *Com. v. Hartman*, 17 Pa. 118 (1851).

tion. Thus, although not expressly prohibited, the Legislature could not do a judicial⁷ or executive act, nor could it pass a law contrary to some provision in the constitution, although the latter might not lay a prohibition in express words upon the power of the Legislature. For example, in *Page v. Allen*, 58 Pa. 338 (1868), an act varying the constitutional qualifications of electors was held void because such qualifications, being expressed in the constitution, must be construed to be exclusive of all others: "The expression of one thing in the constitution is necessarily the exclusion of things not expressed."

§5. *Laws Not Invalid unless Contrary to Some Clause in the Constitution.*—It follows from what has been said that a law duly enacted by the Legislature, or, indeed, any other act of the state government, is constitutional unless it is contrary to some express prohibition in the constitution, or is absolutely repugnant to some provision of it. It was formerly supposed by some very great judges that the genius and spirit of our institutions were such that an act of Legislature contrary to natural justice would be void even though not repugnant to any clause in the constitution. Thus Mr. Justice Chase, in *Calder v. Bull*, 3 Dallas, 386 (1798), said: "The people of the United States erected their constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the Federal or State Legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private

⁷See *De Chastellux v. Fairchild*, 15 Pa. 18 (1850).

property, for the protection whereof the government was established. An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of the legislative authority. . . . The genius, the nature, and the spirit of our state governments amount to a prohibition of such acts of legislation, and the general principles of law and reason forbid them." He gave several illustrations of laws such as he had reference to, but most, if not all of them were such as would have been prohibited by express clauses in the constitution. It is clear that laws cannot be declared void by the courts because contrary to natural justice or to the spirit of our institutions, for in such case the decision would be merely a review of the judgment of the Legislature, which presumably is quite as capable as the judiciary of determining whether a law is unjust. Such a question would be a political, not a judicial, one, and the remedy would lie with the people and not with the courts. Numerous cases in Pennsylvania have determined the law to be in accordance with these principles. In *Com. v. McCloskey*, 2 Rawle, 369 (1830), Mr. Justice Rogers said: "If the Legislature should pass a law in plain, unequivocal and explicit terms, within the general scope of their constitutional power, I know of no authority in this government to pronounce such an act void merely because, in the opinion of the judicial tribunals, it was contrary to the principles of natural justice, for this would be vesting in the court a latitudinarian authority which might be abused, and would necessarily lead to collision between the legislative and judicial departments, dangerous to the well-being of society, or at least not in harmony with the structure of our ideas of natural government." In *Sharpless v. Mayor*, 21 Pa. 147 (1853), Mr. Chief Justice Black discussed the question very fully. He referred to the limitations laid upon the Legislature by federal and state constitutions, and continued: "But beyond this there lies a vast field of power, granted to the Legislature by the general words of the constitution, and not reserved, prohibited, or given away to others. Of this field the General Assembly is entitled to the full and uncontrolled possession. Their use of it can be limited only by their own discretion. The reservation of some powers does not imply a restriction on the

exercise of others which are not reserved. On the contrary, it is a universal rule of construction, founded in the clearest reason, that general words in any instrument or statute are strengthened by exceptions and weakened by enumeration. To me it is as plain that the General Assembly may exercise all powers which are properly legislative, and which are not taken away by our own or by the federal constitution, as it is that the people have all rights which are expressly reserved.

"We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, and to interpolate into it whatever in our opinion ought to have been put there by its framers. The constitution has given us a list of the things which the Legislature may not do. If we extend that list, we alter the instrument, we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the Legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar; if we can remove the landmarks which we find established, we can obliterate them; if we can change the constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely.

"The great powers given to the Legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to the true course. In the very best a great deal must be trusted to the discretion of those who administer it. In ours, the people have given larger powers to the Legislature, and relied, for the faithful execution of them, on the wisdom and honesty of that department, and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing

that the mere abuse of power was meant to be corrected by the judiciary.

"There is nothing more easy than to imagine a thousand tyrannical things which the Legislature may do, if its members forget all their duties, disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice. But to take away the power from the Legislature because they may abuse it, and give to the judges the right of controlling it, would not be advancing a single step, since the judges can be imagined to be as corrupt and as wicked as legislators. It has been said of the ablest judge that ever sat on this bench, and one whose purity of character was as perfect as any who has ever lived or ever will live, that his opinions on such subjects are not to be relied on. If this be so, then transferring the seat of authority from the Legislature to the courts would be putting our interests in the hands of a set of very fallible men, instead of the respectable body which now holds it. What is worse still, the judges are almost entirely irresponsible, and heretofore they have been altogether so, while the members of the Legislature, who would do the imaginary things referred to, 'would be scourged into retirement by their indignant masters.'

"I am thoroughly convinced that the words of the constitution furnish the only test to determine the validity of a statute, and that all arguments, based on general principles outside of the constitution, must be addressed to the people, and not to us."⁸ In *Russ v. Com.*, 210 Pa. 544 (1905), there is a more recent expression by Mr. Justice Brown, quoting the language of Cooley on Constitutional Limitations: "The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection

⁸Other expressions of the court to the same effect are to be found in *Erie & North East Railroad v. Casey*, 26 Pa. 287 (1856); *Sunbury & Erie Railroad Co. v. Cooper*, 33 Pa. 278 (1859); *Weister v. Hade*, 52 Pa. 474 (1866); *Weber v. Reinhard*, 73 Pa. 370 (1873).

against unwise and oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinion upon points of right, reason and expediency with the lawmaking power. . . . If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it should be found that these principles are placed beyond legislative encroachment by the constitution.' Cooley on Constitutional Limitations, ch. VII, secs. 4 and 5 (6th ed., 1890, p. 201)." As the courts will pay little regard to a contention based on a conflict between the law and considerations of natural justice, they will pay none at all to an argument based upon the evil motives of legislators in enacting a law. This is a matter of no moment.⁹

§6. *All Presumptions in Favor of Validity of Laws.*—It having been determined that the courts may decide whether a law is consistent with the constitution, and if not to declare it void, a decent regard for the judgment of a co-ordinate department of government would nevertheless lead them to start upon the assumption that the law is constitutional, and to resolve all doubts in its favor. This is the first principle applied by them when the validity of a law is questioned. All presumptions are in its favor, and it will not be declared void unless it is so clearly and palpably repugnant to the constitution that all doubt is at an end. Mr. Chief Justice Black, in *Sharpless v. Mayor*, 21 Pa. 147 (1853), said: "There is another rule which must govern us in cases like this; namely, that we can declare an act of Assembly void only when it violates the constitution clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation on our minds." "It is a maxim, indeed, that he who alleges a law to be unconstitutional, must show it to be so, and if he leaves it in doubt, it is valid. This, of course, means

⁹*Com. v. Moir*, 199 Pa. 534 (1901). See also *Com. v. Gilligan*, 195 Pa. 504, 513 (1900); *Penna. R. R. Co. v. Riblet*, 66 Pa. 164, 169 (1870); *Sunbury, etc., R. R. v. Cooper*, 33 Pa. 278 (1859).

that the Legislature is presumed not only to have put the true interpretation on the constitution, but also to have understood the facts of the particular case, and that it did not wilfully disregard either."¹⁰ "To doubt is to be resolved in favor of the constitutionality of the act."¹¹

In *Perkins v. Phila.*, 156 Pa. 554 (1893), Mr. Justice Dean gave expression to a view which may be construed to be a slight modification of these principles. He called attention to the very large number of unconstitutional statutes constantly enacted by the Legislature; made reference to the difficulty of avoiding the numerous constitutional prohibitions, and continued: "This is no imputation on either the integrity or patriotism of the popular branch of the government. Under the circumstances it would be strange if the fact were otherwise.

"But, being the fact, what reasonable intendment in favor of the constitutionality of an act is to be made from its passage by the General Assembly? What is the reasonable presumption of law from that fact? The law presumes all departments of the government will observe the constitution, for all are alike sworn to do so; but if an infringement of it be alleged, we can only determine that question by an impartial scrutiny of the statute, and by giving the constitution its fair, natural and obvious meaning; in so doing, caution in arriving at an opinion adverse to the statute is a duty; so is firmness in pronouncing one when formed. This is all the law enjoins.

"Neither the law controlling us in the exercise of the duty, nor, since 1874, any extreme rarity of unconstitutional acts of Assembly, warrants such intendment in favor of a bill as relieves us from the necessity of a judicial inquiry, which, it seems to us in this case, leads, inevitably, to a conclusion adverse to its constitutionality."

¹⁰Mr Justice Black, in *Erie & North East Railroad Co. v. Casey*, 26 Pa. 287 (1856).

¹¹Mr. Justice Sharswood, in *Com. v. Butler*, 99 Pa. 535 (1882). Other cases to the same effect are: *Emerick v. Harris*, 1 Binn. 416 (1808); *Com. v. Smith*, 4 Binn. 117 (1811); *Com. v. McCloskey*, 2 Rawle, 369 (1830); *Com. v. Zephon*, 8 Watts and Sergeant, 382 (1845); *Com. v. Maxwell*, 27 Pa. 444 (1856); *Speer v. School Directors*, 50 Pa. 150 (1865); *Patterson v. Barlow*, 60 Pa. 54 (1869); *Hilbish v. Catherman*, 64 Pa. 154 (1870); *Com. v. Moir*, 199 Pa. 534 (1901); *Com. v. Mintz*, 19 Pa. Superior Ct. 283 (1902).

Mr. Justice Dean evidently thought that while every intendment was in favor of the act, yet, in view of the actual existing conditions, the presumption arising from its enactment by the Legislature was not to be given undue weight by the court.

It naturally follows from the principles discussed that not only will the courts resolve all doubts as to the meaning of the constitution in favor of the law, but in construing the law itself, they will so interpret its meaning as to make it constitutional, if this is at all possible.¹²

§7. *Construction Not Technical; Regard for the Spirit and Intention.*—Having seen that the courts are the final interpreters of the constitution, and that they have the power to declare legislative acts void in clear cases, it remains to consider the principles by which they are guided in determining the meaning of the constitution.

The rule of construction which is most fundamental is that "Conventions to regulate the conduct of nations are not to be interpreted like articles of agreement at the common law; and that where multitudes are to be affected by the construction of an instrument, great regard should be paid to the spirit and intention. And the reason for it is an obvious one. A constitution is made, not particularly for the inspection of lawyers, but for the inspection of the million, that they may read and discern in it their rights and their duties; and it is consequently expressed in the terms that are most familiar to them. Words, therefore, which do not of themselves denote that they are used in a technical sense, are to have their plain, popular, obvious and natural meaning."¹³ "A constitution is not to receive a technical construction like a common law instrument or a statute. It is to be interpreted so as to carry out the great principles of government, not to defeat them."¹⁴ "In construing a

¹² *Com. v. Martin*, 107 Pa. 185 (1884), in which the court struck out a portion of the title which was surrounded by a line, but not erased or crossed out, it appearing that if the interlined portion were allowed to stand the law would have been unconstitutional. See also *Road in Otto Twp.*, 2 Pa. Superior Ct. 20 (1896).

¹³ Mr. Chief Justice Gibson, in *Monongahela Navigation Co. v. Coons*, 6 Watts and Sergeant, 101 (1843).

¹⁴ *Com. v. Clark*, 7 Watts and Sergeant, 127 (1844); *Com. v. Zephon*, 8 Watts and Sergeant, 382 (1845); *Com. v. Hanley*, 9 Pa. 513 (1848); *Com. v. Maxwell*, 27 Pa. 444 (1856); *Chester Co. v. Brower*, 117 Pa. 647 (1888); *Phila., etc., St. Railway's Petition*, 203 Pa. 354 (1902).

constitution it must be borne in mind that its provisions are necessarily general, and couched in the language of the people by whom it was ordained. Its words should, therefore, be taken in their popular, natural and ordinary meaning, rather than in any technical or restricted sense. The object of construction, as applied to such an instrument, is to give full effect to the intent of its framers, and the people in adopting it. That intent, of course, is to be sought for in the instrument itself."¹⁵ "Every word employed in the constitution is to be expounded in its plain, obvious and common sense meaning."¹⁶ If, however, the usual meaning of the words will operate as a restriction of a power, and another interpretation is possible which will sustain a grant of it, the latter meaning must be adopted, and the exercise of the power upheld.¹⁷ No attention will be paid to the captions of the articles or sections. They are inserted only for convenience.¹⁸

§8. *Whole Instrument to be Examined.*—It is the duty of the courts to so interpret the constitution as to carry out the intention of the people who adopted it, and that intent must be gathered from the instrument itself. The whole instrument should be examined, for only by so doing can the courts gain a comprehensive idea of its purpose. It sometimes occurs that two sections of a constitution appear to be inconsistent with each other, and would be so construed were each taken separately, but by considering the whole instrument the apparent differences can often be harmonized, and it is the duty of the court to do this if it is at all possible. "It is a familiar canon of construction that one part of a statute must be so construed that the whole may, if possible, stand; and this is equally applicable to the construction of the organic law of the commonwealth. A single provision may not be selected out of several relating to the same subject and full literal meaning given to its words without reference to the qualifying effect of other provisions,

¹⁵*Com. v. Bell*, 145 Pa. 374 (1891). See also *Keller v. Scranton*, 200 Pa. 126 (1901).

¹⁶*Com. v. Gaige*, 94 Pa. 193 (1880).

¹⁷*Com. v. Butler*, 99 Pa. 535 (1882).

¹⁸*Houseman v. Com.*, 100 Pa. 222 (1882); *Com. v. Bell*, 145 Pa. 374 (1891).

and thus produce an apparent repugnance of one provision to another. On the contrary, all the provisions relating to a particular subject, and all others qualifying such provisions, no matter where they may stand in the constitution, are to be grouped together, when considering such subject, and so read that they may blend or stand in harmony, if that can be done without violence to the language."¹⁸

§9. *History of the Times to be Considered.*—Another familiar maxim relative to the construction of constitutions is that the history of the times is to be considered, and that the "old law, the evil and the remedy," are to be examined in the effort to arrive at the true intent of the instrument. It is only by so doing that the purpose of those who framed and adopted the constitution can be ascertained. The law previously existing and the evils thereunder show the moving purpose of the change in the constitution, and it should be so construed as to fulfil that purpose. There are numerous cases in which these matters have been discussed and relied upon by the courts. In *Sugar Notch Borough*, 192 Pa. 349 (1899), while construing the clause in the constitution providing that laws shall contain but one subject, which must be clearly expressed in the title, Mr. Justice Mitchell said: "The evil at which the constitution was aimed is thus stated with great clearness by the present Chief Justice in *Road in Phoenixville*, 109 Pa. 44 (1885): 'The design and scope of this constitutional amendment, adopted in 1864, are readily understood when we consider the mischief which it was intended to remedy. Prior to that date the vicious practice had obtained of incorporating in one bill a variety of distinct and independent subjects of legislation. The real purpose of the bill was often and sometimes intentionally disguised by a misleading title, or covered by the all comprehensive phrase, "and for other purposes," with which the title of many "omnibus" bills concluded. Members of the Legislature, as well as the general public, were thus misled or kept in ignorance as to the true character of proposed legislation.' This being the evil intended to be remedied, the constitutional require-

¹⁸*Guldin v. Schuylkill Co.*, 149 Pa. 210 (1892). To the same effect are *Com. v. Griest*, 196 Pa. 396 (1900), and *Com. v. Mathues*, 210 Pa. 372 (1904).

ment as to the title is not to be strained to apply to cases not really within its reasonable intent."²⁰

§10. *Debates in Constitutional Convention.*—In considering the history of the times and the circumstances surrounding the framing and adoption of a constitution, the courts have sometimes examined the debates in the constitutional convention which were supposed to throw light upon the reason for the enactment of the section under discussion and to aid in interpretation by disclosing the views held by the members of the convention. The debates in the convention which framed the federal constitution have always been deemed to be of great weight, both on account of the character of the men who composed it and because the Constitution of the United States, while ratified by the states, was in a sense adopted by the convention. The Pennsylvania courts have made reference on various occasions to the debates in the constitutional convention of 1873, the only one fully reported,²¹ but of late years they have concluded that the views of the members thus expressed are to be given little or no consideration, especially in view of the fact that the constitution was not enacted by this convention, but by the people. In *Commonwealth v. Balph*, 111 Pa. 365 (1886), Mr. Justice Paxson said: "In the consideration and discussion of this section of the constitution I throw out of view the copious citations which have been furnished us from the debates in the convention. They are of value as showing the views of individual members, and as indicating the reasons for their votes. But they give us no light as to the views of the large majority who did not talk; much less of the mass of our fellow-citizens whose votes at the polls gave that instrument the force of fundamental law. We think it safe to construe the constitution from what appears upon its face." In *Weigold v. Pittsburg, etc., Railroad Co.*, 208 Pa. 81 (1904), Mr. Justice Dean said: "While the able counsel for appellant has now fortified his former argument by copious citations from the

²⁰Other cases where the history of the times was considered are *Com. v. Mann*, 5 Watts and Sergeant, 403 (1843); *Road in Phoenixville*, 109 Pa. 44 (1885); *Chester Co. v. Brower*, 117 Pa. 647 (1888); *Clark's Estate*, 195 Pa. 520 (1900); *Keller v. Scranton*, 200 Pa. 130 (1901).

²¹See *Perkins v. Slack*, 86 Pa. 270 (1878); *Com. v. Gaige*, 94 Pa. 193 (1880).

debates of the constitutional conventions, it fails to convince. . . . While the speeches of the members of the convention may occasionally throw light on obscurity, they cannot be used to distort the obvious meaning of the language they adopted in the instrument framed. Were we, in interpretation of the constitution, to resort to the convention debates as our guide, we would find too much of our time taken up in interpretation of speeches of members instead of devoting it to the language of the written instrument." At a more recent date, Mr. Chief Justice Mitchell gave an even stronger expression of opinion adverse to the consideration of the debates. During an oral argument he said to one of counsel who was arguing from the debates: "Counsel should remember that it is not of the slightest consequence what the constitutional convention may have meant to adopt. The members of that convention probably could not have agreed on any subject. The constitution derives its power, not from the convention, but exclusively from its adoption by the people. The question in the construction of the constitution, therefore, is what did the people mean by the words they adopted."²² This remark, as well as the previous cases cited, conveys the impression that it is useless to cite the debates, as they will not be considered.

§11. *Construction of Other Departments of Government.*—It has been seen that the courts always presume a law constitutional because it has been enacted by a co-ordinate department of government, whose judgment they will be very slow to overturn. Even more weight is given to a series of constructions extending over a considerable length of time and concurred in by all departments of government. Thus, if a law has stood upon the statute books for a long period of time, if the executive department has acted under it, and particularly if its constitutionality has been tacitly assumed by all, no objection having been made to it, this is almost conclusive against a contention that it is in conflict with the constitution. This is true to an even greater degree of a settled construction relative to a governmental power which has been handed down for generations

²²Reported in Notes and Comments, 62 Legal Intelligencer, 424 (1905). The Chief Justice himself edited the remarks, so they are authentic.

and concurred in not only by all departments of government, but by the people themselves, as evidenced by their meeting in convention to alter the fundamental law and recording no objection to it. Reference has already been made to the dissenting opinion of Mr. Chief Justice Gibson in *Eakin v. Raub*, 12 Sergeant and Rawle, 330 (1825), in which he expressed the decided view that the courts had not the power to declare void an act of Legislature. Subsequently, on account of the intervention of the constitutional convention of 1838, and its silence on the subject, he changed his view. During the argument of the case of *Norris v. Clymer*, 2 Pa. 277 (1845), attention was called by one of counsel to his opinion in *Eakin v. Raub*, and he then observed: "I have changed that opinion for two reasons. The late convention, by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the Legislature; and from experience of the necessity of the case."

In the same case, delivering the opinion of the court, he expressed himself very fully as to the weight to be given a practical construction concurred in for a great length of time. In discussing the constitutionality of an act authorizing a sale of real property, he said: "But the constitutionality of the act stands on much safer ground than a chancery power unseparated from the other powers of the government, and reserved to the Legislature. It stands on the notions of parliamentary power, brought by our forefathers from the land of their birth, and handed down to their descendants unimpaired, in the apprehension of any one, by constitutional restriction of ordinary legislation. A list of nine hundred statutes, in principle like the present, has been laid before us; some of them enacted at the instance of judges of this court; some at the instance of law judges of the common pleas, and some at the instance of learned and eminent lawyers, most of whom executed trusts under them without suspecting that their authority was prohibited by the constitution. It is not above the mark to say that ten thousand titles depend on legislation of the stamp. For many of those statutes contain distinct provisions for more than twenty estates. And could not the ruin that would be produced by disturbing

them be avoided by anything less than a convention to effect a constitutional sanction of them, the consummation would not be dearly bought. Fortunately there is no need of a measure so grave. Many of the pre-eminent men who framed the constitution of 1790, in which it was first attempted to impose specific restrictions on the power of the Legislature over property, were returned as members in the succeeding years; and we find no opposition to such enactments on constitutional grounds. This remedial legislation has prevailed from the foundation of the province to this day." In *Cronise v. Cronise*, 54 Pa. 255 (1867), in discussing the constitutionality of a legislative divorce, Mr. Justice Agnew said: "This power has been exercised from the earliest period, by the Legislature of the province, and by that of the state under the Constitutions of 1776 and 1790. The Constitution of 1790 was framed in view of this practice. The continued exercise of the power after the adoption of the Constitution of 1790 cannot be accounted for, except on the ground that all men, learned and unlearned, believed it to be a legitimate exercise of the legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it. *Communis error facit jus* would be sufficient to support it, but it stands upon the higher ground of contemporaneous and continued construction by the people of their own instrument. It has a still higher basis. The people, finding defects in the Constitution of 1790, voted in 1836 to reform it. The unlimited power of the Legislature on the subject of divorce was proposed for reform and discussed in the convention. The result was the amendment to be found in the fourteenth section of the first article of the amended constitution. 'The Legislature shall not have power to enact laws annulling the contract of marriage in any case where, by law, the courts of this commonwealth are, or may hereafter be, empowered to decree a divorce.' This section was placed by the convention in the first article as a restriction upon the grant of legislative power. It is, therefore, a clear recognition of the power, outside of the restriction."²³ While such practical construction is most persuasive of the constitutionality of an act of Assembly, it is not conclusive, and, even though the act may have

²³See also *Pittsburg v. Railroad Co.*, 205 Pa. 13 (1903).

stood unchallenged for a long time, if it is clearly unconstitutional the courts will declare it void. In *Com. v. Gilligan*, 195 Pa. 504 (1900), Mr. Justice Mitchell, referring to an act relating to school districts in cities of the third class, and which was alleged to be a local law, said: "The act has stood on the statute book, without challenge, for nearly a quarter of a century, and millions of dollars of school funds have been collected and disbursed under its provisions. While these are not reasons for refusing to declare it void if in contravention of the constitution, yet they are strongly persuasive that the act is not so clearly unconstitutional as it should be shown to be to make it our duty now to set it aside."

§12. *Construction to be Continuous and Uniform and Having Regard for the Common Law.*—Another principle by which the courts are guided in their construction of the constitution is that such construction is to be continuous and uniform and having regard for the common law. By continuous is meant that a clause of an earlier constitution having received a settled construction, the adoption of this clause as a part of a subsequent constitution is deemed to take place in the light of the previous interpretation and the construction is adopted with the clause. The meaning placed upon the section by the courts is therefore continuous, although the section may appear in different constitutions. The numerous cases construing the various sections of the Bill of Rights are all illustrative of this principle, which needs no citation of particular authorities to support it.

The rule that the construction shall be uniform is no more than the application of the doctrine of *stare decisis*, which should be especially adhered to in the construction of the fundamental law. When the highest courts of a state determine the meaning of a section of the constitution, they lay down a rule for the guidance of the other departments of government, as well as for the people, and upon the faith of their decision rights will subsequently be acquired. In view of the fact that the function of American courts in determining the constitutionality of statutes is peculiar, and lends added authority to them, it is a rule that their validity, once being settled by decisions of the highest court, contract rights acquired on the faith of such decision will be protected from impairment, either

by subsequent legislation or judicial change of view.²⁴ It is, therefore, doubly important that there shall be no change of view as to the meaning of the constitution, except in cases of the clearest error, and not then if property rights will be destroyed or contracts endangered, which have been acquired on the faith of a previous ruling of the same court.

It need not be said that the courts in construing the constitution pay no heed to changes in public sentiment. The safeguards of the constitution depend in large part upon the courage and independence of the judges. As the written word of the people cannot be altered quickly by changes in public sentiment or waves of public passion, neither should the courts allow themselves to be influenced by the demands of the multitude. The written word is to be construed as it is, and the construction once adopted is to be steadfastly adhered to, until the people in an orderly and legal manner have made changes in the fundamental law or indicated their will that the construction shall be otherwise. In *Perkins v. Philadelphia*, 156 Pa. 554 (1893), Mr. Justice Dean said: "Another point made in the argument before us—that the public sentiment of Philadelphia with practical unanimity demanded the passage of this law, was doubtless more effectively urged before the Legislature. But the question presents itself to us in a different shape; we do not believe the intelligent public sentiment of the greatest city of the commonwealth demands the accomplishment of a lawful purpose by unlawful means; unconstitutional statutes are the very essence of lawlessness. Even if the unanimous public sentiment of the city demanded the enforcement of this act, we could not heed it. Public sentiment, properly, may move courts, in matters wholly discretionary, such as the adoption of rules to speed causes, afford quick relief to suitors, and eradicate abuses in the administration of justice; but such sentiment can have no place in the interpretation of a constitution; the public sentiment expressed in that instrument is the only sentiment of which a court can take notice; it contains the deliberate, emphatically expressed sentiment of the whole people; they, and they alone, can change or amend it in the way provided in it, but even they cannot trample upon it. If laws in conflict with

²⁴*Ray v. Gas Co.*, 138 Pa. 576 (1890).

it be passed by the Legislature, be approved by the Governor, and sustained by this court, that is revolution. It is no less revolution because accomplished without great violence. It matters little to the house owner whether the structure intended to shelter him be blown up by dynamite or the foundation be pried out, stone by stone, with a crowbar; in either case he is houseless. There can be no stability in a free government, if successful assaults in any department be made on the fundamental law;—the supreme law, deliberately established by the whole people as a rule of action in all governmental matters affecting their welfare.”

“It is also a very reasonable rule that a state constitution shall be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force. By this we do not mean that the common law is to control the constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common-law rules, but only that for its definitions we are to draw from that great fountain, and that, in judging what it means, we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes.”²⁵

§13. *Operation to be Prospective.*—A constitution establishes a system of government, and being enacted by the sovereign power could destroy all preceding systems and start the government anew. It is evident, however, that such a proceeding would be most unfortunate in its consequences and fraught with disaster to the state. The resulting disorder would be no less than that following a revolution. Even the original government established in 1776, while in one sense a completely new system, in fact was made up in very large part of existing institutions. The subsequent constitutions have never been construed as abolishing old systems and establishing new, but rather in the light of amendments of existing law. This being so, the constitution is not to be construed as an abrogation of existing

²⁵Cooley's Const. Lim. (7th ed.), 94.

laws unless the intent is too clear to be mistaken, but, like amendments to the statute law, is deemed to be operative only for the future. In *County of Allegheny v. Gibson*, 90 Pa. 397 (1879), Mr. Justice Paxson decided that an act of Assembly, enacted prior to the adoption of the constitution, was not abrogated thereby. He made reference to the argument of counsel to the effect that as the act was inconsistent with certain sections in the constitution, it should be deemed to be struck down by that instrument, and continued: "This argument is based upon the theory that the constitution was not a mere amendment of the Constitution of 1838, but a substitution of a new frame of government, and that it was an abrogation of all acts and authorities derived from the old frame unless preserved by the new. It is true this principle of constitutional law was introduced into this state by the Constitution of 1777, and the Act of Revival of January 28th of that year: 1 Bioren's Laws, 429. The preamble to the constitution recites the rights of the people and the oppressions of the crown, and declares that all allegiance and fealty to the said king and his successors are dissolved and at an end, and all power and authority derived from him ceased in these colonies. It is not difficult to understand why this principle should be asserted in a constitution that was the outgrowth of a revolution and of a total severance of all political relations between the colonies and the mother country. In its application to the present times we must not overlook the fact that the conditions are essentially different. The convention of 1873 was not throwing off the yoke of an oppressor and abrogating laws imposed upon the people by a parliament not in sympathy with their views, and in whose deliberations they had no voice. The convention was simply the people of the state, in a representative capacity, it is true, sitting in judgment upon their own acts, altering and modifying their own constitution to suit the progress of the age, and changing their own laws where deemed essential to the welfare of the state. To such a body so constituted no intention to abrogate all that had gone before can be imputed, unless such intention be clearly expressed. I will not stop to discuss the difference between the Constitutions of 1838 and 1874 in this respect. It is more seeming than real. Each is an alteration or amendment of the

constitution existing at the time and nothing more." It follows, therefore, that provisions in the constitution in the nature of present limitations upon the power of the Legislature do not destroy previous legislation, inconsistent with them, but operate merely as restrictions for the future.²⁶

There are some few clauses of the constitution which abrogate existing laws of a particular description,²⁷ but such provisions must be express or necessarily implied. As retrospective legislation of any kind usually operates oppressively and unjustly, a construction which has this effect is to be avoided if this is at all possible.²⁸

§14. *Directory and Mandatory Provisions.*—In the construction of ordinary statutes it is a rule that injunctions which relate to the manner or time of doing a thing and are not of the essence of the matter are merely directory, binding only on the conscience of those upon whom they are laid. "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed."²⁹ On the other hand, positive prohibitions and all commands which are plainly intended to be of the essence, even though they may refer merely to manner or time, are deemed to be mandatory. This rule is applied to the construction of constitutions, but to

²⁶The restrictions relative to taxation, *Lehigh Iron Co. v. Lower Macungie Twp.*, 81 Pa. 482 (1876); *Coatesville Gas Co. v. County of Chester*, 97 Pa. 476 (1881); *County of Erie v. City of Erie*, 113 Pa. 360 (1886), and those forbidding local and special legislation, *Evans v. Phillipi*, 117 Pa. 226 (1887), are among those which have been construed to operate prospectively only.

²⁷For example, in Art. III, §21, special acts of limitation in favor of corporations were forbidden, and it was further provided "and such acts now existing are avoided."

²⁸*Weigold v. Pittsburg, etc., Railroad Co.*, 208 Pa. 81 (1904).

²⁹Cooley's Const. Lim. (7 ed.), 113.

a less degree. Instruments which embody the fundamental law are supposed to be framed with great solemnity, and any commands or prohibitions contained therein are *prima facie* mandatory, although if plainly directory only they will be so construed. "But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication."³⁰ On the other hand, there are provisions in nearly every constitution which from the very

³⁰Cooley's Const. Lim. (7th ed.), 114.

nature of things must be construed to be directory, for example, sections commanding the Legislature to pass laws of a particular character, as to redistrict the state into senatorial or representative districts at stated periods. Such provisions are binding only on the conscience of the legislative body. "A constitution is not to receive a technical construction, like a common-law instrument or a statute. It is to be interpreted so as to carry out the great principles of the government, not to defeat them; and, to that end, its commands as to the time or manner of performing an act are to be considered as merely directory wherever it is not said that the act shall be performed at the time or in the manner prescribed, and no other."³¹ Our courts have placed the requirements of the usual methods of enacting legislation within the same category, although in this they are not wholly in line with other authorities.³² In *Kilgore v. Magee*, 85 Pa. 401 (1877), in which it was contended that upon the passage of an act the formalities required by the constitution were disregarded, it was said: "In regard to the passage of the law and the alleged disregard of the forms of legislation required by the constitution, we think the subject is not within the pale of judicial inquiry. So far as the duty and the consciences of the members of the Legislature are involved, the law is mandatory. They are bound by their oaths to obey the constitutional mode of proceeding, and any intentional disregard is a breach of duty and a violation of their oaths. But when a law has been passed and approved and certified in due form, it is no part of the duty of the judiciary to go behind the law as duly certified to inquire into the observance of form in its passage. The presumption applies to the act of passing the law, that applies generally to the proceedings of anybody whose sole duty is to deal with the subject. The presumption in favor of regularity is essential to the peace and order of the state." The law relative to this subject, as interpreted in Pennsylvania, is set forth somewhat at length in *Com. v. Griest*, 196 Pa. 396 (1900). In deciding that the provision in Article XVIII of the constitution, requiring the publication of proposed amend-

³¹Mr. Chief Justice Gibson in *Com. v. Clark*, 7 Watts and Sergeant, 127 (1844).

³²See Cooley's Const. Lim. (7th ed.), 114.

ments to the constitution three months before the next general election, was directory in that the time mentioned was not exclusive, Mr. Chief Justice Green said: "We think that the provision as to the publication three months before the next general election, as prescribed in the first clause of Article XVIII, should be regarded as merely a directory provision, where strict compliance with a time limit is not essential. There are very numerous decisions upon this subject, a few of which only need be cited. They are fully collected in Endlich on the Interpretation of Statutes, at section 436. The author says: 'On the other hand, the prescriptions of a statute often relate to the performance of a public duty, and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons having no control over those entrusted with the duty without promoting the essential aims of the Legislature. In such case they are said not to be of the essence or substance of the thing required, and depending upon this quality of not being of the essence or substance of the thing required, compliance being rather a matter of convenience, and the direction being given with a view simply to proper, orderly and prompt conduct of business, they seem to be generally understood, as mere instructions for the guidance of those on whom the duty is imposed, or, in other words, as directory only. . . . It has often been held, for instance, when an act ordered a thing to be done by a public body, or public officers, and pointed out the specific time when it was to be done, that the act was directory only, and might be complied with after the prescribed time. Such is, indeed, the general rule, unless the time specified is of the essence of the thing, or the statute shows it was intended as a limitation of power, authority or right. Thus the 13 Hen. 4, c. 7, which required justices to try rioters 'within a month after the riot,' was held not to limit the authority of the justices to that space of time. . . . So a direction to sell land for taxes at a certain time, there being nothing in the act from which to imply a prohibition against doing it at a later date; a provision in a statute that the Secretary of State should cause it to be published for three months. . . . And so, as to the time limited, was the requirement of a statute directing the Secretary of State to

advertise for sealed proposals for the state printing, which provided that the proposals be deposited in his office 'on or before' a certain date. . . . In a word, where a statute fixes a time within which public officers are to perform some act touching the rights of others, and there is no substantial reason apparent from the statute itself . . . why the act might not be as well done after the expiration of the period limited as during the same . . . the latter will, as regards third persons, be treated as directory, and the fixing of it will not invalidate or prevent official acts, under the statute, after the expiration of the prescribed period." These being the general principles relating to this subject, the more particular discussion of the various sections of the constitution will be found where the construction of these sections is particularly treated.

§15. *Effect of Declaring a Statute Unconstitutional.*—When it is decided by the courts that an act of the Legislature is repugnant to the constitution, it is as if such statute had never been. Having been beyond the power of the Legislature to enact, it never legally had any existence, and no rights can be acquired under it. To this rule there are two exceptions. One is that after an act has been adjudged constitutional by the highest court of the state, contract rights acquired on the faith of this construction will be protected, even though by subsequent change of view the law may be declared to be unconstitutional and void.⁵³ The other is that while an unconstitutional act is void *ab initio*, yet the courts will so far recognize its existence that they will construe the legislative intent by an examination of its invalid, as well as its valid, provisions. In *Keystone Telephone Co. v. Ridley Park Borough*, 28 Pa. Superior Ct. 635 (1905), the law on this point was well explained by President Judge Rice. He said, referring to a contention of counsel: "This proposition implies that the fourth section of the act of May 1, 1876, P. L. 90, as amended by the act of June 25, 1885, P. L. 164, is unconstitutional and void. The argument is that the section, as originally enacted, was in conflict with section 7, Article III, of the constitution, because by the proviso cities of the first class were exempted from its provisions; that being for that reason unconstitutional and void, it is to be treated as

⁵³*Ray v. Gas Co.*, 138 Pa. 576 (1890).

if it had no existence, as if it never had been passed; therefore there was nothing upon which an amendment could operate. An unconstitutional statute is not a law, but it is not strictly accurate to say that it is always and under all circumstances to be treated as if it never had been passed. In a well considered New Jersey case the court said: 'For many purposes an unconstitutional statute may influence judicial judgment, where, for example, under color of it, private or public action has been taken:' *Allison v. Corker*, 67 N. J. L. 596 (52 Atl. Repr. 362). An illustration of its effect in such a case will be found in *King v. Philadelphia Company*, 154 Pa. 160. So in *Philadelphia v. Barber*, 160 Pa. 123, it was held that, although to the extent that the provisions of the act of May 14, 1874, P. L. 158, attempted to make property taxable which was not previously so, it transgressed the rule of the constitution as to the titles to legislative acts, and therefore was inoperative, yet it was proper to look at it in determining the intention of the Legislature in using the language contained in the residue of the act. See also *Commonwealth v. Potts*, 79 Pa. 164; *General Assembly v. Gratz*, 139 Pa. 497. The appellate courts of some of the other states have held that an amended section of a statute takes the place of the original section, that the whole statute after the amendment has the same effect as if re-enacted with the amendment, and hence an unconstitutional statute may be amended into a constitutional one, so far as its future operation is concerned, by removing its objectionable provisions, or supplying others to conform it to the requirements of the constitution: *State v. Cincinnati*, 52 Ohio, 419 (40 N. E. Repr. 508); *Ferry v. Campbell*, 110 Iowa, 290 (1 N. W. Repr. 604); *Allison v. Corker*, 67 N. J. L. 596 (52 Atl. Repr. 362)." The principle last expressed in this quotation from the opinion is believed to be sound law, although not yet definitely approved in Pennsylvania. If the objectionable sections in a statute are amended so as to make it conform to the constitution, the whole legislation is construed as one law, and is constitutional.

It sometimes happens that only a portion of an act offends against the constitution. In such case, what will be the action of the courts? Will the entire act be stricken down, or only that part of it which is unconstitutional? The question to be decided

is whether the unconstitutional part is so connected with the remainder of the act as to form with it one complete system or to effect one single purpose, so that to destroy part would destroy all. If so, the entire act is void. But if it was intended to accomplish several distinct objects, and these can be severed, so that one may fall and the others stand, only the part which infringes the constitution will be declared invalid, and the remaining sections may remain in force.³⁴

§16. *The Preambles.*—A preamble may be of use in construing a statute or a constitution, as it is supposed to express the purpose and intention of the lawmakers. Although it cannot ordinarily extend subsequent provisions, yet it sometimes serves to explain away ambiguities.³⁵ The preamble of the Constitution of Pennsylvania, however, is of little or no value as an aid to interpretation. Its only purpose was to register the state of mind in which the convention began its labors. It provides: "We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this constitution." It was the desire of the members of the convention to go on record as recognizing the omnipotence and watchful care of the Almighty and to express gratitude for the protection which he had given to them and to their forefathers.³⁶

³⁴See *Mauch Chunk v. McGee*, 81 Pa. 433 (1876); *Dewhurst v. Allegheny*, 95 Pa. 437 (1880); *Dorsey's Appeal*, 72 Pa. 192 (1872); *Allegheny Co. Home's Case*, 77 Pa. 77 (1874); *Com. v. Green*, 58 Pa. 226 (1868); *Smith v. McCarthy*, 56 Pa. 359 (1867); *Lea v. Bumm*, 83 Pa. 237 (1877); *Wynkoop v. Cooch*, 89 Pa. 450 (1879).

³⁵Story on the Constitution, C. VI.

³⁶See the discussion of the wording of the preamble in 4 Conv. Debates (1873), 758-771. The preamble of the Constitution of 1776 was very long, reciting therein the causes of the Revolution:

"WHEREAS, All government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent, to change it, and take such measures as to them may appear necessary to promote their safety and happiness; and,

"WHEREAS, The inhabitants of this commonwealth have, in consideration of protection only, heretofore acknowledged allegiance to the King of Great Britain; and the said king has not only withdrawn that protection, but commenced, and still continues to carry on, with unabated vengeance, a most cruel and unjust war against them, employing

The first part of the constitution is devoted to the preservation of the rights of the individual against the power of the government. It is called the "Declaration of Rights," and is introduced by the following preamble: "That the general, great and essential principles of liberty and free government may be recognized and unalterably established, We declare, that:" etc.

It has been said that "bills of right" should have no place in the fundamental law of American states, because ours is a government of the people, who are themselves the objects of the protection of such bills, and that to protect the individual against such a government is to protect him against himself, which is unnecessary and absurd. Experience has proven, however, that the most tyrannical of all governments can be that of a majority; and those most in need of protection, they who

therein, not only the troops of Great Britain, but foreign mercenaries, savages and slaves, for the avowed purpose of reducing them to a total and abject submission to the despotic domination of the British parliament, with many other acts of tyranny (more fully set forth in the declaration of Congress), whereby all allegiance and fealty to the said king and his successors are dissolved and at an end, and all power and authority derived from him ceased in these colonies; and,

"WHEREAS, It is absolutely necessary, for the welfare and safety of the inhabitants of said colonies, that they be henceforth free and independent states, and that just, permanent and proper forms of government exist in every part of them, derived from and founded on the authority of the people only, agreeably to the directions of the honorable American Congress. We, the representatives of the freemen of Pennsylvania, in general convention met, for the express purpose of framing such a government, confessing the goodness of the great Governor of the universe (who alone knows to what degree of earthly happiness mankind may attain, by perfecting the arts of government) in permitting the people of this state, by common consent, and without violence, deliberately to form for themselves such just rules as they shall think best for governing their future society; and being fully convinced that it is our indispensable duty to establish such original principles of government as will best promote the general happiness of the people of this state, and their posterity, and provide for future improvements, without partiality for, or prejudice against, any particular class, sect, or denomination of men whatever, do, by virtue of the authority vested in us by our constituents, ordain, declare and establish the following Declaration of Rights and Frame of Government, to be the constitution of this commonwealth, and to remain in force therein forever, unaltered, except in such articles as shall hereafter on experience be found to require improvement, and which shall by the same authority of the people, fairly delegated as this frame of government directs, be amended or improved for the more effectual obtaining and securing the great end and design of all government, hereinbefore mentioned." The preamble to the Constitution of 1790, on the other hand, was very short, being nothing more than an enacting clause, as follows: "We, the people of the Commonwealth of Pennsylvania, ordain and establish this constitution for its government."

compose the minority. Moreover, our governments being representative, the individual often finds himself imposed upon by the very men whom his ballot has helped to elect. Legislative bodies sometimes, through ignorance, and less often through malice, seek to infringe private rights, and would do so were it not for the restraining bounds laid down by the constitution. They serve as a constant guarantee of the rights of the weak, as well as the strong, and in times of passion and excitement, as well as in moments of sober reflection. The provisions of our Declaration of Rights should be so construed as to carry out the purpose expressed in the preamble, which undoubtedly has a real influence upon the construction of the great principles of individual freedom laid down in our constitution.

CHAPTER II.

RIGHT OF SELF-GOVERNMENT.

§1. *Constitutional Provisions Concerning Right of Self-Government.*—Having discussed the principles by which the courts are guided in interpreting the constitution, the construction of its various clauses as developed in our courts will be considered. The first to be discussed is that contained in the second section of the Bill of Rights, which declares that “all power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.”

This assertion of the inherent right of the people to govern themselves was taken from the Constitution of 1790, Art. IX, Section 2. It in turn was derived from the Constitution of 1776, which contained similar provisions largely copied from the Declaration of Independence.¹

¹The Constitution of 1776, in its Preamble, contained the following words, “All government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent, to change it, and to take such measures as to them may appear necessary to promote their safety and happiness,” and in the body of the first chapter the following sections: Sec. 3. “The people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same.” Sec. 4. “All power being originally inherent in, and consequently derived from, the people, therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them,” and Sec. 5. “Government is, or ought to be instituted for the common benefit, protection and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community; and the community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish government in such manner as shall be, by that community, judged most conducive to the public weal.”

§2. *Who May Exercise the Right—Meaning of People.*—The principle thus expressed is the foundation of democratic government² and in its general aspect needs no explanation; even though the principle be plain, however, it is not always easy of application.

All power resides in the people and their right to create, destroy or alter government is inherent and everlasting; but how are they to act? The "people" is a very inclusive term. It involves in Pennsylvania at least six and a quarter millions of human souls. How can the power, lying dormant in this vast multitude be brought into action? How can they so express their will that those in authority must conduct themselves in accordance with it?

The term "people" in its broadest sense includes every human being, man, woman and child. But as a practical fact a large portion of the people exercise no power to alter government. They do not have the elective franchise and ordinarily take no active part in political affairs. They lost their inherent right or rather failed to assert it, more on account of tradition and natural acquiescence than by any positive rule or enactment. The term "people" may for practical purposes be taken to include only those who are entitled to the ballot; at least they are the only ones who in the absence of revolution can change existing government.³

§3. *How the People May Exercise Their Right—Revolution.*—Even so limited in meaning, the people cannot express their will directly in the ordinary forms of legislation, and so it has become the custom in democratic communities for them to embody it in a constitution, which is the fundamental law of the state determining how the government shall be constituted and the powers which it may exercise. But when in the progress of human affairs, the existing government becomes unsatisfactory, and the fundamental law requires a change, how can the body of the people alter that system and establish another? How can they exercise their inherent right to abolish, create or alter government?

There are several ways by which this may be done. The

²See Cooley, *Constitutional Limitations*, Chap. 3

³*Ibid.*

first and most fundamental is by revolution. The right thus to alter government in proper cases is distinctly asserted in the preamble to the Constitution of 1776. That constitution was itself the product of revolution. It was enacted for the people of Pennsylvania by a small body of men, chosen by ballot for that purpose. It was revolutionary not only as against the British authority, but was essentially so against the minority of voters and all non-voters in Pennsylvania. The Declaration of Independence vested the sovereignty in the people as a whole. The call for a constitutional convention for Pennsylvania was issued by a committee of gentlemen who had no authority from the whole body of the people for such a purpose. The members of the convention were chosen by a majority of the voters. But as to all those who gave no assent the new government was in truth the product of revolution and was forced upon them without their consent. This of course was necessary in founding a new nation and was not objected to nor questioned by any considerable number of persons.

§4. *Through the Medium of the Legislature—Constitution of 1790.*—The council of censors provided by the Constitution of 1776 were given authority by that constitution to call a convention to make alterations in it, should they deem such alterations to be necessary. They did not exercise this power, as the necessary two-thirds of their members failed to approve it.⁴ The popular call for a convention was so urgent, however, that the General Assembly itself took action, first passing a resolution favoring a convention, and afterwards issuing a formal call for it. In doing so they recited that the bill of rights preserved to the people the right to “reform, alter or abolish” government and declared that they, as the legal representatives of the people, had the authority to call a convention for that purpose.⁵ The minority of the Legislature dissented from this assumption, stating that they were of opinion that the house was not “competent to the subject.”⁶

⁴Constitutional Conv. of Pa., Part 3.

⁵Constitutional Conv. of Pa., p. 133.

⁶We are delegated for the special purposes of legislation, agreeably to the constitution. Our authority is derived from it, and limited by it. We are bound by the sanction of our solemn oaths to do nothing injurious to it, and the good people of Pennsylvania have in the constitution de-

The convention came into existence under the terms of this act and enacted the Constitution of 1790, under which the commonwealth lived and prospered for nearly fifty years.

This then is another means by which the people may alter their fundamental law, to wit, through their legislative body, which may call a convention for the purpose. There was a difference of opinion as to the power of the Legislature to do this, but subsequent judicial opinion upholds the views of the majority of the General Assembly of 1789.⁷

§5. *Means Provided in the Constitution Itself.*—A third method has already been indicated by which a constitution may be amended, that is, the means provided by its own terms. This, under the provisions of the Constitution of 1776, could be done through the initiative of the council of censors. There was no provision for amendment in the Constitution of 1790, hence the objection raised by the minority resolution of the General Assembly of 1789 that the means provided in the constitution must be taken to be exclusive would have no application should the General Assembly again issue a call for a convention.

§6. *Convention Called by Vote of the People.*—Such a call was issued, although in a different way, by the Legislature in 1835. In that year an act⁸ was passed which submitted the question to the people, whether or not a convention should be called. The vote being in favor of it, the Legislature provided⁹ for the election of delegates to a convention, which should have power not to enact a new constitution but only to propose certain changes to be submitted to the people for ratification. The proposed amendments were thus submitted and by a narrow majority ratified.

The same method was pursued in 1871, when the General Assembly again submitted the question of convention or no

clared the only mode in which they will exercise 'the right of a community to reform, alter or abolish government,' as being the manner most conducive to the public weal."—Constitutional Conv. of Pa., 136.

⁷*Wells v. Bain*, 75 Pa. 39 (1874). If the minority were correct in their view of the functions of the Legislature, the convention of 1790 was contrary to law, and the constitution which it enacted, by the subsequent assent of the majority of the people, became the product of a real though bloodless revolution.

⁸April 14, 1835, P. L. 270.

⁹Acts of March 29, 1836, P. L. 214, and February 13, 1837, P. L. 18.

convention to the people, and the vote being in favor of it, summoned a convention, and the constitution proposed by them was ratified by vote of the people in the same way.

§7. *Meaning of Revolutionary Constitution.*—It thus appears that the constitution of a state can be altered by the people in at least four ways:

- (1) By the method provided in the constitution.¹⁰
- (2) By convention called by the General Assembly to enact a new constitution.
- (3) By convention called in the same way to propose a new constitution or amendments to the people for ratification.
- (4) By revolution.

The first three methods are legal. That is, they are consistent with existing law.¹¹ The latter is illegal, and when attempted it is the duty of the existing government to resist it to the extent of its ability. Such would be the character of any attempted enactment of a constitution in any way not enumerated above. The constitution being the written will of the people, of course the method provided therein may be safely followed. It is not exclusive, however, as the people cannot be deemed to have deprived themselves of any of their fundamental right to change the government in any manner they may determine

¹⁰The Constitution of 1873 provides, Art. XVIII, §1: "Any amendment or amendments to this constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by a majority of the members elected to each house, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the Secretary of the Commonwealth shall cause the same to be published three months before the next general election in at least two newspapers in every county in which such newspapers shall be published; and if in the General Assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each house, the Secretary of the commonwealth shall cause the same again to be published in the manner aforesaid; and such proposed amendment or amendments shall be submitted to the qualified electors of the state, in such manner and at such time, at least three months after being so agreed to by the two houses, as the General Assembly shall prescribe, and if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the constitution. But no amendment or amendments shall be submitted oftener than once in five years. When two or more amendments shall be submitted they shall be voted upon separately." Amendments proposed by the General Assembly need not be submitted to the Governor for his approval or veto. *Com. v. Griest*, 196 Pa. 396 (1900). See Chapter XVI, The Executive, and Chapter XXVIII, Amendments to the Constitution.

¹¹*Wells v. Bain*, 75 Pa. 39 (1874); *Wood's Appeal*, 75 Pa. 59 (1874).

unless they have expressly so stated.¹² They may, therefore, bring about a change of government by calling a convention in any way in which it is possible for them as a whole to express their will. The only way this can be done is through the Legislature, the only legislative body which represents the people as a whole. If a number of citizens should voluntarily issue a call for a convention, which should assemble, composed of members elected by even a large majority of the people, this would be a revolutionary body; it would not represent the people but only those who had voted for its delegates. It might succeed by sheer force of numbers in establishing a new constitution, but it would be by revolution and not by law. This would be true even though the constitution thus proposed should be ratified by every man but one within the commonwealth. That one would have a legal right to resist the new government, and if he occupied an official position under the pre-existing government it would technically be his duty to do so.

§8. *Power of Constitutional Convention.*—It follows as a logical sequence that if the Legislature in issuing the call for a convention, expressly lays down certain limits to its powers, the convention is bound by those limits. This is an inevitable conclusion. The people through the Legislature have expressed their will that a convention with certain powers only shall be called. The people again in voting for delegates have expressed their will that those delegates shall have the authority described in the act of Assembly and no more. They could not confer more, for the election of delegates would otherwise not be in accordance with the expressed will of the whole people, acting through the General Assembly, and hence the election itself would be an act of revolution, seeking to bring about changes in government not sanctioned by the duly constituted representatives of the people.

§9. *Constitution of 1873 Partially Revolutionary.*—If, therefore, the convention does overstep its limits it becomes a revolutionary body, and the constitution thus enacted is illegal. This is what happened when the Constitution of 1873 was framed. The convention was forbidden to alter the Bill of Rights and was required to submit the question of approval or

¹²*Wells v. Bain*, 75 Pa. 39 (1874).

disapproval of the work of the convention to the people in a particular way. The Bill of Rights was altered and the proposed constitution was not so submitted. In the case of *Wells v. Bain*, 75 Pa. 39 (1874), the Supreme Court, sitting at *nisi prius*, issued an injunction to restrain the commissioners appointed by the convention from holding an election in Philadelphia to vote on the ratification in a manner not authorized by the enabling act. The election, thus hindered, was accordingly held in the manner originally provided in the act of Assembly. In *Wood's Appeal*, 75 Pa. 59 (1874), it was alleged that the constitution was illegal because the convention had overstepped its powers. Mr. Justice Agnew and the majority of the court were of the opinion that the new constitution was revolutionary mainly because it involved changes in the Bill of Rights. It had, however, been submitted to the people in the meantime and ratified by a large majority. The court, therefore, decided that as the work of the convention had been ratified, the court had no authority to interfere. The new constitution had been accepted by the people as the law of the land, no matter if illegally framed, but the court might logically have conceived it to be its duty to declare the Constitution of 1838 to be the fundamental law of the commonwealth, and to protect and defend that constitution against its illegal successor to the extent of their power. The people who voted against its adoption had never consented either expressly or impliedly to be governed by it, and were technically entitled to the protection of the court. The Constitution of 1873 was, therefore, partially revolutionary, but, being acquiesced in by the great mass of the people, there was no alternative but to accept it, and in truth this is one of the methods of altering government always reserved to the people if legally constituted authorities fail to act.

The members of the convention considered the question of their power to overstep the limits of the enabling act and came to the conclusion that they had the power, although a minority dissented. The discussion beginning on page 52 of Vol. I of the *Debates in the Constitutional Convention (1873)* shows the various views of the members. The prevailing sentiment was that the convention was called into being by the people directly and was entirely independent of any restrictions placed

upon it by the Legislature. This is surely an erroneous conception. The only way that a convention can represent the whole people is where delegates are chosen in accordance with an act of Assembly providing for an election. The election, under the said act, vests in the delegates as much power as the act of Assembly provides they shall have and no more, for the voters by acting under the said act must be taken to have assented to its terms, including the limitation of the power of the convention. The remarks of Mr. J. S. Black, on page 55, express the correct view.¹³

"Mr. Black said: "Mr. President—Nobody in this convention seems to desire to make any alteration whatever in any part of the ninth article, but to leave it precisely as it is. We are all willing to make the government of the state as efficient as we can, consistently with the liberties of the people. No one desires to go any further; but a committee is proposed to take into consideration the Bill of Rights, simply as an assertion, and the object is avowed as an assertion of the right of this convention to do what they please, inconsistently with the act of Assembly under which we are organized and elected. On the other hand, there are those in the convention who believe that the power to amend and alter the government of a state must be in accordance with the rules that are laid down for that purpose by the existing government; that, although there be a majority of the people in favor of a change, of an alteration which may consist of taking away the fundamental rights of the minority, they cannot do it except in the way as prescribed by existing law passed under and in pursuance of the constitution which is now in force; that is, those people who are the majority cannot just go to work and count themselves, and say: 'We are so many thousands and so many hundreds and you are so many less than we are, and therefore we are going to change the government altogether and take away from you the rights that the government has established for the purpose of protecting and securing you.' I therefore believe that the Legislature, when it delegated its power (if this power has not been delegated by the Legislature we would not have had it, and all delegated power must be accepted by the grantee upon the terms and with the limitations which were expressed in the grant) and that when the Legislature declared that we should be a convention for the purpose of considering not the whole constitution, but a certain part of it only, the power was withheld from us to consider anything else. They had the right to mark out the line of our power. This principle was asserted in Rhode Island on the one side, and a majority of the people, nevertheless, stampeded and ran across it and disregarded it, and the consequence was civil war. It was disregarded by two parties in Kansas, each of them claiming to be the majority, each of them acting separately, one sitting in one part of the state, and the other sitting in another part of the state, and the consequence was a conflict which extended all over the Union. Any man who will read Mr. Webster's argument will understand not only that this is the sound principle in theory, but that any transgression of it will lead to serious consequences. I do not say that I have very much hope that this view of the case will be adopted by the convention, because it concerns a question of our own power, and it is human nature that whenever we get power into our hands we hold on to it with as tight a grip as we

The convention held one or two sessions after the decision in *Wells v. Bain*, 75 Pa. 39 (1874), referred to above, and there was much criticism of the action of the court in that case and particularly of the views expressed concerning the powers of the convention. As a result of this feeling the convention placed itself on record by a formal resolution as follows: "*Resolved*, That the constitution of the state is the only recognized form of its government, and the people having expressly reserved to themselves the right to alter, reform, or abolish their government in such manner as they think proper, and having in distinct terms excepted this right out of the general powers of government and declared that such right shall forever remain inviolate, this convention deems it to be its duty to declare that it is not in the power of any department to control the powers of a convention called by the people to reform their constitution, and that the convention, subject to the Constitution of the United States, is answerable only to the people from whom it derived its power."¹⁴ In the evening of the same day the reading before the convention of a letter from one of its members commenting on the same question caused much applause and some merriment. The letter, from Mr. De France, was in part as follows: "Let me congratulate you on being the honorable president of a sovereign convention (the Supreme Court to the contrary) which did its work more in accordance with the people's wishes and more against the wishes of the criminals and bad men of the Republic than any constitution ever formed on American soil."

can. But I submit to members of the convention whether we are not taking a little too much upon ourselves when we say we are omnipotent, and can do with this constitution just as we please, without any reference to the law which delegated this power to us."

¹⁴8 Debates in Const'l Conv. (1873), 745.

CHAPTER III.

LIBERTY OF CONSCIENCE.

§1. *Views of American Colonists as to Religious Freedom.*—The American Colonists were, as a rule, far more liberal in their views about religious freedom than the people of England or of other countries from which they emigrated. They intended, and in most cases succeeded, in incorporating such sentiments into their colonial governments. Religious intolerance, however, was so firmly ingrafted in the minds of the English settlers that in several instances it required a further experience in the new world to demonstrate its inherent viciousness and finally to destroy it.¹

§2. *Religious Toleration in Pennsylvania.*—William Penn probably desired to establish religious freedom or at least toleration in the colony of Pennsylvania,² but on account of opposition in England he was unable to do so. By the "Laws agreed upon in England" in 1682³ it was provided that no peaceable and law-abiding citizen should ever be molested by reason of his belief or manner of worship, provided he acknowledged the being of "the one Almighty and Eternal God." Officeholders, however, were by the same laws required to be

¹The early history of Massachusetts colony exhibits this tendency:

"The settlers of Massachusetts had formed a commonwealth in which 'truth' was to rule, and 'error' to be punished and exiled. They, too, had suffered in England, and had emigrated to secure liberty of conscience for themselves. They had formed a Puritan reservation at great expense of time, treasure and heroic self-sacrifice. They must preserve this at whatever cost. 'There is no room in Christ's triumphant army for tolerationists.' How could they see their state invaded, their laws defied, their ecclesiastical system scorned, by the very agencies they had left England to avoid? If Episcopacy was on one hand to be ruled out, still more necessary was it that they should show to the world that the errors of the Baptists and Quakers had no place there, and so the heretics were sent to Rhode Island and Pennsylvania, and the very persistent Quakers were hanged on Boston Common."—Sharpless: "History of Quaker Government in Pennsylvania," Vol. I, page 117.

²See Sharpless: "A History of Quaker Government in Pennsylvania," Vol. I, page 119.

³1 Colonial Records, XXXIII.

Christians.⁴ The same liberal ideas were afterwards somewhat more elaborately incorporated into Penn's charter of privileges of 1701,⁵ but a law passed in 1700 seeking to enforce such principles was repealed by the Queen in Council because in the opinion of her advisers it gave too much leniency to non-Christians,⁶ and by subsequent enactment "liberty of conscience" was

"1 Colonial Records, XXXIII. It was also provided that the first day of the week, "called the Lord's Day," should be observed as a day of rest, and that swearing, cursing, etc., should be discouraged.

"These provisions were as follows:

"First. Because no people can be truly happy, though under the greatest enjoyment of civil liberties, if abridged of the freedom of their consciences, as to their religious profession and worship: And Almighty God being the only Lord of conscience, father of lights and spirits, and the author as well as the object of all divine knowledge, faith and worship, who only doth enlighten the mind, and persuade and convince the understandings of people, I do hereby grant and declare that no person or persons, inhabiting in this province or territories who shall confess and acknowledge one Almighty God, the creator, upholder and ruler of the world, and profess him or themselves obliged to live quietly under the civil government, shall be in any case molested or prejudiced in his or their person or estate, because of his or their conscientious persuasion or practice, nor be compelled to frequent or maintain any religious worship-place, or ministry, contrary to his or their mind, or to do or suffer any other act or thing, contrary to their religious persuasion.

"And that all persons who also profess to believe in Jesus Christ, the Saviour of the world, shall be capable (notwithstanding their other persuasions and practices in point of conscience and religion) to serve the government in any capacity, both legislatively and executively, he or they solemnly promising, when lawfully required, allegiance to the king as sovereign, and fidelity to the proprietary and governor, and taking the attests, as now established by the law made at New-Castle in the year one thousand seven hundred, entitled An act directing the attests of several officers and ministers, as now amended and confirmed by this present assembly."—Constitutional Conventions of Pennsylvania, page 31.

"II Statutes at Large of Pa., 1. In the report of the Attorney General to the Lords Commissioners it is said concerning this act:

A. And as to the law concerning liberty of conscience, by which liberty of conscience is allowed every person that shall only own that God Almighty is the Creator, Upholder and Ruler of the World, and that he is obliged in conscience to live peaceably and quietly under the civil government, and every person so professing is to be unmolested for his conscientious persuasion or practice, and is not obliged to any religious worship whatsoever, but on Sunday are only enjoined for their ease to abstain from toil and labor. I am of the opinion that this law is not fit to be confirmed, no regard being had in it to the Christian religion and also for that in the indulgence allowed to the Quakers in England, by the statute of the first by William and Mary, Chapter 18 (which sort of people are also the principle inhabitants of Pennsylvania), they are obliged by declaration to profess faith in God and in Jesus Christ his Eternal Son, the true God and in the Holy Spirit one God blessed forevermore, and to acknowledge the scriptures of the old and new testaments to be given by divine inspiration, and also for that

confined to those professing belief in the Trinity.⁷ Strict religious tests were imposed upon civil officers at a later date (1705), and these tests remained in force until the Revolution.⁸ It is thus seen that in colonial Pennsylvania there was toleration but not religious freedom even under the declarations first made by Penn. Absolute freedom means that unbelievers as well as believers shall be equal before the law—a principle recognized

none can tell what conscientious practices allowed by this act may extend to.—II Statutes at Large of Pa. 489. Subsequently in 1705 the act was amended substantially in accordance with the foregoing opinion.—II Stat. at Large of Pa., 171.

"II Stat. at Large of Pa., 171.

"The test prescribed for members of the Assembly was as follows:

"I, A. B., do sincerely promise and solemnly declare before God and the world, that I will be faithful and bear true allegiance to Queen Anne. And I do solemnly profess and declare, that I do from my heart abhor, detest and renounce as impious and heretical that damnable doctrine and position, that princes excommunicated or deprived by the Pope or any authority of the See of Rome, may be deposed or murdered by their subjects or any other whatsoever. And I do declare that no foreign prince, person, prelate, state or potentate, hath or ought to have any power, jurisdiction, superiority, pre-eminence or authority ecclesiastical or spiritual, within the realm of England or the dominions thereunto belonging.

"And I, A. B., do solemnly and sincerely in the presence of God profess, testify and declare, that I do believe that in the sacrament of the Lord's Supper there is not any transubstantiation of the elements of bread and wine into the blood of Christ, at or after the consecration thereof by any person whatsoever; and that the invocation or adoration of the Virgin Mary or any other saint, and the sacrifice of the Mass as they are now used in the Church of Rome, are superstitious and idolatrous.

"And I do solemnly in the presence of God profess, testify and declare, that I do make this declaration and every part thereof in the plain and ordinary sense of the words read unto me, as they are commonly understood by English Protestants, without any evasion, equivocation or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the Pope or any other authority or person whatsoever, or without any hope of any such dispensation from any person or authority whatsoever; or without thinking I am or may be acquitted before God or man, or absolved of this declaration or any part thereof, although the Pope or any other person or persons or power whatsoever should dispense with or annul the same, or declare that it was null and void from the beginning.

"And I, A. B., profess faith in God the Father, and in Jesus Christ, His Eternal Son, the true God, and in the Holy Spirit, one God blessed forevermore; and do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration."—II Stat. at Large of Pa., 219.

This test was subsequently extended to all civil officers in Pennsylvania in conformance with a previous order of the Crown (1702) that all colonial officers should subscribe to the English act.—See Sharpless: "A History of Quaker Government in Pennsylvania," Vol. I, pages 123, 124.

by Roger Williams in the founding of Rhode Island—but nowhere else in colonial America. Penn may have believed in it, but it does not clearly appear in his writings that his conception of religious freedom was broad enough to include irreligion.

§3. *Relative Power of Federal and State Governments.*—By the terms of the Federal Constitution, the power to make laws concerning the exercise and enjoyment of religious profession and worship is left to the states. Indeed, Congress is expressly forbidden to interfere. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."⁹ The question of the power of the state does not, therefore, enter into the discussion. A state might even set up an "Established Church" should it see fit to do so.¹⁰

§4. *Provisions of State Constitutions.*—The state constitutions, which, with few exceptions, were drafted after the Declaration of Independence, contain as one of the chief provisions of the Bill of Rights, a clause intended to establish religious freedom. A few of the earlier ones contained religious tests for officeholders,¹¹ but all such tests have now been abandoned.¹² When, however, it is said that religious freedom is a part of the fundamental law of all the states it must not be supposed that this means that in all instances there is entire equality before the law of all persons no matter of what belief or religious persuasion they may be. This would be an erroneous assumption, as in some states there are still some slight incapacities resulting from disbelief in the Christian God. In so far as they exist in Pennsylvania they will be explained hereafter.

§5. *Provisions in Pennsylvania Constitutions.*—The first Constitution of the State of Pennsylvania (1776), followed the colonial frame of government in requiring members of the Assembly to subscribe to an oath professing faith in God and acknowledging the divine inspiration of the Old and New Testaments,¹³ but it made a decided step in advance by providing that

*Constitution of U. S., Amendment 1.

¹⁰*In re King*, 46 Fed. Rep. 905 (1891).

¹¹See Constitution of Massachusetts (1780), C. VI, Art. I.

¹²See Cooley's Constitutional Limitations, C. XIII; Kent's Commentaries, page 35 *et seq.*

¹³Constitution of 1776, Chap. II, Section 10. The material part of the oath was as follows: "I do believe in one God, the creator and governor

no further religious test should ever be required.¹⁴ This latter clause was inserted at the solicitation of Franklin, who disapproved of the one requiring members of the Assembly to declare their belief in the divine inspiration of the Old and New Testaments, and thought it "had better have been omitted."¹⁵

It is to be observed that this test was required only of members of the Assembly and not of other civil officers.

The Bill of Rights of the same constitution contained a declaration similar to Penn's that entire freedom of worship should be enjoyed and that no one who acknowledged "the being of a God" should on account of his religious sentiments be "justly deprived or abridged of any civil right as a citizen."¹⁶

The third section of the Declaration of Rights as adopted by the convention of 1790 was as follows (Art. IX): "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishments or modes of worship." This provision remains unchanged at the present day, no alteration having been made by the convention of 1873.

of the universe, the rewarder of the good and punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration." The members of the convention which framed the constitution had been required by the provincial committee which called the convention to take the same oath.—Const. Conv. of Pa., page 39.

¹⁴Const. of 1776, Ch. II, Section 10.

¹⁵Spark's "Life and Writings of Franklin," X, 134.

¹⁶Ch. I, Sec. 2. The full section is as follows:

"That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship."

The fourth section of Article IX of the Constitution of 1790, which also remains unchanged in the Constitution of 1873, was as follows: "That no person who acknowledges the being of a God and a future state of rewards and punishments, shall on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth." This clause, like its predecessors, does not place all persons on an equal footing as regards possible disqualification resulting from religious unbelief. For this reason several efforts were made to change it both in the convention of 1790 and in that of 1873, but the sentiments of both conventions seemed irrevocably opposed to the proposed alterations.¹⁷

"In the convention of 1790 it was moved, in the committee of the whole, to amend by the omission of the words "and a future state of rewards and punishments," and later to strike out the whole qualifying clause which made it possible for unbelievers to be declared ineligible to public office, but the vote was overwhelmingly against the amendment.—Const. Convs. of Pa., 376-7. Again, when the constitution was being considered section by section, the following clause was offered as a substitute:

"As civil society is instituted for the purposes of enforcing a discharge of the relative duties and preventing the violences of men towards each other, so the great author of their existence, can alone determine the truths of religious opinions, therefore no power shall be assumed of depriving a citizen of the privilege of serving his country, in office, on account of his religious belief." The votes stood, yeas 6, nays 55.—Const. Conv. of Pa., 217.

During the deliberations of the convention of 1873 a strong effort was made to abolish or modify the clause in the fourth section which discriminates between those who do and those who do not possess certain religious beliefs. It was moved to strike out the qualifying words and provide simply that no man should ever be disqualified to hold office on account of his religious belief—5 Debates in Const. Conv. (1873), 561—but the motion was overwhelmingly defeated. The principal argument in favor of the amendment was that the clause was of no practical benefit and was often productive of evil; that those men who were candid enough to disclaim a belief in a God and a future state of rewards and punishments were more worthy of being trusted with public office than many who would profess a belief they did not have in order that they might accept an office with its emoluments. The reply was that no man who disbelieved was capable of taking an oath or of being a witness in a judicial proceeding, and that no one who could not be bound by his oath should be elected to office. The latter argument seemed to impress the convention more than the former. An attempt was also made to omit the words "a future state of rewards and punishments," making the qualification of a public officer depend merely upon his belief in the existence of a God. But this amendment met the same fate as the other in spite of the argument that a very respectable religious sect, the Universalists, would or could thus be excluded by reason of the fact that they disclaim belief in such future state, though acknowledging the being of a God.—7 Debates in Const. Conv. (1873), 253-255.

§6. *Construction of the Clauses.*—In investigating the meaning of these clauses of the Constitution of Pennsylvania they should be considered in two aspects: First, How far do they limit the power of the legislative body? Second, Inasmuch as certain principles either directly or indirectly connected with religious belief long ago became incorporated into the common law, how far if at all is the common law altered by the constitution?

The first sentence in Article I, Section 3, guarantees freedom of worship. The second sentence declares that no man can be compelled either to attend any place of worship or to maintain any ministry against his will, and the third is a simple declaration that no human authority can control or interfere with the rights of conscience. As limitations on the power of the Legislature these provisions are no longer of much importance; it is hardly conceivable that any laws limiting or abridging such rights will ever be enacted by our modern legislative bodies. The only case in Pennsylvania of such a character is that of *Brown v. Hummel*, 6 Pa. 86 (1847), in which an act of Assembly giving to certain Lutheran Synods the right to control a fund left generally for the benefit of orphans, was held unconstitutional as giving a preference to a religious sect.¹⁸

§7. *Control of State Over Religious Organizations.*—There are, however, a number of questions of some difficulty and importance which have arisen owing to the doubt as to whether these constitutional provisions limit the civil power of the state over religious organizations or their members. Does

¹⁸The question as to whether it is a violation of this section of the constitution to read the Bible in the public schools has arisen and been passed upon by the Courts of Common Pleas in three counties. It has been held constitutional because Christianity is a part of the common law of the commonwealth and the Bible is a part of Christianity as a whole and is not the book of any particular or individual sect of Christians. *Hart v. School Directors*, 2 Lanc. L. R. 346 (1885); *Stevenson v. Hanyon*, 7 D. R. 585 (1898); *Curran v. School Directors*, 22 Pa. C. C. 201 (1898). The contention that the versions of the Bible as adopted by different Christian sects are not the same and that the reading of any particular version favors the particular sect or sects which has adopted the version was met by the court with the answer that what particular version of the Scriptures is used is of no importance. The constitution recognizes Christianity of which the Bible is the basis, and what translation of the Scriptures is used is a question for the local authorities, and they having decided, no one else has any right to complain.

the provision that "No human authority" can, in any case whatever, "control or interfere with the rights of conscience" prevent the civil authority from controlling or interfering with the acts of persons done in performance of ecclesiastical duties?

Neither the Legislature nor the courts can under any circumstances dictate to individuals or to religious bodies the tenets to which they shall subscribe, nor the manner in which they shall worship. This is clear from the words of the constitution; but at the same time it is apparent that every institution must be under the supervision of the temporal authorities, so that no organization opposed to the laws of the land may be permitted and so that private rights may be protected. The churches are not exempt from this rule. Their laws must conform to the law of the land and in proper cases where individuals have suffered a deprivation of rights arising out of their connection with religious bodies the civil courts will not deny relief

§8. *Disciplinary Measures.*—The church organization, whether incorporated or unincorporated, may make, subject to the laws of the land, such rules and regulations as it pleases concerning the conduct of its members and officers. It may establish such rules for trial and punishment of members or officers as seem best to it or may vest discretionary power of punishment in superior officers without the formality of a trial. When an individual becomes a member of such an organization he thereby subscribes to its discipline and voluntarily places himself under the control of those who by such discipline are given authority over him. Sometimes, however, a member will be expelled or an officer dismissed as he believes unjustly. He may contend that he has been injured either because his trial was conducted in an improper and irregular manner or because he was denied any trial or merely because, as he believes, the verdict was against the evidence. Can he in such cases appeal to the civil tribunals? Have they jurisdiction to interfere with the actions of ecclesiastical bodies, or by so doing will they overstep the bounds laid down by the constitution?

§9. *Power of Courts to Interfere.*—It is quite clear that under no circumstances can any person appear as a litigant in a court, unless he has suffered or is about to suffer a substantial

injury of a temporal nature, such as the law will take cognizance of. Hence in no case can such an appeal to civil authority be entertained unless by reason of the action of the ecclesiastical authorities the appellant has suffered some temporal injury, such as the loss of office or of a share in property rights appurtenant to membership in the organization in question.

§10. *When Church Officers are Within Their Constitutional Rights.*—Even in such cases, if the ecclesiastical authorities act within their constitutional rights as laid down in the fundamental law of the church, no appeal from their decision to civil courts is permissible. It may be that their action was ill-judged or unwise or based upon erroneous assumptions of fact, but this will not give the injured member a right to seek the aid of the temporal courts. When he joined the church he impliedly agreed to abide by the decision of such ecclesiastical authorities as were then in existence or might by proper constitutional means be brought into existence and he cannot be heard to complain of their verdict. "The rules of a church organization constitute the law for its government, and the civil courts will in general recognize and enforce these as any other voluntary agreement between the parties."¹⁹ Thus in *Stack v. O'Hara*, 98 Pa. 213 (1881), s. c. 90 Pa. 477 (1879), the court refused to reinstate a pastor who had been dismissed without trial because *inter alia* the rules of the church to which he had subscribed gave exactly that power to the bishop who had removed him.²⁰ In any case, the member aggrieved must ex-

¹⁹*Tuigg v. Tracy*, 104 Pa. 493 (1883); *Riddle v. Stevens*, 2 S. & R. 537, 542 (1816); *Krecker v. Shirey*, 163 Pa. 534 (1894): In the latter case Mr. Justice Williams said: "The decision actually made does not violate the laws of the state or of the church, and is conclusive upon the ecclesiastical body of which the General Conference is the Chief Tribunal. For this reason it should be followed by the Civil Courts." *Irvine v. Elliott*, 206 Pa. 152 (1903).

²⁰Mr. Justice Trunkey at page 233 said: "The plaintiff urges that the removal so injured him in the property of his profession that if not contrary to the laws of the church, it is to the supreme law of the land. His profession is that of a priest in the church. He acquired it by compact. He holds it under a promise to obey the laws of the church and the proper orders of the bishop. Were his contract void for its immorality or illegality, he could recover nothing for its breach. If illegal, he is neither entitled to restoration nor to damages for his removal. If legal, and his removal was authorized by the terms of the compact, no law of the land is violated. In this country the church is completely separate from the state. Every church organization is voluntary on the part of its members, and the terms and conditions depend

haust his remedy in the church before he can be permitted to seek redress in the civil courts.⁴¹

§11. *Church Legislation Affecting Constituent Parts of the Church Organization.*—The same principles which apply to disciplinary measures in individual cases are also applicable in cases where a superior legislative or judicial body of the church has sought to punish constituent parts of its organization by cutting them off from the main body and thus denying to them rights as part of said church. In *Com. v. Green*, 4 Whart. 531 (1839), the General Assembly of the Presbyterian Church “excinded” several synods, depriving them of their rights as members of the general body of the Presbyterian Church. *Quo warranto* proceedings were had to test the right of the trustees (who had been selected by the excinding faction) to hold office. It was contended that the excinding act was contrary to the constitution of the church, and hence the courts could interfere to protect the rights of those synods whose connection with the main body of the church had been severed. Mr. Justice Rodgers, who presided at the trial, was of the opinion that the excinding act was judicial in its nature, and having taken place without a trial and without notice to the parties to be affected, was in conflict with the church law. He therefore sustained the right of the court to interfere. “In this country,” said he, “for the mutual advantage of church and state, we have wisely separated the ecclesiastical from the civil power. The court has as little inclination as authority to interfere with the church and its government, farther than may be necessary for its protection and security. It is only as it bears upon the corporation, which is the creature of the civil power, that we have any right to determine the validity, or to construe the act and resolutions of the

entirely upon its own rules. The profession of priest or minister in any denomination is taken subject to its laws. These he agrees to obey. If they become distasteful to him he can withdraw—no power can compel him to remain and perform his priestly functions; but if he violates the laws of his church, or disobeys the lawful commands made in accord with his compact, the civil courts will not maintain his footing in the church. If the plaintiff was removed in accord with the law of the church he has no cause of complaint. If such laws provide that the bishop may remove a priest without trial he has no right to a trial, and if they provide that he shall have recourse to the bishop’s superior in case of wrongful removal, his remedy is by such recourse, for this is his contract.” See also *Woodside’s Appeal*, 4 Pennypacker, 124 (1884).

⁴¹*German Reformed Church v. Seibert*, 3 Pa. 282 (1846).

general assembly. . . . I have said that excising the presbyteries without notice, and without trial, was not only contrary to the common law, but it was contrary to the constitution of the church. . . . This, as has been before observed, is a judicial act; and if a regular trial had been had, and judgment rendered, the sentence would have been conclusive. We should not have attempted to examine the justice of the proceeding; but inasmuch as there have been no citations, and no trial, I instruct you, that the resolution of the general assembly excising the four synods of Utica, Geneva, Genessee and the Western Reserve, are unconstitutional, null and void."

When the case was heard in banc, however, the court decided that the excising act was not judicial, but a regular legislative act and being within the power of the general assembly it could not be inquired into.²²

§12. *When the Action of the Church Authorities is in Violation of the Church Law.*—On the other hand, if a member or a constituent body of members has been deprived of a substantial right by the action of some church authority in violation of its constitution, then the court will interfere. They will in this case, as in the other, enforce the church constitution as a civil contract between the parties and permit no deprivation of rights or privileges save in accordance with its provisions. In *Green v. The African M. E. Society*, 1 S. & R. 253 (1815), a mandamus was applied for to reinstate Green as a member of a religious society from which he had been expelled. The return to the mandamus set forth that he had sued a fellow-member in violation of the church discipline, but failed to show either that the suit was unjustifiable (which was necessary to make out a breach of the discipline) or that Green had been tried by a judicial body, properly authorized by the church. These omissions were fatal as not showing constitutional action and the mandamus issued. In the case of *St. Clement's Church*, 8 Phila. 251 (1871), a court of equity decreed the reinstatement of the rector of an Episcopal church, who had been dismissed without a trial (which was guaranteed to him by the church constitution) by the vestry, a body which had no authority to take such action. "If in violation of its own laws a

²²See also *Dayton v. Carter*, 206 Pa. 491 (1903).

church has ousted (a pastor) from his pulpit and in effect wrongfully deprived him of his living, he can have recourse to the civil courts for restoration of his rights. A church cannot illegally wrest from its servants their property, any more than can an individual."²³ So if a presbytery or other organized subordinate body of the church be "excised" unconstitutionally its rights will be preserved.²⁴

The court may control any other action of the church authorities, whether legislative or judicial, but only if that action is contrary to the fundamental law of the church and is prejudicial to the rights of those seeking relief.²⁵ In *Long v. Harvey*, 177 Pa. 473 (1896), Mr. Justice Dean said: "Our power of adjudication in disputes between warring church factions is limited. In such cases we can look into the rules of a church organization only to ascertain the church law, and if that be not in conflict with the law of the land, all we can do is to protect the rights of parties under the law they have made for themselves." A court of equity, however, will in its discretion deny relief if it appears that the injury suffered will be of a trivial nature.²⁶

An alteration in the charter of a congregation is obviously of vital importance to its members, and even if a majority of a congregation are seeking to have such a change brought about, the court will refuse to permit it unless the proposed change is consistent with the church constitution or assented to by all the members.²⁷ In ascertaining whether the application for altera-

²³*Wallace v. Trustees*, 194 Pa. 178 (1899).

²⁴*McAuley's Appeal*, 77 Pa. 397 (1875); *Kerr's Appeal*, 89 Pa. 97 (1879). In these two cases the General Synod of the Reformed Presbyterian Church had "excised" the Fifth and the Second Presbyteries of Philadelphia. This action was the result of contumacious behavior on the part of the two presbyteries, but took place without the formality of a trial and clearly in violation of the fundamental law of the church. The court therefore interfered to preserve their rights.

²⁵*Com. ex rel. Miller v. Cornish*, 13 Pa. 288 (1850). In this case the appointment of an elder by the bishop (according to the constitution) was upheld against the illegal election of another by the congregation.

²⁶*Cushman v. Church of the Good Shepherd*, 188 Pa. 438 (1898).

²⁷*In re Walnut Street Presbyterian Church*, 7 Phila. 310 (1869). The change here contemplated was to transfer the power to hire the choir from the ministers and elders to the trustees. By the constitution of the Presbyterian Church all matters connected with the worship of God were to be controlled by the ministers and elders. The suggested change was therefore denied. *African M. E. Union Church*, 28 Pa. Superior Court, 193 (1905), in which it appeared that proper notice of an intent to amend the charter had not been given.

tions to a charter has been regularly made, the court will go behind the application itself, and will inquire by what authority the corporate seal was affixed. The whole proceedings will be scrutinized, and wherever the rights of any person have been denied him the court will grant the appropriate relief.²⁸

§13. *Ownership of Church Property as Between Warring Church Factions.*—Nearly akin to the topic last discussed is the question of the ownership of property by a church or congregation. It is well settled that a church even though unincorporated may own property.²⁹ Where it has been thus acquired by such a body and subsequently a factional quarrel has occurred resulting in a split into two or more factions, who is entitled? When such a question arises the courts are governed by the same general principles heretofore discussed. The terms of the gift (if there was one) or the contract between the members of the congregation implied from the purchase of the property will be enforced just as rights arising out of any other contract or trust relation will be protected. The court will look into the church law, but only for the purpose of giving effect to the intention of the parties.

The property in dispute between two warring church factions may have been purchased by the congregation or its predecessors or (more often) may have been acquired by gift. In either case the problem to be solved is one of identity. The members of the original congregation who purchase or accept property acquire it (under ordinary circumstances) for the benefit of those who shall continue to worship at that place and according to the usages and customs as then understood. If a subsequent division of the congregation occurs, and both parties

²⁸Case of *St. Mary's Church*, 7 S. & R. 516 (1822). The application for a change in the charter had been first made by certain of the lay members. This was irregular, as the trustees were the only persons who could legally represent the church. New trustees were thereafter elected and the lay trustees, eight in number, were for the alteration. The clergy, three in number, were against it. The court decided that since by the fundamental law of the church there were two separate bodies to whom the corporate power was delegated (lay and clergy), there must be consent of a majority of both bodies before lawful application for a change in the charter could be made. The application was therefore refused.

²⁹*Caufman v. Congregation of Cedar Spring*, 6 Binn. 59 (1813); *Zimmerman v. Anders*, 6 W. & S. 218 (1843); *Unangst v. Shortz*, 5 Whart. 506 (1840); *Brown v. Lutheran Church*, 23 Pa. 495 (1854); Acts of Feb. 6, 1831, 1 Sm. 1, 193; Aug. 2, 1842, P. L. 465.

lay claim to the property, each alleging itself to be the true congregation, the court will investigate the question and will protect the title of that portion of the congregation which they determine has remained true to the fundamental doctrines as they were recognized at the time the property was acquired. They take this action on the ground that the gift or purchase must have been made at least upon an implied understanding that it was to be used to further the interests of a congregation adhering to the principles as then understood. It follows that the title of even a small minority will be protected if they have thus remained true, while a majority which has departed from these principles will forfeit all rights to the property in dispute.³⁰

§14. *What Constitutes Departure from Original Doctrines.*—The difficult problem is to determine which of the two factions is in harmony with the old established customs and forms of the church. If there has been no departure by either, so that while at odds with each other, both may be said to adhere to the fundamental doctrines, the action of the majority, if constitutional, must of course govern. It is somewhat doubtful how far a majority may introduce innovations and make changes in their manner of worship without losing their property rights. In *McGinnis v. Watson*, 41 Pa. 9 (1861), it appeared that a congregation of the Associate Seceder Church of North America had purchased land and erected a meeting-house thereon. Something more than fifty years later the congregation voted by a large majority to join itself to the Associate Reformed Synod. This action was objected to by the minority, as they claimed it was contrary to all traditions of the church. The court decided

³⁰*Ebaugh v. Hendel*, 5 Watts, 43 (1836); *Means v. Presbyterian Church*, 3 W. & S. 303 (1842); *App v. Lutheran Cong.*, 6 Pa. 201 (1847); *Trustees v. Sturgeon*, 9 Pa. 321 (1848); *Sutter v. Trustees*, 42 Pa. 503 (1862); s. c., 3 Grant. 336 (1862); *Winebrenner v. Colder*, 43 Pa. 244 (1862); *Schnorr's Appeal*, 67 Pa. 138 (1870); *Roshi's Appeal*, 69 Pa. 462 (1871); *Gass's Appeal*, 73 Pa. 39 (1873); *Sawer v. Gosser*, 1 W. N. C. 55 (1874); *Sarver's Appeal*, 81* Pa. 183 (1874); *McAuley's Appeal*, 77 Pa. 397 (1875); *Jones v. Wadsicorth*, 4 W. N. C. 514 (1877); *Kerr's Appeal*, 89 Pa. 97 (1879); *Landis's Appeal*, 102 Pa. 467 (1883); *Appeal of the First M. E. Church of Scranton*, 16 W. N. C. 245 (1885); *Krecker v. Shirey*, 163 Pa. 534 (1894); *Bliem v. Schultz*, 170 Pa. 563 (1895); *St. Paul's Reformed Church v. Hower*, 191 Pa. 306 (1899); *Bose v. Christ*, 193 Pa. 13 (1899); *Greek Church v. Orthodox Church*, 195 Pa. 425 (1900); *Bishop's Estate*, 200 Pa. 598 (1901); *Dochkus v. Lithuanian Soc.*, 206 Pa. 25 (1903).

that the connection formed with the Associate Reformed Synod was not a departure in any essential particular from the doctrines of the church as they were known and acted upon when the land was first bought. Mr. Chief Justice Lowrie went further in his opinion and declared that a congregation could, without losing title to its property, introduce such changes from time to time as a proper advancement seemed to justify. For example, said he: "It will not be pretended that the Jewish Church would have lost its legitimate succession and its synagogues, if it had generally believed in the Messiah and become Christian, for this would have been a proper spiritual growth within the limits of social identity." It must be observed that these sentiments are not legally sound. If property had been purchased by a Jewish congregation and a majority of that congregation should subsequently desire to embrace Christianity and turn the synagogue into a church, there is no question that the rights of the minority to the property would be fully protected. In *Schnorr's Appeal*, 67 Pa. 138 (1870), Mr. Chief Justice Sharswood said: "The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute began, are the standard for determining which party is right: *McGinnis v. Watson*, 5 Wright, 9. If the opinion of Chief Justice Lowrie in this last case may seem to controvert any of these positions and to hold that a congregation may change a material part of its principles or practices without forfeiting its property, on the ground that to deny this 'would be imposing a law on all churches that is contrary to the very nature of all intellectual and spiritual life,' and because the guarantee of freedom to religion forbids us to understand the rule in this way, I ask leave most respectfully to enter against it my dissent and protest. . . . The guarantee of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches. It secures to individuals the right of withdrawing, forming a new society, with such creed and government as they please, raising from their own means another fund and building another house of worship; but it does not confer upon them the right of taking the property

consecrated to other uses by those who may now be sleeping in their graves.”

This criticism does not mean that the decision in *McGinnis v. Watson* is questioned. There is abundant authority to the effect that a mere change of synodical connection is not necessarily a substantial departure from the church doctrines. But the apparent idea of Chief Justice Lowrie that a substantial change if in the line of advancement (as interpreted by the court) would not work a forfeiture of property rights, is erroneous.

§15. *Alliance with New Synod.*—But what is such a substantial change? As just observed, a new alliance with a synod or other governing body, if unconnected with any doctrinal changes, is not necessarily a departure from fundamental principles, hence in cases where the church property has been bought by the congregation itself without any understanding as to any particular connection of this kind or where the deed of gift has not expressly or impliedly limited the use of the property to a congregation with a particular synodical connection, such new alliance or severance of an old one will not work a forfeiture of property rights.

In *Presbyterian Congregation v. Johnston*, 1 W. & S. 9 (1841), it appeared that a grant of land had been made to “The Society of English Presbyterians and their Successors in and near the Borough of York.” At a subsequent date the congregation became affiliated with the General Assembly of the Presbyterian Church in the United States. Still later this assembly was split into two sections, each claiming to be the true “assembly.” The congregation in question refused to become affiliated with either. A minority then claimed that this refusal was a departure from the established customs of the church, and that they who were willing to continue their connection with whichever general assembly should be determined to be the true one, were entitled to the property. The court (Gibson, C. J., delivering the opinion) decided that inasmuch as there was no general assembly when the grant was first made, there could have been no implied understanding that any connection with such a body, either should or should not continue, therefore the action of the majority in repudiating such connection was entirely

justifiable. It was further observed, which is in any case self-evident, that the grant once having been made, no subsequent action of the congregation can alter the terms upon which the property is held.³¹

On the other hand, wherever the property has been acquired with an express or implied stipulation on the part of the donor or agreement among the purchasers contemplating a continued connection with a particular governing body, the congregation will forfeit its rights to the property by severing this connection.³² In *Roshi's Appeal*, 69 Pa. 462 (1871), Mr. Justice Sharswood said: "The principle which governs in such cases is old and well settled, and has been frequently asserted by this court. Whenever a church or religious society has been originally endowed in connection with or subordinate to some ecclesiastical organization and form of church government, it can no more unite with some other organization or become independent, than it can renounce its faith or doctrine and adopt others."

§16. *Alteration of Creed*.—Aside from the matter of synodical connection a congregation may alter its forms of worship in minor details without losing its property rights,³³ but a change made in essential doctrinal matters, even if brought

³¹Other authorities to the effect that a mere change of synodical connection does not work a forfeiture (in the absence of an express or implied condition in the deed or will) are *McGinnis v. Watson*, 41 Pa. 9 (1861); *Trustees v. St. Michael's Evangelical Church*, 48 Pa. 20 (1864); *St. Paul's Church Case*, 2 W. N. C. 677 (1876); *Ramsey's Appeal*, 88 Pa. 60 (1878); *Ehrenfeldt's Appeal*, 101 Pa. 186 (1882); *United Zion's Congregation v. German Evangelical Church*, 5 Kulp, 441 (1890); *Aitkin's Estate*, 158 Pa. 541 (1893).

³²*Means v. Presbyterian Church*, 3 W. & S. 303 (1842); *App. v. Lutheran Congregation*, 6 Pa. 201 (1847); *Trustees v. Sturgeon*, 9 Pa. 321 (1848); *Sutter v. Trustees*, 42 Pa. 503 (1862); s. c. (dissenting opinions), 3 Grant, 336 (1862); *Winebrenner v. Colder*, 43 Pa. 244 (1862); *Schnorr's Appeal*, 67 Pa. 138 (1870); *Sawer v. Gosser*, 1 W. N. C. 55 (1874); *Jones v. Wadsworth*, 4 W. N. C. 514 (1877); *Appeal of First M. E. Church of Scranton*, 16 W. N. C. 245 (1885); *Krecker v. Shirey*, 163 Pa. 534 (1894); *Bliem v. Schultz*, 170 Pa. 563 (1895); *Bose v. Christ*, 193 Pa. 13 (1899); *Greek Church v. Orthodox Church*, 195 Pa. 425 (1900); *Dochkus v. Lithuanian Society*, 206 Pa. 25 (1903).

³³*Kisor's Appeal*, 62 Pa. 428 (1869); *St. Paul's Church Case*, 2 W. N. C. 677 (1876); *Fernstler v. Seibert*, 114 Pa. 196 (1886); *Schlichter v. Keiter*, 156 Pa. 119 (1893). See also *Cushman v. Church*, 162 Pa. 280 (1894), s. c., 188 Pa. 438 (1898), in which the case turned upon the perpetuation of a memorial window, and *Manning v. Shoemaker*, 7 Pa. Superior Ct. 375 (1898), where it was held that a split in the Church itself had no effect upon the property of an independent missionary society.

about by constitutional means, will work a forfeiture in favor of a minority or in some instances in favor of the heirs of the original donors or purchasers. What is such a change is necessarily a question to be determined from the facts of each particular case. Hiring a minister not in harmony with the church doctrines³⁴ or any other action which results in the introduction of new measures may have the effect indicated.³⁵ Any action even if of a trivial nature if brought about by unconstitutional means will have the same result and will work a forfeiture of the property of the church.³⁶

§17. *Christianity a Part of the Common Law.*—It has long been the rule in England that Christianity is part of the common law.³⁷ In the past this principle in that country has been the basis of many decisions. Thus it is said that any act of an individual or even a public law, if contrary to the divine law (by which law the commands in the Scriptures is meant), is illegal and void.³⁸ In consequence of this rule all religions other than the Christian religion and even all sects not in harmony with the prevailing ideas in England were classed as false. Any act tending to destroy Christianity or to promote a false religion or sect was by the common law illegal.³⁹ Any gift made for the purpose of propagating any such "false" doctrines was said to be for a "superstitious use" and was therefore avoided;⁴⁰ thus gifts for the support of "popish" orders or schools, or to circulate "popish" literature,⁴¹ or for the purpose

³⁴*Ebaugh v. Hendel*, 5 Watts, 43 (1836); *Sutter v. Trustees*, 42 Pa. 503 (1862); *Schnorr's Appeal*, 67 Pa. 138 (1870); *Sarver's Appeal*, 81* Pa. 183 (1874).

³⁵*App. v. Lutheran Congregation*, 6 Pa. 201 (1847); *Jones v. Wadsworth*, 4 W. N. C. 514 (1877); *Landis' Appeal*, 102 Pa. 467 (1883).

³⁶*Sutter v. Trustees*, 42 Pa. 503 (1862); *Winebrenner v. Colder*, 43 Pa. 244 (1862); *Schnorr's Appeal*, 67 Pa. 138 (1870); *Gass's Appeal*, 73 Pa. 39 (1873); *Sawer v. Gosser*, 1 W. N. C. 55 (1874); *McAuley's Appeal*, 77 Pa. 397 (1875); *Henry v. Deitrich*, 84 Pa. 286 (1877); *Kerr's Appeal*, 89 Pa. 97 (1879); *St. Paul's Reformed Church v. Hower*, 191 Pa. 306 (1899).

³⁷*Omychund v. Barker*, 1 Atkin, 21 (1744); *Cowan v. Milbourn*, L. R. 2 Ex. 230 (1867).

³⁸*Doctor and Student*, 16th ed., p. 11; *Broome's Legal Maxims*, 19; *Noy's Maxims*, 2; 1 *Broome & Hadley*, 35; *Forbes v. Cochrane*, 2 B. & C. 448 (1824).

³⁹*Rex v. Lady Portarlington*, Salk, 162 (1692).

⁴⁰*De Garcin v. Lawson*, 4 Ves. Jr. 433, n. (1798); *Croft v. Evetts*, Moore, 784 (1085); *Cary v. Abbot*, 7 Ves. Jr. 490.

⁴¹*De Themmines v. DeBonneval*, 5 Russ. 288 (1828).

of having masses said for the repose of souls,⁴² etc., were all classed as illegal and void. There were also a number of acts of Parliament in England, for example, the statutes of Mortmain, 37 Hen. VIII, 1 Edw. 6, Chap. 14, 9 Geo. II, Chap. 36, which had in view the same purpose, and which it is unnecessary further to enumerate.

§18. *Rule as Applied to Pennsylvania.*—How far if at all are these principles applicable to Pennsylvania? If applicable, are they affected by our constitutional provisions guaranteeing religious freedom? As early as 1815, in the case of *Commonwealth v. Sharpless*, 2 S. & R. 91, it was intimated that any act tending to corrupt religion would be illegal, and a few years later, in the case of *Updegraph v. Commonwealth*, 11 S. & R. 394 (1824), it was definitely asserted that Christianity is a part of the common law of Pennsylvania.

The question in that case was as to the constitutionality of the act prohibiting blasphemy, 1 Sm. L. 6. It was held that the constitutional provision providing that no preference shall ever be given to any religious establishments or modes of worship is not in conflict with the rule that Christianity is part of the common law. The meaning of the clause was intimated to be that no preference shall be given to one Christian sect over another; the court asserted what was called "the constitutionality of Christianity." The main ground of the decision, however, was not that the law was valid as upholding Christianity, but that it was a proper police regulation tending to prevent breaches of the peace. It was said that words vilifying the common religion of the country should be restrained, no matter what that religion might happen to be. But nevertheless the English rule that Christianity is part of the common law was fully sanctioned and has since been reaffirmed in a number of cases.⁴³ In *Harvey v. Boies*, 1 Penrose & Watts, 12 (1829), the court went so far as to say that Christianity is the mark of special favor, at least to the extent of preserving it from revilement.

⁴²*West v. Shuttleworth*, 2 Myl. & K. 684 (1835); *Da Costa v. De Pas*, 1 Amb. 228 (1754); *Gates v. Jones' Case*, cited in 2 Vern. 266; *Smart v. Prujean*, 6 Ves. 560 (1801); *Atty. Gen. v. Power*, 1 Ball & Beat. 145 (1809). For definition of "superstitious use" see Boyle on *Charities*, p. 242.

⁴³*Harvey v. Boies*, 1 Penrose & Watts, 12 (1829); *Mohney v. Cook*, 26 Pa. 342 (1855); *Zeisweiss v. James*, 63 Pa. 465 (1870).

§19. *Doctrine of Superstitious Uses in Pennsylvania.*—The main principle being admitted, how far do its consequences follow? It seems inevitable that the whole doctrine of superstitious uses in England should be swept away by our constitution, putting all sects upon an equality; indeed it seems incredible that any American courts should consider an argument based upon such a theory, but it has been intimated by *dicta* that there is such a thing as a “superstitious” use in this country, which would be prohibited by the statute of Mortmain,⁴⁴ although no decisions are recorded based upon such an idea. On the contrary, most of the applications of the English doctrine have been distinctly repudiated. As there are no “dissenting” sects in this country in the English sense, gifts for the support of any religious body are not only upheld but fostered,⁴⁵ and bequests left to have masses said for the repose of one’s soul are likewise supported and the wishes of the testator carried out.⁴⁶ On the other hand, the rule that Christianity is part of the common law results in the destruction of gifts which are for a purpose actually opposed to the Christian religion. Thus a gift to an infidel society for the purpose of more widely disseminating its doctrines is void.⁴⁷ But the mere fact that the donor stipulates that there shall be no direct assistance to Christianity from his bounty or that unchristian influences shall not be excluded is not enough to make the gift unlawful,⁴⁸ nor can it be avoided merely on the ground that the doctrines of the society to be benefited are extravagant and foolish.⁴⁹ It seems reasonable to suppose that a gift for the

⁴⁴*M. E. Church v. Remington*, 1 Watts, 218 (1832).

⁴⁵*Witman v. Lez*, 17 S. & R. 88 (1827); *M. E. Church v. Remington*, 1 Watts, 218 (1832); *Pickering v. Shotwell*, 10 Pa. 23 (1848); *Thompson v. Swoope*, 24 Pa. 474 (1855); *Price v. Maxwell*, 28 Pa. 23 (1857); *Missionary Society’s Appeal*, 30 Pa. 425 (1858); *Brendle v. German Reformed Congregation*, 33 Pa. 415 (1859); *Evangelical Association’s Appeal*, 35 Pa. 316 (1860); *Burton’s Appeal*, 57 Pa. 213 (1868); *Henderson v. Hunter*, 59 Pa. 335 (1868); *Seller’s Church Petition*, 139 Pa. 61 (1890); *Frazer v. St. Luke’s Church*, 147 Pa. 256 (1892).

⁴⁶*Rhymer’s Appeal*, 93 Pa. 142 (1880); *Appeal of Seibert and Bradley*, 18 W. N. C. 276 (1886); *O’Donnell’s Estate*, 209 Pa. 63 (1904).

⁴⁷*Zeisweiss v. James*, 63 Pa. 465 (1870). See also *Knight’s Estate*, 159 Pa. 500 (1894).

⁴⁸*Vidall v. Girard’s Ex’rs.*, 2 How. 127 (1844); *Manners v. Library Co.*, 93 Pa. 165 (1880).

⁴⁹*Schreiber v. Rapp*, 5 Watts, 351 (1836). See, however, *Application of First Church of Christ, Scientist, for a Charter*, 205 Pa. 543 (1903).

purpose of teaching the doctrines of any religion, such as Judaism or Brahminism would be upheld, unless there were an express purpose also to vilify or attack Christianity. The remarks of Mr. Justice Story in *Vidal v. Girard's Executors*, in 2 Howard, at pp. 198-199, were very guarded on this point, however, and the other view might possibly be taken by some judges, but surely could not long survive.

§20. *Exemption of Clergymen from Civil Duties.*—As a corollary to the rule just discussed it may be remarked that in England clergymen have from ancient times, by virtue of their offices, been exempted from certain of their civil duties, such as acting as bailiff, jurymen, etc.⁵⁰ There is very little authority in Pennsylvania on this point, but the custom follows the English rule. In *Guardians of the Poor v. Greene*, 5 Binn. 554 (1813), the court reasserted it in full.⁵¹

§21. *Laws Prohibiting Work on Sunday—Their Constitutionality.*—Not only the laws against blasphemy, but also the law prohibiting the performance of worldly labor on the "Lord's Day, commonly called Sunday," 3 Sm. Laws, 177, were passed in pursuance of the same idea that Christianity is part of the common law and should be the mark of especial favor. Indeed, it has been said in England that even in the absence of statutes the Sabbath must be observed,⁵² and in Pennsylvania it has been held that there is by the common law a "Sunday Peace," to break which is a misdemeanor.⁵³ This act prohibit-

⁵⁰Case of the *Vicar of Dartford*, 2 Str. 1107; *Chambers Case*, Andrews, 353 (1738); *Doctor Lee's Case*, 1 Mod. 282 (1682); *Anon.*, 6 Mod. 140; 2 *Coke's Inst.*, Cap. I, VIII; 1 *Ibid.*, Sec. 96; *Fitz Nat. Brei.*, 175; *Gibson's Codex*, 215.

⁵¹There are one or two other interesting cases where conscience and civil duty conflict. In Pennsylvania it has long been the custom to excuse a man from jury duty in a capital case if he expresses conscientious scruples against inflicting the death penalty. It was ruled that this was a proper cause for excusing a juror in *Com. v. Leshner*, 17 S. & R. 155 (1827), but Mr. Justice Gibson dissented. He thought all alike should be compelled to perform this disagreeable duty. He took the same view in *Simmon's Executors v. Gratz*, 2 Penrose & Watts, 412 (1831), in which case he refused to excuse a Jew from attendance at court on Saturday. See also *Stanbury v. Marks*, 2 Dallas, 213 (1793), in which a Jew was fined £10 for refusing to testify on Saturday—his Sabbath.

⁵²*Fish v. Broket*, Plowden, 265 (1563); *Mumford v. Hitchcocks*, 14 C. B. N. S. 361 (1863); *Swann v. Broome*, 3 Burrowes, 1595 (1764); *Broome's Legal Maxims*, 21; *Noy's Maxims*, 2; *Co. Litt.*, 135a.

⁵³*Com. v. Teaman*, 1 Phila. 460 (1853); *Com. v. Jeandelle*, 3 Phila. 509 (1859), s. c., 2 Gr. 506.

ing Sunday labor was undoubtedly passed for the purpose of protecting the Christian Sabbath from desecration, and hence it favors that religion to the exclusion of others. Its constitutionality was therefore questioned in *Com. v. Wolf*, 3 S. & R. 47 (1817), and again in *Specht v. Com.*, 8 Pa. 312 (1848). The act prohibiting the performance of worldly labor on Sunday unquestionably militates against the Jew and the Seventh-day Adventist, whose religion requires them to observe the seventh day of the week as their Sabbath, because they are deprived of two days' business instead of one. The construction adopted by the court therefore would seem to be necessarily that while one sect of the Christian religion cannot be favored above others, yet that one religion (*viz.*, Christianity) may be so favored. It was held, however, that even if the constitution prohibits laws from favoring one religion above another, yet there were other than religious reasons for supporting the act. It was said experience has proven that one day ought to be set aside and enforced as a day of rest in every country. That the first day of the week was chosen, not because it was the Christian Sabbath, but because it was already observed by the great majority of the people and therefore was the most convenient day to adopt. It has been suggested that being contrary to the constitutional provision the law should be declared void even though an otherwise proper regulation. It was argued that the motive prompting the passage of the law, even if it was as suggested, a desire to promote merely the civil welfare of the people (and this was said, not to be its motive), is immaterial, if in fact it does give a preference to one religious sect over another. However, the act has been adjudged valid, and the question is not likely to be reopened. Its effect is to make unlawful any act of worldly employment done on Sunday unless it be an act of necessity or charity. The meaning of the exception has been much broadened in recent years, so that many things formerly forbidden are now deemed not within the prohibition.⁵⁴

⁵⁴The Pennsylvania statute was modeled somewhat after the English act, 29 Car. II, Chap. 7, which makes unlawful all acts not of necessity or charity done in pursuance of one's ordinary calling. It is frankly admitted by English judges to have been passed in the interest of Christianity. *Fennell v. Ridler*, 5 B. & C. 406 (1826), in which a private act which could not possibly affect the public morals was punished because it was against religion. Owing to the wording of the

§22. *Religious Belief as Affecting the Competency of Witnesses.*—There is one other respect in which religious believers and Christians particularly are favored by the law. At

English act only work done in pursuance of one's calling is unlawful. *Drury v. Defontaine*, 1 Taunt, 131 (1808); *King v. Whitnash*, 7 B. & C. 596 (1827). The exception also is liberally construed. *Rea. v. Cox*, 2 Burr, 785 (1759); *King v. Younger*, 5 T. R. 449 (1793).

In Pennsylvania any work on Sunday not of necessity or charity is unlawful, whether it be in pursuance of one's ordinary calling or not. *Com. v. Eyre*, 1 S. & R. 347 (1815); *Com. v. Teaman*, 1 Phila. 460 (1853); *Johnston v. Com.*, 22 Pa. 102 (1853); *Omit v. Com.*, 21 Pa. 426 (1853); *Com. v. Jeandelle*, 3 Phila. 509 (1859); s. c., 2 Grant, 506; *Com. v. Brunner*, 3 Pa. C. C. 28 (1886); *Knorr v. Com.*, 4 Pa. C. C. 32 (1887); *Com. v. Matthews*, 2 D. R. 13 (1892), s. c. 152 Pa. 166 (1893). Amusements also are unlawful if conducted in a boisterous manner, *Com. v. Rees*, 10 Pa. C. C. 545 (1891), otherwise not, *Com. v. Meyers*, 8 Pa. C. C. 435 (1890). Each sale was formerly held to be a separate offense, *Duncan v. Com.*, 2 Pears, 213 (1874), but this is not now the law, *Friedeborn v. Com.* 113 Pa. 242 (1886). The seller only, not the buyer, is guilty, provided the purchase is merely for consumption. *Com. v. Hoover*, 25 Pa. Superior Ct. 133 (1904).

The exception of works done out of charity or necessity is of late years very liberally construed. The following are or may be works of necessity or charity: Traveling, *Jones v. Hughes*, 5 S. & R. 298 (1819); tending canal lock, *Murray v. Com.*, 24 Pa. 270 (1855); driving carriage, *Com. v. Nesbit*, 34 Pa. 398 (1859); running street cars, *Sparhawk v. Union Pass. Ry. Co.*, 54 Pa. 401 (1867); selling ice cream by innkeeper, *Com. v. Bosch*, 15 W. N. C. 316 (1884), but see *Com. v. Barry*, 5 Pa. C. C. 481 (1888); selling tickets for train to camp meeting, *Com. v. Fuller*, 4 Pa. C. C. 429 (1887); repairing broken rail of track, *Com. v. Fields*, 4 Pa. 434 (1887); selling meals in a restaurant, *Com. v. Hengler*, 15 Pa. C. C. 222 (1894); running freight and mail trains, *Com. v. Robb*, 3 D. R. 701 (1894); repairing cars, *Com. v. Bobb*, 17 Pa. C. C. 350 (1894). The following are not works of necessity or charity: Driving an omnibus, *Johnston v. Com.*, 22 Pa. 102 (1853); shaving customers, *Com. v. Stodler*, 15 Phila. 418 (1882); *Com. v. Waldman*, 8 Pa. C. C. 449 (1890); s. c., 140 Pa. 89 (1891); *Com. v. Mattern*, 24 Pa. C. C. 655 (1900); sale of liquors, *Omit v. Com.*, 21 Pa. 426 (1853); *Com. v. Brunner*, 3 Pa. C. C. 28 (1886); selling cigars, *Duncan v. Com.*, 2 Pears. 213 (1874); *Friedeborn v. Com.*, 113 Pa. 242 (1886); *Knorr v. Com.*, 4 Pa. C. C. 32 (1887); *Baker v. Com.*, 5 Pa. C. C. 10 (1887); selling milk, lemonade, etc., *Com. v. Martin*, 7 Pa. C. C. 154 (1889); pumping oil, *Com. v. Gillespie*, 10 Pa. C. C. 89 (1891); *Com. v. Funk*, 9 Pa. C. C. 277 (1890); selling soda water, *Com. v. Ryan*, 15 Pa. C. C. 223 (1894); selling papers and confectionery, *Sackville v. Com.*, 24 Pa. C. C. 565 (1900). The indictment in such cases must set forth specifically that the doing of the act was on Sunday, and, according to *Miller v. Com.*, 24 Pa. C. C. 513 (1901), must set forth that the act was not one of necessity or charity, although as to this there is room for doubt.

The effect of this act upon contracts and other relations created on Sunday is peculiar. Those contracts which can by any means be construed to be works of necessity or charity are held valid. *E. g.*, a subscription to a fund for building a church, *Dale v. Knepp*, 98 Pa. 389 (1881); a contract of marriage on Sunday is probably valid, *In re Ganguere's Estate*, 14 Pa. 417 (1850), and so is an engagement to marry, *Markley v. Kessering*, 2 Pennypacker, 187 (1882); *Fleischman v.*

common law no man could be admitted as a witness in any judicial proceeding unless he would take an oath to tell the truth.⁵⁵ At one time it was said only Christians could be witnesses, because they were thought to be the only ones capable of taking an oath,⁵⁶ but this was shown to be error by the case of *Omychund v. Barker*, 1 Atk. 21, Willes, 538 (1744), in which it was decided that any person who believed in a god who would punish in this world or in the next, was competent to take an oath and hence could be a witness, although non-Christians were said to be of less credit than Christians. The result of the decision, therefore, is that Christians are given by the common law the advantage over non-Christians in that their evidence is declared to be of more weight and believers are given a very

Rosenblatt, 20 Pa. C. C. 512 (1897); in the latter case it was intimated that such a contract was one both of necessity and of charity.

Ordinary contracts are valid and can be enforced if they are executed, *Com. v. Kendig*, 2 Pa. 448 (1846); *Therman v. Roberts*, 1 Grant, 261 (1855); *Uhler v. Applegate*, 26 Pa. 140 (1856); *Shuman v. Shuman*, 27 Pa. 90 (1856); *Baker v. Lukens*, 35 Pa. 146 (1859); *Foreman v. Ahl*, 55 Pa. 325 (1867); *Chestnut v. Harbaugh*, 78 Pa. 473 (1875); *Stevens v. Hallock*, 7 Kulp, 260 (1894); *Chambers v. Brew*, 18 Pa. C. C. 399 (1896); and although a judgment note may have been given on Sunday, if judgment is entered on a week-day it will not be reopened, *Thomas v. Van Dyke*, 23 Pa. C. C. 385 (1898); *Hodgson v. Nesbit*, 25 Pa. C. C. 78 (1901); but see *Whitmire v. Montgomery*, 165 Pa. 253 (1895).

But executory contracts made on Sunday are not enforceable, *Kepner v. Kiefer*, 6 Watts, 231 (1837); *Foreman v. Ahl*, 55 Pa. 325 (1867); *Miley v. Wildermuth*, 4 W. N. C. 560 (1877); such a contract may, however, be ratified on a week-day. *Cook v. Forker*, 193 Pa. 461 (1899); courts may sit on Sunday and their acts are valid, *Huidekoper v. Cotton*, 3 Watts, 56 (1834); but many acts of court officers have been held void if done on Sunday—e. g., direction given to sheriff, *Stern's Appeal*, 64 Pa. 447 (1870); papers filed with Prothonotary, if he receives them in his official capacity, *Kaufman's Appeal*, 70 Pa. 261 (1871); issuing a warrant, *Com. v. De Puyter*, 16 Pa. C. C. 589 (1895); arrest for misdemeanor, 5 D. R. 635 (1896); a service of notice of dishonor of a draft is void if made on Sunday, *Rheem v. Carlisle Deposit Bank*, 76 Pa. 132 (1874); a promise on Sunday will not even operate to revive a debt barred by the Statute of Limitations, *Haydock v. Tracy*, 3 W. & S. 507 (1842); *Linn's Estate*, 2 Pears. 487 (1874); but see *Lea v. Hopkins*, 7 Pa. 492 (1848). A will made on Sunday is valid, *Beitenman's Appeal*, 55 Pa. 183 (1867). As to act of June 3, 1878, P. L. 160, prohibiting hunting and fishing on Sunday, see *Com. v. Rothermel*, 27 Pa. Superior Ct. 648 (1905).

⁵⁵ Phil. on Ev., 15; *Omychund v. Barker*, 1 Atkin, 21; *Lord Shaftsbury v. Lord Digby*, 3 Keb. 631, 2 Roll Abr. 686; *Rea v. Sutton*, 4 M. & S. 532.

⁵⁶ Britton, p. 135; Bracton, p. 116, Vol. II, p. 24a-41; Coke, 3 Inst. 65; 4 Inst. 278; Hale, Pleas of Crown, Vol. II, p. 279; Hawkin's Pleas of Crown, title Evidence; *Calvin's Case*, 7 Coke, 1, 17a.

great advantage over unbelievers, since the latter are excluded altogether from the witness stand. This is still the law in Pennsylvania, those persons who have no belief in God being incompetent to be witnesses.⁵⁷

⁵⁷*Quinn v. Crowell*, 4 Whart. 334 (1839); *Cubbison v. McCreery*, 2 W. & S. 262 (1841); *McFadden v. Com.*, 23 Pa. 12 (1853); *Blair v. Seaver*, 26 Pa. 274 (1856); *Com. v. Winnemore*, 2 Brewst. 378 (1867). For an exhaustive paper on this topic see "Oaths in Judicial Proceedings and their Effect upon the Competency of Witnesses," 42 (N. S.), *American Law Register*, 373-446.

CHAPTER IV.

TRIAL BY JURY.

§1. *Constitutional Provisions.*—The right to be secure in property and person and to suffer no deprivation of the one nor liberty of the other save by the judgment of his peers has long been one of the most treasured rights of every Englishman, guaranteed to him by *Magna Charta*.¹ It was secured to the first inhabitants of Pennsylvania by a law promulgated by William Penn before leaving England.² The denial of this right of trial by jury to the colonists of America was one of the principal causes of the Revolution,³ and after the separation from the mother country it was incorporated into the constitutions of the various states. In the Constitution of 1776 it was provided, Chap. 1, §11: "That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred;" and Chap. II, §25: "Trials shall be by jury as heretofore, and it is recommended to the Legislature of the state to provide by law against every corruption or partiality in the choice, return, or appointment of juries." Substantially the same provisions were placed in the Constitution of 1790, in somewhat shorter language, Art. IX, §6: "Trial by jury shall be as heretofore, and the right thereof remain inviolate." This section, appearing as Art. I, §6, in the Constitution of 1873, remains unchanged.

§2. *Meaning of "Heretofore."*—It will be observed that

¹For discussion of the origin of trial by jury see Pollock and Maitlands' *History of English Law*; Thayer on Evidence; Cooley, *Const. Lim.*, Chap. X.

²All trials shall be by twelve men, and as near as may be peers or equals, and of the neighborhood, and men without just exception. In cases of life there shall be first twenty-four returned by the Sheriff for a grand inquest, of whom twelve at least shall find the complaint to be true, and then the twelve men, or peers, to be likewise returned by the Sheriff, shall have the final judgment; but reasonable challenges shall be always admitted against the said twelve men or any of them."—Duke of York's Book of Laws, 100.

³See Declaration of Independence.

this clause, like so many others in our Bill of Rights, does not purport to create a new right, but only to preserve an existing one. "Trial by jury shall be as heretofore." To determine the extent of the constitutional guarantee it must be ascertained what the right of jury trial was "heretofore." In the first place, what is the meaning of "heretofore"? Does it mean prior to the enactment of the constitution or does it mean at common law? Whatever might be the meaning attached to it, if it had appeared for the first time in the Constitution of 1873, there can be no doubt that "heretofore" has reference to conditions as they existed at common law as modified by English statutes in force prior to the Revolution, since the same or substantially the same provision has been a part of our fundamental law from the foundation of the commonwealth. This is therefore the construction which has been placed upon it by the courts.⁴ At the same time it is reasonable to assume that if a law or rule of practice relative to jury trials has been in force from a time long prior to the enactment of the Constitution of 1873, the silence of the convention on the matter must be taken as a tacit acquiescence in such law or rule of practice.⁵

§3. *Summary Convictions.*—It follows from what has been said that a man is entitled to a trial by a jury of twelve men in any case involving his interests, provided he would have been so entitled prior to 1776, and not otherwise. This principle becomes important in considering the constitutionality of summary convictions, which has been many times argued in our courts. There are two classes of such convictions. The first class consists of those cases in which from ancient times no jury trial was allowable. Thus, as pointed out in *Byers v. Com.*, 42 Pa. 89 (1862), vagrants, disorderly persons, professional thieves, fortune tellers, beggars, etc., have from very ancient times been committed summarily by magistrates without any jury trial. Hence such persons can be so dealt with by our laws.⁶ The principles of this case have been uniformly followed in

⁴*Van Swartow v. Com.*, 24 Pa. 131 (1854); *Irwin v. Irwin*, 17 Leg. Int. 116 (1860); *Byers v. Com.*, 42 Pa. 89 (1862); *Com. v. Saal*, 10 Phila. 496 (1873).

⁵See *Smith v. The Times*, 178 Pa. 481 (1896).

⁶The English statutes of 7 Jam. I, C. 4; 17 Geo. II, C. 5; 23 Geo. III, C. 88; 5 Geo. IV, C. 83, are among those providing for the summary punishment of such offenders.

Pennsylvania, being applied to offences against municipal ordinances to enforce good order,⁷ breaches of the Sunday laws⁸ and many other similar offenses which have been enumerated in statutes but not in all cases specifically ruled upon by the courts.⁹

§4. *Summary Convictions Where the Offense is New.*—

The other class of summary convictions consists of those cases where the Legislature has created new offenses, unknown at the common law, and has provided that the offenders may be summarily tried and convicted without the intervention of a jury trial. In opposition to these laws it has been urged that the spirit of the constitutional clause preserving the jury trial inviolate is to protect all persons from summary trial and conviction in all cases other than those in which such convictions were allowed at common law or under statutes prior to 1776. That the framers of the constitution, or the people who adopted it, never meant to leave the way open for the Legislature to create offenses heretofore entirely unknown and to provide that persons accused of them should be tried other than by a jury. The opposite construction would leave the liberties of the citizen at the mercy of the Legislature.

On the other hand, it is said that one is not entitled to trial by jury in any case where he cannot point to such a trial allowed in just such a case at common law. Since the offense was unknown at common law, there was, of course, no trial by jury, and hence none can legally be demanded under the constitution. This reasoning has received the support of judicial authority in this state,¹⁰ but it is difficult to believe it to be sound construction. It is foreign to the spirit, if not the letter, of the constitution. The purpose of this clause of the Bill of Rights clearly was to protect the citizen in his right to a jury trial in all cases where heretofore he was so protected. For a new offense created by the Legislature the citizen was at common

⁷*Jones v. Wilkesbarre*, 2 Kulp, 68 (1881).

⁸*Com. v. Wuldmann*, 140 Pa. 89 (1891).

⁹See Acts of April 22, 1794, §2, June 13, 1836, §28-30, P. L. 793; April 13, 1867, §1, P. L. 1230; April 21, 1869, §7-10, P. L. 84; May 8, 1876, §1, 2, P. L. 154; June 13 (1883), §1, P. L. 100.

¹⁰*Van Swartow v. Com.*, 24 Pa. 131 (1854); *Com. v. Andrews*, 24 Sup. 571 (1904); but see *Com. v. Saal*, 10 Phila. 496 (1873); *Com. v. Walter*, 2 Blair Co. 90 (1901).

law liable to no penalty at all. Then surely the constitutional clause must have meant to guarantee him a right to have a jury to determine his guilt or innocence in such case. Where he was formerly subject to a penalty if guilty he is guaranteed a jury trial, but under this view of the constitution he is not protected in such right in cases where formerly he was subject to no penalty at all. The true construction of the clause would seem to be that he can be summarily tried in those cases in which he could have been so tried at common law, but in no others. No other view seems consistent with the spirit of the constitution.¹¹

§5. *Trial by Jury in Civil Cases.*—In civil cases the same general principles prevail. Wherever a property right is in dispute, or a question of liability either in tort or contract is to be decided, both parties have a right to have the question determined by a jury, provided they would have had such right at common law. The Legislature cannot establish any other tribunal which shall have jurisdiction of the case to the exclusion of the ordinary forms of trial.¹² Such right, however, has reference only to the main issue in the case. There is no right to a jury trial on collateral or incidental issues.¹³

On the other hand, if at common law the right claimed did not exist, but has been given by the Legislature, the manner by which the questions of fact involved may be determined may be constitutionally fixed by the same instrumentality. Thus, in *Pennsylvania Hall*, 5 Pa. 204 (1847), it was decided that a plaintiff seeking to recover damages allowed solely by act of assembly for the destruction of his building by a mob was limited to the remedy provided by the act, and could not complain because a jury of twelve men was not to determine the amount of his loss.¹⁴ In any case where the state allows itself to be sued

¹¹It has been determined that one guilty of offenses against military law is not entitled to a jury trial, *Moore v. Houston*, 3 S. & R. 169 (1817); and that infants may be committed to the house of refuge without such trial, *ex parte Crouse*, 4 Whart. 9 (1839); a similar ruling was made in the cases sustaining the Juvenile Court Law, *Com. v. Fisher*, 27 Sup. 175 (1905), 213 Pa. 48 (1905).

¹²*Rhines v. Clark*, 51 Pa. 96 (1865). Municipal corporations, however, are not entitled to the benefit of this clause. *Borough of Dunmore's Appeal*, 52 Pa. 374 (1866).

¹³*Powel's Estate*, 209 Pa. 76 (1904).

¹⁴See also *Northern Liberties v. St. John's Church*, 13 Pa. 104 (1850); *Ewing v. Filley*, 43 Pa. 384 (1862); *Simpson v. Neill*, 89 Pa. 183 (1879); *School Dist. v. Pittsburg*, 184 Pa. 156 (1898).

it can fix the mode of trial without a jury, since at common law the state could not be sued at all.¹⁵ Upon the same principle acts fixing the manner of assessing damages for the opening of streets or for the taking or injuring of any property in the exercise of the power of eminent domain were constitutional,¹⁶ prior to the constitution of 1873, but by Art. XVI, §8 thereof, a jury trial in such cases on appeal is specifically guaranteed.¹⁷ Such right of appeal is, however, secured to the citizens only in cases in which the right to damages existed prior to, or by virtue of, the Constitution of 1873, and not to cases where the right to recover damages has been created since that time.¹⁸

§6. *Summary Civil Remedies.*—There are certain summary civil remedies, such as those giving a landlord the right to recover possession of premises upon the refusal of his tenant to vacate at the end of his term, which have been attacked on the ground that they infringe the right of trial by jury. They have, however, been upheld because in all of them the right of appeal and ultimate trial by jury in the Common Pleas courts is preserved to the litigants. This is thought to be a sufficient saving of the right of jury trial.¹⁹

¹⁵*Ligat v. Com.*, 19 Pa. 456 (1852).

¹⁶*McMasters v. Com.*, 3 Watts, 292 (1834); *In re District of Pittsburgh*, 2 W. & S. 320 (1841); *Fenelon's Petition*, 7 Barr, 173 (1847); *Hancock St.*, 18 Pa. 26 (1851); *Paschall St.*, 81 Pa. 118 (1876).

¹⁷The provision is as follows: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury, according to the course of the common law." See also the act of June 13, 1874, P. L. 283.

¹⁸*South Lebanon Twp. School Dist.'s Petition*, 22 Pa. Superior, 330 (1903).

¹⁹See acts of March 21, 1772, 1 P. L. 370, and Dec. 14, 1863, P. L. (1864), 1125, and the cases of *Haines v. Levin*, 51 Pa. 412 (1866); *Kinley v. McFillen*, 6 Phila. 35 (1865); *Wynkoop v. Cooch*, 89 Pa. 450 (1879); act 1st May, 1861, Sec. 4, providing for collection of wages by distress is unconstitutional, *Linderman v. Reber*, 1 Woodw. 82 (1861). The state may in the exercise of its police power destroy property without a jury trial. *In re Northern Liberty Hose Co.*, 13 Pa. 193 (1850).

§7. *Jury Trial in Equity and Orphans' Court Cases.*—

The right to a jury trial in civil cases exists only in those cognizable in courts of common law. Cases subject to the jurisdiction of equity are not and never have been triable by a jury as a matter of right; the facts on the contrary are found by the court, sometimes assisted by a master. It follows that in those cases properly cognizable by equity courts there is no right to a jury trial under the constitution, since the courts of chancery were in existence long prior to 1776.²⁰ On the other hand, the line between the jurisdiction of law and equity must be maintained. The Legislature cannot give to equity exclusive jurisdiction over cases formerly triable by a jury at common law. This would conflict with the constitution which secures to individuals the right to try all common law cases by a jury of twelve men.²¹ Thus an act is unconstitutional which purports to give courts of equity the right to determine the title to land when such question would previously have been tried by an action of ejectment or other legal proceeding.²² Acts are constitutional, however, which in the exercise of legislative discretion merely bring the facts within the jurisdiction of equity. Thus acts declaring premises used for the illegal sale of liquor to be a nuisance are valid, and equity can then act as in other cases.²³ It is also well settled that matters exclusively cognizable in the Orphan's Court can be disposed of therein according to the usual practice, without a trial by jury.²⁴

²⁰*Phillip's Appeal*, 68 Pa. 130 (1871).

²¹*Haines' Appeal*, 73 Pa. 169 (1873).

²²*North Pa. Coal Co. v. Snowden*, 42 Pa. 488 (1862); *Norris's Appeal*, 64 Pa. 275 (1870); *Tillmes v. Marsh*, 67 Pa. 507 (1871); *Grubb's Appeal*, 90 Pa. 228 (1879); *Washburn's Appeal*, 105 Pa. 480 (1884); *Duncan v. Iron Works*, 136 Pa. 478 (1890); *Penna. Co. v. Junction Co.*, 204 Pa. 356 (1903); *Penna. Canal Co. v. Turnpike Co.*, 1 D. R. 663 (1892).

²³*Wishart v. Newell*, 4 Pa. C. C. 141 (1887); *New Castle v. Raney*, 6 Pa. C. C. 87 (1888).

²⁴The origin of the Orphans' Court is so remote and its practice was so well established prior to the Constitution of 1873 that few questions as to the right to a jury trial therein have arisen. It was, however, argued in *Gallagher's Estate*, 10 Pa. District Rep. 733 (1901), that the basis of the claim being an alleged tort, trial must be by jury. Since the "exclusive jurisdiction of the Orphans' Court in administration and distribution of decedents' estates existed long prior to the adoption of the constitution," trial by jury "as heretofore" was held not to be violated by the practice of the court. The jurisdiction of the Orphans' Court has been enlarged by various acts of Assembly, but the method of trial has never been by jury. See also *Wimmers' Appeal*, 1 Wharton, 96 (1836); *Horner v. Hasbrouck*, 41 Pa. 169 (1862).

§8. *Regulations to Expedite the Business of the Courts.*—

It has already been said that the right of trial by jury is sufficiently preserved within the meaning of the constitution, if it be allowed to the litigant upon appeal. The fact that the case is tried without a jury in the first instance is not necessarily an infringement of the constitutional right. The obvious purpose of these summary trials of cases both civil and criminal is to advance the business of the courts. This method is much more expeditious, and the right of appeal gives either party ample redress if he feels aggrieved by the decision of a magistrate or justice of the peace.

Any reasonable regulations tending toward expediting the court's business are proper, so long as they are not of such a nature as in fact to seriously impede or interfere with the right of appeal;²⁵ and any similar regulation of the trial itself, not of such a character as to impair it, is valid.²⁶

Similarly any reasonable rule of practice adopted by the court to enforce diligence in suitors is constitutional, as that on appeal from a magistrate, judgment of nonsuit may be entered if no one appears to prosecute the appeal.²⁷ The same is true of a rule of law designed to bring the defendant before the court promptly as by arrest.²⁸

Rules of practice and acts of assembly requiring defendants to file affidavits of defense and authorizing the entry of judgment for the plaintiff if no affidavit is filed or if filed is insufficient have also been uniformly upheld, although they have on numerous occasions been attacked.²⁹

Mr. Chief Justice Black, in *Hoffman v. Locke*, 19 Pa. 57

²⁵*Emerick v. Harris*, 1 Binn. 416 (1808); *McDonald v. Schell*, 6 S. & R. 241 (1820), requiring payment of costs before appeal taken; *Biddle v. Com.*, 13 S. & R. 405 (1825), requiring oath that appeal is not taken for delay. See also, as to the same point. *Thompson v. White*, 4 S. & R. 135 (1818); *Com. v. McCann*, 174 Pa. 19 (1896), as to regulating method of appeal.

²⁶*Warren v. Com.*, 37 Pa. 45 (1860); *Hartsell v. Com.*, 40 Pa. 462 (1861), as to standing aside and challenging jurors.

²⁷*Lloyd v. Toudy*, 4 W. N. C. 225 (1877).

²⁸*White v. Thielens*, 106 Pa. 173 (1884); *Slingluff v. Sisler*, 196 Pa. 121 (1900).

²⁹*Vanatta v. Anderson*, 3 Binn. 417 (1811); *Hoffman v. Locke*, 19 Pa. 57 (1852); *Laurance v. Borm*, 86 Pa. 225 (1878); *Randall v. Weld, Jr.*, 86 Pa. 357 (1878); *Honeywell v. Tonery*, 5 Kulp, 360 (1889); *Neale v. Dempster*, 184 Pa. 482 (1898).

(1852), said: "I am ignorant of any provision (in the constitution) which secures to the good people of this commonwealth the privilege of making false defenses against honest claims. The (affidavit of defense) law is not only constitutional, but eminently wise, just and necessary. It is no tyranny to require that a good defense shall be fully and fairly stated on the record, and no hardship to verify it on oath. Still less is it a subject of reasonable complaint that a judgment may be rendered against a party who, upon his own showing, has no legal or equitable ground upon which he can resist it."

The power of the court to enter nonsuit when the facts do not warrant a submission of the case to the jury, is equally clear. It can be sustained both because it is not an impairment of the right of jury trial to give judgment against him who has not in law made out even a *prima facie* case, and also because the practice has existed from the earliest times.³⁰

§9. *Right of Court to Oversee Trial and Grant New Trials.*
 --Upon the same basis stands the court's power to have general oversight of the trial and the record of the whole proceedings and in proper cases to revise, or strike off judgments, or to correct obvious mistakes in the record, even after verdict.³¹ In *Com. v. Kocher*, 23 Pa. Superior Ct. (1903), it was said "the common law supervisory power of the court cannot be limited by legislation," because protected by the clause under discussion.

The right of the court to control the jury in its action and to set aside its verdict when against the weight of the evidence, or if the amount allowed as damages is excessive, or for other legal reasons, has also been recognized from the earliest times. It has been said that where the jury finds contrary to the law and evidence it is not only the right, but the "duty of the court to grant new trials forever."³² It is fully recognized that the court should be very cautious in overthrowing the solemn decision of twelve men, but it has never been seriously doubted that such action is constitutional and proper.³³

³⁰*Munn v. Mayor*, 40 Pa. 364 (1861).

³¹*Banning v. Taylor*, 24 Pa. 289 (1855), motion to strike off judgment; *Parks v. Boynton*, 98 Pa. 370 (1881), amending record after verdict.

³²*Brawdy v. Brawdy*, 7 Pa. 157 (1847); *Irvin v. Irvin*, 34 Pa. 525 (1859).

³³See *Leeman v. Allen*, 2 Wils. 160 (1763); *Ash v. Ash*, Comb. 357; Forsyth on Trial by Jury, p. 164; 9 Bacom's Abr., 582, as to the practice

§10. *Right of Appellate Court to Review Action of Lower Court in Refusing New Trial.*—There was doubt at one time as to the constitutionality of a review by an appellate court of the discretion of a trial judge in refusing a new trial, where such review necessarily involves passing upon the facts. The plaintiff having tried his case before a jury of twelve men and having convinced them and the trial judge that he is entitled to damages of a certain amount, it has been argued that the appellate court cannot constitutionally deprive him of his verdict merely because their judgment as to the facts differs from the jury and the trial judge. At common law the appellate court did not review the facts. The Supreme Court of Pennsylvania denied its right to do so and particularly to reverse where it deemed the verdict to be excessive in amount, until the passage of the act of May 20, 1891, P. L. 101, which conferred such jurisdiction. In *Pa. Railroad Co. v. Allen*, 53 Pa. 276 (1866), Mr. Justice Strong said: "It may be and probably is the fact that the damages found were excessive and quite unreasonable. There must always be danger of such assessments, if a jury is at liberty to fix a valuation upon something that cannot be valued. But this is irremediable by us," and in *Pennsylvania R. R. Co. v. Spicker*, 105 Pa. 142 (1884), Mr. Justice Sterrett said: "In view of the testimony, the damages in this case appear to us to be exorbitant, but we have no right to grant relief on that ground alone. The power to do so was exclusively in the court below, and its refusal to exercise the discretion with which it was invested is not the subject of review here."³⁴ The act referred to gave the Supreme Court the general power to order verdicts to be set aside and new trials to be granted. The first notable case in which the Supreme Court was called upon to exercise such jurisdiction was *Smith v. The Times*, 178 Pa. 481 (1896), in which the contention was made that the jury had awarded excessive damages. The constitutionality of the act making the

in England. As to the Pennsylvania practice see *Kuhn v. North*, 10 S. & R. 399 (1823); *Smith v. The Times*, 178 Pa. 481 (1896). The court cannot coerce the jury into a verdict, *Miller v. Miller*, 187 Pa. 572 (1898); *Nugent v. Phila. Traction Co.*, 183 Pa. 142 (1897).

³⁴See also *Vallo v. U. S. Express Co.*, 29 W. N. C. 423 (1892), and the remark of Mr. Chief Justice Gibson at the close of his opinion in *Lehigh Bridge Co. v. Lehigh Coal and Navigation Co.*, 2 Rawle, 9 (1832), apparently *contra*.

innovation was questioned. It was contended that for the Supreme Court to overrule the judgment of the jury and the judge who presided at the trial was destructive of the right of trial by jury and therefore unconstitutional.

The court sustained the enlarged jurisdiction. It was said that inasmuch as it had long been the function of appellate courts to review the discretion of lower courts, there was no sufficiently strong reason why they should not do so in this instance. Mr. Justice Mitchell, who delivered the opinion of the court, said: "There remain the exceptions based on the amount of the verdict. This is a matter which has not been within our province to consider, until it was made so by the act of May 20, 1891, P. L. 101. It is a new power, a wide departure from the policy of centuries in regard to appellate courts, and so clearly exceptional in character that no case has been presented until now in which we have felt called upon to exercise it. But the duty has been put upon us by the law-making authority of the state, and we must perform it in accordance with the spirit of the enactment. The argument against the constitutional validity of the act has had the most deliberate consideration, but we do not think it can prevail.

"The provision of the constitution is that 'trial by jury shall be as heretofore, and the right thereof remain inviolate.' The same or very similar language is contained in the constitution of nearly every state, and the uniform construction by judges and text writers has been that the phrase 'shall be as heretofore' refers to the method of trial itself and means that it shall be preserved with its substantial elements, while the second phrase, 'the right thereof shall remain inviolate,' refers to the right to a jury trial before the *final* decision in all cases where it would have existed at the time of the adoption of the constitution. 'The object of the provision,' says Sharswood, J., 'was to preserve the jury as a tribunal for the decision of all questions of fact,' *Wynkoop v. Cooch*, 89 Pa. 450. 'The general idea intended to be conveyed by the constitutional guarantee of the trial by jury undoubtedly is that all contested issues of fact shall be determined by a jury, and in no other way. . . . It was not intended to tie up the hands of the Legislature so that no regulations of the trial by jury could be made, and it

has been held that the provision is not violated so long as the trial by jury is not substantially impaired, although it be made subject to new modes,' Sedgwick on Stat. and Const. Law, 2d ed., 496. 'Trial by jury is by twelve free and lawful men who are not of kin to either party, for the purpose of establishing the truth of the matter in issue. . . . Any legislation which merely points out the mode of arriving at this object, but does not rob it of any of its essential ingredients, cannot be considered an infringement of the right,' *Dowling v. The State*, 5 Sm. & M. (Miss.) 685. The definition of a jury adopted by so distinguished a jurist as Mr. Justice Miller, though more elaborate than this, is not materially different, Miller, Lectures on the Constitution, 511, and all the authorities agree that the substantial features, which are to be 'as heretofore,' are the number twelve, and the unanimity of the verdict. These cannot be altered, and the uniform result of the very numerous cases growing out of legislative attempts to make juries of less number, or to authorize less than the whole to render a verdict, is that as to all matters which were the subject of jury trials at the date of the constitution, the right which is to remain inviolate, is to a jury 'as heretofore' of twelve men who shall render a unanimous verdict. Matters not at that time entitled to jury trial, and matters arising under subsequent statutes prescribing a different proceeding, are not included. 'The constitutional provisions do not extend the right, they only secure it in cases in which it was a matter of right before. But in doing this they preserve the historical jury of twelve men, with all its incidents,' Cooley, Const. Limitations, 504 (ed. 1890), and see Black on Const. Law, 451, and cases there cited.

"The constitutional provision does not, however, go beyond the essentials of the jury trial as understood at the time. It does not extend to changes of the preliminaries, or of the minor details, or to subsequent steps between verdict and judgment. The jury as an institution has been frequently commented upon by the most learned historians as one of the most remarkable in the history of the world, for the length of time which it has existed and the zealous care with which it has been cherished by the English-speaking race. But while its essential features have been preserved, it has undergone great changes in all other

respects. Originally the sworn twelve were witnesses as well as jurors, and they were summoned from the vicinage on account of their knowledge of the case or its surroundings. Forsyth, Trial by Jury, Ch. VII, Sec. 3. The very qualifications which originally put them in the box, would now be generally held to exclude them, and send them, instead, to the witness stand. The jury is above everything a practical part of the administration of justice, and changes of non-essential features, in order to adapt it to the habits and convenience of the people have therefore always been made without hesitation, even in this country under the restrictions of the constitutions.

"The preliminary pleadings and mode of making up the issue are no part of the jury trial itself. The affidavit of defense law, now of general application in this state to actions *ex contractu*, originated by agreement among the members of the bar (see 3 Weekly Notes, 567), but there were two, according to Chief Justice Tilghman, who thought it an infringement of the right of trial by jury, and therefore never gave or took judgment under it. The Supreme Court had no such difficulty, *Vannatta v. Anderson*, 3 Binn. 417. Constitutional scruples, however, or the lack of other pegs on which to hang a writ of error, brought the question up again after the adoption of the present constitution, and this court again found no violation of the right, *Lawrance v. Borm*, 86 Pa. 225. So the statute for compulsory nonsuits, though a change in the jury trial, was held not an infringement of the right, *Munn v. Mayor of Pittsburg*, 40 Pa. 364; and other changes, such as the qualifications of the jurors themselves, the vicinage from which they shall come, the mode of selecting and summoning them, the regulation of venires, and, notably, even the matter of challenges, *Warren v. Com.*, 37 Pa. 45, have been held to be within legislative control. In the case last cited the whole subject of the constitutional provision, and the changes in jury trial under it, receives a very full and comprehensive discussion from Chief Justice Thompson. He quotes Chief Justice Tilghman, in *Biddle v. Com.*, 13 S. & R. 405, that the act for collection of a license fee by suit before a justice without a jury was not unconstitutional because it required an affidavit that injustice had been done, before an appeal could be taken to the common pleas. 'Laws such as these

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promote justice and leave the existence of trial by jury unimpaired, and that is all that is required by the expression in the constitution that trial by jury shall be as heretofore.' Chief Justice Thompson then proceeds: 'It is a mistake that is often made, to suppose that every modification of its accompanying powers detracts from the right. This is too narrow and rigid a rule for the practical workings of the constitution and the rights guaranteed by it in the particular in question. There is no violation of the right unless the remedy is denied, or so clogged as not conveniently to be enjoyed. . . . The framers of the constitution . . . undoubtedly knew and intended that legislation must provide the forms under which the right was to be enjoyed, and they meant no more than that it should be enjoyed under regulations which should not take away the right.' And in *Haines v. Levin*, 51 Pa. 412, the same principle is reiterated by Chief Justice Agnew: 'The great purpose of the constitution in providing that "trial by jury shall be as heretofore, and the right thereof remain inviolate," was not to contract the power to furnish modes of civil procedure in courts of justice, but to secure the right of trial by jury in its accustomed form before rights of person or property shall be finally decided,' *id.*, p. 414.

"The act of 1891 makes no change in the trial itself, nor does it deny the right. All that it does is to provide for another step between the verdict and final judgment, of exactly the same nature and the same effect as the long-established power of the lower courts. The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence with a view to securing a result not merely legal, but also not manifestly against justice, a power exercised in pursuance of a sound judicial discretion without which the jury system would be a capricious and intolerable tyranny which no people could long endure. This court has had occasion more than once recently to say that it was a power the courts ought to exercise unflinchingly. It has never been thought to be confined to the judge who heard and saw the witnesses, but

belongs to the full court in banc, and was freely exercised by this court when the judges sat separately for jury trials. See, for example, *Sommer v. Wilt*, 4 S. & R. 19. The act of 1891 vests a further power of revision, of the same nature, in this court. It is an authority to review the exercise of the discretion of the court below in this respect, as we do in some others. It is a power of review only, before final judgment, and does not violate the right to a jury trial nor even interfere with it in the particular case more than was or might have been done by the court below. We do not see that it transgresses the constitutional command."

Mr. Justice Dean concurred in the judgment, but dissented from the reasons advanced. He thought the judges of the Supreme Court could not estimate the amount of damages better than the jury and judge who heard the evidence, and that for them to exercise such a function was contrary to the constitution. The litigant prior to the act was secure (so far as the matter of excessive damages was concerned) after he had successfully resisted all efforts before the lower court to set aside the verdict. Now he must also run the gauntlet of the Supreme Court. Mr. Justice Dean therefore deemed the assumption of jurisdiction to be an infringement of the jury trial and hence illegal.³⁵

The court, however, is very loath to exercise this power. In *Stauffer v. Reading*, 208 Pa. 436 (1904), it was said *per curiam*: "The authority conferred by the act of May 20, 1891, P. L. 101, was first exercised by this court in 1897, six years after the passage of the act, in *Smith v. Times Publishing Co.*, 178 Pa. 481, in which it was said by the present chief justice: 'It is a new power, a wide departure from the policy of centuries in regard to appellate courts, and so clearly exceptional in char-

³⁵The court in *Smith v. The Times*, 178 Pa. 481 (1896), reversed generally, with a new venire. Mr. Justice Mitchell, speaking for himself alone, stated that he thought a sum should be named by the court, which the plaintiff might accept, or, if not satisfied with it, at his option take a new trial. Mr. Chief Justice Sterrett dissented from that view, holding that such a proceeding would be an infringement of the right of trial by jury. It is difficult to see this, however. If the court can reverse for excessive damages, there seems to be no reason why they cannot name a sum which the plaintiff can accept if he will and thus avoid the delay and expense attendant upon a new trial. This latter view was pointed out by Mr. Justice Dean in his concurring opinion.

acter that no case has been presented until now, in which we have felt called upon to exercise it.' The power has not since been exercised, and it will not be except in cases where the injustice in allowing an excessive verdict to stand is so manifest as to show clear abuse of discretion by the trial judge: *Schenkel v. Pittsburg, etc., Traction Co.*, 194 Pa. 182; *Stevenson v. Ebervale Coal Co.*, 203 Pa. 316."

§11. *Waiver of Jury Trial in Civil Cases.*—The last question on this topic is whether the constitutional right to a jury trial can be waived? In civil cases there is little or no question. If two individuals desire to waive a trial by jury and submit their differences to an arbitrator or agree to have them tried by a judge without a jury, there can be no constitutional objection to such action, and they will be bound by it. Indeed, the constitution itself provides expressly: "The parties by agreement filed may in any civil case dispense with trial by jury, and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same; and the judgment thereon shall be subject to writ of error as in other cases."³⁶

This provision was merely declaratory of existing law;³⁷ such trial, however, cannot be waived by implication, it must be done expressly.³⁸

Voluntary submissions of disputes to arbitrators (if otherwise legal) will be upheld and enforced as not contrary to the constitution, but no compulsory submission to arbitration and none which can be forced upon either party without his consent is valid, and any law providing for such compulsory arbitration is unconstitutional.³⁹

§12. *Waiver of Jury Trial in Criminal Cases.*—As to waiver of jury trial in criminal cases there is more doubt. If the accused person admits his guilt and formally enters a plea accordingly, there is, of course, no question at issue and no neces-

³⁶Art. V, §27. This clause is not self-executing, *Com. v. Mitchell*, 80 Pa. 57 (1875).

³⁷*Krugh v. Lycoming Fire Ins. Co.*, 77 Pa. 15 (1874); *City of Philadelphia v. Linnard*, 97 Pa. 242 (1881).

³⁸*Trimble's Appeal*, 6 Watts, 133 (1837); *Lauman v. Young*, 31 Pa. 306-310 (1858).

³⁹*Cutler v. Richly*, 151 Pa. 195 (1892).

sity for a trial at all, although in capital cases the court will hear evidence to fix the grade of the offense. But where the defendant denies his guilt, can he, even with his own consent, be constitutionally tried in any way save by a jury of twelve men. In *Com. v. Shaw*, 1 Pitts. 492 (1858), it was held that a prisoner consenting to be tried by a jury of eleven men (one juror having become ill) was illegally convicted. The charge in that case was attempted abduction of a negro slave. The court went into an elaborate review of the authorities and held that trial by jury could not be waived in that case, and used language indicating an opinion that it could not be waived in any criminal case. An exactly similar decision is that of *Com. v. Byers*, 5 Pa. County Ct. 295 (1888). In both these cases the record was irregular because it showed that twelve jurors were empanelled, but that a verdict was rendered by eleven only. Such verdict it was declared would be a nullity.⁴⁰ It does not necessarily follow from these decisions that a prisoner cannot waive a trial by twelve men if he does so before the jury is sworn, so as to obviate this irregularity. On the contrary, it has been held by the Supreme Court that he can do so. In *Lavery v. Commonwealth*, 101 Pa. 560 (1882), it was decided that an act providing that certain offenses could at the election of the defendant be tried by a jury of six men, was constitutional. It may therefore be concluded that there is nothing in the constitution to prevent an accused person from waiving a trial by twelve men, but that such waiver must properly appear upon the record and must take place before the trial begins.⁴¹

⁴⁰See also *Doebler v. Com.*, 3 S. & R. 237 (1817), apparently supporting the same view.

⁴¹See also *Com. v. Sweet*, 4 D. R. 136 (1894).

CHAPTER V.

FREEDOM OF SPEECH AND OF THE PRESS.

§1. *Freedom of Speech and of the Press at Common Law.*

—Freedom of speech and of the press, like the right of trial by jury, has long been treasured by Englishmen as a most precious and inalienable right, the possession of which is essential to the liberty of the individual and the well being of the state. The utmost freedom consistent with a proper protection of the rights of individuals was permitted by the common law. There was no restraint of the right of publication, but every publisher was liable for false and malicious articles tending to injure or disgrace another. This wisely regulated liberty, however, was not allowed to be exercised by the citizens without interference by the government. In England and in some of the American colonies, prior to the Revolution, the governing powers acted upon the assumption that freedom of the press was essentially dangerous to the state. The art of printing was for a long time looked upon with much disfavor, and private persons could print only under the supervision of a censor. In England until 1641 the printing press was regulated by the Court of the Star Chamber, and after its destruction in the year mentioned the function of licensing printers and censoring publications was performed under the supervision of Parliament until 1694, although it never amounted to much after the Revolution of 1688.¹ There was not real freedom of the press until a much later period, as under the prevailing statutes the penalties for the publication of matter of a scandalous nature, particularly if it reflected on the government, was severely punished. The proceedings of Parliament were not allowed to be published at all until about the time of the American Revolution.²

¹See 4 Bl. Com. 152, note; Story on the Constitution, Vol II, §1882; Cooley, Const. Lim., Ch. XII.

²May's Const. Hist., Chs. VII, IX, X.

There was little freedom of speech in America during the early colonial days. The idea that men should not be allowed free expression of their opinions, especially about governmental matters, could not be eradicated in a day. The feeling that the printing press was a dangerous weapon, likely to promote sedition and rebellion against proper authority, led to drastic measures against indiscreet publishers in many colonies. In Massachusetts "licensors" were appointed;³ in Virginia printing was at one time forbidden altogether;⁴ even in the Quaker Province of Pennsylvania a printer was compelled to flee for publishing a paper written by a Quaker, criticising his brethren who were in authority.⁵ On a number of occasions measures were taken to suppress books already published, which were deemed to offend against public authority.⁶

§2. *Constitutional Provisions.*—As already suggested, these measures were not taken by virtue of the common law, but in derogation of it, at the instance of arbitrary powers. Freedom of speech and of the press would exist in the absence of anything done to limit it. This was recognized by the framers of the constitutions of the United States and of the various states, so that the constitutional phrases are usually so framed as not to create freedom of the press, but to preserve it. Thus the first amendment to the Constitution of the United States provides that Congress shall make no law abridging freedom of speech or of the press. The states, then, are left free to deal with the subject as they please. All of them have adopted provisions similar in effect to those of Pennsylvania, which are intended to guarantee to the citizens that freedom of speech and of the press which was sanctioned by the common law.

The Pennsylvania convention of 1776 adopted two provisions which were intended to have the effect heretofore suggested, Ch. I, §12, "The people have a right to the freedom of speech and of writing and publishing their sentiments, therefore the freedom of the press ought not to be restrained," and Ch. II, §35, "The printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature or

³Hutch. Mass., 257 (2d ed.).

⁴1 Hildreth Hist. U. S., 561.

⁵2 Hildreth Hist. U. S., 171.

⁶Cooly, Const. Lim., Ch. XII.

any part of government." Both of these provisions, it will be observed, are intended not to extend but to preserve the freedom of the press. Particularly was the right to criticise those in authority insisted upon, it being realized that the liberty of the people depends upon it.

The convention of 1790, in pursuance of their expressed determination to define more accurately the rights guaranteed by the constitution, made certain alterations in these provisions. The two clauses of the Constitution of 1776 were consolidated into one and altered as follows: "The printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." Art. IX, §7.

The convention of 1873 made no change in the first two sentences, but the third was stricken out, and in its place was substituted the following: "No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." Art. I, §7.

§3. *Right of the Citizen to Speak, Write and Print on Any Subject.*—The first two sentences in the sections relating to liberty of the press in the constitutions both of 1790 and 1873 consist of a declaration that private persons have an inalienable right to speak, write and print on any subject, and particularly

when engaged in the investigation of the proceedings of the Legislature or any branch of government.

No one will suppose that these provisions exempt any person from liability for slanderous or libelous words. This would be clear even in the absence of the qualifying clause, "being responsible for the abuse of that liberty." Their meaning is, that censorship of the press is forbidden, and that under no circumstances can the Legislature suppress a publication because of the general tone of the criticism. The publisher may be held responsible if he abuses his privilege, but his right to publish is preserved inviolate. As early as 1788, Chief Justice McKean, in *Respublica v. Oswald*, 1 Dallas, 319 (1788), said: "What, then, is the meaning of the Bill of Rights and the Constitution of Pennsylvania, when they declare 'That the freedom of the press shall not be restrained' and 'that the printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature or any part of the government?' However ingenuity may torture the expressions, there can be little doubt of the just sense of these sections: they give to every citizen a right of investigating the conduct of those who are entrusted with the public business, and they effectually preclude any attempt to fetter the press by the institution of a licenser. The same principles were settled in England so far back as the reign of William the Third, and since that time, we all know, there has been the freest animadversion upon the conduct of the ministers of that nation. But is there anything in the language of the constitution (much less in its spirit and intention) which authorizes one man to impute crimes to another, for which the law has provided the mode of trial and the degree of punishment? Can it be presumed that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred, by the authority of the constitution, when delivered to the public through the more permanent and diffusive medium of the press? Or will it be said that the constitutional right to examine the proceedings of government extends to warrant an anticipation of the acts of the Legislature or the judgments of the court? and not only to authorize a candid commentary upon what has been done, but to permit every endeavor to bias and intimidate with respect to matters still in suspense?

The futility of any attempt to establish a construction of this sort must be obvious to every intelligent mind. The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description it is impossible that any good government should afford protection and immunity."⁷

§4. *Alterations by the Legislature of the Law of Libel.*—All are agreed that clauses of this character forbid censorship,⁸ and that this freedom from censorship does not excuse licentiousness, but that if the words are libelous, they properly subject the publisher to liability. There is, however, some difference of opinion as to how far liability for spoken or written words can be altered by the Legislature. On the one hand, it may be said that freedom to publish being guaranteed, the constitution does not extend its protection further, and everyone runs the risk of being held responsible for his words, whether that responsibility is imposed by the common law or by legislative action; that the constitution does not concern itself with what happens after the matter has been given to the public. In other words, the publisher has full liberty to publish what he pleases, but let him see to it that he does not transgress the law, written or unwritten.

Another view is that the constitution not only gives permission to publish, but guarantees immunity from liability for such words as at common law were non-libelous. It is said that "freedom of the press" would mean nothing if the Legislature, while not able to restrain the printing, could pass laws which would inflict severe penalties for the publication of words which, judged by the standard of the common law, were innocent. The difference between the two views is that under the former the Legislature can create new civil or criminal liability for spoken

⁷See also Addison's Report, Appendix, p. 274 *et seq.* (1803); *Res. pub. v. Dennie*, 4 Yeates, 267 (1805). Immoral publications, however, may be suppressed. *Com. v. Dowling*, 14 Pa. County Ct. 607 (1894), and probably those tending to provoke a breach of the peace could be also.

⁸2 Story on the Constitution, §1884, §1885; Hallam, Const. Hist. of Eng., Ch. XV; De Lohne, Const. of Eng., 254; 4 Bl. Com., 151.

or written words, whereas, under the latter, its hands are tied; it cannot increase the common law responsibility. Cooley, *Constitutional Limitations* (7th ed.), p. 605, says: "We understand liberty of speech and of the press to imply not only liberty to publish but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common law rules which were in force when the constitutional guarantees were established and in reference to which they have been adopted."

This conception of the meaning of liberty of the press, as applied to the clause in the Constitution of Pennsylvania which provides that "the printing press shall be *free*" and "*no law* shall ever be made to restrain the right" to investigate the proceedings of any branch of government, seems logical and sound. If the Legislature could at will punish the publication of the result of such investigation (either criminally or by establishing civil liability), then, surely, the printing press would not be free. It follows that a law establishing new liability for a published investigation of any branch of government, as, for example, a provision that negligence only and not malice need be shown to establish liability, would be contrary to the constitution, and hence of no effect.⁹

As applied to the second sentence, guaranteeing freedom to any person to speak, write and print on any subject, being responsible for the "abuse" of that liberty, there is more doubt. The solution of the question would turn upon the construction of the word "abuse." It may with reason be contended that this clause

⁹The Pennsylvania libel act of May 12, 1903, P. L. 349, may be attacked upon this ground, and if so there may be a judicial determination of this important question. By the terms of that act civil liability is created in a class of cases in which at common law there was no liability. It is provided that the publishers of newspapers shall be civilly responsible in damages for all publications made without a careful investigation into the facts. In other words, the test of liability in all cases is negligence. This means that where the words have been spoken upon a privileged occasion, the plaintiff to succeed need not (as he must at common law) prove actual malice on the part of the defendant, but that it is sufficient if he prove negligence only. It is true that recklessness in publishing may be evidence of malice, but it is not malice (in *Briggs v. Garrett*, 111 Pa. 404 (1886), mere failure to investigate was held no evidence of malice); hence the new act creates liability in a class of cases in which at common law there was no liability.

is less broad in its provisions than the preceding, and that the Legislature may create new liability for words spoken under any circumstances which may reasonably be construed as an "abuse" of the privilege of free speech. Hence a provision, such as the one mentioned, making one liable for words negligently but not maliciously published upon a privileged occasion, but not an investigation of any branch of government, might be upheld—the lack of due care being construed as an "abuse." But even under the latter clause the Legislature could not wantonly punish innocent words.

§5. *Prosecutions for Libels Relating to Public Officers.*—

We now come to the consideration of the next sentence in Section 7: "No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury."

The first observation to be made concerning these words is that they refer to criminal cases only. This is clearly evident from the text and has been judicially determined.¹⁰ Unlike its predecessors, this clause does not purport merely to guarantee an existing right, but to create a new one. Its language would seem to imply that, in the absence of such a provision, convictions could be had in such cases where the libel was not malicious and not negligent. This, however, is not the fact. At common law libels published upon privileged occasions do not subject the publisher to civil or criminal liability unless malice is shown. The public welfare sometimes requires a disclosure of facts the publication of which might otherwise subject the publisher to criminal liability. The private injury is considered to be of less importance than the public good resulting from the disclosure. Upon such occasions, even though the publisher may have been entirely mistaken in his facts, and the statement made be grossly false, yet he is exonerated both civilly and criminally unless the injured party can prove express malice. The publisher, therefore, at common law, in giving out statements upon privileged occasions, warrants only that he is acting from good motives

¹⁰*Barr v. Moore*, 87 Pa. 385 (1878).

and not on account of personal spite. He does not warrant that the words are true.¹¹

Libels published in "papers relating to the official conduct of officers or men in public capacity" are undoubtedly privileged at common law, and therefore the constitution affords no additional protection to those who conduct such investigations. There could have been no convictions in such cases unless express malice were shown, even in the absence of the constitutional clause.¹²

§6. *Meaning of "Matter Proper for Public Investigation or Information."*—The latter part of the clause includes all prosecutions for papers relating to "any matter proper for public investigation or information." There are no Supreme Court decisions as to the scope of these words, and the common pleas cases are not entirely in accord. The question first came up before Judge Thayer in Philadelphia County. He stated that the constitution had introduced "an entirely new principle" into the law of libel, probably meaning thereby that there was a class of cases not privileged by the common law and covered by the constitutional provision.¹³ Judge Woodward was of opinion that the constitution increases the cases of privilege;¹⁴ and this also seems to be the view of Judges McPherson¹⁵ and Parsons.¹⁶

¹¹Odgers, *Libel and Slander*, p. 197 *et seq.*, p. 436; Wharton, *Crim. Law*, §1629 *et seq.*, *Gray v. Pentland*, 2 S. & R. 23 (1815); s. c., 4 S. & R. 420 (1819); *Chapman v. Calder*, 14 Pa. 365 (1850); *Pittcock v. O'Neill*, 63 Pa. 253 (1869); *Neeb v. Hope*, 111 Pa. 145 (1885); *Briggs v. Garrett*, *ibid.* 404 (1886); *Press Co. v. Stewart*, 119 Pa. 584 (1888); *Conroy v. Pittsburg Times*, 139 Pa. 334 (1890); *Com. v. Featherston*, 9 Phila. 594 (1874); *Com. v. Smethurst*, 16 Phila. 475 (1883).

¹²Odgers, *Libel and Slander*, p. 225, 226. The only doubt (if there is any) that could be raised to this statement would be on account of the expression "relating" to official conduct, etc. The Constitution of 1776, as we have seen, in providing that the truth might be given in evidence, confined it to cases where there were prosecutions for papers "investigating" official conduct. These are privileged without doubt. It is not thought, however, that there is any essential difference in the two expressions.

¹³*Com. v. McClure*, 3 W. N. C. 58 (1876). In *Com. v. Singerly*, 15 Phila. 368 (1881), Judge Briggs evidently misinterpreted the law on this point. He says that the new constitution made an innovation in requiring proof of malice for the conviction of a defendant in any case. This is clearly wrong.

¹⁴*Com. v. McClure*, 1 Pa. County Ct. 207 (1885); *Com. v. Coon*, 4 Pa. County Ct. 422 (1886).

¹⁵*Com. v. Rudy*, 5 Pa. Dist. Rep. 270 (1896).

¹⁶*Com. v. Sanderson*, 2 Clark, 269 (1844), referring to the same words in the Constitution of 1790. See also the cases of *Com. v. Costello*, 1 Pa. Dist. Rep. 745 (1892), and *Com. v. Place*, 153 Pa. 314 (1893).

There is some expression of opinion in the Superior Court, but the question has never been the basis of a decision. In *Shelly v. Dampman*, 1 Pa. Superior Ct. 115 (1896), Judge Wickham, at page 123, intimated that "privilege" at common law and under the constitution are not the same. On the contrary, President Judge Rice, in *Oles v. Pittsburg Times*, 2 Pa. Superior Ct. 130 (1896), at page 144, used language showing that he deemed the very words of the constitution "proper for public investigation and information," as the test of privilege at common law

If, in fact, all matter "proper for public investigation or information" is at common law privileged, then, notwithstanding the *dicta* mentioned, no change is in fact made by the new constitution, because all the cases to which it extends its protection were better protected by the common law itself. There are many occasions which are privileged at common law, so that no recovery or conviction can be had unless the plaintiff or the commonwealth proves express malice. The class most nearly approximating to the one defined by the constitution is that comprising cases in which the public has an interest in the disclosure. It is well settled that if one person in good faith and with a proper motive makes even a false statement to another about a matter which affects the interest of both, he is protected. If the subject-matter of the communication concerns the welfare of the public, the public has an interest in it, and any member of the public making the statement in good faith is protected. This includes any statement made in the progress of a *bona fide* investigation of the character or fitness of a candidate for public office, or relating to the official conduct of any public officer. "Every communication is privileged which is made *bona fide* . . . to prevent or punish some public abuse."¹⁷ This is the extent of such common law privilege. The cases contemplated by the Pennsylvania constitution do not go beyond it. Matter "proper" for public information is that only in which the public has an interest, and the constitution not only does not exceed the protection of the common law, but in fact falls short of it. The words of the constitution purport to protect publishers of certain libels from

¹⁷Odgers, *Libel and Slander*, p. 225; Pollock on Torts (Webb's Edition), p. 335.

the consequences of their acts unless malice or negligence be shown. But at common law there was such protection unless malice were shown; there could be no conviction by proving negligence only. It has been argued that the constitutional clause meant to create a new class of privileged cases; that there may be within its meaning "matter proper for public investigation or information" which at common law was not privileged. This position is untenable for reasons which have already been suggested. The constitution means no more than that cases privileged at the common law should continue to be so by the terms of the fundamental law. It did not intend to extend the protecting arm of the law about publications relating to matters which only excite the curiosity of the public, but in which it has no real interest. True liberty of the press does not mean a license to circulate with impunity libelous statements about private individuals. It means that the press or any individual may freely discuss matters which vitally affect the public welfare, and may disseminate information which the public has a right to know, even though it be untrue, warranting only their good faith in so doing. Nothing can be "proper for public investigation or information" unless it be of this character.¹⁸

In *Com. v. Murphy*, 8 Pa. County Ct. 399 (1890), Judge Endlich, in rejecting the argument of counsel that the facts concerning a man's treatment of his stepdaughter were proper for public information within the meaning of the constitution, said: "There are occasions where the interest of the public to know the truth is of more consequence (than) the possibility of its peace being disturbed by the publication of that truth, and in those cases where the truth is disclosed in a plain, unvarnished tale, without wrongful motive, simply for the information either of private persons or officials, who have a right to

¹⁸Hon. George M. Dallas, who fathered this constitutional provision in the convention of 1873, expressed his opinion that it made no change in the law, as he understood it to be. He favored the provision to prevent future action by the Legislature prejudicial to the freedom of the press, and also because a recent decision in a quarter sessions court had apparently disregarded the fixed principles of the common law, as heretofore explained. He therefore felt it to be of the highest importance that the matter should be settled. The decision he referred to has never been recognized as authority, so that the common law of Pennsylvania is as he then thought it was and should be.—4 *Debates* 688 *et seq.*

know it, or of the public that has a right to know it, the fact that it is true or that it is made upon reasonable ground of belief is a complete justification for its disclosure. Such publications are termed privileged. . . . The subject-matter (of this libel) is not one proper for public information and discussion. Subjects that are proper for public information and discussion are only those in which the community has a public interest. The fact that a large number of people may have a private interest in the matter will not make it a matter proper for public investigation. . . . Nothing that happens in the privacy of a man's family, short of a crime that calls for public interference, can justify the publicity of accusation or comment in the columns of a newspaper."¹⁹

§7. *Meaning of "Not Maliciously or Negligently."*—The latter part of the sentence of the constitution under discussion requires a more particular examination. It is provided that no conviction shall be had in the cases which have been discussed, "where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury." As the cases to which this language is applied are at common law privileged, express malice must be proved in order to convict, irrespective of the constitution. But what is the meaning of the phrase, "or negligently"? These words were inserted by amendment against the protest of the promoters of the clause, after a long, tiresome debate, in which the true aspect of the law had been almost lost sight of. Mr. Dallas, who had been the chief sponsor for the clause all through the debate, expressed his opinion that they mean nothing. Negligence may be evidence of malice, but since the malice must be shown at all events, the expression, "or negligently," is mere surplusage.²⁰

¹⁹See also opinion of President Judge Henderson in *Com. v. Brown*, 1 Pa. Dist. Rep. 565 (1892); *Com. v. Paschall*, 8 Lanc. L. Rev. 37 (1890).

²⁰Mr. Dallas, 5 Debates, 589, says: "Before the vote is taken, I wish to say that I have no objection to the amendment, except that it adds two additional words, and unnecessary words, to the proposition. What my friend from Carbon stated is precisely true, that if a man negligently fires a pistol or throws a stone he is held liable, because the law reasonably infers, from the negligence, malice. That is the only reason. Negligence such as the amendment of the gentleman from Allegheny comprehends would be in result malicious, and therefore I think it unnecessary."

It has been intimated in some common pleas decisions that in the cases covered by the constitution, the defendant may be convicted if it be shown that he is negligent, although there be no malice.²¹ This is not the law. This misconception undoubtedly arose from the unfortunate use of the words "or negligently," but they cannot be construed to increase criminal responsibility for libels, and this would be their effect if the meaning indicated were attributed to them. At common law and under the constitutions prior to 1873, there could be no conviction for a libel published upon a privileged occasion, unless express malice were shown in the publication. While negligence in the ascertainment of the truth of the facts alleged might be evidence of malice, it was not of itself malice, hence proof of negligence only would be insufficient to convict. If, therefore, the words "or negligently" in the new constitution should be construed to mean that a conviction could be had upon proof of negligence only, the result would be not a preservation or enlargement of the liberty of the press, but a curtailment of it. This is an impossible construction of a clause in the Bill of Rights admittedly enacted to preserve to the citizens that freedom of speech and of the press which they enjoyed at the common law.

§8. *Burden of Proving Malice.*—The last inquiry relative to this branch of the subject is how may malice in the publication of a libel be shown? Upon whom is the burden of proof? If the publication relates to matter proper for public information, must the commonwealth affirmatively prove malice to convict, or is the burden on the defendant to clear himself by showing no malice, that is, by proving his good faith and his reasonable grounds for believing in the truth of the matter published?

At common law the burden was on the commonwealth. The

²¹*Com. v. Singerly*, 15 Phila. 368 (1881); *Com. v. McClure*, 3 W. N. C. 58 (1876); see also *Com. v. Chambers*, 15 Phila. 415 (1882); *Com. v. McClure*, 1 Pa. C. C. 207 (1885); *Com. v. Rudy*, 5 D. R. 270 (1896); *Com. v. Moore*, 2 Chest. Co. 358 (1884); *Com. v. Costello*, 1 Pa. Dist. Rep. 745 (1892); *Com. v. Rentschler*, 26 Pa. County Ct. 39 (1901); *Com. v. Telford*, old series, 32 Pitts. L. J. 422 (1885). See, however, the opinion of Judge Woodward in *Com. v. Coon*, 4 Pa. C. C. 422 (1886), and that of Judge Allison in *Com. v. Smethurst*, 16 Phila. 475 (1883), apparently expressing the opposite view, viz., that malice must be shown. See also *Com. v. Warfel*, 5 Lanc. L. Rev. 113, 119 (1888).

defendant, by showing that the publication was made upon a privileged occasion, rebutted the presumption of malice created by the publication itself, and threw upon the prosecutor the duty of showing evil motive,²² and unless some evidence more than the mere fact of publication was produced, the verdict necessarily had to be for the defendant.²³

As has been said, the constitutional provision operates only upon cases privileged at common law. The language of the clause "where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury," seems at first thought to place upon the defendant the duty of proving a negative. But this cannot be the true construction, for the clause was intended and by its terms clearly shows that its sole purpose was to guarantee immunity (if not to increase it) from criminal convictions for libel in certain cases. But if we construe it to lay upon the defendant the burden of proving his own innocence, his good faith, lack of malice, etc., then his criminal responsibility is increased and not diminished. This cannot, therefore, be the meaning of the clause. The words do not require such an interpretation. They merely show that the question of malice is to be left to the jury to be found as a fact, and the burden is left where it properly belongs, on the commonwealth. This conclusion results from the ordinary principles of criminal law. The commonwealth must prove every essential element of the crime, and in cases of prosecutions for privileged libels, malice is one of these essential elements.²⁴ The decisions on this point are not altogether in accord,²⁵ but the larger number support the true rule as given above.²⁶

²²Odgers, *Libel and Slander*, 270, 271, 330.

²³Odgers, *Libel and Slander*, 273.

²⁴In the case of *Com. v. Sanderson*, 2 Clark, 269 (1844), Judge Parsons intimated that actual malice must be proven by the commonwealth in all cases of criminal prosecutions for libel, whether the occasion be privileged or unprivileged. This is not the law. The mere fact of publication where no excuse is offered implies malice, and it need not be proven as a fact. *Com. v. Murphy*, 8 Pa. C. C. 399 (1890).

²⁵See *Com. v. Singlerly*, 15 Phila. 368 (1881); *Com. v. McClure*, 3 W. N. C. 58 (1876), and perhaps *Com. v. Chambers*, 15 Phila. 415 (1882); *Com. v. Swallow*, 8 Super. 539 (1898); *Com. v. Rovnianek*, 12 Sup. 86 (1899); *Com. v. Warfel*, 5 Lanc. L. R. 113 (1888); *Com. v. Moore*, 2 Chester Co., 358, 364 (1884).

²⁶*Respub. v. Dennie*, 4 Yeates, 267 (1805); *Com. v. Golshalk*, 13 Phila. 575 (1877); *Com. v. Smethurst*, 16 Phila. 475 (1883); *Com. v.*

§9. *Evidence of the Truth of the Libel.*—Upon prosecutions for criminal libel in cases of privilege the defendant may, if he chooses, show that he made the publication in good faith, honestly believing it to be true or that in fact it was true. The truth, however, is not of itself a justification for a criminal libel. According to the common law as interpreted in England, it could not be shown at all. Defamatory words, if true, were thought to be more likely to lead to a breach of the peace than if untrue. "The greater the truth, the greater the libel."²⁷ This was changed in England by Lord Campbell's Act, 6 and 7 Victoria, Ch. 96, making the truth always admissible in mitigation of punishment, and making it a justification if the public welfare required its disclosure. In America the English view of the common law on this point was not universally accepted. It was ruled in most states, and among them in Pennsylvania, that while at common law the truth was not a justification for a libel, yet it was always proper to be given in evidence after conviction in mitigation of punishment, and in cases of privilege, upon trial, to show lack of malice. Perhaps the earliest case on record where the truth was held admissible in a criminal prosecution for libel at common law was that of *The Proprietor v. George Keith et al.*, Pennypacker's Colonial Cases, p. 117 (1692).²⁸

Most of the states have specific provisions, either statutory or constitutional, concerning the admission of evidence to prove the truth.²⁹ In Pennsylvania, by Article IX, Section 7, of the Constitution of 1790, it was provided, that "in prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence." This did not mean that the truth was a justification for the libel, but merely that it might be given in evidence in certain cases of privilege for the purpose of rebut-

McClure, 1 Pa. C. C. 207 (1885); *Com. v. Mellon & Porter*, 29 W. N. C. 433 (1892); *Com. v. Costello*, 1 D. R. 745 (1892); *Com. v. Rudy*, 5 D. R. 270 (1896); *Com. v. Meeser*, 1 Brewst. 493 (1867); *Com. v. Rentschler*, 26 Pa. County Ct. 39 (1901).

²⁷Odgers, 437, Wharton Crim. Law, §1643, and cases there cited.

²⁸See *People v. Croswell*, 3 Johns. Cas. 337 (1804), usually accredited with being the first case in which the truth was admitted.

²⁹See Whart. Crim. Law, §1643, and notes.

ting evidence of malice, etc.³⁰ In the convention of 1873 it was not thought necessary to reincorporate this sentence in the constitution, and it was accordingly omitted. The rule is, therefore, as at common law.

As already indicated, the truth may not be given in evidence, except, perhaps, in mitigation of punishment, unless the occasion be privileged.³¹ Upon other occasions no public or private good can be accomplished by circulating defamatory stories. In such cases the old maxim, "The greater the truth, the greater the libel," is and should be enforced. To revive old scandals and circulate them about persons who may have outlived early faults and be leading exemplary lives, is certainly no less a crime than to tell that which is untrue. But when the occasion is privileged and the commonwealth has introduced evidence to prove express malice on the part of the defendant, it is proper that he should be allowed to show not only that his words were proper for public information, but that they were true, in order to rebut the evidence of malice, and this in Pennsylvania is the common law.³² Nevertheless, even in such cases, the truth is not an absolute defense, for although the words be true and privileged, if they be spoken maliciously the defendant may be convicted.³³

³⁰See Whart. Crim. Law, §1643. A dictum in *Com. v. Sanderson*, 2 Clark, 54 (1844), seems to indicate that truth under the Constitution of 1790 may be a justification. This is a mistake.

³¹*Runkle v. Meyer*, 3 Yeates, 518 (1803); *Respub. v. Dennie*, 4 Yeates, 267 (1805); *Com. v. Woodward*, 7 Luz. Leg. Reg. 44 (1878); *Com. v. Warfel*, 5 Lanc. L. Rev. 113 (1888); *Com. v. Brown*, 1 Pa. Dist. Rep. 565 (1892).

³²*Proprietor v. Keith et al.*, Penny. Col. Cas. 117 (1692); *Runkle v. Meyer*, 3 Yeates, 518 (1803); *Respub. v. Dennie*, 4 Yeates, 267 (1805). See cases cited *supra*, in which the defendant (since the new constitution omitting the provision about proving the truth) was allowed to show the truth in order to rebut the evidence of malice.

³³Wharton Crim. Laws, §1645. In New York and in various other states there are provisions, either statutory or constitutional, to the effect that the truth shall be a complete justification if the matter is proper for public information. See Whart. Crim. Law, §1643 (notes). But such is not the law in Pennsylvania, where the truth may be given in evidence, but is not a justification. There was a short period during which in Pennsylvania the truth in certain cases was, by statute, a complete justification, but the act was allowed to expire by its own limitation and has never been revived. Act of March 16, 1809. See *Com. v. Duane*, 1 Binn. 601 (1809). At the present time the act of July 1, 1897, P. L. 204, is declaratory of the common law (as interpreted in Pennsylvania) in providing that the truth may be given in

§10. *Jury to be Judge of Law and Fact.*—The last sentence in the section under discussion is, "And in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." The purpose and meaning of this provision become evident by a glance at the evil in the common law procedure which it was designed to correct. At common law, upon prosecutions for libel, some cases held that the court must decide whether the words were libelous as a matter of law, and all that the jury could determine was whether the defendant published in the manner and form charged, and the truth of the *innuendo*.³⁴ In other words, the jury was deprived of the right, usual in criminal cases, of bringing in a general verdict of guilty or not guilty. Mr. Justice Sharswood doubted whether this ever really was settled law,³⁵ but, at any rate, it was deemed necessary in England to pass an act guaranteeing to the jury this right; this was done in 1792 by the Act of 32 Geo. III, C. 60, usually known as "Mr. Fox's Act," because he was instrumental in passing it. The early Pennsylvania courts recognized that by the common law the jury had the right to determine both law and fact. In the colonial case heretofore mentioned the jury was allowed to determine whether the words published were seditious or not.³⁶ In order, however, that all doubts might be set at rest, the provision quoted above was inserted in the Constitution of 1790 and retained in that of 1873.

Its meaning is that the jury under judicial instruction may find the defendant guilty or not guilty. It does not, however, give the jury any higher right than in other cases. It has been suggested that the constitution gives the jury the right not only to pass upon the question of guilt or innocence as determined by the elements present in the publication, but that it also gives it the right to determine whether the occasion be privileged;

evidence if the matter charged as libelous be proper for public information. Of course, if the matter be true and proper for public information, it is nearly impossible to prove actual malice; but if in any case it should be done, a conviction must follow. Sometimes the manner in which the publication is made, its headlines, etc., if in a newspaper, are evidence from which malice may be inferred. *Com. v. Scouton*, 20 Super. 503 (1902); *Com. v. Little*, 12 Super. 636 (1900).

³⁴Odgers, *Slander and Libel*, p. 94.

³⁵*Kane v. Com.*, 89 Pa. 522 (1879).

³⁶*Proprietor v. Keith et al.*, Penny. Col. Cas. 117 (1692).

for example, that the jury and not the judge is to decide whether the matter is proper for public information.³⁷

This view is erroneous.³⁸ The evil which the law was intended to correct was only as to the right of the jury to decide whether the words are libelous. It is so recognized in all the cases. The decision as to whether an occasion be privileged has always belonged exclusively to the court in both civil and criminal cases. The distinction between civil suits and criminal prosecutions in the function of the jury was sought to be corrected by Mr. Fox's act and by the Constitution of 1790. That this only was intended is clear from the expression, "as in other cases." Judge Endlich, in *Com. v. Costello*, 1 Pa. Dist. Rep. 745 (1892), pointed out that if the determination of what occasions are privileged should be left to the jury, the "knowne certaintie" of the law would be lost. It is proper that the defendant's motives and purposes and the essential effect of the alleged libel shall in each case be decided by the jury, but the court only is competent to say whether the occasion is such as to justify the publication and to rebut the presumption of malice.³⁹

³⁷*Com. v. Paschall*, 8 Lanc. L. Rev. 37 (1890); *Com. v. Moore*, 2 Chest. Co. Rep. 358 (1884); *Com. v. McClure*, 3 W. N. C. 58 (1876); *Com. v. Godshalk*, 13 Phila. 575 (1877); *Com. v. Warfel*, 5 Lanc. L. Rev. 113 (1888).

³⁸See *dictum* by Mitchell, J., in *Com. v. McManus*, 143 Pa. 64, 91 (1891), where this clause of the constitution is quoted with the comment that there never was any intention to make or to consider juries in any sense judges of the law. For a complete discussion of this question see 1 Crim. Law Magazine, 47, 51, where Francis Wharton, LL.D., criticises the opinion of Sharswood, J., in *Kane v. Com.*, 89 Pa. 522 (1879), and discusses the law in Pennsylvania and other states. See also *Com. v. Rovnianek*, 12 Pa. Sup. 86 (1899).

³⁹See also *Respub. v. Dennie*, 4 Yeates, 267 (1805).

CHAPTER VI.

RIGHTS OF ACCUSED PERSONS.

§1. *Constitutional Provisions.*—The rights of persons accused of crimes were at common law but indifferently protected. The American colonists had seen much injustice done and not a few of them had personally suffered by reason of the oppressive methods of trial formerly in vogue in England. Accordingly, we find provisions in early colonial laws and charters and later in constitutions of states guaranteeing to accused persons a speedy and impartial trial, and securing to them the proper means to establish their innocence if they be not guilty. The Pennsylvania Constitution of 1776, following the earlier constitutions, provides, Art. I, §9: "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land," and §10: "No person shall for any indictable offense be proceeded against criminally by information, 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, or by leave of the court, for oppression or misdemeanor in office; no person shall for the same offense be twice put in jeopardy of life or limb."¹

§2. *Right to Have Advice of Counsel.*—One of the most senseless and oppressive rules of the common law was the one providing that an accused person, except in cases of misdemeanor, should not be allowed the benefit of the advice of

¹These provisions were copied from the Constitution of 1790, the first exactly and the second with very slight changes.

counsel. The assumption was that the judge would look after the interests of the prisoner and see that no injustice was done him. Blackstone inveighs against the rule,² and indeed it is wholly indefensible. It has now been changed in England by statute.³

William Penn was fully sensible of the iniquity of the custom, and provided against it by one of his laws agreed upon in England, as follows: "In all courts, all persons, of all persuasions, may freely appear in their own way and according to their own manner, and there personally plead their own cause themselves, or if unable, by their friends." In the charter of 1701 it was further provided that criminals should have the same privileges of witnesses and counsel as their prosecutors.⁴

The provision in the constitution, "that in all prosecutions for criminal offenses, a man has a right to be heard by himself and his counsel," was considered in the case of *Stewart v. Commonwealth*, 117 Pa. 378 (1887). The defendant was charged with selling liquor without a license, and the evidence so clearly pointed to his guilt that the trial judge thought argument to the jury would be a waste of time; he, therefore, declined to permit counsel for the defendant to address the jury, and because of his refusal the judgment was reversed. Mr. Justice Williams said: "The right to be so heard is expressly provided for in the constitution of the commonwealth. The 'declaration of rights' asserts in the plainest terms that 'in all criminal prosecutions the accused hath the right to be heard by himself and his counsel.' The constitution is the law paramount which binds all departments of the government.

"The Legislature cannot take away what the constitution guarantees, nor can the courts. On the contrary, it is the duty of the judges to obey the constitution and to enforce observance of its provisions on others. Courts may regulate the manner and time for the exercise of the right to be heard by counsel, and may limit the number and the length of the addresses to be made to the jury by general rule or by an order made in the particular case. These subjects are within the exercise of

²4 Bl. Com., 355.

³6 and 7 Wm. IV, Chap. 114.

⁴Charter of 1701, §§5 and 6.

judicial discretion, and merely regulate the exercise of the constitutional right.

"To deny the right altogether is beyond the power of the courts. In *Cathcart v. Commonwealth*, 37 Pa. 108, a similar question was raised, and, in the opinion of the court, Justice Strong said: 'The right to be heard by himself and his counsel is doubtless a constitutional right, and if it had been denied it would have been error.' In the present case the right was denied. The fact that it was demanded by the accused and that the court refused to allow its exercise appear clearly upon the record, and we have no alternative."⁵

§3. *Right to Demand Nature and Cause of Accusation.*—

The second clause in §9 guarantees to the accused the right to demand the nature and cause of the accusation against him. This is nothing more than a reaffirmance of the common law rule. The accusation, in all of the more serious offenses, is by indictment which sets forth its nature and cause and gives due notice to all those who are to be subsequently tried by petit juries. This method might be abolished and another substituted, but in such case the new method would have to provide some means by which due notice should be given to the accused of the crime with which he is charged, and it would also be subject to the provisions of §10, quoted above. The criminal procedure act of March 31, 1860, provides that certain indictments need not set forth "the manner in which, or the means by which, the death of the deceased was caused." In *Cathcart v. Com.*, 37 Pa. 108 (1860), the constitutionality of this mode of indictment was questioned. The contention was that the nature and cause of the accusation was not set forth with sufficient definiteness, within the meaning of the constitution. The court, however, decided that the indictment was sufficient in this respect, and the decision has since been reaffirmed.⁶

§4. *Right to Meet the Witnesses Face to Face.*—The next clause provides that the accused hath a right to meet the witnesses face to face. In other words, that in criminal trials evidence taken by deposition or commission is not admissible,

⁵See Story, Const. Law, §§1793-4, and Cooley, Const. Lim., Chap. X, for a further discussion of this right.

⁶*Campbell v. Com.*, 84 Pa. 187 (1877); *Goersen v. Com.*, 99 Pa. 388 (1882).

but that the witnesses for the prosecution must be present in court.⁷ This means merely that the prisoner has the right to see and cross-examine the witnesses. In *Howser v. Com.*, 51 Pa. 332 (1865), it was argued that it operates to prohibit the examination of jurors as witnesses, because such examination in effect makes it impracticable to attack their credibility, the assumption being that to meet the witnesses face to face implies a right to attack their credibility. The argument did not prevail, however, and it is permissible now, as formerly, to examine jurors as witnesses if they have knowledge of the facts.

The rule that in criminal cases the accused has a right to meet the witness face to face guarantees to him the right to cross-examine once. If a witness who formerly testified and was cross-examined dies, or for some reason cannot appear, his former testimony is not excluded by this constitutional rule;⁸ dying declarations also are admissible, as at common law.⁹

This clause renders it imperative that the accused shall be present in court at all times during his trial and when sentence is pronounced.¹⁰ The right to be present at the trial in cases of felony the defendant cannot waive,¹¹ although if he absent himself voluntarily a verdict may be received in his absence.¹² The rule requiring the defendant to be present at all times during the trial is so rigidly enforced that additional instruction given to the jury in his absence constitutes cause for reversal.¹³ In trials for misdemeanors, however, the accused may waive his right to be present, although he cannot be deprived of it without his consent.¹⁴

§5. *Right to Have Compulsory Process.*—The next clause

⁷*Com. v. Zorambo*, 205 Pa. 109 (1903).

⁸*Brown v. Com.*, 73 Pa. 321 (1873); *Com. v. Cleary*, 148 Pa. 26 (1892), construing act of May 23, 1887, P. L. 158; *Com. v. Keck*, 148 Pa. 639 (1892). See also *Cooley, Const. Lim.* (6 ed.), 387. If, however, a witness at a preliminary hearing is not cross-examined because the prisoner had no counsel, his testimony is not admissible at the trial. *Com. v. Lenousky*, 206 Pa. 277 (1903). See also *McLain v. Com.*, 99 Pa. 86 (1881).

⁹See act June 26, 1895, P. L. 387; *Com. v. Winkelman*, 12 Pa. Sup. Ct., 497 (1900).

¹⁰See *Sadler, Crim. Proc. in Pa.*, §469, and cases there cited. See also *Com. v. Van Horn*, 188 Pa. 143 (1898), where jury was allowed to view premises where killing took place, in the absence of the prisoner.

¹¹*Prine v. Com.*, 18 Pa. 103 (1851).

¹²*Lynch v. Com.*, 88 Pa. 189 (1878).

¹³*Com. v. House*, 6 Pa. Superior Ct., 92 (1897).

¹⁴*Ibid.*

is the one providing that the accused shall have "compulsory process for obtaining witnesses in his favor." Not only were accused persons denied compulsory process at common law, but they were even denied the right in capital cases to offer any evidence at all.¹⁵ This monstrous doctrine was destroyed in England by the revolution of 1688, but for a time after that the witnesses for the defense in trials for treason and felony were not sworn and were less credited by juries on that account.¹⁶ The old rule already changed in England by statute was permanently altered in Pennsylvania by our earliest constitution, and has remained unchanged unto this day.¹⁷

The practice is for the subpoena to issue for such witnesses as the defendant may call for, and the officers are compelled to serve it, without compensation.¹⁸

§6. *Right to Have a Speedy Trial by a Jury of the Vicinage.*—The accused is also entitled "to a speedy public trial by an impartial jury of the vicinage," which right has likewise been secured to him since the foundation of the commonwealth.¹⁹

How "speedy" the trial shall be is largely within the discretion of the trial judge, although we have acts of Assembly in Pennsylvania which guarantee a trial for offenses against the peace of Pennsylvania at least so soon as the second term after his commitment.²⁰ Motions for continuance are addressed to the discretion of the court, and its action in the matter is not, except for gross abuse, reviewable by any higher court.²¹

As the right to be tried by a jury of the "vicinage" is guaranteed to the accused, he cannot be compelled to stand trial at any place save where the crime was committed. He can for

¹⁵See Story on the Constitution, §1792.

¹⁶The practice was finally abolished in cases of treason by 7 Wm. III, C. 3, and altogether during the reign of Anne. See also 4 Bl. Com., 359.

¹⁷See act of May 31, 1718, 1 Sm. L. 105, §4, allowing compulsory process to defendants in capital cases.

¹⁸Sadler on Crim. Procedure in Penna., §473, citing *Com. v. Painton*, 8 Lanc. L. Rev. 376 (1891); *Com. v. Lindsey*, 2 Chest. Co. R. 268 (1884).

¹⁹As to the essential features of the jury trial, see Chapter IV, Trial by Jury.

²⁰Act of March 31, 1860, P. L. 427, §54; as to Philadelphia, act of March 13, 1867, P. L. 420, §4.

²¹See Sadler, Crim. Proc. in Pa., §387; Cooley, Const. Lim. (6 ed.), page 378.

good cause shown procure a change of venue,²² but the same privilege is not possessed by the commonwealth.

The jury that tries him must be impartial, *i. e.*, must be selected in an impartial manner (as by the use of the jury wheel), and the members of the panel may be challenged for cause shown, as that they have formed opinions concerning the guilt or innocence of the accused, which opinions they declare cannot be altered by evidence, etc. If, however, a juror declares that in spite of his previous opinion he can render a verdict according to the evidence, the rule is to admit him. It has been argued that the clause in question should prevent jurors from being used as witnesses and *vice versa*, should prevent persons acquainted with the facts of the case from serving as jurors. Judicial authority, however, is opposed to the contention.²³

§7. *Right to Refuse to Incriminate Oneself.*—The next clause in the section under discussion provides that an accused person cannot be convicted by a process of inquisition. In other words, that he shall not be compelled to give evidence against himself. It is well known that in former times inquisitorial methods, enforced by torture, were used in some countries (although never legally in England), to extort confessions.²⁴ The common law rule forbidding such a practice is made a part of our fundamental law by the clause referred to.²⁵ The constitution does no more than to protect the defendant from being compelled to become a witness and testify as to his own guilt or innocence. He may if he chooses remain silent, and no adverse comment upon his failure to present himself for examination may be made by court or counsel during the trial.²⁶ If, however, the defendant elects to become a witness in his own behalf, he is deemed to have waived his constitutional privilege, and may be compelled to answer any proper question on cross-examination, whether it tends to incriminate him or not.²⁷ Unless he does so elect, however, no person can be compelled to answer any question put to him, either in a civil or criminal proceeding, if the

²²See Sadler, *Crim. Proc.*, p. 363.

²³*Howser v. Com.*, 51 Pa. 332 (1865).

²⁴See Story on the Constitution, §1788.

²⁵See 5 Am. L. Rev., p. 14, "Trials of Troppman and Bonaparte;" Cooley, *Const. Lim.*, 379 (6 ed.).

²⁶Act of May 23, 1887, P. L. 158, §10.

²⁷*Com. v. House*, 6 Pa. Superior Ct. 92 (1897).

reply might, in the opinion of the trial judge, tend to show him to be guilty of a crime,²⁸ or even which might subject him to ignominy and contempt.²⁹ As just indicated, the trial judge, and not the witness, is to decide whether the answer to a question will tend to incriminate him. It is expressly so provided in the act of May 23, 1887, P. L. 158, and was fully discussed and decided in *Com. v. Bell*, 145 Pa. 374 (1891). The witness' privilege does not extend so far as to warrant him in refusing to obey a lawful subpoena. He must present himself in obedience to process, take oath or affirmation, and then, if a question tending to incriminate him is propounded, he may assert his constitutional privilege.³⁰

§8. *Constitutional Exception to the Rule.*—There are two exceptions to the rule that a witness cannot be compelled to answer incriminating questions, which are found in Art. III, §32, and in Art. VIII, §10, of the constitution, as follows, viz.: "Any person may be compelled to testify in any lawful investigation or judicial proceeding against any person who may be charged with having committed the offense of bribery, or corrupt solicitation, or practice of solicitation, and shall not be permitted to withhold his testimony upon the ground that it may criminate himself, or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony; and any person convicted of either of the offenses aforesaid, shall, as part of the punishment therefor, be disqualified from holding any office or position of honor, trust, or profit in this commonwealth."³¹ The other exception referred to is: "In trials of contested elections and in proceedings for the investigation of elections, no person shall be permitted to withhold his

²⁸In an action of ejectment, *Galbreath v. Eichelberger*, 3 Yeates, 515 (1803); in an action of assumpsit, *Horstman v. Kaufman*, 97 Pa. 147 (1881), holding unconstitutional the fraudulent debtor's act of June 11, 1879, P. L. 129. See also *Com. v. Meads*, 11 D. R. 10 (1901).

²⁹*Galbreath v. Eichelberger*, 3 Yeates, 515 (1803), apparently approved in *Eckstein's Petition*, 148 Pa. 509 (1892), but disapproved in *Brown v. Walker*, 161 U. S. 591 (1896).

³⁰*Eckstein's Petition*, 148 Pa. 509 (1892). For cases where production of books is demanded to furnish evidence for a criminal prosecution see *Hazlett's Est.*, 8 Pa. Dist. Rep. 201 (1899), where the books are those of a corporation, *McElree v. Darlington*, 187 Pa. 593 (1898). See also *Horstman v. Kaufman*, 97 Pa. 147 (1881).

³¹Art. III, §32. See *Com. v. Bell*, 145 Pa. 374 (1891).

testimony upon the ground that it may criminate himself or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony."³²

Whether a like statutory immunity would warrant the court in compelling a witness to give answers tending to incriminate him has never been decided in Pennsylvania. In the United States courts it has been decided that a witness is not compelled to incriminate himself, even though a statute protects him by providing that the evidence he gives shall never be used against him. This is because, while the evidence he gives may not be used against him, yet it may serve to call attention to other evidence which may be sufficient to convict him.³³ On the other hand, if the act provides that there shall never be a prosecution or punishment of the witness for the offense which the examination concerns, then there is complete immunity, and he may be compelled to answer any and all questions.³⁴ It is believed that this case would not be followed in Pennsylvania, because under our decisions³⁵ the clause in the Bill of Rights protects a man from being compelled to answer questions tending to bring "ignominy and contempt" upon him, and no statute could give him immunity from this inevitable consequence of a disclosure of his evil actions.

§9. *Proceedings by Information.*—The next clause dealing with the rights of accused persons is embodied in §10, as follows: "No person shall, for any indictable offense, be proceeded against criminally, by information, 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; or by leave of the court, for oppression or misdemeanor in office."

An "information" is a formal accusation filed by a prosecuting officer without the intervention of a grand jury. It was in ancient times used to the oppression of persons who had excited the enmity of the public officers or others, and was looked upon with great disfavor by the founders of our govern-

³²Art. VIII, §10. See *Kelly's Contested Election*, 200 Pa. 430 (1901); *Com. v. Gibbons*, 9 Pa. Sup. Ct. 527 (1899).

³³*Counselman v. Hitchcock*, 142 U. S. 547 (1892).

³⁴*Brown v. Walker*, 161 U. S. 591 (1896).

³⁵See *Galbreath v. Eichelberger*, 3 Yeates, 515 (1803); *Eckstein's Petition*, 148 Pa. 509 (1892).

ment. At the same time, it was recognized that there are some cases where the occasion or the offense is of such a nature that a proceeding by information is both necessary and proper. The only instances where it has been used in Pennsylvania are in cases of prosecution of public officers for misdemeanor in office.³⁶

§10. *Twice in Jeopardy*.—The last clause in §10, dealing exclusively with the rights of accused persons, provides that “no person shall, for the same offense, be twice put in jeopardy of life or limb.”

The first observation to be made concerning this clause is that it applies only to capital cases. This was not the fact anciently, when punishment might take the form of the mutilation of one's members or their endangerment, as in trial by battle, for in such cases, when placed on trial, he was in jeopardy of his limbs, but under the modern system an accused person is never in jeopardy of his limbs without also being in jeopardy of his life. The cases in which the protection of the clause may be invoked are those in which at the time the crime was committed it was punishable by death. Thus crimes which at common law were capital, but which under our statutes are not so punished, are not within the meaning of the provision.³⁷ If at some future time the punishment for murder should be made life imprisonment in all cases, the clause in question would be of no service except because of the possibility of a return to capital punishment.³⁸

§11. *When a Prisoner is in Jeopardy*.—The next question is, when is a man in jeopardy. If he has been tried and either acquitted or convicted the plea of twice in jeopardy is of no use, for he is fully protected by the plea of former acquittal or former conviction. But is he in jeopardy at some time prior to the termination of the trial, so that, if a mistrial results, he cannot again be arraigned? The Pennsylvania rule

³⁶*Respublica v. Griffiths*, 2 Dall. 112 (1790); *Respublica v. Prior*, 1 Yeates, 206 (1793); *Respublica v. Burns*, 1 Yeates, 370 (1794), all three cases being prosecutions of justices of the peace for misdemeanor in office. See *Com. v. Hurd*, 177 Pa. 481 (1896), for *dictum* as to right to proceed against a county commissioner by information.

³⁷*McCreary v. Com.*, 29 Pa. 323 (1857).

³⁸The court's *dicta* in *Com. v. Arner*, 149 Pa. 35 (1892), seemed to overlook this fact, viz.: that the “Twice in Jeopardy” clause applies only to capital cases.

on this point is much more tender of the interests of the accused person than that of some other jurisdictions. In this state a man is deemed to be in jeopardy so soon as he is placed on trial upon a good indictment and the jury has been sworn to make a "true deliverance," even though not a word of evidence has been heard. In *Com. v. Clue*, 3 Rawle, 498 (1831), Gibson, C. J., said: "Nor do I understand how he shall be said not to have been in jeopardy, before the jury have returned a verdict of acquittal. In the legal as well as in the popular sense, he is in jeopardy the instant he is called to stand on his defense; for, from that instant, every movement of the commonwealth is an attack on his life."³⁹ If, however, the jury has not been sworn, there is no jeopardy, and a continuance of the case after the jury is in the box, but unsworn, is no bar to a subsequent trial for the same offense. Until the oath has been administered and the jury is "charged" with the prisoner, his trial has not really begun, and he is not yet called to "stand on his defense,"⁴⁰ nor is he in jeopardy during a preliminary trial of fact raised by a plea in abatement.⁴¹

§12. *Discharge of Jury in Case of Necessity.*—There must, of course, be some cases where there is an absolute necessity for the discharge of a jury before verdict. In such a case, must the result be the discharge of the prisoner or can he be placed on trial a second time?

There are certain well recognized cases in which, from ancient times, the discharge of a jury, even in a capital case, has been held to be legal. But it must be where there is in truth an absolute necessity for such discharge. Thus, Mr. Justice Duncan, in *Com. v. Cook*, 6 S. & R. (1822), at page 591, says: "What is the nature of these exceptions? It is either where the discharge is by his consent and for his benefit, or where ill practices have been used, or where he is insane or becomes suddenly ill, so that by the providence of God he is rendered totally incapable of speaking for himself, or instructing others to speak for him, or where a juror or witness is suddenly taken ill; these

³⁹*Com. v. Cook*, 6 S. & R. 577 (1822); *Hilands v. Com.*, 111 Pa. 1 (1885); *Com. v. Fitzpatrick*, 121 Pa. 109 (1888).

⁴⁰*McFadden v. Com.*, 23 Pa. 12 (1853); *Alexander v. Com.*, 105 Pa. 1 (1884).

⁴¹*Hilands v. Com.*, 111 Pa. 1 (1885); *Com. v. Fitzpatrick*, 121 Pa. 109 (1888).

last are cases of positive, absolute and extreme necessity; visitations of God, which are exceptions to all rules; or where it is on account of the misbehavior of a juror, who has absconded or is incapable to perform the duties of one by reason of intoxication."⁴² Whether failure to agree is good cause for discharging a jury is a matter about which there is some difference of opinion,⁴³ but in Pennsylvania it is well settled that the discharge of a jury because of a disagreement, even at the end of the term, is a bar to a second trial in a capital case, and twice in jeopardy can be successfully pleaded.⁴⁴ A discharge of the jury after being sworn in a capital case for any cause other than absolute necessity amounts to a discharge of the prisoner, as he cannot be tried again for the same offense.⁴⁵

§13. *Waiver of Constitutional Immunity.*—Whether the prisoner can waive his constitutional immunity from being twice put in jeopardy of his life for the same offense is doubtful. There is no authority in Pennsylvania, although there are *dicta* to the effect that he can do so.⁴⁶ These *dicta*, however, were based upon the assumption that the prisoner by moving for a new trial places himself voluntarily in jeopardy a second time. This assumption is not correct.⁴⁷ If a prisoner, convicted of murder, seeks a new trial, he cannot be said thereby to place himself again in jeopardy. He is already not only in jeopardy, but he is wholly lost. The motion for a new trial, so far from jeopardizing his life, is an effort to escape a certain fate. The only circumstances under which such a construction could be placed upon a motion for a new trial would be where a prisoner, convicted of murder in the second degree, moves for a new trial and runs the risk of a verdict in the first degree on the second trial. But in Pennsylvania it has been decided that a conviction of murder in the second degree is an acquittal of

⁴²See also *Com. v. Clue*, 3 Rawle, 498 (1831); *Hilands v. Com.*, 111 Pa. 1 (1885); *Com. v. Fitzpatrick*, 121 Pa. 109 (1888).

⁴³See *U. S. v. Perez*, 9 Wheat. 579 (1824), holding a disagreement in a capital case no bar to a subsequent trial for the same offense.

⁴⁴*Com. v. Cook*, 6 S. & R. 577 (1822); *Com. v. Clue*, 3 Rawle, 498 (1831); *McCreary v. Com.*, 29 Pa. 323 (1857); *Com. v. Fitzpatrick*, 121 Pa. 109 (1888).

⁴⁵*Hilands v. Com.*, 111 Pa. 1 (1885); *Com. v. Fitzpatrick*, 121 Pa. 109 (1888).

⁴⁶See *Lavery v. Com.*, 101 Pa. 560 (1882).

⁴⁷See *Com. v. Lutz*, 200 Pa. 226 (1901).

the first degree, hence on second trial only the second degree could be found.⁴⁸ Under no circumstances, therefore, does a prisoner, by moving for a new trial, place himself in "double jeopardy."

However, there seems on the whole to be no valid reason why an accused cannot waive his constitutional privilege if he chooses to do so. If he consents to the discharge of a jury he should not afterwards be heard to interpose his constitutional immunity as a bar to a second trial. In all the cases in this state where the plea of "double jeopardy" was upheld, the jury had been discharged without the prisoner's consent, and there is no intimation that the plea would have been good had he consented.

§14. *Excessive Bail, Excessive Fines and Cruel Punishment.*—The next clause of the Bill of Rights relating to the rights of accused persons is §13, providing: "Excessive bail shall not be required nor excessive fines imposed, nor cruel punishments inflicted." This provision was copied from the Constitution of 1790,⁴⁹ and is substantially the same as the provision on the same subject in the Constitution of 1776.⁵⁰ The section as it now stands is almost an exact copy of a similar clause in the English Bill of Rights, enacted at the time of the revolution of 1688. The language in that famous document is precisely the same except that the phrase, "*cruel and unusual punishments*," instead of "*cruel punishments*," as in our constitution, is used.⁵¹

Under our system of government and at this period of the world's history such a clause seems wholly superfluous, but it at least serves to remind us of the blessings of liberty we now enjoy by recalling to our minds the oppression suffered by our forefathers, and which they found it necessary to guard against. Enormous fines and bail wholly out of reason were not at all

⁴⁸*Com. v. Lutz*, 200 Pa. 226 (1901); *Com. v. Gabor*, 209 Pa. 201 (1904); *Com. v. Winters*, 1 Pa. County Ct. 537 (1885), holding that if, after conviction, the court of its own motion orders a new trial because of some error, the prisoner cannot object to a second trial.

⁴⁹Art. IX, §13.

⁵⁰Chap. II, §29, providing: "Excessive bail shall not be exacted for bailable offenses, and all fines shall be moderate."

⁵¹See 5 Cobbett's Parl. Hist., 110.

uncommon in England, particularly during the reigns of the Stuarts.⁵²

§15. *Amount of Bail a Matter of Judicial Discretion.*—The question as to what is excessive bail is to be decided by the judge, who admits to bail. It is entirely within his discretion. Some proceedings* which seem rather arbitrary have been supported under the power of judges of courts of oyer and terminer and of the quarter sessions to place persons under bond to keep the peace. The right has been exercised from ancient times to require prisoners, even after acquittal, to procure sureties to keep the peace.⁵³ It has on a few occasions been exercised in Pennsylvania for the purpose and with the effect of keeping suspected persons in prison in default of the ability to procure the very large bail demanded. In *Respublica v. Donagan*, 2 Yeates, 437 (1799), the defendants, who had been acquitted of murder, but whom the court suspected to be guilty, were required to produce security in the sum of ten thousand dollars conditioned for their good behavior for the space of fourteen years. This practically amounted to a sentence to that term of imprisonment, the prisoners (as the court well knew) being wholly unable to procure bail in the amount demanded.⁵⁴ The same right was reaffirmed in *Bamber v. Com.*, 10 Pa. 339 (1849). If carried further, or if attempted in a case where guilt was doubtful, it is probable that the constitutional clause under discussion could be successfully invoked to procure the prisoner's release.

§16. *Right to be Admitted to Bail.*—The first part of the next section of the Bill of Rights (§14) deals with the right of prisoners to be admitted to bail in the following words: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or presumption great."⁵⁵

Our law presumes every man innocent until proven guilty; hence the justice of not inflicting a degrading imprisonment

⁵²See Story on the Const., §1903.

⁵³Sadler, Crim. Proc., p. 113; *Respublica v. Donagan*, 2 Yeates, 437 (1799); *Bamber v. Com.*, 10 Pa. 339 (1849).

⁵⁴The report in 2 Yeates states that "The prisoners afterwards broke gaol and escaped."

⁵⁵This provision was contained in the Constitution of 1776, C. II, §28, and also in that of 1790, Art. IX, §14, and in the laws agreed upon in England, §11.

upon him until convicted, except in those cases where the surety would probably not be sufficient to insure his presence at his trial. Thus it has always been the practice to admit to bail in minor cases as a matter of course. In the greater offenses the discretion of allowing bail or not lay with the judge at common law. It was usually denied in cases of felony, and sometimes for less crimes. Under our law, however, the judge has no discretion save in capital cases. In all others he must admit to bail—in the case of those accused of murder in the first degree, he may, if he thinks the presumption not overwhelming, but he cannot be compelled to do so. In homicide cases, where it appears that the killing took place under such circumstances that a verdict no higher than that of murder in the second degree can be supported by the court, it is his constitutional duty to admit to bail,⁵⁶ and the prisoner can compel him to do so on *habeas corpus* proceedings. "Capital" as here used means offenses punishable with death at the time of the application for admission to bail, not so punishable at common law.⁵⁷

§17. *Suspension of the Writ of Habeas Corpus.*—The second sentence in the same section provides: "And the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it."⁵⁸

The right of *habeas corpus* is the right of any person whose liberty is denied him to demand the cause of his detention and to have such cause shown immediately to the satisfaction of the judge or else that he be discharged from custody. This privilege existed, theoretically at common law, but prior to the English Habeas Corpus Act, 31 Car. II, C. 2, it was of comparatively little use, as certain evasions and delays were habitually practiced by the judges.⁵⁹ While in time of peace it is of the highest importance that the privilege of this writ be preserved at all

⁵⁶*Com. v. Keeper*, 2 Ash. 227 (1838); *Com. v. Lemley*, 2 Pitts. 362 (1862).

⁵⁷*Com. v. Keeper*, 2 Ash. 227 (1838). See acts of March 14, 1877, P. L. 3, and of March 31, 1860, P. L. 427, for jurisdiction of various courts in admitting to bail for different offenses.

⁵⁸This clause was the same in the Constitution of 1790, Art. IX, §14, but did not appear in that of 1776.

⁵⁹See Story on the Const., §1341; Cooley, Const. Llm. (6 ed.), p. 416 *et seq.*

times,⁶⁰ yet it was recognized that there are occasions when the public safety demands its suspension; hence in case of invasion or insurrection the executive power may constitutionally suspend the writ and hold suspicious persons in custody, without showing cause, until the danger to the state has abated.

⁶⁰See *Com. v. Trach*, 3 Pa. C. C. 65 (1887).

CHAPTER VII.

PROTECTION TO LIFE, LIBERTY AND PROPERTY.

§1. *Constitutional Provisions.*—No provision of our constitution is so fundamental or so familiar as that a man cannot “be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land.”¹ This is a prohibitory and self-executing section, enacted in pursuance of the general declaration contained in the first section of the Bill of Rights, that: “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”

This section is identical with that contained in the Constitution of 1790,² and is substantially the same as that found in all our state constitutions and in the Constitution of the United States,³ which in turn are but repetitions of the right first guaranteed to Englishmen by Magna Charta.⁴

§2. *Right of Private Property.*—The right to life and liberty are of supreme importance to the individual, but the constitutional protection to his property claims a greater share of attention, for, while modern legislative bodies perhaps never wilfully infringe any of these sacred rights, they sometimes

¹Art. I, §9.

²Art. IX, sec. 1. The only changes made by the convention of 1790 were to insert the words “and reputation,” and to change the expression “natural, inherent and inalienable” into “inherent and indefeasible,” otherwise the provision was left as in the Constitution of 1776.

³The latter provides, Amendments, Article V, “Nor shall (any person) be deprived of life, liberty or property, without due process of law,” and in Article XIV, “Nor shall any state deprive any person of life, liberty or property, without due process of law.”

⁴Those cases dealing with the power of taxation as limited by these clauses and those dealing with the power of eminent domain will be treated under their appropriate heads. There will be no attempt to discuss the police power. It is not properly within the scope of this, work, and the decisions of the state courts upon it are rarely, if ever, final.

unwittingly do so, and much more frequently in the case of property than of personal liberty. The protection afforded private property, therefore, will be first considered. The first section of the constitution which has been quoted is no more than a general assertion of the right of the individual to acquire, possess and enjoy private property under the protection of law. This right he already possessed as a heritage of the common law, and it could not be taken away without the destruction of all those principles which from time immemorial Englishmen have most highly cherished. Even parliament, nearly omnipotent as it is, cannot do an act so opposed to natural justice as to limit or destroy the right of the individual to possess and enjoy property.

§3. *Meaning of Law of Land.*—In the conduct of business by which property is continually being transferred from hand to hand, the title to property is frequently taken from one by some act of law and vested in another. If a man is divested of his title as the result of the judgment of a court of competent jurisdiction, or if it is taken from him, after compensation rendered, in order that the public safety may be secured, or its convenience served, there is no wrong done. But the deprivation of the property of an individual in order that it may be vested in another shocks our sense of justice, and it was to prevent this, even if done by act of Legislature, that the constitution provides that no man “shall be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land.” The expression “judgment of his peers” clearly has reference to an adjudication in a court of law. “By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land.”⁵ Scarcely less pregnant of meaning are the words of Mr. Justice Coulter, in *Brown v. Hummel*, 6 Pa. 86 (1847).

⁵Cooley’s Const. Lim. (7th ed.), 502, quoting the words of Webster in the Dartmouth College case.

He says: "What, then, is the law of the land, as it relates to the protection of private rights? Does it mean bills of attainder in the shape of an act of Assembly, whereby a man's property is swept away from him without hearing, trial, or judgment, or the opportunity of making known his rights or producing his evidence? It certainly does not. It was to guard against such things which had been common in the reign of the Stuarts and their predecessors, and with which our forefathers of the Anglo-Saxon race were familiar, that these irrevocable and unassailable provisions were introduced into the constitution. The law of the land does not mean acts of Assembly in regard to private rights, franchises, and interests, which are the subject of property and individual dominion. But it means what is clearly indicated by the other provisions of the Bill of Rights, to wit: the law of the individual case, as established in a fair and open trial, or an opportunity given for one in court, and by due course and process of law. 'I am a Roman citizen,' were once words of power, which brought the proudest proconsul to a pause when he was about to commit oppression; and the talismanic words, I am a citizen of Pennsylvania, secures to the individual his private rights, unless they are taken from him by a trial, where he has an opportunity of being heard by himself, his counsel, and his testimony, *more majorum*, according to the laws and customs of our fathers, and the securities and safeguards of the constitution. Sir Edward Coke defines the meaning of the words by the law of the land—for they were used in Magna Charta, and have been sprinkled with the tears and blood of many patriots—to be a trial by due course and process of law. I do not, therefore, regard an act of Assembly, by which a citizen of Pennsylvania is deprived of his lawful right, as the law of the land. The first judgment on earth was upon summons and hearing. Where art thou, Adam? and hast thou eaten, etc., preceded the ejection of Adam and Eve from their beautiful inheritance, the Garden of Eden. And the proudest legislator may learn wisdom from such an example. It is against the principles of liberty and common right to deprive a man of his property or franchise, while he is within the pale of the constitution, and with his hand on the altar, and give it to another, without hearing and trial by due course and

process of law. I oppose against it the majestic authority of this great people, as reflected from the constitution of their own making and adoption. And here, in this court, the citizen can never claim protection from that august and high charter in vain, if its provisions cover and protect his cause."

It is clear from what has been said that the constitutional provision is a limitation on the power of the Legislature and prevents it from arbitrarily destroying rights of property. All departments of government may, under certain circumstances, interfere with private rights of property, but only when authorized by the general principles of the "law of the land." Thus the courts may decree titles to pass from one to another after a trial of the issues of the case; the executive may destroy property in the exercise of its right and duty to protect the health, safety and morals of the people, and the Legislature may take private property for public purposes, rendering proper compensation therefor, and may levy and collect taxes for public purposes, and, if necessary, take property to pay for them. But above and beyond such powers of government lies a field which may not be invaded. When the public interest is not involved, the sacred rights of private property may not be interfered with.

§4. *Meaning of Property. Expectant Interests.*—It now becomes important to consider the scope of the meaning of "property" as used in this connection. What rights of the individual come within this protection and what are without it? It is apparent that every person may have many expectations and hopes which are dependent in some measure on the maintenance of the present status of the laws, but that such hopes or expectations are not rights of property within the meaning of the constitution, and cannot stand in the way of those changes in the laws which are constantly being made. Those rights which are within its meaning are such as are already vested in the individual, and are rights of property. Of these he cannot be deprived without the process of the law.⁶

⁶*Austin v. University of Pennsylvania*, 1 Yeates, 260 (1793); *Pittsburg v. Scott*, 1 Pa. 309 (1845); *Lambertson v. Hogan*, 2 Pa. 22 (1845); *Sharpless v. Mayor*, 21 Pa. 147 (1853); *Grim v. School Dist.*, 57 Pa. 433 (1868); *Wolford v. Morgenthal*, 91 Pa. 30 (1879), and cases cited *infra*. *Cooley's Const. Lim.*, 437. See, however, *Satterlee v. Mathewson*, 16 S. & R. 169 (1827), in which it is difficult to avoid the conclusion

As might naturally be inferred from what has been said, interests which are in expectancy, and not in possession, are not within the protection of the constitution. It may happen that the expectation of acquiring property rights is defeated by changes made in existing laws, but this is not contrary to the constitution, and is impossible to avoid. For example, one may suppose, under existing laws of inheritance, that upon the death of certain persons their property will devolve upon him, but this hope or even certain belief cannot prevent the Legislature from altering the rules of inheritance, even if, by so doing, he is cut off from the line of descent. No right of property having vested, there is none which can be destroyed. This principle was applied in *Bambaugh v. Bambaugh*, 11 Sergeant and Rawle, 191 (1824), to the destruction by legislative action of the incidents of joint tenancy. The act of March 31, 1812, 5 Sm. L. 395, provided that the estate of a joint tenant should descend to his heirs, instead of becoming vested in the surviving tenants. This act was held valid, as applied to existing estates; no vested right to receive the interest of his fellows existed in any joint tenant; it was a mere expectancy, and no one could tell whether he would ever enjoy it.

The same principles are applicable to expectant interests possessed by husbands or wives in each other's estates. The laws relating to the extent of their respective claims, upon the death of the other, may be materially altered and legally applied to the claims of those who have already entered into the marriage state at the time the changes are made, although not to any interests which have actually vested.⁷

§5. *Altering or Destroying Remedies.*—As an individual has no vested right in an estate because under the law he may have reason to expect he will sometime receive it, neither has he any vested right in any particular remedy which he may design to use in the enforcement of a right or the redress of a wrong. He has a vested right to some remedy if his claim is already in

that vested rights were disturbed. See same case, *Satterlee v. Matthewson*, 2 Pet. 380 (1829), seeming to admit that such was the case. See further *Martin v. Bear*, 2 Clark, 17 (1845).

⁷*Meluzet's Appeal*, 17 Pa. 449 (1851).

existence, but not to a particular remedy, unless by contract, which cannot be impaired.⁸

As just indicated, the law cannot altogether destroy his remedy, in cases where his right to pursue it has already come into existence, for to do so would be to destroy the right itself, which the constitution forbids. Thus an act of limitation which entirely bars an existing right is unconstitutional, although one which leaves a reasonable time in which to pursue the remedy is valid.⁹ In *Biddle v. Hooven*, 120 Pa. 221 (1888), Mr. Justice Paxson, discussing the act of April 27, 1855, P. L. 369, said: "I shall not attempt to show that statutes of limitation, which affect the remedy merely, are constitutional. There are some few legal principles which may be regarded as settled, and this is one of them. If, therefore, the act of 1855 merely operates to deprive the owner of a remedy for the collection of his ground rent after the expiration of twenty-one years from any suit, claim or demand for the same, we cannot see any sufficient reason for holding that the act is unconstitutional."¹⁰ For similar reasons acts relating to rules of evidence, to the effect of a judgment of a court or the decision of a register of wills, are all constitutional and valid. They do not destroy existing rights, but operate on remedies alone. In *Kenyon v. Stewart*, 44 Pa. 179 (1863), an act making the probate of a will conclusive evidence of title to realty after the lapse of five years without contest was held to be constitutional, Mr. Justice Woodward saying: "The power of the Legislature to modify legal remedies is the same whether applied to past or future cases, but it is to be exercised with a sound discretion

⁸See Chapter VIII, Ex Post Facto Laws and Laws Impairing the Obligation of Contracts.

⁹See *Eakin v. Raub*, 12 Sergeant and Rawle, 330 (1825), and Chapter VIII, Ex Post Facto Laws and Laws Impairing the Obligation of Contracts.

¹⁰A number of attempts have been made to have this act declared unconstitutional, but without success. *Korn v. Browne*, 64 Pa. 55 (1870); *Biddle v. Hooven*, 120 Pa. 221 (1888); *Wallace v. Church*, 152 Pa. 258 (1893); *Clay v. Iseninger*, 187 Pa. 108 (1898), 190 Pa. 580 (1899); *Rodenbaugh v. Traction Co.*, 190 Pa. 358 (1899). It provides that after twenty-one years non-claim ground rents shall be irrecoverable. It was argued that this in effect destroyed such ground rents, which are estates in land, for, if not destroyed, the rent would still accrue annually and could not be barred by a mere limitation act. The courts, however, have uniformly treated the act as one of limitation, and have upheld it for the reasons given.

and a due regard to the rights of private property. Where it is so exercised no constitutional doubt can arise. If, on the other hand, we saw an exercise of the power in wanton disregard of private rights, it would be our duty to interpose the judicial shield.¹¹

§6. *Creation of Remedies Where None Existed.*—As the converse of the proposition that the Legislature may constitutionally alter or impair remedies, but may not destroy them as applied to existing rights, the question arises whether new remedies may be created where none existed. On the one hand, it may be said that the creation of a remedy where there is a right is no infringement of the rights of property, but, on the other hand it may be urged that the one against whom the right could not previously be enforced may complain that his vested interests have been interfered with. In *Bleakney v. Farmers' & Mechanics' Bank*, 17 S. & R. 64 (1827), it appeared that an act had validated a promissory note which was void only because of the forfeiture of the charter of the bank. The law was held to be constitutional, Mr. Justice Duncan saying: "This law divests no right, but removes an impediment or disability. It renders lawful an act prohibited, as if it had been lawful *ab initio*. It works no injustice—infringes no man's right—it impairs no contract—but takes from the contract the taint which the policy of the law interposed, and gives to the holder of the note a right to recover on the contract—a right which he would have possessed if there had been no legislative interposition." This principle was applied to a claim of the state in *Turnpike Co. v. Commonwealth*, 2 Watts, 433 (1834), Mr. Justice Rogers saying of a law giving the state the right to recover money paid to the turnpike company in excess of its proper claims: "The

¹¹See also the following cases upholding certain laws affecting remedies: *Bolton v. Johns*, 5 Pa. 145 (1847), making a mere debt a lien; *Northern Liberties v. St. John's Church*, 13 Pa. 104 (1850), regulating evidence; *Taggart v. McGinn*, 14 Pa. 155 (1850); *Gault's Appeal*, 33 Pa. 94 (1859), enlarging time for redemption of land sold for taxes; *Donoghue v. Traction Co.*, 201 Pa. 181 (1902), regulating suits for personal injuries; *Meredith v. Thomas*, 4 Kulp, 505 (1888), changing rules of evidence; *Strasburger v. Guinter*, 23 Pa. County Ct. 481 (1900), making lien of taxes prior to mortgages; *Cunnius v. Reading School District*, 206 Pa. 469 (1903), establishing procedure for disposition of estate of one presumptively dead on account of seven years' unexplained absence.

act creates no new right, but is merely remedial of an existing right. In the case of individuals it cannot admit of dispute, that remedies have been repeatedly given by legislative enactment, where none existed before; and it may be asked what reason is there that the Legislature should not have the same power in the case of the commonwealth." So in *Hepburn v. Curts*, 7 Watts, 300 (1838), a law removing certain disabilities imposed by the policy of the law on the plaintiff, and making it possible for him to sue his partner, was held valid. Mr. Justice Sergeant said: "Here the rights of the parties are not touched; but an objection existed arising out of the nature of an action at common law which interposed a bar to the trial of right—an objection which a court of equity does not allow to prevail, but, by means of the greater freedom and flexibility of its process, calls all parties before it and renders complete justice. This objection the Legislature removes, and authorizes a court of common law, by the ordinary common law process, to entertain the suit and to do justice between the parties: the method which in this state we have frequently been compelled to employ for want of courts of equity, sometimes by the legislative enactment, and sometimes by an amplification of the jurisdiction of the courts, in order to incorporate equity principles and equity relief into our system as far as possible. In pursuance, therefore, of the directions of this act of the Legislature, this cause must be remitted to the court below, that they may proceed according to its provisions to trial and judgment, as though the parties, plaintiffs and defendants, were separate and distinct parties."¹²

In the cases heretofore referred to it was clearly apparent that a legal right existed and that the extent of the legislative interposition was to remove a bar imposed by the policy of the law. In *Lycoming v. Union*, 15 Pa. 166 (1850), however, a different situation was presented. The defendant county owed a duty resting not in legal but only in moral obligation, and an act of Assembly had been passed which afforded a remedy by which that obligation could be enforced. This was held to be constitutional. It is believed, however, that this decision is not authority for a general principle that the Legislature can

¹²See also *Biddle v. Starr*, 9 Pa. 461 (1848).

turn a moral into a legal obligation. The case is authority for its own peculiar facts, but probably will not be extended, particularly in view of the now generally accepted doctrine that a moral obligation (contrary to the opinion expressed in *Lycoming v. Union*) cannot support a promise based upon it alone. It is difficult to escape the conclusion that a law which imposes an obligation not previously in law existing, upon one man in favor of another, operates as a deprivation of his property.

But the courts have even gone so far in Pennsylvania as to hold in one or two cases that, when a remedy has been completely barred by the lapse of time, the Legislature can remove the bar and divest the defendant of vested rights of property. In *Stuber's Road*, 28 Pa. 199 (1857), it was held that the Legislature could without compensation deprive a man of a private way, the title to which he had gained by prescription. Mr. Justice Lowrie said: "It was by an adverse user of over twenty-one years that this right of way was acquired. Can the Legislature make a law by which all rights of way thus acquired may be divested?"

"No doubt such a law would be strictly legislative in its character, because it would prescribe a rule of action for the courts in relation to a class of cases supposed to stand in need of a remedy. Such an act has been passed, and it is supposed that it exceeds the constitutional authority of the Legislature because it sets aside vested rights. How vested? Not by contract: rights vested in that form are expressly protected. But by adverse user: and whence does this derive its force? From positive enactments, or from the usages of the government, or from the customs of the people; all which are forms of law-making. Legislation, therefore, in some one of its forms, gave the title relied on here, by declaring that government will not inquire into the true title, if there has been an adverse user of twenty-one years. The title, therefore, is founded simply on a limitation of the adverse remedies.

"In other words, legislation, in a perfectly competent form, that is, by the limitation of actions, has partially taken one man's land and given it to another: may legislation provide in another form for divesting the right? It is hard to see how this question can be answered in the negative, unless possibly

by the coming in of a new owner of the way, who might have a true moral ground of title, arising from a purchase on the faith of appearances. . . . Legislation gives this right in one form and takes it away in another, when it becomes useless; and we see no objection to such legislation. In principle it is only declaring that the law will not furnish remedies for perpetuating servitudes thus originating by its indulgence, if it be ascertained that they have become useless. And surely this fact may be ascertained in the case of a road by the same form of process that is used generally for establishing and vacating roads." The same principle was reaffirmed in *Krier's Private Road*, 73 Pa. 109 (1873). While it may be supportable in the particular cases in which it has been applied, it is difficult to believe that it will ever be extended to any other situations. It could scarcely be contended that, as a general proposition, the Legislature can constitutionally deprive any person of rights acquired by adverse possession or prescription. It is well settled that by this means, as well as by other methods of purchase, individuals can gain title to land or personal property. In such a case it is not possible to suppose that these rights could be taken away by a mere legislative command. Even in the case of the vacation of a private road under the circumstances of *Stuber's Road*, it will be safer to treat the question as unsettled in the unlikely event of the enactment of another law of similar import.

The courts, while allowing new remedies to be created, even after suit brought, have refused to allow litigation once concluded to be reopened by legislative action. Thus, in *McCabe v. Emerson*, 18 Pa. 111 (1851), an act allowing a writ of error, after the time for taking it out had expired, was held to be unconstitutional, and in *Bagg's Appeal*, 43 Pa. 512 (1862), the court refused to allow an account in the orphans' court to be reopened eleven years after the final adjudication, although an act of Assembly had been passed purporting to give that right.¹³

§7. *Laws Validating Defective Deeds or Wills.*—If a deed or will has been defectively executed so that, although by its terms it attempted to pass title to property, none actually

¹³See Chapter XVII, The Judiciary.

passed, can its defects be cured by subsequent enactments by the Legislature? To ask such a question should answer it, for it seems too clear for argument that such laws are invalid, because they clearly take the property from the grantors, who never conveyed it away, and vest it in the grantees, who never actually obtained it. Nevertheless, it was formerly thought that acts passed to remedy faults in previous conveyances were constitutional, in cases where there was a moral obligation to complete the conveyance.¹⁴

The law was unquestioned until 1845, when Chief Justice Gibson, in *Menges v. Wertman*, 1 Pa. 218 (1845), while following the previous decisions, gave expression to his opinion that the act in question, validating a defective title given by a sheriff, was unconstitutional. In *Dale v. Medcalf*, 9 Pa. 108 (1848), *Menges v. Wertman* was distinguished, and, although the cases were similar in principle, an opposite conclusion was reached. In *Greenough v. Greenough*, 11 Pa. 489 (1849), an act was under discussion which provided that wills executed by the testator's mark, instead of his signature, whether before or after the date of the act, should be valid. Such wills by numerous decisions of the Supreme Court were void. In deciding the act to be void, Mr. Chief Justice Gibson said: "It is destitute of retroactive force, not only because it was an act of judicial power, but because it contravenes the declaration in the ninth section of the ninth article of the constitution, that no person shall be deprived of life, liberty or property except by the judgment of his peers or the law of the land. Taking the proof of execution, at this stage of the argument, to be defective under the act of 1833, it would follow that the plaintiff had become the owner of a third of the property in contest, by the only assurance that any man can have for his property—the law. Yet the Legislature attempted to divest it, by a general law, it is true, but one impinging on particular rights. Still it is argued that the act may be sustained as a confirmation of conveyance by will, as a confirmation of conveyances by deed was sustained in *Underwood v. Lilly*, *Mercer v. Watson* and other

¹⁴*Underwood v. Lilly*, 10 S. & R. 97 (1823); *Barnet v. Barnet*, 15 S. & R. 72 (1826), confirming defective acknowledgment by *feme covert*; *Tate v. Stooltzfoos*, 16 S. & R. 35 (1827), *ibid.*; *Mercer v. Watson*, 1 Watts, 330 (1833), *ibid.*

cases of the class. It was remarked in *Menges v. Wertman* that a party, who has received a benefit from a transaction, is under a moral obligation to convey, and that the Legislature may add a legal one to it; and I still think that a distinction between a purchaser and a volunteer is the only ground left us to found a practical limitation of special legislation. In this case the devisee is a volunteer, and the heirs are bound by no obligation which did not bind the legitimate heirs in *Norman v. Heist*. But the great obstacle in *Menges v. Wertman* was the number of titles that depended on legislation of the same stamp. I have doubted whether we ought not to have swept them all away; but we had a choice of evils set before us, and want of steadiness in the judiciary was thought to be the greater one."¹⁵ Finally, in *Menges v. Dentler*, 33 Pa. 495 (1859), raising the same question as in the earlier case, the authority of *Menges v. Wertman* and kindred cases was definitely overthrown. Mr. Chief Justice Lowrie said: "The Bill of Rights declares that no man shall be deprived of life, liberty or property unless by the judgment of his peers or the law of the land: and that the courts shall be always open to every man, so as to afford remedy by due course of law for all invasions of rights; and that right and justice shall be therein administered without sale, denial or delay. It seems to us that these provisions of the constitution were entirely overlooked when the act of Assembly alluded to was passed, and when the case of *Menges v. Wertman* was decided; for, to our minds, they most plainly forbid both the act and the decision. They leave no shadow of doubt about the general class of functions which fall under the denomination of judicial power, and which are vested by the constitution in the courts of justice. They declare that all claims for justice between man and man shall be tried, decided and enforced exclusively by the judicial authority of the state, and by due course of law. . . . The law which gives character to a case, and by which it is to be decided (excluding the forms of coming to a decision), is the law that is inherent in the case, and constitutes a part of it when it arises as a complete transaction between the parties. If this law be changed or annulled,

¹⁵See to the same effect *Snyder v. Bull*, 17 Pa. 54 (1851); *McCarty v. Hoffman*, 23 Pa. 507 (1854).

the case is changed, and justice denied, and the due course of law violated. . . . This view of these constitutional provisions may cast doubt upon several decisions to be found in our reports. Some of them are acknowledged to be erroneous, and others are exceptional, and must stand on their exceptional principles. The cases, recognizing the laws curing defective certificates of acknowledgment of deeds of married women and other kindred cases, may be reconciled with the constitution (without rejecting other reasons) by treating the certificate as not an inherent part of the contract; but as a means of proving it, the strict form of which being dispensed with, leaves the instrument to the support of the legal presumption, *omnia rita acta esse*.

"We are, therefore, bound to declare that the act of Assembly, passed for the purpose of deciding this controversy as it originally arose, constitutes no part of the present case, and cannot be allowed to influence our judgment relative to the effect of the sheriff's deed to Oyster. In strict law it does not tend to validate that deed, so far as it purports to convey land in Northumberland County. If the deed had no such validity when made, the act of Assembly could give it none."

A distinction is taken between such laws as have been discussed and those which validate deeds which have been defectively acknowledged. It is said that the latter operate only on the mode of proof, and not on the instrument itself. In *Journey v. Gibson*, 56 Pa. 57 (1867), such an act, validating the acknowledgment of deeds made by married women in other states was upheld, although the court expressed themselves as much impressed with the injustice of the legislation. Mr. Justice Strong said: "In view of the numerous decisions heretofore made in this and in other states, it is too late to deny the power of the Legislature to validate defective acknowledgment of deeds, and give to such acknowledgments the same force they would have had if correctly made and certified at first. Such legislative acts are sustainable only because they are supposed not to operate upon the deed or contract changing it, but upon the mode of proof. It must be admitted that they often produce very harsh results, of which *Mercer v. Watson*, 1 Watts, 330 (1833), is a notable illustration. They are retroactive statutes,

and for this reason they are not to be extended beyond the plain intent of the Legislature, and yet so far as they are remedial they must be construed as remedial statutes are." The distinction made is very shadowy and such acts also seem unconstitutional, but there are so many decisions upholding them that the question can scarcely be considered open. Such cases, however, are not to be extended in principle.

There is, however, a marked distinction between laws correcting defects in the acknowledgments of deeds and those which purport to validate deeds which the grantors at the time had no power to make. The latter are unquestionably void. In *Shonk v. Brown*, 61 Pa. 320 (1869), this distinction was clearly stated. It appeared that an act had been passed purporting to validate a conveyance of a married woman which she had no power to make, under the terms of the gift to her. Judge Agnew in his opinion drew a distinction between acts which correct a defect in the manner of conveyance (as in *Journey v. Gibson*) and those which seek to make a conveyance good, when there was no power in the grantor to make it. He said, referring to previous cases, among which were those just discussed: "The most of them are cases of the defective acknowledgments of deeds of married women. But there is a marked difference between them and this. In all of them there was a power to convey, and only a defect in the mode of its exercise. Here there is absolute want of power to convey in any mode. In ordinary cases a married woman has both the title and the power to convey or to mortgage her estate, but is restricted merely in the manner of its exercise. This is a restriction it is competent for the Legislature to remove, for the defect arises merely in the form of the proceeding and not in any want of authority. Those to whom her estate descends, because of the omission of a prescribed form, are really not injured by the validation. It was in her power to cut them off, and in truth and conscience she did so, though she failed at law. They cannot complain, therefore, that the Legislature intervenes to do justice. But the case before us is different. Mrs. Ather-ton had neither the right nor the power during coverture to cut off her heirs. She was forbidden by the law of the gift which the donor impressed upon it to suit his own purposes. Her title

was qualified to this extent. Having done an act she had no right to do, there was no moral obligation for the Legislature to enforce. Her heirs have a right to say: This was our grandfather's will. The estate was vested in us because there was no power to prevent it in accordance with his will. The Legislature cannot take our estate and vest it in another who bought it with notice on the face of his title that our mother could not convey to him." The law seems to be settled in accordance with this decision, and cases like *Journey v. Gibson* are also clearly opposed to the spirit, if not the letter, of the Bill of Rights. They are upheld out of respect to the doctrine of *stare decisis* rather than because of the principles they involve.¹⁶

§8. *Laws Conferring Power to Convey on Persons Acting in a Representative Capacity.*—It happens very often in the usual progress of events that the title to property will for long periods of time be vested wholly or in part in persons who are not capable of conveying it, on account of youth, lack of mental capacity, or other disability. In such cases, can the Legislature constitutionally invest some person in a representative capacity with power to make such conveyance? The point was first raised in *Estep v. Hutchman*, 14 S. & R. 435 (1826). In that case a statute authorizing the guardian of infant children to convey certain real property to a vendee, who had contracted to purchase from the decedent, was under discussion. The court upheld it, Mr. Justice Huston saying: "It is mistaking and misstating the question to call this an act divesting those children of their estate. It may and does happen, that, from infancy, or idiocy, there exists property, and no person has power to convey that property. Justice to other persons, as well as the best interests of infants or idiots, may require that a conveyance of it should be made. I know of no principle of public policy, or of law, of no provision of the constitution, which forbids the Legislature to vest in some person the power to convey in such cases; but a law giving such power to convey would be worse than nugatory, if the conveyance, when made,

¹⁶See also *Alter's Appeal*, 67 Pa. 341 (1871), in which an act to validate a will signed, not by the testator, but by his wife through a mistake, was held bad, and *Richards v. Rote*, 68 Pa. 248 (1871), where an act purporting to validate the appointment of a trustee met a similar fate.

was of no validity. A power to supply the want of trustees, to enable some person to complete defective titles, instead of and for the use of infants and others, must exist somewhere in every government. If not expressly given by the law or the constitution, it would seem to reside in that branch of our government which has usually exercised it." The principle of this decision, that the Legislature may constitutionally give to a guardian or executor or other person in proper cases power to convey the property of individuals who are under some disability, such as infancy or lunacy, has been reaffirmed in a number of cases,¹⁷ and is a well settled principle of our law.

Legislation which has for its object the marketing of property so tied up by the terms of a will that under ordinary circumstances it could not be sold, has also been uniformly upheld in Pennsylvania. The free alienation of property is greatly favored by the common law, and particularly has it been in this state, where much legislation on the subject has been enacted.¹⁸ In *Norris v. Clymer*, 2 Pa. 277 (1845), in which a private act of this kind was upheld, Chief Justice Gibson stated that there were more than nine hundred such statutes in force in Pennsylvania, giving trustees the power to convert unproductive land into available assets. He said that the power to pass such acts rests "on the notions of parliamentary power, brought by our forefathers from the land of their birth, and handed down to their descendants unimpaired, in the apprehension of any one, by constitutional restriction of ordinary legislation. It is not above the mark to say that ten thousand titles depend on legislation of this stamp."¹⁹

On the other hand, the Legislature cannot confer power to convey upon any person when there are parties in interest who are *sui juris* and who do not consent,²⁰ for this would deprive them of their property without due process of law, and

¹⁷*Kerr v. Kitchen*, 17 Pa. 433 (1851); *Kneass's Appeal*, 31 Pa. 87 (1857), and cases *infra*.

¹⁸See act of April 18, 1853, P. L. 503, generally known as the "Price Act," and *Smith's Estate*, 207 Pa. 604 (1904), upholding it.

¹⁹See also *Sergeant v. Kuhn*, 2 Pa. 393 (1845); *Kerr v. Kitchen*, 17 Pa. 433 (1851); *Carter v. Com.*, 1 Grant, 216 (1855).

²⁰*Ervine's Appeal*, 16 Pa. 256 (1851); *Kneass's Appeal*, 31 Pa. 87 (1857); *Shoenberger v. School Directors*, 32 Pa. 34 (1858); *Hegarty's App.*, 75 Pa. 503 (1874).

later cases have not altogether approved the doctrine of *Norris v. Clymer*.²¹

These cases are no longer of much importance save as they illustrate a general principle, for since the Constitution of 1873 all such laws must be general and not special. Those passed to promote the marketability of titles are upheld, particularly as applied to subsequent cases.²² Laws in the nature of police regulations may deprive an individual of his property in order to promote the health, safety or morals of the people.²³ Laws consented to by all parties in interest are valid, although they might not be otherwise.²⁴

§9. *Vested Rights Not to be Destroyed*.—Aside from the classes of cases heretofore discussed, it is now well settled that it is beyond the power of the Legislature to destroy vested rights of property, unless by the process of the law. Retro-spective laws, which neither destroy property nor impair contracts, may be valid, though never favored, but they must not divest vested rights. At an earlier date, before the overturning of the decisions upholding the validity of laws curing defects in defective titles, it was supposed that vested rights might be constitutionally destroyed. In *Grim v. Weissenburg School District*, 57 Pa. 433 (1868), Mr. Justice Sharswood gave expression to some such thought. He said: "If an act of Assembly be within the legitimate scope of legislative power, it is not a valid objection that it divests vested rights," and called attention to the various cases holding that irregularities in titles, etc., could be cured by legislative action. A distinction was made between such cases and the actual taking of property, which was forbidden.²⁵ As has already been seen, the courts

²¹See remarks of Woodward, J., in *Shoenberger v. School Directors*, 32 Pa. 34 (1858). See also *Saxton v. Mitchell*, 78 Pa. 479 (1875).

²²*Greenwall's Appeal*, 37 Pa. 95 (1860); *Freeman's Estate*, 181 Pa. 405 (1897); *Smith's Estate*, 207 Pa. 604 (1904), upholding "The Price Act."

²³See *Moninger v. Ritner*, 104 Pa. 298 (1883), construing *feme sole* trader act of May 14, 1855, to be valid.

²⁴*Caverow v. Life Ins. Co.*, 52 Pa. 287 (1866); *Jones's Appeal*, 57 Pa. 369 (1868); but see *Rogers v. Smith*, 4 Pa. 93 (1846); *Fullerton v. McArthur*, 1 Grant, 232 (1855). The commonwealth may impair its own rights, as in *Davis v. Dawes*, 4 W. & S. 401 (1842).

²⁵See *Norman v. Heist*, 5 Watts & Sergeant, 171 (1843), holding invalid an act which, after the death of an ancestor, placed an illegitimate child in the same class as legitimate children for purposes of

are now more liberal in their construction of this clause than formerly, and all laws which destroy vested rights of property are adjudged to be invalid.²⁶

§10. *Liberty of the Person*.—That part of the section under discussion which guarantees freedom of the person has been invoked very little in Pennsylvania, because there have not been many instances where it has seemed to be infringed. There are a few such cases, however, and particular reference is made to those where the Legislature has sought to limit the right of the individual to contract. The first case of this kind in Pennsylvania was *Godcharles v. Wigeman*, 113 Pa. 431 (1886). It was a decision relative to the validity of the so-called store order act, forbidding employees and employers to contract for the payment of the former in orders on the stores of the latter. The act was held to be an unconstitutional usurpation of power and an infringement of the Bill of Rights. Mr. Justice Gordon, who delivered the opinion of the court, said: "The first, second, third and fourth sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the Legislature to do

inheritance; *Lauman v. Lebanon Valley Railroad Co.*, 30 Pa. 42 (1858), deciding that the Legislature could not compel a stockholder of a corporation to surrender his own stock and to accept in lieu thereof the shares of another company; *Reiser v. William Tell Saving Fund Ass'n*, 39 Pa. 137 (1861), holding invalid an expository act which in effect destroyed property rights.

²⁶Acts to effect the following objects have been declared to be unconstitutional: Giving borough right to sue for injuries inflicted upon an individual, *Fleming's Appeal*, 65 Pa. 444 (1870); providing a method of extinguishing ground-rent, *Palairot's Appeal*, 67 Pa. 479 (1871); directing a man to open a drain for the benefit of his neighbor, *Rutherford's Case*, 72 Pa. 82 (1872); providing a penalty for not repairing a river bank within forty-eight hours after injury, *Phila. v. Scott*, 81 Pa. 80 (1876); making illegitimate child capable of taking under deed limited to legitimate children, *Appeal of Edwards*, 108 Pa. 283 (1885). The state may, however, revoke a mere license given to an individual without infringing the Bill of Rights. *Susquehanna Coal Co. v. Wright*, 9 W. & S., 9 (1845); an elective office is not properly within the protection of this clause, unless it be one provided for by the constitution, in which case the opposite view is taken. In the former case the office may be constitutionally abolished at any time and the incumbent deprived of the emoluments, *Com. v. McCombs*, 56 Pa. 436 (1867); *Com. v. Weir*, 165 Pa. 284 (1895); *Com. v. Moir*, 199 Pa. 534 (1901); *Neuls v. Scranton*, 211 Pa. 581 (1905). Riparian rights are property within the meaning of the clause, *Hough v. Doylestown*, 4 Brewst. 333 (1870); manufacturer's interest in the indenture of an apprentice is a property right, *Flaccus v. Smith et al.*, 199 Pa. 128 (1901). A man's profession is his property, *Ritter v. Rodgers*, 8 Pa. County Ct. 451 (1890).

what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States.

"He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." The same principle was reaffirmed in *Waters v. Wolf*, 162 Pa. 153 (1894), where an act seeking to interfere with the freedom of contractors and builders to agree that no mechanics' liens should be filed was overthrown.²⁷

There has been of recent years a decided tendency toward class legislation, which, in Pennsylvania, at least, has been checked by the action of the courts in liberally construing our Bill of Rights, and particularly the clause guaranteeing the right to life, liberty and property. Thus in *Purvis v. United Brotherhood*, 214 Pa. 348 (1906), the Supreme Court recognized these rights as being entitled to protection, not only from laws infringing them, but also from the unlawful acts of individuals. In deciding that an employer was entitled to manage his own business, and to be free from coercion by his employees, Mr. Justice Brown said: "The right of a workman to freely use his hands and to use them for just whom he pleases, upon just such terms as he pleases, is his property, and so in no less degree is a man's business in which he has invested his capital. The right of each—employer and employee—is an absolute one, inherent and indefeasible, of which neither can be deprived, not even by the Legislature itself. The protection of it, though as old as the common law, has been reguaranteed in our Bill of Rights. 'All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and

²⁷See also *Com. v. Brown*, 8 Pa. Superior Ct. 339 (1898); *Bauer v. Reynolds*, 14 Pa. County Ct. 497 (1894); *Lee v. Lewis*, 7 Kulp, 164 (1893); *Com. v. Isenberg*, 4 Pa. Dist. Rep. 579 (1895).

liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.' Const., Art. I, sec. 1. 'The principle upon which the cases, English and American, proceed, is that every man has the right to employ his talents, industry and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce are all, in equal sense, property.' *State v. Stewart*, 59 Vt. 273. A person's business is property, entitled under the constitution to protection from unlawful interference. Every person has a right, as between his fellow-citizens and himself, to carry on his business, within legal limits, according to his own discretion and choice, with any means which are safe and healthful, and to employ therein such persons as he may select. *Barr v. Essex Trades Council*, 53 N. J. Equity, 101. With the absolute right of the appellees in their property, the appellants assumed to interfere, and would injure, if not destroy, it, if their demands are not complied with. This no court will tolerate." A similar ruling was made with regard to a law which purported to subject one man to liability for the negligence of another. This was said to be class legislation and contrary to the Bill of Rights.²⁸

But, although it may not unduly limit the freedom of contract, the Legislature, within reasonable limits, may regulate the letting and carrying out of contracts as an exercise of the police powers,²⁹ and may even prohibit certain contracts altogether if the public safety seems to require it.³⁰

²⁸*Durkin v. Kingston Coal Co.*, 171 Pa. 193 (1895).

²⁹*Com. v. Vrooman*, 164 Pa. 306 (1894); *Com. v. Beatty*, 15 Sup. Ct. 5 (1900).

³⁰*Com. v. Keary*, 198 Pa. 500 (1901). See as to the right to peddle: *Fromberg's Petition*, 4 Pa. County Ct. 354 (1887); *Com. v. Dunham*, 191 Pa. 73 (1899); *Warden's License*, 24 Pa. Superior Ct. 75 (1903); *Com. v. Deinno*, 20 Pa. County Ct. 371 (1898); *Com. v. Lippincott*, 7 Pa. County Ct. 32 (1889). As to the power of the state to have an individual declared a lunatic, see *May's Case*, 10 Pa. County Ct. 283 (1891). The Legislature may prescribe terms upon which foreign corporations may do business in the state: *Swing v. Munson*, 191 Pa. 582 (1899). See also on limitation of power to contract: *Com. v. Eaby*, 16 Lanc. L. R. 25 (1898); *Mehl v. Carey*, 21 Pa. County Ct. 275 (1898); *Com. v. Baxter*, 23 Pa. County Ct. 270 (1899); *Com. v. Penn Forest Trout Co.*, 26 Pa. County Ct. 163 (1902).

CHAPTER VIII.

EX POST FACTO LAWS AND LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.

§1. *Ex Post Facto Laws*.—Section 17 of Article I provides “No *ex post facto* law, nor any law impairing the obligation of contracts . . . shall be passed.”¹ This provision is identical in meaning with one contained in the Constitution of the United States, and indeed with like provisions in all the state constitutions. Any law which relates to past events and alters the status of parties with respect to them is unjust and unwise, and this has been universally recognized by the American people. But the expression *ex post facto* while literally including within its meaning all retroactive laws has been construed, in the light of the previous history of the term, to relate only to criminal cases. Therefore one is fully protected from the effect of any law which seeks to punish him for a past act, committed perhaps at a time when it was not punishable, but he is not protected from the consequences of retroactive legislation which concerns only his property.²

The protection afforded in criminal cases is very complete. No law can punish an act which when committed was not punishable, nor can it increase the punishment or alter the rules of evidence or the conduct of the trial so as to place the accused person under any greater disability than he would have been had his trial followed immediately after the commission of the act.³ But the limitation of time within which the indictment may be exhibited, can be extended, and this is deemed to be no

¹This section was taken almost verbatim from the Constitution of 1790. Art. IX, §17.

²*Stoddart v. Smith*, 5 Binney, 354, 363 (1812); *Adle v. Sherwood*, 3 Wharton, 481 (1838); *Lane v. Nelson*, 79 Pa. 407 (1875).

³See *Cooley, Const'l Lim.*, 6 ed., p. 318, *et seq.*; 2 Story on the Constitution, §1345.

disadvantage to the prisoner, provided the statute had not fully barred the prosecution when the act was passed.⁴

In other than criminal cases, however, it is well settled that there is no constitutional objection to retroactive legislation, so long as the rights of private property are not interfered with and the obligation of contracts is not impaired.⁵

§2. *Laws Impairing the Obligation of Contracts.*—The same section (§17) provides against the passage of any law "impairing the obligation of contracts."⁶ This clause being identical with one in the Constitution of the United States the decisions of the Supreme Court of the United States control our own in cases where the right of the litigant who invokes the protection of the clause is denied, but in cases where a law is declared unconstitutional, because in conflict with this clause, the decisions of the Pennsylvania Supreme Court are not subject to review.⁷

It is remarkable that the clause forbidding any state to pass a law impairing the obligation of contracts aroused so little attention at the time of its framing, either in the Federal or state conventions. There was scarcely any comment upon it, so that we have little or no light thrown upon its interpretation by those who incorporated it into our government.⁸

§3. *Meaning of Contracts.*—The first question to be considered is the meaning of the word "contracts" as here used. What contracts or agreements are within the protection of the clause?

⁴*Com. v. Duffy*, 96 Pa. 506 (1880). See also the cases of *Com. v. Taylor*, 2 Kulp, 364 (1883), and *Com. v. Wasson*, 29 Pitts L. J. 434 (1882), relating to laws punishing the practice of medicine without first having conformed to certain regulations.

⁵See *Ade v. Sherwood*, 3 Whart. 481 (1838); *Gault's Appeal*, 33 Pa. 94 (1859).

⁶The Constitution of 1790 contained the following clause: Art. IX, §17, "No *ex post facto* law nor any law impairing contracts shall be made." In *Deichman's Appeal*, 2 Wharton, 395 (1837), there was held to be no difference in the meaning of the two expressions, but in the convention of 1873 the expression "obligation of," before "contracts," was inserted to make the section conform exactly to the clause in the Constitution of the United States. A proposition to insert the following words was made but rejected, "or any law depriving the party of any remedy for the enforcement of a contract which existed when the contract was made." 5 Conv. Debate (1873), 632.

⁷The Judiciary Act allows an appeal from the State Supreme Court in such cases only where the law alleged to impair a contract is upheld.

⁸See Cooley, Const. Lim. (6 ed.), p. 328.

It may be stated generally that all contracts, if such as the law will enforce, whether executed or executory, are protected from impairment by any law of the state. This is true of contracts made elsewhere as well as of those made here. Thus a law of Pennsylvania could not impair the obligation of a contract validly made in New York, although it might prohibit the making of such contracts in this state.⁹

This, however, is true only of contracts in the strict sense. To be protected they must be founded on express or implied agreement.¹⁰ A marriage contract is not within the meaning of the constitutional provision, for a marriage is not a contract in the usual sense of the word, but is rather a *status* or relation which may be regulated or dissolved for cause under state laws irrespective of the clause forbidding the impairment of the obligation of contracts. It follows that the rights of husband and wife in each other's property may be enlarged or diminished prior to the vesting of such rights, and there is by such action no impairment of the obligation of any contract.¹¹

It has been doubted in some jurisdictions whether the clause would not protect a marriage from dissolution without cause by the Legislature or under its authority. A legislative divorce is, of course, impossible under our present system forbidding local and special legislation, but in the only judicial opinion which has dealt specifically with the question it was intimated that the power to dissolve a marriage without cause might be upheld if exercised in a proper manner.¹²

§4. *Contracts of the State.*—It being conceded that contracts of private individuals cannot be impaired, the question was early raised as to the right of a state to pass a law impairing the obligation of a contract to which it is a party. The very first case in our books on the subject was such an one and the court promptly took the position that such a contract is as sacred and as fully within the protection of the constitution as any

⁹*Com. v. Biddle*, 139 Pa. 605 (1891); *Insurance Co. v. Storage Co.*, 6 Pa. Superior Ct. 288 (1898).

¹⁰*Lawrence Co. v. New Castle*, 18 Pa. Superior Ct. 313 (1901).

¹¹*Melizet's Appeal*, 17 Pa. 449 (1851); *Moninger v. Ritner*, 104 Pa. 298 (1883).

¹²*Cronise v. Cronise*, 54 Pa. 255 (1867).

other.¹³ This principle was reasserted by Mr. Chief Justice Tilghman a quarter of a century later,¹⁴ and in 1870 Mr. Justice Sharswood referred to the doctrine as being too well settled to require discussion.¹⁵

It is recognized by our courts, however, in common with the universal current of authority, that grants to private persons or corporations of privileges or rights of a public nature are to be construed strictly in favor of the state and against the individual. Such a grant will not be construed to be irrevocable or exclusive unless the language is too clear to be mistaken, and therefore may be withdrawn or given to others without the impairment of a contract.¹⁶

§5. *Contracts of Municipal Corporations, Etc.*—Contracts entered into by cities, boroughs, counties, etc., stand on precisely the same footing as those executed by the state. The power having been given to the municipality to make the contract it cannot be impaired either by the authority that made it or by the state. Thus the City of Philadelphia having sold certain bonds upon the express representation that the city gas works were to be managed by a certain board of trustees and subject to particular regulations, could not subsequently alter these arrangements without the consent of the bondholders.¹⁷ As before indicated, the state itself cannot impair a contract made by a municipal corporation. Although it has full power over the municipality itself and may alter its powers or destroy them at will, it cannot impair a contract made with a third person.¹⁸

§6. *Charters of Private Corporations.*—Before the question had been brought before the Pennsylvania Supreme Court, the Supreme Court of the United States had decided in the

¹³*Van Horne's Lessee v. Dorrance*, 2 Dall. 304 (1795). This case being one of the earliest to deal with constitutional questions, contains an elaborate discussion of the nature of the constitution and its binding force upon the Legislature.

¹⁴*Trustees of Western Univ. of Pa. v. Robinson*, 12 Sergeant & Rawle, 29 (1824). The principle was here applied to a grant of certain rights of common.

¹⁵*Drew v. New York & Erie R. R. Co.*, 81* Pa. 46 (1870); see also *Taylor v. Murphy*, 148 Pa. 337 (1892).

¹⁶*Johnson v. Crow*, 87 Pa. 184 (1878); making grants of special privileges or immunities irrevocable is now forbidden, Art. I, §17.

¹⁷*Western Saving Fund Soc'y v. Philadelphia*, 31 Pa. 175 (1858).

¹⁸*Williams's Appeal*, 72 Pa. 214 (1872).

Dartmouth College case that a grant of corporate privileges constituted a contract between the state and the incorporators, which contract was protected from impairment by the state.¹⁹ This decision was soon followed by a case in the highest court of Pennsylvania, and the principle of it has been subsequently reaffirmed a number of times, so as not to be open to doubt.²⁰ In *Bank of Pennsylvania v. Com.*, 19 Pa. 144 (1852), Mr. Chief Justice Black said: "That an act of incorporation is a contract between the state and the stockholders is held for settled law by the Federal courts and by every state court in the Union. All the cases on the subject are saturated with this doctrine. It is sustained not by a current, but by a torrent of authorities. No judge who has a decent respect for the principle of *stare decisis*—that great principle which is the sheet-anchor of our jurisprudence—can deny that it is immovably established."²¹

Charters are, however, only protected as contracts, in cases where some consideration has moved from the incorporators to the state, as by the organization of the company and the performance of its corporate functions. Therefore a supplement to the original act of incorporation, conferring additional privileges, but not calling forth any consideration from the company, is not considered a part of the contract, and is not protected by the constitution.²²

§7. *Where State Has Reserved Power to Alter Charter.*

—As a direct result of the decisions to the effect that the charter

¹⁹*Dartmouth College v. Woodward*, 4 Wheat. 518 (1819).

²⁰*Ehrenzeller v. Union Canal Co.*, 1 Rawle, 181 (1829); *Indiana & Ebensburg Turnpike Road Co. v. Phillips*, 2 P. & W. 184 (1830); *Brown v. Hummel*, 6 Pa. 86 (1847); *Com. v. Claghorn*, 13 Pa. 133 (1850); *Phila. & West Chester Railroad Co. v. Everhart*, 28 Pa. 339 (1857); *Iron City Bank v. Pittsburg*, 37 Pa. 340 (1860); *Com. v. Penna. Canal Co.*, 66 Pa. 41 (1870); *Hays v. Com.*, 82 Pa. 518 (1876); *Long's Appeal*, 87 Pa. 114 (1878); *Com. v. Erie & Western Transportation Co.*, 107 Pa. 112 (1884).

²¹The principle, of course, protects a charter from alteration by a constitution of the state as well as by the Legislature. Thus charters granted prior to the adoption of the new constitution are unaffected by it. *Leavis v. Jeffries*, 86 Pa. 340 (1878); *Penna. Railroad Co. v. Duncan*, 111 Pa. 352 (1886); *Williamsport Passenger Railway Co.'s Appeal*, 120 Pa. 1 (1888).

²²*Philadelphia, etc., Co.'s Appeal*, 102 Pa. 123 (1883). Such a supplement, except as a general act, could not now be passed owing to the clause in the Constitution of 1873 forbidding the passage of local or special laws relating to corporations.

of a corporation is a contract which the state cannot impair, general laws were passed in practically all the states providing that thereafter all charters should be subject to alteration, amendment or withdrawal. All charters granted subsequent to such law would be subject to its terms, and no alteration by the Legislature could work an impairment of the contract, provided the reserved power was properly exercised. In Pennsylvania the power is reserved in the constitution as follows: Art. XVI, §10, "The General Assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this commonwealth, in such manner, however, that no injustice shall be done to the corporators."²³ It will thus be observed that the power reserved in the constitution to alter or amend is not in terms absolute, but may be exercised only when in the opinion of the General Assembly the further existence of the charter is injurious to the citizens of the commonwealth. All charters granted since the adoption of this provision as a part of our fundamental law may therefore be altered when the General Assembly is of opinion that the exigency referred to has arisen,²⁴ but charters granted prior to its adoption are not affected by it unless its provisions have been accepted.²⁵ The power to alter or amend in particular cases, however, was frequently reserved even before any such general provision was made, and when such power has been reserved, the constitution does not protect the charter from alteration or amendment. If such reservation be general and unconditional, the Legislature may act at its own discretion.²⁶

²³In the amendments of 1838, Art. I, §26, the same provision was inserted, but relating only to corporations having banking and discounting privileges. In the fourth amendment of 1857 it was provided as follows: Art. I, §26, "The Legislature shall have the power to alter, revoke or annul any charter of incorporation hereafter conferred by or under any special or general law whenever in their opinion it may be injurious to the citizens of the commonwealth, in such manner, however, that no injustice shall be done to the corporators."

²⁴*N. C. Ry. Co. v. Holland*, 117 Pa. 613 (1888).

²⁵A corporation cannot by such acceptance relieve itself from any of its own contract obligations: *White Haven Borough v. White Haven Water Co.*, 209 Pa. 166 (1904).

²⁶*Com. v. Bonsall*, 3 Wharton, 559 (1838); *Monongahela Navigation Co. v. Coon*, 6 Pa. 379 (1847); *Houston v. Jefferson College*, 63 Pa. 428 (1869).

"If the power to repeal be reserved, its exercise is merely carrying out the contract according to its terms, and the state is using her own rights; not forfeiting those of the company."²⁷

On the other hand, if the power arises only upon the happening of a contingency, as the abuse of its privileges by the corporation, then the alteration cannot take place unless the contingency happens. The Legislature may determine in the first instance whether the event has happened, subject, however, to review by the court. Thus, where the charter contained the following clause, "If the said company abuse or misuse any of the privileges hereby granted the Legislature may resume the rights hereby granted to the said company," the court declared its power to determine whether the corporation had abused or misused its privileges, and if not to protect the charter from impairment,²⁸ and where the power to revoke is subject to the limitation that no injustice shall be done to the incorporators, there also the court is the final judge and must determine whether the proposed alteration will work injustice.²⁹

Whether the court can determine if the continued existence of a charter of incorporation will be "injurious" to the citizens of Pennsylvania within the meaning of the constitutional clause is a more difficult question. The language of the clause is "Whenever in their opinion" the exercise of the corporate privileges becomes injurious, the Legislature may exercise the right to amend. This would seem to confer the absolute discretion upon the Legislature to determine whether a charter is injurious. In *Hays v. Com.*, 82 Pa. 518 (1876), it was intimated that the court might review the discretion of the Legislature in determining whether the exercise of the charter privileges was injurious,³⁰ but the matter was carefully considered and decided the other way in *Wagner Institute v. Phila.*, 132 Pa. 612 (1890), so that it may now be considered as settled that the Legislature may alter, amend or withdraw charters

²⁷*Erie & North East Railroad Co. v. Casey*, 26 Pa. 287 (1856), Black, J.

²⁸*Erie & Northeast Railroad Co. v. Casey*, 26 Pa. 287 (1856); *Com. v. Fayette Co. Railroad Co.*, 55 Pa. 452 (1867); *Com. v. Pittsburg & Connellsville Railroad Co.*, 58 Pa. 26 (1868).

²⁹*Iron City Bank v. Pittsburg*, 37 Pa. 340 (1860); *Com. v. Fayette Co. Railroad Co.*, 55 Pa. 452 (1867).

³⁰See also dictum to the same effect in *Williamsport Passenger Railway Co.'s Appeal*, 120 Pa. 1 (1888).

at its own discretion, and that such discretion is not subject to review by the courts,³¹ save as to the proviso that no injustice shall be done.

§8. *Power of State to Bargain Away Taxing Power, Police Power, etc.*—In construing contracts made by the state and more particularly those made with private corporations, by the granting of charters, it should be called to mind that there are certain functions of the state which in the nature of things cannot be the subject of contract and that certain others are construed to be bargained away only where the words of the agreement are of the utmost clearness.

One of the most important powers of the state is the power to tax; if such power is bargained away so that it cannot again be resumed the efficiency of the government is to that extent impaired. It has been therefore a mooted question whether the Legislature can constitutionally make a contract by which subsequent Legislatures are prevented from levying taxes on property which was the subject matter of the contract. In the first case where the question was directly raised in Pennsylvania, *Mott v. Penna. Railroad Co.*, 30 Pa. 9 (1858), it was held in elaborate opinions that the Legislature could not bargain away the taxing power, although the Federal courts had already decided to the contrary. Mr. Chief Justice Lewis said: "Government is but an aggregation of individual rights and powers. It has no more right to commit political suicide than an individual has to destroy the life given by his Creator. Contracting away the taxing power in perpetuity tends, as we have seen, inevitably to the destruction of the government. If twelve or twenty millions of taxable property may be released to-day, one hundred millions may be released to-morrow, and the principle being established, the process might go on until all power to raise revenue was gone. If this did not destroy the government, it would result in something infinitely more dangerous to the liberties of the people. It would make it the servile dependent of the wealthy corporations or individuals to whom it contracted away its means of support. Although the taxing power is but an incidental one, to be

³¹Such power of the Legislature is, of course, subject to the constitutional prohibition of local or special legislation. A special act conferring charter privileges could be repealed, but could not be amended.

exercised only as the necessary means of performing governmental duties, it is nevertheless a branch of the legislative power which always, in its nature, implies not only the power of making laws, but of altering and repealing them, as the exigencies of the state and circumstances of the time may require: Rutherford's *Institutes of Natural Law*, B 3, ch. 3, §3. If one portion of the legislative power may be sold, another may be disposed of in the same way. If the power to raise revenue may be sold to-day, the power to punish for crimes may be sold to-morrow, and the power to pass laws for the redress of civil rights may be sold the next day. If the legislative power may be sold, the executive and judicial powers may be put in the market with equal propriety. The result to which the principle must inevitably lead, proves that the sale of any portion of governmental power is utterly inconsistent with the nature of our free institutions, and totally at variance with the object and general provisions of the constitution of the state." This reasoning is well worth considering and is difficult to confute, although it is not now open to question that where a contract of this character is made, the courts will protect it from impairment. It is equally well settled, however, that such a contract will never be implied, but must be expressed in the clearest terms. Our own decisions have fully recognized both principles, so that the General Assembly may bargain away the taxing power, but the rules of construction lead the courts to find no such intent unless absolutely necessary. In *Bank v. Com.*, 10 Pa. 442 (1849), the remarks of Mr. Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 514 (1830), were quoted with approval as follows: "It would seem," he observed, "the relinquishing of such a power is never to be assumed. The court will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but, as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

In *Bank of Pa. v. Com.*, 19 Pa. 144 (1852), the law on the point was thus forcibly expressed by Mr. Chief Justice

Black: "It is the appointed duty of the Legislature to use the power of taxing the people with justice and moderation, and not to alien it away. To sell out this part of the state's sovereignty is not one of their regular functions. It is intrusted to the legislative department not to be annihilated, but to be exercised and administered. The power is given by all, and ought to operate on all for the benefit of all. To exempt some would be to increase the burdens of others. Taxation, to be just, must be equal, and to be equal, it must be universal. The whole community has, therefore, a deep interest in retaining the power undiminished in the hands where the constitution has placed it. Chief Justice Marshall (4 Peters, 561) thought it so important that he seemed to doubt whether a state could relinquish it at all. That it can be surrendered, at least partially, has since been settled in *Gordon v. The Appeal Tax Court* 3 Howard, 133 (1845). But surely, a power so vitally necessary to the very existence of a state, is not to be taken as surrendered, relinquished, and given up, by a contract which says nothing about it.

"If acts of incorporation are to be so construed as to make them imply grants of privileges, immunities, and exemptions, which are not expressly given, every company of adventurers may carry what they wish without letting the Legislature know their designs. Charters would be framed in doubtful or ambiguous language, on purpose to deceive those who grant them; and laws which seem perfectly harmless on their face, and which plain men would suppose to mean no more than what they say, might be converted into engines of infinite mischief. The Legislature, without knowing or intending it, might be thus induced to disarm the state of its most necessary powers, and transfer them to corporations. The continued existence of a government under such circumstances would not be of much value. There is no safety to the public interests except in the rule which declares that the privileges not expressly granted in a charter are withheld."

We have had a number of other leading cases which firmly settle the principle that no charter which is silent on the question of taxation or which contains words of doubtful import, can be construed to tie the hands of the Legislature so that it

cannot subsequently impose such taxes as the best interests of the community may require.³²

The power of eminent domain or the power to take private property for public use is one quite as essential to the existence of the state as the taxing power. Our courts have gone even further in protecting it, for it has been decided that the power of eminent domain cannot be bargained away. It follows that no matter what may be the terms of the agreement between the parties, the bargainee cannot claim to hold property exempted from liability to be taken by the state, for being supposed to know the law, he must be deemed to have been cognizant of the lack of power of the Legislature to make such a contract. In such a case, therefore, the constitutional prohibition of laws impairing the obligation of contracts has no application.³³

The absolute inability of the Legislature to provide by contract against the future enactment of proper police regulations is well settled and rests upon principles of self-preservation. No contract which the state may make can interfere with its right and duty to protect the health, safety and morals of its people. This principle was first laid down in Pennsylvania in the case of *Myers v. Irwin*, 2 Sergeant & Rawle, 367 (1816). Mr. Chief Justice Tilghman said: "The Legislature has a right to take care of the public welfare, by prohibiting future acts which may be detrimental to the public, and if from such prohibition it should happen that prior engagements to perform such acts should be dissolved, that would not be the violation of the contracts contemplated by the constitution." In *Western Saving Fund Soc'y v. Phila.*, 31 Pa. 175 (1858), it was held that neither the state, nor a municipal corporation which acts in place of the state and exercises a portion of its sovereignty over a limited area, has any "right to enter into a contract which interferes with its duties to preserve the health and morals of the city. It may therefore defeat the title of its own

³²*New York & Erie Railroad Co. v. Sabin*, 26 Pa. 242 (1856); *Iron City Bank v. Pittsburg*, 37 Pa. 340 (1860); *Erie Railway Co. v. Com.*, 66 Pa. 84 (1870); *Union Passenger Railway Co. v. Phila.*, 83 Pa. 429 (1877).

³³*Com. v. Penna. Canal Co.*, 66 Pa. 41 (1870); *Penna. Railroad Co. v. Duncan* (U. S. Supreme Ct.), 129 Pa. 181 (1889); *Bridge Co. v. Clinton Co.*, 157 Pa. 379 (1893).

grantee when it becomes necessary to do so, in order to abate a nuisance or preserve the public health."²⁴

§9. *Grants to Municipal Corporations.*—Municipal corporations are organized solely for public purposes; they are constituted the agents of the state to govern certain localities. To them are granted certain executive functions, which they are at liberty to exercise until withdrawn. But there is no guarantee they will not be withdrawn at the pleasure of the legislative body. No contract can be implied that the powers delegated to a municipality will be continued for any definite period or will not be altered or withdrawn at any time. In the nature of things this must be so, for the municipality is only an agent, and its authority as agent is revocable at will. In *Brown v. Hummel*, 6 Pa. 86 (1847), Mr. Justice Coulter said: "There can be no doubt that the Legislature possesses the power to alter the charters of such public bodies as concern the welfare and wholesomeness of the body politic; such as concern the administration of government, and are emphatically public. Such are the corporations of cities and boroughs, when no private right of property is involved, except incidentally, and such as can be easily reserved and compensated." The point was even more fully covered by Mr. Justice Sharswood in *Phila. v. Fox*, 64 Pa. 169 (1870). He said: "The City of Philadelphia is beyond all question a municipal corporation, that is, a public corporation created by the government for political purposes, and having subordinate and local powers of legislation: 2 Kent's Com. 275; an incorporation of persons inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government: Glover Mun. Corp. 1. It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government—essentially a revocable agency—having no vested right to any of its powers or franchises—the charter or act of erection being in no sense a contract with the state—and therefore fully subject to the control of the Legislature, who may enlarge or diminish its territorial extent or its functions, may

²⁴See also *Johnson v. Phila.*, 60 Pa. 445 (1869); *Craig v. Kline*, 65 Pa. 399 (1870). As no agreement by the state to abdicate the police power can be implied under any circumstances, it is frequently unnecessary to decide the question as to the power to make such a contract. See *Commissioners v. Gas Co.*, 12 Pa. 318 (1849); *Johnson v. Phila.*, 60 Pa. 445 (1869).

change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion.”³⁵

§10. *Meaning of Law.*—No law shall be passed impairing the obligation of contracts is the language of the clause. “Law” as here used includes acts of the Legislature and ordinances of councils, etc., and the same expression used in the Constitution of the United States also includes provisions of state constitutions. This meaning has been recognized by our own decisions, and it has been expressly ruled that contracts cannot be impaired by a constitution any more than by an act of the General Assembly.³⁶

The question as to whether the decision of a court can ever be a law within the meaning of this clause is open to much doubt. The only situation where such a claim can be made is when a court reverses its former ruling upon the faith of which a contract has been made, and by so doing decides that the supposed contract is of no validity. The litigant has some just cause to complain because, having every reason to believe the law to be settled in such a way as to give rise to contract rights, he now finds himself to have nothing because of a change of view by the court. But while this is a hardship, it is no impairment of the obligation of contracts. The theory is that the law always has been as most lately interpreted and therefore there never was any contract to impair, although the contracting parties and the courts as well, at one time thought there was.³⁷

There is one class of cases, however, in which the courts’ decisions are treated as becoming a part of the law itself, and any change of view as an amendment of it, incapable of impairing the obligation of contracts. The cases referred to are those in which the highest court of the state is called upon to determine whether an act of Assembly is consistent with the state constitution. If the decision upholds the law, it is considered to enter into and become a part of it, and contracts will be made and rights acquired on the faith of the decision quite as much as on the faith of the enactment. If the Supreme Court then

³⁵*City of Erie v. Erie Canal Co.*, 59 Pa. 174 (1868), and *Thompson v. Com.*, 81 Pa. 314 (1876), are two other authorities to the same effect.

³⁶*Lewis v. Jeffries*, 86 Pa. 340 (1878); *Penna. Railroad Co. v. Duncan*, 111 Pa. 352 (1886); *Williamsport Passenger Railway Co.’s Appeal*, 120 Pa. 1 (1888).

³⁷See *Satterlee v. Matthewson*, 16 S. & R. 169, at p. 179 (1827).

reverses its ruling and declares that the General Assembly had no power to pass the act, will not the contracts made on the faith of its former ruling be protected? Will not our courts consider the later decision as a "law" impairing the obligation of contracts and therefore refuse to apply it to contracts entered into upon the faith of the former decision? The only expression of opinion by our courts is in the case of *Ray v. Gas Co.*, 138 Pa. 576 (1891), in which the court, through Mr. Justice Clark, used the following language: "The courts of highest authority of all the states, and of the United States, are not infrequently constrained to change their rulings upon questions of the highest importance. In so doing, the doctrine is, not that the law is changed, but that the court was mistaken in its former decision, and that the law is, and really always was, as it is expounded in the later decision upon the subject. The members of the judiciary in no proper sense can be said to make or change the law; they simply expound and apply it to individual cases. To this general doctrine there is a well-established exception, as follows: 'After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of a legislative enactment.' *Douglass v. Pike Co.*, 101 U. S. 677. See also *Anderson v. Santa Anna*, 116 U. S. 361, and cases there cited: *Cooley*, Const. Lim., 474-477. To this effect and no more, we understand to be the cases of *Ohio Trust Co. v. Debolt*, 16 How. 416; *Gelpcke v. Dubuque*, 1 Wall. 175; *Havemeyer v. Iowa Co.*, 3 Wall. 294; *Olcott v. Supervisor*, 16 Wall. 678. In *Ohio Trust Co. v. Debolt*, *supra*, the doctrine is thus stated: 'The sound and true rule is that if a contract, when made, was valid by the laws of the state, as then expounded by all the departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the Legislature, or decision of its courts altering the construction of the law.' The ruling applies, it will be observed, not to the general law, common to all the states, but to the laws of the state 'as expounded by all the departments of its government;' and it is held that contracts

valid by these laws may not be impaired, 'either by subsequent legislation, or by the decisions of its courts altering their construction. The reference is, of course, to the statute law.'

This dictum recognizes the rule as laid down in *Gelpcke v. Dubuque*, 1 Wall. 175 (1863), and cases following it, to be the law in Pennsylvania, that when a contract is made upon the faith of a decision determining the constitutionality of a law, the Supreme Court cannot impair such contract by a reversal of its judgment. This rule is sensible and right. The function of the court when determining the validity of a law is somewhat different from its usual function of interpretation only. In deciding that a law is consistent with the constitution the court necessarily reviews the ground previously gone over by the Legislature. The latter has in the first instance declared its judgment to be that the law is constitutional and the court reviews that judgment. This power to determine the constitutionality of a legislative act is in other countries vested exclusively in legislative bodies. In America it has been given to the courts, and in performing it they do an act which partakes in one sense of a legislative character, although in reality judicial, but which should be treated as an amendment of the law, affecting only contracts subsequently entered into. This is the view of our own courts, and all such contracts are therefore protected from impairment by reversal of judgment.³⁸

§11. *Meaning of Impairment.*—The next question to be considered is the meaning of the words "impairing the obligation of contracts." The phrase "obligation of contracts" needs no extended explanation, as its meaning is sufficiently well known. The obligation of the contract is the legal duty which one party has a right to demand from the other, by reason of

³⁸The U. S. Supreme Ct. protects such contracts from impairment by a reversal of judgment by the Supreme Court of a state in cases which come before them by appeal from circuit courts, but when an appeal is taken from the Supreme Court of a state the Supreme Court of the United States will decline to assume jurisdiction on the ground that the decision of a court even in such a case is not a "law" within the meaning of the twenty-fifth section of the Judiciary Act regulating appeals from the judgments of state courts. For a review of the decisions on the subject, see paper entitled "Some Recent Criticism of *Gelpcke v. Dubuque*," also published in the *American Law Register*, Vol. 38 N. S., pp. 473, 529, 593, 657. This paper also contains a brief and inadequate, but suggestive discussion of the function of a court when determining the validity of a law.

his contractual undertaking. If any law is passed which detracts from or adds to that obligation, this is an impairment of it to the injury of the one party or the other. The duty may be one which is incident to either an executory or an executed contract.

The difficult thing to determine is whether the law complained of does in fact impair the obligation of the contract. It may affect it without impairing it and the line between laws which merely affect and those which impair is not always easy to draw. Then, again, some laws which do apparently impair or alter the terms or value of the contract, may not do so in a legal sense, because the contract in the first instance contemplated such alteration. Thus insolvent laws, which excuse the debtor from a portion of his obligation are an impairment of the obligation of all contracts entered into before their passage, but not of those subsequently executed, for they were made in legal contemplation of the operation of the very law complained of. They cannot therefore be impaired by it.³⁹

By a parity of reasoning any contract made in legal contemplation of the law alleged to impair its obligation, cannot in fact be impaired by it. Thus every contract is subject to taxation, and, in the absence of an express agreement exempting it from taxation, may be taxed. We have already seen that no exemption can be implied, and in the absence of such express exemption the contracting parties must be deemed to have foreseen the possibility of taxation, which therefore is not impairment.⁴⁰

The exaction of a "*bonus*" for the privilege of increasing the stock of a corporation stands upon a somewhat different footing. This *bonus* is not strictly a tax, and if the state has granted to a corporation a charter, with the right to increase its capital stock from time to time, the subsequent requirement of a bonus for such privilege would be an impairment of the obligation of the contract created by the granting of the charter.⁴¹

The same thing is true of the police power as of the power

³⁹*Farmers' and Mechanics' Bank v. Smith*, 3 Sergeant & Rawle, 63 (1817); *Deichman's Appeal*, 2 Wharton, 395 (1837); *Eckstein v. Shoemaker*, 3 Wharton, 15 (1838).

⁴⁰*Com. v. Lehigh Valley Railroad Co.*, 129 Pa. 429 (1889).

⁴¹*Com. v. Erie & Western Transportation Co.*, 107 Pa. 112 (1884).

to tax. Every contract is made in contemplation of the paramount power of the state to make police regulations, hence any duty which one party has a right to demand from the other is subject to the interference of laws to preserve the health and safety of the people. It is well settled by decisions of the Supreme Court of the United States as well as of our own courts, that all contracts are subject to the power of the state to make police regulations.⁴²

Similarly every contract is likely to be taken under the power of eminent domain. The state cannot bargain away the power, contracts or franchises are no more sacred than any other kind of property, and upon proper compensation being given or secured, may be appropriated for the necessities or convenience of the public.⁴³

But aside from these considerations there is always the question whether in fact the law amounts to an impairment or whether it affects the contract only in an incidental and immaterial manner. In this connection a distinction must be made between the consideration for or terms of the contract and the motive which may have led one of the parties to enter into it. The latter may be destroyed entirely so long as the former are not affected. Thus where a man subscribes to the stock of a railroad because he believes it is going to be located in a particular place, a subsequent change of location does not impair his contract, unless he has expressly stipulated that the subscription is to be conditional upon the location of the road.⁴⁴

A law which actually improves the situation of the complaining litigant cannot be objected to as impairing the obligation of his contract;⁴⁵ nor can a law which removes an impediment to the enforcement of a contract;⁴⁶ but while a law making valid a previously made but void contract could hardly be

⁴²See *Craig v. Kline*, 65 Pa. 399 (1870). It was held in this case that the particular regulation in question was not in fact an impairment of the contract, and so the rule that contracts are subject to the police power was not necessary to be invoked.

⁴³*In re Twenty-second St.*, 102 Pa. 108 (1883); *Philadelphia & Gray's Ferry Railroad Co.'s Appeal*, 102 Pa. 123 (1883).

⁴⁴*Irvin v. Susquehanna, etc., Turnpike Co.*, 2 Penrose & Watts, 466 (1831).

⁴⁵*Philadelphia & West Chester Railroad Co. v. Everhart*, 28 Pa. 339 (1857).

⁴⁶*Hess v. Werts*, 4 Sergeant & Rawle. 356 (1818); *Blackney v. Farmers' & Mechanics' Bank*, 17 Sergeant & Rawle, 64 (1827).

objected to as impairing the obligation of contracts, yet it would undoubtedly be a very improper species of legislation and probably would amount to a deprivation of private property without due process of law.⁴⁷

§12. *Laws Affecting Remedies.*—A distinction has been made between laws which impair the obligation of contracts and those which merely alter remedies from the very first expression of judicial opinion upon the clause under discussion. Some judges, however, while recognizing the distinction were not impressed by its soundness and others openly condemned it. In *Penrose v. Erie Canal Co.*, 56 Pa. 46 (1867), Mr. Justice Strong said: "In construing this provision of the constitution the Supreme Court of the United States early made a distinction between the obligation of a contract and the legal remedy for its breach, holding that while the obligation may not be impaired the remedy to enforce it may be changed and even partially taken away. It is doubtless true that the constitution was never intended to stereotype the laws of the different states which at the time of its adoption provided remedies for the enforcement of contracts, or to deprive the states of the power to substitute others in place of those then existing. And yet if by the obligation of a contract is meant its legal force at the time it is entered into, it is difficult to see how a remedy can be diminished or partially taken away, and still the obligation remain unimpaired unless another equally efficient is provided in its stead. An obligation without any means of enforcing it certainly is not a legal one, and just in proportion as the means of compelling the performance of a contract are taken away, it would seem must its legal effect be diminished. It is, however, settled that alterations may be made in the remedies provided by law, though the creditor may thereby be hindered and delayed, if they do not substantially deprive him of the right he had when the contract was made and assured to him by it." A stronger expression of opinion, and more unfavorable to the distinction made, is to be found in the case of *Western Saving Fund Soc'y v. Phila.*, 31 Pa. 175 (1858), in which Mr. Chief Justice Lewis said: "It is a rule in the construction of contracts, that the law existing when a contract is made enters into

⁴⁷See *Plank-Road Co. v. Davidson*, 39 Pa. 435 (1861).

it and necessarily forms a part of it. The remedies prescribed for enforcing performance are regarded by the parties as constituting that 'obligation' of the contract which is within the protection of the constitution. If the remedies were taken away there would be nothing but the moral obligation left, and it is absurd to suppose that this was the 'obligation of the contract,' which the Legislature was prohibited from impairing. Plain common sense, responding to the demands of justice, has scattered to the winds the flimsy distinction between the right and remedy, so far as to declare that any change of the nature or extent of the latter, so as to impair the former, is just as much a violation of the compact as if the right itself was directly destroyed."

Notwithstanding these views, however, it is now well settled that the remedy provided for the enforcement of a contract is not strictly a part of it, and therefore laws may alter or impair the remedy without infringing the clause prohibiting the impairment of the obligation of contracts, so long as the remedy left to the contracting parties is not entirely destroyed or unreasonably restricted. The first case which our Supreme Court was called upon to decide on this question arose out of litigation incidental to the sale of lots in the City of Washington, then being established. A summary remedy for the failure of purchasers to perform their contracts was given to the commissioners. It was contended that this new remedy which was conferred by a law subsequent to the contract, was an impairment of its obligation, but the court held otherwise. The law left everything as before, except that it gave a more prompt remedy to one party in case of the default of the other.⁴⁸ In accordance with this decision, it has been uniformly held that it is within the constitutional power of the Legislature to give a new remedy, even though there was none provided by the law existing at the time the contract was made.⁴⁹ In *Hepburn v. Curts*, 7 Watts, 300 (1838), Mr. Justice Sergeant said of a law

⁴⁸*Stoddart v. Smith*, 5 Binney, 354 (1812).

⁴⁹*Turnpike Co. v. Com.*, 2 Watts, 433 (1834); *Hinkle v. Riffert*, 6 Pa. 196 (1847); *Biddle v. Star*, 9 Pa. 461 (1848); *Taggart v. McGinn*, 14 Pa. 155 (1850); *McElrath v. Pittsburg & Steubenville Railroad Co.*, 55 Pa. 189 (1867); *McCurdy's Appeal*, 65 Pa. 290 (1870); *Lane v. Nelson*, 79 Pa. 407 (1875); *Lumber & Boom Co. v. Com.*, 100 Pa. 438 (1882); *Lane v. White*, 140 Pa. 99 (1891).

under consideration: "It thus furnishes a remedy where none existed before, and does so, in pending cases, without divesting any right, impairing any contract, or exercising any *ex post facto* legislation in the judicial sense of these words of the constitution. The Legislature, provided it does not violate the constitutional prohibitions, may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of recovering redress by legal proceedings." On the same principle a new effect may be given to an existing remedy as that a debt shall become a lien, although not so heretofore, provided no property rights are divested.⁵⁰

It goes without saying that laws which merely regulate the evidence to be admitted are valid, whether they operate to enlarge or narrow the remedy.⁵¹

Not only may a remedy be made more effective by new legislation, but laws may constitutionally be passed which alter it by lessening its efficiency so long as it is not unreasonably restricted or absolutely taken away from parties to contracts existing at the date of the law.⁵² If the remedy is destroyed, it must be replaced by another, not necessarily as good, but which must for practical purposes serve the same purpose. Thus where a law in effect deprived a creditor of the right to have sequestration proceedings against his debtor, and gave him no similar remedy in its place, it was declared to be an impairment of the obligation of his contract.⁵³ These principles are applicable to contracts which have been reduced to judgment as well as to those not yet sued upon, and the lien of judgments may be altered or reduced without infringing the constitution.⁵⁴ Acts of limitation either of ordinary remedies on contracts or relating to the probate of wills and prescribing within what time contests must be made are constitutional, even if applied to

⁵⁰*Bolton v. Johns*, 5 Pa. 145 (1847).

⁵¹*Foster v. Gray*, 22 Pa. 9 (1853); *New Fra Life Ass'n. v. Musser*, 120 Pa. 384 (1888); *Fuller v. East End Homestead Loan & Trust Co.*, 157 Pa. 646 (1893).

⁵²*Evans v. Montgomery*, 4 Watts & Sergeant, 218 (1842); *Waters v. Bates*, 44 Pa. 473 (1863); *Long's Appeal*, 87 Pa. 114 (1878); *Union Canal Co. v. Gilfillin*, 93 Pa. 95 (1880).

⁵³*Penrose v. Erie Canal Co.*, 56 Pa. 46 (1867).

⁵⁴*Miller v. Com.*, 5 Watts & Sergeant, 488 (1843).

instruments made before their passage, provided a reasonable length of time is left to the litigant in which to begin his action.⁵⁵ A remedy cannot be altogether denied, but it may be suspended for a limited time, thus the act of April 18, 1861, P. L. 408, providing that no civil process should be enforced against any person while in the military service was held valid, as applied to soldiers who had enlisted for a specified term, as three years or during the war, the suspension of the remedy being reasonable and definite,⁵⁶ but the same law was held bad as to soldiers whose terms of enlistment were indefinite,⁵⁷ because in such case the remedy of the creditor was practically taken away.

The same thing is true of laws staying execution. If they postpone the remedy of the creditors (usually upon agreement of a certain proportion of them) for no more than a reasonable time, they are constitutional and valid,⁵⁸ but, on the other hand, if the suspension of the remedy is for an indefinite time, or for a period deemed to be unreasonable, the law will be condemned.⁵⁹ The same may be said of any such law which for any reason fails to properly safeguard the rights of the creditor during the period in which his hands are tied.⁶⁰

§13. *Contracts Respecting Remedies.*—But in no case can the express terms of a contract be altered or its obligation be impaired by even a law relating to the remedy only. If the contract expressly provides for a specific remedy no alteration of it can be permitted. In *Billmeyer v. Evans and Rodenbaugh*, 40 Pa. 324 (1861), Mr. Justice Woodward said: “But a statute strictly remedial may impair the obligation of a contract, and when this happens the act is unconstitutional: *Bronson v. Kenzie*, 1 How. 311 (1843). This always happens where the parties make legal remedies a subject of their contract, and

⁵⁵*Kenyon v. Stewart*, 44 Pa. 179 (1863); *Korn v. Broune*, 64 Pa. 55 (1870); *Biddle v. Hooven*, 120 Pa. 221 (1888); *Bates v. Cullum*, 177 Pa. 633 (1896); *Clay v. Iseminger*, 187 Pa. 108 (1898); same case, 190 Pa. 580 (1899).

⁵⁶*Clark v. Martin*, 49 Pa. 299 (1865).

⁵⁷*Ibid.*

⁵⁸*Chadwick v. Moore*, 8 Watts & Sergeant, 49 (1844); *Breitenbach v. Bush*, 44 Pa. 313 (1863).

⁵⁹*Bunn, Raiguel & Co. v. Gorgas*, 41 Pa. 441 (1862); *Williams's Appeal*, 72 Pa. 214 (1872).

⁶⁰*Chaffee v. Michaels*, 31 Pa. 282 (1858).

subsequent legislation conflicts with what they have expressed in their agreement. If they do not prescribe the rule of remedy in their contract, the law-making power is free; but if they do, they become a law to themselves and the Legislature must let them alone." The most usual contracts of such description are those in which stay or exemption laws have been waived,⁶¹ or which provide for a specific remedy by arbitration or by the terms of which a sum is agreed upon as liquidated damages, etc. In all such cases, the Legislature must leave the remedy alone, for to alter it would clearly be an impairment of the obligation of the contract. "Usually parties do not contract as to the manner of ascertaining the damages, nor as to their measure, in case of a failure to fulfil the substantial obligations of an agreement. They leave these questions to be settled in the manner provided by general law. Yet when they do contract in regard to them, the contracts become of binding force, and the courts must so recognize them. (Thus in a contract for the construction of a railroad, full effect is given to a clause providing that the decision of the chief engineer shall be final and conclusive in all matters of dispute arising between the parties to the agreement as to the proper execution of the work.) In like manner, an agreement liquidating the amount of damages in case of a non-performance of the contract, will be enforced. Whenever the parties have made the legal remedy the subject of their contract, that portion of their contract is as far removed from subsequent legislative action as the main obligation of their contract. Where legislative power is unable to impair the one, it cannot the other."⁶²

§14. *Special Privileges and Immunities*.—While providing that the obligation of contracts shall be protected, the clause also prohibits the making of certain contracts which are thought to be opposed to the welfare of the people; "no . . . law . . . making irrevocable any grant of special privileges or immunities shall be passed." Art. I, §17. Such grants would leave the state subservient to its grantees, which would be particularly objectionable when the subject matter of the grant involves franchises or privileges of a public nature. The

⁶¹*Lewis v. Lewis*, 47 Pa. 127 (1864).

⁶²*White v. Crawford*, 84 Pa. 433 (1877).

same end is accomplished as to corporate franchises, grants, etc., by Art. XVI, §10, providing that all such grants shall be subject to the right of the state to alter, amend, etc. It has already been seen that this reservation of power is legal and that its exercise is not open to the objection that contracts are impaired thereby, provided the corporate charter was granted subsequent to the constitution, or has been made subject to its terms by the acceptance of new legislation.⁶³

⁶³See the case of *Freeport Water Works v. Prager*, 3 Pa. C. C. 371 (1887), in which an effort was made to invoke the assistance of the clause forbidding the irrevocable grant of special privileges or immunities. The case is of little importance, as no irrevocable grant had been attempted.

CHAPTER IX.

MISCELLANEOUS RIGHTS OF CITIZENS.

§1. *Searches and Seizures—The General Warrant.*—Until the reign of George III in England the general warrant, one of the most arbitrary measures of tyranny ever invented, was used without serious question. A general warrant is one which mentions the offense, but not the offender, and authorizes the constable to seize any person whom he may have cause to believe has committed the offense and to search any place in the hunt for evidence. This obviously places the liberty of all persons at the caprice of the writ-server. He is protected in the arrest of any person if he thinks he has just cause to suspect him, and is at liberty to enter any man's dwelling and ransack his papers and private effects without specifying the particular thing searched for.

The overthrow of this iniquitous practice came about without the intervention of Parliament, by the action of a number of courageous judges. During the reign of George III a general warrant was issued, to arrest the persons who had published a certain libel and to search any and all places necessary to secure evidence. Wilkes, one of the libellers, resisted arrest, saying the writ was "a ridiculous warrant against the whole English nation." The arrest of himself and a large number of other persons, many of whom were entirely innocent, and in particular the outrageous seizure of property and papers of those suspected, gave rise to a large number of actions. Damages were allowed on the ground of the illegality of the warrant, opinions being delivered, among others, by Lord Mansfield.¹ Since that time it has been the law in England that the warrant must point out the offender as well as the crime, and yields no authority to arrest any person except the one named or described. Search warrants are now only issued in reasonable and proper cases and must be served strictly according to law.²

¹For a complete review of the case see May's Constitutional History of England, Chap. II.

²See Cooley, Const. Limitations (6 ed.), p. 364 *et seq.*

§2. *Provisions in Pennsylvania Constitutions.*—The principles thus but recently established in England were in America incorporated into the fundamental law of the states. The Pennsylvania Constitution of 1776 contained the following clause, Chap. I, §10: "The people have a right to hold themselves, their houses, papers and possessions free from search or seizure, and therefore warrants without oaths or affirmations first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right and ought not to be granted."

In the Constitution of 1790 it was provided, Art. IX, §8: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

No change was made by the convention of 1873 except the addition of the words "subscribed to by the affiant" at the end. These were doubtless inserted in order to more certainly identify the person responsible for the prosecution.³

§3. *Warrant of Arrest to be Supported by Oath.*—The rights and liabilities of officers and private citizens in making arrests are not to be discussed here; such questions belong rather to the domain of criminal law. The constitution does not interfere with the common law right to arrest without a warrant. This may be done by a private citizen, at his peril, since the enactment of the constitution, just as it could prior to that event.⁴ The only important bearing the clause under discussion has upon the right to make arrests is that no warrant can issue unless supported by oath or affirmation, subscribed to

³Art. I, §8. In *Wakely v. Hart*, 6 Binn. 316 (1814), Mr. Chief Justice Tilghman said: "The whole section indeed was nothing more than an affirmance of the common law, for general warrants have been decided to be illegal; but, as the practice of issuing them had been ancient, the abuses great, and the decisions against them only of modern date, the agitation occasioned by the discussion of this important question had scarcely subsided, and it was thought prudent to enter a solemn veto against this powerful engine of despotism."

⁴*Wakely v. Hart*, 6 Binn. 316 (1814).

by the affiant, and if a warrant is illegally issued without oath or affirmation a constable is justified in refusing to serve it.⁵

§4. *Search Warrants*.—The clause under discussion is also declaratory of the common law in requiring a search warrant to describe the thing to be searched for. It must also be supported by oath or affirmation. It is unnecessary that the goods or chattels sought shall be described in detail, but they must be pointed out with reasonable accuracy. A description of "jewelry and other personal effects" has been held sufficient.⁶

§5. *Right to Remedies*.—Among the rights guaranteed to Englishmen by *Magna Charta* there was none more highly prized than the one securing to them speedy justice. "To none will we sell, to none will we deny or delay right or justice." This provision was intended to put an end to the practices, so frequent at that time, of altogether denying justice to the citizens by vexatious and unwarranted delays. In drawing up the laws agreed upon in England, Penn had the great charter in mind, and one of these laws was modelled after the clause quoted. "All courts shall be open, and justice shall neither be sold, denied nor delayed."⁷ The same idea was incorporated into the Constitution of 1776: "All courts shall be open and justice

⁵*Conner v. Com.*, 3 Binn. 38 (1810); *Kossouf v. Knarr*, 206 Pa. 146 (1903). It has been held also by a Common Pleas Court that an indictment by a grand jury cannot ordinarily be found unless there be a previous affidavit and commitment by a magistrate, *Com. v. Hunter*, 2 D. R. 707 (1893). But the District Attorney of a county may send a bill directly to the grand jury at the direction of the court, who may institute proceedings without oath—*McCullough v. Com.*, 67 Pa. 30 (1870); *Rowand v. Com.*, 82 Pa. 405 (1876). A magistrate also may hold a man for court, if he has been guilty of disorderly conduct in his office, without the issuance of a warrant, *Com. v. McClure*, 10 W. N. C. 466 (1881). A warrant failing to give name of informant or facts of case, alleging a crime was committed "as he, deponent, is informed and expects to be able to prove," is insufficient, *Com. v. Clement*, 8 D. R. 705 (1898); a complaint made "from information received" which does not set out the name of the informant, and deponent's belief in the information is insufficient, *Com. v. Roland*, 10 D. R. 410 (1900); an affidavit "to the best of his knowledge, information and belief" is sufficient, *Com. v. Green*, 185 Pa. 641 (1898); but an affidavit is sufficient upon "information received" if the deponent alleges in positive terms the commission of the crime, *Knorr v. Com.*, 4 Pa. County Ct. 32 (1887); an oral complaint for an arrest though sworn to is not sufficient, *Kessler v. Hoffman*, 9 Pa. District Rep. 365 (1899). This constitutional provision does not apply to process issued for arrest in civil cases, *Finn v. Teeter*, 1 Lack. Jur. 31 (1889).

⁶*Moore v. Coxe*, 10 W. N. C. 135 (1881).

⁷Laws Agreed upon in England, §5.

shall be impartially administered, without corruption or unnecessary delay."⁸ This clause, with slight modifications, was made a part of the Constitution of 1790,⁹ and remains unchanged in the constitution as it now exists;"¹⁰ "All courts shall be open, and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

§6. *Construction of the Right to Speedy Justice.*—There is very little judicial authority concerning the interpretation of this clause, as few questions involving it have arisen. It stands, however, as a barrier to any action by the Legislature tending to interfere with a man's right to sue and recover for an injury which he has suffered. Thus an act limiting the amount which a plaintiff can recover for personal injuries is unconstitutional, because it is a substantial interference with this right,¹¹ and so is an act requiring a plaintiff in such a suit to enter security for costs, because this amounts to a denial of justice to poor suitors.¹² On the other hand, a law which places any person lawfully working upon the premises of a railroad company in the position of a servant of the company as regards his right to recover for personal injuries received while thus working, has been held valid as a police regulation.¹³

The provision that courts shall be open does not mean that any person, even if an attorney, may physically enter the courtroom at any time, whether his entry will cause disorder or not,¹⁴

⁸Chapter II, §26.

⁹Art. IX, §11.

¹⁰Const. of 1873, Art. I, §11.

¹¹*Cent. Ry. of N. J. v. Cook*, 1 W. N. C. 319 (1875); *Pass. Ry. Co. v. Boudrou*, 92 Pa. 475 (1880).

¹²*Schade v. Luppert*, 17 Pa. C. C. (1896). In *Kurrie v. Cottingham*, 209 Pa. 12 (1904), it was said that a law giving a right of appeal from every interlocutory order of the court would be a denial of his remedy to the other party.

¹³*Kirby v. Pa. Railroad Co.*, 76 Pa. 506 (1874); *Dicard v. N. Pa. Railroad Co.*, 89 Pa. 193 (1879); *Pa. Railroad Co. v. Price*, 96 Pa. 256 (1880); *Spisak v. B. & O. R. R. Co.*, 152 Pa. 281 (1893). See also *Phila. v. Fox*, 64 Pa. 169 (1870), where the contention was made that an act vesting in the judges the power to appoint the trustees for certain trusts was invalid because the accounts of such trustees could not subsequently be passed upon by the judges who had appointed them. The point was held to be not well taken.

¹⁴"All Courts Shall Be Open." 30 Pitts L. J. 362 (1883); *Com. v. Van Horn*, 4 Lack. L. N. 63 (1897).

it was "intended to insure the constant and regular administration of justice between man and man."¹⁵

§7. *Suits Against the State*.—It is self-evident that a sovereign, from the very nature of things, cannot be sued. The idea of a suit involves compulsion, and a supreme power cannot be compelled. In this sense the states, as well as the United States, are recognized to be sovereign.¹⁶

Sovereigns ordinarily consent to waive their prerogative in certain cases, and permit themselves to be sued, particularly by their own subjects, who may have equitable claims against the government which ought to be adjusted. The earliest Constitution of Pennsylvania was silent on this subject, but it was provided in the Constitution of 1790 that "Suits may be brought against the commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."¹⁷ The same provision is retained in the Constitution of 1873,¹⁸ and under it the Legislature may provide for the adjudication of claims against the state.

§8. *Suspension of Laws*.—In England, particularly prior to the Revolution of 1688, it was not uncommon for the king to suspend the operation or execution of laws for the purpose of carrying out some temporary and arbitrary intention of his own. Such action was really illegal, and in fraud of the rights of the citizens, but was nevertheless persisted in until finally forbidden by the Bill of Rights, providing "That the pretended power of suspending of laws, by regal authority, without consent of Parliament is illegal." In order that executive authority (of which there was great jealousy at the foundation of our constitutional government) might be deprived of the power ever to suspend the laws, a provision forbidding any power except the Legislature to do so, was made a part of our fundamental law in 1790 (Art. IX, §12), and has remained a part of it ever since.¹⁹ The section is "No power of suspending laws shall be exercised unless by the Legislature or by its authority." As indicated by the

¹⁵*Sharpless v. Mayor*, 21 Pa. 147, 166 (1853).

¹⁶See *Chisholm v. Georgia*, 2 Dall. 419 (1793); *Cohens v. Virginia*, 6 Wheat. 264, 380 (1821); Locke on Government, §205.

¹⁷Art. IX, §11.

¹⁸Art. I, §11.

¹⁹Const. of 1873, Art. I, §12.

language of the clause, the Legislature may suspend the laws at its option: the power which makes can destroy or suspend at pleasure.

§9. *Commissions of Criminal Courts Forbidden.*—Not only is the citizen entitled to the general operation of the laws, but he has a right to have a court of general jurisdiction determine his guilt or innocence, should he be accused of crime. The issuance of special commissions to try prisoners for certain offenses or even in particular cases was not infrequent in England at one time. In such cases the result of the trial was always a foregone conclusion, as the court would be selected from those who were avowedly of the king's way of thinking. To prevent such things from ever happening in Pennsylvania, it was provided in the Constitution of 1790²⁰ that "no commission of oyer and terminer or jail delivery shall be issued." The clause also appears in the Constitution of 1873.²¹

In 1844 the Legislature attempted to disobey this provision of the constitution and passed an act purporting to establish a special court of oyer and terminer in Cambria County for the purpose of hearing a rule to show cause why the verdict of the jury in a certain case of *Com. v. Flanagan* should not be set aside.²² The judges who were appointed to hold said court declined to act, and assigned for their reason the unconstitutionality of the statute.²³ It was stated that the act was inconsistent with the constitution, "which meant to secure to the commonwealth, as well as the accused, a trial by the ordinary tribunals, to the exclusion of special tribunals, created for the trial of particular cases, it was supposed with a view to produce a particular result."

The meaning of the clause is not more extended than here indicated. It is not construed to prevent the Legislature from altering the powers or composition of courts of general jurisdiction²⁴ or to interfere with the practice of calling judges from one district or county to sit in another during the temporary disability of the regular members of the courts of such counties.²⁵

²⁰Art. IX, §15.

²¹Art. I, §15.

²²Act of April 4, 1844, P. L.

²³*Com. v. Flanagan*, 7 W. & S. 68 (1844).

²⁴*Com. v. Green*, 58 Pa. 226 (1868).

²⁵*In re Application of the Judges*, 64 Pa. 33 (1870).

§10. *Imprisonment for Debt.*—In nearly or quite all countries the right of a creditor to control the person of his debtor was recognized in ancient times. If his goods could not satisfy the debt, his body could be taken in satisfaction, and at very remote periods even his life was forfeit. It is well known that in England, until modern times, the prisons were crowded with debtors, who were confined sometimes throughout the whole period of their lives, through inability to pay the amount of their debt, often trifling, and the small sums needed for their sustenance.²⁶ This condition of affairs was still in existence at the time of the founding of most of the American colonies, as the full measure of the absurdity of confining debtors had not yet been realized by the people in general. The practice obtained in the colonies generally for many years, until at first mitigated by insolvent laws and finally abolished altogether.²⁷

During the early colonial days in Pennsylvania many persons were imprisoned for debt; the matter was soon called to the attention of the Assembly, and various acts were passed for their relief. In 1730 "An Act for the relief of insolvent debtors within the Province of Pennsylvania," was enacted, which provided that the prisoners might be released upon their surrendering all their goods to their creditors.²⁸ There was yet much suffering, however, as it was still within the power of a creditor to keep the debtor in confinement upon the plea that he was not satisfied with his oath as to the delivery of all his property. It is reported that three such prisoners died of starvation in 1772, and that there were at that date a considerable number in confinement.²⁹

§11. *Constitutional Provisions.*—An investigation was undertaken by the Assembly by reason of the representations thus made in 1772,³⁰ and the adoption of the first constitution following shortly after, a provision was inserted to permanently

²⁶In the year ending January, 1830, there are said to have been 7,114 prisoners for debt confined in London alone.

²⁷Imprisonment for debt was finally abolished in England by the Act of 32 and 33 Vict. C. 62 (1868).

²⁸1 Sm. Laws, 181.

²⁹See Hist. of Phila. by Sharp and Westcott, Vol. I, p. 262. For a full review of the Colonial acts see 1 Sm. Laws, 189 (note).

³⁰See 9 Col. Rec. 659, for a reference to an act passed for the relief of "languishing prisoners."

relieve honest debtors from the burden of imprisonment. It is provided: "The person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up *bona fide* all his estate, real and personal, for the use of his creditors, in such manner as shall be hereafter regulated by law."³¹ Substantially the same provision was inserted in the Constitution of 1790,³² and is retained in that of 1873.³³ The effect of the provision is to require the passage of insolvent laws which shall provide a method by which a debtor can obtain his discharge from custody upon surrendering his property. This discharge, however, was often delayed for various reasons, or even denied altogether, so that the clause is not quite so efficacious as might at first thought appear. It is practically obsolete at the present day, owing to the entire abolition of imprisonment for debt by the act of July 12, 1842, P. L. 339. This important enactment was the result of long and continued efforts for reform in this direction, and worked a most salutary change in the law.³⁴ During the years 1828, 1829, 1830, 3,000 persons are said to have been imprisoned for debt in Philadelphia alone.³⁵ Since the passage of the act of 1842 there can be no arrest for debt, unless the claim is founded upon a tort or a breach of promise to marry, or arises out of the breach of certain contracts of a public nature. The act is liberally construed, and there may be no arrest or imprisonment even for a tort where the plaintiff might at his election sue in contract.³⁶

§12. *Attainder by Legislature.*—Section 18 of the Bill of Rights provides: "No person shall be attainted for treason or felony by the Legislature." An attainder is a legislative con-

³¹Const. of 1776, C. II, §28.

³²Art. IX, §16. "That the person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law."

³³Art. I, §16.

³⁴See Hist. of Pa. (Historical Society), Vol. II, p. 324.

³⁵Hist. of Pa. (Historical Society), Vol. II, p. 327.

³⁶*Kelly v. Henderson*, 1 Pa. 495 (1845); *Gilcspe v. Hewlings*, 2 Pa. 492 (1846). This clause was sought to be invoked in the case of *Com. v. Sponsler*, 16 Pa. C. C. 116 (1895), in which it was contended to be in conflict with the Act of May 9, 1889, P. L. 145, providing for the imprisonment of a banker convicted of receiving money on deposit with knowledge of the bank's insolvency. The clause manifestly has no application.

viction followed by judgment of death. The power to pass "bills of attainder" was formerly exercised not infrequently by the English Parliament, and many innocent persons met their death through such pretended convictions of crime, when their only offense was that they had incurred the enmity of those who were then in power. A legislative body is composed of persons who ordinarily have passed through an exciting political campaign, and it needs no argument to show that such a body is totally unfit to exercise the functions of a judge and jury and to determine the guilt or innocence perhaps of their political opponents.

For a considerable period prior to the American Revolution it was recognized that bills of attainder are opposed to free government, and there was entire unanimity of opinion as to the propriety of forbidding them. The Constitution of the United States also forbids the states to pass any bills of attainder.³⁷

§13. *Attainder Not to Work Corruption of Blood.*—At common law one convicted of treason or felony was attainted so that his property could not descend to his heirs: his blood was corrupted so that there was a total failure of heritable blood, and his property escheated. This was obviously a senseless custom, for the innocent family of the victim were the real sufferers. Penn was fully sensible of the desirability of a change in the common law in this regard, and it was accordingly provided by the laws agreed upon in England.

"That the estate of capital offenders as traitors and murderers shall go, one-third to the next of kin to the sufferer and the remainder to the next of kin to the criminal."³⁸

The Constitution of 1776 was silent on the subject, but it was provided in the Constitution of 1790, Art. IX, §19: "That

³⁷During the reigns of the Tudors and Stuarts and particularly during those of Henry VIII and of James II, many bills of attainder were passed which served to thoroughly disgust all lovers of liberty. The act promulgated by James II's Parliament at Dublin (where he was in exile), attainting over two thousand persons, is one of the most famous. It, of course, amounted to nothing, as James never returned to power.

³⁸Laws agreed upon in England, XXV. As to the property of other criminals, the law was not so liberal toward his family. It was provided, XXIV: "That all lands and goods of felons shall be liable to make satisfaction to the party wronged twice the value; and for want of lands or goods, the felons shall be bondmen to work in the common prison, or workhouse, or otherwise, till the party injured be satisfied."

no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth." This provision is contained in the Constitution of 1873 unchanged.³⁹ The effect of this provision is absolutely to destroy any and all rules of the common law relative to the forfeiture of estates as a penalty for the commission of crime. So liberally is it construed that one may inherit, even though he murders another for the very purpose of obtaining his property by inheritance.⁴⁰ It was argued in the case cited that the rule forbidding one from profiting by his own wrong should prevent the murderer from inheriting, and Mr. Justice Williams dissented on that ground, but the majority of the court were of opinion that the positive rules laid down by the intestate law admitted of no exception and that the criminal was capable of inheriting.

Suicide at common law destroyed the right of the suicide's family to inherit, because it attainted their blood. A special provision was thought to be necessary to deal with this situation, and therefore it was further provided in the Constitution of 1790, Art. IX, §19, and in that of 1873, that: "The estates of such persons as shall destroy their own lives shall descend or vest as in cases of natural death."⁴¹

§14. *Forfeiture for Accidental Killing Forbidden.*—Another curious rule of the common law, which survived unaccountably almost into modern times was that relating to "deodands." If one was killed by casualty through the instrumentality of an inanimate thing such as a cart, the thing which caused the death should be forfeited to the family of the victim.⁴²

To do away with this absurd rule of law the Constitutions of 1790 and 1873 in the same sections contained the further provision, that "if any person shall be killed by casualty, there shall be no forfeiture by reason thereof."⁴³

§15. *Right of Petition.*—It is observed by Story that the

³⁹Art. I, §19.

⁴⁰*Carpenter's Estate*, 170 Pa. 203 (1895).

⁴¹Art. I, §19.

⁴²So late as the middle of the nineteenth century a claim is said to have been made to a locomotive by the family of a man who was killed by it in England. It is needless to say that the claim was disallowed.

⁴³The Charter of 1701, referred to above, also contained a clause almost identical with the one just quoted.

right of petition is one which "would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature and structure of its institutions. It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen." Constitutional provisions guaranteeing it may perhaps be deemed to be unnecessary at this time, as they in truth are, but they have survived from a time when they were of the highest importance. It is well known that the right of the citizens to assemble together to petition the king was frequently denied in England in early times, and was only firmly established by the provision in the English Bill of Rights of 1689: "That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal." Our earliest constitution contained a similar provision,⁴⁴ and the clause as it now stands is: "The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address or remonstrance."⁴⁵

§16. *Right to Bear Arms.*—The right to bear arms requires only a passing mention, although at one time it was of real importance. The Constitution of 1873 provides, Art. I, §21: "The right of the citizens to bear arms in defense of themselves and of the state shall not be questioned."⁴⁶

Our criminal laws⁴⁷ provide that the carrying of concealed deadly weapons with malicious intent to do injury to another shall be a misdemeanor. It has been contended that such a law is in conflict with the constitutional clause above quoted, but the courts have upheld it as a proper police regulation in no way infringing upon the constitutional right of carrying weapons for

"Const. of 1776, Chap. I, §16: "The people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the Legislature for redress of grievances by address, petition or remonstrance."

"Const. of 1873, Art. I, §20; Const. of 1790, Art. IX, §20.

"This clause was copied from the Constitution of 1790, Art. IX, §21, and this in turn was derived from the Constitution of 1776, Chap. I, §13.

"Act of May 3, 1864, P. L. 823.

defense.⁴⁸ The carrying of a weapon for defense is lawful,⁴⁹ and there may be no indictment under the act unless there is a malicious intent to do injury.⁵⁰

§17. *Standing Army.*—The citizens in nearly all the colonies had some very unpleasant experiences with standing armies which were quartered upon them and which they were obliged to support. They were frequently ill-treated by the soldiers and the power of their civil officers set at naught. To provide against this we have clauses in the Bill of Rights providing, Art. I, §22, that: "No standing army shall in time of peace be kept up without the consent of the Legislature, and the military shall in all cases, and at all times, be in strict subordination to the civil power;" and Art. I, §23, 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."⁵¹

Fortunately there has been little need for construing that part of this constitutional provision which declares that the military power shall always be subject to the authority of the civil power. The civil authority gives rise in the first instance to the military organization, calls upon it for assistance when needed and can temporarily suspend its own functions, thus establishing martial law, limited in extent and duration. But even in so doing the civil power retains all of its powers unimpaired and may at will resume the exercise of its functions. It has direct supervision over the military organizations, so that private rights alleged to be injured by some unlawful action of such organization or its members will be protected. Thus in *Com. ex rel. Tyler v. Small*, 26 Pa. 31 (1856), the court intervened to prevent the defendant from exercising the office of brigadier general, he having been illegally elected. It is obvious that the civil authorities must retain this power under any and

⁴⁸*Wright v. Com.*, 77 Pa. 470 (1875).

⁴⁹*Com. v. McNulty*, 28 L. I. 389 (1871).

⁵⁰See also the Act of March 18, 1875, P. L. 33, under which the jury may infer the intent from the fact of carrying the weapon.

⁵¹These provisions were taken from the Bills of Rights of 1790, Art. IX, §§22, 23. The Constitution of 1776, Chap. 1, §13, provided: " . . . As standing armies in the time of peace are dangerous to liberty, they ought not to be kept up: and the military should be kept under strict subordination to, and governed by, the civil power."

all circumstances, for under our system of government there can be no military power save that created by authority of and in strict subordination to the civil power.

This is true even in the matter of the discipline administered by military powers, with which, however, civil authorities will rarely interfere, and the courts retain the right to review the measures taken by military officers or their subordinates in the discharge of their duties and to pass judgment upon the legality of their actions. In *Com. ex rel. Wadsworth v. Shortall*, 206 Pa. 165 (1903), it appeared that a private of the National Guard of Pennsylvania had killed a man while in the discharge of his duties as a sentinel. The act was alleged to have been unjustifiable homicide, and Wadsworth was brought to trial before the civil courts. The jurisdiction of the civil courts to determine whether Wadsworth was guilty of any crime was fully sustained. He was discharged by order of the Supreme Court, they having come to the conclusion that the shooting was justifiable under the admitted facts.

§18. *Organization of Militia*.—In connection with the sections of the constitution just discussed should be considered Art. XI, §1, which provides: "The freeman of this commonwealth shall be armed, organized and disciplined for its defense when and in such manner as may be directed by law. The General Assembly shall provide for maintaining the militia by appropriations from the treasury of the commonwealth, and may exempt from military service persons having conscientious scruples against bearing arms." This section is similar to the provisions contained in the earlier constitutions of Pennsylvania, all of which directed that the freemen of the commonwealth should be organized for its defense, and that persons having conscientious scruples against bearing arms might be exempted.⁵² It will be observed that the Legislature is not

⁵²Constitution of 1776, Chapter I, §8: "That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms be justly compelled

required, but only empowered, to exempt from military service persons having conscientious scruples against bearing arms. In the constitution as existing prior to 1874, the exemption of such persons was obligatory, although by the same provision they were required to pay an equivalent in money in case of such exemption.

§19. *Titles of Nobility, etc.*—Section 24 of Article I provides: "The Legislature shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment to which shall be for a longer term than during good behavior." The first part of this clause is a mere repetition of a prohibition laid upon all the states by the Constitution of the United States, and is intended to preserve the republican form of government from monarchical tendencies.⁵³ The latter part of the provision relative to the term of officers was obviously intended to prevent appointments even for life unless coupled with the condition that the tenure is to extend only during good behavior.

§20. *Right to Emigrate.*—The inalienable right of man to emigrate from one country to another whenever he believes by so doing he may promote his own happiness and welfare has always been asserted by Americans, and is now almost universally recognized. That no Legislature might ever restrain

thereto, if he will pay such equivalent, nor are the people bound by any laws but such as they have in like manner assented to for their common good."

Chapter II, §5: "The freemen of this commonwealth and their sons shall be trained and armed for its defense under such regulations, restrictions and exceptions as the General Assembly shall by law direct, preserving always to the people the right of choosing their colonel and all commissioned officers under that rank, in such manner and as often as by the said laws shall be directed."

Constitution of 1790, Art. VI, §2: "The freemen of this commonwealth shall be armed and disciplined for its defense. Those who conscientiously scruple to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service. The militia officers shall be appointed in such manner and for such time as shall be directed by law."

By the amendments of 1838 this section was changed to read as follows: "The freemen of this commonwealth shall be armed, organized and disciplined for its defense, when and in such manner as may be directed by law. Those who conscientiously scruple to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service."

⁵³The clause was copied from the Constitution of 1790, Art. IX, §24.

it, we have the clause providing, Section 25, that "Emigration from the state shall not be prohibited."⁵⁴

§21. *Reservation of Power to People.*—Finally, at the very end of the Bill of Rights, we find a solemn declaration that: "To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate."⁵⁵ This clause has frequently been quoted by the courts, and is considered by them to be a solemn injunction laid upon them to see to it that none of the powers thus expressly reserved to the people and denied to the general government shall ever be exercised by the latter in violation of the fundamental law. While of little importance in itself except to add emphasis to the prohibitions laid upon the legislative power, it is of real value in its unconscious influence on the interpretation placed upon the Bill of Rights by the courts.⁵⁶

⁵⁴The Constitution of 1776 provided, Chap. I, §15: "All men have a natural, inherent right to emigrate from one state to another that will receive them, or to form a new state in vacant countries, or in such countries as they can purchase, whenever they think that thereby they may promote their own happiness." The Constitution of 1790, Art. IX, §25, contained the same clause as is quoted above.

⁵⁵Art. I, §26.

⁵⁶This clause was copied from the Constitution of 1790, Art. IX, §26. The Constitution of 1776 contained the following, Chap. I, §46: "The Declaration of Rights is hereby declared to be a part of the constitution of this commonwealth, and ought never to be violated on any pretense whatever."

CHAPTER X.

THE LEGISLATIVE POWER.

§1. *Extent of the Grant.* The constitution provides: "The legislative power of this commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."¹

The effect of this clause is to delegate the whole legislative power, resting primarily in the people, to the General Assembly, save in so far as that power is limited by other clauses in the state constitution, or by the Constitution of the United States. The General Assembly therefore possesses all legislative power not forbidden by one of the two constitutions mentioned. But the reference is only to power strictly legislative in character. The judicial and executive functions are just as fully delegated to their appropriate departments of government, and, while the Legislature has the power to pass any law not forbidden, it cannot invade the judicial or executive fields by enactments which are judicial or executive rather than legislative in character. In *Sharpless v. Mayor*, 21 Pa. 147 (1853), Mr. Chief Justice Black said: "The powers bestowed on the state government were distributed by the constitution to the three great departments: the legislative, the executive and the judicial. The power to make laws was granted in Section 1 of Art. I, by the following words: 'The legislative power of this commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives.' It is plain that the force of these general words, if there had been nothing elsewhere to qualify them, would have given to the assembly an unlimited power to make all such laws as they might think proper. They would have had the whole omnipotence of the British Parliament. But the absolute power of the people

¹Art. II, §1. This is an exact copy of Art. I, §1, of the Constitution of 1790. The Constitution of 1776 provided, Chap. II, §2: "The supreme legislative power shall be vested in a House of Representatives of the freemen of the Commonwealth or State of Pennsylvania."

themselves had been previously limited by the Federal Constitution, and they could not bestow on the Legislature authority which had already been given to Congress. The judicial and executive powers were also lodged elsewhere, and the legislative department was forbidden to trench upon the others by an implication as clear as words could make it."²

This rule of law is fundamental in our system of government. The stability and endurance of the republic is due to the fact that we have separated governmental powers into three divisions and have delegated them to co-ordinate departments, each of which operates as a check upon the other two. In *De Chastellux v. Fairchild*, 15 Pa. 18 (1850), Mr. Chief Justice Gibson said: "The functions of the several parts of the government are thoroughly separated, and distinctly assigned to the principal branches of it, the Legislature, the executive, and the judiciary, which, within their respective departments, are equal and co-ordinate. Each derives its authority, mediately or immediately, from the people; and each is responsible, mediately or immediately, to the people for the exercise of it. When either shall have usurped the powers of one or both of its fellows, then will have been effected a revolution, not in the form of government, but in its action. Then will there be a concentration of the powers of the government in a single branch of it, which, whatever may be the form of the constitution, will be a despotism—a government of unlimited, irresponsible and arbitrary rule." It therefore follows that, while supreme in its sphere, save as restrained by the fundamental law, the Legislature cannot trench upon the power of either of the other departments of government.

§2. *Legislative Power Not to be Delegated.*—But while the General Assembly cannot exercise any powers not vested in it by constitutional mandate, neither can it divest itself of any of the powers committed to it, by delegating them to any other person or bodies. The people have divested themselves of all legislative power by the clause under discussion, providing: "The legislative power of this commonwealth shall be

²This inability of the Legislature to pass laws judicial in character is more fully treated in Chapter XVII, relating to the powers of the judiciary.

vested in a General Assembly consisting of a Senate and a House of Representatives," and by the same words have placed it all in the custody of the General Assembly. They have determined that the enactment of laws shall be entrusted exclusively to the discretion of the men who shall be chosen to compose the legislative body, and they have a right to demand that the discretion of that body shall be exercised in the enactment of any and all laws. It follows that this duty cannot be exercised through the medium of any other body whatever, not even the people themselves. As they have divested themselves of all legislative power, it cannot be exercised by them unless by a change in the fundamental law they again assume that function.

§3. *Laws Dependent Upon the Vote of the People.*—In *Parker v. Commonwealth*, 6 Pa. 507 (1847), it appeared that a law had been passed, providing that the sale of liquor should be prohibited under penalty in certain counties of the state, if the citizens of said counties should vote in favor of such prohibition. If, on the other hand, a majority of the citizens of any of said counties should vote in favor of the sale of liquor, then the law was not to become operative in those counties. The constitutionality of the law was questioned because of the fact that the power of determining whether or not it should become operative was delegated to the people of the particular county to be affected. This, it was argued, amounted to a delegation of the legislative power to the people of the county and therefore was unconstitutional. The court so determined. Mr. Justice Bell said: "To exercise the power of making laws delegated to the General Assembly is not so much the privilege of that body as it is its duty, whenever the good of the community calls for legislative action. No man is bound, under the constitution, to accept the office of a legislator; but he who does so accept, cannot, rightfully, avoid the obligations it imposes, or evade the constitutional responsibilities incident to it. As has been well remarked, the constituent is entitled not only to the industry and fidelity of his representative, but to his judgment also, in all that relates to the business of public legislation. Among the primal axioms of jurisprudence, political and municipal, is to be found the principle that an agent, unless expressly empowered, cannot transfer his delegated authority

to another, more especially when it rests in a confidence, partaking the nature of a trust, and requiring for its due discharge understanding, knowledge and rectitude. The maxim is, *delegata potestas non potest delegari*. And what shall be said to be a higher trust, based upon a broader confidence, than the possession of the legislative function? What task can be imposed on a man, as a member of society, requiring a deeper knowledge and a purer honesty. It is a duty which cannot, therefore, be transferred by the representative; no, not even to the people themselves, for they have forbidden it by the solemn expression of their will that the legislative power shall be vested in the General Assembly; much less can it be relinquished to a portion of the people, who cannot even claim to be the exclusive depositories of that part of the sovereignty retained by the whole community. . . . It will be perceived this act of the General Assembly, whether considered as an enactment of new and substantive provisions, or as a statute of repeal, abrogating existing laws, depends for its validity and binding efficacy, within the several counties named in it, upon the popular vote of designated districts. Without this affirmatively expressed, it is inert. Possessing no innate force, it remains a dead letter, until breathed upon by the people and called into activity by an exertion of their voice in their primary assemblies. Until then it prohibits no act, creates no offense, points out no mode of trial, fixes no penalty, and, when so bidden into life, its existence as a rule of action is limited to the brief period of a single year; unless new energy be again infused through the medium of the ballot-box. If a majority within the particular district should vote negatively upon the question, yearly to be submitted to the people, the act, as a statute, has no existence. It is not to be deemed a law within the district where such a vote is cast. If a majority of votes be cast in the affirmative, then the act is to take effect as a statute, establishing a new rule and repealing the old. It operates not *propria vigore*, but, if at all, only by virtue of a mandate expressed subsequently to its enactment, in pursuance of an invitation given by the legislative bodies. As it left the halls of legislation it was imperfect and unfinished, for it lacked the qualities of command and prohibition absolutely essential to every law."

It was argued that sundry delegations of legislative power had long been recognized by every department of government. For example, that the power to pass local regulations and even to levy and collect taxes had in many cases been delegated to municipal corporations and by them exercised without objection. It was also said that the people of particular localities had in the past been given the power to say whether or not common schools should be established among them, and according to their vote was the application of the legislative will. In answer to these contentions the court said that the power to enact by-laws, etc., for the regulation of the members of a particular municipal corporation was not a power to legislate. That such by-laws were necessarily assented to by those who were or became members of the community, and were no more legislation in the usual sense than by-laws of a private corporation. As to the expression of popular will relative to the establishment of public schools, the court said that was a mere administrative act and was not legislation at all.

The reasoning in the case was all good, save as to the crucial fact upon which the decision depended. The court thought, as may be seen from the language of Mr. Justice Bell, above quoted, that the law prohibiting the sale of liquor under penalty was in reality enacted by the people who voted in the county to be affected. The law, said he, is of no force or validity whatever until the breath of life is breathed into it by the mandate of the people. He deemed it to be an incomplete and imperfect piece of legislation when it left the halls of legislation, but in this assumption he fell into error. The law was not incomplete when it left the halls of legislation. On the contrary, it was perfect in every part, although it was not to go into effect until the happening of a certain contingency, to wit: the favorable vote of a majority of the qualified voters of a particular county. There is no reason why, if they choose, the Legislature cannot enact a law which is not to become operative until the happening of any contingency which they may please to adopt. For example, the Legislature might pass a law relative to the preservation of game birds and provide that it should be operative only in case the winter happened to be of a certain severity. If, therefore, the Legislature chooses to

enact a perfect piece of legislation and to provide that it shall not go into effect unless a majority of the voters of a certain community vote in favor of it, this is not a delegation of legislative power, but is merely making the application of a law dependent upon a contingency. There is nothing unconstitutional in this, and the law in *Parker v. Commonwealth* should have been upheld.³

§4. *Parker v. Commonwealth Overruled.*—That *Parker v. Commonwealth*, 6 Pa. 507 (1847), was erroneously decided is now recognized by our Supreme Court. The case which definitely overthrew its authority was *Locke's Appeal*, 72 Pa. 491 (1873). The same question as in *Parker v. Commonwealth* was presented for determination, that was, could the Legislature constitutionally pass a law regulating the liquor traffic and which was to become operative in a particular county or ward only upon the contingency of a majority of its voters voting in favor of it? The court determined that such law could be constitutionally enacted. The act was to become operative if a majority of the voters of the Twenty-second Ward of the City of Philadelphia should vote in favor of it. The court, Mr. Justice Agnew delivering the opinion, said: "What did the Legislature, in this section, submit to the people, and what did they not submit? This is quite as clear as any other part of the act. Each elector is to vote a ticket for license or against license. He is allowed by the law to say, 'I am for the issuing of license,' or 'I am against the issuing of licenses,' and thus to express his judgment or opinion. But this is all he was permitted by law to do. He declared no consequences, and prescribed no rule resulting from his opinion. Nor does the majority of the votes declare a consequence. The return of a majority is but of a mere numerical preponderance of votes, and expresses only the opinion of the greater number of electors upon the expediency or in expediency of licenses in this ward. When this is certified by the return, the Legislature, not the voters, declare 'it shall (or it shall not) be lawful for any license to issue for the sale of spirituous liquors.' Thus it is perfectly manifest this law was not made, pronounced or ratified

³There is, however, considerable authority to the contrary. See *Cooley*, Const. Lim. (6th ed.), p. 143.

by the people; and the majority vote is but an ascertainment of the public sentiment—the expression of a general opinion, which, as a fact, the Legislature have made the contingency on which the law shall operate. When the law came from the halls of legislation it came a perfect law, mandatory in all its parts, prohibiting in this ward the sale of intoxicating liquors without license; commanding an election to be held every third year to ascertain the expediency of issuing licenses, and when the fact of expediency or in expediency shall have been returned, commanding that licenses shall issue or shall not issue. Then what did the vote decide? Clearly, not that the act should be a law or not be, for the law already existed. Indeed, it was not delegated to the people to decide anything. They simply declared their views or wishes, and when they did so, it was that fiat of the law, not their vote, which commanded licenses to be issued or not to be issued. . . . The Legislature in the act of 1871 have given to the people a law, not a mere invitation; needing no ratification, no popular breath to give it vitality. The law is simply contingent upon the determination of the fact whether licenses are needed or are desired in this ward. And why shall not the Legislature take the sense of the people? Is it not the right of the Legislature to seek information of the condition of a locality, or of the public sentiment there? The constitution grants the power to legislate, but it does not confer knowledge. The very trust implies that the power should be exercised wisely and judiciously. Are not public sentiment and local circumstances just subjects of inquiry? A judicious exercise of power in one place may not be so in another. Public sentiment or local condition may make the law unwise, inapt, or inoperative in some places, and otherwise elsewhere. Instead of being contrary to, it is consistent with, the genius of our free institutions, to take the public sense in many instances, that the legislators may faithfully represent the people, and promote their welfare. So long, therefore, as the Legislature only calls to its aid the means of ascertaining the utility or expediency of a measure, and does not delegate the power to make the law itself, it is acting within the sphere of its just powers.”

The court then points out the fallacy in *Parker v. Com-*

monwealth, 6 Pa. 507 (1847), and adds: "Then the true distinction, I conceive, is this: The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." Mr. Chief Justice Read delivered a dissenting opinion, which was concurred in by Mr. Justice Sharswood, with a few oral remarks. It seemed to be the opinion of these two justices that *Parker v. Commonwealth* was rightly decided and that the court was making a mistake in departing from it.⁴ The reasoning of the majority, however, is flawless, and has been recently reaffirmed.⁵

§5. *Repeal of Law Dependent Upon Vote of People.*—In *McGonnell's License*, 24 Pa. Superior Court, 642 (1904), it appeared that an act had been passed providing for the repeal of an earlier law, relating to the granting of liquor licenses in Potter County, but with a further proviso that the repealing act was not to go into effect unless a majority of the voters of the county voted in favor of it. The Superior Court decided that the law was an unconstitutional delegation of legislative power, basing their decision upon a supposed distinction between the case at bar and *Locke's Appeal*, 72 Pa. 491 (1873). It was

"Mr. Chief Justice Read was apparently somewhat influenced in his opinion by his conviction that a prohibitory law would be an unwise piece of legislation. Toward the end of his opinion he said:

"The brewers in Philadelphia produce 600,000 barrels of malt liquor annually, giving employment to nearly one thousand men, and consuming in its manufacture a million and a half bushels of barley of the value of \$1.10 per bushel. Ale is a healthy liquor, and lager beer is a favorite beverage, particularly of our large German population.

"The question of license or no license is to be submitted to the citizens of Philadelphia, at the general election in October, and if the vote is against license, then the city will be under a prohibitory liquor law during the whole Centennial celebration to which we have invited the whole country. On the 4th July, 1776, every patriot drank to the independence of the thirteen states; shall it be that on the 4th July, 1876, all we can lawfully offer to our guests on this great anniversary will be a glass of Schuylkill water, seasoned with a lump of Knickerbocker ice? I am a strong believer in temperance. For twenty-five years of my life I drank nothing but water, but a dangerous illness made a strong stimulant an absolute necessity, and, by the advice of my physician, I am obliged occasionally to resort to it. Some of my friends older than myself have drunk wine all their lives, and are temperate men. I believe in moral suasion as the true means of advancing the temperance cause, but I do not believe in a prohibitory law which would reduce us to the condition of Boston."

⁵*McGonnell's License*, 209 Pa. 327 (1904).

said that in *Locke's Appeal* the voters were not to determine directly whether the law should be operative or not, but were to vote for license or no license under the direction of the Legislature, whereas, in the case at bar, the voter was to vote directly for "repeal" or "no repeal"; upon appeal to the Supreme Court, however, this supposed distinction was determined not to exist, and the decision of the Superior Court was reversed.⁶ The case was said to be undistinguishable from *Locke's Appeal*.

§6. *Administrative Acts Dependent Upon Vote of People.*—Shortly after the decision in *Parker v. Commonwealth*, 6 Pa. 507 (1847), there were a number of cases which involved the determination of the validity of statutes which were to become operative only upon the contingency of a vote of the people in favor of certain regulations of an administrative character. For example, the matter of the location of a county seat or of a school or the determination of county lines are matters of paramount local interest and yet which are administrative rather than legislative in character. The same thing may be said of the rules and regulations which are enacted through the medium of local bodies such as city councils. They are considered as administrative rather than legislative acts. A distinction was taken between such acts, the expediency of which might be left to local authorities or to the people to determine, and those of a strictly legislative character. It was said in the earlier cases that the latter could not be made to depend upon the vote of the people, whereas the former could. This distinction was referred to though not directly sanctioned in *Parker v. Commonwealth*, 6 Pa. 507 (1847), but in *Commonwealth v. The Judges*, 8 Pa. 391 (1848), it was clearly recognized. In that case a law was upheld which permitted the voters of certain townships to determine whether or not a new township should be erected. This, it was said, was a mere administrative function which might be delegated. The same principle was subsequently recognized with reference to fixing the site of public buildings,⁷ the consolidation of districts into a city,⁸ etc. This distinction, however, is no longer of much importance, since it has now been settled that the Legislature may in any case pass

⁶*McGonnell's License*, 209 Pa. 327 (1904).

⁷*Com. v. Painter*, 10 Pa. 214 (1849).

⁸*Smith v. McCarthy*, 56 Pa. 359 (1867).

a law and make its applicability or even its binding force dependent upon an expression of the will of the people.

§7. *Delegation of Legislative Power to Municipal Corporations.*—The right of the Legislature to delegate its power to local bodies such as city councils is not quite so clear, although equally well established. The reasons given for supporting such delegation have not been entirely harmonious. In *Parker v. Commonwealth*, 6 Pa. 507 (1847), Mr. Justice Bell said: "The counsel for the commonwealth have pointed to a supposed analogy existing in the case of municipal corporations clothed with the power of making by-laws, for the conduct of its concerns and the government of its members. It is argued that this is legislation by virtue of an authority delegated by the legislative power—a right which has not only passed unquestioned, but received the express approval of this court in the case of *Respublica v. Duquet*, 2 Yeates, 493, where it was decided that an act of Assembly, empowering the corporation of Philadelphia to pass ordinances to prevent persons from erecting wooden buildings within certain districts of the city, was constitutional. But the position assumed by the commonwealth is based upon an entire misapprehension of the nature of the right to make ordinances—a right which is said to be necessarily incident to every corporation aggregate. By-laws, whether enacted in pursuance of express authority given by charter or without it, are no more than a species of contract between the individual members; and, in the case of municipal corporations, may be extended to a stranger who comes voluntarily within the jurisdiction, upon the principle that his coming is equivalent to an assent to be bound by the local law of the place."

It will thus be observed that the apparent delegation was upheld in this case on the theory that ordinances of councils are in reality not laws at all, but merely voluntary agreements entered into by the citizens themselves. In *Locke's Appeal*, 72 Pa. 491 (1873), on the other hand, the power of the city councils was recognized to at least partake of a legislative character, but its exercise by them was sanctioned on the ground of authority without a very serious effort to support it on principle. Mr. Justice Agnew said: "If in any case a question could arise

upon a delegated power, it would be in that which is delegated to the Councils of Philadelphia to make *laws* so called. Look at the language of the sixteenth section of the act of March 11, 1789: 'The Mayor shall have full power and authority to make, ordain, constitute and establish such and so many laws or ordinances,' etc. See also the fourth section of the consolidation act of February 2, 1854: 'That the legislative powers of the said city shall be vested in two bodies, to be called the Select and Common Councils.' In pursuance of this power rights of person and property are regulated, fines and forfeitures inflicted, and discretionary powers are vested in committees, departments and officers. Can there be a clearer instance of the exercise of powers in their nature legislative, by an act of delegation? Yet who believes that this is unlawful, or that it is really a delegation of the lawmaking power in the sense of a relegation of it from the halls of legislation to the council chambers? On the contrary, the charter of the city is itself the law, which breathes into these quasi-legislative acts of councils all their life and power, and which, for useful and necessary local purposes, delegated to councils, not the power of making laws, but the discretion and determining power necessary to regulate the affairs of a great city, that, owing to distance, and want of knowledge and of time, the Legislature cannot determine for itself, but which by its law it directs to be done by others. Just at this point the opinion in *Parker v. Commonwealth* evidently labors when it touches this instance of delegated powers, and attributes the efficacy of corporation laws to the consent of the citizens, and affirms that the relation between the municipality and the members is founded in contract. But it is too clear for argument that ordinances derive their binding force from the law which authorizes them, and not from compacts. The power to pass them is delegated, and the true question is, what is the nature of the delegated power? As already stated, it is merely a determining power, as to matters committed to the discretion of the councils by law, not a lawmaking power *per se*."

All that can be said on the point is that our system of government has from the first recognized the propriety of leaving the details of local regulations and the levying of local taxes to municipal corporations, and the validity of such delegation,

if it is such, has been too many times sanctioned to admit of any doubt.⁹

§8. *Law Must be Complete When It Leaves the Legislative Halls.*—In view of these decisions it may be asked what has become of the rule as first stated that the legislative power of the commonwealth cannot be delegated? It may be said in reply that while the courts have determined that laws contingent upon the happening of certain events, or upon the expression of the popular will are constitutional, yet the rule that the discretion of the Legislature cannot be delegated is still in full force. It will be remembered that in all cases where laws dependent upon the vote of the people have been upheld, they were complete in all their parts when they left the halls of legislation. For example, the acts above referred to, which prohibited the sale of liquor in certain localities, provided in their terms the fact of prohibition, the penalties for a breach of the law, etc., although their application was to await the vote of the people. But if the Legislature should undertake to say that such a penalty as the people or some individual member of the public might provide should be visited upon the offender, or if the law should provide the penalty, but leave the breach to be defined by some outside party, such a law would undoubtedly be a delegation of legislative power and would be unhesitatingly condemned. In *O'Neil v. Insurance Co.*, 166 Pa. 72 (1895), it appeared that the Legislature had passed a law providing that an officer styled "The Insurance Commissioner" should prescribe a standard form of fire insurance policy, which under penalty must be used by all companies doing business within the state. It is quite evident that this law was an unconstitutional delegation of power, because it was imperfect and incomplete when it left the legislative halls. The legislators had not used their discretion in determining what form of policy should be required, but had merely provided that such policy as a third person might fix upon must be used under penalty. Mr. Justice Williams said: "The effect of our cases is to settle firmly the rule that the law must be complete in all its terms and pro-

⁹*Respublica v. Duquet*, 2 Yeates, 493 (1799); *Butler's Appeal*, 73 Pa. 448 (1873). See *Cooley*, Const. Law (6th ed.), p 226. See also *Com. v. Hallam*, 25 Pa. C. C. 471 (1901), holding that a municipal corporation cannot delegate its legislative powers to others.

visions when it leaves the legislative branch of the government, and that nothing must be submitted to the judgment of the electors or other appointee of the Legislature except an option to become or not to become subject to its requirements and penalties. In the light of this line of well considered cases, let us examine the act of 1891 in order to get its provisions before us. Section 1 declares 'That the insurance commissioner shall prepare and file in his office on or before the 15th day of November, 1891, a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be indorsed thereon or added thereto and form a part of such contract or policy; and such form when filed shall be known and designated as the standard fire insurance policy of the State of Pennsylvania.' Section 2 provides, among other things, for the incorporation of the provisions of the standard policy into the contracts of insurance made on property within the state by foreign insurance companies. Section 3 makes the use of this standard form of policy obligatory on all fire insurance companies doing business in this state from and after the 1st day of May, 1892. Section 4 provides the penalties to be imposed upon any insurance company, its officers or agents, or either of them, for failure to comply with the requirements of the act or with the form of policy which the insurance commissioner may devise and file in his own office.

"It may be well to say in this place that we do not now deny the power of the Legislature to direct the form of a policy of insurance against fire. We held in *Commonwealth v. Vrooman*, decided in October last, that the business of insurance against loss by fire was, by reason of its nature, its magnitude, and the temptation to improper practices which it presented, a proper subject for legislative regulation and control. The power to prohibit technical and unjust conditions intended to open the way to vexatious litigation and to defeat the just expectations of the insured, belongs to the police control, which *Commonwealth v. Vrooman* asserted. The question is not therefore one of power over the subject, but of the manner in which the conceded power must be exercised. Upon this question our judgment is with the appellant, for reasons that we will state as concisely as possible and without any attempt at elaboration.

"The act of 1891 is a delegation of legislative power because:

"First. The act does not fix the terms and conditions of the policy the use of which it commands.

"Second. It delegates the power to prescribe the form of the policy, and the conditions and restrictions to be added to and made part of it, to a single individual.

"Third. The appointee clothed with this power is not named, but is designated only by his official title. He is the person who may happen to be insurance commissioner when the time comes to prepare the form for the standard policy for insurance against fire.

"Fourth. The appointee is not required to report his work to the body appointing him, but simply to file in his own office the form of policy he has devised. It does not become part of the statute in fact, is not recorded in the statute book, and no trace of it can be found among the records of either branch of the Legislature.

"Fifth. The act was approved in April, 1891. The appointee had until the following November to prepare and file the form of policy, over which when filed the Legislature had no control whatever. They did not consider, they had no knowledge of, the form which they required all companies doing business in the state to adopt and the use of which they compelled by heavy penalties.

"The elementary books divide a statute into three parts, the declaratory, the directory and the vindicatory. In this statute the Legislature furnished the first and third. It delegated the preparation of the second. It declared in effect the need of a standard form of policy. It provided punishment for the failure to use such form when provided; but it turned the preparation of the form over to its appointee and gave him six months in which to do his work and file a copy of it in his own office. Whoever might be interested in knowing the directory part of the statute and understanding what it was he was required to do, had to go beyond the act of Assembly and inquire of the appointee of the Legislature what it was he had filed in his own office, of which the people of the commonwealth were bound to take notice at their peril."

It will thus be observed that while our decisions seem liberal in permitting a law to be made contingent upon the vote of the people and in sanctioning a delegation of certain powers of legislation to municipalities, the rule has not been relaxed in the least in cases where the preparation of a vital portion of an act of legislation is sought to be delegated to others than the body in which the people have reposed the sole power of legislation.

CHAPTER XI.

ELECTION, LENGTH OF TERMS, QUALIFICATIONS, COMPENSATION AND PRIVILEGES OF MEM- BERS OF THE GENERAL ASSEMBLY.

§1. *Election Every Second Year.*—In the laws as existing during the colonial period and under the constitutions previous to that of 1873 the members of the General Assembly were chosen annually, representatives to serve for one year only. The proposition to elect them every second year and to provide for but one legislative session in two years was made in the convention of 1873 and gave rise to prolonged debate.¹ The real reason for the proposed change was a feeling on the part of the majority of the convention that less evil was likely to be done by a Legislature meeting once in two years than by one meeting every year. It was frankly stated by its advocates to be a companion provision to the clause forbidding local and special legislation, both of which were intended to reduce to a minimum the opportunities for evil legislation. There was also a distinct sentiment among the members of the convention that the state had suffered greatly from too much legislation, and that if the sessions recurred but once in two years the laws were likely to be better considered and less in number. The opponents of the change based their argument upon the proposition that a popular assembly should be composed of short term members, who would be immediately answerable to the will of their constituents. The change was made, however, so that, as finally adopted, the clause provides, Art. II, §2: "Members of the General Assembly shall be chosen at the general election every second year."

§2. *Beginning of Terms of Service.*—The terms of service of the legislators, under the old constitution, began immediately after their election, so that if the Governor for any reason found

¹See Conv. Debates (1873), Vol I, pp. 331-4, 337-47, 355-61, 364-74, 380-408, 409-29; Vol. V, pp. 338-47.

it necessary to call a special session during the period intervening between the election and the date fixed for the meeting of the Legislature, such special session would be composed of the newly-elected members instead of the retiring ones. This was objected to because of the possibility of contested elections, which might result in a county being without representatives in such special session. It was, therefore, proposed to make the terms of service begin with the calendar year, but finally the first day of December was fixed upon as being the most convenient day. By this arrangement sufficient time would be allowed for the determination of contested election cases and yet the new legislators would be in a position to serve should a special session be called in December. The clause as adopted was: “. . . Their term of service shall begin on the first day of December next after their election.”

§3. *Issuance of Writs to Fill Vacancies.*—It was provided in the Constitution of 1790² that if a vacancy should happen to occur in the General Assembly, by death or otherwise, the speaker should issue writs of election to fill such vacancies. It was proposed in the convention of 1873 to give this power to the Governor or to any one who should for the time being be acting as Governor. The reason for the proposed change was a supposition that there might be occasions when there would be a vacancy and no speaker to issue the writ. For example, it was suggested in debate that if a vacancy should occur by death immediately after the election of a member no writ of election could be issued until the Legislature should meet and organize, and perhaps even then the election of a speaker might be postponed by reason of a tie vote or other unforeseen event. The convention at first agreed to the change, but at a later date the original clause was restored because to give such power to the Governor would be a further confusion of the legislative and executive power. It was the feeling of the convention that in no case should legislative power be placed in the hands of the executive unless there was a real need for a check upon possible action of the General Assembly.³ The clause as finally approved was, therefore, Art. II, §2: “. . . Whenever a vacancy

²Art. I, §19.

³See I Conv. Debates (1873), 346.

shall occur in either house, the presiding officer thereof shall issue a writ of election to fill such vacancy for the remainder of the term." This leaves the entire control of the election of its own members in the hands of each house, and prevents any possible interference by the executive in the improbable event of a conflict between the two departments.

§4. *Length of Terms.*—The section previously discussed, relating to the time of election of the members of the General Assembly, naturally suggests and prepares the way for the following section, which definitely fixes the duration of their terms of service. The election being biennial, of course the terms of the representatives can be no less than two years, although they serve at but one regular session of the General Assembly. The terms of senators under the Constitution of 1790, the one which first provided for a senate, were four years.⁴ The purpose of the longer term was that the senate might be a more conservative body, not so quickly amenable to waves of popular opinion. Among the amendments made in 1838 was one which decreased the terms of senators to three years.⁵ This was done for the purpose of making the Legislature more directly answerable to the people. The change, however, was not thought to be an advantage, and in 1873 the convention restored the term to four years, but provided that half of the senators should be chosen every two years, so that at each session half the membership at least would be experienced in legislation.⁶ The section provides, Art. II, §3: "Senators shall be elected for the term of four years and representatives for the term of two years."

§5. *Apportionment of the State for Election of Representatives.*—There were four questions which demanded attention during the discussion as to the manner of apportioning the state for the election of representatives and senators: First, the number who should be elected; second, whether the representation should be based upon taxable inhabitants or upon population alone; third, whether representation should be by counties or by districts; fourth, whether the larger centers of population should be allowed the same representation as the rural districts.

⁴Art. I, §5.

⁵*Ibid.*

⁶Schedule, §§3, 4.

The number of the members of the house was fixed substantially at 200. There were propositions made in the convention both for increasing and for diminishing the number, but neither seemed to find favor with the members. It is fortunate that the number was made no greater, and perhaps it would have been better still had it been reduced. It is undoubtedly the fact that a smaller body is more deliberative in character and its members are more alive to their personal responsibility. In the larger bodies the main work of legislation is done in committee rooms and under circumstances which make it extremely difficult for the public to fix the responsibility.

The principle of representation by counties, which had been recognized from the foundation of the commonwealth, was adhered to. It was thought preferable to representation by arbitrary districts for various reasons, among others being the lessened opportunity for "gerrymandering." But the method of apportioning the number of representatives to the various counties was changed; heretofore the representation had been based on population and taxable property in combination; by the new constitution population alone was to be considered. Why this change was made is not apparent; there was little or no debate in reference to it, and therefore we have no means of determining the thought in the minds of the convention.⁷

The principle of uniformity of apportionment to large and small counties in proportion to their population was recognized and as nearly as could conveniently be arranged every county was to have its full quota of representatives. The practical method of arriving at these results is sufficiently shown by the section itself, which was as follows: "The members of the house of representatives shall be apportioned among the several counties, on a ratio obtained by dividing the population of the state, as ascertained by the most recent United States census, by two hundred. Every county containing less than five ratios shall have one representative for every full ratio, and an additional representative when the surplus exceeds half a ratio; but each county shall have at least one representative. Every county containing five ratios or more shall have one representative for every full ratio. Every city containing a population equal to a

⁷See remarks of Mr. Buckalew, quoted below in the note.

ratio shall elect separately its proportion of the representatives allotted to the county in which it is located. Every city entitled to more than four representatives, and every county having over one hundred thousand inhabitants, shall be divided into districts of compact and contiguous territory, each district to elect its proportion of representatives according to its population; but no district shall elect more than four representatives." On the construction and history of this clause the remarks of Mr. Buckalew are given below. The courts have not been called upon to construe these clauses, and therefore the opinions of one who was a member of the convention and gave especial attention to the subject are of more value than any other observation which could be submitted.⁸

*Mr. Buckalew says, "Buckalew on the Constitution," p. 59 *et seq.*: "CONSTRUCTION. The apportionment is to be 'among the several counties,' that is, the general distribution is to be to counties as such, and not at all to divisions of counties or to cities. The distribution of representatives obtained by certain counties, to divisions thereof, or to districts therein, is a subsequent question, and not at all involved in this clause.

That 'the most recent United States census' here intended is a decennial one, appears plainly from section 18. The number 200 as a divisor for obtaining the representative ratio was adopted by the convention, on motion of Governor Curtin.

The allowance of representation to small counties for fractions of a ratio, though such representation is disallowed to large counties, was fully considered by the convention on several occasions, and is plainly necessary to just representation.—5 Convention Debates, 466, 543, 546.

The separate representation of the smallest counties of the state has the argument of uniformity in its favor, and it excludes, as to those counties, all opportunity of gerrymandering; but it is open to question upon other grounds, and may be regarded as one of the debatable provisions of the constitution.

There may be attempts to break over this rule (as to large counties) or to evade its application in future apportionments in cases where the fractions of large counties are large; but the rule is imperative, and, applied to the census returns, will always fix conclusively the quantum of representation for such counties.

The provisions before given for fractional representation will have no application to cities within counties, or to divisions or districts of cities or counties. A surplus fraction of over one-half a ratio will or will not carry an additional representative to such city or district according to circumstances and not of course. If, at any apportionment, a county which has a city within it should have a total population of 66,000, the representative ratio being 20,000, it would be entitled to three representatives in the general distribution for the whole State. Then suppose the city within the county should have 32,000 and the remaining parts of the county 34,000 inhabitants, it is plain that in the division of representation between the city and those remaining parts the city would be entitled to but one representative. If it were a

§6. *Apportionment for the Election of Senators.*—The senate, of course, is a smaller body than the house, and its members are chosen for longer terms. As is the case with the senate

separate county, it would get two representatives, because its population would exceed a ratio and a half, but in the division between it and the rest of the county the latter would have the better right to a second representative because of superior numbers. And so, in regard to all legislative districts formed of divisions of cities or counties, there is no fixed fraction of a general ratio upon which, or with reference to which, representation is to be allowed. In brief, the division of representatives between a county and a city contained within it, or between districts of a city or county, is a secondary distribution wholly distinct from the general one to counties, and is to be made upon a principle of just proportion between local populations.

A question arises upon this division (of large cities or counties) which was not probably foreseen. The division appears to prescribe that every county with more than 100,000 inhabitants shall be divided as a county into representative districts. But will this apply where a city within a county shall be entitled to separate representation to such an extent that the county will have left to it but four representatives or less? Inasmuch as the following provision is, in substance, that districts may be made to elect as many as four representatives each, and as the evident object of the section is to prevent the election of more than that number from any district made by the Legislature, it would seem that there ought to be no further division of the county after the separation of the city from it. In such a case, does not the separation of the city substantially comply with the requirement that the county shall be divided into districts? Against the evident general purpose are we to hold that so much of the county as lies outside of the city must be divided into districts of less than four members each?

This may become a practical question as to several counties in future apportionments, but in the apportionment of 1874 it had relation only to the county of Berks. That county was entitled to six representatives, of which the city of Reading obtained two, and the county, exclusive of the city, was not divided.

In the making of all representative districts (as in the case of senatorial districts) "compact and contiguous territory" is required. All gerrymandering as to the form or territorial composition of districts is plainly forbidden.

This provision (that no district shall elect more than four representatives), though one of limitation, will not prevent gerrymandering in the formation of districts, nor would gerrymandering be excluded if single districts were required, as experience clearly proves. So long as discretion shall be left to the Legislature, it is possible that that discretion will be abused, and it is not at all likely that a plan of single districts would have, in regard to fairness, any advantage over the plan of plural ones permitted by this clause. Gerrymandering is unquestionably one of the most flagrant evils and scandals of the time, involving notorious wrong to the people and open disgrace to republican institutions, and the convention was in fault in not providing more adequate guards against it. Upon this most important subject their work was but partly performed. All their limitations upon the divisibility of counties in the forming of senatorial and representative districts were well advised, but they should have gone further and cut up wholly the system of legislative apportionments (as was proposed), or, retaining it, have prescribed plural districts with minority

of the United States, a slightly different method of apportioning the senators from that resting on population alone was recognized and established by the constitution. That is to say, while representation. Either of these remedies would have been appropriate, but their application, or the application of either, was unfortunately left to the future.

Single districts were not required by this clause of the section, for general reasons fully stated in the convention debates. 2 Conv. Deb., 194-5, 197-8.

HISTORY, ETC.: A house of representatives alone constituted the General Assembly under provincial charters and under the Constitution of 1776. By the charter of 1682, §14, the number of representatives was not to exceed 200, but the number of each county was not fixed. By the sixteenth section it was further provided that the first General Assembly might consist of all the freemen of the province, and that afterwards the number of 200 should be increased, as the country should increase in people, but not to a greater number than 500. The first Assembly met at Chester, December 4, 1682, on the call of William Penn, and consisted of as many of the freemen of the province and 'the three lower counties' as chose to attend, when an act of union was passed annexing the three lower counties (now constituting the State of Delaware) to the province proper of Pennsylvania, for the purposes of legislation. The session continued but three days.

The second Assembly met at Philadelphia on the 12th of March, 1683, and was composed of nine members from each of the counties of Philadelphia, Bucks and Chester, in the province, and the same number from each of the 'lower counties' of New Castle, Kent and Sussex, thereafter called 'the territories,' until their separation from the province.

By the charter of 1683, §§13, 15, the number of representatives was fixed at six for each county (including the territories), but the whole number might be increased by statute to any number not exceeding 200, to be apportioned equally to the divisions of the country or number of the inhabitants.

By the Markham Charter of 1696 the number of representatives for each county was reduced to four, 1 Col. Rec., 49, and that number was continued by the charter of 1701, §2, with an additional provision that the Governor and Assembly might increase the number if they should agree, 2 Col. Rec., 57-8.

By the Constitution of 1776, Chap. II, §§7, 17, six representatives were to be chosen annually by the city of Philadelphia and by each county, for the years 1776 to 1778 inclusive, and in the latter year, and every seventh year thereafter, an apportionment of representatives was to be made by the General Assembly in the city of Philadelphia and to each county, based upon returns of taxable population in each, and in proportion thereto. The number of representatives after the year 1778 does not seem to have been fixed, but, as ten counties were organized in 1776, the number at each of the first three sessions would be 66.

By the Constitution of 1790, Article I, §4, provision was made for an enumeration of the taxable inhabitants of the State within three years after the first meeting of the General Assembly and within every subsequent term of seven years. Upon returns of those enumerations, septennially, representatives were to be apportioned 'among the city of Philadelphia and the several counties, according to the number of taxable inhabitants in each,' the number to be fixed by the Legislature at each apportionment, but never to be less than 60, nor more than 100; each

population alone is the basis of apportionment of members of the house, population and locality together govern the question of the distribution of the senators. There was a long debate

county then existing to have at least one representative, but no county thereafter erected to be entitled to separate representation until it should contain a full ratio of taxable inhabitants.

Lastly, we have the third amendment of 1857, which, so far as it related to representatives, took position as the fourth section of the first article of the constitution, supplanting the corresponding section in the Constitution of 1790. It was as follows:

'Section 4. In the year 1864, and in every seventh year thereafter, representatives to the number of 100 shall be apportioned and distributed equally throughout the state, by districts, in proportion to the number of taxable inhabitants in the several parts thereof, except that any county containing at least 3,500 taxables may be allowed a separate representation; but no more than three counties shall be joined, and no county shall be divided in the formation of a district. Any city containing a sufficient number of taxables to entitle it to at least two representatives shall have a separate representation assigned to it, and shall be divided into convenient districts of contiguous territory of equal taxable population, as near as may be, each of which districts shall elect one representative.' Provision was further made by the amendment for a temporary apportionment to continue until the year 1864.

A leading principle which has obtained in apportionments in Pennsylvania from the earliest times has been the representation of taxable population in the General Assembly. The Constitution of 1776 announced, Chap. II, §17, that 'Representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty and make the voice of a majority of the people the law of the land,' and to apply that principle provided for septennial enumerations of taxables and apportionments based thereon. Less thoroughly applied in colonial charters and legislation, it was yet substantially regarded and held in constant respect therein. It was reasserted by the Constitution of 1790, remained unmolested by the convention of 1838, and was reindorsed by the third amendment of 1857. And yet it was wholly swept away by the convention of 1873, without serious objection in any quarter, and the principle of the representation of the whole population accepted in its stead.

Representation by counties was another principle prominent in all former regulations of apportionment. With but two recent exceptions, no county has ever been divided in the formation of senatorial or representative districts, and counties have mostly enjoyed separate representation in the house. The fact was otherwise as to the latter point after 1790, and prior to 1857, as to all counties below a representative ratio, erected after the former date, and as to many small counties, even after the latter date (and some large counties have been of necessity connected with small ones), but, as far as possible, and with some disregard of the principle of numbers, separate representation has been maintained. Philadelphia City, after 1857, and the City of Pittsburg, after 1871, constituted the only cases of the division of municipalities in apportionments, until the adoption of the new constitution.

These principles of municipal unity and of separate representation in representative apportionments are conspicuous in the Constitution of 1874, and receive from it new and extended application. With two exceptions, these principles are completely applied. Each county is to have one or more representatives, as its population may require, separate

over this subject, many members, particularly those from Philadelphia county, contending that it was a deprivation of their right of suffrage to limit the number from that county so that the citizens of Philadelphia should have less senators representing them in proportion to their population than other parts of the state.⁹ The country members, on the other hand, argued that the senate should be representative of the territory rather than the population of the state, some even going so far as to suggest that one senator should be elected from each county, regardless of its population. Others contended that while population was a proper basis of apportionment, the counties containing large cities should be discriminated against because of the fact (said to be well known) that cities contained a greater proportion of wicked and irresponsible voters and therefore ought to have less power than the rural communities. Many plans were proposed and rejected before the section was finally adopted, which in its practical effect limits the county of Phila-

from all other counties; it is to be independent of all others in all matters of representative nomination and election. And then, no county is to be divided into representative districts unless its population shall exceed 100,000, or unless there shall be included within it a city containing one or more representative ratios of population. In 1874, 58 counties out of 66 were indivisible under this regulation, the exceptions being the counties of Philadelphia, Allegheny, Luzerne, Lancaster, Schuylkill, Berks, Erie and Dauphin. Of these, the six first named had each more than 100,000 inhabitants, Philadelphia was both a city and county, and the other contained within their boundaries cities entitled to separate representation.

The division of populous cities into representative districts was first required by the third amendment of 1857. The provision, already cited, was that cities containing at least two ratios of taxable population should be divided into single representative districts; a provision applicable at once upon its adoption to Philadelphia, and which became applicable to Pittsburg when the apportionment of 1871 came to be made. The Constitution of 1874 extends this provision, and in modified form applies it to all cities with one or more representative ratios of population, as well as to counties of more than 100,000 inhabitants. All such cities are to be separated from the counties in which they are located for representative purposes, and, whenever they shall be entitled to more than four representatives, they shall be divided into representative districts of not more than four members each. Counties of more than 100,000 inhabitants are also to be divided into representative districts of not more than four members each, so that the undue concentration of political power at any point in the state will be checked or prevented."

"The views of the Philadelphia members were well expressed by Mr. Biddle, II Conv. Debates (1873), 178 *et seq.* One of Judge J. S. Black's characteristic speeches was made on the same side, II Conv. Debates (1873), 190 *et seq.*

delphia to eight senators, although, based upon its population at the present time, it should normally be entitled to ten. This arrangement was a compromise between the various factions, and there is perhaps no other explanation for it. As the section stands it can hardly be said that senators are distributed territorially, as population alone seems to be the basis, but nevertheless the power of any one county is kept from being too great by the rule limiting any one county to one-sixth of the whole number, or eight, senators. Why this should be in a country where the government is supposed to be by the people and for the people, in cities as well as in the country, cannot, perhaps, be adequately explained.

The section as finally adopted is: "The state shall be divided into fifty senatorial districts of compact and contiguous territory, as nearly equal in population as may be; and each district shall be entitled to elect one senator. Each county containing one or more ratios of population, shall be entitled to one senator for each ratio, and to an additional senator for a surplus of population exceeding three-fifths of a ratio, but no county shall form a separate district, unless it shall contain four-fifths of a ratio, except where the adjoining counties are each entitled to one or more senators, when such county may be assigned a senator on less than four-fifths, and exceeding one-half a ratio; and no county shall be divided, unless entitled to two or more senators. No city or county shall be entitled to separate representation, exceeding one-sixth of the whole number of senators. No ward, borough or township shall be divided in the formation of a district. The senatorial ratio shall be ascertained by dividing the whole population of the state by the number fifty."

The meaning of these clauses is perhaps sufficiently clear, and so far as it is doubtful little can be added to the admirable discussion of Mr. Buckalew, which is given below.¹⁰

¹⁰"Buckalew on the Constitution," p. 53 *et seq.* CONSTRUCTION: "The state shall be divided." The whole fifty districts will be state districts and not sub-districts or divisions—primary, not secondary—and all equal in right, privilege, position, and dignity. It follows that all the general provisions which follow, whether of privilege or regulation, apply to every district without exception.

"Districts of compact and contiguous territory:—"What is compact must be contiguous and something more; but "contiguous" slips into the

§7. *Duty of General Assembly to Make Apportionment.*

—In order that the two preceding sections may be enforced it

text from the third amendment of 1857. It is retained, but is superfluous, in view of the stronger new work which precedes it. That word, "compact," does not mean merely adjoining or connected, but joined together, substantially united and consolidated. Applied to territory, it excludes all disconnection or slight connection of parts, or any considerable attenuation or distortion of form. That territory is compact which is, figuratively speaking, packed together or compressed into a form approaching those of bodies of least extension, as round or square. The case admits only of approximation to exactness, but good faith alone is required for a substantial execution of the rule of the constitution.

In Article V, §5, where judicial districts are provided for, a requirement is inserted, that counties of less than 40,000 inhabitants "shall be formed into convenient single districts:" for it was foreseen that, after the establishment of counties of over 40,000 inhabitants into separate districts, the smaller counties remaining could not, in all cases, be formed into single districts of compact territory. The rule of convenience and not of compactness, or even contiguity, was therefore prescribed for judicial districts composed of counties of the second class. It is true that another reason may be mentioned for this difference, namely, that the danger of gerrymandering is not as great in the case of a judicial as of a political apportionment, but it is pretty certain that the reason first mentioned, being both palpable and imperative, was the controlling one. The counties of Union, Montour and Snyder might be made to constitute a convenient judicial district, but the district, so made, could not be described as a compact one.

"As nearly equal in population as may be:"—That is, as nearly as may be, regard being had to the limitations upon the principle of equality, or rather upon its application, contained in this section. Those limitations are five in number, and will be presently considered. For the present it may be observed that population here spoken of is evidently population as ascertained at each successive decennial census of the United States, accepting that taken in 1870 as an approximate basis for the apportionment of 1874. See the next two sections.

"Each county:"—The word county in this and the next section, as in other parts of the constitution, includes the city of Philadelphia, for Philadelphia is both a city and county. Art. V, §§6, 8, etc.

"Shall be entitled:"—The word *entitled*, used here and in other divisions of the section, is one of settled constitutional use and meaning. Constitution of 1790, Art. I, §§3, 4, 7; Art. III, §1; third amendment of 1857. In every instance of its former use there is a complete exclusion of all legislative control over a right asserted, and in the present section wherever this term appears, there is a right of representation declared which is unqualified and absolute.

"But no county shall form a separate district unless it shall contain four-fifths of a ratio:"—Here the implication is irresistible that a county containing less than a full ratio of population, but not less than four-fifths of a ratio, may be made a separate district by the Legislature. In the preceding division of the section counties containing one or more ratios of population, having been provided for, this division deals with those containing less, but confines its prohibition of separate county districts to those which fall below four-fifths of a ratio, and even as to them a qualification is found in the words which follow:

"Except where the adjoining counties are each entitled to one or more senators, when such county may be assigned a senator on less than

is further provided, in section 18, that "The General Assembly, at its first session after the adoption of this constitution, and

four-fifths and exceeding one-half of a ratio:"—But what counties "are each entitled to one or more senators" within the meaning of this clause? Unquestionably those with a full ratio of population or more, as expressly declared in a prior division of the section. A county with less than a full ratio, but more than four-fifths of a ratio, cannot be said to be entitled to one or more senators within the meaning of this clause, because it is not included in the class above mentioned, and the clause immediately preceding the present one does not confer such right upon it. A mere power in the Legislature to make such counties separate districts will not establish for them a right to separate representation, or, in the exact language of the clause under consideration, "entitle them to one or more senators." The power must be exerted before the result will follow, and, being a discretionary power, it may never be exerted at all.

The non-division of counties is continued, as a general rule, from the old constitution; but the former exception of Philadelphia is necessarily extended to embrace any county entitled to two or more senators. For all such counties must be divided in order to execute the plan of single districts prescribed by the first division of this section.

The only practical effect of this provision (that no city or county can have more than one-sixth of the whole number of senators), at present, is to limit Philadelphia to eight senators. The word "separate" appears to have been placed in this section at a time when it was proposed to allow the junction of territory from Philadelphia with Delaware County to form a senatorial district. It was then intended that the separate representation of the city as to amount should not be reduced by such use of a portion of her territory. As the section now stands the word is useless, because Philadelphia and all other large counties must have separate representation.

In the non-divisibility of wards, boroughs and townships in forming senatorial districts, we have a valuable security against unfairness, especially in cities and counties densely populated. In part this provision is new, and in part is borrowed from the third amendment of 1857.

This provision (that the senatorial ratio shall be ascertained by dividing the population of the state by fifty) is necessary in order to fix beyond dispute the rule by which senatorial ratios shall be ascertained at decennial apportionments.

The general construction to be given to this section is principally determined by the first clause. That, read in connection with the eighteenth section, confers fully the power of apportionment upon the Legislature, while all that follows in this section limits or regulates the exercise of the power. "The state shall be divided," etc. The eighteenth section says this shall be done by the Legislature. A power is conferred, and with it a duty imposed, and that power is to be exercised, and that duty performed, according to the regulations and subject to the limitations which follow. These are:

1. The fifty districts, with one senator each, to be each composed of compact and contiguous territory.
2. They are to be equal in population as nearly as may be,
3. Each county with a ratio or more of population to have a senator for each ratio and an additional one for a fraction of three-fifths.
4. No county under four-fifths of a ratio to be a separate district, unless it shall have more than half a ratio and be wholly surrounded by counties above a full ratio each.

immediately after each United States decennial census, shall apportion the state into senatorial and representative districts,

5. A county with less than a ratio, but with more than four-fifths not to be entitled to separate representation, but the Legislature may make it a district, or join it with another county, as circumstances and other provisions relating to apportionment shall require.

6. No county shall be divided unless entitled to two or more senators.

7. No city or county shall be entitled to more than eight senators.

8. No ward, borough or township to be divided in forming a senatorial district.

9. To fix senatorial ratio, divide the whole population of the state by the number 50.

Upon the fourth point above we have the highest authority, of which the case admits, independent of the text of the section itself. Accompanying the pamphlet of the constitution, as submitted to the people, was a "Statement and Exposition" of the changes contained in the new instrument, carefully prepared by the Committee on Revision and Adjustment, pursuant to a resolution of the convention, and signed and attested by the president and chief clerk. As an official paper, in view of which the popular vote upon the constitution was taken, and by which presumably that vote was influenced, its construction of any clause of the constitution is entitled to great weight. In its explanation of this sixteenth section of the legislative article (Constitution Pamphlet, p. 40) it says: "A full senatorial ratio will entitle a county to separate representation, but the Legislature may assign a senator to a county with less than four-fifths of a ratio which shall be wholly surrounded by counties entitled of right to separate representation."

HISTORY, ETC.: The Constitution of 1790 contained the following provisions in regard to senators and senatorial districts:

1. The number of senators was never to be less than one-fourth nor more than one-third the number of representatives, Article I, §6. As the number of representatives was never to be less than 60 nor more than 100, §4, the number of senators could never be less than 15 nor more than 33.

2. Senators were to be chosen by the citizens of Philadelphia and of the several counties, §5, and from districts to be formed by the Legislature every seventh year, §§6, 7.

3. Senators were to be apportioned to districts according to the number of taxable inhabitants in each, §6.

4. Senatorial districts were to contain, respectively, such number of taxable inhabitants that no district should be entitled to elect more than four senators, §7.

5. When a senatorial district should be composed of two or more counties, such counties should be adjoining, and neither the city of Philadelphia, nor any county, should be divided in forming a district, §7.

By one of the amendments of 1838, the provision above mentioned, that no district should be entitled to elect more than four senators, was changed and made to read as follows: "No district shall be so formed as to entitle it to elect more than two senators, unless the number of taxable inhabitants in any city or county, at any time, be such as to entitle it to elect more than two; but no city or county shall be entitled to elect more than four senators," §7.

Further changes were made by the third amendment of 1857. The words, "of Philadelphia and of the several counties," were struck from the fifth section, and in the seventh section the prohibition upon the

agreeably to the provisions of the two next preceding sections."¹¹

§8. *Qualifications of Members of the General Assembly.*

—"Senators shall be at least twenty-five years of age and representatives twenty-one years of age. They shall have been citizens and inhabitants of the state four years and inhabitants of their respective districts one year next before their election (unless absent on the public business of the United States or of this state), and shall reside in their respective districts during their term of service."¹² It was suggested in the convention that the language of this clause should be altered by striking out the word "inhabitant"; a doubt being suggested whether one temporarily absent at the seashore or in Europe would not thereby become ineligible. The sense of the convention, however, seemed to be that by such temporary absence one would not lose his domicile within the meaning of this clause, and this undoubtedly is the law.¹³ These qualifications are not materially different

division of the city of Philadelphia in forming districts was removed and the following new provision added at the end: "The city of Philadelphia shall be divided into single senatorial districts, of contiguous territory, as nearly equal in taxable population as possible, but no ward shall be divided in the formation thereof." Another change as to senators was produced by that division of the third amendment of 1857, which fixed the number of representatives at 100; for the number of senators thereafter could not be less than 25, or one-fourth the number of representatives.

It will now be seen that the Constitution of 1874 increases the number of senators from 33 (the highest possible number under the old constitution) to 50; that for the first time in this state it requires single districts alone in senatorial representation; that it dictates decennial instead of septennial senatorial apportionments based upon population instead of taxables; establishes a plain rule for ascertaining at all times the senatorial ratio of distribution; fixes county representation in the senate as far as practicable, and prescribes reasonable regulations, mostly new in their terms or application, for the formation of senatorial districts.

¹¹This provision was absolutely ignored by the Legislature for over thirty years. Although once attempted in vain no reapportionment, after that of 1874, was made until the special session of the Legislature of 1906.

¹²Art. II, §5.

¹³See remarks of Mr. McVeagh, V Conv. Deb. (1873), 353. "Mr. President: I do submit that the lawyers of this house will listen with great deference to the legal views of the gentleman (Mr. Cuyler) on all other occasions; precedent to this we have done so; subsequent to this we will do so; but we must not take such law as this even from such an authority. If the authority was less distinguished I would assert that it is preposterous to say that a gentleman going away to a watering place for the summer or making a trip to Europe, loses his domicile in any sense whatever within the meaning of this section or ceases to be an inhabitant of the district in which his home and lot is cast. The

from those provided in the earlier constitutions, except as to the requirement of residence during the term of service which has been added.¹⁴

§9. *Members of General Assembly Not to Hold Other Offices.*—In addition to the qualifications of senators and representatives, there are certain provisions which will prevent them from holding certain other offices and others which disqualify certain officeholders from being senators or representatives. "No senator or representative shall, during the time for which he shall have been elected be appointed¹⁵ to any civil office¹⁶ under this commonwealth, and no member of Congress or other person holding any office (except of attorney-at-law or in the militia) under the United States or this commonwealth, shall be a member of either house during his continuance in office."¹⁷ As to the alteration made in the old constitution, Mr. Buckalew observes: "There are two omissions in the text as compared with that constitution (1790, Art. I, §17); the one producing an important change, the other being an evident but unimportant mistake. In that constitution, after the word 'commonwealth' where it first occurs in the section, appear the words, 'which shall have been created or the emoluments of which shall have been increased during such time.' By the dropping of those words the prohibition, which was special and confined to new offices and to those of increased compensation, becomes general and extends to all civil offices under the commonwealth, whether old or new, and whether increased in compensation or not. The prohibition in its original form, and still more in its extended form, is judicious, because it increases the independence of members, will often secure them from the imputation of improper motives, and tends strongly to the maintenance of integrity in public life. The word 'appointed' in this section must have a strict or limited construction, so that it shall not

words have been here for forty years and nobody ever imagined that such a construction was possible. I trust the amendment will be voted down."

¹⁴See Const. of 1776, Chap. II, §7; Const. of 1790, Art. I, §3.

¹⁵*Factory Inspector's Lawyer*, 28 Pa. County Ct. 369 (1903).

¹⁶*Factory Inspector's Lawyer*, 28 Pa. County Ct. 369 (1903); *Com. ex rel. v. Murphy*, 25 Pa. County Ct. 637 (1901); *Com. ex rel. Bache v. Binns*, 17 S. & R. 219 (1828); also *Respublica v. Dallas*, 3 Yeates, 300 (1801).

¹⁷Art. II, §6.

include an election by a popular vote to any civil office. For, although in a general sense an election is an appointment, the words elected and appointed are here presented in contrast and distinguished from each other in signification, and besides the reason of the prohibition does not apply to a popular election."¹⁸ This change is in line with the general purpose of the convention to secure the legislators so far as possible from all manner of temptation.

§10. *Persons Guilty of Infamous Crimes Ineligible.*—It is somewhat remarkable that such a disqualification of legislators as the conviction of certain crimes should have been made a part of our fundamental law. Such action contemplated the possibility of the people electing convicted felons to represent them in their legislative body. The reputation of some of the members for some years prior to 1873 had been such, however, that the convention felt itself impelled to provide that "no person hereafter convicted of embezzlement of public moneys, bribery, perjury or other infamous crime, shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this commonwealth."¹⁹ Not only did the convention thus seek to guard against the election of such persons, but it also sought to provide a means by which persons guilty of bribery in procuring their election might be excluded from the General Assembly, by reason of their inability to subscribe to an oath which it was provided all must take, solemnly swearing that they had made no such improper use of money.²⁰ It seems strange that the convention thought such safeguards necessary; its members, however, held a strong distrust of the legislators of that day and felt that public safety justified the action taken.

¹⁸Buckalew on the Constitution, p. 34.

¹⁹Art. II, §7.

²⁰The oath was as follows: "I do solemnly swear (or affirm), that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth; that I will discharge the duties of my office with fidelity; that I have not paid or contributed, or promised to pay or contribute, either directly or indirectly, any money or other valuable thing to procure my nomination or election (or appointment), except for necessary and proper expenses expressly authorized by law; that I have not knowingly violated any election law of this Commonwealth, or procured it to be done by others in my behalf; that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law."—Art. VII.

§11. *Bribery Defined.*—To further carry out the purpose of the General Assembly to exclude all persons guilty of bribery, and to protect its members from temptation to accept bribes, so far as this is possible, it was further provided, in Art. III, §29: "A member of the General Assembly who shall solicit, demand, or receive, or consent to receive, directly or indirectly, for himself or for another, from any company, corporation, or person, any money, office, appointment, employment, testimonial, reward, thing of value or enjoyment or of personal advantage, or promise thereof, for his vote or official influence, or for withholding the same, or with an understanding expressed or implied that his vote or official action shall be in any way influenced thereby; or who shall solicit or demand any such money or other advantage, matter, or thing aforesaid, for another, as the consideration of his vote or official influence, or for withholding the same; or shall give or withhold his vote or influence in consideration of the payment or promise of such money, advantage, matter, or thing to another, shall be held guilty of bribery within the meaning of this constitution, and shall incur the disabilities provided thereby for said offense, and such additional punishment as is or shall be provided by law." The following sections are in furtherance of the same purpose, Art. III, §30: "Any person who shall, directly or indirectly offer, give or promise any money or thing of value, testimonial, privilege, or personal advantage, to any executive or judicial officer, or member of the General Assembly, to influence him in the performance of any of his public or official duties, shall be guilty of bribery, and be punished in such manner as shall be provided by law." Art. III, §31: "The offense of corrupt solicitation of members of the General Assembly, or of public officers of the state, or of any municipal division thereof, and any occupation or practice of solicitation of such members or officers to influence their official action, shall be defined by law, and shall be punished by fine and imprisonment."²¹

§12. *Compensation of Members.*—In all of the constitutions of Pennsylvania there have been provisions relating to the

²¹See *Williams v. Com.*, 91 Pa. 493 (1879); *Com. v. Bell*, 145 Pa. 374 (1891); *Com. v. Petroff*, 8 W. N. C. 212 (1880); *In re Bribery Investigation*, 7 W. N. C. 306 (1879).

compensation to be paid to members of the General Assembly. It seems to have been recognized to be proper for some clause to be inserted in the fundamental law, perhaps from a fear that the legislators would feel a delicacy about taking the initiative in such a matter. In the Constitution of 1776²² and of 1790²³ the provision was simply to the effect that compensation should be paid out of the state treasury, leaving it to the Legislature to determine its amount. In the convention of 1873 a proposition was made to fix a definite amount of compensation, and this proposition at first met with the approval of the members, but wiser counsels prevailed, and the suggested clause was amended to read: "The members of the General Assembly shall receive such salary and mileage for regular and special sessions as shall be fixed by law, and no other compensation whatever, whether for service upon committee or otherwise. No member of either house shall, during the term for which he may have been elected, receive any increase of salary or mileage under any law passed during such term."²⁴

It was pointed out in the debates that it would be very unwise to name a fixed sum in the fundamental law, for the economic changes sure to come would certainly soon render a change in this compensation necessary; as the constitution is intended to be a permanent system of law, nothing of this character should be inserted in it. The last sentence in the section was new. It was added for the obvious purpose of preventing any member from voting to increase his own compensation.

It will be noticed that the language of the clause is to the effect that the members of the General Assembly shall be entitled to receive such "salary" as shall be fixed by law. The act of May 11, 1874, P. L. 129, provided that their compensation should be one thousand dollars for each session not exceeding one hundred days, and ten dollars per day for additional time, so that the added length of time did not exceed fifty days at any one session. It was contended, in *Commonwealth v. Butler*, 99 Pa. 535 (1882), that the constitution did not permit of the payment of compensation on a *per diem* computation; that the

²²Chap. II, §17.

²³Art. I, §17.

²⁴Art. II, §8.

constitution contemplated the payment of a "salary," but not of "wages." The contention was not upheld, the words "salary" and "wages" being declared to be synonymous.²⁵

§13. *Privileges of Members.*—It is customary for the members of a supreme legislative body to be beyond the reach of the ordinary process of the courts, except in case of commission of serious offenses, so that they may not at any time be disabled from performing their duties. Accordingly, we find such a provision in the Constitution of 1874: "The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach or surety of the peace, be privileged from arrest during their attendance at the sessions 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."²⁶ This guarantee of the members against suits for slander on account of any remarks made in debate, seems to be an excess of caution, since no such liability could arise in any case, words so spoken being by the common law absolutely privileged. However, the possibility of a change of the common law by the Legislature is sufficient reason for the enactment of the clause.²⁷

²⁵The compensation named in the constitution, of course, refers to that received for duties as a member of the General Assembly. Prior to 1874 the legislators could serve the state in other capacities, and any compensation paid them for such services was distinct from that paid for performance of their duties as members of the General Assembly. *County of Phila. v. Sharswood*, 7 W. & S. 16 (1844).

²⁶Art. II, §15. See *Com. v. Keeper of the Jail*, 4 W. N. C. 540 (1877), holding that the protection from arrest extends only to civil actions.

²⁷The Constitution of 1790, Art. I, §17, contained the same provision with the exception of the words "violation of their oath of office," which were omitted.

CHAPTER XII.

TIME OF MEETING, ORGANIZATION AND CONDUCT OF BUSINESS OF THE GENERAL ASSEMBLY.

§1. *Time of Meeting.*—As the convention had decided that the sessions of the General Assembly should be biennial, the date of meeting would necessarily recur but once in two years, except when the Legislature was specially convened by the Governor. Section 4 provides: "The General Assembly shall meet at twelve o'clock noon on the first Tuesday of January, every second year, and at other times when convened by the Governor, but shall hold no adjourned annual session after the year 1878." As will be observed, the practice of holding adjourned annual sessions was forbidden, to prevent the Legislature from nullifying the provision limiting the sessions to one in two years by holding an adjourned session in the off year.¹

Provision for a special session to elect a United States senator, in case of a vacancy between sessions, was made in the clause following: "In case of a vacancy in the office of United States senator from this commonwealth, in a recess between sessions, the Governor shall convene the two houses, by proclamation, on notice not exceeding sixty days, to fill the same." This section requires such action on the part of the Governor, whether the vacancy actually occurs during the recess or whether it exists during the recess, although it may have happened during the session. Thus, if a senator's term expires, and by

¹Mr. Buckalew observes: "The time for the annual meeting of the General Assembly under the charter of 1682, §14, was the 20th of April; under that of 1683, §3, on the 10th of May, and under that of 1701, §2, on the 14th of October. The Constitution of 1776, Chapter II, §9, fixed the time for meeting on the fourth Monday of October, and that of 1790, Article I, §10, on the first Tuesday of December, 'unless sooner convened by the Governor.' One of the amendments of 1838 was the striking out of the word 'December,' in the tenth section of the first article, and inserting the word 'January.' The time fixed by that amendment is retained in the Constitution of 1874, except that it is made biennial instead of annual, and that the hour of meeting as well as the day is designated. Under the old constitution, by usage, the senate met at three o'clock p. m. and the house of representatives at noon, on the first day of the session. Both houses will, hereafter, meet at noon."—Const. of Pa., 32.

reason of a deadlock in the General Assembly no election takes place, the duty to call a special session would arise, and no appointment by executive power in such case could legally be made.² The Constitution of the United States provides that "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." Article I, section 3. In *Knox's Case*, 29 Pa. County Ct. 471 (1904), it appeared that a vacancy had happened between sessions by the death of Senator Quay. The Governor, under the authority of the Federal Constitution, decided that he had the power to appoint. The vacancy having happened between sessions, a distinction may be taken between this case and that above referred to, where the vacancy happened during the sessions, but at any rate Governor Pennypacker interpreted the section of the Pennsylvania Constitution under discussion to give him power to call a special session but not to require him to do so.

§2. *Organization of General Assembly.*—The organization of the two houses is left by the constitution almost wholly to their own discretion, the election of presiding officers only being directed. The Lieutenant Governor presides over the senate as a part of his duties, but the constitution nevertheless requires the election of a president *pro tempore*, who may be ready in case of an emergency. The clause is: "Section 9. The senate shall, at the beginning and close of each regular session, and at such other times as may be necessary, elect one of its members president *pro tempore*, who shall perform the duties of the Lieutenant Governor in any case of absence or disability of that officer, and whenever the said office of Lieutenant Governor shall be vacant. The house of representatives shall elect one of its members as speaker. Each house shall choose its other officers."³ The other officers may be chosen in any manner which the two houses may choose to adopt, and are removable at the pleasure of the power that appointed them.

²This was the decision of the United States Senate in the case of Senator Quay, who, having failed of re-election during the session of the General Assembly, was appointed by the Governor and was subsequently refused his seat.

³See Constitution of 1790, Art. I, §11, containing substantially the same provisions.

With respect to their duties and compensation it is provided, Article III, §10: "The General Assembly shall prescribe by law the number, duties and compensation of the officers and employees of each house, and no payment shall be made from the state treasury, or be in any way authorized, to any person except to an acting officer or employee elected or appointed in pursuance of law."⁴

§3. *Each House to Judge of the Election and Qualifications of its Members.*—The latter part of section 9, Article II, relative to the powers of each house, provides "and shall judge of the election and qualifications of its members." This gives each house full power to judge of the qualifications of its members, but that part of the sentence relating to the determination of contested election cases must be read in connection with Article VIII, §17, which provides *inter alia*: "The trial and determination of contested elections of . . . members of the General Assembly . . . shall be by courts of law or by one or more of the law judges thereof." At first thought these two clauses may seem to be in conflict, but they are not really so. Mr. Buckalew expressed it to be his opinion that the first provision in Article II, giving the two houses power to "judge" of the election of their members, was more restricted in meaning than the clause in Article VIII, which says that the "determination" of any contested case shall be by a court of law. Reading the two clauses together with intent to harmonize them if possible, he concludes that the two houses have a right to judge as to which of two claimants has a *prima facie* right to his seat, but that the ultimate decision of the question must be determined by a law court.⁵

The Supreme Court, however, adopted just the opposite view of the meaning of the two clauses in the case of *In re Contested Election of McNeill*, 111 Pa. 235 (1885). McNeill's opponent had contested the election and tried his case in the court of common pleas in accordance with the directions of the act of May 19, 1874, P. L. 211. The court found that McNeill had not received a majority of the votes, as had at first

⁴See *Shiffert v. Montgomery Co.*, 5 Pa. Dist. Rep. 568 (1896); s. c., 5 Pa. Dist. Rep. 570.

⁵Buckalew on the Constitution, 43.

been supposed, and made a decree to the effect that his opponent was entitled to a certificate of election. McNeill then took a writ of certiorari to the Supreme Court. The writ was quashed on the ground that the Supreme Court had no jurisdiction. It was decided that the correct course for McNeill was to appeal his case to the proper house of the General Assembly, in this case the senate, which had final authority to judge of the qualifications of its members under the constitution. The court's construction of the two clauses of the constitution above referred to was that the *proviso* in Article VIII, §17, was intended merely to direct a means of collecting evidence and making an examination into the facts concerning a contested election case, but that the final determination rested with the proper house of the General Assembly, as indicated in Article II, §9. The court said: "A careful reading of this section 17 shows that its purpose is not to take from each house the power to judge of the election and qualification of its members, given by section 9, cited. Its purpose is merely to provide a method for procuring and presenting to the respective house the evidence and information necessary for an intelligent decision, and to secure early action."

§4. *Majority to Constitute a Quorum.*—By our earliest constitution it was provided that no business could be transacted by the house of representatives unless two-thirds of the members were present,⁶ but this was soon discovered to be a cumbersome regulation, and in 1790⁷ the rule we now have was adopted, "A majority of each house shall constitute a quorum, but a smaller number may adjourn from day to day and compel the attendance of absent members."⁸ The power of a minority to compel the attendance of absent members is necessary to the expeditious transaction of business, and is so recognized in all deliberative bodies.

§5. *General Powers of Each House Relative to the Behavior of its Members, etc.*—Section 11 of Article II is merely an enumeration of certain powers belonging to each house and which it would have in any event. The section provides: "Each house shall have power to determine the rules of

⁶Constitution of 1776, Chap. II, §10.

⁷Art. I, §12.

⁸Art. II, §10.

its proceedings, and punish its members or other persons for contempt, or disorderly behavior in its presence, to enforce obedience to its process, to protect its members against violence or offers of bribes or private solicitation, and with the concurrence of two-thirds to expel a member, but not a second time for the same cause, and shall have all other powers necessary for the Legislature of a free state. A member expelled for corruption shall not thereafter be eligible to either house, and punishment for contempt or disorderly behavior, shall not bar an indictment for the same offense." The clause, conferring generally all powers necessary to the Legislature of a free state, is unimportant in view of the general delegation of power in the first section, but has been expressly construed to be an enlargement rather than a restriction of the powers of the Legislature.⁹

§6. *Journals to be Kept and Sessions to be Public.*—"Each house shall keep a journal of its proceedings, and from time to time publish the same, except such parts as require secrecy, and the yeas and nays of the members on any question shall, at the desire of any two of them, be entered on the journal."¹⁰

"The sessions of each house and of committees of the whole shall be open, unless when the business is such as ought to be kept secret."¹¹

§7. *Adjournment of One House Without Consent of Other.*—"Neither house 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."¹² It has been argued that an adjournment by one house without the consent of the other would work a dissolution of the General Assembly so that any further business transacted at that session would be illegal. That view of the case, however, was not accepted by the court before which the argument was made.¹³ The effect of a disregard of this provision has not been determined. It is probable that the clause must be considered to be merely directory.

⁹*Sharpless v. Mayor*, 21 Pa. 147 (1853).

¹⁰Art. II, §12, derived from Constitution of 1790, Art. I, §14. See also Constitution of 1776, Chap. II, §14.

¹¹Art. II, §13.

¹²Art. II, §14.

¹³*West Phila. Ry. Co. v. Union Pass. Ry. Co.*, 9 Phila. 495; s. c., 29 Legal Intelligencer, 196 (1872).

CHAPTER XIII.

FORMAL REQUISITES OF LEGISLATION.

§1. *Laws to be Passed by Bill, etc.*—The constitution contains a number of provisions relative to the method of enactment of laws and to the forms of legislation, all tending to insure a full and accurate knowledge of the laws, not only among the legislators, but also among the people affected by them. The first of such provisions is in Article III, §1, which provides: "No law shall be passed except by bill; and no bill shall be so altered or amended, on its passage through either house, as to change its original purpose." The latter clause was intended to prevent the addition of "a rider" containing the really important part of an act, to a bill perhaps otherwise unimportant, and thus to secure its passage without the full knowledge of those voting on it.

To insure deliberation upon all legislation and to make sure that the contents of the proposed law should be fully understood by the members of the General Assembly, it was further provided, Article III, §2: "No bill shall be considered unless referred to a committee, returned therefrom, and printed for the use of the members;" and Article III, §4: "Every bill shall be read at length, on three different days, in each house; all amendments made thereto shall be printed for the use of the members, before the final vote is taken on the bill; and no bill shall become a law unless, on its final passage, the vote be taken by yeas and nays, the names of the persons voting for and against the same be entered on the journal, and a majority of the members elected to each house be recorded thereon as voting in its favor." A further safeguard as to amendments is provided in section 5: "No amendment to bills by one house shall be concurred in by the other except by the vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting for and against recorded upon the journal

thereof; and reports of committees of conference shall be adopted in either house only by the vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting recorded upon the journals."

While these directions as to the method of passing laws are mandatory in form, they are binding only on the conscience of the legislative body. The courts, in the very nature of things, are obliged to accept the enactment of the law as conclusive proof of the compliance of the Legislature with the necessary formalities, and cannot consider questions of fact relative to the regularity of procedure. It has been expressly decided that such matters will not be inquired into by the courts. In *Kilgore v. Magee*, 85 Pa. 401 (1877), it was contended that an act of Assembly had been so altered during its passage as to change its original purpose, and also that the required forms had been disregarded. As to this the court said: "In regard to the passage of the law and the alleged disregard of the forms of legislation required by the constitution, we think the subject is not within the pale of judicial inquiry. So far as the duty and the consciences of the members of the Legislature are involved the law is mandatory. They are bound by their oaths to obey the constitutional mode of proceeding, and any intentional disregard is a breach of duty and a violation of their oaths. But when a law has been passed and approved and certified in due form, it is no part of the duty of the judiciary to go behind the law as duly certified to inquire into the observance of form in its passage. The presumption applies to the act of passing the law, that applies generally to the proceedings of any body whose sole duty is to deal with the subject. The presumption in favor of regularity is essential to the peace and order of the state."¹

§2. *Members to Disclose Personal Interest in Pending Bills.*—In the hope of providing against votes given by reason of personal interest in legislation, it was provided, in Art. III, §33: "A member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly, shall disclose the fact to the house of which he is a member, and shall not vote thereon."

¹See also *Perkins v. Phila.*, 156 Pa. 554 (1893).

§3. *Bills to be Signed.*—After the bill has duly passed the respective houses that fact is to be attested by the signature of the presiding officers. Section 9 provides: "The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the General Assembly, after their titles have been publicly read, immediately before signing; and the fact of signing shall be entered on the journal."

The failure of these presiding officers to so sign a law will render it void, as it is upon their signatures that the courts depend for evidence that the law has been passed by the two houses.²

The bill then goes to the Governor for his signature, as do all orders in which the concurrence of both houses is necessary, and if within ten days he vetoes it,³ it must be repassed by two-thirds majority. The twenty-sixth section provides: "Every order, resolution, or vote, to which the concurrence of both houses may be necessary, except on the question of adjournment, shall be presented to the Governor, and, before it shall take effect, be approved by him, or being disapproved shall be repassed by two-thirds of both houses, according to the rules and limitations prescribed in case of a bill." The meaning of this clause is not quite so sweeping as would at first appear, for an amendment to the constitution proposed by both houses need not be submitted to the Governor.⁴

§4. *Singleness of Subject and Title of Acts.*—The abuses arising from the passage of "omnibus bills" became so flagrant by the year 1863 that a special amendment to the constitution was made to destroy the evil. Until that year there was no restriction on the power of the Legislature to incorporate as many subjects in one bill as seemed to be convenient. Frequently the title of the bill would disclose various objects more or less unconnected followed by the expression "and for other purposes." Of course, such a title contained no intimation of the purport of the "other purposes," hence the legislators during the passage of the bill through the assembly and the public after

²See *Speer v. Plank Road Co.*, 22 Pa. 376 (1853).

³See Art. IV. §15.

⁴*Com. v. Griest*, 196 Pa. 396 (1900). See also Chapter XXVIII, Amendments to the Constitution.

it became a law might, and often did, remain in complete ignorance of the contents of the enactment. The most vicious feature of this abuse, however, was the practice of taking advantage of these lax methods to put through enactments which were not at all understood, under the cloak of other and better measures incorporated into the same bill. In 1863 an amendment to the constitution was proposed, and subsequently adopted in 1864,⁵ as follows: "No bill shall be passed by the Legislature containing more than one subject, which shall be expressed in the title, except appropriation bills." This was altered in the convention of 1873⁶ by placing the last clause earlier in the sentence to improve the English and by adding the qualifying words "general", and "clearly," so that now the section reads: "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title."⁷

§5. *Laws to Contain But One Subject.*—The section really contains two restrictions on the legislative power, which are quite independent of each other. The first forbids the law to contain more than one subject. It is frequently difficult to determine whether more than one subject is dealt with by the act. A law may have several objects while relating to but one subject; for example, an act relating to but one subject, the liquor traffic, might regulate it in various ways and at the same time accomplish several objects.⁸ But even with this distinction in mind, it frequently becomes a matter of very nice discrimination to decide whether an enactment really embraces more than one subject. The very first case which arose on the subject has probably marked the limit of the construction of the clause and certainly will never be extended. In that case, *Blood v. Merceiot*, 53 Pa. 391 (1866), it was contended that an act entitled "An act to increase the boundaries of Forest County" contained more than one subject. The act provided both for the enlargement of the county and for the relocation of the county seat and for various incidental matters connected therewith. It was clearly not a vicious piece of legislation and,

⁵Art. XI, §8.

⁶See 5 Conv. Debates (1873), 243-6.

⁷Art. III, §3.

⁸See as to this point *Fahay v. State*, 11 S. W. (Tex.) 108 (1889).

therefore, was not within the evil which the constitutional clause was designed to correct. This influenced the court very appreciably, and they came to the conclusion that all matters contained in the act were really part of but one subject—the enlargement of the county. The relocation of the county seat was declared to be the natural consequence of a change of the county lines. The decision went to the limit, and the court has so expressed itself in subsequent cases.⁹ The matter of removing the county seat from one town to another is a distinct subject of legislation in itself, vastly important to the citizens of the towns affected. It would not have been at all surprising had the court come to the conclusion that it was a different subject from that of merely enlarging the county. The case, however, is authority for the proposition, unquestionably law, that if the various matters affected by the act and dealt with by its terms are all germane to its main purpose, it is not open to the objection that it contains more than one subject.¹⁰ On the other hand, the law is unconstitutional and void if it does relate to two or more subjects that are distinct from each other.¹¹

⁹See *Dorsey's Appeal*, 72 Pa. 192 (1872), at page 196; *Road in Phoenixville*, 109 Pa. 44, 49 (1885).

¹⁰*Clearfield Co. v. Cameron Tp. Poor Directors*, 135 Pa. 86, 89 (1890), in which an act (1) "to organize the state hospital for the insane at Danville and" (2) "to provide for the government and management of the same" was held to contain but one subject; in *Kelley v. Mayberry Twp.*, 154 Pa. 440, 448 (1893), "An act relative to actions brought by husband and wife, or by the wife alone, for her separate property in cases of desertion," was upheld; in *Com. v. Hospital*, 198 Pa. 270, 274 (1901), an act regulating the location of hospitals, pest houses and burial grounds, was decided to contain but one subject, and the same construction was placed upon "An act providing that the right of action for injury wrongfully done to the person shall survive against the personal representative of the wrongdoer, and limiting the time within which suit for such injury must be brought." *Rodebaugh v. Tracton Co.*, 190 Pa. 358, 362 (1899); for an expression of the general principle see *Com. v. Jones*, 4 Sup. Ct. 362, 368 (1897).

¹¹*Perkins v. Phila.*, 156 Pa. 554, 561 (1893). It is impossible to believe, however, that the act here construed would have been declared unconstitutional as containing more than one subject, had it not been bad for other reasons. The title of it was "An act to abolish the commissioners of public buildings and to place all public buildings heretofore under the control of such commissioners under the control of the department of public works in cities of the first class." In *Payne v. School Dist.*, 168 Pa. 386, 391 (1895), the act declared unconstitutional gave certain school directors the power to establish a graded school, annexed certain territory to the district, and authorized the collection of a tax not necessarily to be applied to the support of the graded school.

§6. *Title Now Part of the Act.*—The title of an act is no part of it unless made so by special provision. The English doctrine has long been that the title cannot be resorted to in order to explain the terms of the enactment, and this was also the earlier American view.¹² Indeed, it is said that the title was formerly not enacted at all by the legislative body, but was merely added by a clerk for convenience, and, therefore, could not affect the law itself.¹³ In Pennsylvania, prior to the amendment of 1864, no consideration attached to the title of an act, for it need not conform to the body of the law, and might or might not give some adequate impression of its contents. Since that amendment, however, the title must clearly express the purpose or subject matter of the act, and therefore it is necessary for the Legislature to consider it, and it does, in fact, become a part of the act itself, and the law is now so understood. In *Penna. Railroad Co. v. Riblet*, 66 Pa. 164, 169 (1870), Mr. Justice Sharswood said: "The title of an act since the first amendment of the Constitution of 1864 must now be regarded as a part of it, however it may have been before," and in *Perkins v. Phila.*, 156 Pa. 554, 558 (1893), Mr. Justice Dean said: "The title of an act is part of it; it limits its scope and is properly used in interpreting its words."¹⁴

§7. *Title Need Not be an Index.*—The last clause in the section under discussion provides that the subject of the act "shall be clearly expressed in its title." The question as to whether this clause has been infringed has been raised in very many cases, but the leading principles are simple and of comparatively easy application.

In the first place, it is well settled that the title need not be an index of the contents of the act. All that is necessary is that it shall give reasonably clear notice of the matter to be

¹²*Hunter v. Nockolds*, 1 McN. & Gord. 640 (1849); *Salkeld v. Johnson*, 2 Ex. 254 (1848); *Powlter's Case*, 11 Rep. 336; *Rex v. Williams*, 1 W. Bl. 93; *Att'y. Gen. v. Weymouth*, Ambler, 19 (1743); *Hadden v. Collector*, 5 Wall. 107 (1866); *U. S. v. Palmer*, 3 Wheat. 610 (1818); see, however, *Wilson v. Spaulding*, 19 Federal Rep. 304 (1884).

¹³Cooley, *Const. Lim.*, 169 (6 ed.).

¹⁴The title, however, cannot be resorted to for the purpose of extending the scope of enacting words, which plainly are more restricted in their meaning, *Yeager v. Weaver*, 64 Pa. 425 (1870). See also *Eby's Appeal*, 70 Pa. 311 (1872); *Bittinger's Estate*, 129 Pa. 338 (1889); *Com. v. Lloyd*, 2 Superior Ct. 6 (1896).

found in it, and this need not include subjects accidentally but not directly affected by it.¹⁵ The number of cases in which this principle has been enunciated is very large. The majority of the objections to acts based on supposedly defective titles have been that the title did not point out with sufficient particularity the exact contents of the act, and most of these objections have failed of their purpose, because of the interposition of the principle that such particularity of enumeration is unnecessary, so long as the title gives reasonable notice and is not misleading. In *Blood v. Merceiliott*, 53 Pa. 391 (1866), already referred to, an act "to increase the boundaries of Forest County," was held to sufficiently indicate a provision in the body of the act changing the county seat. As remarked above, this goes the full limit of the law and will certainly never be extended. It is doubtful whether, in fact, such title did sufficiently indicate a purpose to change the county seat.¹⁶ But in cases where, as here, the act is not within the evil in that there is no attempt to hide vicious legislation under the cloak of an innocent title, the courts are very slow to overthrow it, and will even stretch a point to find in the title an indication of the subject matter; they will punctuate it where necessary to make its meaning clear.¹⁷ The cases are very numerous in which it has been reiterated that the title of an act need not be an index of its contents, and that reasonable notice is all that is required.¹⁸

¹⁵*Com. v. Keystone Benefit Ass'n*, 171 Pa. 465 (1895).

¹⁶See remarks of the court in *Dorsey's Appeal*, 72 Pa. 192, 196 (1872), and in *Road in Phoenixville*, 109 Pa. 44, 49 (1885).

¹⁷*Com. v. Taylor*, 159 Pa. 451 (1894).

¹⁸*Com. v. Green*, 58 Pa. 226 (1868), "An act to establish criminal courts for Dauphin, Lebanon and Schuylkill Counties," providing for the appointment and election of the judge, who should act as clerk and by whom jurors should be selected; *Allegheny County Home's Case*, 77 Pa. 77 (1874), "An act providing for an equitable division of property between the County of Allegheny and City of Pittsburg" and extending its provisions to the City of Allegheny; *State Line and Juniata R. R. Co.'s Appeal*, 77 Pa. 429 (1875), "An act to incorporate the State Line and Juniata Ry. Co.;" *Mauch Chunk v. McGee*, 81 Pa. 433 (1876), "An act giving the right . . . to build drains and sewers and file liens for the building of the same" and providing for the collection of the cost of building sewers by an action of debt; *Craig v. First Presbyterian Church*, 88 Pa. 42 (1878); *Taggart v. Com.*, 102 Pa. 354 (1883); *Myers v. Com.*, 110 Pa. 217 (1885); *In re Airy St.*, 113 Pa. 281 (1886); *In re Pottstown Borough*, 117 Pa. 538 (1888); *Nason v. Poor Directors*, 126 Pa. 445 (1889); *Reid v. Smoulter*, 128 Pa. 324 (1889); *Bradley v. Pittsburg*, 130 Pa. 475 (1889); *Millvale Borough v. Evergreen Railway Co.*, 131 Pa. 1 (1889); *Com. v. Silverman*, 138 Pa. 642 (1891), "An act to

If the title indicates that individuals will in some manner be obliged to conform to its injunctions, it is unnecessary for the nature of the penalty to be explicitly set forth.¹⁹

§8. *Clause Liberally Construed.*—The natural tendency of the courts to uphold legislation if possible is not only heeded in determining whether the title of an act gives sufficient notice of its contents, but by reason of the very difficulty which the Legislature has in avoiding restrictions of this kind they construe the clause with great liberality. In *Com. v. Dickert*, 195 Pa. 234 (1900), the opinion in *Allegheny County Home's Case*, 77 Pa. 77 (1874), was quoted with approval by Judge Edwards. "The course of decision in this court has been intended to carry out the true intent of the amendment of 1864, as to the title and subject of bills, instead of resorting to sharp criticism, which must often bring legislation to nought. The amendment of 1864 was in substance proposed in the constitutional convention of 1837-1838, and rejected, because it was feared it would render legislation too difficult and uncertain and lead to litigation. It will not do, therefore, to impale the legislation of the

restrain and regulate the sale of . . . liquors" and prohibiting the furnishing of liquors to minors by sale, gift or otherwise: *Com. v. Morningstar*, 144 Pa. 103 (1891); *Washington Borough v. McGeorge*, 146 Pa. 248 (1892); *Donley v. Pittsburg*, 147 Pa. 343 (1892); *Com. v. Depuy*, 148 Pa. 201 (1892). "An act for the taxation of dogs," etc., and providing that they shall be personal property and the subject of larceny; *Luzerne Water Co. v. Toby Creek Water Co.*, 148 Pa. 568 (1892); *Com. v. Shirley*, 152 Pa. 170 (1893); *Kelley v. Mayberry Twp.*, 154 Pa. 440 (1893); *Lackawanna Twp.*, 160 Pa. 494 (1894); *Com. v. Railway*, 162 Pa. 614 (1894); *Bruce v. Pittsburg*, 166 Pa. 152 (1895); *Com. v. Morgan*, 178 Pa. 198 (1896); *Com. v. Lloud*, 178 Pa. 308 (1896), affirming *Com. v. Lloyd*, 2 Superior Ct. 6 (1896); *Com. v. Muir*, 180 Pa. 47 (1897); *Dorrance v. Dorranceton Borough*, 181 Pa. 164 (1897); *Rodebaugh v. Traction Co.*, 190 Pa. 358 (1899); *Page v. Suspender Co.*, 191 Pa. 511 (1899); *Gas & Water Co. v. Downingtown Borough*, 193 Pa. 255 (1899); *New Brighton Borough v. Biddell*, 201 Pa. 96 (1902); *Hood v. Norton*, 202 Pa. 114 (1902); *Rockhill Iron & Coal Co. v. Fulton County*, 204 Pa. 44 (1902); *Com. v. Connor*, 207 Pa. 263 (1903); *Com. v. Moore*, 2 Pa. Superior Ct. 162 (1896); *Goebeler v. Wilhelm*, 17 Pa. Superior Ct. 432 (1901); *Franklin v. Hancock*, 18 Pa. Superior Ct. 398 (1901); *Com. v. Mintz*, 19 Pa. Superior Ct. 283 (1902); *Rose v. Beaver Co.*, 20 Pa. Superior Ct. 110 (1902); *Dickinson Twp. Road*, 23 Pa. Superior Ct. 34 (1903); *Stroudsburg Borough v. Shick*, 24 Pa. Superior Ct. 442 (1904); *City of Allentown v. Wagner*, 27 Pa. Superior Ct. 485 (1905); *Bridge-water Borough v. Big Beaver Bridge Co.*, 210 Pa. 105 (1904); *Philadelphia Company's Petition*, 210 Pa. 490 (1904); *Com. v. Caulfield*, 211 Pa. 644 (1905), affirming 27 Pa. Superior Ct. 279 (1905); *Com. v. Fisher*, 213 Pa. 48 (1905); *House of Refuge v. Luzerne Co.*, 215 Pa. 429 (1906).

¹⁹*Com. v. Olymer*, 30 Pa. Superior Ct. 61 (1906).

state upon the sharp points of criticism, but we must give each title, as it comes before us, a reasonable interpretation, *ut res magis valeat quam pereat*. If the title fairly gives notice of the subject of the act so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary. It need not be an index to the contents, as has often been said." This language on appeal was affirmed. In later cases particularly has it been reaffirmed that the purpose of the title is merely to give warning to the public and to the legislators of that which may be found in the body of the act, so as to lead to further inquiry and in determining whether such notice is given the language of the title will be construed with the utmost liberality. In *Com. v. Beatty*, 15 Pa. Superior Ct. 5 (1900), an act 'to regulate the employment and provide for health and safety of men, women and children in manufacturing establishments' was held to be constitutional. It was said that the title of the act fairly invites an examination of the contents of the bill by all who employ men, women or children in the establishments, industries, works or offices mentioned, and everything which the nature of the subject of a title reasonably suggests as necessary or appropriate for the accomplishment of the expressed purpose is sufficiently indicated by the title: *Com. v. Jones*, 4 Pa. Superior Ct. 362. To regulate the employment and provide for the health and safety of men, women and children in industrial establishments necessarily implies that rules and methods of government, permissive, mandatory and prohibitive, are within the contemplation of the Legislature, and an enforced submission to the regulating agencies is implied through the imposition of penalties.

"There has been a general disposition to construe the constitutional provision liberally, rather than to embarrass legislation by a construction the strictness of which is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted: *Cooley's Const. Lim.*, 175. The title need not be a complete index to the bill (*Mauch Chunk v. McGee*, 81 Pa. 433), if it fairly gives notice of the subject of the act so as reasonably to lead into an inquiry into the body of the bill, it is all that is necessary."

§9. *Particular Reference in Title to Some Branches of*

Subject and Not Others.—If the title of the act is sufficiently broad to include its subject matter, and gives sufficient notice of it, the fact that some of the topics of the enacting clauses are enumerated in the title and not others will not make the act unconstitutional. The mere fact that the title particularizes as to some portions of the body of the act will not be misleading unless there is an intimation that those enumerated are exclusive of others. In *Sugar Notch Borough*, 192 Pa. 349 (1899), an act did so particularize as to certain topics, but omitted others equally dealt with by the enacting clauses. Mr. Justice Mitchell said: "Where a general title, sufficient to cover all the provisions of an act, is followed by specifications of the particular branches of the subject with which it proposes to deal, the scope of the act is not limited nor the validity of the title impaired except as to such portions of the general subject as legislators and others would naturally and reasonably be led by the qualifying words to suppose would not be affected by the act. This is the rule established by all our cases. It is an application of the maxim, *expressio unius exclusio alterius*. The express enumeration of the specific subjects must be affirmatively misleading as to the intent to exclude others, or the title will not be made invalid by it." The same principle has been laid down by other cases.²⁰ The use of the word *et cetera* after the particular enumeration is especially effective to show conclusively that the subjects mentioned are not exclusive, but that others of the same character are also included and are to be looked for. In *Com. v. Clark*, 3 Pa. Superior Ct. 141 (1896), Judge Wickham said: "The title to the act of 1881, which is repeated in the amending act of 1895, reads as follows: 'An act to protect fruit, gardens, growing crops, grass, et cetera, and punish trespass.' The body of the act makes it punishable to 'wilfully enter or break down through or over any field, orchard, garden or yard fence, hotbed or greenhouse,' and 'to wrongfully club, stone, cut, break, bark or otherwise mutilate or damage any field crop, nut, fruit or ornamental tree, shrub, bush, plant or vine, trellis, arbor, hotbed or greenhouse,' or to 'trample or anywise injure any grain, grass, vines, vegetables or other growing crop.'

²⁰*Pittsburg v. Daly*, 5 Pa. Superior Ct. 528 (1897); *Middletown Road*, 15 Pa. Superior Ct. 167 (1900).

"It is contended in behalf of the defendants that the acts of 1881 and 1895 are, as to them and others similarly situated, unconstitutional, because the titles do not include the word 'trees.' To this we cannot assent. The title need not schedule nor index the contents of the act. It is enough that in a general way attention is called to the matters contained therein. The word 'et cetera' in the titles under consideration refer to things generically the same as those particularly specified, and, therefore, embrace trees, plants, flowers and the like. Had the body of the act included mines or domestic animals or agricultural implements as subjects of the trespasses to be punished, it might well be said that, as to these things, the titles gave no notice. But they suggest with sufficient clearness to every one who reads that, by reading on, he will likely find something relating to ornamental or useful trees, plants or shrubbery. This is enough: *Allegheny County Home's Appeal*, 77 Pa. 77."

§10. *Repealing Clauses*.—It having been determined that the enacting clauses are within the title, it follows that a clause repealing generally acts inconsistent with the law is germane. In *Com. v. Moir*, 199 Pa. 534 (1901), Mr. Justice Mitchell said: "It is further said that the act has more than one subject and one not expressed in the title. This is based on the last section of the schedule, which is a repealing clause. It is enough to say at present that the repeal of previous acts on the same general subject is always germane to the title. Usually the repealing clause is only declaratory of what would be the legal effect without it, but it is useful as preventing doubt upon the legislative intent. And a clause saving from repeal an act that is not within the intent but might have appeared to come within the language of the repealing clause merely operates as a proviso, and is in no sense a re-enactment or extension of the act so executed. It makes no new law. If the section in question repeals expressly any act not germane to the general subject in the title, which has not yet been shown, the repeal might be ineffective, but would not vitiate the whole act."²¹

§11. *Supplements to Previous Laws*.—A supplement to an original act is a law relating to the same subject matter and

²¹See also *Phillips v. Barnhart*, 27 Pa. Superior Ct. 26 (1904), and *Brown's Estate*, 152 Pa. 401 (1893).

adding some provision germane to the main purpose of the legislation. Such an act is valid if entitled "A supplement to an act," etc., reciting the title of the first act, provided, of course, its provisions are actually supplemental in character.²² "The true rule is that where the legislation in the supplement is germane to the subject of the original bill, the object of such supplement is sufficiently expressed in the title,"²³ if it expresses the act to be a supplement of the earlier one. In *Philadelphia v. Railway Co.*, 142 Pa. 484 (1891), Mr. Justice Clark said: "A distinction exists, however, between the title to an original act and that of a supplement. When an act of Assembly is a supplement to a former act, if the subject of the original act is sufficiently expressed in its title, and the provisions of the supplement are germane to the subject of the original, the general rule is that the subject of the supplement is covered by a title which contains a specific reference to the original by its title, giving the date of its approval and declaring it to be a supplement thereto." On the other hand, if the "supplement" contains enactments which are not germane to the original legislation or go beyond it, it is unconstitutional. Being entitled a "supplement," the natural supposition is that its terms are within the scope of the original title, and nothing outside of it can stand.²⁴

§12. *Title Must Not Mislead.*—On the other hand, while the title will be construed to give sufficient notice of the contents of the act, if reasonably possible, and the act will not ordinarily be declared unconstitutional for mere generality of title or because it does not enumerate everything contained in the body of the instrument, yet it is perfectly well settled that the title must not mislead. Its faults will be reviewed with a favoring eye if

²²In the matter of *Church Street*, 54 Pa. 353 (1867); *Craig v. First Presbyterian Church*, 88 Pa. 42 (1878); *In re Pottstown Borough*, 117 Pa. 538 (1888); *Millvale Borough v. Evergreen Railway Co.*, 131 Pa. 1 (1889); *Luzerne Water Co. v. Toby Creek Water Co.*, 148 Pa. 568 (1892); *Com. v. Taylor*, 159 Pa. 451 (1894); *Com. v. Railway*, 162 Pa. 614 (1894); *Com. v. Keystone Benefit Ass'n*, 171 Pa. 465 (1895); *Com. v. Morgan*, 178 Pa. 198 (1896); *Rodger's Petition*, 192 Pa. 97 (1899); *Gas and Water Co. v. Downingtown Borough*, 193 Pa. 255 (1899); *Stroudsburg Borough v. Shick*, 24 Pa. Superior Ct. 442 (1904).

²³Mr. Justice Paxton, in *State Line & Juniata Railroad Company's Appeal*, 77 Pa. 429 (1875).

²⁴*Phila. v. Market Co.*, 161 Pa. 522 (1894); *Mount Joy Borough v. Turnpike Co.*, 182 Pa. 581 (1897).

they be merely a failure to give specific notice of some provision,²⁵ yet if the title actively deceives by leading one to believe that the legislation actually found in the body of the act is not contained in it, then the law will be unhesitatingly condemned. The body may contain less than the title indicates, but never more. In *Dorsey's Appeal*, 72 Pa. 192 (1872), an act entitled "An act relating to the liens of mechanics, materialmen and laborers upon leasehold estates" was declared unconstitutional as to freehold estates for reasons which need not be elaborated. Mr. Justice Agnew said: "Had the qualifying term 'leaseholds' been omitted in this title, all the various kinds of estates of freehold would have been comprehended within the title, and the sale of a freehold interest under the lien would have been good. Mere generality of meaning in the title ought not to avoid a law. For instance, the title, 'An act relating to executions,' is quite general as an expression of the subject of the act; yet no one could doubt the power of the Legislature, under this title, to provide for the various kinds of executions generally comprised within the term execution; as, for example, writs of *feri facias*, *liberari facias*, *levari facias*, *venditioni exponas*, etc. So an act relating to actions might include covenant, case, debt, etc. But a restriction in a title, which tends to mislead, stands on a different footing. The purpose of the amendment is to prevent a number of different and unconnected subjects from being gathered into one act, and thus to prevent unwise or injurious legislation by a combination of interests. Another purpose was to give information to the members or others interested, by the title of the bill, of the contemplated legislation; and thereby to prevent the passage of unknown and alien subjects, which might be coiled up in the folds of the bill. The amendment was found necessary to correct the evils of unwise, improvident and corrupt legislation, and therefore is to receive an interpretation to effectuate its true purpose. It would not do to require the title to be a complete index to the contents of the bill, for this would make legislation too difficult, and bring it into constant danger of being declared void. But, on the other hand, the title should be

²⁵See *Com. v. Martin*, 107 Pa. 185 (1884), where "An act to provide revenue by taxation" was held a good title.

so certain as not to mislead. The language of the amendment is 'one subject which shall be clearly expressed in the title.' To be 'clearly expressed' certainly does not mean something which is dubious, and therefore is not clearly expressed. If, then, the title seems to mean one thing while the enactment as clearly refers to another, it cannot be said to be clearly expressed. Now, in the present case, the words leasehold estates certainly do not express estates of freeholds. Perhaps a very cautious man might look into the body of a bill with this title to see whether other articles were embraced in it, but certainly only a few persons would think it necessary. We think the title does not even point to freehold estates, and therefore that the sixth section of this act is not constitutional." In *Union Passenger Railway Company's Appeal*, 81* Pa. 91 (1872), the same Justice further remarked: "When the title conveys the belief that one subject is the purpose of the bill, while another and different one is its real subject, it is evident that it tends to mislead by diverting the attention from the true object of the legislation. Confiding in the title as applicable to a purpose unobjectionable to the reader, he is led away from the examination of the body of the bill."²⁶

In *Commonwealth v. Kebort*, 212 Pa. 289 (1905), the Supreme Court, overruling the Superior Court, held that the act of June 26, 1895, P. L. 317, entitled "An act to provide against the adulteration of food, and providing for the enforcement thereof," was unconstitutional in so far as it related to drink. In the body of the law was a clause defining "food" to include all articles used for drink. It was said that the usual meaning of food does not include drink, and that if the word was so used in the title there should have been some plain indication of the sense in which the term was employed. The purpose of the constitutional provision was to require that the title should inform legislators and others of the contents of the law, therefore the words used in the title must be understood in their common signification, and if any other meaning is to

²⁶In this case the title was "A further supplement to an act entitled 'An act to incorporate the Union Passenger Railway of Philadelphia,' approved April 8, A. D. 1864, authorizing said company to declare dividends quarterly and to lay additional tracks of railway." The body of the act conferred power to extend the railway into new territory.

be given them by a definition adopted by the Legislature, there must be some indication of this in the title.

It has been seen that the body of the act must not go beyond the title as to the objects affected, and this is also true as to the territory affected. Thus, in *Beckert v. City of Allegheny*, 85 Pa. 191 (1877), it was held that an act purporting in its title to apply only to the City of Allegheny could not affect any other territory. Mr. Justice Gordon observed: "The words, 'An act relative to grading, paving, curbing and otherwise improving Troy Hill road, in the City of Allegheny,' certainly notify all persons outside of the city limits, if of anything whatever, that the matters contained in the act of which they form the title, do not affect them. If then, it be true, as is said in the case cited, that the purpose of this part of the constitution is that members of the Legislature, and all others interested, may have notice of the contemplated legislation, in order that such as is secret and unwise may be discovered and prevented, then the act under consideration certainly comes within its prohibition and is of no effect as to all persons outside of the City of Allegheny." So in *Road in Phoenixville*, 109 Pa. 44 (1885), it was held that the title, "An act relating to boroughs in the county of Chester," did not sufficiently disclose a purpose to impose taxation upon inhabitants of the county outside of the borough.²⁷

If for any reason the title misleads by indicating a purpose foreign to the actual enactments of the bill, then it is unconstitutional.²⁸

²⁷See also, to the same effect, *Quinn v. Cumberland Co.*, 162 Pa. 55 (1894); *Payne v. School District*, 168 Pa. 386 (1895).

²⁸The following acts have been held unconstitutional because their titles were misleading: "An act to incorporate the Manufacturer's Improvement Co.," and giving power to dam streams, etc., *Rogers v. Manufacturer's Imp. Co.*, 109 Pa. 109 (1885); An act to "exempt" from taxation and including a taxing clause, *Sewickley Borough v. Sholes*, 118 Pa. 165 (1888); "An act to prohibit the issuing of licenses within two miles of the Normal School at Mansfield, Tioga County, Pennsylvania," and making a sale within that radius a misdemeanor, *Hatfield v. Com.*, 120 Pa. 395 (1888); to the same effect, *Com. v. Frantz*, 135 Pa. 389 (1890); "An act relating to the Ridge Avenue Passenger Railway Company," and in effect laying a burden on the City of Philadelphia formerly borne by the companies, *Ridge Ave. Ry. Co. v. Phila.*, 124 Pa. 219 (1889); "An act to perfect the records of deeds," etc., and providing for the payment of fees to recorders out of the county treasury, *Pierie v. Phila.*, 139 Pa. 573 (1891), *Gackenbach v. Lehigh Co.*, 166 Pa. 448

§13. *Title Must Give Sufficient Notice.*—But it is not enough to say that the title must not be misleading—it must give sufficient notice of the contents of the act. It has been said that the courts are very slow to declare a law void merely because the title does not disclose its purpose or contents with sufficient particularity, but nevertheless there are limits to their liberality in this regard, and if they are of opinion that the title does not give due warning the act will be held void. In *Com. v. Hazen*, 207 Pa. 52 (1903), “An act to incorporate the Blooming Grove Park Association” was held unconstitutional because this title did not give sufficient notice of an intent, disclosed in the body of the act, to establish a private game preserve. It was also intimated that the title should have indicated in what county the park was to be located. In *Bennett v. Sullivan Co.*, 29 Pa. Superior Ct. 120 (1905), an act entitled “An act for the destruction of wildcats, foxes and minks in this commonwealth, and providing for payment of bounties on the same, officers’ fees and fixing a penalty for violation of the same,” was declared to be unconstitutional in so far as it attempted to place the burden of paying such bounties, etc., upon counties, there being no intimation in the title of such an intent. Judge Porter said: “It may be safely assumed that the title must not

(1895); “An act to require assessors . . . to assess . . . lands . . . where county lines divide a tract of land,” and which made the same provisions in cases where borough or township lines divide a tract of land, *La Plume Borough v. Gardner*, 148 Pa. 192 (1892); “An act to regulate the nomination and election of public officers” and regulating the method of voting on the question of increase of municipal indebtedness, *Evans v. Willistown Twp.*, 168 Pa. 578 (1895); An act whose title related only to “appeals” and which regulated the proceedings prior to appeal, *Otto Twp. Road*, 2 Pa. Superior Ct. 20 (1896), affirmed in 181 Pa. 390 (1897); “An act authorizing counties of . . . Pennsylvania to purchase . . . bridges, etc.” and vesting certain powers in the grand jury, *Stegmaier v. Jones*, 203 Pa. 47 (1902); “An act providing for the relief of needy sick, injured, etc.,” and placing burden of maintaining almshouses on counties, *Daily v. Potter Co.*, 203 Pa. 593 (1902), *Colley Twp. v. Sullivan Co.*, 22 Pa. Superior Ct. 482 (1903); “An act to regulate the treatment and control of dependent, neglected and delinquent children,” etc., and containing provisions relating to children not included within this description, *Mansfield’s Case*, 22 Pa. Superior Ct. 224 (1903); An act purporting to give a borough power to make contracts for providing a water supply and which affected or destroyed existing contracts, *Water Co. v. Austin Borough*, 206 Pa. 297 (1903); An act purporting to alter certain procedure by substituting one justice of the peace for two, and which also substituted six jurors for twelve, *Moore v. Moore*, 23 Pa. Superior Ct. 73 (1903).

only embrace the subject of proposed legislation, but also express the same so clearly and fully as to give notice of the legislative purpose to those who may be specially interested therein. Unless it does so it is useless." *Road in Phoenixville*, 109 Pa. 44; *Quinn v. Cumberland County*, 162 Pa. 55. The title of this act was merely notice that a bounty was to come from some source, but it gave no indication whether it was to be paid by the state, the county, the township or the owner of the land where the animal was destroyed. "Nothing ambiguous can be said to be clear, and this is a decisive answer to the argument that the title is sufficient to lead to inquiry. An inquiry into a dubious or uncertain thing is not the purpose of the constitution. Its requirement is that the subject shall be clearly expressed." *Union Passenger Railway Company's Appeal*, 81* Pa. 91. "The title to an act need not be an index to its contents, and though the title may be general it will cover all details as collateral matters naturally and properly incident to the subject named, but to omit as the act under consideration does, all indication of its most important feature and effect is to fail entirely in the constitutional requirement that the subject shall be clearly expressed in the title." *Stegmaier v. Jones*, 203 Pa. 47. This act imposed a burden upon counties to which they were not before subject, in a matter with which counties generally had had no previous connection, and is defective in title and unconstitutional, inasmuch as the title gives no notice to counties of the burden imposed upon them by the act: *Dailey v. Potter County*, 203 Pa. 593."²⁹

§14. *Notice Contained in Title Must be Complete in Itself*.—The notice in the title must be complete in itself and no extrinsic information, even though of common knowledge, may be drawn upon for the purpose of aiding an insufficient notice. In *Com. v. Samuels*, 163 Pa. 283 (1894), "An act creating the office of county controller" in certain counties, and which also abolished the office of county auditors, was held unconstitutional, because nothing was said in the title as to the auditors, and this, although it was generally known that the

²⁹See also *Com. v. Schulte*, 26 Pa. Superior Ct. 95 (1904), in which the title of an act was held unconstitutional because it did not clearly express the contents thereof.

two sets of officers had the same duties, and hence the creation of one would imply the abolition of the other. Mr. Justice Mitchell said: "It is true that the constitution, in enumerating county officers, Art. XIV, sec. 1, puts the two offices together in the disjunctive, 'auditors or controllers,' and that those who are familiar with the duties of controllers as existing in Philadelphia and Allegheny would know that they are mainly the same as those of auditors in other counties, and therefore that the creation of the office of controller was likely to interfere with, if not to abolish, the other. But this is not the notice which the constitution requires the title of the act to give of its subject. The object of that requirement is that legislators, and others interested, shall receive direct notice in immediate connection with the act itself, of its subject, so that they may know or be put upon inquiry as to its provisions and their effect. Suggestions or inferences which may be drawn from knowledge dehors the language used, are not enough. The constitution requires that the notice shall be contained in the title itself."³⁰ It has also been decided that the title must be valid at the time the act was passed. It cannot be cured by a subsequent amendment of it.³¹

§15. *Requirements as to Title Applies Only to Acts of Assembly.*—The constitutional provision under discussion was intended to apply only to bills enacted by the General Assembly, hence it is no valid objection to a city ordinance to suggest that its title does not give notice of its contents, unless there is some other regulation or restriction by the General Assembly or other body which is directed to the same end.³²

§16. *Effect of Defective Title.*—If the title of an act is adjudged to be defective it does not necessarily follow that the entire act is unconstitutional. It may be that some of the enacting clauses are within the scope of the title and others not. In such case that part of the act which is not clearly expressed in the title is surely void, but the rest is good unless the destruction of the part will destroy the main purpose of the whole.

³⁰Reaffirmed in *Obm. v. Severn*, 164 Pa. 462 (1894).

³¹*Bennett v. Sullivan Co.*, 29 Pa. Superior Ct. 120 (1905).

³²*Corry v. Corry Chair Co.*, 18 Pa. Superior Ct. 271 (1901). See, however, *Com. v. Larkin*, 27 Pa. Superior Ct. 397 (1905), quoting act of May 23, 1874, P. L. 230, sec. 3.

Thus, if the law has several well defined objects and one fails because of a defective title, the others may yet be enforced unless the object which fails is so inseparably connected with the rest that its destruction will practically destroy the main purpose of the act.³³

§17. *Revival and Amendment of Laws.*—Section 6 of Article III provides: “No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length.”³⁴

This section is mandatory and must be complied with, or the attempted enactment will be of no effect whatever.³⁵

Only express amendments are referred to and not the incidental or implied amendments which are inevitably brought about by the enactment of any law. Every new act affects the existing law, and so may be said to amend existing laws, but such amendments are not within the constitutional provision. If they were, every act passed would have to set out at length all previous legislation on the same subject, which would be impossible.³⁶ In *Searight's Estate*, 163 Pa. 210 (1894), it was contended that a law was invalid because it incidentally affected a previous statute, to which no direct reference was made. Mr. Justice Mitchell said: “The act of 1887 does not undertake to amend the act of 1834, and therefore did not need to repeat its terms. The constitutional provision has reference to express amendments only. Its object, like that of section two of the same article, requiring each act to have its subject clearly expressed in the title, was to secure, to the legislators themselves and others interested, direct notice, in immediate connection with proposed legislation, of its subject and

³³*Com. v. Green*, 58 Pa. 226 (1868) (*dicta*); *Dorsey's Appeal*, 72 Pa. 192 (1872), in which a law relating to mechanics' liens was upheld as to leasehold estates, but declared void as applied to freehold estates; *Allegheny Co. Home's Case*, 77 Pa. (1874); *Allegheny City v. Moorehead*, 80 Pa. 118 (1875); *Dewhurst v. City of Allegheny*, 95 Pa. 437 (1880); *McGee's Appeal*, 114 Pa. 470 (1886); *Sewickley Borough v. Sholes*, 118 Pa. 165 (1888).

³⁴This section was new, nothing like it having appeared in any previous constitutions of Pennsylvania.

³⁵*Barrett's Appeal*, 116 Pa. 486 (1887).

³⁶*Washington Borough v. McGeorge*, 146 Pa. 248 (1891); *Hood v. Norton*, 202 Pa. 114 (1902); *Wilson v. Downing*, 4 Pa. Superior Ct. 487 (1897); *Emsworth Borough*, 5 Superior Ct. 29, (1897).

purpose. The constitution does not make the obviously impracticable requirement that every act shall recite all other acts that its operation may incidentally affect, either by way of repeal, modification, extension or supply. The harmony or repugnance of acts not passed with reference to the same subject can only be effectually developed by the clash of conflicting interests in litigation, and the settlement of such questions belongs to the judicial, not the legislative, department. No constitutional provision is involved in the present case."³⁷

Similar reasoning is applied to the revival of laws. The section applies only to revivals brought about by express re-enactment. The repeal of a repealing act may by the common law revive the previous law, but such law would not have to be re-enacted and set forth at length.³⁸ It is not the repealing act which revives the original law, that again becomes operative by its own force in virtue of the common law.

But whenever a law really extends or amends the provisions of a previous statute, the rule is strictly enforced, and there must be a full re-enactment. In *Pittsburg's Petition*, 138 Pa. 401 (1891), it appeared that a law reorganizing the city government of Pittsburg had created certain departments of city government and had delegated to the head of each department powers previously conferred upon certain other officers. This amounted to an amendment of the previous laws, for the functions theretofore given to a number of officers were now vested in one man, and, as the previous legislation had not been re-enacted in full, the law was invalid.

An act is also unconstitutional which in fact extends the provisions of a previous statute by altering the construction of its terms. Thus, in *Titusville Iron Works v. Keystone Oil Company*, 122 Pa. 627 (1888), it appeared that an act of Assembly had provided that the requirements of a mechanics' lien law previously construed to affect only contractors should hereafter be construed to affect also certain other material-men and mechanics, etc. There was no re-enactment or republica-

³⁷Statutes adopting by reference only the procedure for enforcement of prior acts are valid, *New Brighton Borough v. Biddle*, 201 Pa. 96 (1902), affirming 14 Sup. Ct. 207 (1900); *Smith & Co. v. Browne*, 206 Pa. 543 (1903); *Com. v. Cannon*, 30 Pa. C. C. 637 (1905).

³⁸*Durr v. Commonwealth*, 3 Pa. County Ct. 525 (1887).

tion of the previous statute, and for this, among other reasons, the act was held to be invalid.

On the other hand, an act which merely brings certain objects within the operation of previously existing laws is not necessarily unconstitutional, even though there is no re-enactment. In such a case the act may be said not to extend or amend the previous statutes, as it relates merely to the objects affected by it. In *Clearfield Co. v. Cameron Twp. Poor Directors*, 135 Pa. 86 (1890), an act organized an asylum for the insane, and thereby brought it within the operation of prior acts of Assembly. While the point was not necessary to the decision, it was said that the law was not unconstitutional as conflicting with Article III, §6.

The courts are not disposed to be too critical in construing this clause, and if they think the new law works no substantial alteration in the previous act referred to it will be upheld.³⁹ In *Lloyd v. Smith*, 176 Pa. 213 (1896), it was held that a law which merely changed the name of an officer created by statute, giving to the new incumbent all the powers possessed by the old, without more than a reference to the title of the former act, was a proper exercise of legislative power. Mr. Justice Mitchell said: "The fifteenth section of the act of 1895 is not a revival, amendment, extension or conferring of the provisions of the act of April 15, 1834, so as to bring it within the prohibition of section 6 of Article 3 of the constitution. It makes no change in the duties of the office, but merely in the name of the officer by whom they are to be performed. If the act had provided that 'the officer now known as the county auditor shall hereafter, in all counties having one hundred and fifty thousand inhabitants and over, be called the county controller, and shall, in addition to the duties and powers of said officer have the following,' then enumerating the new duties and powers covered by the act, its effect would have been precisely the same, and yet it could hardly have been contended that it was unconstitutional for not re-enacting at length all the provisions of the act of 1834. In substance this section of the act of 1895 is nothing but a change of the name of the officer, and that is not within the purpose of

³⁹*Purvis v. Ross*, 158 Pa. 20 (1893); *Smyers v. Beam*, 158 Pa. 57 (1893).

the constitutional prohibition. The evil at which that was aimed was ignorant or uninformed legislation." It has already been noticed that if the powers given to the new officer are those formerly possessed by a number of officers under various acts of Assembly, the previous acts must be re-enacted in full; but this is not true where the same officer, with substantially the same powers, existed in all but name under the previous act. The new legislation is good, even if it confers additional powers upon the officer or gives him common law powers not previously exercised by other officers. For example, in *Pittsburg's Petition*, 138 Pa. 401 (1891), referred to above, the city treasurer and the mayor, among others, were given the same powers under the new act which they had previously exercised under the old; together with the mayor, certain magistrates were given the common law powers which had previously been exercised by the mayor alone. The act in both respects was held good, although as to the magistrates the decision would have been otherwise, had the powers of the mayor been statutory instead of common law.

This constitutional provision is prospective only,⁴⁰ and if a law passed subsequent to 1874 re-enacts in full a previous act passed before the new constitution went into effect, which in turn re-enacts a previous law by a reference to its title only, the last act is nevertheless valid. Its immediate effect is to re-enact the law which it quotes in full, and while indirectly it does re-enact the first act by reference to its title only, such a case is not deemed to be within the meaning of the constitution.⁴¹

⁴⁰*Clearfield v. Cameron Twp. Poor Directors*, 135 Pa. 86 (1890).

⁴¹*Purvis v. Ross*, 12 Pa. County Ct. 193 (1890), affirmed in 158 Pa. 20 (1893).

CHAPTER XIV.

LOCAL AND SPECIAL LEGISLATION.

§1. *Distinction Between Public, Private, General and Local Laws.*—In the absence of express restriction by a constitution a Legislature may enact laws affecting all or only a part of the territory over which it has jurisdiction. It may pass laws which concern the public as a whole or which relate to the rights of private persons only. While public and general laws are, as a rule, fairer in their operation, there is nothing inherently vicious in either local or special legislation so long as the character of the laws is good.

In England the distinctions between public, private, general and local acts have been well understood from very early times. A public act is one which concerns the public as a whole; a private act is one which concerns only a limited portion of the public or a single individual; a local act is one which affects only a limited portion of territory as distinguished from a general act which affects all the territory subject to the control of the Legislature.¹

Prior to 1850 the distinction between public and private acts of parliament was very important, because the courts could take judicial notice of the former but not of the latter. In the year mentioned, however, Lord Brougham's act² was passed, providing that all acts are to be deemed public unless they contain an express declaration to the contrary, hence there is no

¹In Stephen's Commentaries on the Laws of England it is said: "Statutes are either public or private. Thus the statute of 1571 (13 Eliz., C. 10), which prohibits the master and fellows of a college, the dean and chapter of a cathedral, or any other person having a spiritual living, from making leases for longer terms than twenty-one years or three lives, is a public act, being a rule prescribed to spiritual persons in general. But an act to enable the Bishop of Chester to make a lease to A. B. for sixty years concerns only the parties and the bishop's successors, and is, therefore, a private act. Again of private acts, some are *local*, as affecting particular places only; others *personal*, as confined to particular persons.

²13 and 14 Vict., C. 21.

longer any difficulty in determining between them. At the present time the distinction in England is chiefly important because of the manner in which the acts, when pending, are considered, and in which they are afterwards indexed. Three classes are distinguished—public general acts, private acts and local acts.³ The first class are measures of public policy or convenience, and are considered solely as to their effect upon the public. The second and third classes, however, are recognized to be analogous to decisions of courts in private litigation, and, proper notice having been given to all parties interested, they are allowed to present their views as to the propriety of the proposed legislation. This is to safeguard the interests of all persons whose private interests may be affected by the law.⁴

Subject to these distinctions in the method of enacting and indexing, laws, public and private, general and local, are passed by the British parliament, and there seems to be no sentiment in favor of one class as against another. The power to meet a particular need by a law covering the exact point, subject to no vexing restrictions as to its public or general nature, is a salutary one and not likely to be taken away from any legislative body except for gross abuse.

§2. *Reasons for Restrictions as to Local Legislation in Pennsylvania.*—It was because the power to thus meet a particular exigency by passing a local or special law was abused that the Legislatures of many states in this country have been deprived of it by constitutional provisions. The history of all the states has been marked by a growing distrust of the Legislature. The early constitutions were little more than bare frames of government, with a general delegation of power to the Legislature. The later ones are full of restrictions on the legislative power, most of which are the direct result of distrust of the character and purposes of the representatives of the people.⁵

³See Ilbert, *Legislative Methods and Forms*, p. 26. As to indexing, see *ibid.*, *et seq.*

⁴See Ilbert, *Legislative Methods and Forms*, Chaps. II and IV.

⁵See *Com. v. Gilligan*, 195 Pa. 504 (1900), in which Mr. Justice Mitchell said: "The Constitution of 1873 was a new departure in the history of the law. Instead of being confined, in accordance with the traditions of American institutions, to the framework of the government as composed of general and fundamental principles, it was converted into a binding code of particulars and details which had previously been left to the province of ordinary legislation. And the ruling motive with which we

The restriction of the power of the General Assembly of Pennsylvania to pass local or special laws is directly attributable to this feeling. The idea was prevalent that legislation granting local or special privileges could be had at Harrisburg by anyone who could pay the price. There can be no doubt that the Legislature had greatly abused its powers. The remarks of the members of the convention clearly show that they so understood it, and that one great reason for calling the convention was that the power to pass local and special laws might be taken from the General Assembly. This, it was argued, would greatly lessen the number of corrupt laws, as there would be comparatively little to gain by the purchase of legislation which offered equal privileges to all.⁶ The purpose of this clause in the Constitution of 1873 was undoubtedly to prevent the grant of special privileges for corrupt considerations and purposes.

are now specially concerned was profound distrust of the Legislature. As pointed out by our Brother DEAN, in *Perkins v. Philadelphia*, 156 Pa. 554, Article 3, contains sixty specific prohibitions of legislation, besides other restrictions and regulations not absolutely prohibitory. Through these the pathway for honest and desirable and necessary laws even yet is not always clear, and it was inevitable that there should be some uncertainty and even divergence in the views of judges thus forced to enter on an untrodden and difficult field."

"The great volume of local and special as compared with general legislation is shown by the remarks of Mr. Mantor. He said: "In looking over the acts which the Legislature has passed for the past few years, say commencing with 1866 and ending with 1872, we find the following results: In 1866 general laws passed were 50, special laws were 1,096; in 1867 general laws passed were 86, special laws were 1,392; in 1868 general laws passed were 73, special laws were 1,150; in 1869 general laws passed were 77, special laws were 1,276; in 1870 general laws passed were 54, special laws were 1,276; in 1871 general laws passed were 81, special laws were 1,353; in 1872 general laws passed were 54, special laws were 1,232. So you see that in seven years there were passed 475 general laws and 8,755 private acts. The number of acts which the present Legislature of 1873 have passed are many, and, I am told, will duplicate the number of the acts of any one former year. This is undoubtedly correct, and is but another proof of the necessity for this convention of adopting this section with all its paragraphs complete.

"From 1866 to 1871 the legislators passed for railroads, and granted them corporate privileges, some four hundred and fifty special acts bearing on railroads alone. These were, perhaps, not all the laws that were passed in which railroads were not directly or indirectly interested.

"But, Mr. Chairman, what a fearful commentary is this on the abuses of special legislation. By a restrictive section in this constitution, the best and largest interests of a free and industrious people like ours, in this state, would be protected. Without it we have not much faith in the ultimate results, for, as we are carried forward by the political maelstrom, we shall find that our political rights will be swallowed up by granting special privileges to soulless corporations."—II Conv. Debates (1873), 592.

§3. *Text of the Clause Forbidding Local and Special Laws.*—The section under consideration (§7, Art. III) is the first in any Pennsylvania constitution limiting the power of the General Assembly to pass local or special laws. Its scope is very broad, as it was the desire of the members of the convention to cover all possible subjects of legislation which it was not necessary to deal with by special laws and which if so dealt with might give rise to temptation of the members of the legislative body. The meaning of the provisions are for the most part clear and need no explanation. The section provides: "The General Assembly shall not pass any local or special law authorizing the creation, extension or impairing of liens;⁷ regulating the affairs of counties, cities, townships, wards, boroughs or school districts;⁸ changing the names of persons or places; changing the venue in civil or criminal cases; authorizing the laying out, opening, altering or maintaining roads, highways, streets or alleys; relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other state; vacating roads, town-plats, streets or alleys; relating to cemeteries, graveyards or public grounds not of the state; authorizing the adoption or legitimation of children; locating or changing county seats; erecting new counties or changing county lines; incorporating cities, towns or villages, or changing their charters; for the opening and conducting of elections, or fixing or changing the place of voting; granting divorces; erecting new townships or boroughs, changing township lines, borough limits, or school districts; creating offices, or prescribing

"Mr. Buckalew observes: "This clause can hardly apply to liens of the state."—Const. of Pa., p. 71.

"The word "affairs" here has been very liberally construed to include all subjects which in any substantial way affect the objects mentioned. It was used in preference to the word "business," which was similarly used in various other constitutions mentioned by Mr. Buckalew, Const. of Pa., p. 72, and had been somewhat strictly construed. Any matter which concerns the city or county mentioned comes within the term "affairs" of that city or county. *Montgomery v. Com.*, 91 Pa. 125 (1879); *Morrison v. Bachert*, 112 Pa. 322 (1886); *City of Scranton v. Silkman*, 113 Pa. 191 (1886); *Frost v. Cherry*, 122 Pa. 417 (1888); *Straub v. Pittsburgh*, 138 Pa. 356 (1890). On the other hand, if the subject matter of the act does not actually concern the object about which legislation is forbidden, then, of course, it does not come within the term "affairs." *Loftus v. F. & M. N. Bank*, 133 Pa. 97 (1890); *Com. v. Anderson*, 178 Pa. 171 (1896).

the powers and duties of officers, in counties, cities, boroughs, townships, election or school districts; changing the law of descent or succession; regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding, or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate; regulating the fees, or extending the powers and duties of aldermen, justices of the peace, magistrates or constables; regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes; fixing the rate of interest; affecting the estates of minors or persons under disability, except after due notice to all parties in interest, to be recited in the special enactment; remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury; exempting property from taxation; regulating labor, trade, mining or manufacturing; creating corporations, or amending, renewing or extending the charters thereof; granting to any corporation, association or individual any special or exclusive privilege or immunity, or to any corporation, association or individual, the right to lay down a railroad track; nor shall the General Assembly indirectly enact such special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed; nor shall any law be passed granting powers or privileges in any case where the granting of such powers and privileges shall have been provided for by general law, nor where the courts have jurisdiction to grant the same, or to give the relief asked for.⁹

⁹This last clause is a partial re-enactment of Art. XI, §9, the second amendment adopted in 1864 providing: "No bill shall be passed by the Legislature granting any powers or privileges, in any case, where the authority to grant such powers or privileges has been, or may hereafter be, conferred upon the courts of this commonwealth." This was deemed preferable to a form used in various other constitutions." Mr. Buckalew observes: "In the report of this twenty-eighth division of the section, by the Committee on Legislation, Jour., 345, there was included a prohibition upon the passage of any local or special law, 'where a general law can be made applicable.'" But, upon full consideration, this clause was struck out upon second reading, 5 Conv. Deb., 253-6, and the division left to stand as above. Clauses corresponding to this omitted one, which now have place in the constitutions of fourteen states, do not seem to

§4. *Local and Special Laws Defined.*—Local and special legislation on these subjects being forbidden, it becomes necessary to distinguish laws which are general from those which are local or special.

A general law is one which applies to the whole state, and which affects all the objects, or all members of a class of objects, to which it can appropriately apply. A local law is one which applies to but a portion of the commonwealth, and a special law one which affects some members of a class of objects, to all of which it may properly apply, to the exclusion of others.

When it is said that a general law applies to the whole state, it is not meant that it must necessarily affect all parts of the state, but that no portion of the commonwealth shall be specifically excluded; that the law shall apply wherever its objects may be found. Conversely, the fact that a law actually affects only one small part of the state does not make it local, provided it affects all the objects which it appropriately may. A law may only affect one object, one corporation or one city, and yet may be general and not special, provided the one thing affected is in a class by itself.

§5. *Classes Determined by Natural Selection.*—When these principles are applied to legislation for classes set aside by natural selection, no difficulty is encountered. Thus laws applying to married women or to minors or to corporations

be well advised; for not only are they unreasonably stringent and inconsistent with the specific enumeration of acts forbidden, but they must tend to burden the statute book with unnecessary and sometimes mischievous laws of a general nature and application. "We should suppose that so stringent a provision would, in some of these cases, lead to the passage of general laws of doubtful utility, in order to remedy the hardships of particular cases." Cooley on Con. Lim., 128. In note. In *State v. Hitchcock*, 1 Kansas, 178, it was held that the constitutional provision that "in all cases where a general law can be made applicable, no special law can be enacted," left a discretion with the Legislature to determine the cases in which special laws should be passed; and similar decisions have been made in other states whose constitutions contain a like provision. *Gentile v. State*, 29 Ind. 409; *Marks v. Trustees Purdue University*, 37 Ind. 155; *State v. County Court of Boone*, 50 Mo. 317.

These decisions probably produced the provision in the Constitution of Missouri (1875), Art. IV, §53, cl. 32. That clause at the end of an enumeration of special acts forbidden continues: "In all other cases where a general law can be made applicable no local or special law shall be enacted, and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined, without regard to any legislative assertion on that subject."

engaged in the carrying trade would unquestionably be valid, although such laws assuredly do not affect all persons in the state. A law relating only to ports of entry could not properly be objected to, although it would affect only a small part of the commonwealth. In these cases it is quite clear that the laws are general, because they affect all the objects to which they appropriately may apply.

§6. *Artificial Classification for Purposes of Legislation.*

—The apparent difficulty of formulating general principles on this subject arises from the fact that artificial classification has been resorted to where natural classification has not seemed to differentiate sufficiently for practical purposes. It is believed, however, that this difficulty is more apparent than real. The confusion of thought on the matter will largely disappear if the underlying definition of a general law is kept constantly in mind. A law applying to a class artificially segregated from a natural class will be upheld as general, provided the subject matter of the act is such that there are good and substantial reasons why it should be confined in its operation to the artificial class thus separated. For example, minors are a natural class; yet a law forbidding the sale of cigarettes to a class of minors, boys under sixteen, would undoubtedly be valid because the object of the law, to prevent the sale of a harmful thing to young boys, is properly confined to those of the age mentioned. Cigarettes may be, and probably are, more harmful to boys under sixteen than to older ones. But if we had a law giving married women under thirty the capacity to become sureties, it is equally clear that the law would be special and unconstitutional, because married women under thirty are no more capable of contracting than those over thirty—hence since the law might with entire propriety apply to the whole class of adult married women, it could not be limited to a part only.

§7. *Classification of Cities.*—There is no phase of this subject which has seemed more difficult to solve than the *status* of laws relating to classes of cities, counties, school districts or other organized portions of the commonwealth. Cities in one sense constitute a class naturally separated by reason of their municipal organization from all other objects of legislation. *Prima facie*, therefore, all laws relating to the affairs of cities

must apply to all cities. But there are certain subjects of legislation concerning which laws cannot appropriately apply to all cities because of the great difference in their population and consequent variance of municipal needs. In such cases it seems reasonable to suppose that the Legislature may, constitutionally, confine the operation of the law to those cities to which it may appropriately apply, describing and setting them apart by reference to their natural peculiarities.

This was the view of the General Assembly which convened next after the adoption of the new constitution. It passed a law dividing the cities of the state into three classes, for the purpose of legislating for each class separately.¹⁰

§8. *Constitutionality of Legislation for Classes of Cities.*

—Of course the classification of cities could not of itself be objected to as being local or special legislation, but a law applying to one of these artificial classes might be challenged on the ground that it could appropriately apply to the entire natural class of cities, and hence was improperly confined to some members of that class. The first legislation to be thus attacked was contained in the eleventh section of the said act of May 23, 1874, P. L. 230, which provided for an increase of the municipal debts of "cities of the first class." A taxpayer's bill was filed to restrain the City of Philadelphia from borrowing by authority of this act, alleging it to be unconstitutional. The Supreme Court assumed original jurisdiction of the case under §3, Art. V, of the new constitution, *Wheeler v. Philadelphia*, 77 Pa. 338 (1875). The division of the cities made by the act comprehended three classes:

¹⁰The act provides as follows: "Section 1. Be it enacted, etc., That for the exercise of certain corporate powers, and having respect to the number, character, powers and duties of certain officers thereof, the cities now in existence or hereafter to be created in this commonwealth shall be divided into three classes:

Those containing a population exceeding three hundred thousand, shall constitute the first class.

Those containing a population less than three hundred thousand, and exceeding one hundred thousand, shall constitute the second class; and

Those containing a population less than one hundred thousand, and exceeding ten thousand, shall constitute the third class.

The corporate powers and the number, character, powers and duties of the officers of the first and second class, and those of the third class, now in existence by virtue of the laws of this commonwealth, shall be and remain as now provided by law, except where otherwise provided by this act."

1. Cities of the first class; those having a population of 300,000 or more.

2. Cities of the second class; those having a population less than 300,000 and more than 100,000.

3. Cities of the third class; those having a population of less than 100,000 and more than 10,000.¹¹

Philadelphia was the only city of the first class and Pittsburg the only city of the second class. It was contended that all laws relating to cities must apply to all cities, but that even if classification could be allowed, this particular law, applying only to cities of the first class, was invalid, because the only city of that class was Philadelphia, and that the purpose and effect of the act was to legislate for Philadelphia alone.

As to the first point, the court held that cities might be classified according to their population, and a law applicable to but one class would be general, provided its subject matter was such that it could not appropriately apply to other classes. It was pointed out that classification for purposes of legislation had been recognized for many years, was no where forbidden in the constitution, and that the needs of cities of different sizes were as to many subjects of legislation so essentially different that different laws for the various classes were not only appropriate, but necessary.

As to the second contention, that this particular law, applying only to cities of the first class, was invalid, because Philadelphia was the only city of that class, it was said that this was a mere incident. If the law was properly confined to cities of more than 300,000 inhabitants, the fact that there was but one answering that description was immaterial.¹²

¹¹The figures as determined by the last census are conclusive as to which class the city belongs. *Luzerne Co. v. Glennon*, 109 Pa. 564 (1885).

¹²The remarks of some members of the convention of 1873, as reported in 5 Conv. Debates (1873), *et seq.*, are of interest as showing the views which they held upon the subject of classification under the constitution. For example, Mr. Darlington said: "The moment you allow the Legislature to favor a particular class or interest, you are favoring the individuals engaged in that class and pursuit. In other words, you are specially legislating for a set of individuals engaged in a particular business, whether it be in the floating of steamships, the making of railroads, the developing of iron ore or coal or other thing. You may aid the interest of coal or iron or commerce, but you shall not aid the interest of railroads.

"Now, I take it this convention will understand what any man who

§9. *Generality of Law Dependent Upon Its Subject Matter.*—The principles thus enunciated are applicable to classification of counties, boroughs, school districts, or to any other component organizations, as well as to cities. Although the opinion in *Wheeler v. Philadelphia*, 77 Pa. 338 (1875), does not bring out the point very distinctly, it should be made clear at the outset that the generality of the law depends not more upon the nature of the classification than upon the subject matter of the act. Some laws may with propriety apply to but a single class of cities or counties, but others may with equal propriety apply to all sizes and descriptions alike. A law of the latter character, if confined in its operation to but a single class, would be special and not general, since it does not affect all members of the class which it appropriately and conveniently may.

Confining our attention for the present to legislation concerning the affairs of cities, it will be found that our decided cases may in the main be fully explained by the above rules. Laws relating to subjects which demand legislation varying with the size of the cities may be valid if applied to a reasonable and not too refined artificial class, selected by substantial uniformity of population, provided they have reference to the peculiarities of the class. The motive of the Legislature in making the classification is immaterial, and the court will not inquire into it.¹³

§10. *Subjects Suitable for Legislation Applying to Classes of Cities.*—Mr. Justice Williams, in *Ruan Street*, 132 Pa. 257 (1890), very clearly set forth the views of the court as to the subjects suitable for legislation for classes of cities

reads can understand, that you cannot under any prohibition of special legislation evade that provision by saying that cities of a certain class or population shall be allowed to borrow, or that persons engaged in the business of mining for coal or iron may borrow, or that persons engaged in the building of railroads may borrow at a higher rate of interest than others. This is all special legislation and will be entirely prohibited by such a clause in the constitution. Gentlemen must not fancy, therefore, that they can prohibit the Legislature from doing what is right to be done, if it is right to do that which I suppose everyone will agree it is right to do—allow even members of a corporation to borrow at a higher rate of interest than others may choose to give.”—5 Conv. Debates (1873), 262.

¹³*Kilgore v. Magee*, 85 Pa. 401 (1877); *Com. v. Moir*, 199 Pa. 534 (1901).

in this language: "I will adopt the words of the act of 1874, and say that classification authorizes such legislation as relates to the exercise of the 'corporate powers' possessed by cities of the particular class to which the legislation relates, and to the 'number, character, powers and duties' of the officers employed in the management of municipal affairs. These are the purposes contemplated by the Legislature; they are the only purposes for which classification seems desirable; they are the only purposes for which it has been upheld by this court. In order that a given act of Assembly, relating to a class of cities, may escape the charge of being a local law, it is necessary, as was said in *Weinman v. Railway Co.*, *supra*, that it should 'be applicable to all the members of the class to which it relates, and must be directed to the existence and regulation of municipal powers, and to matters of local government.' A law that will bear the application of this test is within the purposes for which classification was designed, and therefore constitutional. A law that will not bear its application is local, and offends against the constitution. Among the many subjects of legislation which classification presents we may call attention to such as the establishment, maintenance and control of an adequate police force for the public protection; the preservation of the public health; protection against fire; the provision of an adequate water supply; the paving, grading, curbing and lighting of the public streets; the regulation of markets and market houses, of docks and wharves; the erection and care of public buildings, and other municipal improvements. These are mentioned, not because they include all the subjects for the exercise of municipal powers, but as a suggestion of some of the more obvious ones, and as an illustration of the character of the subjects upon which legislation for the classified cities may be necessary. These classes are thus seen to embrace, not mere geographical subdivisions of the territory of the state, but organized municipalities, which are divided with reference to their own peculiar characteristics and needs; and the legislation to which they are entitled by virtue of such division is simply that which relates to the peculiarities and needs which induced the division. In this way each class may be provided with legislation appropriate to it, without imposing the same

provisions on other classes to which they would be unsuitable and burdensome."

The same judge, in *Wyoming Street*, 137 Pa. 494 (1890), thus continues the discussion of the same subject: "Some confusion seems to exist, however, in regard to the definition of a general law, and a theory has been advanced in several recent cases, and has been contended for by the appellee in this case, that the division of the cities of the state into classes by the act of 1874, which was recognized as a necessary classification in *Wheeler v. Philadelphia*, 77 Pa. 338, requires us to hold any law to be general which embraces all the cities of a given class, without regard to the subject to which it relates. This theory overlooks the objects and purposes of classification, which are very clearly set forth in the first section of the act which divides the cities of the state into three classes. These are to make provision for the municipal needs of cities which differ greatly in population. Differences in population make it necessary to provide different machinery for the administration of 'certain corporate powers,' and to make a difference in 'the number, character, powers and duties of certain corporate officers,' corresponding with the needs of the population to be provided for. An act of Assembly that relates to a subject within the purposes of classification, as they are thus declared by law, is a general law, although it may be operative in a very small portion of the territory of the state, if it relates to all the cities of a given class. For example, an act relating to the lighting of streets in cities of the third class would be a general law for the following reasons: (a) It relates to the exercise of 'corporate powers;' (b) it affects all the cities of a given class in the same manner; (c) it affects the inhabitants and property owners in such cities, because of their residence and ownership therein, and the circumstances and needs that are peculiar to the class to which their city belongs. But a law that should provide that all applications made by guardians, administrators and executors for leave to sell the real estate of a decedent for the payment of his debts, in cities of the third class, should be made, not in the court having jurisdiction of the petitioner's accounts, but in the court of quarter sessions, would be a local law, and therefore unconstitutional. It would be applicable to

the same subdivisions of territory as the law relating to the lighting of streets, but it would relate to the exercise of no corporate power residing in a city, nor to the duties of any municipal officer, nor to the needs or welfare of citizens of a city of the third class, as distinguished from other citizens of the commonwealth. On the other hand, it would affect the jurisdiction of the state courts, modify the duties of public officers whose functions are not local but general, and touch the inhabitants of cities of the given class in the exercise and enjoyment of their rights as citizens of the state, not as dwellers in the municipality. The test, therefore, by which all laws may be tried is their effect. If they operate upon the exercise of some power or duty of a municipality of the given class, or relate to some subject within the purposes of classification, they are general; otherwise they are local."

Laws relating to almost any municipal power or function can be limited to but a single class of cities, as it is recognized that the structure of municipal governments and the powers exercised by them must vary with the population. Thus laws giving cities of one class power to collect and disburse taxes and water rents,¹⁴ to pass ordinances relative to the opening of streets,¹⁵ or the care of the poor,¹⁶ or to regulate the grading and paving of streets and the collection of the cost,¹⁷ or the kind of motive power that may be used by street car companies within their limits,¹⁸ or relating to the organization of the government and the powers and duties of city officers¹⁹ are held to be general and constitutional.

§11. *Laws Relating to Subjects Other Than Municipal Functions.*—But laws relating to municipal powers are not the only ones which may properly be limited in their application to a single class of cities. Any law which in the nature of things is needed in cities of a certain kind or size and not in others would surely be valid. Thus a law relating only to cities which

¹⁴*Kilgore v. Magee*, 85 Pa. 401 (1877); *Jermyn v. Fowler*, 186 Pa. 595 (1898).

¹⁵*Shaaber v. Reading*, 133 Pa. 643 (1890).

¹⁶*Straub v. Pittsburg*, 138 Pa. 356 (1890).

¹⁷*Scranton v. Whyte*, 148 Pa. 419 (1892); *Scranton v. Bush*, 160 Pa. 499 (1894).

¹⁸*Reeves v. Philadelphia Traction Co.*, 152 Pa. 153 (1893).

¹⁹*Com. v. Motr.*, 199 Pa. 534 (1901).

are ports of entry or which are located on navigable rivers, etc., would be general, provided it had reference to the peculiarities of the cities to which it applies. This is also true with respect to police regulations in cities of varying size. There are certain subjects which require peculiar regulation in large centers of population, and laws relating to such subjects and applying only to cities or to cities of a certain size may be general. This principle has been applied to a law regulating undertaking in cities of the first, second and third classes,²⁰ and to one prohibiting the establishment of hospitals or pest houses in built-up portions of cities.²¹

§12. *Subjects Not Proper for Class Legislation.*—The converse of the principles just discussed are equally true. If the law, having regard to its subject matter does not apply to all objects to which it may appropriately, but affects some to the exclusion of others equally in need of its remedial force, then it is not general, but local or special. Thus (still confining our attention to cities for the moment) if the law relates to a subject which is a proper one for legislation applying to all classes of cities alike, then if it is confined in its operation to one class only, it is special and unconstitutional. Or if, though the subject matter demands different legislation for different sized cities, and artificial class selected for its application is unnecessarily and improperly restricted, still the law is special. Not only must its subject matter be proper for class legislation, but the class must be one separated by well marked peculiarities from the other classes.

We have seen that laws relating to municipal powers and functions, etc., may properly be confined to cities of one of the three classes as provided in the various acts of Assembly.²² But laws which relate to matters which can conveniently be dealt with by legislation applying to all cities cannot be limited in their operation to one class only. Thus a law relating to writs of *scire facias* and their effect in cities of the first class is invalid because there is no connection between the size of the cities and

²⁰*Com. v. Hanley*, 15 Pa. Superior, 271 (1900).

²¹*Com. v. Hospital*, 198 Pa. 270 (1901). See also *Beltz v. Pittsburg*, 211 Pa. 561 (1905).

²²Acts of May 23, 1874, P. L. 230; May 8, 1889, P. L. 133, and June 25, 1895, P. L. 275.

the effect of *scire facias*.²³ It may be that writs of *scire facias* can be classified so as to admit of legislation for classes, but that does not warrant legislation for those writs only which issue in cities of a particular class.

Laws relating to the incorporation and government of street railway companies located in cities of the second or third classes are likewise invalid. The method of incorporating such companies need not vary according to the size of the city in which they happen to do business. "The act provides for the incorporation and government of street railway companies, but it does not affect all such companies. It selects such companies as many be located in cities of the second and third class and makes special provision for them, while all other street railway companies remain under the operation of the general law. This is just what the constitution declares shall not be done."²⁴ Laws relating to procedural matters in cities of one class are, as a rule, invalid, since the practice of the courts need not be essentially different in cities of different sizes.²⁵ In *Ruan Street*, 132 Pa. 257 (1890), Mr. Justice Williams, holding void a law relating to procedure in road cases in cities of the first class, said: "We now come to inquire what legislation remains forbidden to cities, notwithstanding classification. I reply that all legislation not relating to the exercise of corporate powers, or to corporate officers and their powers and duties, is unauthorized by classification. In Article III, §7, the constitution declares that the Legislature shall not pass any local or special law 'regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals.' The same section forbids the passage of any local or special law fixing the rate of interest, exempting property from taxation, changing the laws of descent, affecting the estates of minors, and many other purposes, among which is 'authorizing the laying out, opening, altering or maintaining roads, highways, streets or alleys.' It is very clear that the purpose of the constitutional

²³*Philadelphia v. Haddington Church*, 115 Pa. 291 (1886).

²⁴*Weinman v. Pass. Ry. Co.*, 118 Pa. 192 (1888); *Berks and Dauphin Tp. v. Lebanon Elec. Ry. Co.*, 5 Pa. County Ct. 467 (1888).

²⁵*Betz v. Philadelphia*, 19 Phila. 452 (1887).

provision is to require that laws relating to the several subjects enumerated in §7 shall be general, affecting the whole state, so that the rule upon all these subjects shall be uniform throughout every part of the territory in which the constitution itself is operative. For example, there cannot be one rate of interest in cities of the first class, another in those of the second or third, and still another for the rest of the state, but the rate, when fixed by law, must apply to all parts and divisions of the state alike. The same thing is true of the law of descent, and so on, through the entire list of subjects upon which local and special legislation is forbidden. If classification can relieve against the constitutional prohibition as to one of these subjects, it can relieve as to all. If it can justify a change in the practice in the courts of law, or the proceedings to assess damages for an entry by virtue of the right of eminent domain, it can, by the same reasoning, justify a change in the law of descents, or the settlement of estates, or the rate of interest, and sweep away the entire section with all its safeguards. But a statute is not above the constitution. The classification act is subject to the limits which Article III, §7, prescribe, and it cannot transcend a single one of them. For that reason the courts of law in Philadelphia have the same jurisdiction and powers, and proceed in the same manner, as the courts in other counties of the commonwealth. The system of practice, so far as it rests on statutory provisions, must be the same. The same proceedings are had on writs, the same method for securing the benefit of the exemption of property from levy and sale, the same writ of *habeas corpus* for one who is restrained of his liberty, the same procedure for one whose land is entered and appropriated to public or to corporate uses. These are the civil rights of the citizen of Pennsylvania as such, and they are not affected by the size of the town in which he lives, or the value of his land, any more than by the color of his skin. They are the safeguards provided by the constitution for the protection of the weak as well as the strong, the dweller in the country as well as the resident in 'cities of the first class,' and no system of classification of cities or other divisions of the state can disturb them."

A similar law relating to the powers and duties of boards of viewers in assessing damages for the opening and improve-

ment of streets in cities of the second class was also held invalid. "The test, therefore, by which all laws may be tried is their effect. If they operate upon the exercise of some power or duty of a municipality of the given class, or relate to some subject within the purposes of classification, they are general; otherwise they are local."²⁶ All laws relating to the practice of courts located in cities of a particular class or the method of filing or effect of liens therein, etc., come within the same rule, since such matters do not require regulations which vary with the size of the community.²⁷ It has also been held that an act relating to school districts in cities of the second class is unconstitutional,²⁸ but later decisions throw doubt upon the case, it being now considered that school affairs are so intimately connected with municipal affairs as to admit of legislation for classes of school districts, although distinguished by their relation to classes of cities.²⁹

§13. *Police Regulations.*—In the matter of police regulations, also, a law may be applicable to but one class of cities, if the danger which it guards against is peculiar to that class or is greater therein, but if the danger has no connection with the peculiarities of the class of cities to which it applies then it is invalid.³⁰ Thus a law prohibiting the location of cemeteries within one mile of cities of the first class, is local for the reasons suggested.³¹ The same would be true of a law prohibiting the sale of cigarettes to minors in cities of a particular class. In *Com. v. Hospital*, 198 Pa. 270 (1901), Shafer, J.,

²⁶*Wyoming Street*, 137 Pa. 494 (1890); *Pittsburg's Petition*, 138 Pa. 401 (1890).

²⁷*Wilkesbarre v. Meyers*, 113 Pa. 395 (1886), as to right of appeal from magistrates; here, however, the act was upheld because of a clause in the constitution excepting Philadelphia from the power of the Legislature in this regard. See also *Gallaher v. McLean*, 193 Pa. 583 (1899); *Pittsburg's Petition*, 138 Pa. 401, 435 (1890), as to municipal lien practice; *Philadelphia v. Kates*, 150 Pa. 30, 34 (1892), dictum as to extension of liens for taxes in cities of the first class; *Safe Deposit Co. v. Fricke*, 152 Pa. 231 (1893), relating to claims for overdue taxes and water rents in cities of the second class; *McKay v. Trainor*, 152 Pa. 242 (1893); *Van Loon v. Engle*, 171 Pa. 157 (1895), to the same effect.

²⁸*Chalfant v. Edwards*, 173 Pa. 246 (1896).

²⁹See *Sugar Notch Borough*, 192 Pa. 349 (1899), and *Com. v. Gilligan*, 195 Pa. 504 (1900).

³⁰See dictum of Smith, J., in *Com. v. Jones*, 4 Superior, 362 (1897), inclining to the opinion that local or special police regulations are not forbidden.

³¹*Philada. v. Cemetery Co.*, 162 Pa. 105 (1894).

whose opinion was affirmed by the Supreme Court, very well explained the limitations of police regulations as applied to cities of but one class. He says: "The plaintiff contended that, the act being intended to protect the health of the inhabitants of cities, and the protection of the public health being a recognized subject of municipal control, laws passed in regard to hospitals, etc., in cities, or in any class of cities, are general and not local, because the protection of the public health is a proper matter of municipal control. We cannot agree with this contention of the plaintiff, that merely because an act is intended to protect the public health it may be made to apply to cities, or a particular class of cities, without becoming local. If the Legislature, for the protection of health in cities, should undertake to prohibit the sale of cigarettes to minors, or oleomargarine to anybody in all the cities of the commonwealth, it could not be claimed that the act was valid. There must be the additional element, that the danger to be guarded against has relation to the local conditions. Cigarettes and oleomargarine are equally deadly in the forest and in the city; but not so a hospital or pest house."³²

§14. *Unnecessary Municipal Regulations.*—It might seem that even if a law relates to municipal powers of a class of cities, it may be special, provided the municipal functions regulated are not such as require different laws for different sized cities. The courts have not, however, taken this position. In *Com. v. Moir*, 199 Pa. 534 (1901), it was argued "that the act attempts a classification in the method of filling municipal offices and of exercising municipal powers resting on no proper discrimination or foundation, in that it provides for methods of government and administration of cities of the second class different from those required in cities of the first and third class, in particulars where there is no real difference. It is sufficient to say of this that it is a legislative, not a judicial, question. The very object of classification is to provide different systems of government for cities differently situated in regard to their municipal needs. It was recognized that cities varying greatly in population will probably vary so greatly in the amount, importance and complexity of their municipal

³²See also *Beltz v. Pittsburg*, 26 Pa. Superior Ct. 66 (1904).

business, as to require different officers and different systems of administration. Classification therefore is based on difference of municipal affairs, and so long as it relates to and deals with such affairs, the questions of where the lines shall be drawn, and what differences of system shall be prescribed for differences of situation, are wholly legislative. What is a distinction without a difference is largely a matter of opinion. No argument, for example, could be more plausible than that there is no real difference in municipal needs between a city of 99,000 and one of 100,000 population. It is a sufficient answer that the line must be drawn somewhere, and the Legislature must determine where. So long as it is drawn with reference to municipal and not to irrelevant or wholly local matters, the courts have no authority to interfere." It seems to be settled, therefore, that a law relating to municipal powers and functions is valid, although applying to but one class of cities, irrespective of the necessity of a different regulation of such powers in cities of the different classes. The necessity, within the limits mentioned, is for the Legislature to determine, and its discretion is not reviewable.

§15. *Classification Must be Reasonable.*—Considering now the second essential above noticed, not only must the law be one about a subject which requires different legislation for cities of different sizes, and not only must it relate to the peculiarities of the class to which it applies, but the class itself must be one which is distinguished from other cities by well marked peculiarities. The original classification of cities into three classes, upon the basis of their population, having been upheld, the General Assembly attempted to go further and classify them, on the same basis, into five and even into seven classes. It was argued that the power to classify, once conceded, the Legislature had full discretion as to the number and character of the classes to be set apart. It was decided, however, that this is not the law. Whether or not a law is general must be determined by the court in each case; the solution of the question involves considerations of both law and fact. If the law applies to all the objects to which it may reasonably and appropriately be applied, then it is general. But to determine whether it does so apply the courts must necessarily decide

whether the artificial class which it affects does include all such objects. Sometimes, as was done in the case of cities, an act is passed for the sole purpose of making the classification, and so paving the way for further legislation. Again, the law itself will select a class to the exclusion of others and legislate for that class alone. In either case the discretion of the Legislature in thus setting apart a class must be reviewed by the courts. If it is one set apart by natural peculiarities, such that demand separate legislation, then, if the subject matter of the law relates to those peculiarities, it will be upheld. But even though the subject of the legislation is such that separate laws for separate classes are demanded, if the class to which it applies is unnecessarily restricted or improperly selected still the law is special, since a more enlarged class or other objects similar in character should also have had the benefit of its remedial force. The discretion of the Legislature as to the extent and character of the classification is not final, but is always subject to review by the courts.³³ The inquiry of the courts, however, is strictly limited to the act itself—they will not go into the motives of the Legislature in passing it.³⁴

³³*Ayar's Appeal*, 122 Pa. 266 (1888), in which Mr. Justice Sterrett said: "It has also been suggested that the question of necessity for classification and the extent thereof, as well as of what are local or special laws, is a legislative and not a judicial question. The answer to that is obvious. The people, in their wisdom, have seen fit not only to prescribe the form of enacting laws, but also, as to certain subjects, the method of legislation, by ordaining that no local or special law relating to those subjects shall be passed. Whether, in any given case, the Legislature has transcended its power and passed a law in conflict with that limitation is essentially a question of law and must necessarily be decided by the courts. To warrant the conclusion that the people, in ordaining such limitations, intended to invest their law-makers with judicial power, and thus make them final arbiters of the validity of their own acts, would require the clearest and most emphatic language to that effect. No such intention is expressed in the constitution, and none can be inferred from any of its provisions. . . . No such proposition can be entertained by the courts without abandoning one of the most important branches of jurisdiction committed to them by the fundamental law, viz.: the power to ultimately determine whether or not a given law is local or special and has been passed in disregard of the constitutional limitation that has been placed upon the power of the Legislature." The authority of this case is shaken by later decisions which incline to make the test of the validity of the law the good faith of the Legislature, except in cases where it has clearly abused its discretion. See also *Ruan Street*, 132 Pa. 257 (1890).

³⁴*Com. v. Moir*, 199 Pa. 534 (1901). In this case Mr. Justice Mitchell says, quoting from an opinion of Mr. Justice Sharswood: "Nor are the motives of the legislators, real or supposed, in passing the act, open to judicial inquiry or consideration. The Legislature is the lawmaking

§16. *Classification Must Not be Unnecessarily Extended.*

—Still confining our attention to cities, it follows from what has been said that if the Legislature divides the cities into an unnecessarily large number of classes, and legislates for one of these classes when the law could as well apply to other cities outside of it, the court will review the discretion of the Legislature and declare the law invalid. As already mentioned, the Legislature, after the decision in *Wheeler v. Philadelphia*, 77 Pa. 338 (1875), classified the cities of the state, first into five and later into seven classes. In *Ayars' Appeal*, 122 Pa. 266 (1888), both these classifications were held to be improper as constituting an unnecessarily extended division. Mr. Justice Sterrett said: "The underlying principle of all the cases is that classification, with the view of legislating for either class separately, is essentially unconstitutional, unless a necessity therefor exists—a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class, separately, that would be useless and detrimental to the others. . . . The act of 1874, dividing the cities of the state into three classes, viz.: those containing over three hundred thousand population, those containing less than three hundred thousand and exceeding one hundred thousand, and those containing less than one hundred thousand and exceeding ten thousand, was sustained, as to such of its provisions as have been involved in adjudicated cases, because it was considered within the spirit, if not the letter, of the constitution.

department of the government, and its acts in that capacity are entitled to respect and obedience until clearly shown to be in violation of the only superior power, the constitution. It is urged that the act before us was not passed for this purpose (as a police regulation), but, as its title expresses, 'to provide for cases where farmers may be harmed by such railroad companies,' and it is contended that this shows conclusively that it was the design of the Legislature to impose this new burden upon the railroad company for the benefit of the landholders and not for the security of the traveling public. . . . We cannot try the constitutionality of a legislative act by the motives and designs of the lawmakers, however plainly expressed. If the act itself is within the scope of their authority it must stand, and we are bound to make it stand if it will upon any intendment. It is its effect, not its purpose, which must determine its validity. Nothing but a clear violation of the constitution, a clear usurpation of power prohibited, will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void. Sharswood, J., in *Penna. R. R. Co. v. Ethlet*, 66 Pa. 164, cited with approval by the present chief justice in *Com. v. Keary*, 198 Pa. 500."

As to the number of classes created, that act appears to have covered the entire ground of classification. It provided for all existing as well as every conceivable prospective necessity. It is impossible to suggest any legislation that has or may hereafter become necessary for any member of either class that cannot, without detriment to other members of same class, be made applicable to all of them. If classification had stopped where the act of 1874 left it, it would have been well; but it did not. Without the slightest foundation in necessity, the number of classes was soon increased to five, and afterwards to seven; and, if the vicious principle on which that was done be recognized by the courts, the number may at any time be further increased until it equals the number of cities in the commonwealth. The only possible purpose of such classification is evasion of the constitutional limitation; and, as such, it ought to be unhesitatingly condemned."³⁵

§17. *Classification Must be Based on Natural Peculiarities.*—The classification must be based on natural and real differences. Population has been said to be the only proper basis of classification of cities,³⁶ but whether this is the fact or not, the Legislature cannot indirectly enact local and special legislation by arbitrarily selecting some cities to the exclusion of others, or by creating a class marked not by real but only pretended differences. Thus an attempt to legislate specially for the city of Titusville by passing an act relating to all cities of eight thousand inhabitants, situated at a distance of more than twenty-seven miles by the usually traveled road from the county line in a county of more than sixty thousand inhabitants, was held invalid.³⁷ No explanation is needed to show that the pretended classification was a mere subterfuge. No reason could be imagined for separating cities answering to the description given, and legislating for them separately. The object was to legislate for Titusville and for no other city. A subsequent attempt to do the same thing in a scarcely less clumsy way was

³⁵*Ayar's Appeal* was affirmed in *Shoemaker v. Harrisburg*, 122 Pa. 285 (1889); *Berghaus v. Harrisburg*, 122 Pa. 289 (1888); *Com. v. Smoulter, Jr.*, 126 Pa. 137 (1889); *Meadville v. Dickson*, 129 Pa. 1 (1889); *Chester City v. Black*, 132 Pa. 568 (1890).

³⁶*Com. v. Patton*, 88 Pa. 258 (1878).

³⁷*Ibid.*

frustrated by a similar decision.³⁸ In the more recent case of *Sample v. Pittsburg*, 212 Pa. 533 (1905), a law providing for the annexation of two contiguous cities in the same county was held to be invalid as an attempt to legislate for Allegheny and Pittsburg only under the guise of a general law.

§18. *Classification Must Not be Rigid*.—Where the class affected by the law is distinguished by reason of its population or any other feature which is subject to change by natural growth, the law must be so framed that other cities, not members of the class when the law is passed, may in the course of time become members of it by the natural progress of events. If, therefore, the terms of the act are such as necessarily to exclude all not then answering the particular description, the law will be deemed local and unconstitutional. For example, a law applying only to such cities of the first class as have at the date of its passage certain additional peculiarities is invalid, since no other city, even though by increase of population it might become a city of the first class, could ever come within the description. Accordingly a law applying only to cities of the first class which at the date of the act had a public building commission was declared to be local, since no city but Philadelphia could by any possibility ever come into the class thus designated.³⁹ Mr. Justice Dean said: "This act purports to be a general law applicable to cities of the first class. We have held, and now adhere to it, that the Legislature may lawfully classify cities for corporate purposes, and that an act to promote such purposes is not local or special, merely because, at the date of its passage, there was but one city to which it applied. But it has been decided in case after case, since the Constitution of 1874 went into effect, in positive, unmistakable language, that if the act was intended to apply to but one particular city, county or township, and was not intended to and could never apply to any other, it was local and therefore unconstitutional. This act is nominally general; applies in terms to cities of the first class; abolishes commissioners of public buildings for the use of courts and municipal purposes in such cities, created by special acts of Assembly, and places all buildings heretofore

³⁸*Scowden's Appeal*, 96 Pa. 422 (1880).

³⁹*Perkins v. Philadelphia*, 156 Pa. 554 (1893).

under their control in the control of the department of public works. At the date of its passage there was just one city, one set of commissioners, one special act of Assembly, one public building, to which it could apply; from the very nature of the case, there never could be another city in the first class to which the act could apply, for it transfers to the department of public works buildings heretofore under the control of such commissioners; no matter how many cities come into this class, nor how soon they reach it, this act cannot apply to them, for their affairs have not heretofore been regulated by the special provisions of any such act as that of 1870."

On the other hand, a mere temporary provision for putting a law into operation will not make it void, even though it cannot apply to any but existing members of a class.

In *Com. v. Moir*, 199 Pa. 534 (1901), it was contended that an act reorganizing the government of cities of the second class was unconstitutional, because the schedule for putting the law into operation, and a clause providing for the temporary appointment of a "recorder" who took the place of a deposed mayor, could never apply to any cities except those which at that time were members of the class. The court decided, however, that the schedule and the clause providing for the appointment of a recorder were but temporary expedients for putting the act into operation, and could not operate to make it local.⁴⁰

It has been intimated that a law regulating the affairs of cities coextensive with counties would in any event be unconstitutional as being a rigid classification and a mere subterfuge for local legislation,⁴¹ but final judgment on this question must be reserved until we actually have a decision to this effect in a case where the subject matter of the act can appropriately apply

⁴⁰It was strongly urged in this case that the term of the schedule which provided that the appointees of the Governor should hold office for more than two years, although several elections would intervene, showed that the main purpose of the act was this vesting of power in the Governor. There was little doubt of the truth of this assertion, but the court decided that they could not go into it. The dissenting opinion of Mr. Justice Dean is very suggestive. *Pittsburg's Petition*, 138 Pa. 427 (1890), is a decision to the same effect.

⁴¹*De Walt v. Bartley*, 146 Pa. 529 (1891). It has actually been decided that a law relating to boards of revision of taxes in counties coextensive with cities of the first class is invalid.—*Blankenburg v. Black*, 200 Pa. 629 (1901).

to such cities only. It seems that in such a case there could be no objection to the law.

§19. *Classification of Counties.*—The principles which apply to legislation concerning the affairs of cities lead to precisely similar results when we consider legislation upon any other subject included in the section of the constitution under discussion.

Laws may be passed applicable to certain classes of counties and if conformable to the general principles heretofore explained are valid.⁴² But if the subject matter of the act has no relation to the population of the counties, then the act will be construed to be local. In *Davis v. Clark*, 106 Pa. 377 (1884), an act relating to mechanics' liens and excepting from its operation counties of more than two hundred thousand inhabitants was held to be local. There is no reason why laborers in the two most populous counties of the state, which were excluded, should not have the benefit of the legislation equally with those of smaller population.⁴³ An act giving a right of appeal to all counties of less than five hundred thousand inhabitants met the same fate.⁴⁴ We have already learned that procedural matters

⁴²*Davis v. Clark*, 106 Pa. 377 (1884); *Reid v. Smoulter*, 128 Pa. 324 (1889); *Lloyd v. Smith*, 176 Pa. 213 (1896). In this case Mr. Justice Mitchell said: "In regard to some of the prohibited subjects, such as the affairs of counties, cities, etc., it was very early found that there were such differences in situation, circumstances and requirements of the cities of the commonwealth that classification with reference to their governmental machinery was of imperative necessity, and it was accordingly sustained, and the principle established that a law which does not exclude any one from a class, and applies to all the members of the class equally, is general. The same principle must make classification constitutional as to the other political and municipal divisions of the state when considered in their governmental capacity. Classification of counties is, therefore, as permissible as classification of cities, and the Legislature may determine what differences in situation, circumstances and needs, call for a difference of class, subject to the supervision of the courts, as the final interpreters of the constitution, to see that it is actually classification and not special legislation under that guise."

⁴³This was the real ground of the decision. It was stated, however, that no law which excepts from its operation the more populous cities or counties can be valid. This statement is probably not the law. If there were some good reason why this mechanics' lien law could not appropriately apply to counties above two hundred thousand inhabitants, there would seem to be no valid objection to the act. Any law applicable only to cities of the second or third class in effect excludes from its operation cities of the first class, and yet there is no question that such a law is valid.

⁴⁴*City of Scranton v. Silkman*, 113 Pa. 191 (1886).

of this character are fit subjects for laws applicable to all cities or counties in the state, and must be so dealt with.⁴⁵

In the matter of the fees of county officers, the law, if it concerns the amount of the fees so as to affect the "affairs" of the people of the county, must either relate only to the classes set apart by the constitution itself or to all counties alike. A selection of some on the basis of population to the exclusion of others is not sanctioned.⁴⁶

The classification based on the coincidence of county and city lines has already been referred to. If the law is confined in its operation to counties which are coextensive with cities and relates to peculiarities arising from this fact, there would seem to be no objection to it,⁴⁷ but when its subject matter has no connection with the peculiar relation between city and county then, of course, the pretended classification is a mere subterfuge and the law is of no validity.⁴⁸

§20. *Classification of School Districts.*—School districts also may be classified in the same way. There are good reasons why laws should be passed applicable only to such as are located in large centers of population. In the first case on this point, *Chalfant v. Edwards*, 173 Pa. 246 (1896), the court, Mr. Justice Williams delivering the opinion, thought the act before them was local. It applied to school districts in cities of the second class. It was deemed local because schools were not considered a part of the municipal machinery. It was, therefore, held that, as the law did not relate to corporate powers or functions, it could not be valid when confined only to cities of the second class. It does not seem to have been urged that the act might

⁴⁵*Strine v. Folz*, 113 Pa. 349 (1886).

⁴⁶*McCarthy v. Com.*, 110 Pa. 243 (1885), it was indicated in this case that the constitution having already classified counties with respect to the matter of fees, no further classification in any event could be allowed. At any rate, a law operating only on counties between 100,000 and 150,000 inhabitants was held to be local; *Morrison v. Bachert*, 112 Pa. 322 (1886), the act here excluded counties above 150,000 and less than 10,000 inhabitants. Held not a proper classification. In *Rymer v. Luzerne Co.*, 142 Pa. 108 (1891), and in *Com. v. Anderson*, 178 Pa. 171 (1896), the acts followed the classification laid down in the constitution, and hence were held valid.

⁴⁷See dictum in *Bennett v. Norton*, 171 Pa. 221 (1895), at p. 234, inclining to this view. But see *Com. v. Carey*, 2 Pa. C. C. 293 (1886); *Com. v. McMichael*, 22 Pa. C. C. 182 (1899).

⁴⁸*Blankenburg v. Black*, 200 Pa. 629 (1901).

have been considered as applicable to a class of school districts rather than to school districts in a class of cities, and therefore it was considered simply as legislation for cities of the second class and was struck down under the ruling in previous cases. The case of *Sugar Notch Borough*, 192 Pa. 349 (1899), followed soon after. A law was under consideration which related primarily to boroughs, but which also legislated for such school districts as were affected by changes in boroughs. The act was upheld because it only incidentally affected school districts, and also on the ground that school districts could be classified just as cities or counties could be. *Chalfant v. Edwards*, 173 Pa. 246 (1896), was commented on and distinguished on the ground already mentioned, viz.: that the law was there treated as being applicable, not to a class of school districts, but to a class of cities. Finally, in *Com. v. Gilligan*, 195 Pa. 504 (1900), it was definitely and finally decided that school districts may be classified with reference to their location in cities of a certain size and legislated for accordingly.⁴⁹

§21. *Other Classification for Purposes of Legislation.*—

It is plain that the principles hereinbefore discussed apply with equal appropriateness to any other objects about which local and special legislation is forbidden. Class legislation, subject to the preceding limitations, has been sanctioned concerning boroughs;⁵⁰ persons under physical disability—giving to them alone the right to peddle;⁵¹ poor districts in cities of the second class;⁵² and altogether outside of cities;⁵³ all persons, natural or artificial, engaged in the carrying trade;⁵⁴ foreign insurance companies;⁵⁵ anthracite coal mines;⁵⁶ bridges over streams

⁴⁹In this case the law applied only to school districts in cities of the third class. Affirmed in *Com. v. Shires*, 195 Pa. 515 (1900); *School District v. Smith*, 195 Pa. 515 (1900); *Com. v. Howell*, 195 Pa. 519 (1900); *Com. v. Guthrie*, 203 Pa. 209 (1902); *Com. v. Middleton*, 210 Pa. 582 (1905).

⁵⁰*In re Pottstown Borough*, 117 Pa. 538 (1888).

⁵¹*Com. v. Brinton*, 132 Pa. 69 (1890).

⁵²*Straub v. Pittsburg*, 138 Pa. 356 (1890).

⁵³*Rose v. Beaver Co.*, 20 Superior Ct. 110 (1902).

⁵⁴*Hoover v. Penna. R. R.*, 156 Pa. 220 (1893).

⁵⁵*Kennedy v. Agricultural Ins. Co.*, 165 Pa. 179 (1895).

⁵⁶*Durkin v. Kingston Coal Co.*, 171 Pa. 193 (1895); affirmed in *Com. v. Jones*, 4 Superior Ct. 362 (1897). (See dictum of Smith, J., as to local police regulations), and in *Read v. Clearfield Co.*, 12 Pa. Superior Ct. 419 (1900).

forming boundary lines between two counties, on lines of public highways, used exclusively for vehicles and post purposes, and which, having been destroyed by ice, flood or otherwise, have been abandoned by their owners and rebuilt on another site;⁵⁷ townships grouped with respect to their density of population;⁵⁸ municipal liens in boroughs;⁵⁹ livery stable keepers;⁶⁰ adult women employed at certain laborious occupations;⁶¹ all constables in the state;⁶² junk shops;⁶³ minors under and over sixteen years of age;⁶⁴ applying to the entire class of physicians;⁶⁵ relating to dying declarations in cases where death has been due to abortion;⁶⁶ relating to surety bonds purchased from corporations as distinguished from those provided by natural persons, no other difference appearing.⁶⁷ On the other hand, laws have been condemned relating to certain particularized burial grounds;⁶⁸ applying to all pharmacists but operating unequally on persons of equal qualifications;⁶⁹ and to employees of corporations as distinguished from employees of individuals.⁷⁰

§22. *Effect of Constitution on Existing Local Laws.*—There were, of course, many local laws in existence at the date of the adoption of the constitution. The question, therefore,

⁵⁷*Seabolt v. Comm'rs*, 187 Pa. 318 (1898). In this case Mr. Justice Mitchell said: "Legislation for a class distinguished from a general subject is not special but general, and classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine the courts cannot declare the classification void, though they may not consider it to be on a sound basis. The test is, not wisdom, but good faith in the classification." See also *Stegmaier v. Jones*, 203 Pa. 47 (1902).

⁵⁸*Com. v. Blackley*, 198 Pa. 372 (1901); *Philada. & Reading Coal & Iron Co.'s Petition*, 200 Pa. 352 (1901); *Coal Township*, 16 Pa. Superior Ct. 260 (1901); *Plains Township*, 16 Pa. Superior Ct. 262 (1901).

⁵⁹*Com. v. Moore*, 2 Pa. Superior Ct. 162 (1896).

⁶⁰*New Brighton Borough v. Biddell*, 201 Pa. 96 (1902).

⁶¹*Com. v. Beatty*, 15 Pa. Superior Ct. 5 (1900).

⁶²*Weaver v. Schuylkill Co.*, 17 Pa. Superior Ct. 327 (1901).

⁶³*Com. v. Mintz*, 19 Pa. Superior Ct. 283 (1902).

⁶⁴*Com. v. Fisher*, 213 Pa. 48 (1905).

⁶⁵*In re Registration of Campbell*, 197 Pa. 581 (1901).

⁶⁶*Com. v. Winkelman*, 12 Pa. Super. Ct. 497 (1900).

⁶⁷*Clark's Estate*, 195 Pa. 520 (1900).

⁶⁸*York School District's Appeal*, 169 Pa. 70 (1895).

⁶⁹*Com. v. Zacharias*, 3 Pa. Superior Ct. 264 (1897); affirmed in *Com. v. Zacharias*, 181 Pa. 126 (1897).

⁷⁰*Com. v. Clark*, 14 Pa. Superior Ct. 435 (1900).

soon arose as to whether these local laws were repealed by the clause forbidding local and special legislation. It was argued that an entirely new system was introduced by the constitution as to generality of laws, and that its intent was to strike down all laws not of general application. This argument, however, could not prevail, as the constitution is clearly prospective in its operation. Existing local laws were not repealed thereby.⁷¹ General laws, however, may expressly repeal all local laws inconsistent therewith;⁷² when such laws are confined in their operation to a particular class local laws relating to the class may be repealed by implication,⁷³ but this is not ordinarily the case where general follows particular legislation; in such cases there is no presumption of the repeal of preceding local laws, even though they are inconsistent with the later general act.⁷⁴ Special laws passed for the sole purpose of repealing local or special acts are valid by the express words of the constitution.⁷⁵

§23. *Generality of Laws as Affected by Existing Local Laws.*—At first thought more difficulty seems to be presented by the proposition that a law in form general cannot be so in fact, if by reason of the intervention of previously enacted local statutes it does not actually extend to all objects to which it can appropriately apply. It has been decided, however, that such a law ought to stand, as it is not, so to speak, the fault of the law that it has not general application, but of the precedent local acts. This is true even though there is in the act an express saving of local legislation. As a practical matter it might not be convenient nor proper to strike down at one blow all previous legislation relating to a particular locality. Therefore a law applying to the whole class in theory but in fact only to those members of it not provided for by local laws is held to be general. As the local laws are one by one repealed, the

⁷¹*Lehigh Iron Co. v. Lower Macungie Township*, 81 Pa. 482 (1876); *Indiana Co. v. Agricultural Soc'y*, 85 Pa. 357 (1877); *Allegheny v. Gibson*, 90 Pa. 397 (1879); *Colvin v. Beaver*, 94 Pa. 388 (1880); *Evans v. Phillippi*, 117 Pa. 226 (1887); *Com. v. Sellers*, 130 Pa. 32 (1889); *Com. v. Macferron*, 152 Pa. 244 (1893).

⁷²*In re Twenty-second Street*, 102 Pa. 108 (1883).

⁷³*Com. v. Macferron*, 152 Pa. 244 (1893); *Quinn v. Cumberland Co.*, 162 Pa. 55 (1894); *Mohr v. Scherer*, 30 Pa. Superior Ct. 509 (1906).

⁷⁴See *Com. v. Brown*, 25 Sup. Ct., 269 (1904), and cases there cited.

⁷⁵*Perkins v. Phila.*, 156 Pa. 554 (1893); *Blankenburg v. Black*, 200 Pa. 629 (1901).

objects previously affected by them will come under the effect of the general act, and so the whole progress will be toward uniformity.⁷⁶ If a law is passed applicable to an entire class of cities or counties, giving to all equal opportunities to accept by ordinance the benefit of the legislation, and applying to new members entering the class, the fact that some may accept and others may choose to continue temporarily under the old local law will not prevent the act from being construed to be general.⁷⁷

It has been held, however, that if the class to be affected is made up exclusively of those cities, counties, etc., which have voted or may vote to accept the law, and can apply to no others, then it is local and special. In the cases first mentioned equal opportunities are offered to all of a definitely ascertained and reasonably designated class and the tendency is toward uniformity. But a distinction is taken in cases where the class itself is confined to those who accept, for it is said we then have an attempted classification, depending not upon natural differences, but solely upon the arbitrary act of the objects to be affected. The distinction expressed in general terms is extremely difficult to see; the practical effect of the two situations seems to be the same. But in the cases cited in the note laws were under consideration which undoubtedly tended toward non-uniformity; the terms upon which cities or counties could enter the class and receive the benefits of the law were such that as a practical matter it was thought there would be great diversity among them. This, it was said, made the laws local.⁷⁸ The general expression that the "test is not results but possibilities" is made use of in several of the cases cited. The language of the court indicates that if the law permits of different

⁷⁶*Evans v. Phillippi*, 117 Pa. 226 (1887); *Nason v. Poor Directors*, 126 Pa. 445 (1889); *Com. v. Sellers*, 130 Pa. 32 (1889); *Road in Cheltenham Township*, 140 Pa. 136 (1891); *Bennett v. Hunt*, 148 Pa. 257 (1892); *Quinn v. Cumberland Co.*, 162 Pa. 55 (1894).

⁷⁷*Reading v. Savage*, 124 Pa. 328 (1889), overruling *Reading v. Savage*, 120 Pa. 198 (1888); *Meadville v. Dickson*, 129 Pa. 1 (1889); *Lehigh Valley Coal Co.'s Appeal*, 164 Pa. 44 (1894); *Philadelphia v. Reading Coal & Iron Co.'s Petitions*, 164 Pa. 248 (1894); *Middletown Road*, 15 Pa. Superior Ct. 167 (1900).

⁷⁸*Scranton School District's Appeal*, 113 Pa. 176 (1886); *Frost v. Cherry*, 122 Pa. 417 (1888); *Com. v. Reynolds*, 137 Pa. 389 (1890); *Com. v. Demcorth*, 145 Pa. 172 (1891).

systems in different cities or counties it is invalid. As a general proposition this is doubtful. If equal opportunities are offered to all, the fact that some accept and others do not is not a valid objection. The authority of this group of cases, except only as to the precise facts involved, must be accepted with reserve.

A general law, however, cannot be partially repealed, thus indirectly enacting a local law. This is expressly forbidden.

§24. *Clause Forbidding Local and Special Legislation as Applied to City Ordinances, etc.*—The section just discussed applies in terms to the Legislature only. Inasmuch as certain powers of legislation for local purposes are vested in the councils of cities and boroughs, the question arises as to whether they can pass ordinances for only a portion of the territory under their jurisdiction, or, whether by analogy to the prohibition of the Legislature from which their power is derived, they are obliged to pass general ordinances. We have a decision on the point by the Supreme Court deciding that the constitutional clause does not apply to boroughs, and that they are not therefore prohibited by it from passing ordinances which apply only to a part of the territory under their jurisdiction.⁷⁹

§25. *Notice of Intention to Pass Local Laws.*—It will be observed that not all local and special legislation is forbidden by the section under discussion, but only that on certain enumerated subjects. The following section (§8) recognizes this fact and provides that “no local or special bill shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall be at least thirty days prior to the introduction into the General Assembly of such bill, and in the manner to be provided by law; the evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed.”⁸⁰ The effect of dis-

⁷⁹*Klingler v. Bickel*, 117 Pa. 326 (1887).

⁸⁰The method of advertising, etc., is more fully set forth in the act of February 12, 1874, P. L. 43, as follows: “Section 1. Be it enacted, etc., That no local or special bill, either to repeal or enact a law, shall be passed by the Legislature, unless notice of the intention to apply therefor shall be published in the locality where the matter or thing to be affected may be situated, which notice shall state specifically the title and objects of the bill, and shall be published by not less than four insertions in at least two daily or weekly newspapers, one of which may be in a language other than English, once a week for four consecutive

obedience of this clause has been considered in two decisions of our Supreme Court. In *Perkins v. Phila.*, 156 Pa. 554 (1893), it was stated that if the law had been properly certified by the General Assembly and approved by the Governor the presumption that the proper proof of notice had been exhibited was conclusive, and the question could not be inquired into by the court. In *Chalfant v. Edwards*, 173 Pa. 246 (1896), it was admitted that no proper notice was given and the law was declared invalid *inter alia* for that reason. It thus appears that while failure to give notice, if admitted on the record, will invalidate the law, yet when there is no such admission and the law is properly certified, the presumption is conclusive that due notice was given and the court will not inquire into it. The court also decided in the latter case that a law repealing a local law is within the meaning of section 8, and must be published in the locality to be affected. This was said to be so, particularly where the repeal of one local law is to make way for another, as was the fact in the case at bar. This would seem to be a reasonable view, however, in any case, as the people of a particular locality are affected by the repeal just as much as by the enactment of a local law, and therefore are entitled to be notified and to have a hearing. Moreover, the act providing the manner of publication, as quoted above, expressly includes a bill to repeal a local law, and this provision would be binding at any rate until repealed by subsequent action of the Legislature.

weeks, printed in the county, or in each of the several counties, where such matter or thing to be affected may be situated; the first insertion to be at least thirty days prior to and within three months immediately preceding the introduction of such bill into the General Assembly, and he signed by at least one of the parties applying therefor: Provided, That the publication in one newspaper shall be deemed sufficient where but one is published in the county or counties aforesaid.

"Section 2. The evidence of the publication aforesaid shall be by attaching to a bill a copy or copies, as the case may be, of said notice, verified by the affidavit of the owner, publisher, editor or foreman of each of the several newspapers in which said notice is by this act required to be published, of due compliance with the preceding section.

"Section 3. That when such local or special bill shall affect any matter or things situated in any city or borough, said publication shall be in two of the newspapers published in said city or borough, if so many there be; and if there be but one a publication in that one shall be deemed sufficient; if there be no newspaper published in said city or borough, then, by publication in the newspaper or newspapers of the county in which said city or borough is located, as provided in the first section of this act."

CHAPTER XV.

MISCELLANEOUS LIMITATIONS OF THE LEGISLATIVE POWER.

1. *Extra Compensation After Services Rendered.*—There are certain other limitations of the legislative power which require notice. Most of them were passed in the effort to deprive the Legislature of power likely to be abused.

Section 11 of Article III provides: "No bill shall be passed giving any extra compensation to any public officer, servant, employee, agent or contractor after services shall have been rendered or contract made, nor providing for the payment of any claim against the commonwealth without previous authority of law."¹

§2. *Extension of Terms and Increase of Emoluments During Term of Service.*—The section just quoted should be considered in connection with section 13, Article III, which provides: "No law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment."

This clause was made necessary by the frequent exercise by the Legislature of their power to extend terms of office or to increase or diminish the emoluments of the office,² even during the term of the incumbent.

§3. *Meaning of "Law."*—Perhaps the first inquiry to be made is as to the meaning of the word "law" as here used. Is the clause to be construed to prohibit any increase or diminution of emoluments by ordinance of councils or by resolution of county commissioners, or otherwise, or does it mean to lay a prohibition on the Legislature only? The latter is the meaning which the courts have placed upon it. "Law" is construed to have reference only to acts passed by the General Assembly.

¹See *Edwards v. McLean*, 23 Pa. Superior Ct. 43 (1903).

²See the cases of *Barker v. Pittsburg*, 4 Pa. 49 (1846); *Com. v. McCombs*, 56 Pa. 436 (1867).

It follows that the term of an officer may be extended or his salary or other emolument increased during his term if said action is taken by ordinance of city councils,³ by resolution of commissioners or auditors,⁴ or by the action of the courts of law.⁵

The emoluments of a public officer cannot, however, be diminished by the increase of population of the city or county in which he serves, so as to bring him within the operation of a law previously enacted. In *Guldin v. Schuylkill Co.*, 149 Pa. 210 (1892), it appeared that a coroner of Schuylkill County had been elected at a time when the county, by the last census, had a population less than 150,000 inhabitants, so that he was paid by fees. Shortly after his election the new census reports placed the county in the class of those of over 150,000 inhabitants. In the event of the new compilation being applicable to him there would be a diminution of his emoluments. He objected to being made subject to the new conditions, claiming that the new census could not constitutionally affect him any more than could a law actually passed after his incumbency began. The court adopted his view, and his fees continued.⁶

§4. *Meaning of "Public Officer."*—The next question is the meaning of the term "public officer." Does it include all public officeholders of any kind whatever or only certain ones appointed in a particular way? It is apparent that the term cannot be held to apply to all officers without discrimination. There are numerous small officeholders appointed by local authorities in every city and borough who are clearly not within the protection of the clause in question. For example, in *Bigley v. Bellevue Borough*, 158 Pa. 495 (1893), the "high constable" of the borough claimed that he could not be deprived of his emoluments during his term of office, his theory being that he was a public officer within the meaning of the clause of the constitution under discussion. His contention was not

³*Baldwin v. City of Philadelphia*, 99 Pa. 164 (1881); *County of Crawford v. Nash*, 99 Pa. 253 (1881).

⁴*Mervine v. Monroe Co.*, 141 Pa. 162 (1891).

⁵*Peeling v. County of York*, 113 Pa. 108 (1886); *McCormick v. Fayette Co.*, 150 Pa. 190 (1892).

⁶See also *Com. v. Comrey*, 149 Pa. 216 (1892); *Lewis v. Lackawanna Co.*, 200 Pa. 590 (1901).

upheld, the court saying that the constitution evidently had reference to officers of a different character.

It seems reasonable to suppose that the "officers" contemplated by the clause in question are those whose offices were created or at least preserved by the constitution itself, and this is the true view. Those incumbents of offices created by new legislation since the adoption of the constitution are not within its protection. Such offices may be abolished or the emoluments thereof increased or decreased during the term of service.⁷

§5. *Compensation of Judges.*—The question as to whether judges are "public officers" within the meaning of this clause has claimed very considerable attention, by reason of the passage of the judicial salary law of April 14, 1903, P. L. 175, increasing the emoluments of the judges all over the state. It was argued that while the law might apply to judges appointed or elected since its passage, it could not affect those already in office at the time of its enactment. On the other hand, attention was called to section 18 of Article V, which provides: "The judges of the Supreme Court and the judges of the several courts of common pleas, and all other judges required to be learned in the law, shall at stated times receive for their services an adequate compensation, which shall be fixed by law and paid by the state. They shall receive no other compensation, fees or perquisites of office, for their services, from any source, nor hold any other office of profit under the United States, this state, or any other state." This section, it was argued, excluded the application of the preceding because it applied specifically to judges; it required that they be given an adequate compensation, and as the Legislature had determined their salaries to be inadequate, as was shown by its increase of them, the new law should be held to apply to all judges, even if in office at the date of its passage. It was also argued that from early times the compensation of judges had been provided by special provisions not relating to other

⁷*Com. v. Weir*, 165 Pa. 284 (1895). See also *Com. v. Bacon*, 6 Serg. and Rawle, 320 (1820); *Barker v. City of Pittsburg*, 4 Pa. 49 (1846); *Com. v. McCombs*, 56 Pa. 436 (1867); *Donohugh v. Roberts*, 15 Phila. 144 (1881); *Lloyd v. Smith*, 176 Pa. 213 (1896); *Com. v. Gamble*, 62 Pa. 343 (1869); *Reid v. Smoulter, Jr.*, 128 Pa. 324 (1889).

officers,⁸ and that presumably such was the arrangement under the new constitution. In *Com. v. Mathues*, 210 Pa. 372 (1904), the question was carefully considered, and the court came to the conclusion that the section relating to the compensation of judges is exclusive of that which prohibits the increase or diminution of the emoluments of a public officer during his term of office. The decision was placed principally upon the ground that the clause relating to the compensation of public officers was placed in and had to do with the legislative department of government; it should not, therefore, be construed to affect officers of a co-ordinate department of government, the judiciary, in view of the fact that another clause of the constitution regulated the compensation of officers of that department. It is settled, therefore, that the Legislature may constitutionally increase the salary of judges during their terms of office. This conclusion is wise and just. While it is proper to prohibit either increase or diminution of ordinary short term officers during their terms of service, the judiciary stand upon an entirely different footing because of their longer terms. It is highly probable that during one such term economic conditions may so change as to render inadequate what was before adequate. The only unfortunate feature of the case is that as now construed the constitution does not prevent the diminution of the compensation of judges. To permanently secure the independence of the judiciary, there should be a provision guaranteeing to them the same emoluments, but not preventing an increase of them during their terms of service.

§6. "*Emoluments*" Defined.—The next question which requires attention is as to the meaning of "emoluments." The word "salary" is clear in meaning, but "emoluments" is a more comprehensive term and may include sums paid which could not be construed as salary. It has been held to comprehend any sums whatever paid as compensation for services regular or special, and to be of much broader meaning than "salary." In *Apple v. Crawford Co.*, 105 Pa. 300 (1884), in which sums paid to the sheriff for the board of prisoners were construed to constitute "emoluments," Mr. Justice Green said: "The boarding of the prisoners was certainly one of his official duties

⁸*Com. v. Mann*, 5 W. & S. 403 (1843).

imposed upon him by law. For the performance of this duty he was entitled to receive a compensation which was definitely fixed by law at the time of his election. While this compensation could hardly be called a salary, it seems to us that it is included within the larger and broader term 'emolument.' In Webster's Unabridged Dictionary the word 'emolument' is thus defined: 'The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office, as salary, fees and perquisites; advantage; gain, public or private.' We think the word imports more than the word salary or fees, and because it is contained in the constitution in addition to the word 'salary' we ought to give it the meaning which it bears in ordinary acceptance."⁹

§7. *Stationery, Fuel, etc.*—Section 12 of Article III makes a rather elaborate provision for the purchase of stationery, fuel, etc., as follows: "All stationery, printing, paper and fuel used in the legislative and other departments of government shall be furnished, and the printing, binding and distributing of the laws, journals, department reports and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price and under such regulations as shall be prescribed by law. No member or officer of any department of the government shall be in any way interested in such contracts, and all such contracts shall be subject to the approval of the Governor, Auditor General and State Treasurer." Such a clause really has no place in a constitution, which is a body of fundamental law establishing a system of government. Provisions of this character are usually found in statutes. Its presence in our constitution is explainable because of the desire previously referred to on the part of the members of the constitutional convention to eliminate all opportunity for "jobbery."

§8. *Special Commissions not to Interfere with Municipal*

⁹See also *Peeling v. Co. of York*, 113 Pa. 108 (1886); *McCormick v. Fayette Co.*, 150 Pa. 190 (1892).

Functions.—Section 20 of Article III provides: “The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.” This section needs no explanation further than to say that it was enacted for the purpose of limiting the interference by the Legislature with local matters which ought normally to be managed by local authorities. The clause is prospective only.¹⁰

§9. *Damages for Personal Injuries.*—Prior to 1873 certain statutes had been in force limiting the amount of damages which could be recovered for personal injuries. It was suspected that such statutes had been procured through the influence of certain powerful corporations, and the convention determined to put an end to such practices. Accordingly, we have section 21, Article III, which provides that “No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death or for injuries to person or property.” This provision is construed to apply to such laws in force at the date of the constitution and to abrogate them.¹¹

§10. *Right of Action to Survive.*—The following sentence in the clause just considered provides “and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted.” This is nothing more than the provisions which are laid down in most states by legislation. It has the advantage, however, of not being subject to repeal. It does not mean that the liability shall survive,¹² but has reference only to the right of action.¹³

§11. *Limitation of Actions Against Corporations.*—The

¹⁰*Perkins v. Slack*, 86 Pa. 270 (1878). See also *Perkins v. Philadelphia*, 156 Pa. 554 (1893), where a law delegating certain powers to the public building commission of Philadelphia was declared unconstitutional, and *Porter v. Shields*, 200 Pa. 241 (1901).

¹¹*Central Railroad Co. v. Cook*, 32 Legal Intelligencer, 150 (1875); *Lombard & South St. Railway Co. v. Steinhart*, 2 Penny. 358 (1882); *Lewis v. Hollahan*, 103 Pa. 425 (1883); *Pennsylvania Railroad Co. v. Bowers*, 124 Pa. 183 (1889).

¹²*Moe v. Smiley*, 125 Pa. 136 (1889).

¹³See *Books v. Danville Borough*, 95 Pa. 158 (1880), construing sundry acts of Assembly relating to this subject.

last clause in the same section¹⁴ provides: "No act shall prescribe any limitation of time within which suits may be brought against corporations for injuries to persons or property, or for other causes, different from those fixed by general laws regulating actions against natural persons, and such acts, now existing, are avoided."

There are two possible views as to the meaning of this provision. It might be construed to mean that a special limitation act relating to cases against corporations should be abrogated only when the general act of limitation applied to an exactly similar case against a natural person, or it might be construed to mean that all special limitation acts relating to actions against corporations should be abrogated and that the general limitation acts should apply. The latter construction seems to have been adopted by the courts. In *Grape Street*, 103 Pa. 121 (1883), it was held that an act limiting to one year suits against municipal corporations for damages occasioned by the vacation of streets was nullified by the constitutional provision under discussion, although under no circumstances could a suit be brought against a private person for damages so occasioned. The court must have interpreted the constitution to mean that all suits against corporations shall be subject to the six-year limitation rule, whether such suits were formerly within the scope of the general limitation law or not. Under this decision the constitution has the effect of extending the said limitation act to include cases such as the vacation of streets, not formerly within its scope. If it does not have this effect, but merely destroys the special limitation acts, the right of action in such cases, not within the meaning of the general limitation acts, is left without any limitation at all. This point was brought out in the case of *Butler St.*, 25 Pa. Superior Court, 357 (1904), in which precisely this contention was made, to wit: that the special act limiting to one year suits for damages for vacation of streets being abrogated, and the general act of limitations of March 27, 1713, not in its nature applying, there was no limitation at all. The court did not explicitly say whether they construed the act of 1713 to be

¹⁴Article III, §21.

extended by the constitution to cover the case of the vacation of streets, or the special one-year act to be still in force, but said that the plaintiff must fall on one or the other of these dilemmas and hence must lose. The assumption of *Grape Street* that the one-year limitation law was abrogated depended, said they, upon a supposed conflict between it and the act of 1713, which could only exist if the act of 1713 applied to the case. But if there was no such conflict, then the one-year rule was still in force, and in either case the plaintiff could not win.

It is doubtful whether *Grape Street* is law. If, as intimated in *Butler Street*, the abrogation of the special laws depends upon an actual conflict between them and the general limitation acts applying to natural persons, then it may well be doubted whether the one-year rule in the case of vacation of streets is not still in force. It is difficult to understand how the constitutional clause under discussion can be construed to extend the meaning of the general acts of limitation.

§12. *Investment of Trust Funds*.—Section 22 of Article III provides: "No act of the General Assembly shall authorize the investment of trust funds by executors, administrators, guardians, or other trustees, in the bonds or stock of any private corporation, and such acts now existing are avoided, saving investments heretofore made." The section is self-explanatory. No decisions have been rendered concerning it.

§13. *Obligation of Railroads, etc., Not to be Released*.—Section 24, Article III, provides: "No obligation or liability of any railroad or other corporation, held or owned by the commonwealth, shall ever be exchanged, transferred, remitted, postponed or in any way diminished by the General Assembly; nor shall such liability or obligation be released except by payment thereof into the state treasury." This was agreed to almost without debate. It was enacted for the evident purpose of preventing the Legislature from granting improper favors to railroad or other corporations at the expense of the state.

§14. *State Inspectors*.—Section 27, Article III, provides: "No state office shall be continued or created for the inspection or measuring of any merchandise, manufacture, or commodity; but any county or municipality may appoint such officers when authorized by law." This was intended to guar-

antee the entire control of such matters to the local authorities. The section is retroactive.¹⁵

§15. *Location of State Capital.*—Section 28, Article III, which needs no explanation, provides that “No law changing the location of the capital of the state shall be valid until the same shall have been submitted to the qualified electors of the commonwealth, at a general election, and ratified and approved by them.”

§16. *Appropriation Bills, etc.*—There are several clauses relating to revenue and appropriations in the constitution and certain limitations relative thereto which are imposed upon the General Assembly. The first relates to the bills for raising revenue generally and provides: “All bills for raising revenue shall originate in the house of representatives, but the senate may propose amendments, as in other bills.”¹⁶

This clause is followed by directions as to the contents of the “General Appropriation Bill.” It is provided that “The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the commonwealth, interest on the public debt, and for public schools; all other appropriations shall be made by separate bills, each embracing but one subject.”¹⁷ This section should be considered in connection with §16 of Art. IV, which provides: “The Governor shall have power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void, unless re-passed according to the rules and limitations prescribed for the passage of other bills over the executive veto.”¹⁸ The scope and meaning of these two provisions is well explained by Mr. Justice Mitchell in *Com. v. Gregg*, 161 Pa. 582 (1894). He says: “The only provision invoked here is section 15 of Article III, ‘the general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative

¹⁵*Elton v. Geissert*, 10 Phila. 330 (1875).

¹⁶Art. III, §14.

¹⁷Art. III, §15.

¹⁸For discussion of the Governor's veto of items in the appropriation bill see Chapter XVI, The Executive.

and judicial departments of the commonwealth,' etc. The history and purpose of that section are well known. It was aimed at the objectionable practice of putting a measure of doubtful strength on its own merits, into the general appropriation bill, in legislative phrase, tacking it on as a rider, in order to compel members to vote for it or bring the wheels of government to a stop. The same constitutional intent is embodied in section 16 of Article IV, giving the Governor power to disapprove separate items of appropriation bills. It is the practice of thus forcing the passage of extraneous matters not germane to the purpose of the bill itself that was intended to be abolished. As to general legislation, the same object, among others, was secured by the provision of section 2 of Article III, that 'no bill, except general appropriation bills, shall be passed, containing more than one subject.' General appropriation bills from their nature usually cover a number of items, not all relating strictly to one subject. They were, therefore, excepted from the requirement of section 2, and this exception necessitated the special section 15 relating to them. The object of both is the same."

Section 16 of Article III further provides that "No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof," which is a usual safeguard against improper expenditures.

§17. *Appropriations for Charity, etc.*—Certain abuses of a very flagrant character having crept into the practice of making large appropriations to real or alleged charitable or educational institutions, it being charged that there was a regular system of bribery by division of the appropriations, the entire matter was regulated by the constitution as follows: "No appropriation shall be made to any charitable or educational institution not under the absolute control of the commonwealth, other than normal schools established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house."¹⁹ "No appropriations (except for pensions or gratuities for military services) shall be made for charitable, educational or benevolent purposes to any person or community, nor

¹⁹Art. III, §17.

to any denominational or sectarian institution, corporation, or association."²⁰ "The General Assembly may make appropriations of money to institutions wherein the widows of soldiers are supported or assisted, or the orphans of soldiers are maintained and educated; but such appropriations shall be applied exclusively to the support of such widows and orphans."²¹

The obvious purpose of these sections was to destroy the iniquitous practices above referred to by forbidding any such appropriations except those to state institutions or such others as it was thought should be excepted from the general rule.

²⁰Art. III, §18.

²¹Art. III, §19.

CHAPTER XVI.

THE EXECUTIVE.

§1. *Legislative and Executive Departments Distinguished.*—"The executive department of this commonwealth shall consist of a Governor, Lieutenant Governor, Secretary of the Commonwealth, Attorney General, Auditor General, State Treasurer, Secretary of Internal Affairs, and a Superintendent of Public Instruction."¹

As the Legislature and Executive constitute two separate co-ordinate departments of government, neither is at liberty to encroach upon the other. The Legislature is to make the laws and the Executive is to execute them. At the same time it must be admitted that by virtue of its authority to originate rules of conduct the Legislature, if not superior in rank to the other departments, stands in a somewhat more advantageous position. It may not encroach upon the Executive, but it may to a certain extent prescribe the duties it is to perform, and may even regulate the manner of performing those duties expressly committed to the Executive by the constitution itself. The Legislature cannot, however, either detract from or add to the powers and functions delegated to the executive department by the constitution.

§2. *Executive Not Subject to Control of Judiciary.*—The question as to how far the executive department is subject to the control of the judiciary is a matter of some difficulty. As it is the duty of the judiciary to judge of the validity and meaning of the laws, and to determine the legality or illegality of the actions of official persons, it not infrequently becomes necessary for the courts to review and pass judgment upon the acts of the Executive.

The courts may restrain the enforcement of an unconstitutional statute or other threatened and clearly illegal action, and in so doing can resort to the usual process for the enforcement

¹Art. IV, §1. Until 1790 there was no governor, the executive power being exercised by a president and council. Const. of 1776, Chap. II, §3.

of their decrees. In such cases the action of the executive officer, if persisted in, would be illegal and himself a wrong-doer. The court in restraining him will be acting upon him as an individual and not as an officer of the state, for no officer has the power to do an illegal thing. When he steps outside of his authority he ceases to be a representative of the state and becomes a mere individual wrong-doer; and as such can be dealt with by the courts.

The same principle applies in cases where an executive officer has committed a crime in his personal capacity. He is not above the law, and may be tried and sentenced as may any other malefactor.

But it is quite different in those cases where the alleged illegal act is done by the Governor or some other executive officer in the exercise of his official discretion. If the Governor, for example, is given the power to call upon the military forces to suppress a riot, he is necessarily the sole judge of the necessity for military assistance. He and his subordinates are the sole judges of the necessary steps to be taken to suppress the riot. It follows that the courts will not undertake to examine into the necessity of such acts, even if performed by a subordinate, unless there has been a palpable disobedience of orders or a total disregard of private rights,² nor have they the power to inquire into the manner in which the Governor and his subordinates have discharged their duties. As the executive department cannot control the courts or interfere with the discharge of their duties, neither can the courts exercise a similar control over the executive department.

§3. *Power of Courts to Summon Executive Officers as Witnesses.*—Although the courts cannot interfere with the Executive in the discharge of his duties, the question arises whether, in cases pending before them, they have the power to call upon the Executive or his subordinates to testify before them where the evidence required would relate to the work of the executive department. In *Hartranft's Appeal*, 85 Pa. 433 (1877), the Governor of Pennsylvania and certain of his subordinate officers were summoned by the court of quarter sessions

²See *Com. v. Shortall*, 206 Pa. 165 (1903).

of Allegheny County to testify before the grand jury. The matter about which the inquiry was to be made had reference to certain acts which had been done in the suppression of a riot. Had the Executive obeyed the subpœna, he would have testified concerning the means used by him in the suppression of these riots. The Governor refused to obey the subpœna, and instructed his subordinates to do the same. It was decided that he was within his rights in so doing. He was held to be the absolute judge of the acts which he had done in the exercise of his discretion and as to whether or not the considerations of the public welfare justified him in refusing to obey the process of the courts. "The supreme executive power is vested in the Governor and he is charged with the faithful execution of the laws, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy and militia of the state. Who then shall assume the power of the people and call this magistrate to an account for that which he has done in discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where does the court of quarter sessions, or any other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander-in-chief of the militia of the commonwealth? For it certainly is a logical sequence that if the Governor can be compelled to reveal the means used to accomplish a given act, he can also be compelled to answer for the manner of accomplishing such act. If the court of quarter sessions of Allegheny County can shut him up in prison for refusing to appear before it and reveal the methods and means used by him to execute the laws and suppress domestic violence, why may it not commit him for a breach of the peace, or for homicide, resulting from the discharge of his duties as commander-in-chief? And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals; such an one may be compelled to answer, to account and to act. In other words, if, from such analogy, we once begin to shift the supreme executive power, from him upon whom the constitution has conferred it, to the judiciary, we may as well do the work thoroughly and

constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better at the outstart recognize the fact that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere than has the Executive, under like conditions, to interfere with the courts."

As the chief magistrate of the state cannot be compelled to appear and testify concerning matters which he deems the public welfare requires him to keep secret, neither can he be compelled to produce papers which for similar reasons he desires to withhold. In *Gray v. Pentland*, 2 Sergeant and Rawle, 23 (1815), the Governor of the state was held to be justified in refusing to obey a subpoena *duces tecum*, calling for the production of an alleged libelous communication. Mr. Chief Justice Tilghman said: "It is matter of very delicate concern to compel the chief magistrate of the state to produce a paper which may have been addressed to him in confidence, that it should be kept secret. Many will be deterred from giving to the Governor that information which is necessary, if they are to do it at the hazard of an action, and of all the consequences flowing from the enmity of the accused. It would seem reasonable, therefore, that the Governor, who best knows the circumstances under which the charge has been exhibited to him, and can best judge of the motives of the accuser, should exercise his own judgment with respect to the propriety of producing the writing."

§4. *The Governor. His Election.*—Section 2 of Article IV vests the supreme executive power in the Governor and provides for his election in the following manner: "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed. He shall be chosen on the day of the general election by the qualified electors of the commonwealth at the places where they shall vote for representatives. The returns of every election for Governor shall be sealed up and transmitted to the seat of government,

directed to the president of the senate, who shall open and publish them in the presence of the members of both houses of the General Assembly. The person having the highest number of votes shall be Governor, but if two or more be equal and highest in votes, one of them shall be chosen Governor by the joint vote of the members of both houses. Contested elections shall be determined by a committee to be selected from both houses of the General Assembly, and formed and regulated in such manner as shall be directed by law.”³

§5. *Term of Office.*—Section 3, Article IV, provides: “The Governor shall hold his office during four years, from the third Tuesday of January next ensuing his election, and shall not be eligible to the office for the next succeeding term.”⁴

By Section 17 of Article IV it is further provided that the Governor shall exercise the duties of the office until his successor is duly qualified.

§6. *The Lieutenant Governor.*—“A Lieutenant Governor shall be chosen at the same time, in the same manner, for the same term, and subject to the same provisions as the Governor. He shall be president of the senate, but shall have no vote unless they be equally divided.”⁵

§7. *Qualifications of Governor and Lieutenant Governor.*—“No person shall be eligible to the office of Governor or Lieutenant Governor, except a citizen of the United States, who shall have attained the age of thirty years, and have been seven years next preceding his election an inhabitant of the State, unless he shall have been absent on the public business of the United States or of this state.”⁶

“No member of Congress, or person holding any office under the United States or this state, shall exercise the office of Governor or Lieutenant Governor.”⁷

§8. *Governor to be Commander-in-Chief of Army and Navy and to have Certain Powers of Appointment.*—“The

³See Const. of 1776, Chap. II, §20; Const. of 1790, Art. II, §§1, 2, 13.

⁴Under the Const. of 1790 the term of the Governor was three years, and he was eligible for re-election only twice in twelve years, Const. of 1790, Art. II, §3. By the amendment of 1838, Art. II, §3, he was eligible to re-election only twice in nine years.

⁵Art. IV, §4.

⁶Art. IV, §5.

⁷Art. IV, §6.

Governor shall be commander-in-chief of the army and navy of the commonwealth, and of the militia, except when they shall be called into the actual service of the United States.”⁸ “He shall nominate, and by and with the advice and consent of two-thirds of all the members of the senate, appoint a Secretary of the Commonwealth and an Attorney General, during pleasure, a Superintendent of Public Instruction for four years, and such other officers of the commonwealth as he is or may be authorized by the constitution or by law to appoint.”⁹

The Governor’s power of appointment is limited to those officers which he is expressly authorized to appoint by the constitution or which he has been given the power to appoint by statutes.¹⁰ Prior to 1850 he had power to appoint the judges, but an amendment to the constitution approved in 1850 made judgeships in courts of record elective officers.¹¹ The power of appointment is exclusively vested in the Governor, and the senate has merely a restraining power which it may exercise by refusing to approve persons that have been nominated by the executive.¹²

§9. *Power to Fill Vacancies.*—In addition to his power to regularly appoint certain officers, the Governor is also given authority to fill vacancies. “He shall have power to fill all vacancies that may happen in offices to which he may appoint, during the recess of the senate, by granting commissions which shall expire at the end of their next session. He shall have power to fill any vacancy that may happen during the recess of the senate, in the office of Auditor General, State Treasurer, Secretary of Internal Affairs, or Superintendent of Public Instruction, in a judicial office, or in any other elective office which he is or may be authorized to fill; if the vacancy shall happen

⁸Art. 4, §7. As to when the militia is in “actual service” see *Nat’l Guard Expenses*, 20 Pa. C. C. 558 (1898)

⁹Art. IV, §8.

¹⁰*Com. v. Callen*, 101 Pa. 375 (1882).

¹¹Art. V, §2. The provisions in the earlier constitutions relating to the Governor’s power of appointment are to be found in the Const. of 1790, Art. II, §8; amendment of 1838, Art. II, §8; see also Const. of 1776, Chap. II, §20.

¹²It must appear, however, in any case that the office is vacant when the appointment is made. The executive cannot appoint an officer to fill an office in which there is an incumbent at the time of appointment. *Com. v. Sutherland*, 3 Sergeant and Rawle, 144 (1817).

during the session of the senate, the Governor shall nominate to the senate before their final adjournment a proper person to fill said vacancy, but in any such case of vacancy in an elective office a person shall be chosen to said office at the next general election unless the vacancy shall happen within three calendar months immediately preceding such election, in which case the election for said office shall be held at the second succeeding general election. In acting on executive nominations the senate shall sit with open doors, and in confirming or rejecting the nominations of the Governor, the vote shall be taken by yeas and nays, and shall be entered on the journal."¹³

There are two classes of vacancies which the Governor may fill by appointment; those occurring in offices to which he has the power to appoint and those occurring in offices which are elective. In the former case his appointment stands until the senate has an opportunity to confirm it or reject it; in the latter case, until a suitable opportunity occurs for an election by the people.¹⁴

§10. *What Constitutes a Vacancy.*—The first question relative to this section is the meaning of the word "vacancy." Ordinarily speaking, a vacancy is created by the resignation, death or removal of the incumbent of the office. Does it have reference exclusively to cases where an office has been filled by an incumbent who is thus removed before the end of his term, or does it also include cases where the office is created and no person has been appointed or elected to fill it? This question was raised in the case of *Walsh v. Com.*, 89 Pa. 419 (1879). It appeared that a new county had been erected and that the Governor had appointed persons to fill the offices in said county, assuming to do so under his authority to fill vacancies. The court decided that a vacancy existed in the office within the meaning of the constitution. In the course of its opinion, the court said: "To be 'vacant,' in its primary sense, is 'to be deprived of contents; empty; not filled.' The first definition of 'vacancy' is 'the quality of being vacant; emptiness.' The words 'vacant lands,' so familiar in the Pennsylvania courts, convey as to description of subject-matter, the precise idea

¹³Art. 4, §8.

¹⁴*Com. v. Waller, Jr.*, 145 Pa. 235 (1892). As to the Governor's power to appoint a United States Senator see p. 206.

which Cæsar conveyed in explaining the public policy of the Suevi. Surrounding their own territories they desired, to as wide an extent as possible, *vacare agros*. De Gal. IV, 3. Usage has warranted the employment of these words in an enlarged and broader sense, but the primary and strictly grammatical meaning which they still retain is identical with their exclusive original signification. The result is that the word 'vacancy' aptly and fitly describes the condition of an office when it is first created and has been filled by no incumbent. The need to strain and torture terms would lie in the opposite direction."

It must appear, however, that there is an actual vacancy before the Governor may appoint. Therefore, if the office is filled, even though by an officer whom the Governor has unsuccessfully endeavored to remove, he cannot appoint any successor.¹⁵ If a person who has been elected to fill an office dies before he qualifies, this does not constitute a vacancy. He has never been in office, nor was the office made vacant by his death, because at that time it was occupied by his predecessor whose term had not yet expired. If, in such a case, the retiring officer is by law authorized to hold until his successor is duly qualified, there can be no appointment by the Governor; the old officer will hold over until a new election can be held.¹⁶

§11. *Terms for Which Appointments May be Made.*—As has already been suggested, the Governor's power to fill vacancies is applicable to two classes of offices; those which are elective and those which are appointive. He could fill appointive offices in the absence of any clause giving him authority to fill vacancies, were it not for the fact that his power to appoint is by and with the consent of the senate. As during some portion of his term the senate is not in session, it was necessary for the Governor to be given the power to make appointments during the recess of the Senate. The terms for which these appointments can be made are limited to such times as the senate can conveniently confirm or reject them. It is, therefore, provided that the appointees shall hold their commissions only until the end of the next session of the Senate. If the vacancy occurs, however, during the session of the Senate

¹⁵*Com. v. Sutherland*, 3 Sergeant and Rawle, 144 (1817).

¹⁶*Com. v. Hanley*, 9 Pa. 513 (1848).

and an appointment is made and confirmed, the appointee is then entitled to hold until the end of the term, for which his predecessor was originally appointed.¹⁷ This is also the case where an appointment made during the recess is subsequently confirmed.

The terms of officers appointed to fill elective offices rest upon a different basis. The office, being elective, the people should have an opportunity, at the next convenient time, to elect a successor to the one who has ceased to occupy the office. A sufficient length of time, however, should elapse between the creation of the vacancy and the date of the election, so that there may be ample time for the selection of a candidate. The constitution, therefore, provides that when a vacancy occurs more than three calendar months before the next general election, the appointee shall hold office only until such election, when his successor shall be elected. On the other hand, if the vacancy occurs within three months of the next general election, too short time intervening for the proper selection of candidates, the appointee shall hold until the second general election. If, however, the next general election following the happening of the vacancy is the regular time for the election of a successor to the late incumbent of the office, the reason for the rule, and, therefore, the rule itself, does not apply. In *Com. v. King*, 85 Pa. 103 (1877), the sheriff of a county died within three months of the end of his term. The Governor having appointed a person to fill the vacancy, it was contended that a successor could not be elected at the next general election, but that the appointee of the Governor was entitled to hold over until the second general election. The court, however, denied the contention for reasons which are clear. As the approaching election was the regular time for the election of the officer, the selection of a candidate must already have been in contemplation when the incumbent died.

As the constitution refers to a "general election" in this connection, the happening of a vacancy in an office to be filled at a spring election may be filled at said election, even though it occurs within three months thereof. This was decided in *Com. v. Callen*, 101 Pa. 375 (1882). The court said it was

¹⁷*Com. v. Waller, Jr.*, 145 Pa. 235 (1891).

not the intention of the constitution to guarantee three months time for the selection of candidates in cities, wards, boroughs or townships. A less time was thought to be sufficient for the selection of such officers.¹⁸

§12. *Pardoning Power.*—The pardoning power of the Governor is thus provided for: "He shall have power to remit fines and forfeitures, to grant reprieves, commutations of sentence and pardons, except in cases of impeachment; but no pardon shall be granted, nor sentence commuted, except upon the recommendation in writing of the Lieutenant Governor, Secretary of the Commonwealth, Attorney General and Secretary of Internal Affairs, or any three of them, after full hearing, upon due public notice, and in open session; and such recommendation, with the reasons therefor, at length, shall be recorded and filed in the office of the Secretary of the Commonwealth."¹⁹ Although it has been said by some writers²⁰ that the power to pardon should not exist where the laws are properly administered and punishments fit the crimes, yet the pardoning power is universally recognized to be a necessary function of the chief magistrate of the state. "The criminal code of every country partakes of so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt justice would assume an aspect too sanguinary and cruel."²¹ The Governor's power to pardon offenses upon proper recommendation is unexceptional, and the pardon granted by him must be accepted by the court having custody of the prisoner as having been properly made and upon good and sufficient grounds. In *Hester v. Com.*, 85 Pa. 139 (1877), it was alleged that the pardon was irregular in form and that the judges of a court of oyer and terminer might set aside the Governor's order and decline to discharge the prisoner. The Supreme Court, however, decided that this could not be. The court of oyer and terminer was bound to accept the pardon as the deliberate act of the Governor and to act accordingly. In *Com. v. Ahl*, 43

¹⁸As to the construction of the schedule of the Constitution of 1838, relating to vacancies in office, see *Com. v. Swift*, 4 Wharton, 186 (1838).

¹⁹Art. IV, §9. The pardoning power of the Executive has been substantially the same since the charter of William Penn. See Royal Charter, §5; Const. of 1776, Chap. II, §20; Const. of 1790, Art. II, §9.

²⁰See Marquis Beccaria, Chap. 46.

²¹Story on the Constitution, §1498.

Pa. 53 (1862), it was alleged that a pardon exhibited by the prisoner had been obtained by fraud. The Supreme Court decided that the court of quarter sessions should not have disregarded the pardon, and were without power to inquire into the question as to whether or not the Governor had acted upon false information. In this case the pardon did not bear upon its face the evidence of having been procured by fraud; whether the court could have inquired into the matter had such fraud appeared was not decided.

The Governor's power to remit fines and forfeitures extends to all cases except those in which the fine is payable in part to a private person. In such case it cannot be remitted, because this would be depriving this individual of his property without due process of law. The fines and penalties which he may remit are those only which are payable to the state.²² A full pardon carries with it not only a remission of punishment, but also a release of fines;²³ but a pardon after sentence does not release the prisoner from the obligation to pay the costs.²⁴ A pardon which is pleaded before sentence, however, will release the prisoner of the costs.²⁵ By virtue of his power to remit forfeitures, the Governor may remit a recognizance, even though judgment in favor of the county has been entered upon it.²⁶

§13. *Power to Require and Duty to Give Information.*—

The Governor's power and duties with regard to requiring and furnishing information which relates to the state of the commonwealth are as follows: "He may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices."²⁷ "He shall, from time to time, give to the General Assembly information of the state of the commonwealth, and recommend to their consid-

²²*Shoop v. Com.*, 3 Pa. 126 (1846). See also *Com. v. Denniston*, 9 Watts, 142 (1839).

²³*Cope v. Com.*, 28 Pa. 297 (1857). See also *Com. v. Denniston*, 9 Watts, 142 (1839).

²⁴*Ex parte McDonald*, 2 Wharton, 440 (1837); *County of Schuylkill v. Reifsnyder*, 46 Pa. 446 (1864).

²⁵*Com. v. Hitchman*, 46 Pa. 357 (1863). See also *Com. v. Ahl*, 43 Pa. 53 (1862).

²⁶*Com. v. Denniston*, 9 Watts, 142 (1839).

²⁷Art. IV, §10.

eration such measures as he may judge expedient.”²⁸ The latter section has reference to the Governor’s messages which he sends to the General Assembly from time to time. Somewhat similar provisions were contained in the earlier constitutions.²⁹

§14. *Power to Convene the General Assembly and Adjourn the Two Houses, etc.*—Section 12 of Article IV provides as follows: “He may, on extraordinary occasions, convene the General Assembly, and in case of disagreement between the two houses, with respect to the time of adjournment, adjourn them to such time as he shall think proper, not exceeding four months. He shall have power to convene the senate in extraordinary session, by proclamation, for the transaction of executive business.” The power to convene the legislative body in extraordinary sessions is one universally conceded to be necessary for the Executive of the state to possess. Occasions necessarily will arise when the safety of the commonwealth requires immediate action. The power to adjourn the two houses is not less important, for occasions sometimes arise where this is the only peaceable way to terminate a controversy.

§15. *Legislation at Special Session Limited by Call of the Governor.*—Section 25, Article III, provides: “When the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session.”

The only question of interpretation likely to arise under this section is as to whether the Governor, having issued his call and having designated certain subjects upon which legislation may be enacted, can legally thereafter issue a supplemental proclamation naming other subjects, or perhaps indicate others in his message concerning which laws may be passed. Mr. Buckalew intimates it to be his opinion that the latter at least cannot be done.³⁰ Governor Pennypacker did issue a supplemental call after his first summons had gone out for the special session of 1906, naming other subjects upon which laws were subsequently enacted at such session. The validity of his action has not yet been tested in the courts. It is not believed, however, that it can be successfully assailed. To hold it illegal would deprive

²⁸Art. IV, §11.

²⁹See Const. of 1776, Chap II, §20; Const. of 1790, Art. II, §11.

³⁰Constitution of Pa., p. 93.

the state of the protection which the constitution meant it to have, that resulting from the power of the Governor to summon an extra session whenever public exigency may require it. If after issuing his original summons the Governor could not add to it prior to the convening of the General Assembly, there would, for practical purposes, be a period when, no matter how great the need, prompt legislative relief could not be had. It can hardly be supposed that this is the true interpretation of the section.

§16. *Succession of Officers.*—Provisions for the succession of officers upon the death of the Governor, Lieutenant Governor, etc., are contained in Sections 13 and 14 of Article IV. "In case of the death, conviction or impeachment, failure to qualify, resignation, or other disability of the Governor, the powers, duties and emoluments of the office, for the remainder of the term, or until the disability be removed, shall devolve upon the Lieutenant Governor." "In case of a vacancy in the office of Lieutenant Governor, or when the Lieutenant Governor shall be impeached by the house of representatives, or shall be unable to exercise the duties of his office, the powers, duties, and emoluments thereof, for the remainder of the term, or until the disability be removed, shall devolve upon the president *pro tempore* of the senate; and the president *pro tempore* of the senate shall, in like manner, become Governor, if a vacancy or disability shall occur in the office of Governor; his seat as senator shall become vacant whenever he shall become Governor, and shall be filled by election, as any other vacancy in the senate."

§17. *The Veto Power.*—Owing to the widespread distrust of executive officers at the time of the American Revolution, the veto power was not generally given the Governor or executive officers of any state. It was believed at that time that the legislative bodies were the true guardians of the people's liberty, and that the Governor should have but little power. A few years' experience, however, demonstrated the fact that a Legislature, if unchecked by a restraining power in the hands of a co-ordinate department of government, is quite as dangerous a menace to the liberty of the people as is an arbitrary executive officer. This was the experience in Penn-

sylvania, and by the Constitution of 1790, Art. 1, Sec. 22, a qualified veto was given to the Governor. His power was considerably enlarged by Sec. 15, Art. IV, in the Constitution of 1873, which provides as follows: "Every bill which shall have passed both houses, shall be presented to the Governor; if he approve he shall sign it, but if he shall not approve, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections at large upon their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of all the members elected to that house shall agree to pass the bill, it shall be sent, with the objections, to the other house, by which likewise it shall be reconsidered; and if approved by two-thirds of all the members elected to that house, it shall be a law; but in such cases, the votes of both houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered on the journals of each house, respectively. If any bill shall not be returned by the Governor, within ten days 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 General Assembly, by their adjournment, prevent its return; in which case it shall be a law, unless he shall file the same, with his objections, in the office of the Secretary of the Commonwealth, and give notice thereof, by public proclamation, within thirty days after such adjournment." This section should be considered in connection with Art. III, §26, which provides: "Every order, resolution, or vote to which the concurrence of both houses may be necessary, except on the question of adjournment, shall be presented to the Governor, and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both houses, according to the rules and limitations prescribed in case of a bill." The veto power of the Governor as conferred by these sections is enlarged over that given to the Governor under the Constitution of 1790 in two particulars. The vote required to overrule the veto is two-thirds of all the members elected to each house instead of two-thirds of all the members present, as in the Constitution of 1790, and a veto which is filed after the end of a session is a nullification of the law; whereas, under the Constitution of

1790, a bill not acted upon before the end of the session became a law unless returned to the General Assembly within three days after its next meeting.

The extraordinary success of the American system of government is due in great part to the fact that the co-ordinate departments of governments operate as checks upon each other. The veto power of the Governor as a restraint upon improvident legislation is not the least important of these safeguards, and has, perhaps, proved more useful in practice than any other.

"The veto power is a survival of the lawmaking authority vested in the king as a constituent if not a controlling third body of the parliament, in which he might and not infrequently did sit in person. With the growth of free ideas and institutions and the aggressive spirit of the popular branch of the parliament in the affairs of government, it lost its vitality as a real power in England, though it still exists in theory. But in the colonies it not only existed, but was an active power, absolute in character, and so constantly exercised that, as Professor Mason has aptly called attention to, the Declaration of Independence set forth first among the grievances of the colonies, 'He has refused his assent to laws most wholesome and necessary for the public good.' Mason's Veto Power, sec. 7. The most important chapter in the legislative history of the Province of Pennsylvania will be found in the long and obstinate contest between the General Assembly and the proprietaries and the crown (acting through the privy council and the board of trade) over the refusal of assent to the acts of the Assembly.

"From the colonies the power passed with various limitations into nearly all the American constitutions, state and national. Originally intended mainly as a means of self-protection by the executive against the encroachments of the legislative branch, it has steadily grown in favor with the increasing multitude and complexity of modern laws, as a check upon hasty and inconsiderate as well as unconstitutional legislation. The Executive is usually better informed on the exact condition of the public affairs than the individual members of the Legislature, and he acts under the concentrated responsibility of a single officer. That vetoes are usually wise and convincing is shown by the small proportion which has been overridden by

the second passage of the disapproved act. Of 433 acts disapproved by the Presidents of the United States down to 1889, only twenty-nine were passed over the veto. Mason's Veto Power, sec. 116."³¹

§18. *Veto of Appropriation Bills.*—"As inherited from the colonies and adopted in the early constitutions, the veto power was confined to approval or disapproval of the entire bill as presented, and this in experience was found to be inadequate to the accomplishment of its full purpose. The Legislature in framing and passing a bill had full control over every subject and every provision that it contained, and the Governor, as a co-ordinate branch of the lawmaking power, was entitled to at least a negative of the same extent. But by joining a number of different subjects in one bill, the Governor was put under compulsion to accept some enactments that he could not approve, or to defeat the whole, including others that he thought desirable or even necessary. Such bills, popularly called 'omnibus' bills, became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits. So common was this practice that it got a popular name, universally understood as log-rolling. A still more objectionable practice grew up of putting what is known as a 'rider,' that is, a new and unrelated enactment or provision on the appropriation bills, and thus coercing the executive to approve obnoxious legislation or bring the wheels of the government to a stop for want of funds.

"These were some of the evils which the later changes in the constitution were intended to remedy. Omnibus bills were done away with by the amendment of 1864, that no bill shall contain more than one subject which shall be clearly expressed in the title. But this amendment excepted appropriation bills, and as to them the evil still remained. The convenience, if not the necessity, of permitting a general appropriation bill containing items so diverse as to be fairly within the description of different subjects was patent. The present constitution

³¹Mr. Justice Mitchell, in *Com. v. Barnett*, 199 Pa. 161 (1901).

meets this difficulty, first, by including all bills in the prohibition of containing more than one subject except 'general appropriation bills' (Article III, section 3); secondly, by the provision that 'the general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the commonwealth, interest on the public debt, and for public schools; all other appropriations shall be made by separate bills, each embracing but one subject' (Article 3, section 15); and thirdly, by the grant to the Governor of 'power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the Executive veto.' Article IV, section 16.

"The purpose of these provisions is clear beyond question. They are a distinct recognition of the legislative character of the Governor's part in the passage of the bills, and an equally distinct effort to increase the power and scope of his veto. By section 15 of the same article a bill can only be passed over a veto by a vote of two-thirds of all the members elected to each house, instead of two-thirds of a quorum voting, as under the Constitution of 1838. 'The power,' says Mr. Buckalew, 'has been tried and not found wanting; it has won popular confidence in a high degree, and is now justly regarded as an indispensable feature of American constitutions. In the convention of 1873 no voice was raised in opposition to it, or for imposing any new and material limitations upon its exercise in future.' Notes on the Constitution, p. 117. Section 16 of Article 4, above quoted, with which we are immediately concerned, is a clear expression of intent to give the Governor, to the extent of refusing approval, the same control over the particulars of a general appropriation bill that each house of the Legislature had.

"The argument on both sides has included much discussion of the exact definition of the word 'item.' But we have no occasion to consider minutely the language of the dictionaries in this connection. The general idea conveyed by the

word is well understood, and with that in our minds the precise meaning in the constitution is shown by the context to be the particulars, the details, the distinct and severable parts of the appropriation. The language is 'the Governor shall have power to disapprove of any item or items . . . and the part or parts of the bill approved shall be the law, and the item or items of the appropriation disapproved shall be void,' etc. It is clear that 'item' and 'part' are here used interchangeably in the same sense. If any special or different meaning was attached to the word 'item,' the natural mode of expression would have been to use that word throughout the section, but for the sake of euphony and to avoid the repetition of the same words three times in the same sentence, the draughtsman used the word 'parts' as an evident synonym. This is also apparent from the plain purpose of the section. In ordinary bills the single subject is a unit which admits of approval or disapproval as a whole, without serious inconvenience, even though some of the details may not be acceptable. But every appropriation, though it be for a single purpose, necessarily presents two considerations almost equally material, namely, the subject and the amount. The subject may be approved on its merits, and yet the amount disapproved as out of proportion to the requirements of the case, or as beyond the prudent use of the state's income. The Legislature had full control of the appropriation in both its aspects, and the plain intent of this section was to give the Governor the same control as to disapproval, over each subject and each amount. A contrary construction would destroy the usefulness of the constitutional provision. If the Legislature, by putting purpose, subject and amount inseparably together and calling them an item, can coerce the Governor to approve the whole or none, then the old evil is revived which this section was intended to destroy. No better illustration is needed than is afforded by the case in hand. Section 8 of the act of May 13, 1899, appropriated for the public schools \$11,000,000 for the two years of 1899 and 1900, provided that 'out of the amount received by the city of Philadelphia there shall be paid the sum of three thousand dollars to the Teachers' Institute of said city; the sum of three thousand dollars to the Philadelphia School of Design for Women for their corporate

purposes, and the sum of ten thousand dollars to the Teachers' Annuity and Aid Association of said city,' etc. In this portion of the section alone there are included four distinct and severable parts, each of which is an 'item' within the purpose, intent and meaning of the constitutional provision under consideration, namely, the public schools, the Teachers' Institute, the School of Design for Women, and the Teachers' Annuity and Aid Association. The public schools being objects of appropriation by the express mandate of the constitution, the only question before the Governor as to them was the amount, but the other three items presented the double consideration of the beneficiary and the amount. On each of these matters, quoting again the language of Judge Cooley, *supra*, 'the questions presented to the mind of the Executive are precisely the same as those the two houses (of Congress) must determine in passing a bill; whether the proposed law is necessary or expedient, whether it is constitutional, whether it is so framed as to accomplish its intent, and so on, are questions transferred from the two houses to the President (Executive) with the bill itself.' On each of these questions, therefore, the Governor was entitled to exercise his legislative judgment separately, and to approve or disapprove accordingly. Suppose, for illustration, that instead of the beneficiaries being worthy public institutions the city of Philadelphia had been directed to pay part of its appropriation to a sectarian school, in violation of the express prohibition in section 18 of Article III. It would have been the Governor's imperative duty to veto such appropriation, and the Legislature could not coerce him by putting him to the alternative of approving it or disapproving the entire section with its constitutional grant to the public schools. Or suppose, on the other hand, the appropriation had been to one of the institutions named of \$1,000,000 or more. The Governor might in his legislative judgment have approved the beneficiary as a proper object of state aid, but have found the amount excessive. He was entitled to approve as to the object, and to disapprove as to a portion of the amount. That is what he has done in the present case, and his action was within his constitutional powers."³²

³²Mr. Justice Mitchell, in *Com. v. Barnett*, 199 Pa. 161 (1901).

§19. *Constitutional Amendments.*—In *Commonwealth v. Griest*, 196 Pa. 396 (1900), the question was raised as to whether an amendment to the constitution proposed by joint resolution of the General Assembly need be submitted to the Governor for his approval or veto. It had been held by the lower court that it must be so submitted, and as a proposed amendment had been vetoed by Governor Stone, it could not be voted upon by the people of Pennsylvania. The Supreme Court, however, after a careful examination of the question, decided that this position was incorrect. The action of the Legislature in proposing an amendment to the constitution “is constitution-making,” and is not the exercise of the legislative power. It need not, therefore, be submitted to the Governor for his approval or veto.³³

§20. *Contested Election of Governor or Lieutenant Governor. To Hold Until Successors Qualify.*—“The chief justice of the Supreme Court shall preside upon the trial of any contested election of Governor or Lieutenant Governor, and shall decide questions regarding the admissibility of evidence, and shall, upon request of the committee, pronounce his opinion upon other questions of law involved in the trial.” In order that there may be no interregnum between the expiration of the term of the retiring Governor or Lieutenant Governor and the qualification of their successors, particularly in case the election is contested, it is further provided that “The Governor and Lieutenant Governor shall exercise the duties of their respective offices until their successors shall be duly qualified.”³⁴

§21. *Secretary of the Commonwealth.*—The duties of the Secretary of the Commonwealth are thus provided in Art. IV, sec. 13: “The Secretary of the Commonwealth shall keep a record of all official acts and proceedings of the Governor, and when required lay the same, with all papers, minutes, and vouchers relating thereto, before either branch of the General Assembly, and perform such other duties as may be enjoined upon him by law.”

§22. *Secretary of Internal Affairs.*—The duties of the

³³See Chapter II, Rights of Self-Government; Chapter XXVIII. Amendments to the Constitution, in which the case of *Commonwealth v. Griest*, 196 Pa. 396 (1900), is quoted at length.

³⁴Art. 4, §17. As to contested elections see further Art. VIII, §17.

Secretary of Internal Affairs are provided as follows, in section 19 of Art. 4: "The Secretary of Internal Affairs shall exercise all the powers, and perform all the duties of the Surveyor General, subject to such changes as shall be made by law. His department shall embrace a bureau of industrial statistics; and he shall discharge such duties relating to corporations, to the charitable institutions, the agricultural, manufacturing, mining, mineral, timber, and other material or business interests of the state, as may be prescribed by law. He shall annually, and at such other times as may be required by law, make report to the General Assembly."

§23. *Superintendent of Public Instruction.*—The Superintendent of Public Instruction, whose appointment is provided for in section 8, is to perform duties as set forth in section 20 of Art. IV: "The Superintendent of Public Instruction shall exercise all the powers and perform all the duties of the Superintendent of Common Schools, subject to such changes as shall be made by law."

§24. *Terms of Office.*—"The term of the Secretary of Internal Affairs shall be four years; of the Auditor General, three years; and of the State Treasurer, two years. These officers shall be chosen by the qualified electors of the state, at general elections. No person elected to the office of Auditor General or State Treasurer shall be capable of holding the same office for two consecutive terms."³⁵

§25. *Seal of the State.*—"The present great seal of Pennsylvania shall be the seal of the state. All commissions shall be in the name and by authority of the Commonwealth of Pennsylvania, and be sealed with the state seal, and signed by the Governor."³⁶

³⁵Section 21 of Art. IV.

³⁶Art. IV, §22.

CHAPTER XVII.

THE JUDICIARY.

§1. *Judicial Power Vested in the Courts.*—Section 1 of Article V provides: "The judicial power of this commonwealth shall be vested in a Supreme Court, in courts of common pleas, courts of oyer and terminer and general jail delivery, courts of quarter sessions of the peace, orphans' courts, magistrates' courts, and in such other courts as the General Assembly may from time to time establish."¹

This language vests all the judicial power of the commonwealth in the courts, and they therefore have *ipso facto* full power to determine any judicial question.²

§2. *Legislative and Executive Departments Not to Encroach Upon Judicial.*—As the judicial department is supreme within the limit of its powers, the legislative or executive departments cannot encroach upon it. It, therefore, becomes important to distinguish between legislative or executive and judicial acts. A judicial act is one which determines the existing law in relation to existing facts, and which applies that law to the subject matter before the court; a legislative act is a determination of what the law shall be in future; an executive act is one done in execution of the law as enacted by the Legislature and interpreted by the court.

¹The provisions of earlier constitutions were as follows: Constitution of 1790, Art. V, §1: "The judicial power of this commonwealth shall be vested in a Supreme Court, in courts of oyer and terminer and general jail delivery, in a court of common pleas, orphans' court, register's court and a court of quarter sessions of the peace, for each county; in justices of the peace, and in such other courts as the Legislature may from time to time establish."

Constitution of 1776, Chap II, §4: "Courts of justice shall be established in the city of Philadelphia and in every county of this state." And see §§23, 24, 26 and 30. See also Royal Charter, §5; Charter of 1682, §§13, 17, 18; Charter of 1683, §16; Markham Charter, §10; Charter of 1701, §6.

²Before a judicial decree can be made effective the parties must, of course, be brought within the jurisdiction. *Kerr v. Trego*, 47 Pa. 292 (1864).

The only serious difficulty in distinguishing between the functions of these co-ordinate departments arises in cases where the Legislature has approached or crossed the boundary which separates it from the judiciary.

§3. *Interference by Legislature with Trial of Cases.*—As the very definition of a judicial act shows, it is the peculiar function of the courts to determine the application of existing law to the facts of a particular case, hence it seems very clear that the Legislature ought not to interfere with the trial of cases. There have been instances, however, where this has been done or attempted. In *Braddee v. Brownfield*, 2 Watts and Sergeant, 271 (1841), it appeared that an act of Assembly had directed the court to open judgment in a particular case and let the defendant into a defense. It was argued that such action on the part of the Legislature was an unconstitutional interference with judicial functions. The court, however, thought not, and upheld the law in an opinion by Mr. Justice Sergeant. He said: "The defendant in error contends that this act of Assembly, in interfering with the duties of a tribunal of justice, and dictating to them that they should open judgments confessed by bonds and warrants, and allow the plaintiff in error a trial by jury of the fact of payment, prescribing new conditions as to sales under the judgments, after the court had heard the parties, and decided that the judgments ought not to be opened, was in contravention of the Constitution of Pennsylvania, and in no way affected his proceedings. It is certainly true that this species of legislation, for particular cases pending in courts of justice, by granting extraordinary privileges to one party or the other, out of the ordinary course of justice, is susceptible of abuse, and may lead to great injustice, and ought to be warily employed by a wise Legislature. But for us to hold a law unconstitutional, it must be a plain violation of some provision contained in the constitution. It must be an *ex post facto* law, or a law impairing the obligation of contracts, or manifestly in collision with some constitutional provision. The exercise of a certain sort of superior equity jurisdiction of a remedial character, a kind of mixed power, partly legislative, partly judicial, seems to have been practiced by our Legislature from time to time, in the

shape of special laws like that before us. They have been looked at with jealousy by some, while others have considered them as necessary, under our frame of government, to prevent a total failure of justice in certain cases not falling within the control of the judicial branches. There is, at any rate, no clause in our constitution which prohibits them; and when a motion to that effect was introduced in the late convention which formed our present constitution, though the subject was much and ably canvassed, and the law now in question commented upon, no alteration was made on the subject. See *Debates in Convention of 1837*, pp. 479, 544, etc.

“Under these circumstances, it would be difficult to say that a law, granting a remedy to a party by referring the cause to another decision, or enabling him to sustain an action where he could not before sustain one, or removing an impediment in his way to obtaining a hearing and decision, or conferring powers, or ratifying imperfect acts and doings of officers, by which the rights of a party would otherwise be lost, is a violation of the constitution. Every case of the kind must be judged of by itself, according to its own peculiar circumstances. That there is a usurpation on the judiciary, which it would be unconstitutional in the Legislature to assume, may, I think, be safely asserted. That, on the other hand, there are cases where the legislative and judicial powers so commingle that the exercise of a certain kind of judicial authority in the passage of a law is in accordance with precedents and not contrary to received constitutional principles, nor such as a court could annul, is perhaps equally clear. In the passage of the present law the Legislature has acted rather in the character of an appellate tribunal of justice, ordering, by way of mandamus, that to be done which they considered ought to be done, and which no existing appellate tribunal could relieve against by interposing in a special case then depending in court before a competent tribunal, which had already heard and decided between the parties, and giving a remedy in that particular cause alone, without prescribing a general rule for the conduct of all the citizens of the commonwealth.”

This language is quoted to show that the difficulty of determining the question is such that even so learned a

judge as Mr. Justice Sergeant fell into the error of supposing that an act of Legislature might properly require the court to reopen a judgment. That it was an error was definitely determined in *De Chastellux v. Fairchild*, 15 Pa. 18 (1850). In this case the action of the Legislature in ordering a new trial in an adjudicated case was declared null and void, and *Braddee v. Brownfield* was overruled by name. Mr. Chief Justice Gibson said: "If anything is self-evident in the structure of our government, it is that the Legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment. The power to order new trials is judicial; but the power of the Legislature is not judicial. It is limited to the making of laws; not to the exposition or execution of them. The functions of the several parts of the government are thoroughly separated, and distinctly assigned to the principal branches of it, the Legislature, the Executive and the Judiciary, which, within their respective departments, are equal and co-ordinate. Each derives its authority, mediately or immediately, from the people, and each is responsible, mediately or immediately, to the people for the exercise of it. When either shall have usurped the powers of one or both of its fellows, then will have been effected a revolution, not in the form of the government, but in its action. Then will there be a concentration of the powers of the government in a single branch of it, which, whatever may be the form of the constitution, will be a despotism—a government of unlimited, irresponsible and arbitrary rule. It is idle to say the authority of each branch is defined and limited in the constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that it is thoughtlessly but habitually violated; and the sacrifice of individual right is too remotely connected with the objects and contests of the masses to attract their attention.

"From its very position, it is apparent that the conservative power is lodged with the judiciary, which, in the exercise of its undoubted right, is bound to meet every emergency; else causes would be decided not only by the Legislature, but, sometimes, without hearing or evidence. The mischief has not yet come to that, for the Legislature has gone no farther than to

order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a suitor, than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, risk, and expense of another contest. . . .

"We are bound to say therefore that *Braddee v. Brownfield* is not law, and that it was erroneously decided. As the act before us is null, the plaintiff ought to have been allowed to proceed on his judgment."

A few years later a similar law was disregarded by the orphans' court of Allegheny County, which action was approved by the Supreme Court.³ Mr. Chief Justice Lowrie said: "If the courts are the judicial authority of the land, no one has any authority to direct them what disposition they shall make of any case or question that comes before them. And any commands about such matters, other than those contained in the general law of the land, are quite useless; for the courts are, by the constitution, open to everybody appearing in any regular way. And they hear everybody that comes; though in cases very plain or very absurd they may not hear them long, and may dismiss their motion or petition without hearing the other side.

"There ought to be no arbitrary governmental dealing with private rights; to prevent this is one of the principal purposes of the separation of legislative and judicial functions in the government. It is in general guarded against by allotting to each department its appropriate functions, and by the assurance of the constitution of open courts, where every man for every injury shall have remedy by due course of law. A man's rights are not decided by due course of law, if the judgment of the courts upon them may be set aside or opened for further litigation by an act of Assembly. That would be a plain violation of the due course of law, a departure from the functions of legislation and an assumption of those of jurisdiction."

As the Legislature may not interfere with the actual trial of a case nor direct a new trial or other proceedings after the judgment has been rendered, neither can it prescribe in advance what judgment shall be given or in what manner the trial shall

³*Bagg's Appeal*, 43 Pa. 512 (1862).

proceed. In *Pittsburg & Steubenville Railroad Co. v. Gazzam*, 32 Pa. 340 (1858), it appeared that an act of Assembly had been passed providing that no nonsuit should be entered in certain cases in which the railroad company was expecting to sue for certain stock subscriptions. The purpose of the act was to enable the plaintiff company to appropriate and sue upon a promise made to another company. This legislation clearly was inoperative for such a purpose, and court so held. Mr. Justice Woodward said: "Now what right had the plaintiff, a company incorporated to build a railroad down the Ohio, from Pittsburg to Steubenville, to appropriate that promise?"

"Manifestly none, except such as the act of Assembly alluded to conferred. Is it competent, then, for the Legislature, when they find a loose promise adrift, to authorize the plaintiff to seize it and sue upon it? Can the Legislature prescribe what judgment the courts shall or shall not give in a particular case? We think not. The defendant's property might be taken by the Pittsburg and Steubenville Railroad Company, under the sanction of an act of Assembly, but he cannot be legislated into an *assumpsit* to the company. Nor can his right to judicial protection against an unfounded claim be taken away by legislation."

The same rule applies in criminal as in civil cases. The Legislature cannot prescribe the manner of trial nor can it interfere with sentences after judgment by lessening the time for good behavior or otherwise during which prisoners are to serve. In *Com. v. Halloway*, 42 Pa. 446 (1862), where the latter was attempted, the court said: "A majority of us think the act is unconstitutional as interfering with judgments of the judiciary. The whole judicial power of the commonwealth is vested in courts. Not a fragment of it belongs to the Legislature. The trial, conviction, and sentencing of criminals are judicial duties, and the duration or period of the sentence is an essential part of a judicial judgment in a criminal record. Can it be reversed or modified by a board of prison inspectors acting under legislative authority? If it can, what judicial decree is not exposed to legislative modifications? From what judicial sentence may not the Legislature direct 'deductions' to be made if this act be constitutional? What they may do

indirectly they may do directly. If they may authorize boards of inspectors to disregard judicial sentences, why may they not repeal them as fast as they are pronounced, and thus assume the highest judicial functions? . . .

"In respect to one of the relators who was convicted and sentenced before the law was passed, it is considered very clear that it is a legislative impairing of an existing legal judgment. But is it not equally so in respect to him who was sentenced since the date of the act? The court could not have taken the act into account in measuring the sentence, because they could not know how many days of abatement the prisoner would earn. They could fix his sentence only by the exercise of that judicial discretion which the constitution has vested in the judiciary. Any interference with that sentence, except by a court of superior jurisdiction, or by the executive power of pardon, would seem to be a prostration of that distribution of governmental functions which the constitution makes among three co-ordinate departments. In this view the act would be highly unconstitutional."

The more recent act of May 11, 1901, P. L. 166 (superceding the act of May 21, 1869, P. L. 1267), has provided for the commutation of the sentences of prisoners for good behavior, by causing the commutation earned to be formally approved by the Governor and Board of Pardons, so that the reduction of the sentence is an exercise of the pardoning power. There has been no judicial determination of the validity of the law, but it is believed to be constitutional for the reasons stated by Attorney General Elkin in his opinion on the act, reported in 3 Pa. Dist. Rep. 361 (1901), and which are sufficiently indicated in what has been said.

§4. *Laws Validating Defective Judicial Decrees.*—Many laws have been passed in Pennsylvania which had for their purpose the correction of errors, jurisdictional or otherwise, in decrees already made. This usually happens in cases where a deed has proven to be defective for some error in proceedings undertaken to obtain the necessary authority to execute it or for other similar reasons. In such a case, will a law passed for the purpose of correcting the errors and validating the conveyance be valid? This question has already been considered,⁴ and

⁴See Chapter VII, "Protection to Life, Liberty and Property."

indeed such cases are properly discussed in connection with the clause prohibiting the Legislature from depriving any person of his property, without due process of law, for a law validating a void deed necessarily divests vested rights. An additional objection, however, is that such laws are also an usurpation of judicial functions, for they undertake to alter the course of judicial procedure.⁵ It seems clear that for both reasons the courts ought not to uphold them. There are some cases, however, which draw a distinction between laws which attempt to correct a substantial error in a conveyance by decreeing power to the grantor to make it *nunc pro tunc*, and those which merely correct defects in a decree or in the form of a conveyance. The latter, as has already been noticed, are in some instances upheld.⁶

§5. *Expository Statutes.*—A more delicate question is that relating to the power of the Legislature to direct the courts to construe the law in a particular manner. The objection to such laws is largely on account of the form of the enactment. The Legislature has power to alter the common law or to amend a statute, but if, instead of expressly amending the law, it directs the court to construe it in a particular way, this may be objected to with some justice on the ground that the Legislature is attempting to control the courts in the exercise of judicial functions. If the law has reference only to the future, that is, if the courts are directed to construe in the manner indicated in subsequent cases only, the objection to the act is purely a matter of form, for the practical effect of such a law will be the same as an express amendment. If, however, the Legislature undertakes to say that the construction directed shall be applied to cases arising before its passage, the law clearly is null and void, and cannot be enforced.⁷ In *Greenough v. Greenough*, 11 Pa. 489 (1849), Mr. Chief Justice Gibson said: "So far as regards wills consummated by the testator's death—and this is one of them—the act of 1848 is founded on no power known to the constitution, but on the assumption of a power appropriated exclusively to the judiciary. Every tyro or sciolist knows that it is the province of the Legislature to enact, of the judiciary to expound,

⁵See *Richards v. Rote*, 68 Pa. 248 (1871).

⁶See Chapter VII, "Protection to Life, Liberty and Property."

⁷*Ibid.*

and of the executive to enforce. These functions may, if the people will it, be performed by a single organ; but the people of Pennsylvania have not so willed it. They have ordained that the judicial power of the commonwealth be vested in a Supreme Court, in county courts of common pleas, oyer and terminer and quarter sessions, in a register's court, and an orphans' court, and in such other courts as the Legislature may from time to time establish. But the judicial power of the commonwealth is its whole judicial power; and it is so distributed that the Legislature cannot exercise any part of it. Under the constitution, therefore, there is no mixed power—partly legislative and partly judicial—such as was recognized in *Braddee v. Brownfield*. Did it exist, it could be exercised only in concert or in common; for it would give the judiciary as much right to legislate as it would give the Legislature right to adjudicate. Thus blended, I know of no constitutional power, principle, or provision, that would give to either of them, as a co-ordinate branch, an exclusive right to the whole. What then did the Legislature propose by the statute of 1848? This court had ruled in *Asay v. Hoover* directly, and in *Barr v. Strobell*, *Cavett's Appeal*, and perhaps *Hays v. Harden*, incidentally, that a testator's mark to his name, at the foot of a testamentary paper, but without proof that the name was written by his express direction, is not the signature required by the act of 1833; and the Legislature has declared, in order to overrule it, that "every last will and testament heretofore made, or hereafter to be made, except such as may have been finally adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross, shall be deemed and taken to be valid." How this mandate to the courts, to establish a particular interpretation of a particular statute, can be taken for anything else than an exercise of judicial power in settling a question of interpretation, I know not. The judiciary had certainly recognized a legislative interpretation of a statute before it had itself acted, and consequently before a purchaser could be misled by its judgment; but he might have paid for a title on the unmistakable meaning of plain words; and for the Legislature subsequently to distort or pervert it, or to enact

that white meant black, or that black meant white, would, in the same degree, be an exercise of arbitrary and unconstitutional power. . . .

"It is destitute of retroactive force, not only because it was an act of judicial power, but because it contravenes the declaration in the ninth section of the ninth article of the constitution, that no person shall be deprived of life, liberty or property, except by the judgment of his peers or the law of the land."

§6. *Where Doubtful Law has not been Judicially Construed.*—In an earlier case, however, Mr. Chief Justice Gibson had expressed a view somewhat at variance with the language just quoted. In *O'Connor v. Warner*, 4 Watts and Sergeant, 223 (1842), in which it was decided that until the courts have declared the meaning of a law which is doubtful or ambiguous in its terms, the Legislature may do so, and the courts should apply this construction even to previous cases, he said:

"A legislative mandate to change the settled interpretation of a statute, and uproot titles depending on past adjudications, or a legislative direction to perform a judicial function in a particular way, would be a direct violation of the constitution, which assigns to each organ of the government its exclusive function and a limited sphere of action. No one will assert that a court would be bound by a mandate to decide a principle or a cause in a particular way. Such a mandate would be a usurpation of judicial power, and more intolerable in its exercise than a legislative writ of error, because the losing party would be concluded by it without being heard. In the case before us, we are firmly convinced that the Legislature did not design to deprive purchasers of their titles acquired under the original act; but whatever the design, we are bound to give the section a benign interpretation.

"Yet we are not compelled by the preceding considerations to give it an operation entirely prospective. No one has purchased on the faith of a judicial exposition of the act of 1836, for it has received none. Purchasers have acted on their own interpretation of its meaning, and consequently on their own responsibility. They cannot complain of violated faith given to the accredited act of a constitutional organ; and till the

judiciary has fixed the meaning of a doubtful law, the Legislature has a right to explain it. The act of 1836 was susceptible of such explanation. It was not the law which had been before the courts; and the construction given to its predecessors was not applicable to it with conclusive force. For that reason alone the judgment is sustained."

The authority of this case, however, should be accepted with reserve as to this point. The most that can be said of the action of the Legislature in such a case is that it should be considered by the court as an indication of probable legislative intent, but that it should not be binding upon them. Under the numerous cases, refusing to apply any retroactive expository statute, it is extremely doubtful whether this rule, even under the circumstances as they existed in *O'Conner v. Warner*, would now be recognized.

§7. *Prospective Expository Acts*.—But even in cases where the law is prospective only can the Legislature constitutionally require the courts to construe a statute or the common law contrary to their own judgment, as to its meaning? Can they leave the law unchanged and yet require a meaning to be placed upon it by the courts, different from that theretofore adopted by them? If the General Assembly desires to alter the law must it not in terms make such alteration by positive enactment?

A number of the earlier cases, by *dicta* at least, recognize the right of the Legislature to prescribe for the future how a previous enactment shall be construed.⁸ In *Lambertson v. Hogan*, 2 Pa. 22 (1845), Mr. Justice Rogers said: "Explanatory acts must be construed as operating on future cases alone, except where they are designed to explain a doubtful statute, in which cases they deserve and always will receive the most respectful attention from the judicial branch of the government."

In *West Branch Boom Co. v. Dodge*, 31 Pa. 285 (1858), Mr. Chief Justice Lowrie said: "And here I think that I may venture to suggest, whether or not expository statutes, when intended to be retroactive, can have any proper founda-

⁸*O'Conner v. Warner*, 4 Watts and Sergeant, 223 (1842); *Greenough v. Greenough*, 11 Pa. 489 (1849).

tion as acts of legislation proper. The suggestion may be a profitable one, and I would state it thus: A state, or any other party to a grant, may certainly consent, at any time after its execution, that it shall be interpreted differently from its expression; but there seems to be no reasonable principle on which expository statutes can be founded beyond this, except by regarding them as creative of a new law, and not as interpreting an old one. Law, in its proper sense, is a rule of future conduct, and not a test of conduct that precedes it. Legislation and interpretation are naturally and radically distinct functions. Every man must, in the first instance, interpret the law for himself in endeavoring to obey it. It becomes matter of official interpretation only when a case arises in which it is alleged to have been violated; and then, of necessity, the courts must ascertain the interpretation, not according to the terms of any *post facto* expository statute, but according to the terms of the law, as it stood when the act was done. In the very nature of things, interpretation follows legislation, and is not to be confounded with it, either as an act or as an authority. The duties are as distinct as possible, and the performance of them is given to different offices; yet, without preventing the Legislature from embodying, in a statute, rules for its interpretation or from making a new law, by changing the application or interpretation of an old one relative to future cases."

Notwithstanding these decisions, however, it is a serious question whether the Legislature has any such power as suggested in them. When the enactment is made it is undoubtedly competent for the Legislature to insert in it directions as to the sense in which words or phrases are used or otherwise to explain its true meaning, and all these things will be considered by the courts when interpreting the law;⁹ but after the act has once been passed and has been placed upon the statute books, it has in law a definite meaning. It is very questionable whether a subsequent Legislature, without altering the terms of the act, can say what its words shall be interpreted to mean. To do so certainly seems like an usurpation of judicial power. Any such direction contained in the original act

⁹*Getz v. Brubaker*, 25 Pa. Superior Ct. 303 (1904); *Com. v. Kebort*, 212 Pa. 239 (1905).

must be taken as an expression of its true intent and purpose, to which the courts will give due weight, but how can a subsequent Legislature undertake to say what was the intent in the mind of a previous Legislature? When an amendment to a law is considered to be desirable the General Assembly should expressly amend it, and should not undertake to say how it is to be construed.

Later cases are more favorable to the view here expressed and seem more and more inclined to repudiate all expository acts of whatever kind. In *Reiser v. William Tell Saving Fund Association*, 39 Pa. 137 (1861), Mr. Chief Justice Lowrie said: "We must again insist that the making of laws and the application of them to cases, as they arise, are clearly and essentially different functions, and that one of them is allotted by the constitution to the Legislature, and the other to the courts: 9 Casey, 495. Chief Justice Gibson expressed this in *Greenough v. Greenough*, 1 Jones, 489: 'Every tyro or sciolist knows that it is the province of the Legislature to enact, of the judiciary to expound, and of the executive to enforce.' It is expressed in the Bill of Rights, requiring the courts to administer justice by the due course of law. It is expressed in the very form of government, as organized by the constitution, allotting 'the legislative power' to the Legislature, and 'the judicial power' to the courts. Each has its share exclusively. The functions are as distinct as those of the stomach and the lungs in our body. They are concurrent, and not antagonistic functions in the same system, and when each functionary does its work wisely, no interference is possible. We hope we have seen the last expository statute under our constitution: all such are fundamentally vicious. This act, so far as expository, must fall, and its provisions fall with it."

In *Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. 627 (1888), an expository act was under consideration. It was held unconstitutional because it purported to extend the terms of a previous act without re-enacting it in full, and the court said further: "But this is not the only clause of the constitution against which the act of 1887 offends. Section 1, of Article V, vests in the clearest manner possible the judicial power of the commonwealth in the several courts. The Legislature can

no more exercise judicial powers than the courts can arrogate to themselves legislative powers. The legislative and judicial departments of the government are independent and co-ordinate. The act of 1887 is in no respect a legislative declaration of the rights and privileges of the class of persons to whom it relates, but it is a judicial order or decree directed to the courts. It undertakes to give a new and final interpretation of the acts of 1836 and 1845, and directs the courts to adopt that interpretation in all cases that may be before them. Obedience to this order requires an abandonment of a long line of cases, and makes it incumbent on the courts to declare that a large class of claimants is within the provisions of those statutes which they have heretofore solemnly adjudged was not within them. To make this objection still more apparent, it may be borne in mind that the act of 1887 is not an expository statute following upon the heels of that which it seeks to explain, but that it refers to a law which has been on the statute books for over half a century, and the meaning of which has been long and well settled by the courts; and it attempts to overturn the judicial construction given to its provisions, and to force upon the courts the new one which it furnishes ready made. This is a clear case of the exercise of judicial powers by a department of the government that does not possess them, and is a violation of Article V, section 1, of the constitution.

"We do not forget a class of cases of which *Lambertson v. Hogan*, 2 Pa. 22, and *Haley v. Philadelphia*, 68 Pa. 45, are examples. Under the constitution, as it stood prior to 1874, the limits within which legislative power was to be exercised were not so closely drawn as they now are. Many things were then permissible, as to the character and form of legislation which the present constitution plainly forbids. Expository statutes, and statutes directing the courts what construction should be given to previous legislation, were not uncommon prior to 1874, and the courts, while pronouncing all such legislation to be judicial in its character and void as to any retroactive effect intended, yet sought to give effect to the legislative will, however expressed as to future cases. As the constitution prescribed no form or order into which the legislative expression was to be cast, the court sought to give effect to the purpose, however expressed."

This language is a plain intimation that under the new constitution expository statutes would not be sanctioned in any case.¹⁰ Finally we have the whole subject carefully reviewed in *Commonwealth v. Warwick*, 172 Pa. 140 (1895), in which it is said that expository acts, if valid at all, can only be legally passed where the language of the preceding act is doubtful. Mr. Chief Justice Sterrett said. "It was unavoidable in their earlier administration that conflict should have arisen between the legislative and judicial branches of our government. The form of government was new, and the exact limitations of duty and power were imperfectly understood. Even their co-ordination of power was doubted by some: *Eakin v. Raub*, 12 S. & R. 330; and the feeble resistance offered by the judiciary naturally encouraged encroachments by the Legislature. The mischief which resulted became so great that this court was compelled, in *Norman v. Heist*, 5 W. & S. 171, and *Bolton v. Johns*, 5 Pa. 145, to take a stand in assertion of the power which the constitution had conferred. 'The functions of the several parts of the government are,' said Gibson, C. J., in *DeChastellux v. Fairchild*, 15 Pa. 18, 'thoroughly separated and distinctly assigned to the principal branches of it, the legislative, the executive and the judiciary, which, within their respective departments, are equal and co-ordinate,' and hence the principle was declared and has become firmly established in a bead-roll of cases that 'the legislative direction to perform a judicial function in a particular way would be a direct violation of the constitution.' *O'Conner v. Warner*, 4 W. & S. 223. Tested by this principle, the act of 1867 is not legislative, but expository in its character. It does not purport to amend, alter or change the language of the act of 1854. It offers no substitutionary clause, but declares what that act 'shall be construed to mean.' It is, on its face, a legislative mandate to the courts to perform their judicial functions in a particular way. The appellant insists that this court has recognized an exception to the rule of expository prohibition in cases of doubtful construction. There are, it is true, dicta to that effect; but no precedents have been cited in which it was made the basis of decision. In *O'Conner v. Warner*, *supra*, it was placed on the

¹⁰See, however, *Hawkins v. Com.*, 76 Pa. 15 (1874).

ground that no injury had been done the parties. In *Lambertson v. Hogan*, 2 Pa. 22; *Reiser v. Sav. Fund Ass'n*, 39 Pa. 137; *Denny v. Sav. Fund Ass'n*, 39 Pa. 154; *Blackburn's App.*, 39 Pa. 160; *Haley v. Phila.*, 68 Pa. 45, and *Titusville Iron Co. v. Keystone Oil Co.*, 122 Pa. 627, certain expository statutes were denied retroactive effect; while, *In re East Grant Street*, 121 Pa. 596, an act was held invalid so far as it undertook to declare the meaning of a prior act; but, so far as it provided a substitutionary clause, was effective in repeal. Nor is it apparent how an exception can be reconciled with the theory of exclusive legislative and judicial functions. Its existence is an invitation to and has resulted in many attempted encroachments on the province of the latter; and, if it extend to cases like the present, has no limit in its application and puts in the power of the Legislature the abrogation of the principle to which it is said to be an exception.

"But concede the legislative power to pass expository acts; its exercise was said, in *Haley v. Phila.*, *supra*, to be limited to statutes whose construction is 'really doubtful.' 'It would be monstrous,' said Mr. Justice Sharswood, 'to maintain that where the word and intention of an act were so plain that no court had ever been applied to for the purpose of declaring their meaning, it was therefore in the power of the Legislature by a retrospective law to put a construction upon them contrary to their obvious letter and spirit.' 'The word and intention' of the act of 1854 are so plain that there is no room for construction, and therefore no occasion for the passage of an expository statute existed. It declares, so far as relates to the subject under consideration, that 'whenever any elective officer of said city shall die, or become incapable of fulfilling the duties of his office, his place, except where other provision is made for filling the vacancy, shall be filled by a joint vote of the city councils until the next city election and the qualification of the successor in office; Provided, that such vacancy shall exist at least thirty days before the next city election, otherwise such vacancy shall be filled at the next election thereafter;' while the act of 1867 declares that it 'shall be construed to mean,' what is obviously contrary to its 'letter and spirit,' that such appointee shall hold during the unexpired term."

On principle expository acts are wrong and are certainly of doubtful validity, even though they are prospective only and construe a statute which is ambiguous in meaning. They should never be resorted to, but the amendment intended to be made should be set forth in clear and positive language and in accordance with the constitutional provision requiring that part of the statute amended to be re-enacted in full.

The same thing is true of statutes undertaking to declare what the common law is. They may say what the law shall be, but it is beyond the power of the Legislature to require the courts to construe that to be common law which they have already solemnly decided not to be. Such statutes are on principle as objectionable as the others.

§8. *Change of Venue*.—The power to change the venue may be said to be on the borderland between the legislative and judicial departments. Prior to the adoption of the new constitution it was exercised by the Legislature. It was thought, however, to be properly a judicial function, hence it was provided that: "The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law."¹¹

This clause is not self-executing, hence laws existing at the date of the adoption of the constitution were not *ipso facto* abrogated by it.¹²

The constitution having left it to the Legislature to determine the causes for which there may be a change of venue, and the procedure by which it may be brought about the courts are bound by the terms of such laws as the General Assembly may enact. In *Little v. Wyoming Co.*, 214 Pa. 596 (1906), the act of March 30, 1875, P. L. 35, passed to carry out the constitutional provision, was under consideration. The question of interest in this connection was whether the terms of the act were mandatory on the courts, or whether the latter necessarily had discretion, by virtue of their general judicial power, to determine the necessity of any change of venue. It was held that the former was the true interpretation of the constitution and

¹¹Art. III, §23.

¹²*Watson v. Chester & Delaware River Railroad Co.*, 83 Pa. 254. (1877). See also *Felts v. R. R.*, 195 Pa. 21 (1900); reported also in 178 Pa. 290 (1896), and in 170 Pa. 432 (1895).

the law. Mr. Justice Mestrezat said: "The power to change the venue in civil cases, as observed above, is vested in the courts by the constitution, but the causes for which, and the manner in which, it must be exercised are entirely under legislative control. When, therefore, the Legislature has enacted and provided the causes and the mode of procedure, it is the duty of the court to comply strictly with the statutory provisions in determining the right of the applicant to have his case tried in another jurisdiction. It may be that in considering such applications the method which the court would adopt and the causes it would hold as sufficient would be equally effective in promoting the ends of justice. But the answer to that proposition is that the authority to determine the question is not in the court, but by a constitutional provision, belongs exclusively to the legislative department of the government. The question in every case under the first section of the act is, therefore, not whether the grounds or reasons assigned are sufficient to warrant a change of venue in the opinion or judgment of the court, but whether the applicant has brought himself within any of the causes for which the Legislature has determined a change shall be made. If he has, the court is required to grant the application, regardless of the opinion it may entertain as to the propriety of doing it." The same clause was further explained and discussed and similar principles enunciated in *Brittain v. Monroe Co.*, 214 Pa. 648 (1906), and in *Everson v. Sun Co.*, 215 Pa. 231 (1906).

§9. *Power of Legislature Over the Courts.*—As the whole judicial power is vested in certain courts, enumerated in the constitution, the question arises whether additional courts can be created and whether those named may be destroyed or deprived of their powers. That other courts may be established is evident from the very words of the constitution, and is too well known to require discussion. It follows that the jurisdiction of the courts formerly existing may be in part vested in the other courts so established.¹³ In *Com. v. Green*, 58 Pa. 226 (1868), the court, construing the Constitution of 1790, said:

¹³*Com. v. Zephon*, 8 Watts and Sergeant, 382 (1845); *Com. v. Martin*, 2 Pa. 244 (1845); *In re Application of the Judges*, 64 Pa. 33 (1870); *Com. v. Hipple*, 69 Pa. 9 (1871); *Brown v. Com.*, 73 Pa. 321 (1873); *Morgan v. Reel*, 213 Pa. 81 (1905). As to the right of the Legislature

"The main point of contention is whether the Legislature can transfer any part of the criminal jurisdiction now vested in the courts named in the constitution to any other court. It must be admitted that if the framers of the constitution intended to establish an unalterable judicial system, they have not expressed any such intention. The article which relates to the judiciary begins with a declaration that 'The judicial powers of this commonwealth shall be vested in a supreme court, in courts of oyer and terminer and general jail delivery, in a court of common pleas, orphans' court, registers' court, and a court of quarter sessions of the peace for each county, in justices of the peace, and in such other courts as the Legislature may from time to time establish.' It may be fully conceded that the Legislature cannot abolish any of the courts mentioned in this article, nor divest them of their entire jurisdiction, which would practically effect the same result. The words 'and in such other courts' points only to a partition of powers. If it had been 'or in such other courts,' it might be otherwise construed. It is a case in which 'and' cannot be construed 'or,' as it often may in statutes and other instruments when necessary to carry out the intention."

"Yet all this does not affect another proposition, that the Legislature have express power to divest the courts named of some of their jurisdiction, and vest it in such other courts as they may from time to time establish, or they may vest a concurrent jurisdiction in such other courts."

§10. *Composition of Supreme Court. Election and Appointment of Justices.*—"The Supreme Court shall consist of seven judges, who shall be elected by the qualified electors of the state at large. They shall hold their offices for the term of twenty-one years; if they so long behave themselves well, but shall not be again eligible. The judge whose commission shall first expire shall be chief justice, and thereafter each judge whose commission shall first expire shall, in turn, be chief justice."¹⁴

to give a quarter sessions court the power to issue a restraining order see *Com. v. Andrews*, 211 Pa. 110 (1905), affirming 24 Pa. Sup. Ct. 571 (1904). As to judge of one court sitting in another see *In re Application of the Judges*, 64 Pa. 33 (1870); *Com. v. Bell*, 4 Pa. Sup. Ct. 187 (1897).

¹⁴Art. V, §2. As to the history and derivation of this clause, it is said by Mr. Buckalew, *Const. of Pa.*, pp. 124-126: "Constitution of

There was among the members of the convention a desire to make the court as non-partisan as possible, and therefore a method was devised by which it was thought there would always be representatives of the minority party on the supreme bench. It was provided: "Whenever two judges of the Supreme Court

1776, Chap. II, §23: 'The judges of the Supreme Court of judicature shall have fixed salaries, be commissioned for seven years only, though capable of reappointment at the end of that term, but removable for misbehavior at any time by the General Assembly. They shall not be allowed to sit as members of the Continental Congress, Executive Council or General Assembly, nor to hold any other office, civil or military, nor take or receive fees or perquisites of any kind.' By §20, 'The president, and in his absence, the vice-president, with the council, five of whom shall be a quorum, shall have power to appoint and commission judges, naval officers, judge of the admiralty, attorney general, and all other officers, civil and military, except such as are chosen by the General Assembly or the people, agreeably to this frame of government and the laws that may be made hereafter, and shall supply every vacancy in any office occasioned by death, resignation, removal or disqualification, until the office can be filled in the time and manner directed by law or this constitution.'

"By the Constitution of 1790, Art. V, §2, the judges of the Supreme Court were to hold their offices during good behavior, but for any reasonable cause, which should not be sufficient ground of impeachment, the Governor might remove any of them on the address of two-thirds of each branch of the Legislature. They were appointable by the Governor alone, under Art. II, §8.

"By one of the amendments of 1838, Art. V, §2, the judges of the Supreme Court were to be nominated by the Governor, and by and with the advice and consent of the senate, appointed and commissioned by him. They were to hold their offices for the term of fifteen years, if they should so long behave themselves well, but for any reasonable cause which should not be sufficient ground of impeachment, might be removed by the Governor on the address of two-thirds of each branch of the Legislature.

"By the judiciary amendment of 1850, the judges of the Supreme Court were to be chosen by the qualified electors of the state at large, and to hold their offices for the term of fifteen years, if they should so long behave themselves well. They were to be commissioned by the Governor, but for any reasonable cause which should not be sufficient ground of impeachment, he was to remove any of them on the address of two-thirds of each branch of the Legislature. The first election of judges was to take place at the general election next after the adoption of the amendment, and the commissions of all the judges who might be then in office should expire on the first Monday of December following, when the terms of the new judges would commence. The judges first chosen under the amendment were to hold their offices as follows: One for three years, one for six years, one for nine years, one for twelve years, and one for fifteen years; the term of each to be decided by lot by the said judges as soon after the election as convenient, and the result certified by them to the Governor, that the commissions might be issued in accordance thereto. The judge whose commission should first expire should be chief justice during his term, and thereafter each judge whose commission should first expire should in turn be chief justice, and if

are to be chosen for the same term of service, each voter shall vote for one only, and when three are to be chosen he shall vote for no more than two, candidates highest in vote shall be declared elected."¹⁵

As the justice whose term soonest expires is to be chief justice and as two justices might on occasion be elected simultaneously, the priority of their commissions was to be determined by lot: "Should any two or more judges of the Supreme Court . . . be elected at the same time, they shall as soon after the election as convenient cast lots for priority of commission and certify the result to the Governor, who shall issue their commissions in accordance therewith."¹⁶

"The judges of the Supreme Court, during their continuance in office, shall reside within this commonwealth."¹⁷

"Any vacancy happening by death, resignation, or otherwise, in any court of record, shall be filled by appointment by the Governor, to continue till the first Monday of January next succeeding the first general election, which shall occur three or more months after the happening of such a vacancy."¹⁸

two or more commissions should expire on the same day, the judges holding them should decide by lot which should be chief justice. Any vacancy happening by death, resignation or otherwise, in the said court, should be filled by appointment by the Governor, to continue till the first Monday of December succeeding the next general election.

"This amendment did not fix or limit the number of judges except at the first election, but the number continued to be five until it was increased to seven by the new constitution. By the act of 11th March, 1809, the number of judges of the court was reduced to three, but the number was increased to five by the act of 8th of April, 1826.

"It will be observed that the provision in the Constitution of 1790, and amendment of 1838, which conferred power upon the Governor to remove a judge of the Supreme Court upon an address by two-thirds of each branch of the Legislature, was not imperative in form. It authorized a removal upon address, but did not command it; and, therefore, upon a notable occasion of a legislative address, Governor McKean declared with rough emphasis, 'I will let the Legislature know that *may* means *I won't!*' By the amendment of 1850 the provision was made imperative by substituting the word 'shall' for the word 'may.' Now, however, this power of removing judges of the Supreme Court upon address is extinct. See §15 of this article. They can be removed from office only upon impeachment."

"Art. V, §16.

"Art. V, §17.

"Art. V, §19.

"Art. V, §25. A similar clause was included in the judiciary amendment of 1850, Art. V, §2. See also amendments of 1838, Art. II, §8; Const. of 1790, Art. II, §8; Const. of 1776, Chap II, §20. See *Com. v. Maxwell*, 27 Pa. 444 (1856).

§11. *Composition of Courts of Common Pleas.*—The determination as to the composition of the courts of common pleas is left very largely to the discretion of the Legislature. Section 4, Article V, provides:

“Until otherwise directed by law, the courts of common pleas shall continue as at present established, except as herein changed. Not more than four counties shall at any time be included in one judicial district organized for said courts.”¹⁹

§12. *Judicial Districts.*—The directions as to judicial districts are contained in Article V, §5, as follows: “Whenever a county shall contain forty thousand inhabitants it shall constitute a separate judicial district, and shall elect one judge learned in the law; and the General Assembly shall provide for additional judges as the business of the said districts may require. Counties containing a population less than is sufficient to constitute separate districts, shall be formed into convenient single districts, or, if necessary, may be attached to contiguous districts, as the General Assembly may provide. The office of associate judge, not learned in the law, is abolished in counties forming separate districts, but the several associate judges in office when this constitution shall be adopted shall serve for their unexpired terms.”

¹⁹A similar provision is to be found in the Constitution of 1790, Art. V, §4. It is provided: “Until it shall be otherwise directed by law, the several courts of common pleas shall be established in the following manner: The Governor shall appoint, in each county, not fewer than three, nor more than four, judges, who, during their continuance in office, shall reside in such county. The state shall be divided, by law, into circuits, none of which shall include more than six nor fewer than three counties. A president shall be appointed of the courts in each circuit, who, during his continuance in office, shall reside therein. The president and judges, any two of whom shall be a quorum, shall compose the respective courts of common pleas.” In the Constitution of 1776, Chap. II, §4, it is provided: “Courts of justice shall be established in the city of Philadelphia and in every county of this state.” And in §26: “Courts of sessions, common pleas and orphans’ courts shall be held quarterly in each city and county, and the Legislature shall have power to establish all such other courts as they may judge for the good of the inhabitants of the state. All courts shall be open, and justice shall be impartially administered, without corruption or unnecessary delay. All their officers shall be paid an adequate, but moderate, compensation, for their services, and if any officer shall take greater or other fees than the law allows him, either directly or indirectly, it shall ever after disqualify him from holding any office in this state.” As to the organization of county courts prior to 1874 see *Com. v. Swank*, 79 Pa. 154 (1875); *Com. v. Potts*, 79 Pa. 164 (1875).

Although the language of this clause might lead us to suppose otherwise, a county does not *ipso facto* become a separate judicial district upon attaining a population of 40,000 inhabitants, but legislative action is required to make it such. This was determined in *Com. v. Harding*, 87 Pa. 343 (1878), in which Mr. Chief Justice Agnew said: "The principal question, and turning point of this case is, whether the new county of Lackawanna became a separate judicial district under the fifth section of the fifth article of the new constitution immediately upon its erection, and by that fact; or whether it remains within the Eleventh Judicial District, according to the provision in the thirteenth section of the act of 17th April, 1878, Pamph. L. 17), and must be organized under it. The fifth section of the fifth article reads thus: "Whenever a county shall contain forty thousand inhabitants it shall constitute a separate judicial district, and shall elect one judge learned in the law; and the General Assembly shall provide for additional judges as the business of the said district may require. Counties containing a population less than is sufficient to constitute separate districts shall be formed into convenient single districts, or, if necessary, may be attached to contiguous districts, as the General Assembly may provide. The office of associate judge, not learned in the law, is abolished in counties forming separate districts; but the several associate judges in office when this constitution shall be adopted shall serve for their unexpired terms." This section, it will be seen, has no relation to new counties, but operates on all counties, old and new, according to the number of inhabitants in them, and affects existing districts, as already arranged by law. The new constitution found the state already districted, and therefore to be redistricted before it could take effect. Under this section the organization of separate districts consisting of a single county, and that of single districts composed of several counties are different; the former having but one judge who holds all the courts alone, and additional *law* judges when necessary for the dispatch of business; the latter having three judges, one of whom, the president, is learned, and the other two not learned in the law; the president being a judge of every county in his district, and the associate judges only of one county. The

number of inhabitants in a county is an unknown fact, except as it may become known through the decennial census taken by the United States. This connects the question with the fourteenth section of the schedule, which will be noticed presently. Now it is obvious that as the fifth section referred to operates upon an existing arrangement of districts throughout the state, and as counties having a population less than forty thousand are necessarily comprehended with others in districts having a president judge, who presides in each and every county of the district, a most uncertain and confusing state of judicial affairs, followed by ruinous consequences, would happen, if, whenever a county reached the number of forty thousand inhabitants, it became *ipso facto* a separate judicial district, by the simple mandate of the fifth section of the fifth article and without preparatory legislation. Its organization would change *instantly*; the associates not learned in the law, elected and commissioned long after the adoption of the constitution, dropping out; and the president of the whole district becoming the sole judge in the new district. There would arise perplexing questions of jurisdiction likewise, if the fact of the required population determines the operation of the constitution, and not its legal ascertainment by an act of legislative power. If the *fact* determines, then the time of the *fact* also governs, and who shall (outside of the legal mode) determine when this took place? And if it had taken place long before the change in organization took place, what effect will the acts of associates have, acting after their offices expired by virtue of the very terms of the same section? It is evident that if the constitution executes itself, without legislative aid to determine the number of inhabitants and prepare the way for the passage of the county, having the required population, from the old into the new relation, the confusion would be inextricable, and the consequences ruinous. It is also obvious, as the constitution is not confined to new counties, but applies to old and new, that the latter must follow the same rule."²⁰

It will be observed that counties of 40,000 inhabitants are to be made into separate districts, whereas a union of

²⁰The same point was determined in *Com. v. Handley*, 106 Pa. 245 (1884), and in *Contested Election of Judges*, 109 Pa. 337 (1885).

several smaller counties may constitute a "single district." In *Turner v. Com.*, 86 Pa. 54 (1878), it was contended that "single districts" meant that only one law judge could be appointed in said district. The court, however, determined otherwise, saying: "It is alleged, secondly, that the defendant was tried and sentenced by an additional law judge, who had no constitutional power to try pleas of murder in a "double district." The validity of the commission of Judge Orvis, who held the court of oyer and terminer in which the defendant was convicted is thus called in question. It is insisted that the act of Assembly which authorizes the election of an additional law judge for the Twenty-fifth District, composed of the counties of Clearfield, Centre and Clinton, was and is unconstitutional and void. This point is raised under the fifth section of the fifth article of the constitution. It will be observed that when, by this section, a county is to compose a *separate* district, provision is made for additional law judges; but for *single* districts, formed of several counties, no such provision is made. The learned counsel for the defense regards this omission as significant. Not, indeed, because, without more, the Legislature would not possess the power to create such judges, since it is conceded that such power must necessarily belong to that body if it be not in terms withheld, but because it is said the phrase "single district," as used in this section, means a district having but a single law judge. To prove this, reference is had to the debates in the convention. But if these prove anything, they prove too much for the argument which they are adduced to support, for they advocate districts with single judges, without regard to whether those districts were to be composed of one or several counties. As the idea was dropped as impracticable in single county districts, we may well suppose it was also abandoned as to those formed of several counties; for it is not reasonable to suppose that, whilst provision was being made for the possible wants of districts having populations of forty thousand, those having possibly double that number should have been wholly neglected. We are inclined to think that the word "single," directly connected as it is with the word "district," is to be regarded as a synonym of "separate" and as having been used to avoid tautology. If not, its use, in the connection in

which it now stands, was unfortunate, for grammatically it qualifies and characterizes the judicial districts, and does not limit the number of judges."²¹

When a county becomes a separate district its right to have a resident law judge and to have no associate judges, unlearned in the law, is complete. Therefore any election of such unlearned judges in such county would be illegal and they could not lawfully exercise the duties of their offices, and the fact that a smaller county is attached to the larger will not alter the case.²² If, however, such judges have actually entered upon the duties of their office, their acts are not construed to be void, but valid until they are ousted by *quo warranto* at the instance of the attorney general. In the meantime they are judges *de facto* and are deemed to be *de jure* as against all but the Commonwealth.²³

§13. *Courts of Oyer and Terminer, etc.*—Provision for holding of courts of criminal jurisdiction is made by section 9, Article V. "Judges of the courts of common pleas, learned in the law, shall be judges of the courts of oyer and terminer, quarter sessions of the peace and general jail delivery, and of the orphans' court, and within their respective districts shall be justices of the peace as to criminal matters."²⁴

§14. *Style of Process, etc.*—"The style of all process shall be, 'The Commonwealth of Pennsylvania.' All prosecutions shall be carried on in the name and by the authority of the Commonwealth of Pennsylvania, and conclude 'against the peace and dignity of the same.'"²⁵ This is mandatory, and a conviction upon an indictment not framed in accordance with this clause will not be sustained,²⁶ although an immaterial variation will not be fatal.²⁷

²¹Mr. Buckalew strongly disapproves of this decision, and gives his reasons for his dissent in Const. of Pa., 131 *et seq.*, and 173 *et seq.* He thinks "single districts" meant "one judge districts."

²²*Com v. Dumbauld*, 97 Pa. 293 (1881).

²³*Clark v. Com.*, 29 Pa. 129 (1858); *Campbell v. Com.*, 96 Pa. 344 (1880); *Coyle v. Com.*, 104 Pa. 117 (1883).

²⁴As to the power of a judge to hold a quarter sessions court prior to the new constitution, see *Com. v. Martin*, 2 Pa. 244 (1845). For a full review of the organization of the criminal courts, see *Com. v. Zephon*, 8 Watts and Sergeant, 382 (1845). As to the power of the General Assembly to establish a new criminal court see §9, p. 314.

²⁵Art. V, §23.

²⁶*White v. Com.*, 6 Binn. 179 (1813); *Com. v. Jackson*, 1 Grant, 262 (1855); *Com. v. Paxton*, 14 Phila. 665 (1879).

²⁷*Rogers v. Com.*, 5 Sergeant and Rawle, 426 (1819).

§15. *Courts of Common Pleas and Criminal Jurisdiction in Philadelphia and Allegheny Counties.*—"In the counties of Philadelphia and Allegheny all the jurisdiction and powers now vested in the district courts and courts of common pleas, subject to such changes as may be made by this constitution, or by law, shall be in Philadelphia vested in four, and in Allegheny in two, distinct and separate courts, of equal and co-ordinate jurisdiction, composed of three judges each; the said courts in Philadelphia shall be designated respectively as the Court of Common Pleas No. 1, No. 2, No. 3 and No. 4, and in Allegheny as the Court of Common Pleas No. 1 and No. 2, but the number of said courts may be by law increased from time to time, and shall be, in like manner, designated by successive numbers; the number of judges in any of said courts, or in any county where the establishment of an additional court may be authorized by law, may be increased from time to time, and whenever such increase shall amount in the whole to three, such three judges shall compose a distinct and separate court as aforesaid, which shall be numbered as aforesaid. In Philadelphia all suits shall be instituted in the said courts of common pleas without designating the number of said court, and the several courts shall distribute and apportion the business among them in such manner as shall be provided by rules of court, and each court to which any suit shall thus be assigned shall have exclusive jurisdiction thereof, subject to change of venue as shall be provided by law. In Allegheny each court shall have exclusive jurisdiction of all proceedings at law and in equity commenced therein, subject to change of venue as may be provided by law."²⁸

"The said courts in the counties of Philadelphia and Allegheny, respectively, shall, from time to time, in turn, detail one or more of their judges to hold the courts of oyer and terminer and the courts of quarter sessions of the peace of said counties, in such manner as may be directed by law."²⁹

§16. *Prothonotary in Philadelphia County.*—"For Philadelphia there shall be one prothonotary's office, and one pro-

²⁸Art. V, §6.

²⁹Art. V, §8. See *Myers v. Com.*, 79 Pa. 308 (1875), as to construction of this section.

thonotary for all said courts, to be appointed by the judges of said courts, and to hold office for three years, subject to removal by a majority of the said judges; the said prothonotary shall appoint such assistants as may be necessary, and authorized by said courts, and he and his assistants shall receive fixed salaries, to be determined by law, and paid by said county; all fees collected in said office, except such as may be by law due to the commonwealth, shall be paid by the prothonotary into the county treasury. Each court shall have its separate dockets, except the judgment docket, which shall contain the judgments and liens of all the said courts, as is or may be directed by law.”³⁰

§17. *Orphans' Courts.*—“In every county wherein the population shall exceed one hundred and fifty thousand the General Assembly shall, and in any other county may, establish a separate orphans' court, to consist of one or more judges, who shall be learned in the law, which court shall exercise all the jurisdiction and powers now vested in, or which may hereafter be conferred upon, the orphans' courts, and thereupon the jurisdiction of the judges of the court of common pleas within such county in orphans' court proceedings shall cease and determine. In any county in which a separate orphans' court shall be established, the register of wills shall be clerk of such court, and subject to its directions in all matters pertaining to his office; he may appoint assistant clerks, but only with the consent and approval of said court. All accounts filed with him as register or as clerk of said separate orphans' court shall be audited by the court without expense to parties, except where all parties in interest in a pending proceeding shall nominate an auditor, whom the court may in its discretion appoint. In every county orphans' courts shall possess all the powers and jurisdiction of a register's court, and separate register's courts are hereby abolished.”³¹

The effect of this clause is not only to abolish the register's court, but also the office of clerk of said court and to terminate his duties.³²

³⁰Art. V, §7. As to the disposition of the fees prior to the passage of a law fixing salaries, see *Perot's Appeal*, 86 Pa. 335 (1878).

³¹Art. V, §22. See *Com. v. Clark*, 1 W. N. C. 330 (1875).

³²*French v. Com.*, 78 Pa. 339 (1875). As to abolition of an orphans' court, see *Reid v. Smoulter*, 128 Pa. 324 (1889).

§18. *Election, Appointment and Removal of Judges of Courts of Record.*—"All judges required to be learned in the law, except the judges of the Supreme Court, shall be elected by the qualified electors of the respective districts over which they are to preside, and shall hold their offices for the period of ten years, if they shall so long behave themselves well; but for any reasonable cause, which shall not be sufficient ground for impeachment, the Governor may remove any of them on the address of two-thirds of each house of the General Assembly."³³

The meaning of the latter part of this clause is somewhat doubtful. Mr. Buckalew says it gives the Governor power to remove only common pleas or orphans' court judges upon the address of two-thirds of the senate, and that such power as to Supreme Court judges is obsolete.³⁴ This is not altogether clear, however. The clause "any of them" may refer to both Supreme Court and common pleas judges. The point has never been judicially determined. Under this clause a judge could be removed for incompetency or physical disability, etc.³⁵

The power to remove judges here given is somewhat inconsistent with section 4, Article VI, which, in giving the Governor power to remove certain officers, expressly excepts from that power judges of courts of record. This, however, cannot affect the power as expressly given in the section just referred to. A judge cannot be removed in any other way, as by the abolition of his judicial district during his term of office.³⁶

The judge whose commission is oldest shall be president judge where there is more than one judge of a single court. If

³³Art. V, §15. The Constitution of 1776, Chap. II, §20, vested the power to appoint judges in the president of the executive council, with the concurrence of the council. By the Constitution of 1790, Art. II, §8, the judges were to be appointed by the Governor, and by Art. V, §2, were to hold office during good behavior. The term was reduced to ten years by the Constitution of 1838, Art. V, §2. By the amendments of 1850, Art. V, §2, the office of judge was made elective. Judges under this clause had to be elected whether they were called judges or not. *Com. v. Conyngham*, 65 Pa. 76 (1870). As to right to vote for a judge in a county of under 40,000 inhabitants, see *In re Contested Election of Law Judges*, 109 Pa. 337 (1885). As to putting the judge of a previously existing court upon a newly created one, see *Mansfield's Case*, 22 Pa. Sup. Ct. 224 (1903).

³⁴Buckalew, *Const. of Pa.*, p. 126.

³⁵See *Removal of Judges of Common Pleas*, 5 District Rep. 158 (1896).

³⁶*Com. v. Gamble*, 62 Pa. 343 (1869).

two judges are elected at once, they shall draw lots to determine the priority of their commissions in the same manner as has already been noticed in the case of Supreme Court justices.³⁷

During their continuance in office the common pleas judges are required "to reside within the districts for which they shall be respectively elected."³⁸ The provision for filling vacancies is the same as in the case of justices of the Supreme Court. "Any vacancy happening by death, resignation or otherwise, in any court of record, shall be filled by appointment by the Governor, to continue till the first Monday of January next succeeding the first general election, which shall occur three or more months after the happening of such a vacancy."³⁹ Three months must intervene between the happening of the vacancy and the general election preceding the first Monday of January, else the Governor's appointee must serve until the general election next following. In counting the three months, under the language of the constitution prior to 1873, both the day of the resignation or death and of the election were excluded from the computation,⁴⁰ the phrase being "more than three months," but as the section now stands only the day of the happening of the vacancy would be excluded.

§19. *Courts Not of Record*.—"Except as otherwise provided in this constitution, justices of the peace or aldermen shall be elected in the several wards, districts, boroughs, and townships, at the time of the election of constables, by the qualified electors thereof, in such manner as shall be directed by law, and shall be commissioned by the Governor for a term of five years. No township, ward, district or borough shall elect more than two justices of the peace or aldermen without the consent of a majority of the qualified electors within such township, ward or

"Art. V, §17: "Should any two or more judges of the Supreme Court, or any two or more judges of the court of common pleas for the same district, be elected at the same time, they shall, as soon after the election as convenient, cast lots for priority of commission and certify the result to the Governor, who shall issue their commissions in accordance therewith."

"Art. V, §19: "The judges of the Supreme Court, during their continuance in office, shall reside within this commonwealth, and the other judges, during their continuance in office, shall reside within the districts for which they shall be, respectively, elected."

"Art. V, §25.

"*Com. v. Maxwell*, 27 Pa. 444 (1856).

borough. No person shall be elected to such office unless he shall have resided within the township, borough, ward or district for one year next preceding his election. In cities containing over fifty thousand inhabitants, not more than one alderman shall be elected in each ward or district."⁴¹ The provision herein relating to the election of two justices in townships, wards or borough is not mandatory, but permissive only.⁴²

"In Philadelphia there shall be established for each thirty thousand inhabitants one court not of record, of police and civil causes, with jurisdiction not exceeding one hundred dollars; such courts shall be held by magistrates, whose term of office shall be five years, and they shall be elected on general ticket by the qualified voters at large, and, in the election of the said magistrates, no voter shall vote for more than two-thirds of the number of persons to be elected when more than one are to be chosen; they shall be compensated only by fixed salaries, to be paid by said county, and shall exercise such jurisdiction, civil and criminal, except as herein provided, as is now exercised by aldermen, subject to such changes, not involving an increase of civil jurisdiction or conferring political duties, as may be made by law. In Philadelphia the office of alderman is abolished."⁴³ Legislation to enforce this provision was necessary, as it was not self-executing.⁴⁴

"All fees, fines and penalties in said courts shall be paid into the county treasury."⁴⁵

"In all cases of summary conviction in this commonwealth, or of judgment in suit for a penalty, before a magistrate or court not of record, either party may appeal to such court of record as may be prescribed by law, upon allowance of the appellate court, or judge thereof, upon cause shown."⁴⁶

§20. *Original Jurisdiction of the Supreme Court. Injunctions.*—"The jurisdiction of the Supreme Court shall extend over the state, and the judges thereof shall, by virtue of

⁴¹Art. V, §11.

⁴²*Com. v. Morgan*, 178 Pa. 198 (1896). As to time of election of aldermen, see *Com. v. Callen*, 101 Pa. 375 (1882); making the mayor a police magistrate, see *Com. v. Moir*, 199 Pa. 534 (1901).

⁴³Art. V, §12.

⁴⁴*Cahill's Petition*, 110 Pa. 167 (1885).

⁴⁵Art. V, §13.

⁴⁶Art. V, §14. The General Assembly cannot give a right to appeal without showing cause. *Com. v. Luckey*, 31 Pa. Superior Ct. 441 (1906).

their offices, be justices of oyer and terminer and general jail delivery in the several counties; they shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of *habeas corpus*, of mandamus to courts of inferior jurisdiction, and of *quo warranto* as to all officers of the commonwealth whose jurisdiction extends over the state, but shall not exercise any other original jurisdiction; they shall have appellate jurisdiction by appeal, certiorari or writ of error in all cases as is now or may hereafter be provided by law."⁴⁷

The first cases in which the court is to have original jurisdiction are where an injunction is prayed for against a corporation. In such cases the injunction must be the main relief sought in the case, and if the real purpose of the bill is something different, a prayer for an injunction being added for the purpose of laying the ground for original jurisdiction of the Supreme Court, said jurisdiction will not be assumed.⁴⁸

The word "corporation" as here used includes municipal corporations,⁴⁹ but such corporation must be a real party defendant. If the application is to prevent the doing of some threatened illegal act by the officers of a city, they alone should be made defendants, for the action contemplated, if illegal, is beyond the power of the city, and the officers only are responsible.⁵⁰

§21. *Mandamus and Quo Warranto*.—The power to assume original jurisdiction in cases of mandamus is limited to those where the writ is directed to courts of inferior jurisdiction. There would, therefore, be no original jurisdiction where

⁴⁷Art. V, §3. The original jurisdiction from the adoption of the constitution was entirely dependent upon the construction of this clause. The Schedule, §11, extended the jurisdiction of "all courts of record and all existing courts" not specified in the constitution until December 1, 1875, but the Supreme Court has been held not to be included in this category. *Com. v. Hartranft*, 77 Pa. 154 (1874); *Fargo v. Oil Creek & Allegheny River Railway Co.*, 81* Pa. 266 (1875). Prior provisions relative to the jurisdiction of the Supreme Court are to be found in the Constitution of 1776, Chap. II, §24; Const. of 1790, Art. V, §§3, 6. As to the construction of these provisions relative to the power of the Legislature to alter the jurisdiction of the Supreme Court, see *McCurdy's Appeal*, 65 Pa. 290 (1870).

⁴⁸*Fargo v. Oil Creek & Allegheny River Ry. Co.*, 81* Pa. 266 (1875).

⁴⁹*Wheeler v. Phila.*, 77 Pa. 338 (1875).

⁵⁰*DeWalt v. Bartley*, 146 Pa. 525 (1891). As to jurisdiction over injunctions to restrain issuing municipal bonds, see *Bruce v. Pittsburg*, 161 Pa. 517 (1894); under old constitution, see *Hottenstein v. Clement*, 41 Pa. 502 (1862).

the writ is directed to the Governor of the state, as was contended in one case.⁵¹

The power to entertain *quo warranto* proceedings is limited to cases the object of which is to inquire into the status of officers whose jurisdiction extends over the state. This includes all general state officers, and has been held to include judges of county courts.⁵²

§22. *Jurisdiction in Criminal Cases.*—The last phrase in the section under discussion is “but shall not have any other original jurisdiction.” There is the further clause, Art. V, §21; “No duties shall be imposed by law upon the Supreme Court, or any of the judges thereof, except such as are judicial; nor shall any of the judges thereof exercise any power of appointment except as herein provided. The court of *nisi prius* is hereby abolished, and no court of original jurisdiction, to be presided over by any one or more of the judges of the Supreme Court, shall be established.” It has been argued that, notwithstanding the Supreme Court justices are by virtue of their offices to be “justices of oyer and terminer and general jail delivery in the several counties,” their criminal jurisdiction is taken away by the section just quoted, which was said to destroy all original jurisdiction not expressly conferred. This argument is unsound. The Supreme Court has always had power to issue certiorari to lower courts in criminal cases, ordering the record to be sent up so that the case might be tried by some one of their number, and in other respects to exercise jurisdiction in criminal cases, and this jurisdiction has been held to be not taken away. In *Com. v. Balph*, 111 Pa. 365 (1886), the whole subject was carefully considered. Balph had been indicted in the quarter sessions court of Warren County, and it was alleged that public sentiment was so inflamed against him that he could not have a fair trial. The Supreme Court was petitioned to issue a certiorari to the quarter sessions court and have the case removed to the Supreme Court for trial. Mr. Justice Agnew, in granting the rule for the writ, first pointed

⁵¹*Com. v. Hartranft*, 77 Pa. 154 (1874). For an attempt to employ a mandamus to review a decision of an inferior court, see *Powel's Estate*, 209 Pa. 76 (1904).

⁵²*Com. v. Dumbauld*, 97 Pa. 293 (1881). See also *Leib v. Com.*, 9 Watts, 200 (1840).

out certain statutory authority for the proceeding which had existed prior to the new constitution and proceeded: "It will thus be seen that the right of this court, or a judge thereof, to issue the writ of certiorari is distinctly recognized by the Constitution of 1790 and by three acts of Assembly. There never was a time since the passage of the act of 1722 when this right was not to be found upon our statute books. It has existed practically unchallenged for over one hundred and fifty years. If taken away at all, it is by the Constitution of 1874. . . .

"From the foregoing I take it to be clear that up to and prior to the adoption of the Constitution of 1874 this court possessed the inherent power of issuing writs of certiorari to remove criminal cases; to try such cases at bar in any district where it might chance to be sitting, or send it for trial at *nisi prius*; and upon sufficient cause shown to send it for trial to a county other than the one in which the indictment was found. And not only was such power inherent in the courts, but the power to remove indictments has been, from time to time, expressly conferred by act of Assembly. There never has been a period since the court was first organized that it did not exist, and the statutes conferring it have never been expressly repealed. Have they been repealed by implication? It would be a novel doctrine to hold that important powers which have been exercised by the highest judicial tribunal in the state for over one hundred and fifty years, not only permissively, but by the express command of the statute, can be taken away by mere implication. The suggestion of such a principle carries with it its own refutation. But the law on this subject is not uncertain. . . .

"The writ of certiorari is a writ of common right, to be taken away not by implication, but only by express words: *Mauch Chunk v. Nescopeck*, 9 Harris, 46; *Rex. v. Moreley*, 2 Burr. 1040, and in *Overseers of the Poor v. Smith*, 2 S. & R. 363, it was held that the jurisdiction of the Supreme Court can be taken away only by express words, or irresistible implication. We might multiply authorities indefinitely upon this point were it necessary. It is sufficient to refer to the late case of *County of Allegheny v. Gibson*, 9 Norris, 397, where the subject of the effect of the new constitution upon existing laws is discussed at length.

"The Constitution of 1874 contains no express repeal of either the act of 1836 or 1860, conferring upon this court the power to issue the certiorari. Nor is there a word in it from which such repeal can be irresistibly implied, or implied at all. We are of opinion that said acts are in full force.

"It is urged, however, that if the right to issue the writ technically exists, yet we have no power to try or control the case after it is brought here, and attention is called to the third section of Article V of the constitution, as taking away our power in this respect. If in point of fact we have no power over a case after it is brought here, it would be a persuasive argument against the power to bring it here, as we do not propose to do a vain thing, nor does the law contemplate that we should."

Mr. Justice Agnew then quoted the section of the constitution heretofore referred to and proceeded: "From this section we may gather with reasonable certainty the following: (1) That the jurisdiction of the Supreme Court extends over the entire state; (2) That the justices thereof are *ex-officio* judges of the oyer and terminer in every county of the commonwealth, and (3) That the original jurisdiction of the court, excepting in the excepted cases, is abolished.

"The first two propositions are not new. They existed in prior constitutions, and conferred no additional power. The third is a limitation of our power as formerly exercised, by taking away a portion of our original jurisdiction. That it was intended to sweep away the court of *nisi prius*, in which our original jurisdiction had been generally, if not wholly, exercised, was not left open to conjecture, as it is expressly declared by the twenty-first section of the fifth article, that 'the court of *nisi prius* is hereby abolished, and no court of original jurisdiction to be presided over by any one or more of the judges of the Supreme Court shall be established.' It is contended that this language, in connection with the third section of Article V takes away all our powers as justices of the oyer and terminer. We do not so understand the constitution, nor does it so read. Conceding for the purposes of this case that we may no longer try a case brought into this court, at *nisi prius*, it is begging the question to say we may not try it at all. The constitution

must be so read as to give effect to all its parts, and when it distinctly says that the judges of this court shall be *ex-officio* justices of the oyer and terminer and general jail delivery in every county in the state, it means something. It is not an idle phrase inscribed for mere sound, or to fill up space. It was not new; it was taken literally from the Constitution of 1838. It was known to the convention that this court had in several cases placed a construction upon this clause. It is sufficient to refer to a single case, *Com. v. Ickhoff*, 9 Casey, 80, in which it was distinctly held that 'each of the judges of this court has power to hold a court of oyer and terminer and general jail delivery in any county of the state.' . . .

"That the same power exists now is beyond all controversy. From all that has been said it would seem to be clear that the only change which the constitution makes in our powers in criminal cases is to prevent our trying indictments in the *nisi prius*. That court is dead, without the hope of resurrection. But each judge has the power to sit and try indictments in any county of the state.

"Much less does the constitution affect the power inherent in this court, and expressly conferred by statute, of removing criminal cases into this court by certiorari. It is not strictly speaking original jurisdiction. A certiorari brings up a record for review; it is not the commencement of an original suit. The general powers of supervision over criminal cases inherent to the king's bench, and expressly conferred upon this court by statute, means something more than the trial of the case before a jury. It means in its broadest sense that we shall see that every man charged with crime shall have a fair and impartial trial; that where it is made clear to us that a man cannot have such a trial, either from an excited and inflamed condition of the public mind in the county where the indictment was found, or from feeling or prejudice on the part of the judge, or any other sufficient cause, we shall issue our certiorari, remove the record into this court and send it down to another county for trial, and if necessary before one of the judges of this court. That it is a power to be exercised with extreme caution is admitted. That it may be abused is possible. But I can readily imagine circumstances in the future which would make the

exercise of this power the only barrier between a good citizen and gross oppression. If the people shall be of opinion that it was unwisely conferred, or that it is being improperly exercised, they can change it by a modification of the fundamental law. The mere knowledge that such a power exists in this court, it is believed, will make its frequent use unnecessary."

§23. *Assumption of Original Jurisdiction.*—While the Supreme Court have the power to assume original jurisdiction in certain cases, it does not necessarily follow that they will do so. They will not unless they are convinced that there are good and substantial reasons why they should, as in *Wheeler v. Phila.*, 77 Pa. 338 (1875), for example, where great public interests depended upon the solution of the question at issue, or, as in *Com. v. Balph*, 111 Pa. 365 (1886), where there was danger of an innocent man being convicted of a crime. But in cases where no good reason appears why the matter may not be properly disposed of in the lower court, the Supreme Court will decline to assume jurisdiction of the case. In *Buck Mountain Coal Co. v. Lehigh Coal & Navigation Co.*, 2 W. N. C. 241 (1876), a bill was filed praying an injunction against a corporation to restrain it from constructing a grade crossing. At the argument Mr. Chief Justice Agnew inquired: "Why do you not file the bill in the county court?" Counsel intimated that there would be certain serious objections to this, and the same justice observed: "Our jurisdiction is undoubted, but we have decided not to assume it where the remedy below is ample, except upon special cause shown. We will, however, consider the matter." Subsequently the following opinion was delivered by the chief justice:

"We decline taking jurisdiction of this case, the plaintiffs having an adequate remedy in the proper court of common pleas, with a right of appeal to this court. In order to prevent further applications of this sort, and to give the true attitude of the court upon the subject, we shall state briefly our reasons, and in what cases we may depart from the rule. In *Wheeler v. The City of Philadelphia* (1 Weekly Notes, 178), we said at the last term: 'We hold to the resolution expressed in *The Commonwealth v. Baroux* (12 Casey, 262), and *Hottenstein v. Clement* (5 Wright, 504), that we are at liberty to decline

jurisdiction in view of the ample remedy elsewhere, while our appellate jurisdiction necessarily requires all our time. But we do not deny our jurisdiction. Cases will arise when we must feel it our duty to act.' We thought that *Wheeler v. The City* was such a case, and for the reasons then stated entertained the bill and heard and decided the case. In the case before us no reason has been given why this cause cannot be heard in the proper court of common pleas. This must be done by affidavit presented with the bill, otherwise we shall not consider the question of entertaining the bill. There are reasons why, in some cases, we should act, as in the case of inability of the president judge of the proper court, by reason of interest, sickness, etc., the presence of hostility of such a character as leads to the belief that justice will not be done, a great public interest, and so forth. We do not undertake to state every case, or to lay down any precise rule as to the cases proper to be heard before us, but simply to illustrate our meaning in the exceptional cases referred to.

"In thus declining jurisdiction, it is not intended to intimate in the slightest degree that the case set forth in the bill before us is not a proper one to be pressed before the court. It may be important to arrest the action of the defendants in limine, to prevent complications. This the proper court should consider.

"The bill is declined, and ordered to be handed back to the solicitor presenting it."

It may further be remarked before leaving this topic, that no action taken by the Supreme Court in an appealed case, such as a direction that a decree be entered or adding to a judgment a penalty not imposed by the court below, etc., is an exercise of original jurisdiction, and therefore it is not subject to the limitations of this clause.⁵³

§24. *Appellate Jurisdiction.*—The latter part of §3, Art. V, already quoted, confers appellate jurisdiction in very general terms upon the Supreme Court,⁵⁴ and §24, Art. V, further pro-

⁵³*Com. v. Coal & Iron Co.*, 145 Pa. 283 (1891). For further cases of certiorari to quarter sessions see *Petition of M. S. Quay*, 189 Pa. 517 (1899); *Com. v. Smith*, 185 Pa. 553 (1898); *Com. v. Delamater*, 145 Pa. 210 (1891).

⁵⁴The cases which may be directly appealed to the Supreme Court are limited by the act of June 24, 1895, P. L. 212, creating the Superior

vides: "In all cases of felonious homicide, and in such other criminal cases as may be provided for by law, the accused, after conviction and sentence, may remove the indictment, record and all proceedings to the Supreme Court for review."

Prior to the adoption of this provision it was understood that the Supreme Court, on appeal in a homicide case, could review only questions of law. They could determine whether the trial judge had wrongly interpreted the law in his charge to the jury or in some other material matter occurring at the trial, and could review the evidence to see if the elements of the crime of which the prisoner had been convicted were to be found therein. But it was equally well understood that the discretion of the trial judge in declining a new trial would not be reviewed. After the new constitution was adopted the contention was made that the functions of the Supreme Court in this regard were enlarged. It was said that court could review the evidence to see if the jury had found in accordance with the facts. This contention, however, has not met with much, if any, consideration. It has been decided that the clause in question does no more than to guarantee to the prisoner a right to have his case reviewed, whether or not he has any reasonable ground for alleging error, but that the Supreme Court is not to review the judgment of the jury,⁵⁵ although it may reverse the action of the lower court in refusing a new trial where he has clearly abused his discretion.⁵⁶ The right thus guaranteed the prisoner may not be abridged by legislation, but may be reasonably regulated. In *Sayres v. Com.*, 88 Pa. 291 (1879), an act was under discussion, which had limited the time in which such appeals could be taken to twenty days after sentence. This limitation was contended to be an unconstitutional abridgment of the right of appeal, but the court held it to be a proper regulation, not unreasonable in its stipulations. Mr. Justice Paxson said:

"The constitution then, having given a writ of error with Court and conferring certain jurisdiction upon it. The act of May 5, 1899, P. L. 248, still further limited them by enlarging the list of the cases appealable to the Superior Court.

⁵⁵*McGinnis v. Com.*, 102 Pa. 66 (1883). See also *Kane v. Com.*, 89 Pa. 522 (1879).

⁵⁶*Com. v. Roddy*, 184 Pa. 274 (1898); *Com. v. Heidler*, 191 Pa. 375 (1899).

or without cause, in a certain class of criminal cases, as a writ of right, has the Legislature the power to control and regulate it? It is conceded that the right may not be denied, nor may its exercise be unreasonably obstructed or interfered with. But may not the Legislature fix return days, and provide for a speedy hearing? This court has already done so, by virtue of its inherent power to control its business, and we have no doubt our action was in entire harmony with the constitution. If the time of returning the writ, or of the hearing upon it, may be limited by rule of court or act of Assembly, why may not the time be limited during which the writ may issue, of course, provided such limitation be reasonable? If the Legislature may fix no limitation whatever upon the issuing of such writs, it is not too much to say that capital punishment cannot be hereafter enforced in Pennsylvania. A writ of error taken out when the prisoner is standing upon the trap of the gallows suspends his execution. Upon the hearing, he may suffer a *non pros.*, and then, when a second death-warrant issues, renew his writ of error, and so on to the end of the dreary farce. The convention which framed the constitution, and the people who ratified it, intended no such result as this when they incorporated the right to a writ of error into the fundamental law."

§25. *Supreme Court to Have None but Judicial Duties.*—To further separate the functions of the Supreme Court from those of the other departments of government, an express provision was inserted that:

"No duties shall be imposed by law upon the Supreme Court, or any of the judges thereof, except such as are judicial; nor shall any of the judges thereof exercise any power of appointment except as herein provided."⁵⁷

The section very clearly applies only to the justices of the Supreme Court, and whatever may be thought of the propriety of its doing so, the Legislature has the power to impose non-judicial duties upon the judges of other courts of record. In *Commonwealth v. Collier*, 213 Pa. 138 (1905), Mr. Justice Brown said:

"The executive, legislative and judicial branches of the state government are created by the people through their con-

⁵⁷Art. V, §21.

stitution, and the powers and duties of each are such only as are expressly conferred or imposed, or are inherent by necessary implication. But there are no powers inherent in either of the branches nor duties to be evaded by either of them, if such powers have been expressly withheld from it by the people or duties have been imposed upon it by them; and therefore no duty can be evaded by the executive or judiciary if the people have authorized its imposition by the Legislature, their law-making power, on either of these branches. In the judiciary article the judges of but one court are exempt from the imposition of non-judicial duties, and from them alone is the power of appointment withheld. 'No duty shall be imposed by law upon the Supreme Court or any of the judges thereof, except such as are judicial, nor shall any of the judges thereof exercise any power of appointment except as herein provided.' Const., sec. 21, Art V. *Expressio unius est exclusio alterius* is no less true of this clause than of any statute; and it is therefore to be presumed that the people, with the knowledge that for years before they adopted the present constitution judges of the common pleas had been directed by acts of Assembly to appoint mercantile appraisers, boards of revision of taxes, and other officers, and were so appointing them, adopted the clause containing the limitation upon this court alone, and left the judges of the other courts to continue to appoint when directed to do so by the Legislature."

§26. *Certiorari and Appeals from Courts Not of Record.*

—There are two clauses in the constitution which guarantee appeals or a removal of proceedings on certiorari from courts not of record to lower courts of record. Art. V, §10: "The judges of the courts of common pleas, within their respective counties, shall have power to issue writs of certiorari to justices of the peace and other inferior courts, not of record, and to cause their proceedings to be brought before them, and right and justice to be done." And Art. V, §14: "In all cases of summary conviction in this commonwealth, or of judgment in suit for a penalty, before a magistrate or court not of record, either party may appeal to such court of record as may be prescribed by law, upon allowance of the appellate court, or judge thereof, upon cause shown."

Under §10 certiorari can only issue from the courts of common pleas. No special allowance by a common pleas judge is necessary since the passage of the act of April 25, 1855, P. L. 304.⁵⁸

Appeals under §14 must first be allowed by a judge of the proper court of record to which the appeal is to be taken. In the absence of such allowance the appeal will be quashed.⁵⁹ Such allowance is not a matter of right, and may be refused if no sufficient cause be shown.⁶⁰ The application must be made to the proper court of record. It cannot be made to the justice of the peace or magistrate who tried the case.⁶¹

§27. *Jurisdiction of Courts of Common Pleas.*—The jurisdiction of the courts of common pleas, so far as it is dealt with by the constitution, is prescribed in §20, Art V: "The several courts of common pleas, besides the powers herein conferred, shall have and exercise, within their respective districts, subject to such changes as may be made by law, such chancery powers as are now vested by law in the several courts of common pleas of this commonwealth, or as may hereafter be conferred upon them by law."⁶² The powers "herein conferred" has reference to the general grant of judicial power and the grants inferred from the various sections already discussed. The jurisdiction of the courts may undoubtedly be increased by law, new remedies being provided where none before existed. This may be done either at law or in equity, but cases previously triable at law cannot be made exclusively cognizable in equity,

"Boards of road commissioners are not such "inferior courts not of record." *Nobles v. Poillet*, 16 Pa. Sup. Ct. 386 (1901); *McGinnis v. Vernon*, 67 Pa. 149 (1870).

⁵⁹*Com. v. McCann*, 174 Pa. 19 (1896). The General Assembly cannot provide that appeals may be taken without allowance, *Com. v. Luckey*, 31 Pa. Superior Ct. 441 (1906).

⁶⁰*Com. v. Eichenberg*, 140 Pa. 158 (1891); *Com. v. Menjou*, 174 Pa. 25 (1896).

⁶¹*McGuire v. Shenandoah Borough*, 109 Pa. 613 (1885); *Com. v. Courtney*, 174 Pa. 23 (1896). The right to appeal does not give the right to a jury trial, *Com. v. Waldman*, 140 Pa. 89 (1891); as to when an appeal should be allowed, see *Thompson v. Preston*, 5 Pa. Sup. Ct. 154 (1897); *Com. v. Hendley*, 7 Pa. Sup. Ct. 356 (1898).

⁶²As to the extent of chancery powers, see *Yaple v. Titus*, 41 Pa. 195 (1861). Court of common pleas has no common law power to issue a writ of mandamus to a state officer, *Com. v. Wickersham*, 90 Pa. 311 (1879). See also §6, Art. V, relating to courts of Philadelphia and Allegheny counties.

for this would be a deprivation of the right of trial by jury, which the present section was not intended to infringe.⁶³

§28. *Compensation of Judges.*—"The judges of the Supreme Court and the judges of the several courts of common pleas, and all other judges required to be learned in the law, shall at stated times receive for their services an adequate compensation, which shall be fixed by law, and paid by the state. They shall receive no other compensation, fees, or perquisites of office, for their services, from any source, nor hold any other office of profit under the United States, this state, or any other state."⁶⁴ The only question of difficulty arising under this section is whether the provision here made for the proper compensation of judges takes precedence over the clause providing that the compensation of public officers cannot be increased or diminished during their term of office. The question was raised after the passage of the judicial salary act of April 14, 1903, P. L. 175, and, as has already been noticed, it was decided that the section relating to the compensation of judges is exclusive of that forbidding the salaries of public officers to be increased or diminished during their term of office,⁶⁵ and therefore that the new salary act could apply to all judges in office.⁶⁶

The latter part of the section forbids judges from holding any other offices of profit under the United States, this or any other state. The only question which could arise under this provision, and that but seldom, is as to what offices are such as are here described. It has been held that the post of "commissioner" in connection with the settlement of the claims of "Connecticut settlers" was not,⁶⁷ but that the office of recorder of a court is such an one, and, therefore, cannot be held by a judge while on the bench.⁶⁸

§29. *Laws to be Uniform, etc.*—"All laws relating to courts shall be general and of uniform operation, and the or-

⁶³*Tillmes v. Marsh*, 67 Pa. 507 (1871), and see Chapter IV, "Trial by Jury."

⁶⁴Art. V, §18.

⁶⁵Art. III, §13.

⁶⁶*Com. v. Mathues*, 210 Pa. 372 (1904); *Opinion of Attorney General*, 13 Pa. District Rep. 91 (1904), and see Chapter XV, Miscellaneous Limitations of the Legislative Power, §5. See also *Judge's Compensation*, 4 Pa. C. C. 596 (1887).

⁶⁷*Shepherd v. Com.*, 1 Sergeant and Rawle, 1 (1814).

⁶⁸*Com. v. Conyngham*, 65 Pa. 76 (1870).

ganization, jurisdiction, and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgments of such courts, shall be uniform; and the General Assembly is hereby prohibited from creating other courts to exercise the powers vested by this constitution in the judges of the courts of common pleas and orphans' courts."⁶⁹

⁶⁹Art. V, §26. See *Phila. v. Linnard*, 97 Pa. 242 (1881).

CHAPTER XVIII.

IMPEACHMENT, REMOVAL FROM OFFICE AND OATHS.

§1. *House to Have Power of Impeachment.*—It is provided in the Federal Constitution and in the constitutions of the various states that the house of representatives shall exercise the power of impeachment. The idea of vesting this important function in the representatives of the people was doubtless borrowed from the English system; the power of impeachment there being vested in the House of Commons. There has never been any doubt that the house of representatives is the proper body to exercise the power. The representatives of the people themselves are most fit to inquire into the conduct of public men and to accuse them of wrongdoing where they find sufficient ground for so doing. It is provided in our constitution that “the house of representatives shall have the sole power of impeachment.”¹

§2. *Impeachments to be Tried by the Senate.*—It is equally well recognized that the proper body to try impeachments is the senate. The reasons the senate is selected are various. It is a more conservative body, not so quickly answerable to waves of popular opinions or prejudices, and by virtue of its large membership is less likely to improperly convict or acquit than a smaller body, such as a court or a jury. Its availability for this duty becomes still more apparent when we consider that the offenses charged are apt to be of a political nature, which are more suitable to be tried by the senate than by a court. It is, therefore, provided in our constitution that “all impeachments shall be tried by the senate.”²

The objection to permitting the senate to try cases of impeachment, founded primarily upon a disinclination to con-

¹Art. VI, sec. 1. Similar provisions were contained in earlier constitutions. Const. of 1776, Chap. II, sec. 9; Const. of 1790, Art. IV, sec. 1.

²Art. VI, sec. 2.

fuse the legislative and judicial functions, have been fully considered by many learned writers and dismissed as being of small importance.³

In order that the senators may be subject to the same obligations as ordinary jurors to render a true verdict according to the evidence, it is provided that "when sitting for that purpose the senators shall be upon oath or affirmation."⁴ In England the members of the house of lords were not sworn when trying impeachments, but merely placed upon their honor. This discrimination between lords and commoners when performing similar duties was repugnant to American ideas. To avoid the possibility of any assumption that the senators need not be sworn this provision was inserted.

The offenses for which officers are impeached are, as a rule, offenses of a political nature. It is but natural that those members of the senate who are opposed to the political actions of the person accused should to some extent be swayed by prejudice; therefore, in order to prevent conviction merely on account of party rancor or political animosity, it was provided that "no person shall be convicted without the concurrence of two-thirds of the members present."⁵ This clause renders it extremely unlikely that any innocent person will ever be convicted.

§3. *Officers Who May be Impeached. Penalties.*—The officers who are subject to impeachment include the Governor and all civil officers. The expression "civil officers" was probably used to distinguish the officers of the state, county or municipality from military or naval officers. The latter are not subject to impeachment.

As has been said, the crimes charged upon the impeachment of a civil officer are usually of a political nature, and it is for this reason that a vote of two-thirds is required in order to convict. Probably for the same reason it is provided that no punishment can be inflicted in case of conviction, except removal from office and disqualification to hold any office of trust or profit under this commonwealth. At the same time it is expressly provided that where the person accused has been

³See Story on the Constitution, sec. 742 to 813.

⁴Art. VI, sec. 2.

⁵Art. VI, sec. 2. For cases of impeachment, see Addison's Trial and Porter's Trial.

guilty of a crime which will make him liable to indictment and punishment by the criminal courts, he is not exempt from such punishment by reason of the fact that he has been impeached by the senate. The entire section is as follows: "The Governor and all other civil officers shall be liable to impeachment for any misdemeanor in office; but judgment in such cases shall not extend further than to removal from office and disqualification to hold any office of trust or profit under this commonwealth; the person accused, whether convicted or acquitted, shall, nevertheless, be liable to indictment, trial, judgment and punishment, according to law."⁶

§4. *Removal from Office.*—As, unfortunately, officers who have been elected or appointed do not always perform their duties with fidelity, it is necessary to have some method by which unfaithful servants may be removed from office. It is, therefore, provided in the constitution that "all officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed officers, other than judges of the courts of record and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed. All officers elected by the people, except Governor, Lieutenant Governor, members of the General Assembly and judges of the courts of record learned in the law, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the senate."⁷ All officers, whether elected or appointed, may hold office only so long as they behave themselves properly, and must be removed after conviction of misbehavior in office or of an infamous crime. The Governor, Lieutenant Governor and members of the General Assembly may be removed only by impeachment.⁸ Judges, possibly excepting those of the Supreme Court, may be removed by the Governor on the address of two-thirds of each house of the General Assembly for any reasonable cause not being sufficient

*Art. VI. sec. 3. Similar provisions are contained in the Constitution of the United States, Art. II, sec. 4. and in the earlier constitutions of this commonwealth. Const. of 1776, Chap II, sec. 22; Const. of 1790, Art. 4, sec. 3.

⁷Art. VI. sec. 4.

⁸It is suggested by Mr. Buckalew in his book on the constitution, page 186, that these officers except, of course, the Governor, may be

ground of impeachment by Art. V, §15. All other elective officers may be removed by the Governor at the request of the senate, after due notice and full hearing.

The sentence giving to the appointing power the right to remove appointive officers at pleasure is an important change in the constitution as it stood prior to 1873. Formerly the power was much more restricted, and it was enlarged only after a full discussion in the convention.⁹

The power to remove at pleasure is unqualified, even though the appointment is subject to the approval of the senate. It was argued in the case of *Lane v. Com.*, 103 Pa. 481 (1883), that the Governor had not the power to remove the recorder of Philadelphia, in view of the fact that he could only appoint such officer by and with the consent of the Senate.¹⁰ The contention was not approved. Mr. Chief Justice Mercur pointed out that while the appointment was subject to the approval of the senate, the sole appointing power was in the Governor, and that he alone had the power to remove. In the course of his opinion he said: "The senate may not be in session for a year and a half at one time. The powers of the Governor are never suspended. He is at all times duly authorized to exercise "the supreme executive power." The fact that an officer may be removed by the dilatory process of impeachment creates no argument against the summary power of removal by the Governor. Crime, imbecility or gross neglect of duty may demand that an officer shall be removed at once. The power to protect the people of the commonwealth by prompt action is wisely given to the Governor. In giving construction to the constitution we cannot assume that he will abuse that high trust." The words of the constitution are sufficiently broad to include officers of any kind, whether they are state, county or borough officers. It has been contended that the constitution was intended to apply only to state officers, but removed by the Governor after conviction of a crime. He is apparently somewhat in doubt about it. The language of the section would seem to point to the conclusion stated in the text.

⁹See Conv. Deb. (1873), 224-7, 230-5; 5 *ibid.*, 375-6; 7 *ibid.*, 559-62, 782; 8 *ibid.*, 122-6. For the earlier provisions see Const. of 1790, Art. VI, sec. 9; amend. of 1850, Art. V, sec. 2.

¹⁰The power of the Governor to appoint recorders in cities of the first class was conferred by an act of Assembly, which has since been repealed. As to what is an "appointed officer," see *Curley's Case*, 4 Dist. R. 207 (1895).

the courts have not taken this view. In *Houseman v. Com.*, 100 Pa. 222 (1882), the power of the receiver of taxes for the County of Philadelphia to remove the collector of delinquent taxes was upheld, and similar action affecting other minor officers has also been sanctioned.¹¹

§5. *Oath of Office.*—Since the very earliest times of which we have any record it has been customary for persons who are about to be inducted into office to swear fidelity to their duties. It is probable that the taking of an oath does not materially affect the subsequent conduct of an officer; if he is an honorable man he will live up to the duties of his office in any case; if he is dishonorable, the oath will not prevent him from a misuse of his powers. Nevertheless, there are many persons who are more or less affected by the ceremony of oath-taking, which operates as a solemn reminder to them that they are pledged to support, obey and defend the constitution. The form of the oath which should be administered was extensively discussed in the debates of the constitutional convention.¹² It was thought by many that if the legislators were required to swear that they had not been guilty of bribery or other similar offenses in procuring their election, it would have a salutary effect upon their conduct during the progress of their campaigns. Others were of the opinion that it would do no good to require some of the members to take oath which it was said would not restrain them in any case. However this may be, an elaborate provision was inserted in the constitution setting forth at length the oath required to be taken by senators, representatives, judicial, state and county officers. The section is as follows: "Senators and representatives, and all judicial, state and county officers, shall, before entering on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States, and

¹¹*Butler Township School District Case*, 158 Pa. 159 (1893). See also *Thomas v. Scranton Poor District*, 4 Com. Pleas Rep. 155 (1887); *Com. v. Stokley*, 19 Phila. 282 (1887); *Com. v. Sanderson*, 1 Pa. District Rep. 714 (1891); *Com. v. Sulzner*, 198 Pa. 502 (1901); *Com. v. Connor*, 207 Pa. 263 (1903); *Brower v. Kantner*, 190 Pa. 182 (1899); *Com. v. Black*, 201 Pa. 433 (1902); *Com. v. Moir*, 199 Pa. 534 (1901).

¹²See 2 Conv. Deb. (1873), 485 to 511, 518 to 547, 551 to 561; 6 Conv. Deb. (1873), 88 to 92, 171 to 193.

the constitution of this commonwealth, and that I will discharge the duties of my office with fidelity; that I have not paid or contributed, or promised to pay or contribute, either directly or indirectly, any money or other valuable thing, to procure my nomination or election (or appointment), except for necessary and proper expenses expressly authorized by law; that I have not knowingly violated any election law of this commonwealth, or procured it to be done by others in my behalf; that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law.' The foregoing oath shall be administered by some person authorized to administer oaths, and in the case of state officers and judges of the Supreme Court shall be filed in the office of the Secretary of the Commonwealth, and in the case of other judicial and county officers in the office of the prothonotary of the county in which the same is taken; any person refusing to take said oath or affirmation shall forfeit his office, and any person who shall be convicted of having sworn or affirmed falsely, or of having violated said oath or affirmation, shall be guilty of perjury, and be forever disqualified from holding any office of trust or profit within this commonwealth. The oath to the members of the senate and house of representatives shall be administered by one of the judges of the Supreme Court, or of a court of common pleas, learned in the law, in the hall of the house to which the member shall be elected."¹³

The section requiring the taking of the oath and the filing of the same is mandatory, as might be inferred from its language. If an officer refuses to take the oath he forfeits his office by the express terms of the constitution. Under the old constitution, containing a similar provision, omitting the clause regarding forfeiture,¹⁴ an officer who had not taken his oath could not recover his fees, although he held his office *de facto*, so that his official acts were valid as to third persons.¹⁵

¹³Art. VII, sec. 1.

¹⁴Const. of 1776, Chap II, sec. 10 and 40; Const. of 1790, Art. 8.

¹⁵*Riddle v. Bedford Co.*, 7 Sergeant and Rawle, 386 (1821). The taking of the oath should precede the service of the officer; the filing, however, may take place at any time. *Com. v. Valsalka*, 181 Pa. 17 (1897).

That part of the section relating to payment of money or other valuable thing by an officer to procure his election has been interpreted by the Supreme Court in one or two cases. In *Williams v. Commonwealth*, 91 Pa. 493 (1879), Mr. Justice Trunkey said: "Both the organic law and the statute strike at bribery, fraud and every corrupt act incident to an election, but leave the candidate free to use all honest means for the success of his party and promotion of his own election. He may disseminate information to the public respecting affairs of state, the principles, the purity and the corruption of the several political parties, and the merits and demerits of candidates; and in so doing he may use every honorable art of persuasion, eloquence and reasoning. These are lawful, are within the very life of free government and are not forbidden to a candidate, though they make interest for him at an election."¹⁶

The section, as its words indicate, refers only to state and county officers, and therefore does not require the taking of the prescribed oath by officers of a municipality.¹⁷

¹⁶See also *Howard v. Jacoby*, 3 Pa. County Court, 436 (1882). Pledge to attend a caucus is a "valuable thing." *Com. v. Havard*, 9 D. R. 493 (1900).

¹⁷*Com. v. McCarter*, 98 Pa. 607 (1881).

CHAPTER XIX.

SUFFRAGE AND ELECTIONS.

§1. *Expression of the Popular Will.*—"Although by their constitutions the people have delegated the exercise of sovereign powers to the several departments, they have not thereby divested themselves of the sovereignty. They retain in their own hands, so far as they have thought it needful to do so, a power to control the governments they create, and the three departments are responsible to and subject to be ordered, directed, changed, or abolished by them. But this control and direction must be exercised in the legitimate mode previously agreed upon. 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."¹

In order that the expression of the popular will may be free and untrammelled, it is necessary that outside interference shall be prevented and that laws relating to elections shall be carefully drawn, and fearlessly executed, so as to admit to the ballot those persons duly qualified and to exclude all not entitled thereto. The supreme importance of this matter to a representative government was recognized by William Penn, and by the founders of the State of Pennsylvania, as is shown by laws adopted by them upon this subject. Both in the laws agreed

¹Cooley's Constitutional Lim. (7 ed.), 892.

upon in England and in his earliest frames of government, William Penn had provisions relative to the qualifications of voters and the freedom and purity of election,² and clauses on the same subject are to be found in our earliest constitutions.³

§2. *Elections to be Free and Equal.*—One of the first cares of the founders of our government was to provide against interference with the freedom of elections. It is provided in the Declaration of Rights that: "Elections shall be free and equal; and no power, civil or military, shall, at any time, interfere to prevent the free exercise of the right of suffrage."⁴ This was but a repetition of the provisions which have been a part of our fundamental law since the foundation of the commonwealth.⁵ The section quoted was designed, as its words clearly indicate, to prevent any outside interference with the free conduct of elections.

"By declaring that elections shall be free and equal the constitutional guaranty is not only that 'the voter shall not be physically restrained in the exercise of his right by either civil or military authority,' *Com. v. Reeder*, 171 Pa. 505; but it is that by no intimidation, threat, improper influence or coercion of any kind shall the right be interfered with. The test of the constitutional freedom of elections is the freedom of the elector to deposit his vote as the expression of his own unfettered will, guided only by his own conscience as he may have had it properly enlightened."⁶

This is the extent of the meaning of the clause, and it has accordingly been held not to prevent the Legislature from providing that an elector may not vote for all candidates to be elected, but only for a certain number or proportion of them. This was said to be a proper method of obtaining minority representation, and no infringement of the freedom of elections. All electors had exactly the same privilege.⁷ The clause was

²See laws agreed upon in England, §§2, 3; Markham Charter of 1696, §2.

³Const. of 1776, Chap. I, §7; Chap. II, §§6, 32. Const. of 1790, Art. IX, §5; Art. III, §1.

⁴Art. I, §5.

⁵See Const. of 1776, Chap. I, §7; Const. of 1790, Art. IX, §5.

⁶Mr. Justice Brown, in *Oughton v. Black*, 212 Pa. 1 (1905). See also *Com. v. Reeder*, 171 Pa. 505 (1895).

⁷*Com. v. Reeder*, 171 Pa. 505 (1895).

also invoked, but without success, in the effort to overturn a law which, in regulating the form of official ballot, provided that voters could vote for all candidates of a party by making a cross in the party square, whereas those who desired to vote for individual candidates of different parties were obliged to mark each individual candidate. This law was alleged to discriminate against voters of independent proclivities, who desired to select each individual for whom their ballots were cast. As the regular "party voter" could mark his ballot by making a single cross, and the independent could not, inequality was said to be the result. The court, however, overruled the contention, in view of the fact that all voters had an equal right to adopt either method of voting.⁸

§3. *Qualifications of Electors.*—It is not enough for the constitution to provide that elections shall be free and equal. They cannot be made so unless laws are enacted and enforced providing the qualifications of electors, prescribing a method of determining the persons who are qualified and supplying a method by which their will may be recorded. The first requisite is the determination of the qualifications which shall entitle an individual to the ballot. It is of such importance that these shall be placed beyond the reach of the Legislature that from the very beginning they have been incorporated in the fundamental law.⁹

The Constitution of 1874, as amended,¹⁰ contains the following provision: "Every male citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections, subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact:

"1. He shall have been a citizen of the United States at least one month.

"2. He shall have resided in the state one year (or, having previously been a qualified elector or native-born citizen of the state, he shall have removed therefrom and returned within six months immediately preceding the election).

⁸*Oughton v. Black*, 212 Pa. 1 (1905).

⁹See Const. of 1776. Chap. II, §6; Const. of 1790, Art. III, §1; amendments of 1838, Art. III, §1.

¹⁰See amendments of 1901, P. L. 427.

"3. He shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election.

"4. If twenty-two years of age and upwards, he shall have paid within two years a state or county tax, which shall have been assessed at least two months and paid at least one month before the election."¹¹

§4. *Qualifications of Electors Unalterable by Legislature.*—The qualifications of electors as set forth in the constitution are unalterable by the Legislature; it cannot either add to or detract from them.¹² In *Page v. Allen*, 58 Pa. 338 (1868),

"Art. VIII, §1. Mr. Buckalew says, explaining the changes made by the Constitution of 1873 in the law previously existing (Const. of Pa., 194): 'The words 'white freemen,' contained in the suffrage amendment of 1838, are dropped, and the words, 'male citizen,' inserted in their place, so that no restriction of suffrage, resting upon a distinction of color, shall hereafter appear in the text of the constitution. A motion made in convention to restore the words 'white freemen' to their former place was rejected by a vote of yeas 7, nays 80.—5 Conv. Deb., 130.

"United States citizenship for one month is required as a qualification for voting. This provision was reported by the Committee on Suffrage, and was fully vindicated in debate.—1 Conv. Deb., 503, 529-530, 658, 668-683, 693-706. A motion to strike out was rejected by a vote of 27 to 66.—5 *id.*, 128-9.

A native-born citizen of the state, not an elector, removing from the state and returning, will, after remaining six months in the state, acquire a sufficient state residence for purposes of voting. It will not be necessary (as under the old constitution) that he shall have been an elector of the state before his removal therefrom. This very proper provision was adopted by the convention on motion of Mr. Russell, of Bedford.—5 Conv. Deb., 132.

"A residence of two months in an election district before an election is made a requisite for voting thereat, instead of ten days, as under the old constitution. This provision was reported by the Committee on Suffrage, 1 Conv. Deb. 503, and all motions to make the time longer or shorter were rejected.—*Id.*, 629; 5 *id.*, 131 (where remarks made by Governor Bigler are, by an error of the reporter or printer, imputed to Mr. Buckalew.)

"Lastly: The state or county tax to be paid as a prerequisite of voting by persons over twenty-two years of age must be assessed at least two months and paid at least one month before the election at which the right to vote shall be claimed. Under the old constitution no time for the payment of such tax within the two years preceding the election was fixed, and its assessment might be at any time preceding the tenth day before the election. The Committee on Suffrage of the convention did not report any tax qualification for voters, and a majority of the committee were opposed to such requirement, 1 Conv. Deb., 503, 528: but on motion of Mr. Niles, of Tioga, the provision of the old constitution on that subject, in amended form as above, was agreed to and added.—*Id.*, 629, 631, 657."

"*De Walt v. Bartley*, 146 Pa. 529 (1892); *McCafferty v. Guyer*, 59 Pa. 109 (1868), holding unconstitutional an act disqualifying deserters,

Chief Justice Thompson, after enumerating the constitutional provisions relative to the qualifications of electors, said: "These are the constitutional qualifications necessary to be an elector. They are defined, fixed and enumerated in that instrument. In those who possess them is vested a high and, to freemen, sacred right, of which they cannot be divested by any but the power which established them, viz.: the people in their direct legislative capacity. This will not be disputed."

§5. *Regulations of Exercise of Right of Suffrage.*—It is equally well settled, however, that the Legislature may constitutionally pass laws to carry out the provisions of the constitution by making proper regulations. In *Patterson v. Barlow*, 60 Pa. 54 (1869), the registry law of April 17, 1869, P. L. 49, was alleged to be unconstitutional. It was contended that the provisions of the act requiring all citizens to have their names registered upon the list was a substantial impairment of the right to vote and a restraint on the freedom of elections guaranteed by the constitution. The court held, however, that the act was not unconstitutional, as it was uniform in its operation, and, instead of interfering with the freedom of elections or the qualifications of voters, in fact promoted the equal right of voters by preventing the exercise of fraudulent methods. The Legislature has the power of regulating the right to vote so as to best promote the objects of the constitution. Mr. Justice Agnew said: "What clause of the constitution forbids this power to be exercised according to the exigency of the circumstances? Where the population of a locality is constantly changing, and men are often unknown to their next-door neighbors; where a large number is floating upon the rivers and the sea, going and returning and incapable of identification; where low inns, restaurants and boarding houses constantly afford the means of fraudulent additions to the list of voters, what rule of sound reason or of constitutional law forbids the Legislature from providing a means to distinguish the honest people of Philadelphia from the rogues and vagabonds who would usurp their places and rob them of their rights? I cannot understand the

Cusick's Election, 136 Pa. 459 (1890); *Com. v. Reeder*, 171 Pa. 505 (1895). An act authorizing election officers to reject the votes of those who have made wagers on the election has been held unconstitutional, *In re Clothier's Application*, 2 Chester Co., 355 (1884).

reasoning which would deny to the Legislature this essential power to define the evidence which is necessary to distinguish the false from the true. The logic which disputes the power to prohibit masqueraders in elections, on the ground that it affects their freedom or equality, must also deny the power to repress the social disorders of a city, because the same Bill of Rights declares that all men are free and equal and independent and have the right of pursuing their happiness. The power to legislate on the subject of elections, to provide the boards of officers, and to determine their duties, carries with it the power to prescribe the evidence of the identity and the qualifications of the voters. The error is in assuming that the true electors are excluded, because they may omit to avail themselves of the means of proving their identity and their qualifications. It might as well be argued that the old law was unconstitutional, because it required a naturalized citizen to produce his certificate of the fact, and expressly forbade his vote if he did not. What injustice is done to the real electors by making up the lists so that all persons without fixed residences shall be required to appear in person and make proof of their residence, and thus to furnish a true record of the qualified electors within the district?"¹³

Various similar statutes have been passed which contain regulations intended to prevent fraudulent voting. The act of January 30, 1874, P. L. 31, which requires certain persons to make stipulated affidavits before being permitted to vote, was attacked in *Cusick's Election*, 136 Pa. 459 (1890), on the ground that it limited the rights of duly qualified voters by requiring affidavits to facts which they might not be able to supply. The court, however, held that the provisions of the act were reasonable and proper regulations intending to identify legal voters and to exclude those who were unqualified. In the course of his opinion, Mr. Chief Justice Paxson, after quoting the provisions of constitution as above given, said: "It was urged on behalf of the appellant that at least some of these requirements are in excess of the legislative authority; that

¹³The previous registry law was declared to be unconstitutional in *Page v. Allen*, 58 Pa. 338 (1868), because it contained some provisions which limited the right of a qualified elector to vote.

they are so stringent as in many instances to deprive the citizen of the right to vote, in disregard of the mandate of the constitution which declares that 'no elector shall be deprived of the privilege of voting by reason of his name not being registered,' §7, Article VIII. By the word 'elector,' in this clause, is meant a duly qualified elector. When an elector has established his qualifications, in the manner pointed out by law, his vote must be received in obedience to the mandate of the constitution. Until, however, an unregistered voter has thus complied with the law, he is not even *prima facie* a qualified elector. We are unable to see anything in these requirements of the act of 1874, which, properly construed, are unreasonable, or in conflict with the constitution. It certainly imposes no hardship upon the voter to require him to swear, 'to the best of his knowledge and belief, when and where he was born.' There are few persons of sufficient intelligence to cast a ballot who have not some knowledge and belief of the time and place of their birth, and those who have neither knowledge nor belief can say so; the law does not require impossible things."

In *DeWalt v. Bartley*, 146 Pa. 529 (1892), the validity of the act of June 19, 1891, P. L. 349, was questioned. This act contains provisions requiring the identification of electors, regulating the manner in which the ballot is to be marked, and the method by which the names of candidates are to be printed upon the official ballot. Among these provisions is one to the effect that a political party is not entitled to have the names of its candidates printed upon the official ballot unless at the last election it polled at least three per centum of the largest vote cast for any office in the state or in that portion of it for which the nomination is made. This provision was argued to be a discrimination against voters who belonged to a political party which had polled less than three per centum of such vote. The court held the act to be constitutional, and as to the latter contention said: "It was contended that the provision or discrimination against the Prohibition party is in violation of that clause of the constitution which declares that elections shall be free and equal, and also §7, Article VIII, which declares that all laws regulating the holding of elections by the citizens shall be uniform throughout the state; that these constitutional pro-

visions were intended to secure to every citizen equality in the manner of voting, and to prohibit the Legislature from passing any law which shall give, directly or indirectly, an advantage to some voters which will not equally apply to all voters.

"This contention is plausible but unsound. The act does not deny to any voter the exercise of the elective franchise because he happens to be a member of a party which at the last general election polled less than three per centum of the entire vote cast. The provision referred to is but a regulation, and we think a reasonable one, in regard to the printing of tickets. The use of official ballots renders it absolutely necessary to make some regulations in regard to nominations, in order to ascertain what names shall be printed on the ballot. The right to vote can only be exercised by the individual voter. The right to nominate, flowing necessarily from the right to vote, can only be exercised by a number of voters acting together. Three persons may claim to be a political party, just as the three tailors of Tooley Street assumed to be 'the people of England.' It follows, if an official ballot is to be used, nominations must be regulated in some way, otherwise the scheme would be impracticable, and the official ballot become the size of a blanket. While so regulating it, the act carefully preserves the right of every citizen to vote for any candidate whose name is not on the official ballot, and this is done in a manner which does not impose any unnecessary inconvenience upon the voter."

In *Independence Party Nomination*, 208 Pa. 108 (1904), a law regulating the use of the official ballot being under discussion, Mr. Chief Justice Mitchell said: "The constitution confers the right of suffrage on every citizen possessing the qualifications named in that instrument. It is an individual right and each elector is entitled to express his own individual will in his own way. His right cannot be denied, qualified or restricted, and is only subject to such regulation as to the manner of exercise, as is necessary for the peaceable and orderly exercise of the same right in other electors. The constitution itself regulates the times and in a general way the method, to wit: by ballot, with certain specified directions as to receiving and recording it. Beyond this the Legislature has the power to regulate the details of place, time, manner, etc., in the

general interest for the due and orderly exercise of the franchise by all electors alike. Legislative regulation has been sustained on this ground alone. *DeWalt v. Bartley* (No. 2), 146 Pa. 529. Anything beyond this is not regulation but unconstitutional restriction. It is never to be overlooked therefore that the requirement of the use of an official ballot is a questionable exercise of legislative power and even in the most favorable view treads closely on the border of a void interference with the individual elector. Every doubt, therefore, in the construction of the statute must be resolved in favor of the elector."

The law on this point may be summarized by saying that wherever the regulations laid down by the Legislature are reasonable and do not seriously obstruct the exercise of the ballot they are constitutional. On the other hand, if they unlawfully deprive duly qualified electors of the right to vote, or unnecessarily interfere with the free exercise of the ballot, they are unconstitutional.

§6. *Registration Laws Under the Amended Constitution.*

—The cases which have been discussed all arose under the constitution as it existed prior to the amendments of 1901. The Constitution of 1873 provided that the qualifications enumerated therein, and which have not been changed, should entitle every male citizen to vote. The constitution as amended in 1901, and as quoted above, makes the exercise of the right of franchise "subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact." The essential purpose of a registration law is that the qualifications of electors may be determined at some period in advance of the election, and that a list of such electors may be made, which shall be binding upon the election officers upon election day. Prior to the amendment of 1901 such a law could not be enacted, for it was provided in Article VIII, §7, that "no elector shall be deprived of the privilege of voting by reason of his name not being registered." This section was amended to read: "All laws regulating the holding of elections by the citizens or for the registration of electors shall be uniform throughout the state; but laws regulating and requiring the registration of

electors may be enacted to apply to cities only, provided that such laws be uniform for cities of the same class."¹⁴

The sentiment of the people of Pennsylvania demanded a registration law, which should be made effective by providing for the exclusion from the right of franchise of persons not registered. It was by reason of this fact that the amendments of 1901, P. L. 427, were enacted by the people, and they are understood to vest in the General Assembly a right to provide for the determination of the qualifications of electors at some fixed period other than election day, and to make registration a necessary qualification of the right to vote. This necessarily carries with it the right to exclude from the franchise persons who are not registered, although otherwise qualified.¹⁵

§7. *Assessment and Payment of Taxes.*—The provision relating to the assessment of a tax two months before the election, which must be paid at least one month before it, has reference to a tax charged individually against the voter. It is not enough that he shall have paid the tax, it must appear that he has paid one which was assessed against him as distinct from a tax assessed against someone else, although paid by him. This was decided in the case of *Catlin v. Smith*, 2 S. & R. 267 (1816), in which Mr. Chief Justice Tilghman said: "The plaintiff insists that the constitution intends a tax laid and assessed on property and persons in general, at least six months before the election; but this will not accord either with the sense in which the words had been generally used, or with the reason for introducing them into the constitution. The voter is to have paid the tax assessed, not upon others, but himself; a tax assessed upon others is no tax as to him."¹⁶

This does not mean that the tax must necessarily be assessed

¹⁴This is the only express provision in the constitution recognizing the power of the Legislature to classify cities for purposes of legislation. Laws relating to elections, other than registration laws, must apply to the whole state, and not merely to a class of cities; this is because of the usual rule of interpretation, that the exception marks the limit of the power.

¹⁵See the Personal Registration Act of February 17, 1906, P. L. 49.

¹⁶See also *Com. v. Peltz*, 6 Phila. 330 (1867); *Election Law*, 9 Phila. 497 (1872); *Connolly's Case*, 5 W. N. C. 8 (1877); *In re Contested Election for School Directors*, 10 Kulp, 367 (1900); *Northampton County Contested Elections*, 6 North. Co. 141 (1898); *Thompson v. Ewing*, 1 Brewst. 67, 103 (1861).

against the voter by name. Owing to a mistake of the assessor, or of other officers, it may be that the property, while really owned by the voter, stands in another's name. This is immaterial if in fact he does own the property, and the tax is assessed against him as the owner, although misnamed. In *Commonwealth ex rel. v. Shrontz*, 213 Pa. 327 (1906), Chief Justice Mitchell said: "The constitution regards substance, not mere form. It makes no requirement that the tax shall be assessed against the elector by name, or personally, or as owner of property in severalty. If it is against ascertained property, and he, being in fact the owner, pays it, the requirement is fulfilled." This ruling of the Supreme Court covers cases in which property stands in the name of a firm, and which is in fact owned jointly or in common by its members. A tax assessed against the firm and paid by one of its members who is in fact one of the owners of the property will qualify him as a voter. This does not necessarily mean that a judge of election must accept a vote from one who produces a tax receipt in another's name, alleging himself to be the owner of the property and to have paid the tax. It means merely that the right of the voter may be established upon a judicial inquiry in which all the facts are ascertained.

§8. *Residence Within the State and Election District.*—The clause of the constitution providing that an elector to be qualified must have "resided" in the state one year and in the election district two months, has reference to a *bona fide* domicile. A mere temporary residence without the intention to make it a permanent home does not answer the requirements of the constitution. In *Fry's Election Case*, 71 Pa. 302 (1872), Mr. Justice Agnew, quoting the words of Story on the Constitution, said: "By the term 'domicile' in its ordinary acceptance, is meant the place where a person lives or has his home. In a strict legal sense that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.' Two things must concur to constitute domicile—first, residence; and, secondly, the intention of making it the home of the party. There must be the fact and the intent. . . . Undoubtedly (says Judge King), resi-

dence is a question of intention. In cases involving it, the inquiry is *quò animo* the party either moved to or from the state. And upon the solution of this question depends the fact whether the petitioner has gained or lost a residence. But before this question can arise an actual removal must have taken place. A mere intention to remove not consummated can neither forfeit the party's old domicile nor enable him to acquire a new one. Removal out of the state, without any intention permanently to reside elsewhere, will not lose residence, nor will a mere intention to remove permanently, not followed by actual removal, acquire it. Case of James Casey, an insolvent debtor, 1 Ashmead, 126.

"These extracts will enable us to understand more clearly the term residence as denoting that home or domicile which the third article of the constitution applies to the freemen of the commonwealth. It means that place where the elector makes his permanent or true home, his principal place of business and his family residence, if he have one; where he intends to remain indefinitely, and without a present intention to depart; when he leaves it he intends to return to it, and after his return he deems himself at home."¹⁷

From the definition given it is clear that a man can have but one voting residence, for he can have but one "home" in the sense here used at the same time. In *Com. v. Devine*, 14 Pa. Dist. Rep. 1 (1905), Judge Bregy thus defined a voting residence, having particular reference to conditions in Philadelphia: "The constitutional requirement of residence is not a thing obtained by anything but actual residence. A man who has a home, a place that he returns to when business and pleasure are ended, where he goes to for his usual sleep and meals, in fact, a place that he lives in, cannot obtain a right to vote by renting a room, furnishing it, having some clothing in it, and occasionally eating or sleeping in it in another election district.

"A man resides where, in ordinary language, his home is.

¹⁷See also *Lower Merion Election Case*, 1 Chester Co. 257 (1880); *Lower Oxford Contested Election*, 1 Chester Co. 253 (1875). That the people approved of this reasoning is shown by their adoption shortly after this decision of Art. VIII, §13, of the Constitution of 1873, which provides, *inter alia*, that one can neither gain or lose a voting residence while at an institution of learning.

Words used in a constitution are to be taken as used in their usual meaning. A man is required to reside for two months in a district to have the right to vote. Would any one imagine, if this were not a political question, that this requirement could be considered as having been complied with by the man who claims his office, his factory, or his rented room as his residence when he has a home that he occupies and calls his residence for all other purposes? Certainly not. I think a great deal of the popular misunderstanding on this subject arises from the expression that 'residence is a matter of intention.'

"These words are repeated without knowing the connection in which they were used. Everything in the way of furniture, clothing, etc., that a man has may be in a storage house, but that storage house is not his residence, because it is not his intention to, and he does not, live there. The same personal property, when placed in another building where the person intends to, and does, live, makes that building his place of residence. Residence is a question of fact and intention, and not of intention alone."

The residence required by the constitution must be within the election district where the elector attempts to vote, hence a law giving to voters the right to cast their ballots at some place other than the election district in which they reside would be unconstitutional.¹⁸ The requirement of residence in the election district, however, does not prevent a voter from being a resident of one district for the purpose of general elections and of another for the purpose of voting for school officers. This does not mean that he may have two domiciles, but that one domicile may make him a resident of one district for some purposes and of another for others. In the case of *Colvin v. Beaver*, 94 Pa. 388 (1880), an act was under consideration which provided that all persons residing within certain lines in the township of Napier should be attached to the borough of Schellsburg for school purposes, and should be entitled to vote for school officers in the said borough. This law was held not to be in conflict with the constitution.

As the domicile must be within the election district, so the polling place must also be within the district. If for any reason

¹⁸Except in the case of soldiers who may vote in the field.

it is located at a place outside of the election district, the election will be illegal.¹⁹

§9. *Voting Residence Not Gained or Lost in Certain Cases.*—There are certain circumstances under which a voter should not forfeit his right to vote, even though temporarily absent from his home, and certain other conditions under which public policy demands that a voting residence be not acquired. The constitution provides, Art. VIII, §13: "For the purpose of voting, no person shall be deemed to have gained a residence, by reason of his presence, or lost it by reason of his absence, while employed in the service, either civil or military, of this state or of the United States, nor while engaged in the navigation of the waters of the state or of the United States, or on the high seas, nor while a student of any institution of learning, nor while kept in any poorhouse or other asylum, at public expense, nor while confined in public prison."

This clause is understood to mean that an elector leaving his home under any of the circumstances enumerated, retains his right to vote at his last domicile. He does not acquire any right to vote at the place where he stays,²⁰ nor does he have the right to elect to change his domicile from the place he left to some other chosen by him. For example, a man residing in Washington on public business may return to the election district he left in order to vote, but he may not select another domicile and cast his vote from there, unless he has actually acquired a voting residence thereat. The same is true of inmates of asylums of various kinds,²¹ although persons residing therein may be eligible to vote if they are not supported at public expense.²²

§10. *Soldiers to Vote Out of Their Districts.*—An act permitting soldiers in the field to vote outside of their home

¹⁹*Kinnear's Contested Election*, 2 Pa. Co. Court, 666 (1882); *Yonkin's Contested Election*, 2 Pa. C. C. 550 (1886); *Smith v. Higby*, 12 Pa. C. C. 423 (1892); *Election Instructions*, 2 Dist. Reports, 299 (1888); *Metzger's Case*, 2 District Reports, 301 (1890).

²⁰See *Fry's Election Case*, 71 Pa. 302 (1872), containing a very full discussion as to the status of a student at an institution of learning.

²¹*Registration in City of Erie*, 8 Pa. Dist. Rep. 14 (1898); *Election Law*, 9 Phila. 497 (1872); *Chase v. Miller*, 41 Pa. 403 (1862).

²²*Registry Lists*, 10 Phila. 213 (1874).

districts having been declared unconstitutional,²³ an amendment to the constitution was immediately adopted so that they should not be disfranchised when unable to return home.²⁴ This section, retained in the Constitution of 1873, provides: "Whenever any of the qualified electors of this commonwealth shall be in actual military service, under a requisition from the President of the United States, or by the authority of this commonwealth, such electors may exercise the right of suffrage, in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual places of election."²⁵

§11. *Manner of Voting.*—Until the amendments of 1901 it had been provided in the constitution that all elections should be by ballot.²⁶ The constitution was amended in this regard so that if desired the Legislature could substitute some other method of voting, as for example, by voting machines, although the limitation was imposed that secrecy in voting should be preserved. The section now is: "All elections by the citizens shall be by ballot or by such other method as may be prescribed by law; provided, that secrecy in voting be preserved." Elections by persons in a representative capacity are to be *viva voce*. Art. VIII, §12, provides: "All elections by persons in a representative capacity shall be *viva voce*."²⁷

§12. *Election Days.*—The days upon which elections shall be held are thus fixed in the constitution: "The general election shall be held annually on the Tuesday next following the first Monday of November, but the General Assembly may by law fix a different day, two-thirds of all the members of each house consenting thereto."²⁸

²³Act of July 2, 1839, P. L. 519, declared unconstitutional in *Chase v. Miller*, 41 Pa. 403 (1862).

²⁴Amendment of 1864.

²⁵Art. VIII, §6. See act of August 25, 1864, P. L. 990.

²⁶Const. of 1776, Chap. I, §§19, 32; Const. of 1790, Art. III, §2; Const. of 1873, Art. VIII, §4.

²⁷See Const. of 1790, Art. III, §2; Art. VIII, §4. The amendment also abolished the system of numbering the ballots which had previously been in vogue. As to the construction of the clause requiring numbering in the Constitution of 1873, see *Dougherty's Contested Election*, 6 Pa. County Ct. 507 (1889).

²⁸Art. VIII, §2.

"All elections for city, ward, borough and township officers, for regular terms of service, shall be held on the third Tuesday of February."²⁹

The date of the general election now conforms to the date of presidential and congressional elections, and if the latter should be changed, could be altered by a two-thirds vote of both houses of Legislature.³⁰

§13. *Bribery and Corruption of Elections.*—Elaborate provisions are contained in the constitution with regard to bribery and the corruption of elections. Whatever may have been the history of this matter in Pennsylvania since the Constitution of 1873, there can be no doubt of the intent of its framers to destroy this form of wrongdoing. It is provided: "Any person who shall give, or promise or offer to give, to an elector, any money, reward or other valuable consideration for his vote at an election, or for withholding the same, or who shall give or promise to give such consideration to any other person or party for such elector's vote or for the withholding thereof, and any elector who shall receive or agree to receive for himself or for another, any money, reward or other valuable consideration for his vote at an election, or for withholding the same, shall thereby forfeit the right to vote at such election, and any elector whose right to vote shall be challenged for such cause, before the election officers, shall be required to swear or affirm that the matter of the challenge is untrue, before his vote shall be received."³¹

"Any person who shall, while a candidate for office, be guilty of bribery, fraud or wilful violation of any election law, shall be forever disqualified from holding an office of trust or profit in this commonwealth; and any person convicted of wilful violation of the election laws shall, in addition to any

²⁹Art. VIII, §3. See *Com. v. McCarthy*, 3 W. N. C. 477 (1877). These are not "general elections," *Wilkesbarre Record v. Luzerne Co.*, 6 Pa. Sup. Ct. 600 (1898).

³⁰For the days fixed by the old constitutions see Const. of 1776, Chap. II, §§9, 17; Const. of 1790, Art. I. §§2, 5; Art. II, §2; Art. VI, §1.

³¹Art. VIII, §8. It has been held that in an election contest the court has the right to throw out votes which they find to have been obtained by bribery. *White's Contested Election*, 4 Pa. Dist. Rep. 363 (1895).

penalties provided by law, be deprived of the right of suffrage absolutely for a term of four years."³²

§14. *Trial of Contested Elections.*—The trial of contested elections in certain cases was thus provided for: "The trial and determination of contested elections of electors of President and Vice-President, members of the General Assembly and of all public officers, whether state, judicial, municipal or local, shall be by the courts of law, or by one or more of the law judges thereof; the General Assembly shall, by general law, designate the courts and judges by whom the several classes of election contests shall be tried, and regulate the manner of trial and all matters incident thereto; but no such law assigning jurisdiction, or regulating its exercise, shall apply to any contest arising out of an election held before its passage."³³

To make it less difficult to obtain evidence in the trials of contested election cases, and in proceedings for the investigation of elections, it was further provided that: "In trials of contested elections and in proceedings for the investigation of elections, no person shall be permitted to withhold his testimony upon the ground that it may criminate himself, or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony."³⁴

§15. *Election Districts.*—"Townships, and wards of cities or boroughs, shall form or be divided into election districts of compact and contiguous territory, in such manner as the court of quarter sessions of the city or county in which the same are located may direct; but districts in cities of over one hundred thousand inhabitants shall be divided by the courts of quarter sessions, having jurisdiction therein, whenever at the next preceding election more than two hundred and fifty votes shall have been polled therein; and other election districts whenever the court of the proper county shall be of opinion that

³²Art. VIII, §9. Under this section on *quo warranto* proceedings one who has obtained his office by bribery may be deprived of it, although he has not been convicted in a criminal court. *Com. v. Walter*, 83 Pa. 105 (1876). See also *Leonard v. Com.*, 112 Pa. 607 (1886).

³³Art. VIII, §17. See Chapter XII, §3. See also *Ewing v. Filley*, 43 Pa. 384 (1862); *McNeil's Contested Election*, 111 Pa. 235 (1885); *Auchenbach v. Seibert*, 120 Pa. 159 (1888).

³⁴Art. VIII, §10. See *Kelly's Contested Election*, 200 Pa. 430 (1901).

the convenience of the electors and the public interests will be promoted thereby.”³⁵ This section invests the court of quarter sessions with exclusive discretion over this matter. “Inasmuch as Art. VIII, §2, of the constitution declares that townships shall form or be divided into election districts . . . in such manner as the court of quarter sessions of the county in which the same are located may direct, it lies not within legislative discretion to take that power from the court. The act of 18th May, 1876, which is now invoked, is so framed as by its terms to command the quarter sessions to confirm the report of commissioners unless exceptions be filed within a given time. The court correctly held the power still rests with the court of quarter sessions, where the constitution placed it.”³⁶

§16. *Election Officers*.—“District election boards shall consist of a judge and two inspectors, who shall be chosen annually by the citizens. Each elector shall have the right to vote for the judge and one inspector, and each inspector shall appoint one clerk. The first election board for any new district shall be selected, and vacancies in election boards filled, as shall be provided by law. Election officers shall be privileged from arrest upon days of election, and while engaged in making up and transmitting returns, except upon warrant of a court of record or judge thereof, for an election fraud, for felony, or for wanton breach of the peace. In cities they may claim exemption from jury duty during their terms of service.”³⁷

“No person shall be qualified to serve as an election officer who shall hold, or shall within two months have held, any office, appointment or employment in or under the government of the United States or of this state, or of any city or county, or of any municipal board, commission or trust in any city, save only justices of the peace and aldermen, notaries public and persons in the militia service of the state; nor shall any election officer be eligible to any civil office to be filled at an election at which he shall serve, save only to such subordinate municipal or local

³⁵Art. VIII, §11.

³⁶*In re Township of Bern*, 115 Pa. 615 (1887). See also *Contested Election of District Attorney*, 11 Phila. 645 (1874); *In re Division of Wards in the City of Pittsburg*, 7 Pa. Sup. Ct. 478 (1898).

³⁷Art. VIII, §14. This may result in both inspectors being of the same political party. *In re Election Officers*, 9 Pa. Dist. Rep. 83 (1900); as to arrest of election officers see *Election Court*, 204 Pa. 92 (1902).

offices, below the grade of city or county offices, as shall be designated by general law."³⁸

§17. *Overseers of Election.*—The right of citizens to have overseers of election appointed in cases where they have reason to believe fraud will be committed is a very valuable one. By this means at least one honest election officer can be secured, who can prevent fraud from being perpetrated. The right was deemed to be so important to the freedom and purity of elections that it was permanently secured to the citizens by a section in the constitution, as follows: "The courts of common pleas of the several counties of the commonwealth shall have power, within their respective jurisdictions, to appoint overseers of elections, to supervise the proceedings of election officers, and to make report to the court as may be required; such appointments to be made for any district in a city or county, upon petition of five citizens, lawful voters of such election district, setting forth that such appointment is a reasonable precaution to secure the purity and fairness of elections; overseers shall be two in number for an election district, shall be residents therein, and shall be persons qualified to serve upon election boards, and in each case members of different political parties; whenever the members of an election board shall differ in opinion, the overseers, if they shall be agreed thereon, shall decide the question of difference; in appointing overseers of election, all the law judges of the proper court, able to act at the time, shall concur in the appointments made."³⁹ The act of January 30, 1874, P. L. 31, passed to carry out this provision of the constitution, was until recently construed not to require the courts to appoint on petition duly filed, but only to give them the power to do so in their discretion. In *Parrish's Petition*, 214 Pa. 63 (1906), however, it was decided that the law was mandatory. Mr. Justice Mestrezat said:

"The fourth section of the act of January 30, 1874, P. L. 33, 1 Purd. 746, provides that upon the presentation of a

³⁸Art. VIII, §15. As to what are disqualifying offices see *Contested Election of Dist. Atty.*, 11 Pa. 645 (1874); *Burke's Contested Election*, 22 Pitts. L. J. 193 (1875); *Com. v. Jones*, 1 Leg. Rec. R. 293 (1878); *McKensie's Election*, 13 Pa. County Ct. 546 (1893); *Walker's Contested Election*, 3 Luz. L. Reg. 130 (1874).

³⁹Art. VIII, §16.

'petition of five or more citizens of any election district, setting forth that the appointment of overseers is a reasonable precaution to secure the purity and fairness of the election in said district, it shall be the duty of the court of common pleas of the proper county . . . to appoint two judicious, sober and intelligent citizens of said district, belonging to different political parties, overseers of election to supervise the proceedings of election officers thereof, and to make report of the same as they may be required by such court. . . . This section of the act of 1874 was passed, as it clearly appears, to carry into effect section 16 of Article VIII of the constitution. The court below and the learned counsel appearing for it here concede that the provisions of this section of the act are mandatory and not discretionary, and that under the act the court, on presentation of a proper petition, is required to appoint overseers.

"The court below held, however, that part of the act of 1874 providing for the appointment of overseers was repealed by the act of June 10, 1893, P. L. 419, 1 Purd. 747, for the reason that it was inconsistent with that part of the latter act providing for the appointment of watchers, which, in the language of the court, 'is evidently intended to take the place of the overseers provided for in the act of 1874.' . . .

"We are of opinion that the act of 1893 did not repeal that part of the act of 1874, providing for the appointment of overseers of elections, and that the court below was in error in declining to appoint overseers on the petition presented by the appellants."

§18. *Electors Privileged from Arrest at Elections.*—In order to prevent abuses of process designed to further political ends, it is provided, Art. VIII, §5, "Electors shall in all cases, except treason, felony and breach or surety of the peace, be privileged from arrest, during their attendance on elections and in going to and returning therefrom."

CHAPTER XX.

LIMITATION OF THE POWER TO TAX.¹

§1. *Power of Taxation Prior to 1874.*—The power of the Legislature to impose taxation upon property or persons within its jurisdiction is unlimited save by express clauses contained in the constitution. Prior to 1874 there were no such provisions, and hence the power to tax was in fact unlimited. "As regards taxation," said Mr. Justice Gibson, in *Kirby v. Shaw*, 19 Pa. 258 (1852), "there is no limitation of it."

"The taxing power, being a legislative duty, is, of course, intrusted to the General Assembly. And it is given to them without any restriction whatever. They are to use it according to their discretion, and if they abuse it, and if public opinion is not just or enlightened enough to correct their errors, there is no remedy. I use the language of Chief Justice Marshall (4 Wheat. 316) when I say that it may be exercised to any extent to which the government may choose to carry it, and that no limit has been assigned to it, because the exigencies of the government cannot be limited."²

In *New York & Erie Railroad Co. v. Sabin*, 26 Pa. 242 (1856), Mr. Justice Woodward said: "The doctrine may be regarded as firmly settled in this court that the taxing power of the Legislature is subject to no constitutional restraint."³

¹As to the power of the state to bargain away the taxing power, see Chapter VIII, p. 134, *Ex Post Facto Laws and Laws Impairing the Obligation of Contracts*. This chapter is not a general discussion of the limitations of the power to tax, but only of such as are contained in the Constitution of Pennsylvania.

²Mr. Chief Justice Black, in *Sharpless v. Mayor*, 21 Pa. 147 (1853).

³Other cases to the same effect are: *Grim v. School District*, 57 Pa. 433 (1868); *Phila. v. Field*, 58 Pa. 320 (1868); *Tonnage Tax Cases*, 62 Pa. 286 (1869); *Kelly v. Pittsburg*, 85 Pa. 170 (1877); *Hewitt's Appeal*, 88 Pa. 55 (1878); *Pa. Railroad Co. v. Pittsburg*, 104 Pa. 522 (1883); *McClenachan v. Curwin*, 3 Yeates 362 (1802); *Com. v. M'Williams*, 11 Pa. 61 (1849); *Speer v. School Directors*, 50 Pa. 150 (1865); *Weister v. Hade*, 52 Pa. 474 (1866); *Ahl v. Gleim*, 52 Pa. 432 (1866); *Maltby v. Reading & Columbia Railroad Co.*, 52 Pa. 140 (1866); *Brown's Appeal*, 111 Pa. 72 (1885).

As the power was unlimited, the Legislature could tax not only once but twice if it desired to do so. The imposition of a double tax on property, as by levying a tax on realty and also upon a mortgage covering the same property, seems to be unjust, but has been repeatedly held to be within the legislative power.⁴ The presumption, however, is always against the imposition of a double tax, and it cannot be collected unless expressly imposed.⁵

It is also well settled that the Legislature may delegate⁶ its power to tax to municipalities or other local authorities.⁷

§2. *Tax Must be for Public Purposes and Reasonably Uniform.*—Although the Legislature, in the absence of any constitutional limitations, could impose taxes in any reasonable manner⁸ and to any amount it might in its discretion decide upon, yet in the very nature of things there were some limitations upon its power. It could not under the guise of taxation take one man's property and give it to another, neither could it require one man or group of men to bear the burden of taxation for an entire community. It need not make all taxes uniform within the limits of the commonwealth, but it could not legally pass a law so unequal in its effect as to amount virtually to a deprivation of private property without due process of law. In *Sharpless v. Mayor*, 21 Pa. 147 (1853), Mr. Chief Justice Black said: "But I do not mean to assert that every act which the Legislature may choose to call a tax law is constitutional. The whole of a public burden cannot be

⁴*Phila. Saving Fund Soc'y v. Yard*, 9 Pa. 359 (1848); *West Chester Gas Co. v. Chester Co.*, 30 Pa. 232 (1858); *Ebervale Coal Co. v. Com.*, 91 Pa. 47 (1879). See also *Com. v. Railroad Co.*, 145 Pa. 38 (1891); *Beechwood Avenue*, 194 Pa. 86 (1899); *Com. v. Hillside Cemetery Co.*, 170 Pa. 227 (1895); *Com. v. R. R. Co.*, 150 Pa. 234 (1892), overruled on another point in 153 U. S. 628.

⁵*Com. v. Fall Brook Coal Co.*, 156 Pa. 488 (1893).

⁶*Durach's Appeal*, 62 Pa. 491 (1869); *Butler's Appeal*, 73 Pa. 448 (1873); *Pa. Railroad v. Pittsburg*, 104 Pa. 522 (1883); *Jermyn v. City of Scranton*, 186 Pa. 595 (1898).

⁷The power to tax is, however, in any case limited strictly to subjects within the jurisdiction. *Com. v. Standard Oil Co.*, 101 Pa. 119 (1882); *Maltby v. Reading & Columbia Railroad Co.*, 52 Pa. 140 (1866), overruled in "*State Tax on Foreign Held Bonds*," 15 Wall. 300 (1872).

⁸The Legislature may collect the taxes either directly, through its agents, or by making use of private persons, *e. g.*, officers of private corporations for the purpose of collecting a tax on bonds or stock. *Maltby v. Reading & Columbia Railroad Co.*, 52 Pa. 140 (1866); *Com. v. Lehigh Valley Railroad Co.*, 104 Pa. 89 (1883).

thrown on a single individual, under pretense of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the debts of the whole state. These things are not excepted from the powers of the Legislature, because they did not pass to the Assembly by the general grant of legislative power. A prohibition was not necessary. An act of Assembly, commanding or authorizing them to be done, would not be a law, but an attempt to pronounce a judicial sentence, order or decree.

“It is the theory of a republican government that taxes shall be laid equally, in proportion to the nature of property; and when collected, shall be applied only to purposes in which the taxpayers shall have an equal interest. But this is impossible even in the simplest state of society, and becomes more and more difficult in proportion as a higher civilization diversifies the characters, circumstances and the pursuits of the people. ‘A just and perfect system of taxation,’ says Chancellor Kent, ‘is yet a desideratum in civil government’ (2 Com. 332). No county or municipal tax ever came up to the theory, and the taxes now levied by the state are a grievous violation of it. The improvements made by the commonwealth added largely to the fortunes of some, to others they did no service, and some were injured by them. Still, all are now compelled to pay for them. It is not, therefore, every inequality of burden or benefit—not every disproportion between the sum which a citizen pays, and the interest which he, as an individual, has in the purpose to which it is applied—that can make a tax law void. I am of opinion with the Supreme Court of Kentucky (9 B. Monroe, 345) that a tax law must be considered valid, unless it be for a purpose, in which the community taxed has palpably no interest; where it is apparent that a burden is imposed for the benefit of others, and where it would be so pronounced at the first blush.

“Neither has the Legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere *private* purpose. No such authority passed to the Assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for *public*

purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the Legislature to usurp any other power not granted to them."

It appears, therefore, that even without any constitutional restrictions a tax law to be valid must impose the tax for a public purpose, and must be reasonably uniform in its operation. In *Washington Ave.*, 69 Pa. 352 (1871), Mr. Justice Agnew, after quoting a portion of the above extract from Mr. Chief Justice Black's opinion, continued: "I admit that the power to tax is unbounded by any express limit in the constitution—that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further than all derive benefit from the purpose to which it is applied. But nevertheless taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must, therefore, visit all alike in a reasonably practicable way of which the Legislature may judge, but within the just limits of what is taxation. Like the rain it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation, extortion, not assessment, and falls within the clearly implied restriction in the Bill of Rights."

§3. *Meaning of Public Purposes.*—To levy a tax for public purposes means that the money raised by the tax is to be applied to some purpose in which the public has or may have an interest. It has been said that if there is the least possibility that the tax will promote the public welfare, it becomes purely a question of policy whether to levy it or not, and as to that matter the decision of the Legislature is final.⁹ In *Sharpless v. Mayor*, 21 Pa. 147 (1853), it was urged that a tax levied for the support of a railroad was for a private pur-

⁹See *Cooley*, Const. Lim. (7th ed.), p. 699.

pose and therefore void. It was argued that the road was a private enterprise and that in no case could the tax be deemed proper because it was levied only on the people of Philadelphia to support a railroad, the greater part of which was outside of the city. The court decided that the tax was valid, inasmuch as it was to be applied to a purpose in which the public had an interest and that the circumstance of the greater portion of the road being actually located outside of the city was of no importance. Mr. Chief Justice Black said: "But it has been argued (and here, perhaps, is the strain of the case) that this will be taxation for a private purpose, because the money levied will be in effect handed over to a private corporation. I have conceded that a law authorizing taxation for any other than public purposes is void; and it cannot be denied that a railroad company is a private corporation. But the right to tax depends on the ultimate use, purpose and object for which the fund is raised, and not on the nature or character of the person or corporation whose intermediate agency is to be used in applying it. A tax for a private purpose is unconstitutional, though it pass through the hands of public officers; and the people may be taxed for a public work, although it be under the direction of an individual or private corporation. The question, then, is whether the building of a railroad is a public or private affairs. If it be public, it makes no difference that the corporation which has it in charge is private.

"A railroad is a public highway for the public benefit, and the right of a corporation to exact a uniform, reasonable, stipulated toll from those who pass over it, does not make its main use a private one. The public has an interest in such a road, when it belongs to a corporation, as clearly as they would have if it were free, or as if the tolls were payable to the state, because travel and transportation are cheapened by it to a degree far exceeding all the tolls and charges of every kind, and this advantage the public has over and above those of rapidity, comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth."

On these principles a law authorizing the levy of a tax to repay citizens for bounty money advanced by them to secure soldiers for the war, was held valid.¹⁰ On the other hand, a

¹⁰*Hilbisch v. Catherman*, 64 Pa. 154 (1870).

tax to repay a personal debt, even though contracted for a purpose of a public nature, cannot be upheld, since the public has no interest in the disposition of the fund.¹¹ This is the test whether the tax may directly or indirectly operate for the public benefit. If it will not, it is for a private purpose and is illegal.

§4. *Constitutional Requirement of Uniformity of Taxation.*—In order to protect the rights of the citizens still further than they were by the decided cases, the constitutional convention of 1873 inserted a new clause, as follows: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."¹²

The requirement that taxes shall be levied and collected under general laws is a mere reiteration, with greater particularity of the more general prohibition of local or special legislation already discussed. That relating to uniformity, however, is new, no such clause having appeared elsewhere in the Constitution of 1873 or in any previous constitution. It is prospective only in its application, and did not repeal, *ipso facto*, existing laws, as may be inferred from the construction put upon like clauses, already noticed.¹³

§5. *Power of Legislature to Classify.*—It requires no argument to show that the only way by which even approximate uniformity can be attained is by classifying property or persons for purposes of taxation. If all persons were taxed a uniform amount and all property at the same rate, there would be a resulting inequality, than which it would be hard to devise anything more unjust. This principle was fully recognized before the adoption of the new constitution, and the classification of persons and property for purposes of taxation was a well-recognized fact.¹⁴ In *Durach's Appeal*, 62 Pa. 491 (1869), Mr. Justice Sharswood said: "But in the legitimate exercise of the power of taxation, persons and things always

¹¹*Faas v. Warner*, 96 Pa. 215 (1880).

¹²Art. IX, §1.

¹³*Lehigh Iron Co. v. Lower Macungie Twp.*, 81 Pa. 482 (1876); *Allegheny v. Gibson*, 90 Pa. 397 (1879); *Coatesville Gas Co. v. Chester Co.*, 97 Pa. 476 (1881); *Com. v. Wheelock*, 13 Pa. Sup. Ct. 282 (1900); *Ruth's Appeal*, 10 W. N. C. 498 (1881).

¹⁴*Serrill v. Phila.*, 38 Pa. 355 (1861); *Weber v. Reinhard*, 73 Pa. 370 (1873); *Kitty Roup's Case*, 81* Pa. 211 (1874).

have been and may constitutionally be classified. No one has ever denied this proposition. To hold otherwise would logically require that all the subjects of taxation, as well persons as things, should be assessed, and an equal rate laid *ad valorem*. Practically no more unequal system could be contrived."

Although the language of the constitution clearly recognizes the continued right and even duty of the Legislature to classify, it was urged in one or two cases that the power so to do was taken away by the new constitutional provision requiring uniformity of taxation. The contention was overruled, however, and it was decided soon after the constitution was adopted that the power to classify still remains.¹⁵ In *Kittanning Coal Co. v. Com.*, 79 Pa. 100 (1875), Mr. Justice Agnew said: "The argument against the tax must, therefore, deny the right of classification. The classification here is of incorporated coal mining, and purchasing and selling companies, and the subject of taxation, their franchise or privilege of pursuing this business. Now, what is there to prevent the Legislature from making this class? It is not expressly forbidden in the first section of the ninth article of the constitution. It says: 'All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.' Clearly there is nothing in this prohibiting the power to classify. Will it be argued that persons, or the owners of property, cannot be classified? For example, can it be said that all single freemen cannot be required to pay a uniform tax? Or that the owners of horses or mules, or of cattle, cannot be taxed upon their horses, mules and cattle, at a certain rate? Or that the owner of unseated lands, or of farms, or mills, or houses and lots, cannot be taxed at a uniform rate? . . . It is clear, therefore, that the moment we concede the power to classify, we have disposed of the question of uniformity, for then all that is required by the constitution is uniformity of taxes among the members of the class. Now the power to classify is not only retained in clear language, but was held by the court to be continued in the case of *Kitty Roup v. The City of Pittsburgh*."

¹⁵*Kitty Roup's Case*, 81* Pa. 211 (1874); *Williamsport v. Brown*, 84 Pa. 438 (1877); *Jermyn v. Scranton*, 212 Pa. 598 (1905).

§6. *Basis Upon Which Classification May be Made.*—The principle once established that the Legislature may classify for purposes of taxation, the basis upon which that classification may be made is largely within the discretion of the General Assembly. The requirement of uniformity is limited to uniformity within the class, and so long as the property or persons included in the class are reasonably distinguished from those not so included, a law taxing them alone will be held valid. This classification may be based upon differences in the character of the property, in the uses to which it is put, in the persons or corporations who control it, or upon real and substantial differences of any kind which separate one class of subjects from others.

It has been suggested that classification should not be based upon the ownership of property, but only upon the character or use of the property itself. This contention has not met with much consideration. In *Kittanning Coal Co. v. Com.*, 79 Pa. 100 (1875), Mr. Justice Agnew said: "That he who has more to be protected by government should pay more for its support is a plain rule. But without the power to classify men as well as things, this undesirable inequality cannot be avoided, for if visible or tangible things only can be classified for taxation, then those whose wealth consists in that which is not visible or tangible, though it be far beyond the few visible effects of the poorer citizen, will not bear their proper share of the public burden."

This language recognizes and upholds the right of the Legislature to classify persons natural or artificial for purposes of taxation. It is not to be supposed that the same property, held in the same way and subjected to the same use, could be differently taxed because held by different persons or different classes of persons or corporations,¹⁶ but where there are differences in the subject matter of the tax, which exist by reason of differences in the persons owning it, then a case is presented where classification of such property dependent upon its ownership is legal and valid. This classification in the case of corporations may be based merely upon citizenship, as in *Germania*

¹⁶Thus, in *Limestone Co. v. Fagley*, 187 Pa. 193 (1898), an act taxing the employer of alien laborers only, was held to be an arbitrary classification and therefore unconstitutional.

Insurance Co. v. Commonwealth, 85 Pa. 513 (1877), in which a law was upheld which divided insurance companies into foreign and domestic and taxed one class independently of the other.

§7. *Classification of Securities Dependent Upon Character of Debtors.*—Similarly it has been held that evidences of indebtedness may be classified with regard to the character of the debtors. It has been decided that such securities, issued by private persons, may be taxed at their real value, while those issued by corporations may be taxed at their face value. This was the conclusion reached in *Commonwealth v. Delaware Div. Canal Co.*, 123 Pa. 594 (1888); the reason for the decision may be sufficiently seen from the following extract from the opinion of Mr. Justice Clark. “But, assuming the power of the Legislature to enforce this method of collecting, it is contended that the tax is not uniform on the same class of subjects, and is therefore illegal and void; that whilst *all* mortgages, money in the hands of solvent debtors, etc., are by the act of 1885 made taxable for state purposes, annually, at the rate of three mills ‘on the dollar of the value thereof,’ the like obligations of private corporations are to be assessed, at the same rate, upon ‘the nominal value.’ The actual value of private or individual obligations for money in the hands of solvent debtors is, as a general rule, equivalent to their nominal value. Such obligations are not ordinarily put upon or quoted in the market, and therefore have no variable market value as other securities have; on the contrary, the actual value of corporate securities is dependent upon a variety of conditions, independent of the value of the debtor’s estate—the fluctuations of trade, the date of maturity, the rate of interest, the amount of competition, and generally upon the stringency of the market and the financial condition of the country. Some of these securities, it is said, upon which interest is regularly paid, sell in the market as low as fifty cents, and others, perhaps, as high as one hundred and fifty cents on the dollar. And it is argued that, as by the first section of the act of 1885 individual and corporate obligations constitute a single class of subjects for taxation, the act unjustly discriminates between them in the fourth section, and that therefore the taxes imposed cannot be said to be uniform upon the same class of subjects.

"The first section of the act does indicate certain subjects for taxation, at a certain rate, and these may in some sense be said to constitute a general class; but the classification of these subjects is extended by the fourth section; one class, consisting of the securities of private corporations, is to be taxed at their nominal value, and the residue (excepting the securities of municipal corporations, which are still taxable under the forty-second section of the act of April 29, 1844) constitute another class, taxable at the same rate, but upon their value to be ascertained under the ordinary processes of assessment by the local assessor.

" . . . Nor is classification necessarily based upon any essential differences in the nature or, indeed, the condition of the various subjects; it may be based as well upon the want of adaptability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods, so as to produce just and reasonably uniform results, or it may be based upon well-grounded considerations of public policy.

" . . . There are several reasons why corporate and individual obligations should be distinguished in classification, not arising wholly out of any essential difference in their physical nature, perhaps, but out of want of adaptation in our general tax laws to reach them, in the ordinary methods of taxation. They are, as a class, transferable by delivery, and therefore capable of concealment. The transactions out of which individual securities originate in the ordinary course of business for the loan of money, have more or less publicity. Experience has shown that the ordinary methods of valuation, as to these, do not fail of enforcement. But in the case of corporate loans, whilst corporate mortgages may be recorded in one city or county, the bonds may be found in the pocket of the holder in another city or county of the commonwealth. Experience has taught us that, in the ordinary processes of valuation, they are not found; the law, generally applicable, lacks adaptation to the discovery of this quality of obligations. Moreover, their negotiability gives them a commercial quality; a vast brood of bonds is covered by a single mortgage, and as they are issued they fly from hand to hand throughout the whole commercial world: it

is only upon their annual return at the interest periods that their ownership can be ascertained. These securities constitute one of the commodities on sale in the market; they are sensitive in many instances to the conditions which affect the price of stocks. They are subject to great fluctuations, caused by the condition of the money market, or the condition of the country, and sometimes by artificial or even accidental means. Well-informed men must differ greatly in their estimate of the value of such property. The stock market exhibits changes in the quotations daily, sometimes hourly. Presumptively, however, the nominal value is the true value of securities yielding and paying interest, and the Legislature has therefore fixed the nominal value, or the par value, for the purpose of taxation. These peculiarities of corporate securities, with others, perhaps, that might be mentioned, arising partly from their nature and properties, and partly from a want of adaptation in our general system to reach this quality of subjects, give rise to their distinct classification."¹⁷

§8. *Extent to Which Classification May be Carried.*—The basis of classification, therefore, may be selected at the pleasure of the General Assembly, provided it affords a reasonable ground for discriminating between the classes set apart. It remains to see how far the Legislature may legally go in dividing subjects into classes, assuming it to be working upon a proper basis of classification. This matter also is very largely within the discretion of the legislative body. The power to select and set apart classes for purposes of taxation having been conceded, there is scarcely any limit to the number and character of the classes which the Legislature may provide.

Perhaps the leading case on the point is *Commonwealth v. Germania Brewing Co.*, 145 Pa. 83 (1891), in which the classification of manufacturing corporations into: (1) Those engaged in the business of brewing or of the manufacturing of gas, and

¹⁷This case has been followed and approved in *Com. v. City of Chester*, 123 Pa. 626 (1888); *Coal Ridge I. & C. Co. v. Jennings*, 127 Pa. 397 (1889); *Com. v. Lehigh Valley R. Co.*, 129 Pa. 429 (1889); *Com. v. Electric Light Co.*, 145 Pa. 147 (1891); *Com. v. D. & H. Canal Co.*, 150 Pa. 245 (1892), relating to foreign corporations doing business in Pennsylvania, and for that reason reversed by Supreme Court of U. S. See *New York, Lake Erie & Western v. Penna.*, 153 U. S. 628 (1893); *Dela-ware & Hudson Canal Co. v. Penna.*, 156 U. S. 200 (1894).

(2) those engaged in any other kind of manufacturing business was upheld. It was contended that manufacturing corporations, in the first part of the act, having been set apart in a class by themselves for purposes of taxation, no further classification could be made, but the court said:

"Could the Legislature lawfully make this classification? Unquestionably, unless restrained by some constitutional provision, or by some consideration found in the nature of the subjects classified; and we are not aware of any such restraint of either kind. Doubtless all corporations of every kind may, for some purposes, be put into one class; so may all manufacturing corporations; but this is not the limit of proper divisibility. Manufacturing corporations are themselves of diverse kinds, depending on their respective business; and we can see no reason, and have heard of none, why the Legislature may not, if it please, put into one class, and tax it, the companies which manufacture liquor and gas, while it leaves all other manufacturing companies untaxed."

Similarly, the Legislature may tax brokers dealing in merchandise and in real estate and leave all others untaxed,¹⁸ or may classify them in respect to the manner or place in which they do business;¹⁹ it may lay a license tax on lodging houses,²⁰ may empower a borough to license hacks,²¹ and may impose a license tax on merchants, taxing wholesalers and retailers at different rates;²² it may make the capital stock of corporations a distinct subject of taxation,²³ and may tax the fees of a person who holds several offices at a different rate from that which it imposes upon the fees of one who occupies but one office.²⁴ In

¹⁸*Pittsburg v. Coyle*, 165 Pa. 61 (1894).

¹⁹*Knisely v. Cotterel*, 196 Pa. 614 (1900), where a classification was made of wholesalers and retailers, of those dealing through an exchange or board of trade and those not so dealing.

²⁰*Com. v. Muir*, 1 Pa. Superior Ct. 578 (1896), affirmed in 180 Pa. 47 (1897), where hotels and "wayfarers' lodges" were excepted from the tax.

²¹*Kittanning Borough v. Montgomery*, 5 Pa. Superior Ct. 196 (1897).

²²*Com. v. Clark*, 10 Pa. Superior Ct. 507 (1899), affirmed in 195 Pa. 634 (1900), and in 184 U. S. 327 (1902). An ordinance imposing a license tax on peddlers but not on travelling salesmen has been upheld. *New Castle v. Cutler*, 15 Pa. Superior Ct. 612 (1901).

²³*Com. v. Nat. Oil Co.*, 157 Pa. 516 (1893); *Com. v. Mill Creek Coal Co.*, 157 Pa. 524 (1893); *Com. v. Edgerton Coal Co.*, 164 Pa. 284 (1894).

²⁴*Com. v. Anderson*, 178 Pa. 171 (1896).

short, the constitution having delegated to the Legislature the power to classify persons and property for purposes of taxation, it may select any reasonable basis upon which to make the classification, and may create as many classes as it may in its discretion decide upon, subject always to the limitation that it must exercise good faith and must not make arbitrary and unjust distinctions.

§9. *Classification Based on Amount of Property.*—It is clear that a classification based merely upon the amount of property held by an individual would be arbitrary and unjust and could not be sustained. In *Cope's Estate*, 191 Pa. 1 (1899), the so-called "direct inheritance law," taxing property descending within certain degrees of consanguinity, was held unconstitutional, because it attempted to except from the operation of the tax a class of persons whose inheritance was less than \$5,000. Mr. Chief Justice Sterrett said: "The language of section one, as to what the rule of uniformity shall embrace, is as broad and comprehensive as it could possibly have been made. The words, 'all taxes,' must necessarily be construed to include property tax, inheritance tax, succession tax and all other kinds of tax the subjects of which are susceptible of just and proper classification. By necessary implication, the first clause of that section recognizes the authority of the Legislature to justly and fairly, but never arbitrarily, classify those subjects of taxation with the view of effecting relative equality of burdens. A pretended classification that is based solely on a difference in quantity of precisely the same kind of property is necessarily unjust, arbitrary and illegal. For example, a division of personal property into three classes with the view of imposing a different tax rate on each,—class 1, consisting of personal property exceeding in value the sum of one hundred thousand dollars (\$100,000); class 2, consisting of personal property exceeding in value twenty thousand dollars (\$20,000) and not exceeding one hundred thousand dollars (\$100,000), and class 3, consisting of personal property not exceeding in value twenty thousand dollars (\$20,000)—would be so manifestly arbitrary and illegal that no one would attempt to justify it."²⁵

²⁵See also *Portuondo's Estate*, 191 Pa. 28 (1899), and *Lacy's Estate*, 191 Pa. 56 (1899); *Bell's Estate*, 191 Pa. 68 (1899); *Clark v. Titusville*, 184 U. S. 329 (1901); *Magoun v. Illinois Trust & Savings Bank*, 170 U. S.

§10. *Meaning of Uniformity.*—Having determined that the class set apart by the Legislature is a proper one, the next requirement is that the tax laid upon the members of that class shall be uniform. An absolutely equal burden of taxation is obviously an impossibility. There never was any intention on the part of the framers of the constitution or of the people who adopted it to require absolute uniformity—all that is meant is that the Legislature in laying the burden of taxation upon the citizens shall make it bear upon all as nearly equally as reasonably may be. Substantial, not absolute, uniformity is all that is required. “Absolute equality is, of course, unattainable; a mere approximative equality is all that can reasonably be expected. A mere diversity in the methods of assessment and collection, however, if these methods are provided by general laws, violates no rule of right, if when these methods are applied the results are practically uniform. If there is a substantial uniformity, however different the procedure, there is a compliance with the constitutional provisions, *Fox’s App.*, 112 Pa. 353; even when there may be some disparity of results, if uniformity is the purpose of the Legislature, there is a substantial compliance.”²⁶

In *Com. v. Del. Div. Canal Co.*, 123 Pa. 594 (1888), the law under consideration taxed mortgages issued by private persons at their real or actual value, whereas similar securities issued by corporations were taxed at their face or nominal value. It was argued *inter alia* that this was non-uniformity, because assuming corporate bonds to be in a class by themselves they were not uniformly taxed, inasmuch as some bonds were worth far more than their face value, whereas others were worth far less.

233 (1897). Compare with *Cope’s Estate*, the earlier case on the collateral inheritance tax; *Minter’s Estate*, 28 W. N. C., 182 (1891), where an exemption of an estate of a value less than \$210 was held valid, a collateral inheritance tax not being regarded as a tax at all.

²⁶*Com. v. Del. Div. Canal Co.*, 123 Pa. 594 (1888); *Mechanicsburg Borough v. Koons*, 18 Pa. Superior Ct. 131 (1901); *New Castle v. Cutler*, 15 Pa. Superior Ct. 612 (1901). The fact that the act affects some members of a class and others escape because they have already paid their tax for the year, does not render the tax non-uniform, *Truby’s Appeal*, 96 Pa. 52 (1880), nor does the fact that some members may avail themselves of an alternative privilege to pay certain sums in lieu of taxes, whereas others do not so avail themselves, *Com. v. Merchants’, etc.*, *National Bank*, 168 Pa. 309 (1895), nor that some may suffer penalties and others not, *Fox’s Appeal*, 112 Pa. 337 (1886).

There is some force in this argument. To tax a bond worth \$2,000 the same amount as a bond worth \$200 hardly seems to be uniformity, but the court was of opinion that the nominal value having been fixed by the corporation itself, it could scarcely be allowed to deny that the par value represented the true value, and hence a sufficient uniformity was obtained by taxing all such bonds at their face value.

On the other hand, if the law does bear unequally and unjustly upon members of the same class, it will be condemned as in violation of the constitution. In *Banger's Appeal*, 109 Pa. 79 (1885), it appeared that the City of Williamsport had endeavored to lay a tax upon "occupations," taxing persons carrying on said occupations not at a uniform rate, but in proportion to the amount earned by them. It further appeared that the method of assessment was inaccurate and non-uniform. The tax was decided to be unconstitutional. If the tax is upon the *right* to carry on a particular business, whether the individual earnings be large or small is immaterial, the same tax must be laid upon each.

On the other hand, a tax may be laid upon the business itself, in which case the value of the business may be gauged by the amount of its earning capacity. This was determined to be the nature of the tax in *Williamsport v. Wenner*, 172 Pa. 173 (1896), in which it appeared that the City of Williamsport had laid a tax upon merchants, classifying them according to the amounts of their annual sales and laying different amounts upon the different classes. The case was distinguished from *Banger's Appeal*, 109 Pa. 79 (1885), on the ground that in that case the tax was upon the occupation, or right of doing business, whereas in the case at bar, it was laid upon the business as property. President Judge Metzgar, in an opinion which was adopted by the Supreme Court, said: "If it were a license merely, then it might be proper that every man should pay alike for the privilege of doing a certain business, but to levy a tax upon the same principle is to say that a dealer whose sales amount to but two or three thousand dollars a year shall pay the same tax as he whose sales amount to two hundred thousand dollars. The inequality of such a mode of assessment is so apparent that it needs no argument to prove it. The case

of *Banger's Appeal*, 109 Pa. 79, is not at all in conflict with this position. That was an attempt to classify the same occupation according to the earnings of individuals. It was very properly ruled that such a tax would be an income tax, measured by the amount of the earnings of the party, but even in that case the right to classify the tax upon property is, at least impliedly, recognized. The tax in controversy is clearly not an income tax in any sense, but it is a tax of the defendant's property estimated by the volume of his annual sales." It was intimated in both cases that an income tax under our constitution would be unlawful.²⁷

§11. *Local Taxation for Local Benefits.*—In connection with the discussion as to the meaning of "uniformity" within the class, should be considered a species of taxation usually denominated "local taxation for local benefits." By this is meant a tax levied upon a few owners of property to pay for improvements which benefit them more directly than their neighbors. "The practice of municipal taxation by counties, townships, cities and boroughs for local objects, had its origin in necessity and convenience. Hence roads, bridges, culverts, sewers, pavements, school houses, and like local improvements, are best made through the municipal divisions of the state, and paid for by local taxation. These have always been supported as proper exercises of the taxing power."²⁸ This practice is extended further even than is indicated by this language. Not only do local authorities tax all persons under their jurisdiction for improvements such as these mentioned and which benefit all alike, but properties peculiarly benefited by the construction of some public work in a particular locality in a municipality are frequently assessed to defray the cost of such improvement. For example, the owners of lots fronting upon a street are taxed to pay the cost of paving this street, whereas, other property

²⁷As to uniformity in collecting taxes, see *Com. v. Macferron*, 152 Pa. 244 (1893); *Evans v. Phillipi*, 117 Pa. 226 (1887); *Van Loon v. Engle*, 171 Pa. 157 (1895).

As to licenses see *Hoffman, Treas., v. Bowman and Paine*, 1 Pa. Dist. Rep. 562 (1889, McPherson, J.); *Com. v. McCandless*, 21 W. N. C. 162 (1887, Supreme Ct.); *Shamokin Borough v. Flannigan*, 156 Pa. 43 (1893); *Com. v. Muir*, 180 Pa. 47 (1897), affirming 1 Pa. Sup. Ct. 578; *Sayre Borough v. Phillips*, 148 Pa. 482 (1892); *Knisely v. Cotterel*, 196 Pa. 614 (1900).

²⁸Mr. Justice Agnew, in *Washington Ave.*, 69 Pa. 352 (1871).

owners in the vicinity are not so taxed. Is such a tax open to the charge of non-uniformity? The constitution provides that all taxes shall be uniform "within the territorial limits of the authority levying the tax." Do not taxes levied on a few property owners to the exclusion of others who are also within the "territorial limits of the authority levying the tax" infringe this clause? It is a general principle that all laws must be uniform within a taxing district, created by the Legislature, and by the express terms of our constitution taxing districts must be co-extensive with the state or municipal division thereof having the power to tax. In opposition to the charge of non-uniformity, however, it is variously said that owners of property fronting upon a certain street constitute a class by themselves, and are therefore taxable as such class; that in time all property owners in the city will be called upon directly or indirectly to pay such a tax, hence there is no non-uniformity; and that the imposition of such amounts is in reality no tax, but the mere collection from the property owner of the amount which his property has benefited, leaving him none the loser.²⁹ Whatever may be thought of the theory of the case, a local tax for local improvements within the limits hereinafter referred to, is held to be legal. Prior to the new constitution it was not questioned,³⁰ and, although the point was made that the new constitution altered the law, it was determined otherwise.³¹ In all cases,

²⁹In *Washington Ave.*, 69 Pa. 352 (1871), Mr. Justice Agnew said: "In two cases, coming under my notice, it was said that a municipal assessment upon property subjected to payment for local improvements is not a tax, *Pray v. Northern Liberties*, 7 Casey, 69; *The Borough of Greensburg v. Young*, 3 P. F. Smith, 280. Technically the statement is true when we speak of a tax as ordinary revenue, but it is clear that in neither case it was meant to say that such an assessment is not taxation within the general legislative power to tax, but only that it was not a tax within the acts of Assembly requiring certain things to be done prescribed in the case of ordinary taxation for revenue. Had it been meant to say that such an assessment is not taxation at all, it would, in effect, deny the power of the Legislature to authorize the assessment, a power which was affirmed in both of these cases."

³⁰*Schenley v. Allegheny*, 36 Pa. 29 (1859); *McGonigle v. Allegheny*, 44 Pa. 118 (1862), deciding that in cases where lots front on but one side of the street, a common being opposite, the abutting owner may be charged with the entire cost, *McMasters v. Commonwealth*, 3 Watts, 292 (1834); *Kirby v. Shaw*, 19 Pa. 258 (1852); *Magee v. Pittsburg*, 46 Pa. 358 (1863); *Philadelphia v. Field*, 58 Pa. 320 (1868); *Hammett v. Philadelphia*, 65 Pa. 146 (1870), and cases there cited.

³¹*Huidekoper v. Meadville*, 83 Pa. 156 (1876).

however, the directions of the statutes must be strictly followed, for the power to thus assess abutting property is recognized to be an extraordinary one.³²

§12. *Upon Whom Assessments May be Levied.*—While the original idea was that the cost of such local improvements should be assessed upon the property benefited rather than upon the individuals who own it, it has been decided that either method is within the discretion of the Legislature. In *Centre Street*, 115 Pa. 247 (1886), Mr. Justice Sterrett said: "While it is perhaps true that such assessments are generally against the property specially benefited, and not against the owner thereof personally, the fact that the Legislature has authorized them to be made against the owner, as in this case, cannot affect the constitutionality of the law. The object, in either case, is to provide a mode of collecting the assessment, and that is wholly within the discretion of the Legislature (Desty on Taxation, 286). Assessment against the property itself is only a method of compelling the owner to pay and thus relieve his property from the charge or lien against it. In some cases *dicta* may be found, and perhaps decisions also, to the effect that assessments for benefits cannot be made or enforced against the owner of the property benefited; but the principle is unsound. As already remarked, the remedy for the collection of such assessments or taxes, as well as every other species of tax, is a matter of legislative discretion."³³

§13. *Purposes for Which Local Tax May be Assessed.*—As has been said, a local tax may be assessed upon all the members of a municipality to pay the cost of any improvement of peculiar and especial benefit to such community, such as a school house, a park, a jail or court house, a bridge, etc.³⁴ In such case the municipality is the taxing district. Further than this, the property in a particular locality in the municipality may be assessed for the purpose of constructing particular public improvements which confer especial benefits upon them. The owners of property abutting upon a street may be charged with

³²*Franklin v. Hancock*, 18 Pa. Superior Ct. 398 (1901), affirmed, 204 Pa. 111 (1902).

³³To the same effect see *Howard St.*, 142 Pa. 601 (1891).

³⁴See *Washington Ave.*, 69 Pa. 352 (1871), quoted above. *Phila. v. Field*, 58 Pa. 320 (1868).

the cost of laying a sewer,³⁵ constructing a culvert,³⁶ paving the street³⁷ and for any other work of a similar nature.

§14. *Disposition of Fund Raised by Local Tax.*—The purpose of such assessments is to defray the cost of constructing the improvements and at the same time exact payment for benefit conferred upon the property owner. It would seem to be of small consequence whether the money thus raised is paid into the public treasury, and used by the proper authorities for the payment of necessary expenses in connection with the work, or whether it is used directly for defraying the cost of the improvement. In *Howard Street*, 142 Pa. 601 (1891), it appeared that an act of Assembly provided that the jury of view, in determining the effect of vacating a street, should ascertain both damages inflicted and benefits conferred, and should apply the latter directly to the payment of the former. This was decided to be legal. Mr. Justice Mitchell said: "Nor is the mode in which the principle is applied by the act of 1858 beyond the legislative discretion. The jury is directed to ascertain both damages and benefits, and to apply the latter directly to the payment of the former. This is doing directly by a single proceeding what had usually been done theretofore by two separate acts. But it is in effect no more, and no different from assessing the benefits in favor and the damages against the city, which are thus collected with one hand and paid out with the other. In the city of Philadelphia it has of late years been the usual practice to pay contractors for paving and like municipal improvements by assessment bills upon the property owners liable, and letting the contractors collect them at their own risk and expense. Suits were brought in the name of the city, to use, etc., but the connection of the city with the proceeding was of the slightest and most technical nature. It was but a step beyond this to drop the city out of the procedure entirely, and pass the money directly from the hand which had ultimately to pay to the hand which was ultimately to receive. As said by Agnew, J., in *Washington Ave.*, *supra*: 'His money, it is true, passes directly

³⁵*Stroud v. Philadelphia*, 61 Pa. 255 (1869); *Oil City v. Botler Works*, 152 Pa. 348 (1893); *Beechwood Ave. Sewer Cases*, 179 Pa. 494 (1897).

³⁶*Phila. v. Tyron*, 35 Pa. 401 (1860).

³⁷*Hammett v. Phila.*, 65 Pa. 146 (1870); *Scranton v. Kochler*, 200 Pa. 126 (1901), and cases cited *infra*.

into their compensation, but this is merely to avoid circuitry of payment by an immediate appropriation of his tax. In principle, therefore, it is an independent transaction, and is the same thing as the money paid by an abutting lot-owner for the pavement before his door, into the public treasury, and thence paid out to the paver of the street. Yet in that case what difference would it make were the money of the abutting lot-owner appropriated directly to pay the paver, provided his assessment be made on the principle of his paying according to his proportionate benefit? ”³⁸

§15. *Property Must be Benefited.*—As the power to assess a special tax for a local benefit is an extraordinary one, it must be exercised only in those plain cases where a direct benefit results to the property owner. This is ordinarily a question of fact to be determined. In the case of street improvements the rule has been uniformly adhered to, that assessments to defray the cost of such improvements can only be made upon property which abuts upon the street where the improvement is made. It cannot be assessed upon property merely because it lies in the neighborhood.³⁹

§16. *Improvement Must be for Private Rather than Public Benefit.*—The theory mainly relied upon by the courts in assessing property for local improvements is that the property so assessed is actually increased in value to an extent approximately equal to the amount of the tax. It must appear, therefore, that there is such a local, as distinguished from a public, benefit, or else the tax may not be upheld. If the improvement is not of especial benefit to the property in the neighborhood, but is rather an improvement public in its nature, its cost must be paid from the public treasury and cannot be assessed upon the immediate locality. Thus it is uniformly held that it is of peculiar and especial benefit to a property owner to have the street in front of his premises paved, so as to connect him by a firm passageway with the remainder of the city. It follows that the cost of such first paving of a street may be

³⁸See also *Washington Ave.*, 69 Pa. 352 (1871); *Centre St.*, 115 Pa. 247 (1886).

³⁹*Morewood Ave.*, 159 Pa. 20 (1893); *Orkney St.*, 9 Pa. Superior Ct. 604 (1899), affirmed, 194 Pa. 425. See also *Thirteenth Street*, 16 Pa. Superior Ct. 127 (1901); *Harriott Ave.*, 24 Pa. Superior Ct. 597 (1904).

assessed upon the abutting property owners. After the street is once paved, however, the element of peculiar benefit ceases and changes in the character of the pavement or even repairs in it are treated, not as a special benefit to the property owner, but as matters of general benefit to the public. In *Hammett v. Philadelphia*, 65 Pa. 146 (1870), it appeared that Broad Street, Philadelphia, a wide and beautiful thoroughfare, was about to be or was in process of being repaved with wooden blocks. The street had been paved with stones, but a wooden pavement, known as the "Nicholson pavement," then much used, was being substituted. The purpose of the repaving was not to benefit the owners of property fronting on Broad Street, but to create a boulevard, smooth and noiseless, over "which elegant equipages may disport of an afternoon." Hammett, an abutting owner, against whose property an assessment had been made to defray the cost of laying the Nicholson pavement, resisted the claim of the city. It was decided that the assessment of the abutting owners to pay for this improvement was illegal and could not be supported. The primary reason for the decision was the fact that the purpose and effect of the substitution of the one kind of paving for the other was not to enhance the value of property bordering the street, but to create a boulevard for the pleasure and convenience of the inhabitants of the entire city. Therefore, the cost of such improvement was obliged to be paid from the funds of the public treasury, rather than by the owners of property in the immediate locality. Mr. Justice Sharswood, who delivered the opinion of the court, said: "The object of this improvement is not to bring or keep Broad Street as all the other streets within the built-up portions of the city are kept, for the advantage and comfort of those who live upon it, and for ordinary business and travel, but to make a great public drive—a pleasure ground—along which elegant equipages may disport of an afternoon. We need look no further than the preamble of the act authorizing the improvement of Broad Street, passed March 23, 1866 (Pamph. L. 299), for evidence that it is for the general public good, not for mere peculiar local benefit. It states it to be 'for the uses and purposes of the public, and the benefits and advantages which will inure to them by making and forever maintaining Broad Street,

in the City of Philadelphia, for its entire length as the same is now opened, or may hereafter be opened, the principal avenue of the said city.' Thus we have special taxation authorized, for an object, avowed on the face of the act to be general and not local, which relieves the case of all difficulty as to the fact. We have only to advance the project a few steps further to see how preposterous is the idea of paying for such an improvement by assessments. In the natural course of things, we may expect that it will be proposed to adorn this principal avenue with monuments, statuary and fountains. Will their cost be provided for in the same way? How much does this plan differ from a proposition to erect new public buildings on Independence Square, and assess the cost on the lots situated on the neighboring streets? On the same principle, lots on the public squares could be assessed to pay for any new project to beautify and adorn them, no matter how great the expense. It might be argued with equal plausibility that their value was increased by the improvement. We must say at some time to this tide of special taxation, thus far shalt thou go and no further. To our own decisions, as far as they have gone, we mean to adhere, but we are now asked to take a step much in advance of them. This we would not be justified by the principles of the constitution in doing.

"Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed or appears to be for the general public benefit."⁴⁰

§17. *Repaving or Repair of Streets.*—In the course of his opinion Mr. Justice Sharswood laid down the general principle which has been followed in all subsequent decisions that while abutting owners may be taxed with the cost of an original paving of a street, they cannot be so taxed with the expense of repaving or repairing a street, both of which must be paid for by the public funds. He said: "But when a street is once opened and paved, thus assimilated with the rest of the city and

⁴⁰Mr. Justice Read dissented and delivered a long opinion explaining his views. Mr. Justice Williams concurred in the dissent.

made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality—for the general good—as cleaning, watching and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments.”⁴¹ This principle has also been applied to the repair or maintenance of sewers or other similar public works. They may be constructed originally at the expense of local property owners, but must be maintained or renewed at the expense of the public.⁴²

§18. *Construction of Boulevards.*—*Washington Ave.*, 69 Pa. 352 (1871), was similar to *Hammett v. Phila.* in that the improvement for which the tax was to be assessed was a public rather than a private benefit. The Legislature had provided for the construction of a boulevard to be known as Washington Avenue, which was to extend from the City of Pittsburg seven miles into the country. The cost of building this avenue was to be assessed at so much per acre, upon farmland lying within a certain distance on either side of it. The master to whom the case was referred found that the proposed improvement would be a public rather than a private benefit, and that in point of fact its construction would not greatly benefit, if at all, the land which was to be required to bear the burden of its cost. The act was, therefore, decided to be unconstitutional in so far as it attempted to require payment in the manner indicated. After speaking of the practice of permitting taxation by municipalities for local improvements, Mr. Justice

“This rule is reaffirmed in *Appeal of Orphan Asylum of Pittsburg*, 111 Pa. 135 (1885). It is applied to cases where the original paving was made by the property owner at his own expense as well as to those where it has been done under public authority, *Wistar v. Philadelphia*, 80 Pa. 505 (1876); *Wistar v. Philadelphia*, 111 Pa. 604 (1886) (curbstones). See also as to bridges *In re Saw Mill Run Bridge*, 85 Pa. 163 (1877).

“*City of Erie v. Russell*, 148 Pa. 384 (1892). The expense of repairing cannot be charged indirectly to the property owner by assessing him in the first instance a sum large enough to cover both original cost and repair. He can, however, be assessed a sufficient sum to pay for an original paving, which, by the terms of the contract with the contractor who lays it, is to be kept in repair for a reasonable time, as five years, this being no longer time than a pavement ought reasonably to last, *Phila. v. Pemberton*, 208 Pa. 214 (1904). As to what is a repaving, see *East St.*, 210 Pa. 539 (1904).

Agnew continued: "In cities and towns where population was dense the authorities began to make improvements of special advantage to certain of the citizens at their expense; such as footwalks in the front of dwellings, and pavements in those streets which were well built up, and where good carriageways were needed. Here, too, though a step far in advance of the system of general taxation, our notions of private right were not violated; for the advantages to the owners were so clear in the promotion of their convenience, and the enhanced value of their lots, caused by improved footwalks and carriageways, that the burthen was duly compensated, and again equality was produced as each street or alley came to be paved. So far, public opinion and ancient and long-continued legislative practice have sustained local taxation with great unanimity, and this is strong evidence of the true interpretation of the constitutional power of the Legislature to authorize municipal taxation of this sort. Indeed, the general acquiescence of the people in this exercise of the power is so clear that few cases are to be found in the books wherein any question has been made upon the power itself. . . . It is found by the master, and if it had not been found by him it is perfectly obvious that this avenue will be one of general public benefit; and specially that it will be of great convenience and individual benefit to citizens and taxpayers, beyond the limit of taxation along the road, both laterally and terminally.

"Indeed, beyond its southern terminus its benefits reach a considerable distance into the County of Washington. This brings it within the principle of *Hammett v. The City of Philadelphia*, *supra*, expressed in these words, at the conclusion of the opinion of our brother Sharswood: 'Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of these benefits. They cannot be imposed when the improvement is either expressed, or appears to be, for general benefit.' "

§19. *Mode of Assessment*.—When the cost of a local improvement is paid from the treasury of a municipality, of course no question arises relative to the manner of assessing the cost; all taxpayers share equally in proportion. But in cases

where it is proposed to pave a street or lay a sewer and assess the cost upon property fronting on the street where the improvement is constructed, a different question is presented. How shall the cost be divided? Shall each piece of property be assessed upon the basis of its actual value or may some arbitrary rule be adopted which shall apply to all alike? May the entire cost be divided among the abutting properties, or can each be assessed only for that part of the improvement directly in front of it?

§20. *Foot-Front Rule.*—Theoretically the most just and equitable method of assessing the cost of such improvements would be by determining the value of the abutting properties and ascertaining to what extent each is actually benefited. Practically, however, this method would be cumbersome and difficult of application, hence a more simple method has been devised and has been sanctioned by the courts. This is what is known as the “foot-front” rule. The theory of its application is that the properties will be increased in value a sum equal approximately to the cost of the improvement, and that the amount each property will be benefited is, in round numbers, the ratio which its frontage bears to the whole number of feet of property fronting on the street upon which the improvement is constructed. The total cost is, therefore, apportioned in this manner among all abutting properties. “As a practical result, in cities and large towns, the per foot-front mode of assessment reaches a just and equal apportionment in most cases. Hence this mode has been deemed a reasonable exercise of the taxing power in such places, with a view to taxation according to the benefits received. Whatever doubt might have been originally entertained of it as a substitute, which it really is, for actual assessment by jurors or assessors under oath, it has been so often sanctioned by decision, it would ill become us now to unsettle its foundation by disputing its principle. But it is an admitted substitute, only because practically it arrives, as nearly as human judgment can ordinarily reach, at a reasonable and just apportionment of the benefits on the abutting properties.”⁴³

“Mr. Justice Agnew, in *Washington Ave.*, 69 Pa. 352 (1871). The “foot-front” rule is conceded to be legal in all the cases, in those which

In *Harrisburg v. McPherran*, 14 Pa. Superior Ct. 473 (1900), affirmed in 200 Pa. 343 (1901), the constitutionality of the foot-front rule was attacked, reliance being placed on the case of *Norwood v. Baker*, 172 U. S. 269 (1898), recently decided. It was argued that *Norwood v. Baker* decided in general terms that the foot-front method of assessing benefits upon property for the purpose of defraying local improvements is a deprivation of private property, without due process of law, and hence illegal. The Superior Court, however, carefully reviewed the case and reached a different conclusion. It was conceded that the theory of such assessments is that the property is benefited approximately to the amount of the assessment. It was denied, however, that *Norwood v. Baker* decided such actual benefit must be assessed by a jury in every case; the foot-front rule was sustained as a quick and fairly accurate method of arriving at the desired result. President Judge Rice said: "The defendant's contention, broadly stated, is that the Legislature has not power to direct or to authorize the assessment of the entire cost of any local improvement whatever upon the abutting properties and to apportion the same according to the 'foot-front' rule, unless the fact that the special benefits to the properties are equal to the cost of the improvement be first judicially ascertained by some competent tribunal, after due notice to the property owners, and an opportunity to be heard upon that question. He contends that, as neither the act, nor the ordinance, provided for such a hearing, both are in conflict with the provisions of our state constitution, and of the fourteenth amendment of the United States Constitution, forbidding deprivation of property, without due process of law, and the taking of private property for public use without compensation. This, it seems to us, is claiming more for the decision of the United States Supreme Court in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, than was actually decided. It is undisputed that the Legislature may, in the exercise of the power of taxation, authorize municipal corporations to assess the cost of such improvement upon abutting properties, but their power is not without limitations. It has been held repeatedly by our Supreme Court that limit its application, discussed below, as well as in those which merely support the principle.

such assessments are sustainable only on the bases of special benefit, and the limit of the benefit is the limit of the taxing power. When this limit is exceeded, the assessment is not taxation, but confiscation, and, in many instances, such assessments have been declared invalid because this principle was violated. At the same time the court has uniformly held that the system is not, *per se*, a violation of any constitutional provision, as, for example, when it is applied to the laying of a sewer, or to the original paving of a street, in the built-up portion of a city or large town. This is so, not because the Legislature has unlimited power absolutely and conclusively to determine what properties are specially benefited by an improvement of that kind, but because such an improvement in such circumstances is manifestly a special benefit to the abutting properties. But when the property manifestly could not be peculiarly benefited, the courts of our state have not hesitated to declare that the assessment could not be sustained. The front-foot rule of assessment does not express a principle of taxation, but merely a convenient method, as was said in *Witman v. Reading*, 169 Pa. 375, the application of which by the Legislature to such conditions as we have suggested has been sustained by the courts of this state, not upon the ground that it is a matter of legislative discretion purely, but because, as a practical adjustment of proportional benefits, it is under such circumstances a reasonably certain mode of arriving at a true result."

§21. *Limitation of "Foot-Front" Rule.*—It is obvious, however, that in the very nature of things the foot-front rule has its limitations. Mr. Justice Agnew, in *Washington Avenue*, 69 Pa. 352 (1871), said, after sanctioning the rule in the language quoted above: "But this rule, as a practical adjustment of proportional benefits, can apply only to cities and large towns, when the density of population along the street, and the small size of lots, make it a reasonably certain mode of arriving at a true result.

"To apply it to the country and to farm lands would lead to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law; so that, at the very first blush, every one would pronounce it to be palpably unreasonable and

unjust." In the case under discussion the assessment of the cost of a public boulevard upon farm lands was declared to be illegal in any event, and much less could it have been accomplished by any application of the foot-front rule. But even in cases where the cost of the improvement may properly be assessed upon abutting property the nature and location of the property may be such that the foot-front rule is not admissible even as a practical and approximate means of reaching a just and equitable result. The whole question was most carefully examined in *Seely v. Pittsburg*, 82 Pa. 360 (1876), in which it appeared that the Legislature had endeavored to assess the cost of paving an avenue by the foot-front rule upon abutting owners, not only in the city, but also in suburban and rural districts through which the street extended. The remarks of Mr. Chief Justice Agnew are so instructive that they are quoted somewhat at length. He said: "It is fortunate for the rights of the people when a case occurs causing the courts to pause and to retrace the boundaries of delegated power. Thus, the stealthy steps of invasion may be detected and the power denied, ere it be too late and a precedent become fixed beyond judicial control. This is such a case. The attempt is to apply, here, the frontage rule of valuation of compact city lots to a rural population, and make farm property and town lots indiscriminately pay for an expensively paved city highway, under the name of a street, running far out into the country. The assumption is that by the addition of extensive rural districts to a city, the whole surface is brought by the legislative power within the sphere of city taxation for municipal purposes; and cases are cited of local or special taxation for local purposes, as justifying this stretch of power. But seeming analogies must not be allowed to lead our minds astray. Fortunately, this subject has been examined in several recent cases, leading to a fuller development of the principles at the foundation of this power. Prominently among them is *Hammett v. Philadelphia*, 15 P. F. Smith, 146, and *Washington Avenue*, 19 *id.* 352. In the early cases the mode of determining the benefits, to pay the damages and the cost of construction, was by actual view and assessment: *McMasters v. Commonwealth*, 3 Watts, 292; *Fenelon's Petition*, 7 Barr, 173; *Extension of Hancock Street*, 6 Harris, 26. These were fol-

lowed in the later cases of *Commonwealth v. Woods*, 8 Wright, 113; *Magee v. Pittsburg*, 10 *id.* 358; *Wray v. Pittsburg*, *id.* 365. Afterwards came the frontage mode of equal valuation per foot front; *Schenley v. Allegheny*, 1 Casey, 128; *Phila. v. Tryon*, 35 Pa. 401; *Schenley v. Allegheny*, 12 *id.* 29; *McGonigle v. Allegheny*, 44 Pa. 118; *Stroud v. Philadelphia*, 61 Pa. 255. In none of these cases was there a close examination of the per foot-front rule, but it seems to have been assumed as a convenient approximation where the property fronting on the street was of a kind and not differing much in value. . . .

“That the benefits a property owner receives from an improvement can be ascertained only by a reasonable mode of assessment is plain. And that to measure the fronts of all the abutting properties and divide the cost by an equal charge per foot front upon each is not an assessment of advantages, but simply an arbitrary mode of charging, is equally plain. Therefore, to be just and equally fair to each, it is evident all the owners must stand in like, or in reasonably equal, circumstances; otherwise the charge is an exaction, not a fair assessment. The cases of frontage cited, so far as discoverable, were of city lots in close juxtaposition. The frontage rule, when applied to such cases, is not denied. . . . The east end of Penn Avenue, upon which this improvement is made, extends from St. Mary’s Cemetery, near the United States Arsenal, eastward for about three miles, as shown by the distances upon the plot made part of the stated case; passing in that distance the grounds of several cemeteries and through lands partly farms, partly large rural residences, partly smaller lots, and partly the lots of several hamlets and villages, which were taken into the city territory. . . . This blending of town and country, of city lots and farm lands, of the residences of the living and the graves of the dead, constitutes a group so motley and discordant, a series so wanting in similitude and uniformity, that the frontage or per foot-front rule cannot be applied to it.”⁴⁴

“This case was followed by *Craig v. Phila.*, 89 Pa. 265 (1879), in which the rule was reaffirmed. Mr. Justice Paxson dissented, because he was doubtful whether the foot-front rule might not be applied to farm lands, and because he thought the equality of the mode of assessment prescribed by the Legislature must be assumed until disproven, and in his judgment it was not disproven.

The principle of this case has been uniformly followed. Property used as farm land, or which may be properly described as rural, although it is within the city limits, cannot be compelled to pay for the cost of paving a street or boulevard by having the cost taxed upon it in proportion to its frontage upon such street or boulevard.⁴⁵

This does not necessarily mean that farm land may not in proper cases and in a proper manner be taxed to pay the cost of an improvement which is in fact a peculiar benefit to such property. The limit of the doctrine is understood to be that the method of assessing the cost of paving streets in cities where the lots are close together and substantially of the same depth and value, cannot be applied to country districts. Where the urban neighborhood ceases and the country begins must, of course, be a question of fact in every case, and no general rule in reference thereto can be laid down.

In assessing the cost of these improvements upon abutting owners, the city may not charge the cost of the exact portion of the improvement in front of each property, but must divide up the whole cost in an equitable manner among those benefited.⁴⁶

It may also, at its option, apportion the cost in an equitable manner between the property owners and the city.⁴⁷

§22. *Exemption from Taxation.*—The clauses of the constitution relating to exemption from taxation are the latter part of section 1 and section 2 of Article IX. They provide: "But the General Assembly may, by general laws, exempt from taxa-

"Phila. v. Rule, 93 Pa. 15 (1880); *Ferson's Appeal*, 96 Pa. 140 (1880); *Scranton v. Pennsylvania Coal Co.*, 105 Pa. 445 (1884).

"Scranton v. Koehler, 200 Pa. 126 (1901); *Chester v. Lane*, 24 Pa. Superior Ct. 359 (1904), in which President Judge Rice, quoting the opinion of Judge McPherson, in *Steelton Borough v. Booser*, 162 Pa. 630, (1894), said: "The grading of a street may be paid for in different ways. Either the public treasury may bear the cost, or, if the statutory authority exists, the cost may be assessed upon the land which is benefited by the improvement. Either method takes the expense of the whole work and divides it ratably among those who are to pay; but to divide the work into sections and to call upon the abutting owners to pay for what is done in front of their respective properties would hardly ever be fair and might often be grossly unjust. An owner in front of whose land a cut or a fill was necessary, or blasting needed to be done, or a wall was required to hold up the soil, would thus be compelled to pay considerable sums, while his adjoining neighbor might pay comparatively little, although benefited just as much."

"Erie v. Griswold, 5 Pa. Superior Ct. 132 (1897), affirmed, 184 Pa. 435 (1898).

tion public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity."

"All laws exempting property from taxation, other than the property above enumerated, shall be void."⁴⁸ These provisions are new. Prior to the adoption of the constitution, property of this general description was exempted, but the Legislature could exempt other property should it so desire, and frequently did so, sometimes from improper motives.⁴⁹ The constitutional provisions "were designed to restrict exemption from taxation within much narrower limits, and thus remedy to some extent what had become a great evil."⁵⁰

§23. *Public Property Used for Public Purposes.*—The first class of property which may be exempted from taxation is "public property used for public purposes." It would naturally be inferred that property of such description means property from which no income is derived, and this is confirmed by the act of Assembly of May 14, 1874, P. L. 158, carrying into effect this provision of the constitution, and providing that no property shall be exempt if an income is derived from the use thereof. In the case of *Chadwick v. Maginnes*, 94 Pa. 117 (1881), it was held that water works owned and controlled by the public, but from which a revenue was derived, were not exempt. This would no doubt be the rule even under the wording of the constitution for property from which an income is derived can scarcely be said to be held for public purposes only.⁵¹ But property which is held for the use and enjoyment

⁴⁸See act of May 14, 1874, P. L. 158, passed to enforce this constitutional provision, and act of April 20, 1905, P. L. 234, exempting public libraries and museums.

⁴⁹*Butler's Appeal*, 73 Pa. 448 (1873).

⁵⁰Mr. Justice Sterrett, in *Chadwick v. Maginnes*, 94 Pa. 117 (1881).

⁵¹A similar decision was made in *County of Erie v. Commrs. of Water Works*, 113 Pa. 368 (1886), overruled on another point by *Sewickley Borough v. Sholes*, 118 Pa. 165 (1888). See also *New Castle v. Lawrence Co. Treasurer*, 2 Pa. Dist. Reps. 95 (1892). It is to be noted that the constitution exempts no property, it simply authorizes the General Assembly to make exemptions, *Wagner Institute v. Phila.*, 132 Pa. 612 (1890); *Phila. v. Barber*, 160 Pa. 123 (1894). Most of the decisions holding public property liable to no taxes do so on the theory that no law was ever passed in which it is taxed, and not that it specifically exempted, for, in the act of May 14, 1874, P. L. 158, and the act of April 20, 1905, P. L. 234, but a few specific kinds of public property are exempted. Such cases are *National Guard v. Tener*, 13

of the public and from which no income is derived may be exempted by the terms of both constitution and statute.⁵²

The constitutional clause does not tax all property not exempt, but merely restricts the power of the Legislature to exempt. If, therefore, property is not made taxable under any law, it is not subject to taxation, even though a tax exempting it has not been passed. Thus, in *County of Erie v. City of Erie*, 113 Pa. 360 (1886), the property of a municipality used in the maintenance of its fire department was held not to be taxable on this ground, although it was not within the exemption laws, which enumerated only school houses, court houses and jails. This construction would seem to place it within the power of the General Assembly to evade the constitutional provisions by simply repealing the laws taxing such property as it is desired to exempt. There is no case so far as is known where this has been done or attempted, but it might be done at least where the repeal of taxing laws would not produce non-uniformity.⁵³

§24. *Actual Places of Religious Worship.*—The second kind of property which may be exempted from taxation includes "actual places of religious worship." This phrase, although inaptly expressed, is intended to mean such places as are actually used for religious worship. Therefore, even though a building is destined to be a church, it is not within the meaning of the clause until religious services are actually held in it.

In *Mullen v. Commissioners of Erie County*, 85 Pa. 288 (1877), Mr. Chief Justice Agnew said: "It must be a *place* of religious worship. What more definite, to describe the use made of the place—a place, be it church, chapel, meeting house, or cathedral? The word place expresses simply *locality*, not *kind*, and hence qualifying words were necessary to denote the kind of place; therefore the convention said, 'of religious worship.' And, not content with a single qualifying expression, it

W. N. C. 310 (1883); *Hastings v. Long*, 11 Dis. R. 370 (1901); *Lancaster County v. Park Commission*, 11 D. R. 605 (1901); *County of Erie v. City of Erie*, 113 Pa. 360 (1886).

⁵²*Reading v. Berks Co.*, 22 Pa. Superior Ct. 373 (1903).

⁵³On the exemption of public property other than that enumerated in act of May 14, 1874, P. L. 153, see also *Reading v. Berks Co.*, 22 Pa. Sup. Ct. 373 (1903). As to the non-liability of public property for municipal claims see §31, *infra*.

prefixed the word *actual*—‘an actual place of religious worship.’ Without religious worship held in it, the place has no character. The convention did not mean to exempt a *place merely*; for this would be unmeaning, without something to characterize the place. But when that body said, ‘an actual place of religious worship,’ it expressed a general thought, which would embrace all kinds of buildings by simply defining the *use*, which was to be the ground of exemption. The debates in the convention clearly indicate this meaning, and hence it was said this language would not include buildings put up for church purposes, as for Sunday schools, lectures and parsonages.”⁵⁴

As a building does not become exempted from taxation until it becomes an “actual place of religious worship,” so it ceases to be exempt when the religious use ceases, for it is the use, not the character, of the building which determines the exemption. In *Moore v. Taylor*, 147 Pa. 481 (1892), it appeared that a building previously used as a church had ceased to be used for religious worship. It was held that the exemption ceased with the use.

As only those actually used for religious worship can be exempted, other buildings owned by the church, even though used for church purposes exclusively, cannot be exempted unless this use includes stated meetings for religious worship. Parsonages are not exempt unless they actually form part of the church building. In *Church of Our Saviour v. Montgomery Co.*, 10 W. N. C. 170 (1881),⁵⁵ a parsonage was held not to be exempt, although it was erected upon ground appurtenant to the church and was used exclusively for purposes of the church.⁵⁶ The same disposition was made of a claim for ex-

⁵⁴In this case a church building in process of erection was held not to be exempt. See, however, the act of June 4, 1879, P. L. 90, providing that buildings in course of construction shall be exempt if they will be exempt when completed. It is believed that insofar as this act attempts to exempt from taxation a building not actually used for religious worship it is unconstitutional, and it was so held in *Pittsburg v. Phelan, Trustee*, 11 Dist. R. 572 (1901).

⁵⁵Also reported in 29 Pitts. L. J. 5 (1881).

⁵⁶See also *Wood v. Moore*, 1 Chest. Co. 265 (1881), holding that a parsonage is not exempt, even though it be used for occasional religious meetings. Under the act May 14, 1874, P. L. 158, the building must be a place where regular meetings are held. And also see *Phila. v. Barber*, 160 Pa. 123 (1894).

emption of a janitor's residence erected on the church lot, but separated from the church building.⁵⁷

§25. *Places of Burial and Institutions of Purely Public Charity.*—The next class of property which may be exempted from taxation comprises "places of burial not used or held for private or corporate profit." There have been no decisions construing these words, and indeed they are so plain as not to require construction. The act of May 14, 1874, P. L. 158, already referred to, uses the precise language of the constitution without elaboration.

It has been the policy of the General Assembly of Pennsylvania from the very inception of the commonwealth to foster and encourage charitable organizations of all kinds. Therefore, such institutions and the property held by them or for their use were very generally exempted from taxation. In *Donohugh's Appeal*, 86 Pa. 306 (1878), it was pointed out that in the twenty-three years immediately preceding the adoption of the new constitution no less than one hundred and thirty laws had been passed to exempt particular charities from taxation. This being the general policy of the commonwealth, the clause exempting "institutions of purely public charity" was inserted in the fundamental law in order that all such exemptions might be by general laws and that institutions of a private character, even if charitable in their nature, should not be exempted.

§26. *Meaning of "Purely Public Charity."*—In interpreting the meaning of the phrase "institutions of purely public charity" the first question which naturally arises is the scope of the word "charity" as here used. The first important case on the subject was *Donohugh's Appeal*, 86 Pa. 306 (1878), in which an injunction was sought to restrain the collector of delinquent taxes of the City of Philadelphia from collecting a tax levied upon the Philadelphia Public Library. It was shown that the Philadelphia Public Library was founded by charitable gifts and bequests, and that it existed for the use and benefit of the citizens. That the purposes of such an institution were charitable was not seriously disputed. A library such as this was admitted to be an institution of learning, which, when

⁵⁷*Pittsburg v. Presbyterian Church*, 10 Pa. Superior Ct. 302 (1899).

founded and endowed by gifts or bequests, is undoubtedly a charity.

But was it a "purely public charity?" This was the real question, and was most carefully discussed by Judge Mitchell, then sitting in Court of Common Pleas No. 2, of Philadelphia County, and whose opinion was adopted as its own by the Supreme Court. It was argued that the charity was not public because all persons were alleged not to be on equal terms as to its use, and because certain small fees were charged in connection with the use of the books. It appeared that "By the original rules of Franklin and the other founders the librarian was required to permit 'any civil gentleman to peruse the books of the library in the library room,' and in the same spirit the charter, which is the fundamental law of the corporation, and the by-laws made under it, permit the use of the library: 1. By *all persons* within the library building free of charge or fee of any kind. 2. By *all persons* who desire to take out books, and for that privilege pay a small hire, and leave a deposit as security for the return of the books. 3. By members or commutors, who pay an annual sum instead of a separate hire for each time of taking out a book." In holding that the public nature of the charity was not destroyed by these facts, Judge Mitchell said: "The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this *indefinite* or unrestricted quality that gives it its public character. The smallest street in the smallest village is a public highway of the commonwealth, and none the less so because a vast majority of the citizens will certainly never derive any benefit from its use. It is enough that they may do so if they choose. So there is no charity conceivable which will not, in its practical operation, exclude a large part of mankind, and there are few which do not do so in express terms, or by the restrictive force of the description of the persons for whose benefit they are intended. Thus Girard College excludes, by a single word, half the public, by requiring that only *male* children shall be received; the great Pennsylvania Hospital closes its gates to all but *recent* injuries, yet no one questions that they are public charities in the widest and most exacting sense.

"Tried by this standard, it would seem clear that the Philadelphia Library is public so far at least as regards the use of the books within the building; that is free to all alike without charge. Is its public character destroyed by any special privileges to members or other individuals? We cannot see that it is. Some system of government, some regulations of administration, are necessary in all large bodies; provided they be reasonable, and not repugnant to the general purpose, they are valid and do not affect the character of the institution. The general privilege of reading the books within the building, and under the supervision of the librarian, being conceded freely to all, the further privilege is sought of taking books away to be read at home, and this we find is also conceded to all persons alike, on the condition that a deposit shall be made of the value of the book to insure its return, and a sum paid for its hire or loan. A step farther brings us to the third and last privilege, that of members, who, instead of paying the hire of each book from time to time, as they take it out, pay a single annual sum as an equivalent. The principle of commutation is familiar. It is as old as the history of tithings in England, as universal as the convenience and the necessities of business everywhere. The law prohibits a common carrier from discriminating between persons; it requires him to carry all men the same journey for the same price; yet there is probably no railroad in the country that does not issue season or mileage tickets, or commutation in some form or other, to its local customers, and this has never been held to impair or infringe upon its public character as a common carrier. Such regulations, within reasonable limits, are mere administrative details, necessary in all but the most insignificant business, and not in any way affecting the general character of the institution."

It was argued that even though the charity might be deemed "public" in the sense described, yet that it was not purely public, which was alleged to mean a charity exclusively supported by the state. It was decided, however, that such was not the meaning of the words of the constitution. "Purely" was merely intended to emphasize "public" and to exclude from the benefits of the exemption any institutions which have about them any elements of private or corporate gain. The Supreme

Court said on this point: "One point, perhaps, we should notice. The word 'purely' must be interpreted so as to confine its qualification of a 'public charity' to those institutions solely controlled and administered by the state herself, or so as to extend it to private institutions for purposes of purely public charity, and not administered for private gain. We prefer the latter interpretation, as declaring the true meaning of the constitution, and subserving best the public interest. On this point, in its application to the library company, the opinion of the learned judge fully sustains the claim of the company to be an institution of this character."⁵⁸

§27. *Charities Whose Beneficiaries Pay Fees.*—It has been uniformly held that institutions may be charities within the meaning of the constitutional provision under discussion, even though its beneficiaries may be charged a portion of the value of the benefits which they receive. In fact, such a charity is far more to be commended and favored than one which bestows alms upon those whom it assists. The objects of its bounty are not made mere dependents, but by paying even but a small part of the cost of benefits which they receive are enabled to retain a feeling of greater independence and self-respect. Such wise charities have been held to be properly exempted from taxation in a number of cases. A young men's Christian association⁵⁹ and a young women's Christian association⁶⁰ are among the number. In the latter case, *Phila. v. Woman's Christian Ass'n*, 125 Pa. 572 (1889), Mr. Chief Justice Paxson said: "It will be seen from the foregoing that the object of the association is to improve the temporal, moral and religious welfare of young females who are obliged to earn their own support, and that as a means to this end, it furnishes them with food and lodging, not as paupers, but for a compensation which, while it does not compensate, aids in defraying the expenses, and thus preserves the self-respect of the recip-

⁵⁸As to the definition of a charity, see further *Fire Insurance Patrol v. Boyd*, 120 Pa. 624 (1888). A poor district is held to be a public charity within the meaning of this clause of the constitution in *Twp. of Cumru v. Directors of Poor*, 112 Pa. 264 (1886).

⁵⁹*Young Men's Christian Ass'n v. Donohugh*, 7 W. N. C. 208 (1879). Only a portion of the building of the association was exempted, as a revenue was derived from the remaining part.

⁶⁰*Phila. v. Women's Christian Ass'n*, 125 Pa. 572 (1889).

ients, while to others who are unable to pay, temporary shelter is furnished free, and aid extended to them in the way of procuring employment. All this and much more is done by a band of devoted women who labor unselfishly, in season and out of season, giving their time and labor freely, and supplying the annual deficit in the treasury by contributions from themselves and their friends. There is no element of gain in the object or operations of this association. It is a public charity, and I regard it as a short-sighted policy in the city of Philadelphia to seek to burden such an institution with taxation. . . .

"It is an essential feature of an institution claiming exemption from taxation under the constitution and the act of 1874, that it shall be a public charity free from any element of private or corporate gain. If it is free from the latter element; if it is an institution devoted to charity by the very fundamental law of its existence, is its character as such destroyed if to some extent its revenues are derived from the recipients of its bounty? As an illustration: Suppose an organization is formed for the sole purpose of supplying cheap fuel to the poor; that such object appears by its charter, and that in pursuance thereof it furnishes coal to the poor at one-half the rates usually charged therefor, and that the balance of the price thereof, or the loss occasioned by such sales, together with all the other expenses of the association, are made up by contributions from the members and the general public; that all the time and labor of the members are given gratuitously, can any one doubt that such an institution would be a purely public charity, 'founded, endowed and maintained by public or private charity?'

"This association is precisely such an institution. It has no element of gain connected with it. The charge for meals and lodging is not more than one-half of what would be charged for similar accommodations elsewhere. It may, therefore, be said to be maintained by charity: it could never have been organized except by charity; it could not be continued for a year without charity. It may be these views conflict slightly with what has been said in some of the cases referred to; it does not conflict, however, with the points decided in either of them: while they are believed to be in entire harmony with *Donohugh's Appeal, supra.*"

§28. *Colleges and Schools.*—The same rule is applied to institutions of learning which in substantially all cases charge their students fees, but which are sustained only by reason of charitable endowments or yearly gifts. Universities, colleges and schools, when endowed and maintained in whole or in part by charity are exempt from taxation under the constitution and the law, even though the students pay in whole or in part for the benefits they receive. In *Northampton County v. Lafayette College*, 128 Pa. 132 (1889), it appeared that Lafayette College was maintained in part by receipts from students, but much more from interest on endowment funds and annual gifts. Some of the students paid tuition, but many were charged no fees. The college was assumed in the case stated to be an institution of purely public charity within the meaning of the constitution, and the same view was taken by the Supreme Court. The decision went to the extent of exempting not only the college itself, as to which there was in fact no contest, but also the buildings erected on the college grounds, owned by the college and used for the residence of professors. A similar decision was rendered in the case of *Haverford College v. Rhoads*, 6 Pa. Superior Ct. 71 (1897), in which the court declined to sanction the taxation of Haverford College, which had been attempted by the Township of Haverford. It was contended *inter alia* that the payment of fees by a portion of the students deprived the institution of its charitable character, but it was held otherwise. "The fact that some of the students are so-called full-pay students does not deprive the institution of its character as a charity. There is no profit derived therefrom. The total receipts are expended in carrying out the charitable design."

In *Episcopal Academy v. Philadelphia*, 150 Pa. 565 (1892), it appeared that the Episcopal Academy while founded and endowed by private charity was nearly or quite self-sustaining, in that the tuition fees added to the income from the endowment funds was sufficient to pay its current expenses. It was contended that such an institution could not be deemed a charity within the meaning of the constitution, but it was decided that, notwithstanding the fact that the school was principally maintained by the fees paid by its scholars, it was a charity; it furnished education to some students free and to others at less

cost than the same advantages could be obtained elsewhere. The decision was placed upon the ground that an institution which furnishes educational facilities to the young at a low cost, supported in part by endowment, and in which there is no element of private gain, is a charity within the meaning of the constitution and the law. It was pointed out, however, that if an income were derived even from an institution founded and endowed by private or public gifts, such institutions would be taxable. The principle of this case is believed to be entirely sound, although it was criticised by Mr. Justice Dean, in *White v. Smith*, 189 Pa. 222 (1899). Any institution supported in part by charitable gifts and which confers the benefit of such gifts upon the public is entitled to exemption, whether such benefit is conferred by a lessening of expenses to those who seek its advantages or in some other way. If any element of private gain should enter into the case, of course the institution would cease to be a charity, but until such is the fact it is not believed that even the circumstance of the receipts exceeding the expenditures should serve to bring the property of the charity within the reach of the taxing power. In the case just mentioned, *White v. Smith*, 189 Pa. 222 (1899), a school building and teachers' residences were held to be exempt, the institution being one founded, endowed and maintained by charity.

On the other hand, in the earlier case of *Thiel College v. County of Mercer*, 101 Pa. 530 (1882), it was held that the college property was not exempt from taxation. The facts of the case are not well stated in the report, but it appeared that the college was located upon a farm all of which was used in connection with the college work, some of the students being allowed to work upon it and being paid for their labor. The products of the farm were consumed by or for the support of the college dormitory. It did not appear that there were any free students in the college, but neither did it appear that there was any element of private gain connected therewith. The decision was placed apparently upon the ground that no free students were shown to be in the school. It is not apparent how this case differs in principle from those previously cited. Chief Justice Sharswood and Mr. Justice Green dissented, and it must be taken to be wrongly decided, especially in view of the later

cases cited above.⁶¹ If, however, the institution is clearly not maintained for charitable purposes at all, but merely for the benefit or entertainment of those who support it, it is not exempt from taxation.⁶²

§29. *Property from Which an Income is Derived.*—It has also been decided that real property held for charitable uses, but from which an income is derived, is not exempt.⁶³ This decision is placed not on the ground that such property cannot be exempted, although under the wording of the constitution there may be some doubt on this point, but that in fact it has not been exempted by legislative action.⁶⁴

On the other hand, personal property held in trust for charitable or religious uses is not taxable under the present laws, even though an income is derived therefrom. This is not because such property has been expressly exempted from taxation, but because the taxing acts are construed (favorably to charities) not to include it. In *General Assembly v. Gratz*, 139 Pa. 497 (1891), this question was very carefully considered. The reason for the decision is well expressed in the following extract from the opinion of Judge Thayer, which was adopted by the Supreme Court: "Now the act of 1889 imposes a tax upon certain descriptions of personal property, 'owned, held or possessed by any person, persons, copartnership or unincorporated association, or company resident, located or liable to taxation within the commonwealth, or by any joint-stock company, association, limited partnership, bank or corporation, whether such personal property be owned, held or possessed by such person or persons, copartnership, unincorporated association, company, joint-stock company or association, limited partnership, bank or corporation, in his, her, their or its own right,

⁶¹See also *Miller's Appeal*, 10 W. N. C. 168 (1881), which is also probably erroneous. See also the later case of *Harrisburg v. Harrisburg Academy*, 26 Pa. Superior Ct. 252 (1904).

⁶²*Delaware County Institute of Science v. Delaware County*, 94 Pa. 163 (1880); *Pocono Pines Assembly v. Monroe Co.*, 29 Pa. Superior Ct. 36 (1905).

⁶³*Wagner Institute v. Philadelphia*, 132 Pa. 612 (1890); *Summit Grove Camp Meeting v. School Dist.*, 12 W. N. C. 103 (1882).

⁶⁴If a part of the property is used for the purposes of the charity and another part is used for business purposes, yielding an income, the part so used will be taxed, although the other may be exempted, *Y. M. C. A. v. Donohugh*, 7 W. N. C. 208 (1879).

or as active trustee, agent, attorney-in-fact, or in any other capacity, for the use, benefit or advantage of any other person, persons, copartnership, unincorporated association, company, joint-stock company, or association, limited partnership, bank or corporation.'

"It appears to us to be plain that the personal property intended to be taxed by this section is property owned or possessed by any person, copartnership, corporation or unincorporated association, in his or its own right, or as a trustee or agent for the use of some other person, copartnership, corporation or unincorporated body. Now, is any of the property described in the bill, in this case, so owned or possessed by the plaintiffs? Clearly, according to the bill, they do not own a dollar of it in their own right or for their own use, and it is equally plain that they do not hold it as trustee or agent for the use of any other person, copartnership or corporation in any proper or legal sense. They do not, according to the bill, hold the property for any person whomsoever, but for certain charitable and religious objects. It does not at all follow that because the charitable and religious purposes to which the property is applied have relation to certain classes of people that, therefore, it is held for a person or persons. By 'person,' in the act, is meant a particular individual; one who could claim in the words of the act 'the use, benefit or advantage' of the property; one who could enforce the trust in his favor. The trusts mentioned are not trusts for particular persons, but for particular objects. It may be that in the administration of the trusts for these charitable and religious objects some person may be incidentally benefited, but he is not a person entitled by law to 'the use, benefit or advantage' of the trust, or who has by law any beneficial interest or ownership in it whatever. The funds are not held in trust for any person whomsoever, but to be applied to the particular charities and religious purposes mentioned, in the discretion of the trustees; so that no person or individual can possibly be said to have any legal right or interest in it whatever. Nor can it be correctly said, in any legal sense, that the plaintiffs are trustees for any person. If that were so, such person could come into court and demand the 'use, benefit or advantage' of the property held in trust for him.

But it is quite plain that, as to the trusts described in the plaintiffs' bill, no person would for a moment have any standing in court to do that. No person exists who can say that he has any legal or equitable claim to the property held in trust by the plaintiffs, or to any 'use, benefit or advantage' thereof. They do not hold it in trust for any person, but in trust for certain charitable and religious objects.

"Now, if the Legislature had intended by this act to depart from the usage and practice settled and steadily adhered to for a great number of years,—I might, perhaps, say from the foundation of the commonwealth,—of abstaining from taxing the personal property of charitable and religious associations; if it had intended to introduce so great a change in the public policy of the state as the defendants' counsel contend has been effected by this act, it is reasonable to suppose that they would have used no uncertain language to accomplish it." The rule of this case has been recently reaffirmed.⁶⁵

§30. *Charity Must Exist Purely for Public Benefit.*—The next phase of this subject which requires a more careful discussion is the precise meaning of the words "purely public" as related to the beneficiaries of the charity. It has already been noticed that this expression does not mean that the institution must be a state institution, but merely that it shall be for the general public benefit.⁶⁶ But to what extent must it exist for the benefit of the public to come within the exemption? Must all persons indiscriminately be admitted to its privileges or may they be confined to members of certain classes? It is quite apparent that the latter is the case. Charitable institutions in their very nature must exist for the benefit of classes, and such is the character of all of them. Homes for aged women, for superannuated clergymen, for the widows of sailors lost at sea, or for the care of orphan children are instances where the charity exists for the benefit of a restricted class, and yet there is no difficulty in determining that it is purely public. If, however, the beneficiaries are described as those holding membership in a church society or other voluntary association the case is not quite so clear. There are two widely different

⁶⁵*Mattern v. Canevin*, 213 Pa. 588 (1906).

⁶⁶*Donohugh's Appeal*, 86 Pa. 306 (1878).

views as to cases of such a nature. One is that all charities in which there is no hint of private gain are purely public, because the recipients, being indigent persons, would otherwise come upon the public treasury for support, hence any such charity is in ease of the public burden and is purely public. This view is a wise and liberal one, and there is much to be said in its favor. The other opinion is that a charity cannot be said to be purely public unless it offers its benefits to the public generally, or to some class of the public, determined by natural selection and not by voluntary association with a church or society. A class determined by age, sex, race, color, birth, trade or occupation is deemed to be a natural one, whereas a class dependent upon membership in a purely voluntary association is not. In *Burd Orphan Asylum v. School District*, 90 Pa. 21 (1879), this question was first raised. The Burd Orphan Asylum conferred its benefits upon white female orphan children between the ages of four and eight years. Of such children were preferred, first, those who had been baptised in the Protestant Episcopal faith in the City of Philadelphia; second, such children so baptised within the State of Pennsylvania; third, any other such children, provided, that children of clergymen in said church were to have the preference. The case was twice argued. Upon the first argument it was decided that the asylum was not a purely public charity because as a practical matter all children were excluded except those baptised in the Protestant Episcopal faith. Chief Justice Sharswood and Justices Mercur and Paxson dissented. A reargument was ordered, Mr. Justice Woodward having been succeeded by Mr. Justice Green, and the decision was reversed. Mr. Justice Green delivered the opinion of the court, and took the broad ground that all charities are purely public which are in ease of the public burden. He said: "It is conceded that the devise in question has created a charity which is public in the strict sense of that expression. But it is urged that it is not *purely* public, and hence that to apply the language of the act to this particular case would be a violation of the constitutional provision. Now it must be conceded, and it has been decided, here and elsewhere, that the word 'purely' is not to have its largest and broadest significance when used in this connection. In the opposing line of thought it is admitted that the

word is to have a limited meaning. It is not contended that a charity to be purely public must be open to the whole public, nor to any considerable portion of the public. Without doubt an asylum for the support of fifty blind men or an equal number of paupers would not be obnoxious to the objection that it was not 'purely public.' A charity for the maintenance of disabled seamen, or of aged and infirm stonemasons, resident in the City of Philadelphia, would undoubtedly be a purely public charity. And so also would a charity for the education and maintenance of the children of such persons. And if such a charity should be limited to the white female orphan children of such persons between the ages of four and eight years, such limitations, though they would very greatly restrict the class and the number of the beneficiaries, would constitute no valid objection to the purely public character of the charity. But seamen and stonemasons are only designated classes of persons distinguished by their occupations. A charity for the support of poor widows, or indigent old men, or the insane poor, of a city, county, borough, or township, would be equally a purely public charity, no matter how small would be the number of the beneficiaries or how limited the class.

"Why, then, would not a charity for the support of poor Episcopalians, Catholics, Jews or Presbyterians of a state or city, be purely public; or a charity for the education and maintenance of the orphan children of such persons? No private gain or profit is subserved; the objects of such a charity are certain and definite, and the persons benefited are indefinite within the specified class. The circumstance that the beneficiaries are to be of a particular religious faith is only of importance as designating the class. It indicates a certain portion of the whole community who are to be recipients of the charity. It has the same effect in this respect as the words seamen, stonemasons, blind persons, poor widows, etc., in the cases already mentioned. For the purpose of defining the class of persons, who, as distinguished from all other persons in the community, are to enjoy the benefit of the donor's bounty, the legal effect is the same, whether the words used be seamen, Episcopalians, blind persons, Catholics, poor widows, Jews, stonemasons or Presbyterians. The argument that to sustain, as purely public, a

charity in favor of persons of a particular religious faith, would be to maintain sectarianism, is of no weight. It is not discrimination in favor of a sect, for it is treating all sects alike. It is not even extending a preference to sectarians; it is merely recognizing them as a class of persons. We see no reason why that community which ranges persons into classes, so far as this subject is concerned, may not be a community of religious faith, as well as of occupation, condition in life, sex, color, age, disability, physical or mental, or nationality. As to the meaning of the word 'purely,' when used in this connection, we concur in the construction which was given by the Supreme Court of Ohio in the case of *Gerke v. Purcell*, 25 Ohio St. Rep. 229, that, 'when the charity is public, the exclusion of all idea of private gain or profit is equivalent in effect to the force of "purely,"' as applied to public charity in the constitution."

The decision was rested also on the ground that the charity in question, the Burd Orphan Asylum, was in the last instance open to any member of the public who came within the general description of the beneficiaries. Mr. Justice Green, continuing, said: "But there is another and a broader ground upon which this particular charity must be sustained as purely public. It is this: the third class of persons enumerated in the will of the testatrix as the objects of her bounty are, 'all other white female orphan children of legitimate birth, not less than four years of age, and of not more than eight years, without respect to any other description or qualification whatever, except that at all times and in every case the orphan children of clergymen of the Protestant Episcopal Church shall have the preference.' It will, of course, not be disputed that if this were the only class of beneficiaries mentioned in the will, the charity would be purely public in the strictest sense."

This question was again examined in *Philadelphia v. Masonic Home*, 160 Pa. 572 (1894), in which it appeared that the property sought to be exempted was a home for indigent Masons. The distinction referred to above was made, that a charity was not public if confined in the distribution of its benefits to members of a voluntary association. In deciding that the home was not a purely public charity, Mr. Justice Dean said: "A charity may restrict its admissions to a class of

humanity, and still be public; it may be for the blind, the mute, those suffering under special diseases; for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread, and as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, it is public. But when the right to admission depends on the fact of voluntary association with some particular society then a distinction is made which concerns not the public at large. The public is interested in the relief of its members, because they are men, women and children, not because they are Masons. A home without charge, exclusively for Presbyterians, Episcopalians, Catholics or Methodists, would not be a public charity. But then to exclude every other idea of public, as distinguished from private, the word 'purely' is prefixed by the constitution; this is to intensify the word 'public,' not 'charity.' It must be purely public; that is, there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public. That the appellee is wholly without profit or gain only shows that it is purely a charity, and not that it is a purely public charity.

"Nor does the argument that, to the extent it benefits Masons, it necessarily relieves the public burden, affect the question; there is no public burden for the relief of aged and indigent Masons; there is the public burden of caring for and relieving aged and indigent men, whether they be Masons or anti-Masons; but age and indigence concern the public no further than the fact of them; it makes no inquiry into the social relations of the subjects of them. *Burd Orphan Asylum v. School District*, 90 Pa. 21, is cited as sustaining a different view. The test there, as to whether the defendant was a purely public charity, was, whether there was any gain or profit to any class of persons or corporations who could assert a right to be beneficiaries. As there was not, and as the administrators of the charity could, in their discretion, select those who should be the recipients of the benefits, giving only a preference, the court held it to be a purely public charity. While concurring in the judgment in that case, because the facts showed it was administered as a purely public charity, I do not concur in the

reason given for distinguishing a quasi-public from a purely public charity. I would put the distinction on firmer as well as on what seems to me more clearly defined ground: Is any member of humanity, that greater public of whom the commonwealth is constructively the parent or trustee, excluded because he has not a particular relation to some society, church or other organization, which relation is dependent on his wholly voluntary act? If so, if he be excluded in fact, because he is not a Presbyterian, Freemason, or a member of some of the innumerable religious, social, or beneficial organizations of the commonwealth, then, however pure may be the charity, however commendable its purpose, it is not 'purely public,' and its property must, under the constitution, be taxed; not because this court says so, but because the people have said so in their fundamental law."

Mr. Justice Williams dissented in a vigorous opinion concurred in by Mr. Justice Green, in which he took substantially the ground of the opinion of Mr. Justice Green in *Burd Orphan Asylum v. School District*, 90 Pa. 21 (1879), holding that all such gifts should be exempt, even though confined to the members of a congregation or religious sect. He said: "I see nothing private about such a charity. It is not limited in its work to the donors or their children. It brings no pecuniary benefit or return. It is done in relief of public taxation, and in the interest of humanity, and that brotherly love that becomes the children of a common father. . . . The institution now made subject to taxation by the decision just rendered is one of the many charities doing the work of the public without the aid of public money, and doing it more tenderly, and more thoroughly, than it could be done in charitable institutions supported by taxation. Such institutions not only provide food and clothing and necessary medical attention to their inmates, but they go further, they seek to assuage the sorrows, and cheer the last days of those to whom they minister, and surround them with the comforts of a well-appointed home. For this added liberality and care they are declared to be private charities, and compelled to take part of the gifts of the benevolent from those they were intended to benefit, and use it to pay taxes upon property actually dedicated to the public use. The position of the City of Philadelphia in levying taxes upon such

charities is ungracious. It says in effect to them: 'It is true your property represents the unselfish gift of the benevolent; it is true that it is devoted to the relief of suffering, and the care of persons who must otherwise be chargeable to us. It is true that your work is for the public good and in relief of taxpayers, but you must do what we do not; you must ask no questions and take all who come. If you do not, then charity is a luxury which we shall tax you for. You must convert your home into a mere public almshouse, or else pay roundly for the privilege of carrying part of the public burden.' The judgment of this court seems to be that the position of the city is correct, and that, notwithstanding the fact that a man or a society devotes a fortune to the care of the helpless and the relief of the taxpayers, the property occupied for the purposes of the charity so founded and maintained must be treated as a business investment and compelled to pay taxes, though the money used for that purpose is taken out of the mouths and off the bodies of the inmates. I dissent from the judgment and from the reasons on which it is rested. In my opinion, nothing marks the advancement of the age in which we live so much as the growth of organized charity, in the increased care for the unfortunate and the helpless. This growth shows itself in the character of the hospitals, reformatories and asylums supported by the public funds. It is seen in a still more striking manner in the number and variety of richly endowed charitable institutions that owe their existence, and their power for good, to the munificence of individuals. So long as sickness and poverty and misfortune are in the world, so long this field for private generosity will offer room for the labors and the fortunes of the benevolent. The better the field is occupied the better it will be for the public at large, and for the individuals who help to make up the indefinite body we call the public.

"Now and then some piece of property used for charitable purposes may cease to pay taxes, but for every dollar so withheld from the public treasury many dollars will be saved to it by the relief of the public burdens by means of the charity so established. But if we lift our eyes from the tax list and consider the work done by these charities, of which there are several hundreds in this city alone, we shall see that the public gain from their labors and expenditures is incalculable. There

is probably no city on either side of the ocean so justly celebrated for the multitude of its charitable institutions as Philadelphia. A distinguished citizen, who is himself actively identified with several of them, places the total number at about six hundred. Some of these are supported by public funds, but most of them are monuments to the enlightened liberality of private citizens who have given their money with a freedom and discrimination that are without any parallel, at least in this country. It would be difficult to name a form of suffering that has not been provided for by some generous man or woman whose attention has, in some manner, been drawn to that particular field for charity. The sums thus dedicated to the public service make an enormous aggregate, and the institutions supported by them embellish the city, and honor it. The Masonic Home is one of these. It now enjoys the undesirable distinction of being the first admitted charity which has no trace of private or corporate gain about its organization or management, to be condemned by this court to the payment of taxes as the price of being allowed to go on with its unselfish work of charity. It carries part of the public burden. It lifts what it carries off the shoulders of the taxpayers. It does this with a stream of generous contributions from the pockets of private citizens; but it is now judicially determined that it must take the money contributed for the care of the sick, the infirm, the aged, the afflicted, and use a part of it to pay taxes on the buildings and grounds in which its work is carried on, and in which the homeless and helpless are sheltered and fed."

It being decided that a charity whose bounty is confined to members of a church or voluntary society is not purely public, the question has been raised, in a number of cases, whether a school or college, otherwise public, should be deemed a private charity, because under the management or control of a sect or religious body. It has been uniformly held that such management does not have this effect. An educational institution may be under the exclusive control of the members of a voluntary religious association and yet be a purely public charity.⁶⁷

⁶⁷*White v. Smith*, 189 Pa. 222 (1899); *Haverford College v. Rhoads*, 6 Pa. Superior Ct. 71 (1897).

§31. *Claims for Water Pipes, Paving Streets, etc.*—Local taxation for local benefits has been discussed, and it has been explained how such claims for taxes can be constitutionally imposed. The question now arises as to whether they can be imposed on property which by the principles we have been discussing is exempted from taxation. In other words, are such claims taxes within the meaning of the constitution and laws relating to exemption from taxation? There can be little doubt that their imposition must be ascribed to the general taxing power,⁶⁸ but when we come to apply the exemption laws, it may be said that the word taxation as there used has a narrower and more technical signification. In *Olive Cemetery Co. v. Philadelphia*, 93 Pa. 129 (1880), it was held that a special exemption “from taxation excepting for state purposes” contained in the act incorporating the cemetery, operated to relieve it from the burden of paying a claim assessed against it for the construction of a sewer. In answer to the argument that such assessments were not taxes, Mr. Justice Sterrett said: “It is conceded, however, that the authority to make and collect such assessments is delegated by the commonwealth. If it does not emanate from the inherent powers of the government to levy and collect taxes, it is difficult to understand whence it comes. The only warrant for delegating such authority must be either in the right of eminent domain or in the taxing power. It cannot be found in the former, and hence it must be in the latter.” In *Erie v. Church*, 105 Pa. 278 (1884), a similar claim was made on behalf of a church, under the constitution and act of Assembly exempting all such property from taxation. The contention of the church was upheld, on the authority of the case last discussed. The same rule was applied in the case of assessments for the laying of water pipe in *Philadelphia v. Church of St. James*, 134 Pa. 207 (1890).⁶⁹

During the time when these decisions were of undisputed authority, a distinction was made between claims for water pipe or sewers, and claims filed against property owners to compel payment for the construction or paving of sidewalks or streets. The power to compel such construction was said to be attrib-

⁶⁸See *Hammett v. Philadelphia*, 65 Pa. 146 (1870).

⁶⁹See also to the same effect *Erie v. Y. M. O. A.*, 151 Pa. 168 (1892); *Philadelphia v. Penna. Hospital for the Insane*, 154 Pa. 9 (1893).

stable to the police rather than to the taxing power and that a charity or church was not exempt.⁷⁰ In *Broad Street*, 165 Pa. 475 (1895), Mr. Chief Justice Sterrett, in deciding that a church was not exempt from a claim filed by the city to compel payment for paving Broad Street, said:

"The constitutional exemption relates to taxes proper, or general public contributions, levied and collected by the state or by its authorized municipal agencies for general governmental purposes, as distinguished from peculiar forms of taxation or special assessments imposed upon property, within limited areas, for the payment of local improvements therein, by which the property assessed is specially and peculiarly benefited and enhanced in value to an amount at least equal to the assessment. There is such an obvious distinction between all forms of general taxation and this species of local or special taxation that we cannot think the latter was intended to be within the constitutional exemption. The distinction is recognized in several of our own cases, among which are *Northern Liberties v. St. John's Church*, 13 Pa. 104; *Pray v. Northern Liberties*, 31 Pa. 69. In the former it was held that a assessment for pitching, curbing and paving a street was not a tax within the meaning of the act of April 16, 1838, P. L. 525, exempting churches and burial grounds from taxes. In none of the cases, however, which we have had occasion to examine, are the distinction and its legitimate result so clearly and forcibly pointed out as they are in *Illinois Central Railroad Co. v. Decatur*, 147 U. S. 190, 197, wherein it is held that an exemption from taxation is to be taken as an exemption from the burden of ordinary taxes, and does not relieve from the obligation to pay special assessments imposed to pay for local improvements and charged upon contiguous property upon the theory that it is benefited thereby."

Notwithstanding the distinction drawn between claims for water pipe and for paving, the principle seems to be the same, and the two lines of cases cannot be reconciled. This is recognized in *Philadelphia v. Union Burial Ground Society*, 178 Pa. 533 (1897), in which it was held that a claim for laying

⁷⁰*Wilkesburg Borough v. Home for Aged Women*, 131 Pa. 109 (1889); *Philadelphia v. Penna. Hospital*, 143 Pa. 367 (1891); *New Castle v. Jackson*, 172 Pa. 86 (1895).

water pipe could be assessed against a cemetery. The earlier cases were referred to, and it was said that if in conflict with the views expressed they must be deemed to be overruled. Mr. Justice Williams delivered a dissenting opinion, in which he said that the case was a departure from preceding decisions.

On the other hand, in a very recent case, *Pittsburg v. Sterrett Sub-district School*, 204 Pa. 635 (1903), it was held that public property held for public purposes is not subject to a claim for grading, paving and curbing a street. The decision was not placed on the ground that such property was exempted from taxation, but that public property is under no circumstances to be taxed unless the intent of the taxing power is too clear to be mistaken, which was not the fact in this case. The court intimated that such assessments were in their essential nature taxes, although it was admitted that they were not within the meaning of the exemption clauses.⁷¹

It may, therefore, be considered to be settled law that actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity are not exempted from assessments for local improvements; but that public property used for public purposes is so exempt under existing laws, because of the general principle that the intendment of the Legislature is always to be taken to be against the taxation of such public property.

§32. *Other Exemption Laws to be Void.*—It has already been observed that the primary purpose of the constitutional provision limiting the power of the Legislature to pass exemption laws was to abolish abuses which had crept into our system owing to the improvident enactment of such legislation. In order that there might be no doubt as to the intent of this clause and that exemption laws already existing, other than those permitted by the constitution might be stricken down, it was further provided that: "All laws exempting property from taxation other than the property above enumerated shall be void."⁷² As already indicated, this section operates as a repeal of existing laws in conflict with it,⁷³

⁷¹To the same effect, see *Robb v. Phila.*, 25 Pa. Superior Ct., 343 (1904).

⁷²Art. IX, §2.

⁷³*Mercantile Library Hall v. Pittsburg*, 11 Atl. 667 (1887). A law which provides a tax in lieu of all other taxes is not an exemption law,

§33. *Power to Tax Corporate Property Not to be Bargained Away.*—There had been in the past so many contracts made between the state and various corporations, exempting them from taxation, and thus bargaining away the taxing power, that it was thought wise to prevent this in future by an express clause in the constitution, as follows: "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party."⁷⁴ The enactment of this clause was perhaps unnecessary, in view of the preceding section, forbidding exemption laws other than those enumerated, but the convention was not satisfied to leave it out.

and hence is not affected by this section. *Lackawanna Co. v. First Nat. Bk. of Scranton*, 94 Pa. 221 (1880); *Truby's Appeal*, 96 Pa. 52 (1880). A law relieving property from all taxes but one is valid. *Com. v. Germania Brewing*, 145 Pa. 83 (1885).

"Art. IX, §3.

CHAPTER XXI.

MISCELLANEOUS PROVISIONS CONCERNING FINANCE.

§1. *Limitation of State Debt.*—Section 4 of Article IX thus limits the power of the state to contract indebtedness: “No debt shall be created by, or on behalf of, the state, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the state in war, or to pay existing debt; and the debt created to supply deficiencies in revenue, shall never exceed, in the aggregate, at any one time, one million of dollars.”

This limitation is not new, being derived from the amendments adopted in 1857.¹ In *Brooke v. Philadelphia*, 162 Pa. 123, 127 (1894), Mr. Justice Dean said in reference to this section: “As to the commonwealth itself, the intention was to wipe out the existing debt, and thereafter permit the incurring of only a limited amount of debt on grave exigencies, and that only temporarily.”

§2. *Borrowing by the State.*—Another provision originally adopted in 1857² contains a further limitation on the borrowing power of the state, as follows: “All laws authorizing the borrowing of money by and on behalf of the state, shall specify the purpose for which the money is to be used; and the money so borrowed shall be used for the purpose specified, and no other.”³

§3. *State Credit Not to be Pledged.*—From the same source was derived the following section: “The credit of the commonwealth shall not be pledged or loaned to any individual, company, corporation, or association; nor shall the common-

¹See Art. XI, §§1, 2 and 3. For *dicta* on the duty of the Governor to veto a bill creating a deficiency, see *Com. v. Barnett*, 199 Pa. 161 (1901).

²See Art. XI, §§1 and 2.

³Art. IX. §5.

wealth become a joint owner or stockholder in any company, association, or corporation.”⁴ The clause from which this section was derived⁵ was said to be “the outgrowth, the offspring of the evils which then prevailed by reason of the subscriptions of so many municipal corporations to particular railroad companies.”⁶

§4. *Municipalities, etc., Not to Loan Credit, etc.*—In order to protect not only the people of the state generally, but also the inhabitants of the various local sub-divisions of the state, it was provided further: “The General Assembly shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution, or individual.”⁷

As its language indicates, this clause is a prohibition for the future, preventing the passage of laws by the General Assembly authorizing the loan of credit, etc., by municipalities, etc. Such laws, therefore, in existence at the date of the enactment of the constitutional amendment of 1857, were not abrogated thereby, and legal action by local authorities could take place under their authority.⁸

This section has been invoked several times in the effort to overturn laws alleged to authorize the loan of credit or the appropriation of money to private individuals, etc., but even by these cases its meaning has not been thoroughly determined. It has been decided that the raising of money to pay soldiers' bounties is not in conflict with the constitution, such money being deemed to be appropriated to a public and not a private use.⁹ It has been questioned whether the appropriation of

⁴Art. IX, §6.

⁵Amendments of 1857, Art. XI, §5.

⁶Remarks of Mr. Harry White, 6 Conv. Debates, 141.

⁷Art. IX, §7; this section was derived, like those immediately preceding, from the amendments of 1857, Art. XI, §7. There were a few slight changes in phraseology which were intended to strengthen the meaning of the words.

⁸*Indiana Co. v. Agricultural Society*, 85 Pa. 357 (1877). See also *Pennsylvania Railroad Co. v. Philadelphia*, 47 Pa. 189 (1864); *Com. v. Perkins*, 43 Pa. 400 (1862).

⁹*Speer v. School Directors*, 50 Pa. 150 (1865); *Hilbish v. Catherman*, 64 Pa. 154 (1870). These cases antedate the Constitution of 1873.

money for the purpose of surveying a proposed ship canal was legal, and has been decided to be so, on the ground that the projected work was likely to be of great public benefit; the appropriation of money in aid of it, therefore, was not within the prohibition of the constitution.¹⁰ It has also been judicially determined that a municipality may invest its funds in gas or electric light plants and operate them for the benefit of its citizens,¹¹ and that a loan of its credit or an appropriation of its funds for the purpose of removing grade crossings and substituting a subway therefor is legal, notwithstanding the fact that such payment or loan inures in part to the benefit of the railroad company.¹²

On the other hand, the Legislature cannot authorize the appropriation of money to the support of private hospitals, however worthy may be their object, because in such event the public funds are subject to private and not public disbursement. In *Wilkesbarre City Hospital v. Luzerne Co.*, 84 Pa. 55 (1877), Mr. Chief Justice Agnew said: "A law enabling a private incorporated hospital to make requisitions upon a county, for the payment of its charges for the support of patients under treatment, even though they be paupers, is an appropriation of money by the county to the corporation, and comes within the prohibition of the constitution. It is not a payment of any debt incurred by the county, but is a transfer of the money by operation of the act of Assembly from the treasury of the county to that of the hospital. The hospital exercises no municipal function, but takes as a private institution by a mere act of appropriation. It is under no obligation to open its doors to municipal inspection or visitation, and cannot be controlled or called to an account for the moneys drawn upon requisition—once paid, the money is beyond the control of the county. Thus its expenditures may be lavish, and the public funds are liable to be misdirected or squandered, without check, through extraordinary charges and unfair requisitions."¹³

but construe the amendment of 1857 substantially identical on this point.

¹⁰*Com. et al. v. Pittsburg*, 183 Pa. 202 (1897). See also *Relief Assn. v. Rathfon*, 18 Lanc. L. Rev. 273 (1901).

¹¹*Wheeler v. Phila.*, 77 Pa. 338 (1875); *Linn v. Chambersburg Borough*, 160 Pa. 511 (1894).

¹²*Brooke v. Phila.*, 162 Pa. 123 (1894).

¹³See also *Northern Home for Friendless Children*, 2 W. N. C. 349

The effect of the clause under discussion upon the power of municipal corporations to make appropriations for purposes not strictly municipal in character has been somewhat discussed. The prevailing opinion seems to be that the only effect the constitution has upon the general power of municipalities to make appropriations is to confine them strictly to purposes municipal in character.¹⁴

§5. *Municipal Debt Limited.*—Section 8 of Article IX thus limits the powers of municipalities to contract indebtedness: "The debt of any county, city, borough, township, school district, or other municipality or incorporated district, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur any new debt, or increase its indebtedness, to an amount exceeding two per centum upon such assessed valuation of property, without the assent of the electors thereof, at a public election, in such manner as shall be provided by law: but any city, the debt of which now exceeds seven per centum of such assessed valuation, may be authorized by law to increase the same three per centum, in the aggregate, at any one time, upon such valuation." Prior to the adoption of the new constitution debts had been contracted by some of the cities and boroughs far beyond their ability to pay. This clause is in line with a general policy to prevent extravagant expenditure of the public funds.

The first question naturally arising in the interpretation of this section is as to the meaning of the word "debt." Does it include all forms of obligations incurred, either temporarily or for stated periods, or does it include only that indebtedness contracted in a formal manner? It is obvious that in the conduct of its ordinary business a municipality incurs large obligations of a temporary nature, which are designed to be met by current revenues. It has been decided that indebtedness such as this is not a "debt" within the meaning of this clause. It has reference only to an obligation which is a charge upon the

(1876), and *Earley's Appeal*, 103 Pa. 273 (1883), in which a borough attempted to buy certain judgments held by a third person.

¹⁴See *Com. ex rel. v. Gingrich*, 21 Pa. Superior Ct. 286 (1902); *Lancaster Firemen's Relief Assn. v. Rathfon*, 18 Lanc. L. Rev. 273 (1901). See also §10, *infra*.

city's credit, and is to be liquidated by future, as distinguished from current, revenues.¹⁵ It seems, however, that in order to avoid an attempted application of this section it must be distinctly alleged that the indebtedness in question can be met by the current income.¹⁶

But aside from this exception any obligation assumed by the city is a "debt." It matters not whether the action for its recovery would be in contract or in tort, if it is a liability with which the municipality would be chargeable, and which it proposes to voluntarily assume, it is a "debt."¹⁷ In *Keller v. Scranton*, 200 Pa. 130 (1901), Mr. Justice Mitchell said: "The constitution is to be understood, *prima facie* at least, as using words in their general and popular sense, unless they are clearly technical in their nature. While the word 'debt' has a technical use of somewhat more limited signification than its common meaning, yet it is not naturally or usually a technical word. And it is to be noted that the constitution uses in immediate and synonymous connection the word 'indebtedness,' which is of wider and even less technical significance. On this point the purpose and intent of the constitutional provision are conclusive. It is part of the open history of the times that many municipalities in haste to get the advantages enjoyed by older and wealthier communities entered recklessly into all kinds of projects under the name of public improvements, and in a few years found themselves like heirs to an estate burdened with *post obits* at ruinous rates, on or beyond the verge of bankruptcy. At the time of the framing of the constitution the subject was fresh in the public mind, notably in the cases of county and city bonds in aid of railroads, etc., in the western states, as found in the reports of the Supreme Court of the United States. Pennsylvania was not without its own experience two generations ago in the default of interest, nobly atoned for in the dark days of depreciated currency during the Civil War by the payment of all its obligations in gold, even though

¹⁵*Wade v. Borough*, 165 Pa. 479 (1895).

¹⁶*Appeal of City of Erie*, 91 Pa. 398 (1879); *Reuting v. Titusville*, 175 Pa. 512 (1896).

¹⁷*Brown v. Corry*, 175 Pa. 528 (1896). See also *Booth v. Weiss et al.*, 15 Phila. 159 (1881). As to a temporary loan, see *Commissioners v. Snyder*, 20 Pa. C. C. 649 (1898).

not so specified in the bond. The constitutional provision is intended as a restraint on this spendthrift tendency, to curb the extravagance of municipal expenditure on credit, to prevent municipalities from loading the future with obligations to pay for things the present desires, but cannot justly afford, and in short to establish the principle that beyond the defined limits they must pay as they go. No limit is fixed to expenditure for which present means of payment are provided (*Erie's Appeal*, 91 Pa. 398), but a peremptory prohibition is put on expenditure on credit beyond the prescribed bounds. Debt and indebtedness in the section in question are not used in any technical way, but in their broad general meaning of all contractual obligation to pay in the future for considerations received in the present. . . .

"It is true that the constitution does not exempt municipalities, how great soever their indebtedness, from liability for wrongful and tortious acts. But it does not authorize the voluntary assumption of obligation to pay money by the scheme of a tort."

The debt may not be increased beyond an amount equal to seven per centum of the "assessed value of the taxable property therein." The taxable property thus referred to includes property of every kind and description that is subject to taxation, including occupations and offices where they are taxable.¹⁸ The valuation referred to in the constitution is that fixed by city, as distinguished from county, officers.¹⁹ In determining the amount of the debt, the evidences of its own indebtedness purchased by the city and deposited in the sinking fund are to be deducted from the apparent debt; in other words, only the actual debt is to be taken.²⁰

In order that public works under way might not be entirely stopped in those cities whose indebtedness was already above the mark there was a temporary provision for cities whose indebtedness was more than the seven per centum at

¹⁸*Brown's Appeal*, 111 Pa. 72 (1885).

¹⁹*Bruce v. Pittsburg*, 166 Pa. 152 (1895).

²⁰*Brooke v. Phila.*, 162 Pa. 123 (1894); *Bruce v. Pittsburg*, 166 Pa. 152 (1895). It has been held in the case of a private corporation that changing the form of indebtedness is not increasing it. *Powell v. Blair*, 133 Pa. 550 (1890). See also *Dolan v. Lackawanna Township School Dist.*, 10 Pa. Dist R. 694 (1901).

the time of the adoption of the constitution. This provision was thus explained in *Wheeler v. Phila.*, 77 Pa. 338 (1875): "The end sought to be attained was clearly a limitation upon the debt of municipalities, and seven per centum upon the assessed value of the taxable property therein was fixed as the maximum. The fact was, however, known to the convention that at that time the debt of the city of Philadelphia, and perhaps some other municipalities, exceeded seven per centum. In such instances an arbitrary provision, that there should be no further increase of the debt, might have worked great injury by the stoppage of public works already commenced and essential to the public convenience and welfare. It was, therefore, provided that as to such municipalities the debt might be increased three per centum." This provision being but temporary, when the indebtedness of a city fell below seven per centum, it became subject to the prior limitation and its debt could not again increase beyond that amount. In *Pepper v. Phila.*, 181 Pa. 566 (1897), Mr. Chief Justice Sterrett said: "According to the manifest meaning of section eight, no city which had reduced its debt below the seven per centum limit, could ever again increase it above that limit, and therefore when, in such city, a subsequent creation or increase of debt was desired, it would have to be made in precise accordance with the provision of the second clause of section eight, which, of course, was the rule for all the municipalities of the commonwealth."

The only part of this section which has really required interpretation is the second provision, which is "nor shall any such municipality or district incur any new debt, or increase its indebtedness, to an amount exceeding two per centum upon such assessed valuation of property, without the assent of the electors thereof, at a public election, in such manner as shall be provided by law." These words leave it somewhat doubtful whether municipalities are merely forbidden to increase their indebtedness or incur new obligations at any one time exceeding two per centum of the assessed valuation of their taxable property, leaving them free to make successive increases each less than two per centum, or whether they cannot increase their indebtedness in the aggregate exceeding two per centum. It has now been definitely settled that the latter is the correct

view. In *Pepper v. Phila.*, 181 Pa. 566 (1897), Mr. Chief Justice Sterrett said: "It is argued here, and was held by the learned court below, that so long as the seven per centum limit was not reached, there might be successive increases which in the aggregate did not exceed that limit. But the vice of that contention is that no such method is authorized by the constitution. On the contrary, it is prohibited by the words of the eighth section above quoted. The amount of the whole debt creation therein authorized is two per centum—and not any other per centum—upon the assessed value of the taxable property. If this were not so, the prohibition against a debt creation of more than two per centum, by municipal authority only, would be easily and absolutely evaded. For if such increase could be made by successive additions of two per centum or less, the whole amount of seven per centum could be successfully reached without any popular vote. Surely this cannot be, because the language of the section prohibits it."²¹ In voting on the question of increase of debt in those cases where there can be no increase by the municipal authorities without such vote, it is not necessary that the people vote on each item of the indebtedness, or that they express themselves as to the purpose to which the money is to be applied. It is sufficient if they authorize an increase to the amount specified.²²

There remains to be considered the question of the effect of an attempt by a municipality to contract debts to an amount greater than is permitted by law. The general rule is that contracts so made are absolutely void and no rights can be acquired under them.²³ It has been decided, however, that such

²¹To the same effect are *Pike Co. v. Rowland*, 94 Pa. 238 (1880); *Appeal of City of Wilkesbarre*, 109 Pa. 554 (1885); *Houston v. Lancaster*, 191 Pa. 143 (1899); *Hirt v. Erie*, 200 Pa. 223 (1901). Some of the cases are a little ambiguous as to whether any indebtedness beyond two per centum of the whole amount of taxable property could be incurred without a vote of the people. The true meaning of the clause is that there can be no more than two per centum of new indebtedness, viz.: that created after the adoption of the constitution. *Hirt v. Erie*, 200 Pa. 223 (1901). The distinction is now of little importance, as probably most of the indebtedness now existing was incurred after the date of the constitution.

²²*Barr v. Phila.*, 191 Pa. 438 (1899); *Major v. Aldan Borough*, 209 Pa. 247 (1904).

²³*Millerstown v. Frederick*, 114 Pa. 435 (1886); *O'Malley v. Olyphant Borough*, 198 Pa. 525 (1901). See also *Bell v. Waynesboro Borough*, 195 Pa. 299 (1900); *Luburg's Appeal*, 23 W. N. C. 454 (1889).

contracts are to be judged by the facts existing at the time they were executed, hence if a contract when made was for an indebtedness within the limit, it will be upheld, even though, on account of the happening of subsequent events, the limit may be passed. Thus, in *Addyston Pipe & Steel Co. v. Corry*, 197 Pa. 41 (1900), it appeared that at the time a contract was entered into for the construction of a sewer, an assessment upon property owners had been made, so that the indebtedness incurred strictly by the city would not be excessive. Subsequently the assessment against some of the property owners was found to be illegal, and the city's debt was thereby increased to an illegal amount. The court nevertheless held that the contract for the construction of the sewer must be held binding. Mr. Justice Mitchell said: "It is not, however, always possible to adapt present action to future results with absolute precision, and if means are adopted which in good faith, according to reasonable expectation, will produce a sufficient fund, the contract entered into on the faith of them should not be held unlawful on account of an unintentional miscalculation, or an accidental and unexpected failure to produce the full result. Thus, if a city at the time of making a contract levies a special tax in good faith supposed to be adequate to meet it, but in consequence of fire or flood or decline in values the result is an insufficient fund, it cannot be held that the contract good at its inception would thereby be made bad. The constitutional restriction was not intended to make municipalities dishonest, nor to prevent those who contract with them from collecting their just claims, but to check rash expenditure on credit, and to prevent loading the future with the results of present inconsiderate extravagance.

"In the present case the City of Corry provided the contract price of the sewer by an appropriation of money which, as already said, we must assume to have been in the treasury, and by assessments upon the property benefited. There is nothing to indicate that these assessments were not in good faith and reasonable expectation supposed to be adequate to produce the required fund and offered and accepted by the contracting parties in the mutual belief in their validity. So far as they were upon abutting property they fulfilled their

intended purpose. The distinction in regard to non-abutting property had not then been made, and was not in contemplation of either side. When it was determined that this part of the agreed means of payment would be unavailable, the loss should in equity and justice fall on the city, which has received the full consideration stipulated for, and to this extent paid nothing."²⁴

§6. *Commonwealth Not to Assume Debts of Municipalities.*—In order to prevent the assumption of debts of municipalities by the state the section first adopted in 1857²⁵ was, with some slight changes, made a part of the constitution. It provides: "The commonwealth shall not assume the debt, or any part thereof, of any city, county, borough or township, unless such debt shall have been contracted to enable the state to repel invasion, suppress domestic insurrection, defend itself in time of war, or to assist the state in the discharge of any portion of its present indebtedness."²⁶

§7. *Annual Tax to Meet Municipal Debt.*—In order to provide for payment of all indebtedness contracted by municipalities it is provided, Article IX, §10: "Any county, township, school district, or other municipality, incurring any indebtedness, shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest, and also the principal thereof, within thirty years."²⁷

This section, like section 8, previously discussed, applies to such debts as are acquired by the municipality, other than those to be met by current revenue. To these it has no application.²⁸

§8. *State Sinking Fund.*—The creation of a state sinking

²⁴This case was followed and approved in *Gable v. Altoona*, 200 Pa. 15 (1901). See also *Redding v. Esplen Borough*, 207 Pa. 248 (1903); *School Dist. of Denison Township v. Shortz*, 2 Penny. 231 (1882).

²⁵Amendments of 1857, Art. XI, §1.

²⁶Art. IX, §9.

²⁷This section is new. In the opinion of the lower court in *Rainsburg Borough v. Fyan*, 127 Pa. 74 (1889), it is stated that bonds issued without compliance with this provision would be invalidated. This decision, however, must be accepted with reserve. The wording of the section is such that it is not believed this result would follow, especially where rights have been acquired under contracts so made. See also *Witherop v. Titusville School Board*, 7 Pa. County Ct. 451 (1889); *Davis v. Doylestown*, 3 Pa. C. C. 573 (1886).

²⁸*Lehigh Coal and Navigation Co.'s Appeal*, 112 Pa. 360 (1886).

fund to guarantee the payment of its debt is provided for as follows: "To provide for the payment of the present state debt, and any additional debt contracted as aforesaid, the General Assembly shall continue and maintain the sinking fund, sufficient to pay the accruing interest on such debt, and annually to reduce the principal thereof, by a sum not less than two hundred and fifty thousand dollars; the said sinking fund shall consist of the proceeds of the sales of the public works or any part thereof, and of the income or proceeds of the sale of any stocks owned by the commonwealth, together with other funds and resources that may be designated by law, and shall be increased from time to time by assigning to it any part of the taxes or other revenues of the state not required for the ordinary and current expenses of government; and unless in case of war, invasion, or insurrection, no part of the said sinking fund shall be used or applied otherwise than in the extinguishment of the public debt."²⁹

Section 12 of the same article further provides on the same subject: "The moneys of the state, over and above the necessary reserve, shall be used in the payment of the debt of the state, either directly or through the sinking fund; and the moneys of the sinking fund shall never be invested in or loaned upon the security of anything, except the bonds of the United States or of this state."

§9. *Expenditure of Public Money, etc.*—The last two sections of Article IX relate to the expenditure of the public money, and forbid any officer to make a profit out of its use. The two sections are as follows: Section 13. "The moneys held as necessary reserve shall be limited by law to the amount required for current expenses, and shall be secured and kept as may be provided by law. Monthly statements shall be published, showing the amount of such moneys, where the same are deposited, and how secured."

Section 14. "The making of profit out of the public moneys, or using the same for any purpose not authorized by law, by any officer of the state, or member or officer of the General Assembly, shall be a misdemeanor, and shall be pun-

²⁹Art. IX, §11. This section was derived in part from Art. IX, §4, of the amendments of 1857.

ished as may be provided by law; but part of such punishment shall be disqualification to hold office for a period of not less than five years."

§10. *Contracts of Municipal Commissions.*—"No debt shall be contracted or liability incurred by any municipal commission, except in pursuance of an appropriation previously made therefor by the municipal government."³⁰

§11. *Sinking Fund of Cities.*—"Every city shall create a sinking fund, which shall be inviolably pledged for the payment of its funded debt."³¹ "The sinking fund is a plan or scheme by and through which the funded debt of the city shall annually be reduced by redemption or payment of the evidences of the debt outstanding."³²

³⁰Art. XV, §2. See *Perkins v. Slack*, 86 Pa. 270 (1878). See also §4, *supra*.

³¹Art. XV, §3. The sinking fund tax is usually in addition to taxes for the ordinary revenues of the city. See *Wilkesbarre's Appeal*, 116 Pa. 246 (1887).

³²*Brooke v. Phila.*, 162 Pa. 123 (1894). City bonds purchased by it and deposited in the sinking fund are not to be treated as a part of the city's indebtedness, *ibid.* See also *Bruce v. Pittsburg*, 166 Pa. 152 (1895), at p. 160. See *Gratz v. Penna. R. R. Co.*, 41 Pa. 447 (1862).

CHAPTER XXII.

EDUCATION AND PUBLIC SCHOOLS.

§1. *General Assembly to Provide Public Schools.*—In Pennsylvania, as in all the colonies, one of the earliest cares of the inhabitants was to provide for the education of the young particularly by the establishment of public schools. Provisions to guarantee an adequate public school system are to be found in all of our constitutions. In the Constitution of 1776 it was provided: "A school or schools shall be established in each county by the Legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public as may enable them to instruct youth at low prices: And all useful learning shall be duly encouraged and promoted in one or more universities."¹ A similar provision was incorporated into the Constitution of 1790, as follows: "The Legislature shall, as soon as conveniently may be, provide by law for the establishment of schools throughout the state, in such manner that the poor may be taught gratis."² Finally, in the Constitution of 1873, we have the following provision: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose."³

§2. *Public School Money Not to be Used for Sectarian Schools.*—Section 2 of Article X provides: "No money raised

¹Chap. II, §44.

²Art. VII, §1.

³Art. X, §1. See *School District v. Beallsville*, 21 Pa. County Ct. 642 (1897). As to excluding an unvaccinated student see *Nissley v. Hummelstown Borough School Directors*, 5 Dist. Rep. 732 (1896); *Com. v. Smith*, 24 Pa. County Ct. 129 (1900); *Duffield v. School District of Williamsport*, 162 Pa. 476 (1894); *Field v. Robinson*, 198 Pa. 638 (1901); *Stull v. Reber*, 215 Pa. 156 (1906). As to the status of a school district see *Ford v. School District*, 121 Pa. 543 (1888). As to the right of the Governor to veto a bill appropriating for school purposes see *Com. v. Barnett*, 199 Pa. 161 (1901).

for the support of the public schools of the commonwealth shall be appropriated to or used for the support of any sectarian school." This section has been construed to prevent the use of the public school buildings for any sectarian teachings. It seems not to prevent the reading of the Scriptures⁴ without comment, but it does prevent the use of the building for teaching the doctrine of any sect, even though this may take place after school hours. In *Hysong v. School District*, 164 Pa. 629 (1894), it appeared that a majority of the teachers in a certain public school were Sisters of St. Joseph and that they wore the garb of their order while engaged in the performance of their duties. It was objected that this amounted to imparting Catholic influence in the school room. The majority of the court, however, held that it was not; the fact that these teachers were Catholics could not disqualify them from service in the public schools, and so long as they did not teach the principles of Catholicism there could be no valid objection to their wearing their prescribed dress while engaged in the school room. The action of the lower court in granting an injunction restraining the Sisters from imparting religious instruction in the school building, even after school hours, was, however, approved. Mr. Justice Williams dissented from that part of the court's opinion which sanctioned the employment of Catholic Sisters as teachers in public schools. He thought their very presence, garbed as they were, was an influence which the constitution was intended to exclude.

§3. *Women Eligible to be School Officers.*—Section 3 of Article X provides: "Women twenty-one years of age and upwards shall be eligible to any office of control or management under the school laws of this state." This section makes women eligible to all offices of control or management, but it does not make them eligible to all positions as teachers, which are not offices of control or management within the meaning of the constitution. The officers charged with the selection of teachers are at liberty to stipulate that certain teachers shall be males if in their discretion they deem this best for the

⁴See *Stevenson v. Hanyon*, 7 Pa. Dist. Rep. 585 (1898); *Hart v. Sharpsville Borough*, 2 Chester Co. 521 (1885). As to the use of school buildings for the instruction of the general public see *Bender v. School Directors*, 182 Pa. 251 (1897).

welfare of the school. In *Commonwealth v. Board of Education*, 187 Pa. 70 (1898), in answer to the contention that women could not be excluded from positions as teachers, Mr. Justice Mitchell said: "It is claimed by the relator that such mandate is found in the provision of Art. 10, §3, of the constitution that 'women twenty-one years of age and upwards shall be eligible to any office of control or management under the school laws of this state.' It may well be questioned whether teachers are officers of a school in any but a very restricted sense as contrasted with pupils or scholars. But even conceding them to be officers in some vague popular sense, they are officers of instruction, and not of 'control and management. The meaning of these words was well known at the time of the adoption of the constitution. They referred to the public officers recognized by the statutes of the state as entrusted with the general administration of the public school system—the State Superintendent of Public Instruction and local school directors and controllers, empowered to lay school taxes, build schoolhouses, establish schools, appoint teachers, regulate the admission of pupils, the course of study, etc. These were officers of control and management. To these offices women were not eligible. It is part of the current history of the times that the sentiment for the participation of women in the affairs of government had its initiative point, both in England and in this country, in connection with the education of the young for which they had certain very manifest natural capacities. It was the force of this sentiment that inserted the provision in question in the Constitution of 1874. Teachers were not intended to be included, for there was no occasion to think of them in that connection."⁵

⁵See also *Com. ex rel. v. Jenks*, 154 Pa. 368 (1893).

CHAPTER XXIII.

PUBLIC OFFICERS.

§1. *Election or Appointment.*—"All officers whose selection is not provided for in this constitution shall be elected or appointed as may be directed by law."¹ This section is merely declaratory of the law; the Legislature would undoubtedly have the power to provide for the election or appointment of officers, even in the absence of an express grant.²

§2. *Incompatible Offices.*—"No member of Congress from this state, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this state to which a salary, fees, or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible."³

The first part of this section is effective without any legislative action. This is apparent from an examination of it, and the court so decided in *DeTurk v. Commonwealth*, 129 Pa. 151 (1889). Mr. Justice McCollum said: "The constitution plainly prohibits any person holding an office of trust or profit under the United States from holding at the same time an office in this state to which a salary is attached; and it as plainly provides that the Legislature may by law declare what offices are incompatible. The prohibition and the permission or direction are contained in the same section, but in separate sentences of it. Is the former inoperative by reason of the latter? Does the section, as a whole, mean that no person can hold these offices at the same time, if the Legislature shall declare them incompatible? We cannot so construe it. The prohibition may be enforced without legislative aid, and no action or inaction

¹Art. XII, §1.

²*Registration of Campbell*, 197 Pa. 581 (1901).

³Art. XII, §2. There were provisions for incompatible offices in earlier constitutions, Const. of 1776, Chap. II, §11; Const. of 1790, Art. II, §8; amendments of 1838. Art. VI, §8.

of the Legislature can destroy it. This construction does not render the last sentence of the section useless, because that relates to offices not within the constitutional prohibition, and authorizes the Legislature to declare them incompatible." A number of laws have been passed in pursuance of the latter portion of the clause, and their construction has been determined in several cases.⁴

§3. *Dueling to Disqualify*.—"Any person who shall fight a duel or send a challenge for that purpose, or be aider or abettor in fighting a duel, shall be deprived of the right of holding any office of honor or profit in this state, and may be otherwise punished as shall be prescribed by law."⁵

⁴See *Com. v. Dallas*, 4 Dallas, 218, 229 (1801); *Com. ex rel. v. Binns*, 17 Sergeant and Rawle, 219 (1828); *Com. ex rel. v. Ford*, 5 Pa. 67 (1846); *Duffield's Case*, Brightley's Election Cases, 646 (1862).

⁵Art. XII, §3. See amendments of 1838, Art. VI, §10.

CHAPTER XXIV.

NEW COUNTIES, COUNTY OFFICERS AND CITY CHARTERS.

§1. *New Counties*.—The power of the Legislature to create new counties was thus limited: “No new county shall be established which shall reduce any county to less than four hundred square miles, or to less than twenty thousand inhabitants; nor shall any county be formed of less area, or containing a less population; nor shall any line thereof pass within ten miles of the county seat of any county proposed to be divided.”¹

§2. *County Officers*.—“County officers shall consist of sheriffs, coroners, prothonotaries, registers of wills, recorders of deeds, commissioners, treasurers, surveyors, auditors or controllers, clerks of the courts, district attorneys, and such others as may from time to time be established by law; and no sheriff or treasurer shall be eligible for the term next succeeding the one for which he may be elected.”² It has been decided that the city controller³ and the city treasurer⁴ of Philadelphia are county officers within the meaning of this section.⁵

§3. *Election and Filling of Vacancies*.—“County officers shall be elected at the general elections, and shall hold their offices for the term of three years, beginning on the first Monday of January next after their election, and until their succes-

¹Art. XIII, §1. *In re County Seat*, 4 Dist Rep. 319 (1895).

²Art. XIV, §1. As to auditors and controllers see *Lloyd v. Smith*, 176 Pa. 213 (1896); *Com. v. Samuels*, 163 Pa. 283 (1894); *Com. v. Severn*, 164 Pa. 462 (1894).

³*Taggart v. Com.*, 102 Pa. 354 (1883).

⁴*Com. v. Oellers*, 140 Pa. 457 (1891). See also *Com. v. Grier*, 9 Pa. County Ct. 444 (1891).

⁵This section does not, by making the district attorney a county officer, prevent the Legislature from providing for the temporary exercise of his functions by another person. *Com. v. McHale*, 97 Pa. 397 (1881). See also *Hower v. Wayne Co.*, 21 Pa. County Ct. 289 (1898), holding that a county superintendent of schools is not a constitutional county officer.

sors shall be duly qualified; all vacancies not otherwise provided for shall be filled in such manner as may be provided by law."⁶ The term of office as fixed by this section may be extended beyond three years if for any reason the successor does not qualify. For example, in *Commonwealth v. Hanley*, 9 Pa. 513 (1848), an officer-elect died before he had qualified. The Governor having appointed a person to fill a supposed vacancy, it was held that there was no vacancy; that the incumbent held until the end of the succeeding term because his successor had not qualified.⁷ It has already been pointed out in a previous chapter⁸ that in case a vacancy exists and an appointment is made, the appointee holds only until such time as an officer can qualify who is elected at an election held three months or more after the creation of the vacancy.⁹

§4. *Residence of Officers*.—"No person shall be appointed to any office within any county who shall not have been a citizen and an inhabitant therein one year next before his appointment, if the county shall have been so long erected; but if it shall not have been so long erected, then within the limits of the county or counties out of which it shall have been taken."¹⁰

§5. *Location of Offices*.—"Prothonotaries, clerks of the courts, recorders of deeds, registers of wills, county surveyors, and sheriffs shall keep their offices in the county town of the county in which they respectively shall be officers."¹¹

§6. *Compensation of Officers*.—"The compensation of county officers shall be regulated by law, and all county officers who are or may be salaried shall pay all fees which they may be authorized to receive into the treasury of the county or state, as may be directed by law. In counties containing over one hundred and fifty thousand inhabitants all county officers shall be paid by salary, and the salary of any such officer and

⁶Art. XIV, §2.

⁷See also *Bechtel v. Farquhar*, 21 Pa. County Ct. 580 (1899); *Vance's Case*, 22 Pa. County Ct. 413 (1889).

⁸See Chapter XVI, The Executive.

⁹See *Com. v. King*, 85 Pa. 103 (1877); *Com. v. Trozel*, 4 Pa. County Ct. 449 (1888); *Com. v. Doverspike*, 20 Pa. County Ct. 109 (1897); *McKinley's Case*, 28 Pa. County Ct. 90 (1903).

¹⁰Art. XIV, §3.

¹¹Art. XIV, §4. See *Scowden's Appeal*, 96 Pa. 422 (1880).

his clerks, heretofore paid by fees, shall not exceed the aggregate amount of fees earned during his term and collected by or for him.”¹² This section is not self-executing, and hence cannot be enforced by the courts until after legislative action.¹³ It is to be construed in the light of Article III, §13, providing that no law shall increase or diminish the salary or emolument of a public officer after his election or appointment.¹⁴ This section when enforced by appropriate legislation operates to abolish compensation by the fee system and to compel the officer to pay all fees into the county treasury. He cannot retain fees, even though he is given additional services to perform. His salary is full compensation for all services performed by him for the county.¹⁵ On the other hand, it has been held that where the county officer also performs duties for the state he may retain the fees which he has received for the performance of that state duty, but for no other.¹⁶ In *Philadelphia v. McMichael*, 208 Pa. 297 (1904), Mr. Justice Dean said: “It is well known that at the date of the adoption of the constitution the aggregate of fees, in counties containing within their boundaries large cities, was enormous; the fees of a single term of office were equivalent to a fortune. The purpose of the fundamental law was to so reduce this extravagant and burdensome compensation, that it would in some degree be measured by the capacity, work and responsibility of the officer. It is not without interest to note how persistent has been the effort to narrow the interpretation of this section. In *Pierie v. Phila.*, 139 Pa. 573, on a claim by the recorder for fees in addition to his salary, it was held that the law fixed the salary of the officer at \$12,000, which sum could not be exceeded on any pretense. In *Commonwealth v. Grier*, 152 Pa. 176, it was argued that the district attorney was to be paid partly in salary and partly by fees; this court held he must be paid wholly by salary. In *McCleary v. Allegheny County*, 163 Pa. 578, the sheriff sought

¹²Art. XIV. §5.

¹³*Lewis v. Lackawanna Co.*, 200 Pa. 590 (1901). See also *Sheppard v. Collis*, 1 W. N. C. 494 (1875); *Crawford Co. v. Nash*, 99 Pa. 253 (1881); *Com. v. Collis*, 10 Phila. 430 (1875).

¹⁴*Guldin v. Schuylkill Co.*, 149 Pa. 210 (1892); *Com. v. Comrey*, 149 Pa. 216 (1892). See discussion of this subject *supra* Chapter XV.

¹⁵*Pierie v. Phila.*, 139 Pa. 573 (1891); *Luzerne Co. v. Kirkendall*, 209 Pa. 116 (1904).

¹⁶*Phila. v. Martin*, 125 Pa. 583 (1889).

to charge mileage and fees; we held he must be confined to a salary. The same ruling was made in *Von Bonnhorst v. Allegheny County*, and in *McGunnegle v. Allegheny County*, in the same volume. In *Commonwealth v. Mann, Same v. Shields*, and *Same v. Latta*, 168 Pa. 290, it was decided that the act of 1876 to carry into effect the fourteenth article of the fifth section of the constitution was a substitute for all previous legislation on that subject; that thereafter, all county officers in counties having a population of over 150,000 must be paid by salaries and that they could lawfully receive nothing more. In *Schuylkill Co. v. Pepper*, 182 Pa. 13, the county treasurer claimed fees on liquor licenses, because he had to divide the money realized among the different townships in such proportions as they were entitled thereto. This, the treasurer argued, was a township duty and he was entitled to additional compensation. We said no, he received the money as county treasurer and must pay it over as county treasurer and his compensation was his salary alone. In *City of Pittsburg v. Anderson*, 194 Pa. 172, it was sought to rest the claim of the county treasurer for fees in liquor licenses on *Phila. v. Martin, supra*. It was argued that the state in turning over a share of the fees to the county, turned over its own money in the nature of a gift to the county, therefore, in receiving and paying out this money, the treasurer acted as the mere agent of the state and was entitled to fees. We held his salary as county treasurer was all he could lawfully claim. And now we have the present appeal.

"It will be noticed that, through most of the years that the act of 1876 carrying into effect the constitution has been in force, county officers have been dissatisfied with it, and have sought to narrow and restrict it, yet, as was said by Judge Thayer in *Pierie v. Phila., supra*: 'The prohibition of the receipt of fees for their own use and the regulation of their compensation by fixed salaries exclusively could hardly have been expressed in plainer language than that which is written in the constitution. It is impossible for any ingenuity to prevail against it.'"

§7. *Accountability of Municipal Officers.*—"The General Assembly shall provide by law for the strict accountability of all county, township and borough officers, as well for the fees

which may be collected by them as for all public or municipal moneys which may be paid to them."¹⁷

§8. *County Commissioners and County Auditors.*—"Three county commissioners and three county auditors shall be elected in each county where such officers are chosen, in the year one thousand eight hundred and seventy-five, and every third year thereafter; and in the election of such officers each qualified elector shall vote for no more than two persons, and the three persons having the highest number of votes shall be elected; any casual vacancy in the office of county commissioner or county auditor shall be filled by the court of common pleas of the county in which such vacancy shall occur, by the appointment of an elector of the proper county who shall have voted for the commissioner or auditor whose place is to be filled."¹⁸ Under this clause the elections of county commissioners or county auditors can take place only at one of these triennial periods. Hence, if a new county is created the commissioners appointed by the Governor must continue in office until the regular time for the election of county commissioners has arrived.¹⁹

§9. *City Charters.*—"Cities may be chartered whenever a majority of the electors of any town or borough having a population of at least ten thousand shall vote at any general election in favor of the same."²⁰

¹⁷Art. XIV, §6. As to the power of the Legislature to control the municipalities see *Burns v. Clarion Co.*, 62 Pa. 422 (1869).

¹⁸Art. XIV, §7.

¹⁹*Com. v. Gaige*, 94 Pa. 193 (1880).

²⁰Art. XV, §1. As to the power of the Legislature to include territory within the limits of a city see *Kelly v. City of Pittsburg*, 85 Pa. 170 (1877); *Smith v. McCarthy*, 56 Pa. 359 (1867).

CHAPTER XXV.

MISCELLANEOUS PROVISIONS RESPECTING PRIVATE CORPORATIONS.

§1. *Certain Charters Invalidated.*—So many charters had been granted to private corporations, many of them improvidently, prior to the adoption of the new constitution, that a provision was inserted to abolish all under which no actual organization had taken place. This provision was as follows: "All existing charters, or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place and business been commenced in good faith, at the time of the adoption of this constitution, shall thereafter have no validity."¹ While a charter under which a company has been organized and business begun constitutes a contract between the state and the corporation, which cannot be impaired by a subsequent act of Assembly or constitutional enactment, it has been uniformly held that a failure to act under a charter operates as a forfeiture of its privileges even at common law, and such charters can constitutionally be revoked.² If there has been a *bona fide* commencement of business under the charter, of course the constitution does not abrogate it,³ and this is true although the corporation may possess additional privileges which it has not exercised.⁴

§2. *Charters Subject to Amendment.*—In order that the Legislature might acquire control over the charters of corporations upon which subsequent benefits should be conferred it was provided: "The General Assembly shall not remit the for-

¹Art. XVI. §1.

²*Lumber and Boom Co. v. Com.*, 100 Pa. 438 (1882).

³*Douglass's Appeal*, 118 Pa. 65 (1888).

⁴*Phila. & Merion Railway Co.'s Petition*, 187 Pa. 123 (1898). As to proof necessary to establish a *bona fide* organization, see *Com. v. Continental Trust & Finance Co.*, 10 Pa. District Rep. 451 (1901). This section applies only to private corporations. *Lehigh Water Company's Appeal*, 102 Pa. 515 (1883).

feiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution."⁵ This means that thereafter such charters should be subject to the power of the General Assembly to alter, revoke or annul them.⁶

§3. *Police Power Not to be Abridged.*—The latter part of section 3 of Article XVI provides: "And the exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state."⁷ This clause under the law as now understood is really nothing more than a declaration of the common law, for a state has not the power to bargain away its police power, had it the will to do so.⁸

§4. *Cumulative Voting.*—The right of so-called cumulative voting is guaranteed in the constitution by the following provision: "In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer."⁹ This section was framed and enacted to protect the rights of minority stockholders in private corporations.¹⁰ By securing representation on the board of directors they are enabled to learn all that goes on and may at least suggest lines of policy which inure to the

⁵Art. XVI, §2. As to the acceptance of a change in the constitution, see *Pennsylvania Railroad Co. v. Duncan*, 111 Pa. 352 (1886); *Philadelphia and Reading R. R. v. Patent*, 17 W. N. C. 198 (1885); *Com. ex rel. v. Flannery*, 203 Pa. 28 (1902). See also §10 *infra*.

⁶See Art. XVI, §10.

⁷For a discussion of the first part of this section, see the following chapter on Eminent Domain.

⁸See in reference to this subject *Phila. & E. Railroad Co. v. Catawissa Railroad Co.*, 1 Walker, 81 (1871); *Delaware and Hudson Canal Co. v. Scranton and P. Traction Co.*, 4 Pa. Dist Rep. 287 (1895); *Com. v. Beatty*, 15 Pa. Superior Ct. 5 (1900); *Pennsylvania R. R. Co. v. Electric Ry. Co.*, 152 Pa. 116 (1893); *McKeesport City v. Pass. Ry. Co.*, 2 Pa. Sup. Ct. 242 (1896); *Light, Heat and Power Co. v. Kittanning Borough*, 11 Pa. Sup. Ct. 31 (1899); *Erie City v. Erie Electric Motor Co.*, 24 Pa. Sup. Ct. 77 (1903).

⁹Art. XVI, §4.

¹⁰See remarks of Mr. Buckalew in constitutional convention, 4 Conv. Deb. (1873), 605.

advantage of the minority. It is not directory but mandatory, and is, therefore, effective without legislative action.¹¹

In *Hays v. Commonwealth*, 82 Pa. 518 (1876), the question was raised as to whether this clause applies to charters already in existence at the date of its enactment or whether it can affect only those thereafter created, or which have accepted the provisions of the constitution. It was decided that the latter is the true view. Corporations in the enjoyment of certain privileges at the date of the constitution cannot be deprived thereof without their own consent, and the existing rights of a majority of the stockholders to elect the directors by the old system of voting is a substantive right which cannot be taken away. In answer to the suggestion that a change in the method of voting was not a destruction of any vested right, Mr. Justice Gordon said: "If it be not a vested right in those who own the major part of the stock of the corporation, to elect, if they see proper, every member of the board of directors, then I would like to know what a vested right means. This was part of the contract under which they entered into the company, and for which they paid their money. The compact was that they should have the power to select those who should have the management and control of the funds which they adventured in this enterprise."

If, however, the corporation has accepted the provisions of the new constitution, it becomes subject to the section relative to cumulative voting, provided such acceptance has taken place in strict accordance with the terms of the charter, for otherwise it would not be binding on the stockholders.¹² Understanding it to be confined in its application to such as are subject to the provisions of the constitution, the section under discussion applies to all private corporations and gives to their stockholders the right of cumulative voting. This includes all except those purely public in their nature, such as municipal corporations.¹³

¹¹*Pierce v. Com.*, 104 Pa. 150 (1883).

¹²*Baker's Appeal*, 109 Pa. 461 (1885); *Com. v. Yetter*, 190 Pa. 488 (1899); *Com. v. Flannery*, 203 Pa. 28 (1902). See also *Com. v. Butterworth*, 160 Pa. 55 (1894).

¹³It has been held to apply to a railroad company, *Pierce v. Com.*, 104 Pa. 150 (1883); a fire association, *Com. v. Butterworth*, 160 Pa. 55 (1894); a state normal school, *Com. v. Yetter*, 190 Pa. 488 (1899), and a literary institute, *Com. v. Flannery*, 203 Pa. 28 (1902).

§5. *Foreign Corporations Doing Business in this State.*

—Relative to the right of foreign corporations to do business in Pennsylvania it is provided: "No foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same upon whom process may be served."¹⁴

The first question of interpretation naturally arising under this section and under the act of April 22, 1874, P. L. 108, passed to carry it into effect, is as to the meaning of doing "business." It is obvious that a single transaction carried on by a foreign corporation in Pennsylvania does not necessarily constitute doing business within the meaning of the act, otherwise the formality of registering would be necessary before any act could be done. The object of the law was to bring foreign corporations, with capital invested here and which carry on regular dealings with citizens of Pennsylvania, within reach of the taxing power and to make them amenable to our laws by placing them within reach of service of process. But if they have no capital here and carry on no regular business within the borders of the state, the reason of the act, and hence the act itself, does not apply. In *Kilgore v. Smith*, 122 Pa. 48 (1888), it was held that a sale of certain supplies to a citizen of Pennsylvania by a Maryland corporation was not "doing business" within the meaning of the act, the corporation actually having no capital invested or employed in Pennsylvania.¹⁵

On the other hand, it has been uniformly held that if a foreign corporation invests and employs any considerable portion of its capital in Pennsylvania, this is doing business, even though the transaction in which it is engaged may be but the execution of a single contract. For example, in *Chicago Building and Manufacturing Co. v. Myton*, 24 Pa. Superior Ct. 16 (1903), it appeared that a foreign corporation had done no business in Pennsylvania other than to build a butter factory, which, however, was of considerable size and required the purchase of material and employment of workmen in this state; it was decided that the foreign corporation had been doing busi-

¹⁴Art. XVI, §5.

¹⁵See also *Leasure v. Union Mutual Life Insurance Co.*, 91 Pa. 491 (1879); *Wile & Brickner Co. v. Onsel*, 1 Pa. Dist. Rep. 187 (1891).

ness within the meaning of the act of Assembly.¹⁶ The courts within the past few years have gradually narrowed the limits within which a foreign corporation can operate without being charged with doing business. If any portion of their capital is invested within the state and is used in business here, they are almost sure to be held to the penalties of the act.¹⁷

§6. *Penalty of Doing Business Without Registration.*—In order to enforce the constitution and the act of Assembly carrying it into effect,¹⁸ it is held that a corporation cannot recover upon any contract made in pursuance of business which it is doing in Pennsylvania without having registered as required by law.¹⁹ The courts have even gone to the extent of holding that the penalty of the act is to be visited upon a foreign corporation, although it may actually have complied with the law relative to registration prior to the commencement of its suit. In the *Delaware River Quarry and Construction Co. v. B. & N. Pass. Ry. Co.*, 204 Pa. 22 (1902), it appeared that a foreign corporation had done business in violation of the act, and thereafter had registered prior to the commencement of its suit. It was argued that this was a sufficient compliance with the law; that the corporation was now amenable to the process of the courts of Pennsylvania, and that it should not suffer the penalty. The court, however, decided that, inasmuch as the contract was made in pursuance of business done in violation of law, there could be no recovery. This is the only practical way in which the act can be enforced. If a foreign corporation could do business without registering, knowing that in case it became necessary to sue, it could then register and recover, it would perhaps neglect to register until such time arrived. It would, therefore, not be amenable in the interim to the taxing laws or to service of process.²⁰

¹⁶To the same effect see *Delaware River Quarry & Construction Co. v. B. & N. Pass. Railway Co.*, 204 Pa. 22 (1902).

¹⁷Other cases holding foreign corporation to be doing business within the meaning of the act are *Hagerman v. Empire Slate Co.*, 97 Pa. 534 (1881); *Del. River Quarry & Construction Co. v. B. & N. Pass. Ry. Co.*, 204 Pa. 22 (1902); *Bond v. Stoughton*, 26 Pa. Superior Ct. 483 (1904).

¹⁸Act of April 22, 1874, P. L. 108.

¹⁹*Thorne v. Travelers' Insurance Co.*, 80 Pa. 15 (1875); *Mutual Benefit Life Ins. Co. v. Bales*, 92 Pa. 352 (1879); *Chicago Building & Manufacturing Co. v. Myton*, 24 Pa. Superior Ct. 16 (1903).

²⁰Mr. Chief Justice Mitchell dissented in this case, on the ground that, being a penal act, the law should not be construed to cover such a case.

If, however, the contract made concerns a collateral proceeding, and is not directly connected with the business done in violation of the act of assembly, it is not invalidated. In *King Optical Co. v. Royal Insurance Co.*, 24 Pa. Superior Ct. 527 (1904), it was argued that a foreign corporation which had violated the act of Assembly with regard to registration could not own personal property within the State of Pennsylvania. The property in question having been destroyed, the insurance company contended that it was not liable because plaintiff, a foreign corporation, was not legally the owner. It was held, however, that the right of a foreign corporation to own personal property in Pennsylvania is not affected by the constitution or the act of 1874. Judge Henderson said: "The principal objects of the statute were to bring foreign corporations within reach of legal process and to subject them to the taxing power of the state. It was not intended to deny to them the right of ownership or to effect a forfeiture of title. Much less does it work a conversion of title to the agent of the corporation in whose possession the property may be. Even if the corporation were engaged in doing business in violation of the statute, the property of the company in possession of the agent would still belong to it, and it could maintain an action against the agent for it."

A similar conclusion was reached in *Construction Co. v. Winton*, 208 Pa. 467 (1904), in which it was held that a foreign corporation was entitled to foreclose a mortgage, although the money for which the mortgage was taken as security was advanced at a time when the company was illegally engaged in business in Pennsylvania. Mr. Justice Metzger said: "The appellant overlooks the fact, essential to sustain his position, that the mortgage was not given to secure an indebtedness arising out of a transaction made unlawful by the appellee engaging in business contrary to a statute or to the state constitution. Concede that the appellee as a foreign corporation had no right to engage in the business set forth in its contract with the appellant, yet the fact is no defense to a recovery on the mortgage . . . The money sought to be recovered here was not invested or employed in this state in any business enterprise by the corporation, it was loaned to the

appellant's decedent, a citizen of Pennsylvania, who employed it in his business for his own use and benefit." It may, therefore, be considered to be settled that a foreign corporation is not denied the right to sue and recover on the contracts made while it is illegally engaged in business in Pennsylvania, provided such contracts do not arise out of, and are not directly connected with, such illegal business.

The decisions which have been referred to were all cases in which the corporation was a party plaintiff. If the corporation is a party defendant in a transaction arising out of business illegally done without registration in Pennsylvania, it cannot set up non-registration as a defense and defeat recovery. This rule rests upon the well known principle of law that a party cannot take advantage of his own wrong.²¹ The same rule applies if the defense is attempted to be set up by an individual member of the corporation.²²

The fact that the corporation cannot set up its own wrong in defense, does not, however, enlarge its liability or that of its directors or stockholders. It was contended, in *Bond v. Stoughton*, 26 Pa. Superior Ct. 483 (1904), that the stockholders of the corporation, which had done business without registering in Pennsylvania, might be held liable as partners. The court decided otherwise. It is uniformly held that a mere failure to comply with a statutory requirement, where there has been a *bona fide* corporate organization, does not make the stockholders or officers liable as partners. They might render themselves responsible by contracting as partners, but cannot be so held for debts contracted by the corporation, even though in violation of the law.

Inasmuch as the act is a penal statute, and therefore is to be strictly construed, the defense of the illegality must be distinctly and explicitly averred in the pleadings or it will not be upheld.²³

²¹*Swan v. Watertown Fire Insurance Co.*, 96 Pa. 37 (1880); *Watertown Fire Ins. Co. v. Simons*, 96 Pa. 520 (1880); *Hagerman v. Empire Slate Co.*, 97 Pa. 534.

²²*Kilgore v. Smith*, 122 Pa. 48 (1888). See also *East Side Bank v. Tanning Co.*, 170 Pa. 1 (1895).

²³*Campbell Mfg. Co. v. Hering*, 139 Pa. 473 (1891); *Sigua Iron Co. v. Vandervort*, 164 Pa. 572 (1894); *Commonwealth v. Shober*, 3 Pa. Superior Ct. 554 (1887); *Blakeslee Mfg. Co. v. Hilton*, 5 Pa. Superior Ct. 184 (1897).

§7. *Corporations to Engage Only in Authorized Business.*—The Constitution of 1873 contains a number of provisions, other than those already mentioned, which were intended to safeguard the rights of minority stockholders. This was one purpose of Article XVI, §6, which provides: "No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business." By the principles of the common law, a minority stockholder has a right to have the capital stock of the corporation used only in the business expressly authorized by its charter; otherwise, the charter might be forfeited and his rights lost. This common law right is now guaranteed to him by the constitution. The section serves the further purpose of restraining corporations from departing from the business for which they were organized, to the prejudice of the commonwealth.

§8. *Fictitious Increase of Stock or Bonds Forbidden.*—Another section devoted to the protection of minority stockholders is as follows: "No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained, at a meeting to be held after sixty days' notice given in pursuance of law."²⁴

The first question of interpretation naturally arising under this section is as to what corporations it applies. The language is broad enough to include all private corporations, and it has been judicially determined that the section not only does apply to them, but also to quasi public corporations, such as street railways or railroad corporations.²⁵

Assuming that the act applies to all private corporations, the question inevitably arose as to whether it applied to such corporations whose charters antedated the Constitution of 1873,

²⁴Art. XVI, §7.

²⁵*Shepp v. Norristown Passenger Ry. Co.*, 13 Pa. County Ct. 254 (1893); s. c., 2 Pa. District Reports, 679; *Commonwealth ex rel. Atty. Gen'l v. Reading Traction Co.*, 25 Pa. County Ct. 156 (1901), affirmed 204 Pa. 151 (1902).

and which had not accepted its provisions. In *Ahl v. Rhoads*, 84 Pa. 319 (1877), it appeared that the Farmers' and Mechanics' Bank of Shippensburg had taken certain action which appeared to be contrary to the section of the constitution under discussion. It was argued that the action therefore was void. It was held, however, that the clause in question had no application to the case, because the charter of the bank permitted the action complained of to be taken, and it had not been withdrawn or modified by the Legislature.²⁶

The same question was again raised in the case of *Gloninger v. Pittsburg and Connellsville Railroad Co.*, 139 Pa. 13 (1891), and a similar decision was reached, Mr. Justice Green saying: "We have seen that the right of the company to mortgage its property was complete, absolute, and without any conditions or limitations as to the manner of its exercise. There was nothing, either in its charter or its supplemental acts, or in any general legislation prior to the Constitution of 1874, which imposed any restrictions or formalities upon it, in the exercise of its right to increase its indebtedness, or to make mortgages upon its property. Neither the act of 1855, nor the amendment of 1857, which gave power to the Legislature to alter, revoke, or annul charters of incorporation when they were injurious to the citizens of the commonwealth, had any specific effect upon this particular chartered right of this company." He then went on to point out that while the charter of the railroad company might be altered by the Legislature at any time, when it was shown that its continued exercise would be "injurious to the citizens of the commonwealth," because it had accepted the benefit of an act passed in 1868, and had therefore made itself amenable to this clause in the constitution, nevertheless, no action had been taken by the Legislature looking to an alteration of its charter—therefore, it stood as at first granted. The acceptance of the clause of the constitution giving the Legislature the right to alter or annul charters of corporations, first adopted in 1857, must not be confounded with an acceptance of the provisions of the Constitution of 1873. The acceptance of the provisions of the present constitution would necessarily

²⁶A similar conclusion appears to have been reached, although the case is inadequately reported in *Lewis v. Jeffries*, 86 Pa. 340 (1878).

make the corporation subject to the section under discussion, as well as to others, without any action by the Legislature looking to an alteration of its charter.

It is therefore settled law that the provisions of Article XVI, §7, apply only to such private corporations as have received their charters since 1874, or have accepted the provisions of the present constitution, or whose charters have been altered so as to make them subject to this particular clause by legislative action. It does not apply to corporations in existence prior to its adoption, and which have not been made amenable to its terms.

The first portion of Article XVI, §7, forbids the issuance of stock or bonds, except for a proper consideration, and makes illegal fictitious increases of either stock or indebtedness. The term "fictitious" as here used is not synonymous with "illegal," as has been supposed.²⁷ It has reference to an increase made without consideration, and not represented by any corresponding increase in the assets of the corporation. Even in such case, it is probable that the rights of innocent purchasers will be protected if they have given value for stock or bonds thus fictitiously issued.²⁸

The latter part of the same section forbids the increase of stock or indebtedness, except in pursuance of general law, and by consent of the stockholders at a meeting held after sixty days' notice. The increase of indebtedness herein referred to has reference to that usually represented by bonds or other formal evidence of indebtedness issued for the purpose of providing funds for the use of the company. It does not have reference to the execution of mortgages or other securities given to existing creditors.²⁹ Such securities do not constitute an increase of indebtedness, but merely afford additional protection to those persons to whom a debt is already owing. It has also been held

²⁷*Fidelity Co. v. Railroad Co.*, 138 Pa. 494 (1891), in which it was held that the increase of bonded indebtedness was not fictitious, although the securities, being illegally issued, were to a large extent unenforceable.

²⁸See *Commonwealth ex rel. Atty. Gen'l v. Reading Traction Co.*, 25 Pa. County Ct. 156 (1901), affirmed 204 Pa. 151 (1902).

²⁹*Ahl v. Rhoads*, 84 Pa. 319 (1877); *Powell v. Blair*, 133 Pa. 550 (1890).

that the section has no application to indebtedness created "by a corporation in the conduct of its ordinary business."³⁰

In *Manhattan Hardware Co. v. Phalen*, 128 Pa. 110 (1889), Mr. Justice McCollum said: "The debts of a manufacturing corporation, accruing in the employment of labor and the purchase of materials in the prosecution of its ordinary business, do not, we think, constitute such an increase of indebtedness, as required a previous meeting and consent of stockholders to validate them."

But even in the event that an increase has taken place without the consent of the stockholders at a meeting held in accordance with the provisions of the constitution, it is doubtful whether the courts would hold that stock or bonds thus created were void, if the money realized from their sale had been received by the corporation and applied to the improvement of its property, with the knowledge of the stockholders. If the stockholders promptly object at a time when it is possible to place in *statu quo* those who have advanced money on the faith of the bonds or stock thus illegally issued, no doubt the court would declare such stock or bonds to be invalidated. But if such objection is not promptly made, and the money has been accepted and used by the corporation, the court will decline to interfere. In *Manhattan Hardware Co. v. Phalen*, 128 Pa. 110 (1889), Mr. Justice McCollum said: "But in the view that we take of this case we need not decide to which class the debt under consideration belongs. The corporation received and applied to the improvement of its property every dollar of the loan covered by the mortgage. It is not denied that the stockholders knew of this improvement and of the loan to effect it; nor is it alleged that any stockholders ever protested against either. It may be assumed, therefore, that with full knowledge of both they allowed the mortgagee to advance his money to the corporation, and the money so advanced to be applied to the uses for which it was borrowed, without a word or act to indicate their dissent. The corporation possesses and enjoys the fruits

³⁰*Manhattan Hardware Co. v. Phalen*, 128 Pa. 110 (1889). See also *Ahl v. Rhoads*, 84 Pa. 319 (1877). The section is not self-executing *Yetter v. Delaware Valley Railroad Co.*, 206 Pa. 485 (1903). Notice of meeting may be waived by the consent of all the stockholders, *Tally-on-Top Sales Book Co.'s Case*, 17 Pa. Circuit Ct. 199 (1895).

of the loan, and neither it, nor its stockholders, can now be permitted to allege as a defense to the mortgage given to secure it that it was unauthorized by a previous meeting and consent of the stockholders."

§9. *Banking Corporations.*—There are two sections in the sixteenth article which relate specifically to banks. Section 9 provides: "Every banking law shall provide for the registry and countersigning, by an officer of the state, of all notes or bills designed for circulation, and that ample security to the full amount thereof shall be deposited with the Auditor General for the redemption of such notes or bills." Section 11 provides: "No corporate body to possess banking and discounting privileges shall be created or organized in pursuance of any law without three months' previous public notice, at the place of the intended location, of the intention to apply for such privileges, in such manner as shall be prescribed by law, nor shall a charter for such privilege be granted for a longer period than twenty years."³¹

§10. *Power to Revoke Charters.*—Section 10 of Article XVI provides: "The General Assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this commonwealth, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew, or extend the charter of more than one corporation." This section has already been discussed³² except as to the last sentence, which needs no particular explanation.

§11. *Telegraph Lines.*—Relative to telegraph lines, section 12 of Article XVI provides: "Any association or corporation organized for the purpose, or any individual, shall have

³¹A provision similar to this was contained in the constitution as amended in 1838, Art. I, §25. See *Renewal of Bank Charters, Opinion of Attorney General*, 14 Pa. County Ct. 144 (1893). As to the interpretation of "discounting privileges," see *Schober v. Accommodation Savings Fund & Loan Ass'n*, 35 Pa. 223 (1860); *Building Ass'n v. Seemiller*, 35 Pa. 225 (1860); *Manfr.'s & Mech. Savings & Loan Co. v. Conover*, 5 Phila. 18 (1862).

³²See Chapter VIII, Ex Post Facto Laws and Laws Impairing the Obligation of Contracts.

the right to construct and maintain lines of telegraph within this state, and to connect the same with other lines; and the General Assembly shall, by general law, of uniform operation, provide reasonable regulations to give full effect to this section. No telegraph company shall consolidate with, or hold a controlling interest in the stock or bonds of, any other telegraph company owning a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph."³³

§12. *Definition of "Corporations."*—The last section of Article XVI, in explanation of those preceding, provides, section 13, that: "The term 'corporations,' as used in this article, shall be construed to include all joint-stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships."³⁴

³³See *Western Union Telegraph Co. v. Pennsylvania R. R. Co.*, 120 Fed. 362 370 (1903), reversed on another point, see 123 Fed. 33 (1903).

³⁴See *Great Southern Fireproof Hotel Co. v. Jones*, 177 U. S. 449 (1900).

CHAPTER XXVI.

CONSTITUTIONAL PROVISIONS RESPECTING THE POWER OF EMINENT DOMAIN.¹

§1. *Eminent Domain Defined.*—Every sovereignty has certain rights in all property within its jurisdiction, even though it be owned by private persons. The earliest form of property holding was by communities rather than by individuals. Subsequently private ownership became a recognized fact under the protection of law, but the sovereign power still retained its right to resume the ownership of property whenever the exigencies of the public welfare should require it. Such resumption of public ownership would necessarily destroy private rights, but the duty of the sovereign to compensate private owners for property so taken was not recognized until within comparatively modern times. Even in England the instances are many of the confiscation of private property without compensation, for the use of the crown. More recently the right of the individual to be compensated has been protected, but the power of the sovereign to take private property when the necessities or convenience of the public may require it, rendering proper compensation therefor, has been fully preserved. This is what is known as the power of eminent domain and is inherent in sovereignty.² The term “eminent domain” is an indication of a right of property superior to that of the private persons who possess it. It has also been applied to the power of the sovereign to regulate or control rights of a public nature, such as navigation, fishery, or precious metals, but in

¹This chapter is not a general discussion of the power of eminent domain. It is confined to a consideration of the construction of the clauses in the constitution and deals with the general subject only in an introductory manner.

²Cooley, *Const. Lim.* (7 ed.), p. 754. *Phila., etc., Ry. Co.'s Appeal*, 102 Pa. 123 (1883); *Lock Haven, etc., Co. v. Clinton Co.*, 157 Pa. 379 (1893).

its ordinary use it is confined to the right to take private property for public use.³

§2. *Constitutional Provisions.*—The power of eminent domain being inherent in sovereignty is vested in the people and its exercise necessitating a legislative act is subject to the control of the General Assembly. This was recognized by our earliest constitution, which contained a provision as follows: "That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto: but no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives."⁴ In the Constitution of 1790 it was provided: "Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being made."⁵ These provisions proved to be inadequate to fully protect the rights of individuals, and they were accordingly considerably enlarged, both by the amendments adopted in 1838⁶ and by the Constitution of 1873. The latter contains three separate clauses relating to this subject: The first was designed to protect the individual from having his property taken without proper compensation being made; the second, to prevent the abridgment of the right of eminent domain, either by legislative action or by decisions of the courts, and the third, to enlarge the liability of corporations invested with the power of eminent domain and to compel them to render more adequate compensation to the citizens. These provisions are as follows: "Nor shall private property be taken or applied to public use

³*U. S. v. Jones*, 109 U. S. 513 (1883); *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 641 (1837); *Groff's Appeal*, 128 Pa. 621 (1889). See also *Trenton Cut-off R. R. v. Newtown, etc., Co.*, 8 Dist. Rep. 549 (1899).

⁴Const. of 1776, Chap. I, §8.

⁵Art. IX, §10.

⁶See amendment of 1838, Art. VII, §4, providing as follows: "The Legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property, or give adequate security therefor, before such property shall be taken."

without authority of law, and without just compensation being first made or secured.”⁷ “The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals.”⁸ “Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed, by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to the course of the common law.”⁹

§3. *Power of Eminent Domain Not to be Bargained Away and to be Strictly Construed.*—It has already been noticed that the power of eminent domain cannot be bargained away, because its continued exercise is necessary to the existence of the state. The constitutional provision quoted above that “the exercise of the right of eminent domain shall never be abridged” was therefore merely declaratory of existing law in this regard.¹⁰ “When the existence of a particular power in the government is recognized on the ground of necessity, no delegation of the legislative power by the people can be held to vest authority in the department which holds it in trust, to bargain away such power, or to so tie up the hands of the government as to preclude its repeated exercise, as often and under such circumstances as the needs of the government may require. For if this were otherwise, the authority to make laws for the government and welfare of the state might be so exercised, in strict conformity with its constitution, as at length to preclude the state perform-

⁷Const. of 1873, Art I, §10.

⁸Const. of 1873, Art. XVI, §3.

⁹Const. of 1873, Art. XVI, §8.

¹⁰See Chapter VIII, *Ex Post Facto Laws and Laws Impairing the Obligation of Contracts.*

ing its ordinary and essential functions, and the agent chosen to govern the state might put an end to the state itself. It must follow that any legislative bargain in restraint of the complete, continuous, and repeated exercise of the right of eminent domain is unwarranted and void; and that provision of the Constitution of the United States which forbids the states violating the obligation of contracts could not be so construed as to render valid and effectual such a bargain, which originally was in excess of proper authority."¹¹

It has also been mentioned that the power being an extraordinary one, and a prerogative of sovereignty,¹² which, if unduly exercised, would result in the oppression of the citizens, is deemed to be granted to corporations or individuals only by express enactments¹³ or necessary implication therefrom,¹⁴ and is always to be strictly construed.¹⁵ In reference to the latter point the latest expression of our Supreme Court is contained in the case of *Woods v. Greensboro Natural Gas Co.*, 204 Pa. 606 (1903), in which it was argued that the grant of right to construct a gas pipe line under the power of eminent domain carried with it the right to erect a telephone line also by the power of eminent domain to be used in conjunction with the business. Mr. Justice Potter said: "The rule for construing statutes of this class is clearly laid down by Chief Justice Black, in *Packer v. Sunbury, etc., R. R. Co.*, 19 Pa. 211: 'All acts of incorporation and acts extending the privileges of incorporated bodies are to be taken most strongly against the companies. Whatever is not expressly and unequivocally granted in such acts is taken to have been withheld.'

"And in *Commonwealth v. Erie & N. E. R. R. Co.*, 27 Pa. 339, this court, speaking by the same justice, says (p. 351): 'That which a company is authorized to do by its act of incorporation, it may do; beyond that, all its acts are illegal. And

¹¹Cooley, Const. Lim. (7 ed.), pp. 754-755. *In re Twenty-second St.*, 102 Pa. 108 (1883); *Lock Haven Bridge Co. v. Clinton Co.*, 157 Pa. 379 (1893).

¹²It cannot be delegated by one sovereignty to another. *Darlington v. U. S.*, 82 Pa. 382 (1876).

¹³*Lance's Appeal*, 55 Pa. 16 (1867); *Lock Haven Bridge Co. v. Clinton Co.*, 157 Pa. 379 (1893).

¹⁴*Phillips v. Dunkirk, etc., R. R. Co.*, 78 Pa. 177 (1875).

¹⁵See Chapter VIII, Ex Post Facto Laws and Laws Impairing the Obligation of Contracts.

the power must be given in plain words or by necessary implication.'

"These principles have ever since been uniformly followed and applied in appropriate cases. The right which the appellant here seeks to establish is not merely in enlargement of its corporate powers, but it is further asserted that its exercise is an incident of the power of eminent domain, with which, for certain purposes, the company is clothed.

"Another rule of construction therefore applies, which is thus stated by Justice Thompson, in *Lance's Appeal*, 55 Pa. 16, 26: 'The exercise of the right of eminent domain, whether directly by the state or its authorized grantee, is necessarily in derogation of private right, and the rule in that case is, that the authority is to be strictly construed: *Dwarris on Stat.*, 750; *Allegheny v. Penna. R. R. Co.*, 26 Pa. 355; *Com. v. Erie, etc., R. R. Co.*, 27 Pa. 339; *Packer v. Sunbury, etc., R. R. Co.*, 19 Pa. 211. What is not granted is not to be exercised.'

"The concurring result of many cases is thus stated in *Lewis on Eminent Domain*, section 254: 'All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other. "An act of this sort," says Bland, J., "deserves no favor; to construe it liberally would be sinning against the rights of property." *Binney's Case*, 2 Bland, Ch. 99.'"¹⁶

§4. *Property to be Taken Only for Public Use.*—The right of eminent domain may be exercised either by the state, acting directly, or through the medium of corporations or individuals to whom its power has been delegated,¹⁷ but there is one limitation which always governs the taking of private property; it may be taken for a public but never for a private use. To take the property of one man and give it to another for his own use, even though compensation should be rendered, would be a deprivation of private property without due process of law,

¹⁶See also *Lance's Appeal*. 55 Pa. 16, 26 (1867).

¹⁷*Brown v. Corey*, 43 Pa. 495 (1862). See also *Finney et al. v. Somerville*, 80 Pa. 59 (1875), where it was said that only corporations organized for public purposes can be clothed with the power of eminent domain.

and therefore illegal. But if the property is to be applied to a purpose beneficial to the public, then the taking may be justified if an exercise of the power of eminent domain. Whether the taking will serve the necessities or convenience of the public or is for a private purpose only, is to be determined in the first instance by the Legislature. The exercise of the power of eminent domain is exclusively under its direction, and it alone is to determine when and how it is to be employed. The action of the Legislature in this regard is, however, always subject to review by the courts, and if it is determined in a judicial proceeding that a law has authorized the taking of property for private use, action under it will be enjoined. In *Pittsburg v. Scott*, 1 Pa. 309 (1845), Mr. Justice Rogers said: "As a general rule, it rests in the wisdom of the Legislature to determine what is a public use, and also the necessity of taking the property of an individual for that purpose. The right of eminent domain does not authorize the government to take the property of the citizen for the mere purpose of transferring it to another, even for a full compensation, when the public is not interested in the transfer. Such arbitrary exercise of power would be an infringement of the constitution, as not being within the power delegated by the people to the Legislature. To justify the exercise of this right, it must be for the use of the public, to be determined in the first place by the Legislature, subject, however, to correction or restriction, where it clearly appears the right is abused either by design which we cannot well suppose, or, what is more to be apprehended, by hasty and improvident legislation." The same thing may be said as to the determination of the necessity for the taking in a particular instance. The general purpose may be public and yet the taking of a particular piece of property may or may not be reasonably necessary for carrying out that purpose. This is to be determined in the first instance by the Legislature or by the corporation or individual to whom the power of eminent domain has been delegated, subject in each case to review by the courts.¹⁸

¹⁸*Smedley v. Erwin*, 51 Pa. 445 (1866) ; *Palairot's Appeal*, 67 Pa. 479, 488 (1871) ; *Edgewood R. R. Co.'s Appeal*, 79 Pa. 257 (1875) ; *Phila., etc., St. Ry.'s Petition*, 203 Pa. 354 (1902) ; *Phila., etc., R. R. v. Neshaminy Elevated R. R.*, 11 Dist. Rep. 461 (1902).

§5. *Public Use Defined.*—It is important to consider briefly the meaning of “public use” and the circumstances under which private property may be taken, before discussing the constitutional provisions quoted above. The power of the state in this regard has been very liberally construed and “public use” deemed to include any purpose which will promote the safety, welfare and even the convenience of the public. In *Pittsburg v. Scott*, 1 Pa. 309 (1845), it appeared that a certain portion of a private way had been appropriated by the City of Pittsburg for the purpose of widening and improving a certain public street known as “Duquesne Way,” and to provide a more convenient steamboat landing. The question having been raised whether a taking for such a purpose could be justified under the power of eminent domain, Mr. Justice Rogers said: “The right of eminent domain, as has been repeatedly held, may be exercised by the government through its immediate officers or agents, or indirectly through the medium of corporate bodies, or private individuals. It may be exercised not only for the public safety, but also where the interest, or even the convenience, of the state or its inhabitants, is concerned; as for the purpose of making turnpikes or other roads, railways, canals, ferries, and bridges for the accommodation of the public. If they have the power for the purposes above stated, they have also the power, as was done here, to take individual property for a public street, or for a public landing. These are improvements, in which not only have the people of Pittsburg an interest, but they affect more or less every citizen of the commonwealth, and, as would not be difficult to show, are of great benefit and advantage to the owners of lots, where property has been appropriated to that purpose. There is, therefore, nothing in the exception that the act is unconstitutional, as not embraced in the power of eminent domain.”¹⁹

The taking of private property for the construction of public buildings or public works of any kind, to provide sites

¹⁹*Smedley v. Erwin*, 51 Pa. 445 (1866); *Phila., etc., R. R. v. Williams*, 54 Pa. 103 (1867); *Lance's Appeal*, 55 Pa. 16 (1867); *Palairot's Appeal*, 67 Pa. 479 (1871); *Market Co. v. Railroad Co.*, 142 Pa. 580 (1891).

for schoolhouses,²⁰ to provide parks,²¹ public landings,²² etc., or for any other like purposes, is fully sustainable as an exercise of the power of eminent domain. The provision of highways for public use is also recognized as a purpose public in its nature, and not only may land be taken for public roads or streets, but it may also be taken by corporations invested with the power of eminent domain for the purpose of constructing railways which, while organized primarily for private gain, are nevertheless a convenience and under modern conditions even a necessity to the public. Upon the same principles property may be taken by any public service corporation, invested with the power of eminent domain, and devoted to the purpose for which it is organized,²³ but in any such case it must be very clear that such power has been conferred upon the company, or else its exercise cannot be upheld.²⁴ If, however, the Legislature has clearly invested a corporation engaged in serving the public with the power of eminent domain, the right to its exercise cannot be questioned, for if the use to which the property is to be devoted will enure to the benefit of the public, the determination as to whether the extent of such benefit will warrant the exercise of such extraordinary power is entirely within the discretion of the General Assembly.²⁵

It must, however, clearly appear that the use will result in some public benefit; if the taking will only serve the interests of the corporation, then it will be illegal, even though authorized by statute.²⁶

§6. *Private Roads and Lateral Railroads.*—Whether the Legislature can constitutionally authorize the taking of land for the construction of private roads or so-called lateral rail-

²⁰*Long v. Fuller*, 68 Pa. 170 (1871).

²¹*Root's Case*, 77 Pa. 276 (1875).

²²*Pittsburg v. Scott*, 1 Pa. 309 (1845).

²³See *Johnston v. People's Nat. Gas. Co.*, 5 Cent. R. 564 (1886); *St. Mary's Gas Co. v. Elk Co.*, 191 Pa. 458 (1899); and the act of March 29, 1885, P. L. 29; *Harvey v. Thomas*, 10 Watts. 63 (1840).

²⁴See *Pa. Telephone Co. v. Hoover*, 24 Pa. Superior Ct. 96 (1904); *Pfoutz v. Pa. Telephone Co.*, 24 Pa. Superior Ct. 105 (1904).

²⁵*Phila., etc., Street Ry.'s Petition*, 203 Pa. 354 (1902); *Edgewood R. R. Co.'s Appeal*, 79 Pa. 257 (1875); *Smedley v. Erwin et al.*, 51 Pa. 445 (1886).

²⁶*Com. v. Bond*, 214 Pa. 307 (1906); *Com. v. Uwchlan St. Ry. Co.*, 203 Pa. 608 (1902); *Phila., etc., St. Ry. Co.'s Petition*, 203 Pa. 354 (1902); *Edgewood R. R. Co.'s Appeal*, 79 Pa. 257 (1875).

roads, connecting the land of an individual with a public railroad, is a question of some difficulty. In other states the prevailing opinion is that such a taking is for a purpose essentially private in its nature and therefore is illegal.²⁷ In Pennsylvania, however, such laws have been on our statute books for many years. They were first upheld on the ground that there was no constitutional prohibition of the power of the Legislature to authorize the application of private property to a private use. In *Harvey v. Thomas*, 10 Watts, 63, 66 (1840), Mr. Chief Justice Gibson said: "The clause by which it is declared that no man's property shall be taken or applied to public use, without the consent of his representatives, and without just compensation made, is a disabling, not an enabling one, and the right would have existed in full force without it. Whether the power was only partially restrained for a reason similar to that which induced an ancient lawgiver to annex no penalty to parricide, or whether it was thought there would be no temptation to the act of taking the property of an individual for another's use, it seems clear that there is nothing in the constitution to prevent it, and the practice of the Legislature has been in accordance with the principle, of which the application of another's ground to the purpose of a private way, is a pregnant proof."²⁸

Hays v. Risher, 32 Pa. 169 (1858), is the first decision that placed the constitutionality of these acts upon the ground of public utility and necessity. Mr. Justice Woodward said: "The truth is, when a lateral railroad is laid upon intervening lands, private property is not taken for *private* use, and there was no occasion for Judge Gibson's remark in *Harvey v. Thomas*, 10 Watts, 63, that the constitution does not forbid such taking. The private property is taken for public use—for clear and definite objects of a public nature which are of sufficient importance to attract the sanction of the sovereign."²⁹

Such laws therefore are now upheld on the ground that it promotes the interests and convenience of the public to have

²⁷See Cooley, *Const. Lim.* (7 ed.), p. 764.

²⁸See also *Harvey v. Lloyd*, 3 Pa. 331 (1840), decided on the same ground.

²⁹See also *Brown v. Corey*, 43 Pa. 495 (1862); *Keeling v. Griffin*, 56 Pa. 305 (1867).

ways provided connecting with public highways or railroads by means of which access may be had to the property of the private persons who have constructed the road. In *Waddell's Appeal*, 84 Pa. 90 (1877), President Judge Harding, whose decision was affirmed on appeal, said: "The right of the Legislature to establish private roads over the land of one man for the benefit of another, for the purpose of access to highways or places of necessary public resort, or even to private ways leading to highways, has never been seriously doubted in Pennsylvania; on the contrary, that right has been distinctly recognized and affirmed; it has, too, been exercised almost continuously ever since the settlement of the province. It is plain, therefore, that the exclusive consideration of the rights of individuals to whom legislative authority to construct private ways has been accorded, does not form the true ground on which the constitutionality of these acts has been predicated. On the contrary, it is the connection of these private ways with public highways, or with places of necessary public resort, together with the implied right or license of the public to use them, at least in going to and from the premises of the person laying them out, quite as much, if not more, as the consideration of purely individual rights, that have won for these acts judicial recognition of constitutionality. The exercise of legislative power for the accomplishment of a purpose in which the general public has an interest, has, indeed, never been gravely questioned anywhere; it will probably never be denied.

"The private road law of Pennsylvania is not in conflict with the principles to which we have adverted. It does not, strictly speaking, authorize the taking of private property for private use, even after full compensation. The roads laid out under its provisions are *quasi* public roads." He affirmed the constitutionality of the lateral railroad acts for similar reasons.³⁰ It must be conceded that the constitutionality of these laws rests on a slender foundation, but as they have been acquiesced in for so long a time their legality is not now open to question. The doctrine will not, however, be extended, and no such legislation will be sanctioned unless the roads to be constructed under its terms are actually to be connected with a public way so that

³⁰See also *Harvey v. Lloyd*, 3 Pa. 331 (1846).

the interests or convenience of the public will be served thereby. A law providing for the taking by eminent domain of land lying under rivers in order to connect with each other lands belonging to the same individual, lying on both sides of such rivers, was held unconstitutional in *Waddell's Appeal*, 84 Pa. 90 (1877). President Judge Harding in the lower court reviewed at length the legislation on this subject. He said: "The legislation as to private roads in this commonwealth had an early beginning. The act of February 20, 1735, was the first; the act of April 6, 1802, Pamph. L. 178, in many respects a re-enactment of the former, followed; and again, the General Road Law of June 13, 1836, Pamph. L. 556, in which there was almost an entire incorporation of the provisions of the previous acts, took its place upon the statute book. Thus far, however, the authorizing of private roads by the Legislature extended only to the surface of lands; but the act of April 16, 1838, section 19, Pamph. L. 642, lengthened the reach; it authorized the construction of private roads under the surface, to connect with coal mines. This was afterwards supplemented by the act of April 13, 1868, Pamph. L. 92, conferring authority to establish private roads to coal mines either under or over the surface of intervening lands. But it was held in *Neeld's Road*, 1 Barr, 353, that the act of April 16, 1838, was crude and imperfect, and that it could only be carried into effect by adding it to our road system, and treating it as if it was a section in the General Road Law. Since then it has been thus treated uniformly.

"With reference to lateral railroads, the act of May 5, 1832, Pamph. L. 501, was the first. It authorized the owner or owners of certain property designated in the act, to construct a lateral railroad over the lands of others intervening, for a distance of three miles, between such property and any railroad, canal or slack-water navigation. A supplement to it was enacted March 28, 1840, Pamph. L. 196, which extended the provisions of the original act to subterranean railways, and otherwise enlarged its scope in many respects. Subsequently it was further extended to the construction of canals, by the thirteenth section of the act of May 5, 1841, Pamph. L. 342. Then followed the tenth section of the act of April 24, 1843, Pamph. L. 361,

relating to the use of landings by lateral railroads at the junction of railroads and canals, and to the assessment and payment of compensation; and, still later, the third section of the act of January 6, 1848, extending more generally the provisions of the tenth section of the act last referred to, followed also, both thus becoming part and parcel of our lateral railroad system.

"The act of June 13, 1874, Pamph. L. 286, now under consideration, came next in order." He then considered the constitutionality of the act last mentioned and decided that it was invalid, saying: "This is legislative authority for a private way which 'may have both termini in private lands, and be laid out solely to connect A.'s white-acre lot with A.'s black-acre lot, separated by the land of B.' The constitutionality of such legislation never yet has received judicial sanction in Pennsylvania, nor indeed, in any of our sister states."³¹

It has also been clearly set forth that any taking of property for a railroad of the description of those contemplated by the lateral railroad laws must be strictly in accordance with their terms or it cannot be sanctioned; private individuals desirous of connection with a public railroad cannot organize as a railroad company and condemn land under the general power of eminent domain for the construction of what is in fact a private road.³²

§7. *What Property May be Taken. Property Devoted to Private Use.*—It being determined that the power of eminent domain exists in a particular instance, the corporation or individual invested with the right may take property of any description reasonably necessary for the public use, with the single exception of money,³³ which may be reached only by the power of taxation.³⁴ This includes the property and franchises of corporations by the very terms of the constitutional provision which has already been quoted. If the property belongs to private persons or corporations, and at the time of the taking is

³¹These road laws were held constitutional in *Pocopson Road*, 16 Pa. 15 (1851), and *Dickinson Twp. Road*, 23 Pa. Superior Ct. 34 (1903), and the lateral R. R. acts in *Harvey v. Thomas*, 10 Watts, 63 (1840); *Harvey v. Lloyd*, 3 Pa. 331 (1846); *Hays v. Risher*, 32 Pa. 169 (1858).

³²*Edgewood Railroad Co.'s Appeal*, 79 Pa. 257 (1875).

³³See, however, *Hammett v. Phila.*, 65 Pa. 146 (1870), in which Mr. Justice Sharswood said that it seemed to him that "there may be occasions in which money may be taken by the state in its transcendental right of eminent domain."

³⁴Cooley, *Const. Lim.* (7 ed.), p. 756.

devoted to private uses, it may be taken if a reasonable necessity exists therefor.³⁵ This does not mean that property not really needed to promote the public welfare may be taken, for if not so needed, the taking while ostensibly for a public use would really be for some private gain. It has already been seen that the determination of this question in the first instance necessarily rests with the corporation or individual or the public body which seeks to take the property, but the final decision rests with the courts. If, however, under all the circumstances a reasonable need for taking the property exists, the courts will permit it to be done. In *Rudolph v. Schuylkill Valley Railroad Co.*, 166 Pa. 430 (1895), it appeared that the railroad company had constructed a branch line of about one and one-quarter miles in length for the purpose of connecting the main line of the road with a large iron works alleged to be principally owned by those who controlled the policy of the railroad. The construction of the branch was objected to on the ground that it was to be built merely to conserve the private interests of those who were interested both in the iron works and the railroad. The court, however, upheld the action of the railroad company in determining that the branch line was reasonably necessary and therefore sanctioned the taking of the necessary property. It was said: "Defendant company is expressly authorized by its charter 'to construct such branches from its main line as it may deem necessary to increase its business and accommodate the trade and travel of the public.' As evidenced by the resolution of November 11, 1889, the construction of the branch line in question was avowedly undertaken by the company for these very purposes; and it does not sufficiently appear that, in constructing and operating the same, there has been any departure from or abandonment by the defendant or its lessee of either of said declared purposes." In his second conclusion—which with others was approved by the court below—the learned master says: "Nothing has been shown to make us doubt the integrity of the action taken, so as to justify us in

³⁵*Phila., etc., Street Ry.'s Petition*, 203 Pa. 354 (1902); *Com. v. Penna. Canal Co.*, 66 Pa. 41 (1870); *In re Towanda Bridge Co.*, 91 Pa. 216 (1879); *In re Twenty-second St.*, 102 Pa. 108 (1883); *Phila., etc., Ry. Co.'s Appeal*, 102 Pa. 123 (1883). See also *West River Bridge Co. v. Dir.*, 6 Howard (U. S.), 507 (1848).

saying that this was an attempt to connect an individual siding with the railroad, without complying with the provisions of the lateral railroad statutes.' In this we think he was right. We find nothing in the case that would justify the inference of bad faith on the part of the company, in not carrying out its declared purpose to exercise the authority given by its charter to construct the branch line in question. If it were otherwise, the commonwealth would be the proper party to complain."³⁶

§8. *Taking Property Already Devoted to Public Use.*—A somewhat different rule obtains, however, when one corporation or individual invested with the power of eminent domain attempts to take the property of another such corporation or individual which property is already devoted to a public use. If such taking has been specially authorized by the Legislature, this action necessarily takes precedence over a previous devotion of the property to another public use. In the absence of such special provision there must be a necessity for the taking of such property, so absolute that without it the grant of powers to the younger corporation would be defeated. This question has most frequently arisen in cases where one railroad company under a later grant of the power of eminent domain has attempted to take or interfere with property already used for public purposes by an older corporation. In *Pennsylvania Railroad Co.'s Appeal*, 93 Pa. 150 (1880), it appeared that the appellant corporation had constructed certain of its tracks on Dock Street, Philadelphia, and in order to have a suitable site for its depot and necessary sidings had attempted, under its power of eminent domain, to destroy a portion of a street car track belonging to and operated by the Lombard and South Street Passenger Railway Company. Having been enjoined by the lower court, the railroad company appealed, claiming that under the grant to it of power to condemn such property as it should "deem necessary for depot and other railroad purposes," it necessarily had the right to take the tracks of the older corporation. It alleged that the grant to it would be defeated otherwise, as it would be extremely inconvenient, if not impossible, to construct its depot and sidings at any other place. Its

³⁶See also *Western Penna. R. R. Co.'s Appeal*, 99 Pa. 155 (1881); *McAboy's Appeal*, 107 Pa. 548 (1884).

claim was denied by the Supreme Court, because under the facts of the case there was no absolute necessity for the taking of the property in question, and such necessity as appeared to exist had been created by the corporation itself. Mr. Justice Gordon said: "Now it is said, as power is here given to take and hold ground and other property, near or convenient to said avenue or streets, for depot and other railroad purposes, it must necessarily have the right to use the adjacent street and intervening franchise in order to gain access to its depot or other property. This may be so, but this plea of necessity is so frequently used to cover infractions of both public and private rights that, *prima facie*, it is suspicious, and must be closely scrutinized, especially where it is used to carry corporate privileges beyond charter limits. This plea, in the first place, must be tested by the rule, now of universal acceptance, that all acts of incorporation, and acts extending corporate privileges, are to be construed most strongly against the companies setting them up, and that whatever is not unequivocally granted must be taken to be withheld. This rule is to be held in all its rigor where the attempt is so to construe a corporate grant as to interfere with a previous grant of the same kind: *Packer v. The Railroad Co.*, 19 Pa. 211 (1852). It is true that a franchise is property, and, as such, may be taken by a corporation having the right of eminent domain, but in favor of such right there can be no implication unless it arises from a necessity so absolute that, without it, the grant itself will be defeated. It must, also, be a necessity that arises from the very nature of things, over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy. To permit a necessity, such as this, to be used as an excuse for the interference with, or extinction of, previously granted franchises would be to subject these important legislative grants to destruction on a mere pretense, in fact, at the will of the holder of the latest franchise." After calling attention to the facts of the case, and explaining the circumstances under which the apparent necessity had arisen, for taking the tracks of the older corporation, he continued: "We thus discover that this necessity, by which the unlawful acts of this company, appellant, are sought to be excused is one of its own making—a

matter of economy. It is cheaper to use Dock Street, and the appellee's franchise, than to buy the property above mentioned. A defense more weak, or more barren of equity, could scarcely be imagined." A more recent expression of the Supreme Court reaffirming the rule is to be found in *Scranton Gas & Water Co. v. Coal & Iron Co.*, 192 Pa. 80 (1899). A railroad corporation endeavored to take by eminent domain a portion of the premises of a gas company, although the facts as reported by the master showed that while such taking would result in a great saving of expense, the track which it was desired to construct could be built elsewhere. The right of the railroad company to thus interfere with the use of its property by the gas company was denied.³⁷

But while the constitution expressly authorizes the taking of the franchises or property of a corporation by eminent domain, it does not follow that this may always be done even by direct legislative authority. The exercise of the power in such cases is still subject to the general principle that property may be taken only for a public use, and it must appear that the property thus appropriated will be applied to a different public use and one which the Legislature may have deemed to be more beneficial to public interests than that to which the property taken was previously devoted. Thus it was held in *Philadelphia, etc., Street Railway's Petition*, 203 Pa. 354 (1902), followed by the later cases of *Com. v. Uwchlan Street Railway Co.*, 203 Pa. 608 (1902), and *Com. v. Bond*, 214 Pa. 307 (1906), that the Legislature cannot constitutionally authorize one corporation for profit to take the property or franchises of another such corporation and apply such property or franchises to exactly the same purposes for which they were previously used. This would be appropriating property not to any public advan-

³⁷There are a number of cases which enumerate the same principles. See *Groff's Appeal*, 128 Pa. 621 (1889); *Stormfeltz v. Turnpike Co.*, 13 Pa. 555 (1850); *Com. v. Erie R. R. Co.*, 27 Pa. 339 (1856); *Cake v. Phila., etc., R. R. Co.*, 87 Pa. 307 (1878); *Penna. R. R. Co.'s Appeal*, 93 Pa. 150 (1880); *Penna. R. R. Co.'s Appeal*, 115 Pa. 514 (1886); *Pittsburg, etc., Co.'s Appeal*, 122 Pa. 511 (1886); *Sharon R. R. Co.'s Appeal*, 122 Pa. 533 (1888); *Phila., etc., Co.'s Petition*, 203 Pa. 354 (1902); *Woods v. Greensboro, etc., Gas Co.*, 204 Pa. 606 (1903); *Snee v. Railroad Co.*, 210 Pa. 480 (1904); *Com. v. Bond*, 214 Pa. 307 (1906).

tage, but solely for the convenience and profit of a private corporation, and therefore would be unconstitutional.

§9. *Taking Public Highways.*—Public highways stand upon a slightly different basis, from the franchises or property of a corporation invested with the power of eminent domain. The former are used exclusively by the public and exist only for the benefit and convenience of the inhabitants, whereas the latter promote the public interests in a less direct manner and are used primarily for private gain. It has been decided that a public highway cannot be taken or appropriated by a corporation invested with the power of eminent domain, unless express legislative authority therefor has been given; no such right can be exercised merely because such taking may be thought necessary. In *Pennsylvania Railroad Company's Appeal*, 93 Pa. 150 (1880), the rule was thus clearly stated: "Though a franchise may be property such as a corporation, vested with the power of eminent domain, may take for its own uses, a public street or highway is not such property. It is a public franchise and cannot be violated except by direct legislative grant: *Commonwealth v. Erie and North East Railroad Co.*, 27 Pa. 339; *Cake v. Philadelphia and Erie Railroad Co.*, 87 Pa. 307."³⁸ In *Groff's Appeal*, 128 Pa. 621 (1889), Mr. Justice Mitchell pointed out that such legislative authority to appropriate a highway, in whole or in part, must be conferred in express words or by necessary implication. After calling attention to the fact that there had been no grant in express words, he continued: "We are left, therefore, to the consideration of the only other ground on which the claim can rest, that of necessary implication. The imperative and inevitable nature of the implication requisite has been laid down in all our cases, and nowhere more strongly than in some of the most recent and carefully considered. See *Pittsburg Junction R. R. Co.'s Appeal*, 122 Pa. 511; *Penna. R. R. Co.'s Appeal*, 93 Pa. 150; *Penna. R. R. Co.'s Appeal*, 115 Pa. 514; *Stormfeltz v. Manor Turnpike Co.*, 13 Pa. 555; *Cake v. P. & E. R. R. Co.*, 87 Pa. 307; *Tyrone School District's Appeal*, 22 W.N.C. 513." He then discussed the facts,

³⁸The same rule was laid down in *Pennsylvania Railroad's Appeal*, 115 Pa. 514 (1886), and in *Pennsylvania Railroad's Appeal*, 128 Pa. 509 (1889). See also *Southwestern State Normal School*, 26 Pa. Superior Ct. 99 (1904).

concluded that there was no necessary implication of a grant of authority and therefore the right to so occupy the public road was denied. The Superior Court also has considered the question. In *Southwestern State Normal School*, 26 Pa. Superior Ct. 99 (1904), in which an attempt was made by the normal school to condemn a public street for its own use, Judge Henderson said: "The 'easement' which the petitioner seeks to condemn is a public street, made so not only by the dedication of the owner of the land who established the plat and sold lots in accordance therewith, but also by continuous use by the public for more than twenty-one years. That franchises are subject to eminent domain has been determined in numerous cases, but it is as certainly declared that they cannot be taken without authority clearly expressed or by necessary implication. It was held in *Pittsburg Junction R. R. Co.'s Appeal*, 122 Pa. 511, that while a franchise is property and as such may be taken by a corporation having the right of eminent domain, yet in favor of such right there can be no implication unless it arises from a necessity so absolute that without it the grant itself would be terminated. It must also be a necessity that arises from the very nature of things over which the corporation has no control. It must not be a necessity created by the company itself for its own needs or for the sake of economy. To the same effect is *Groff's Appeal*, *supra*; *Cake v. P. & E. R. R. Co.*, *supra*; *Stormfeltz v. Manor Turnpike Co.*, 13 Pa. 555.

"In the case of a street or highway, however, something more than necessity is required to authorize an appropriation. A public street is a public franchise and is not such property as a corporation may take for its own use under the general power of eminent domain. It is a franchise which cannot be violated except by express legislative authority: *Pa. R. R. Co.'s Appeal*, *supra*."³⁹

§10. *Interference With Property Already Used for Public Purposes.*—In view of the multiplicity of corporations possessed of the power of eminent domain, and of the large number

³⁹In *Cleveland, etc., R. R. Co. v. Speer*, 56 Pa. 325 (1867), at p. 332, Mr. Justice Agnew said: "It does not admit of a doubt in this state that a railroad company may use a public street or highway when authorized by its charter expressly or *inferentially*." See also *Com. v. Erie, etc., R. R. Co.*, 27 Pa. 339 (1856).

of railroads and other semi-public works which have been constructed, it is to be expected that there will be many cases where one will necessarily interfere more or less with another. Thus railroads must cross each other, and particularly in cities are sometimes obliged to occupy adjacent premises. If in so doing they interfere with each other's convenience, how shall the matter be adjusted? If the strict rules heretofore discussed were applied, every interference being construed to be a taking of property, the resulting inconvenience would be incalculable. But in such cases a different principle is applied in the interest of all. When a railroad crossing or other similar construction affecting an older corporation is to be made, the courts will take into consideration the amount of inconvenience thereby occasioned to it as well as the resulting inconvenience to the new company should the construction be restrained. In cases where the interference is slight, the rule that there must be an absolute necessity is somewhat relaxed. This is well illustrated by the two cases of *Pittsburg Junction Railroad's Appeal*, 122 Pa. 511 (1886), and *Pittsburg Junction Railroad v. Allegheny Valley Railroad Co.*, 146 Pa. 297 (1889).⁴⁰ In the first case the Pittsburg Junction Railroad Company was not permitted to occupy a considerable portion of the yards of the Allegheny Valley Railroad, as it had attempted to do, because such occupation of its property would have been a substantial interference with the use of the yard, and was deemed by the court to be an unnecessary interference. At a later date, the Pittsburg Junction Railroad Company sought a method of conveying its trains across the yards of its rival by constructing an elevated road which would cause little or no inconvenience to the passing and repassing of trains in the yards below. This it was decided could be done. There was a reasonable necessity for the one road to cross the other, and the resulting inconvenience was slight. Mr. Chief Justice Paxson said: "In the case in hand the appellee seeks to cross appellants' yard, not at grade, but by an elevated road which will occupy no portion of the yard except for its necessary supports. That it will occasion some inconvenience to the appellants is probable, but for that it can be compensated in damages. It will certainly do them less

⁴⁰See also *Natural Gas Co. v. Water Co.*, 210 Pa. 177 (1904).

injury than by any other form. While vested rights are to be sacredly guarded, the public interests must not be overlooked, and nothing in the way of mere obstruction can be permitted to interfere with the public convenience. . . . Railroad corporations are the creatures of the public, and were created to serve the public in the matter of transportation of freight and passengers. It is not too much to require them to submit to a slight inconvenience where the public interests are concerned, especially where such inconveniences can be compensated in damages. Their franchises, like other property, may be taken by the public for the public welfare, where there exists a necessity for such taking. We have interfered repeatedly where such an attempt has been made without any actual necessity therefor. In the case in hand, we think such necessity does exist, and the slight inconvenience to the appellant company must yield to the public good."

The crossing of two roads at grade is always attended by inconvenience to one or both companies, and by danger to the public, hence both by the principles just discussed and by the express terms of the acts of Assembly applying to such cases, grade crossings are not to be allowed unless it is impossible to avoid them. Such impossibility must arise from physical conditions, not from acts of the company or by reason of its financial weakness.⁴¹

§11. *Taking Property Not Acquired by Eminent Domain.*—In the case of *Phila. & Reading Railroad v. Pottsville Water Co.*, 182 Pa. 418 (1897), it appeared that the water company sought by eminent domain to take water from a certain stream for the use of the citizens of Pottsville. The railroad company denied its right to do so, on the ground that the water of the stream would thus be so diminished as to interfere with the use of it for its locomotives. The railroad company had not acquired the right to so use the water under its power of eminent domain, but had purchased it from riparian owners. Under

"*Perry Co. R. R. Extension Co. v. Newport and Sherman's Valley R. R. Co.*, 150 Pa. 103 (1892); *Williams Valley R. R. Co. v. Lykens St. Ry. Co.*, 192 Pa. 552 (1899). See also act of June 19, 1871, P. L. 1361, and *Pittsburg, etc., Ry. Co. v. S. W. Ry. Co.*, 77 Pa. 173 (1874); *Scranton, etc., Traction Co. v. Canal Co.*, 180 Pa. 636 (1897); *Penna. R. R. Co. v. Warren St. Ry. Co.*, 188 Pa. 74 (1898).

these circumstances the court held that the railroad company could not avail itself of the principle that property already devoted to public use cannot be taken for public purposes unless there is an absolute necessity therefor; that a corporation, even though engaged in public service, acquires no higher right to property purchased by it to be devoted to public use, than was already possessed by its grantors. Mr. Justice Green said: "The defendant is clothed with the power of eminent domain, and is endeavoring by a strict compliance with the law to exercise its right to supply the citizens of Pottsville with an adequate quantity of water for their consumption. It is met by the claim of the plaintiff to a right to use the water of the stream in question to supply water for the use of its locomotives, and this right, they say, will be interfered with, and perhaps destroyed, if the water company is permitted to divert the water of the stream. It claims title to the water under a lease from the riparian owner. Such right as he was able to give it, it holds, but it was not more than the right of a riparian owner, and as such it was liable to be appropriated by the water company in proper proceedings. We cannot see that the plaintiff, which never exercised any right of eminent domain in obtaining the water, holds by any better title than its grantor, and we are therefore of opinion that the learned court below did not err in dissolving the injunction and dismissing the bill."⁴² The necessary conclusion from this language might seem to be that the property of a railroad company which it has acquired by private arrangement, instead of by eminent domain, can be taken by a later corporation irrespective of its being already devoted to a public use. It is not believed, however, that this position would be assumed by the courts should a case be presented in that form. It would seem that the use, and not the manner of acquisition of property, is the test as to the conditions under which it may be appropriated by another company invested with the right of eminent domain. The reason for the rule is the protection of the right of the public in the existing use, and that right exists

⁴²See also cases where property of corporations not clothed with the power of eminent domain alleged to be devoted to public use was taken by corporation having power of eminent domain. *Market Co. v. Railroad Co.*, 142 Pa. 580 (1891); *Lancaster, etc., Turnpike Co. v. Telephone Co.*, 10 D. R. 322 (1900).

whether the property so devoted was acquired by eminent domain or otherwise.

§12. *Compensation to be Made for Property Taken, Injured or Destroyed.*—The constitutional provisions relative to the power of eminent domain are designed mainly to protect the individual from having his property taken away from him without a proper compensation. The clause in Article I, section 10, provides: "Nor shall private property be taken or applied to public use without authority of law and without just compensation being first made or secured;" and Article XVI, section 8, provides: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed, by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to the course of the common law."

§13. *What is a "Taking" of Property.*—The first inquiry to be made relative to these clauses is as to the extent of the protection of property. It will be observed that the constitution requires the payment of compensation for property "taken, injured, or destroyed." Attention has already been called to previous constitutional provisions which guaranteed compensation for property taken, but not for that injured or destroyed. The distinction is a vital one. The word "taken" is much narrower in its scope than "injured or destroyed," and includes only property which is actually physically appropriated.⁴³ Prior to the adoption of the new constitution, there was no constitutional provision for compensation for injury to property on account of a change of grade of streets,⁴⁴ or for the injury to abutting owners resulting from the location of railroads or street

⁴³*Phila. and Trenton R. R. Co.*, 6 Wharton 25, 46 (1840).

⁴⁴*O'Connor v. Pittsburg*, 18 Pa. 187 (1851); *Henry v. Pittsburg, etc., Bridge Co.*, 8 W. & S. 85 (1844); *Ridge St.*, 29 Pa. 391 (1857).

railways on highways,⁴⁵ or for any other such injuries which, while quite as real in character and extent as a taking of property, did not come within the words of the constitution.⁴⁶ The precise meaning of "taken" is no longer of much, if any, importance by reason of the much broader words which follow.⁴⁷

§14. *Property Injured or Destroyed. Change of Grade of Streets.*—The words of the constitution requiring corporations, or others invested with the power of eminent domain, to render compensation for property injured or destroyed by the construction or enlargement of their works, was a great change, in that compensation was required to be made for all consequential injuries so resulting, which theretofore were irremedial. The class of cases of perhaps greatest importance comprises the innumerable instances where abutting property owners on highways are injured by a change of grade of the street. Many cases of great hardship arose under the old constitution, but, although the courts sometimes expressed themselves as desirous of affording a remedy, they were powerless to do so. For example, in *O'Connor v. Pittsburg*, 18 Pa. 187 (1851), it appeared that a church building had been rendered practically valueless by the lowering of the grade of the street on which it stood, leaving the members without means of ingress and egress. Mr. Chief Justice Gibson expressed his regret that he could afford no remedy, but also stated his conclusion that none existed. Since the adoption of the Constitution of 1873, there have been numerous cases of such a character, and the right of abutting property owners to compensation for any injury resulting proximately from the changing of the grade of streets has been fully sustained.⁴⁸

⁴⁵*Phila. and Trenton R. R.*, 6 Wharton, 25 (1840); *Mifflin v. R. R. Co.*, 16 Pa. 182 (1851); *Reitenbaugh v. Chester, etc., R. R. Co.*, 21 Pa. 100 (1853).

⁴⁶*Monongahela Navigation Co. v. Coons*, 6 W. & S. 101 (1843); *Clark v. Birmingham, etc., Bridge Co.*, 41 Pa. 147 (1861); *Yealy et al. v. Fink*, 43 Pa. 212 (1862); *Freeland v. Penna. R. R. Co.*, 66 Pa. 91 (1870).

⁴⁷*Tucker and Frankford Sts.*, 166 Pa. 336 (1895).

⁴⁸Prior to February 2, 1854, property holders injured by the change of the grade of streets upon which their property abutted had no remedy. By section 27 of the Act of Consolidation, 1854, P. L. 37, a right to damages for such injury was given to residents of the City of Philadelphia. From 1854 to 1891 property owners of Philadelphia had by the decisions of the courts been able to secure damages for changes of grades of streets established before or after 1854, and this payment

§15. *Additional Servitude on Land Abutting on Public Highways.*—Another class of cases in which compensation must now be rendered, but which were irremedial prior to the Constitution of 1873, comprises those where an additional servitude has been imposed upon land lying under public highways and owned by private persons. The persons who own land abutting upon a public highway, ordinarily own to the center of the street or road,

was made at the time the paper grade was established and not at the time of the physical taking. No case had been appealed from Philadelphia, involving this act of 1854, which decided to what changes of grade the act of 1854 referred, until *Change of Grade of Plan 166*, 143 Pa. 414 (1891), and *Ogden v. Phila.*, 143 Pa. 430 (1891).

In these cases Mr. Justice Mitchell decided that the act of 1854 applied only to changes in grade established at the time of the passage of the act and that the right of action did not arise when the grade was changed on the paper plan, but when the actual physical work was done. This decision left Philadelphia with only the constitutional provision and the general laws of the state, except in cases of the change of grades established prior to 1854. In *In re L St.*, 12 Pa. County Ct. 406 (1892), Judge Thayer, in commenting on these decisions, said:

"This case falls within the ruling of the Supreme Court in the case of *In re Change of Grade of Plan 166* and *Ogden v. City*. In those cases it is definitely ruled that an owner of land in Philadelphia has no legal claim against the city for damages arising from a mere change of grade regulation, unless it be a change of grade established prior to the Consolidation Act of February 2, 1854, and that the right of action given by section 8, Article XVI, of the constitution extends only to an actual physical change of grade made upon the ground.

"It is well known that this construction of the proviso contained in section 27 of the act of February 2, 1854, is at variance with the opinions and practice of the several courts of common pleas of Philadelphia in which many cases have been tried, and many judgments have been rendered for plaintiffs for damages arising from alteration of grade regulations which has been established subsequent to the passage of the act of 1854, and before any actual physical change made upon the grounds." See also *In re Fifth and Sixth St.*, 4 W. N. C. 443 (1877).

Although property owners of Philadelphia had for years had a more complete remedy for damages arising from the change in the grade of streets than the constitution provides, there are dicta in a number of cases prior to 1891 to the same effect as Mr. Justice Mitchell's decision in *Change of Grade of Plan 166*. See *Pusey v. City of Allegheny*, 98 Pa. 522 (1881); *In re Change Grade Ridge Ave.*, 99 Pa. 469 (1882).

In *Philadelphia v. Wright*, 100 Pa. 235 (1882), although counsel for the city argued that the right to damages arose only upon the actual physical change of the grade, the point was not touched upon in the decision. In *Campbell v. Phila.*, 108 Pa. 300 (1885), there is a dictum that "the claim for damages was ripe when the grade was confirmed."

In 1891, after the decision in *Change of Grade of Plan 166*, the act of May 26, 1891, P. L. 117, was passed, providing for the payment of damages arising from changes in the paper grade. This act is construed in *Greentree Avenue*, 21 Pa. Superior Ct. 177 (1902).

Greentree Avenue had been established and opened, but no grading had been done. The question before the court was whether the city

subject to the right of way of the public; they or their predecessors in title granted or dedicated a portion of their property to be used as a public highway, or it may have been appropriated by the public under the power of eminent domain. In such cases the burden laid upon the land is measured by the use. If granted or appropriated for a public highway in the country, it is to be used for the passage of horses and carriages, etc., and no other servitude can be imposed upon it without the consent of the owner of the fee, unless by the exercise of the power of eminent domain could assess the cost of this prospective grading upon the abutting owners at the time the street was opened, but when there was no present intention of doing any work upon it.

The court said that the right of action under Article XVI, section 8, of the constitution is for the actual establishment of the grade of the street on the land, the physical change; that prior to this act of 1891 there could have been no recovery of damages for the establishment or change of the paper or office grade of the highway in question; that this act was passed and should be construed so as to compensate property owners for the depreciation resulting from a paper grade which required them to give up the use of their property and to take notice of a contemplated change of grade for building operations.

It has been uniformly held in cases involving the constitutional provision only that the right of action under it accrues only when the actual physical change in the grade is made. *O'Brien v. Phila.*, 150 Pa. 589 (1892).

Plaintiff owned a house on Haines Street, in Germantown, for a number of years prior to 1871. In 1871 a plan for the change of the grade of Haines Street was confirmed. The street, however, was not physically graded until 1888. It was held that the right of action for damages did not accrue until 1888, when the physical grade was made. See also *Jones v. Bangor Borough*, 144 Pa. 638 (1892), affirmed in *Groff v. Phila.*, 150 Pa. 594 (1892); *Busch et al. v. McKeesport*, 166 Pa. 57 (1895); *Butler St.*, 25 Pa. Super. Ct. 357 (1904); *Harp v. Glenolden Borough*, 28 Pa. Superior Ct. 116 (1904); *Kershaw v. Phila.*, 10 Pa. C. C. 153 (1891).

It was held in *Levering Street*, 14 Phila. 349 (1880), that the act of 1854 did not provide for damage resulting to the land owner from a change from the natural to an artificial grade, the latter being the first city grade established. This decision was due to the provisions of the act applying to "established grades."

An attempt was made to have the constitutional provision interpreted in the same way in *Borough of New Brighton v. Presbyterian Church*, 96 Pa. 331 (1880). The streets around the church had been changed from a natural grade to one established by the borough. Counsel for the borough contended that since this was a change from the natural grade it was not such a change of grade as contemplated by the constitution and that the church could not recover. The Supreme Court held that the constitutional provision was broad enough to include any change of grade. This principle was still further enlarged in *New Brighton v. Piersol*, 107 Pa. 280 (1884).

The borough in this case had altered the grade of a street slightly, before the defendant bought his property, but had established no specific grade. After the defendant bought his property, the borough estab-

domain.⁴⁹ Accordingly it has been held since the new constitution that if any such additional burden is imposed by virtue of the right of eminent domain, compensation must be rendered to the owner of the fee. In the country, the construction thereon of a street railway,⁵⁰ a telephone or telegraph line,⁵¹ pipe line,⁵² or, in fact, any use whatever of the highway, other than that usually pertaining to it, or implied from the grant or appropriation, will entitle the abutting owner to compensation.⁵³ In *Sterling's Appeal*, 111 Pa. 35 (1885), Mr. Justice Sterrett said: "By appropriating land for the specific purpose of a common highway, the public acquires a mere right of passage, with the powers and privileges incident to such right. The fee still remains in the land owner, notwithstanding the public have acquired a right to the free and uninterrupted use of the road for the purpose of passing and repassing; and he may use the land for his own purposes in any way that is not inconsistent with the public easement. He may, for example, construct underneath the surface passageways for water and other purposes, or appropriate the subjacent soil and minerals, if any, to any use he pleases, provided he does not interfere with the rights of the public. In other words, the only servitude imposed on the land is the right of the public to construct and maintain thereon a safe and convenient roadway, which shall at all times be free and open for public use as a highway. It is in view of this servitude that damages may be awarded to the land-

lished a grade differing from the existing one, and it was held that the change between a grade physically made by the borough, but not legally established, to one both physically made and legally established, was such a change as is contemplated by the constitution and that the plaintiff might recover. It was also held in Philadelphia in *Germantown Ave. and Nineteenth St.*, 14 Phila. 351 (1880), that the change from a turnpike to an established grade would not give the plaintiff a right of action under the act of 1854. Such a change is, of course, contemplated by the terms of the constitution, and comes within the principle of *New Brighton v. Piersol* (*supra*).

⁴⁹*Penna. R. R. Co. v. Montgomery, etc., Ry. Co.*, 167 Pa. 62 (1895).

⁵⁰*Penna. R. R. v. Montgomery, etc., Ry. Co.*, 167 Pa. 62 (1895); *Hannum v. Media, etc., Ry. Co.*, 200 Pa. 44 (1901); *Dempster v. United Traction Co.*, 205 Pa. 70 (1903); *Hankey v. Phila. Co.*, 5 Pa. Superior Ct. 148 (1897).

⁵¹*Lancaster, etc., Turnpike v. Telephone Co.*, 10 Dist. Rep. 322 (1900).

⁵²*Sterling's Appeal*, 111 Pa. 35 (1885); *Mayer v. Pipe Lines Co.*, 5 York. 1 (1891).

⁵³*Electric Light Poles, Brown v. Electric Light Co.*, 208 Pa. 453 (1904); *Radnor Twp., etc., Co.'s Petition*, 208 Pa. 460 (1904); *Haverford Electric Light Co. v. Hart*, 13 Pa. C. C. 369 (1892).

owner. Laying and maintaining a pipe line, at the ordinary depth under the surface, necessarily imposes an additional burden on the land, not contemplated either by the owner or by the public authorities, when the land was appropriated for the purpose of a public road. It is a burden, moreover, which to some extent, at least, abridges the rights of the landowner in the soil traversed by the road, and hence it is a taking within the meaning of the constitutional provision requiring just compensation to be made for property taken, injured, or destroyed. (Constitution, Article XVI, section 8.) In some cases it is possible the injury may be consequential as well as direct. The constitutional provision embraces both."

If, however, the property so applied to public use as a highway is located within the limits of a town or city, the situation is essentially different. By a dedication of his property the owner or his predecessor in title must be deemed to have contemplated the subjection of it not only to the ordinary uses of a highway, but also to the uses to which city streets are subjected; the location thereon of telephone and telegraph poles,⁵⁴ water mains,⁵⁵ sewers,⁵⁶ etc.

When the question was first raised as to the right to build an electric street railway upon a city street without making compensation to the abutting owners, it was contended that this was an additional burden for which there should be compensation. In *Lockhart v. Railway Co.*, 139 Pa. 419 (1890), the question was fully considered, and such use of a city street decided not to be an additional burden for which compensation could properly be demanded. President Judge Stowe, whose decree on appeal was affirmed, said: "There can be no doubt that, under a proper charter, the city had a right to allow the streets to be used for a street railway, with horses as a motive power. So far as the street use proper is concerned, there is no substantial difference between the tracks of such a street railway and one operated by electricity. We may then assume that, in the occupation of the street with tracks, intermediate paving,

⁵⁴*Shinzel v. Bell Telephone Co.*, 31 Pa. Superior Ct. 221 (1906); dictum in *Lockhart v. Ry. Co.*, 139 Pa. 419 (1890); *York Telephone Co. v. Keesev*, 5 Pa. Dist. Rep. 366 (1896).

⁵⁵*Provost v. New Chester Water Co.*, 162 Pa. 275 (1894).

⁵⁶*Fisher v. Harrisburg*, 2 Grant (Pa.), 291 (1854); *Michener v. Phila.*, 118 Pa. 535 (1888).

and the appliances in ordinary use for railway operated by horses, there is nothing of which plaintiffs can legally complain. Whatever dust, noise and annoyance is incident they must submit to.

"But there is a material and substantial difference between such a road and the one contemplated by defendants as regards its relations to plaintiff's property. The proposed road not only occupies the middle portion of the street or cartway, but will, as a necessary part of its machinery, have iron posts some eighteen feet high, permanently fixed three or four feet in the ground, along or near the curb of the pavement or sidewalk, upon which will also be placed permanent lines of wire crossing the street, and upon which will also be placed a permanent wire over each track running longitudinally with the street. Do these singly or altogether amount to such a taking of plaintiff's property as is prohibited by the constitution without compensation?

"The placing of the wires over the streets does not appear to be a taking of plaintiff's property. The streets are dedicated to the public use, and a citizen has certain special rights, as an abutting owner, but I cannot see how a wire run through the air above the streets can be said to be a taking, injury, or a destroying of his property. But another question arises in reference to the posts placed in the ground for the support of the wires by means of which the cars are moved. It has generally been understood in Pennsylvania that the abutting owner has a fee to the middle of the adjoining street, and that the public has only a right of passage over it: *Chambers v. Furry*, 1 Y. 167; *Lewis v. Jones*, 1 Pa. 336. But this must not be taken in its literal sense, especially in towns and cities. What might be considered an invasion of private right, so far as the use of a highway is concerned, in the country, might not be so in a city. Thus, a city, by virtue of its general authority, may build sewers in streets, and the adjoining proprietor is not entitled to have damages assessed as for a new use or servitude: *Fisher v. Harrisburg*, 2 Gr. 291; *Cone v. Hartford*, 28 Conn. 363; *Traphagen v. Jersey City*, 29 N. J. Eq. 206; *Michener v. Philadelphia*, 118 Pa. 535. In such case, the street is not only used without compensation to the adjoining owner, but he is compelled to pay for the use of the sewer.

"So, the right to lay down gas pipes in the streets, given by the Legislature to municipal authorities, without allowing compensation, has been recognized by the courts, and, while it has not been expressly ruled in Pennsylvania that I know of, Mr. Justice Sterrett, in *Sterling's Appeal*, 111 Pa. 35, while deciding that a gas line was an additional burden which entitled the owner to damages in the country, said: 'As to the streets and alleys in cities and boroughs, there are reasons why a different rule, to some extent, should prevail.' Such has been taken to be the law in cities by common consent. I do not think that any one ever heard of a suit in Pennsylvania to recover damages for injury done merely by running a gas pipe along the street in front of his premises under municipal authority. So with water pipes, awning posts, fire plugs, and lamp posts. These all more or less impinge upon the absolute right of an owner of the soil, and are not necessary to accommodate public travel, or even consistent with the public right to an unobstructed passageway. And it may be now taken as settled that the owner's rights as to abutting property are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extend to all beneficial legitimate street uses, such as the public may from time to time require.

"The use of the streets for sewers, tunneling, public cisterns, gas pipes, water pipes, and other improvements necessary for the comfort and convenience of the citizens of cities and towns, so long as they do not substantially interfere with the use of the streets as such, appear to be under legislative and municipal control: *Dillon on Mun. Corp.* §699. The case of *Taggart v. The Newport Railway Co.*, decided this year by the Supreme Court of Rhode Island, is directly in point, and if good law, covers the case in hand. My own impression is that the use of poles, wires and other necessary appliances, such as are proposed to be used by defendants, is not in any respect a greater interference with the ownership of the adjoining property owner on a street, than the use of streets for fire plugs, horse troughs, and lamp posts, which have long and generally been recognized as within the power and control of the city government.

"Recognizing the right of the Legislature and city authorities to authorize the building of railways upon the streets of a city, without compensation to property owners, because it is a means of public transportation and accommodation, the necessary and proper apparatus for moving them must be allowed to follow as an incident, unless there is something illegal in its construction or use. The proposed construction here is no more illegal by reason of its effects upon the owners of property, so far as actual interference with their rights to use the streets is concerned, than so many lamp posts, and, if compensation could not be compelled for the ground taken by them, neither should it be for the posts supporting the wires in this case."⁵⁷

The theory is that city streets are dedicated or appropriated for all city uses, present or future, and the distinction thus drawn between country roads and city streets is fully recognized and upheld in Pennsylvania.⁵⁸

That an ordinary railroad built upon a city street is an additional servitude cannot be doubted, for this is not a city or local use of the highway,⁵⁹ but there is some uncertainty relative to an elevated railroad. Such road is constructed for the accommodation of local traffic and even in cases, which are infrequent, where the abutting owner owns the fee to the center of the street, it is not believed that he could legitimately complain of the building of the structure, or could exact damages on the theory of the imposition of a servitude not contemplated by the dedication of the street. This discussion relates exclusively to the right of the abutting owner to compensation for an additional burden imposed upon his estate in

⁵⁷This language was expressly approved in *Rafferty v. Central Traction Co.*, 147 Pa. 579 (1892). See also *McHale v. Easton, etc., Transit Co.*, 169 Pa. 416 (1895). Neither does the change of motive power from horses to cable or electricity create an additional servitude. *Rafferty v. Central Traction Co.*, *supra*.

⁵⁸*Penna. R. R. v. Montgomery, etc., Ry.*, 167 Pa. 62 (1895); *Sterling's Appeal*, 111 Pa. 35 (1885); *McDevitt v. The Gas Co.*, 160 Pa. 367 (1894). It has not been suggested in any of the cases that there may be instances where a highway first dedicated as a country road afterward becomes a city street for reasons with which the abutting owner had nothing to do. It is not doubted that in such a case the rule would be applied, probably on the theory that such a contingency must be assumed to have been contemplated by the original owner.

⁵⁹*Penna. R. R. v. Duncan*, 111 Pa. 352 (1886); *Penna.-Schuylkill Valley Railroad Co. v. Walsh*, 124 Pa. 544 (1889); *Penna.-Schuylkill Valley R. R. Co. v. Ziemer*, 124 Pa. 560 (1889); *Jones v. Erie & Wyoming R. R.*, 151 Pa. 30 (1892).

the bed of the highway; it does not relate to his claim for injury consequential upon the construction of the railroad or elevated structure before his door.⁶⁰

§16. *Consequential Injuries*.—The constitutional clause under discussion guarantees compensation for property injured by the construction or enlargement of works erected by corporations or others possessed of the right of eminent domain; this includes not only cases such as have been discussed where the injury is inflicted upon the property by some direct burden imposed upon it, but also those in which the injury, while real, is consequential rather than direct. Thus an injury resulting from the construction of an elevated railroad may give rise to a claim for damages even though the person injured may not have owned property actually taken or upon which an additional burden has been imposed. In *Pennsylvania Railroad Co. v. Duncan*, 111 Pa. 352 (1886) a claim was held valid for injuries occasioned by the construction of an elevated railroad on Filbert Street in Philadelphia. The property injured was located on Filbert Street, and so near the embankment of the elevated tracks that access to it was cut off. This was held to be an injury for which he was entitled to damages. A similar decision was reached in *Pennsylvania-Schuylkill Valley Railroad Co. v. Walsh*, 124 Pa. 544 (1889) in which it appeared that the railroad company had constructed its tracks on the street in front of the property in question, and so near thereto that, by reason of the passing and repassing of trains, it was dangerous to go in and out. This was held to constitute an interference with the use of the property which entitled the plaintiff to damages.

On the other hand in *Pennsylvania Railroad Co. v. Lippincott*, 116 Pa. 472 (1887), a property owner on Filbert Street was denied the right to compensation for injuries suffered by him because his property, while undoubtedly depreciated greatly in value, was located far enough away from the elevated structure so that access to it was not impeded. It was said that the injury suffered by him was the result not of the construction or enlargement, but of the operation of the railroad, and that

⁶⁰See *Pittsburg Junction R. R. v. McCutcheon*, 18 W. N. C. 527 (1886).

the constitution does not afford a remedy for injury occasioned merely by the lawful operation of a public work. The scope of the constitutional provision was limited to cases where the injury could be compensated at common law if inflicted by an individual. Mr. Justice Gordon said: "In the case in hand the plaintiffs sustained no injury from the construction of the viaduct; none of their property was taken, neither was any of their rights infringed; so that neither by the constitution, nor by the cases quoted, is there a warrant for the plaintiffs' contention. We agree, that over and beyond the damages which arise from a taking of property, whether in the shape of land or a right, the constitution does impose on corporations a direct responsibility for every injury for which a natural person would be liable at common law; so we have held in the case of *Edmundson v. The Railroad Company*, 111 Penna. St. 316, and to this doctrine we adhere, for such, we think, is the spirit of that instrument; but beyond this we cannot go. Nor is there any reason why we should depart from a rule so reasonable, and subject artificial persons to a burden which cannot be imposed upon natural persons." In *Pennsylvania Railroad Co. v. Marchant*, 119 Pa. 541 (1888), upon similar facts, the question was again raised and a similar conclusion reached. Owing to the far-reaching consequences of the decision the question was carefully re-examined by the court and an elaborate opinion was delivered by Mr. Justice Paxson, which explains fully the distinction made between injury resulting from the construction of a railroad or other public works, and that resulting from operation only, for which there can be no recovery. He said: "If we resort to the familiar rule of interpreting statutes, the old law, the mischief and the remedy, we have no difficulty in arriving at the true construction of the language cited from the constitution. Prior to 1874, the citizen whose property was injured by a corporation in the construction of its works had no remedy therefor unless some portion of his property was actually taken. This was an immunity enjoyed by corporations and not by individuals. Cases of great hardship soon arose. *O'Connor v. Pittsburg*, 18 Pa. 187, was one of these. In that case the city by the change of the grade of a street practically ruined a valuable church pro-

perty; yet there was no remedy. This court of its own motion ordered a reargument of that case, 'in order to discover if possible,' in the almost pathetic language of Chief Justice Gibson, 'some way to relieve the plaintiff, consistently with law, but I grieve to say we have discovered none.' Instances of a like nature might be cited indefinitely. I have selected this one as an illustration of the principle, and as perhaps one of the most striking. In all of them, however, there was an injury to the property of the plaintiff in consequence of the erection or construction of the works of the corporation, as by the change of grade in *O'Connor v. Pittsburg*, and the interference with water rights, as in *Monongahela Nav. Co. v. Coons*, 6 W. & S. 101. In all these cases the property has been seriously injured, and yet no portion of it taken by the offending corporation.

"This was the mischief which the constitutional convention had before it when section 8 of Article XVI was adopted by that body, and it was the evil the people were smarting under when they ratified the work of the convention at the polls. The constitution, since 1790, had declared that the property of the citizen should not be taken or applied to public use without just compensation. The Constitution of 1874 went further, and declared not only that it shall not be taken but also that it shall not be injured or destroyed by corporations in the construction or enlargement of their works, without making compensation, etc., etc. There is no ambiguity in this language. We have applied it several times to cases arising under it without the least difficulty. We are now asked to apply it, not to injuries to the plaintiff's property, arising from the construction of the defendant's road, but to injuries resulting from the lawful operation of their road without negligence. . . .

"If we hold that property owners on Filbert Street are entitled under the constitution to recover for the injuries complained of in this case; in other words, that it embraces injuries the sole result of the lawful operation of the defendant's road, where are we to stop in its application? Where is the line to be drawn? If property owners on Filbert Street may recover, why not those on Arch Street, and Race, and so on north and south, east and west, as far as the whistle of the locomotive can

be heard, and its smoke can be carried? The injury is the same, it differs only in degree. And it does not stop here. The constitution does not apply to railroads merely. It affects all corporations clothed with the power of eminent domain, including cities, boroughs, counties, and townships; it is applicable to canals, turnpikes, and other country roads. If, by judicial construction, we extend the constitution to all the possibilities resulting from the lawful operation of a public work, to all kinds of speculative and uncertain consequential injuries, we shall find ourselves at sea, without chart or compass to guide us. Were we to adopt such a construction we would be compelled, to use the language of Chief Justice Shaw, in *Proprietors of Locks and Canals v. Nashua & Lowell Railroad Company*, 10 Cush. 385, to extend it 'to turnpikes and canals, the value of which is diminished or destroyed by loss of custom, to taverns and public houses deserted or left in obscurity; to stage-coach proprietors and companies, to owners of dwelling houses, manufactories, wharves, and all other real estate in towns and villages, from which the line of travel has been diverted. If it can extend to the next estate beyond the one crossed or touched by the railroad, why not to the next, and the next, which may be affected less in degree, but in the same manner?

"It is very plain to our view that the constitutional provision was only intended to apply to such injuries as are capable of being ascertained at the time the works are being constructed or enlarged, for the reason among others, that it requires payment to be made therefor, or security to be given in advance. This is only possible where the injury is the result of the construction or enlargement. For how can injuries which flow only from the future operation of the road, which may never happen, be ascertained in advance, and compensation made therefor? . . .

"We understand the word 'injury' (or injured), as used in the constitution, to mean such a legal wrong as would be the subject of an action for damages at common law. For such injuries, both corporations and individuals now stand upon the same plane of responsibility.

"That I am correct in the meaning we attach to the word 'injured,' appears abundantly by our own authorities. This

was clearly shown by our brother Gordon in *Penn. R. Co. v. Lippincott*. In addition to the authorities there cited by him, I will add *Lehigh Bridge Co. v. Lehigh Coal and Nav. Co.*, 4 Rawle, 1; *Pittsburg and Lake Erie R. Co. v. Jones*, 111 Pa. 204.

"It is not necessary for us to look outside of our own state for authorities in construing our own constitution. It may not be out of place, however, to say that in England, where they have statutes containing provisions bearing a close analogy to our constitution, and which give damages to persons whose property, though not taken, is yet 'injuriously affected by the construction' of public works, such damages are not extended to injuries resulting from the operation of the road. It was said by Lord Westbury in *Ricket v. Railway Company*, L. R. 2 Eng. and Irish Appeals, 175, 198: 'I agree with the distinction that has been taken between damage resulting from the railway when complete, or from the act of making it, and damage occasioned by the proper (not negligent) use of the railway when made. No claim can be made for loss resulting from the use of a railway. . . . Compensation is given by the statute only to individuals who in respect of the ownership or occupancy of lands or tenements sustain loss in or through the construction of the railway, or the execution of the incidental works.' To the same point are *Hammersmith and City Railway Company v. Brand*, L. R. 4 Eng. and Irish Appeals, 171; *Caledonian Railway Company v. Walker*, L. R. 7 Appeal Cases, 259; *Penny v. Southeastern Railway Company*, 7 E. & B. 660; *Glasgow Union Railway Co. v. Hunter*, L. R. 2 Scotch Ch. Div. Appeals, 78.

"The language of the constitution is not equivocal and is entirely free from ambiguity. The framers of that instrument understood the meaning of words, and many of them were among the ablest lawyers in the state. Two of them occupy seats upon this bench. Hence, when they extended the protection of the constitution to persons whose property should be injured or destroyed by corporations in the construction or enlargement of their works, we must presume they meant just what they said; that they intended to give a remedy merely for legal wrongs and not for such injuries as were *damnum absque injuria*.

Among the latter class of injuries are those which result from the use and enjoyment of a man's own property in a lawful manner, without negligence and without malice. Such injuries have never been actionable since the foundation of the world."

It will be observed that in the case of *Pennsylvania-Schuylkill Valley Railroad Co. v. Walsh*, 124 Pa. 544 (1889), referred to above, the court permitted a recovery for the injury caused by the location of tracks on the street near the curb in front of the property in question. It was said that under such circumstances the construction could not be separated from the operation; that the construction of the tracks coupled with the fact that trains frequently ran over them constituted an obstruction, for which damages were recoverable. It was contended in the Filbert Street cases that the construction of the embankment for the railroad could likewise not be disassociated from the fact that trains were daily and hourly to run upon it; hence the construction did cause the injury, for the depreciation in value resulted immediately from the construction. But under the decisions which have been referred to the law must be deemed to be settled that damages for construction only can be recovered, and that the fact of operation should be considered only when the tracks are so near the property alleged to be injured that access to it will be cut off or impeded by the operation.⁶¹

A case of a somewhat different nature, in which operation rather than construction caused the injury, was that of *Butchers Ice & Coal Co. v. Phila.*, 156 Pa. 54 (1893). The plaintiff was allowed compensation under the constitution for injury occasioned his dock by deposits from a sewer constructed by the City of Philadelphia. Mr. Justice McCollum said: "It seems clear to us that for the injury done to the appellees' property by the construction of the sewer the city is liable under section 8, Article 16, of the constitution, which provides that 'Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works,

⁶¹See also *Penna. Co. v. Penna.-Schuylkill Valley Railroad Co.*, 151 Pa. 334 (1892).

highways or improvements.' This liability is for consequential damages, and is not affected by the fact that the sewer is on the city's land and opens into a dock adjoining the city's wharf, nor is it necessary to the existence of the liability that the land on which the sewer was constructed should have been taken by the city in the exercise of the right of eminent domain." This case and that of *Pennsylvania-Schuylkill Valley Railroad Co. v. Walsh*, 124 Pa. 544 (1889) are instances in which the injury was the result of both construction (by reason of the location in the one case of the tracks, and in the other of the sewer) and operation, it being considered that the two could not be separated. In the Filbert Street cases, on the other hand, the damage was occasioned by operation only so that no recovery could be had.⁶² These cases mark the limit of the

"The injury done to property as contemplated by the constitution means the direct, immediate, necessary and unavoidable consequence of the act done. It does not contemplate injury arising from negligence in construction. In *Stork v. Phila.*, 195 Pa. 101 (1900), the plaintiff sought damages from the city for injury to her property by the construction of the Reading Subway. Plaintiff's lot was fourteen feet from the building line of Pennsylvania Avenue. A dwelling house between her property and Pennsylvania Avenue was torn down by the contractors and the ground on which it stood was being excavated. Plaintiff's house was cracked and the walls settled and it was otherwise damaged. For this injury plaintiff sought damages. Mr. Justice Mitchell said: "The injury meant to be provided for (by the constitution) was such as in the language of *Navigation Co. v. Coons*, 6 W. & S. 101, and *Henry v. Bridge Co.*, 8 W. & S. 85, was 'unavoidable in the accomplishment of the object.' . . . For negligence in the manner of doing the work there is and always has been a liability and adequate redress by action on the case. Such injury was not in need of any additional remedy, and none was contemplated by the provision in question. . . . For such injury as is the direct and necessary consequence of the act itself of eminent domain, the liability of the city under the constitution is absolute, and no care or diligence will relieve it. But for damage resulting from the manner in which the act is done, the city is only liable by reason of negligence. . . . For this class of injuries the only appropriate remedy is an action of trespass for negligence." See also *Denniston v. Phila. Company*, 161 Pa. 41 (1894); *Chatham St.*, 16 Pa. Superior Ct. 103 (1901); *Curran v. East Pittsburg Borough*, 20 Pa. Superior Ct. 590 (1902); *Cooper v. Scranton*, 21 Pa. Superior Ct. 17 (1902). The injury which is the unavoidable consequence of the taking means the taking as it was done, irrespective of whether a better plan might have been adopted, which would have injured the plaintiff less. *Chatham St.*, 16 Pa. Superior Ct. 103 (1901); *Fyfe v. Turtle Creek Borough*, 22 Pa. Superior Ct. 292 (1903). Interference with the drainage of property is an injury. *Penna., etc., R. R. v. Ziemer*, 124 Pa. 560 (1889); *Chambers v. So. Chester Borough*, 140 Pa. 510 (1891); *In re Change of Grade of Chatham St.*, 191 Pa. 604 (1889); *Curran v. East Pittsburg Borough*, 20 Pa. Superior Ct. 590 (1902); *Cooper v. Scranton*, 21 Pa. Superior Ct.

protection afforded property by the constitutional provisions under discussion.

§17. *Corporations Affected.*—The clause in the constitution which imposed upon corporations invested with the right of eminent domain, the duty to pay for property injured or destroyed, laid upon them a burden not previously existing. The question therefore naturally arose whether this did not amount to an alteration of the charters of such corporations as were doing business prior to 1873. This contention was made in the case of *Pennsylvania Railroad v. Duncan*, 111 Pa. 352 (1886), in which Duncan recovered damages for consequential injuries sustained by him as a result of the construction of an elevated railroad structure by the company. The case was appealed to the Supreme Court of the United States on the ground that the application of the constitutional provision to the Pennsylvania Railroad Company, which was chartered prior to its enactment, was an impairment of the obligation of its charter and hence unconstitutional. The Supreme Court decided that the contention was unsound, because the Pennsylvania Railroad Company had not been expressly exempted by contract from the imposition of an additional duty to pay for property injured or destroyed by it in the exercise of the right of eminent domain and no such exemption could be implied. It was said: "There was no such contract between the state and the defendant, prior to the Constitution of 1874, as prevented the subjection of the defendant by that constitution to the liability for consequential damages arising from its construction of this elevated road in 1880 and 1881. Prior to the Constitution of 1874, and under the constitutional provisions existing in Pennsylvania before that time, the Supreme Court of that state had uniformly held that a corporation with such provisions in its charter as those contained in the charter of the defendant, was liable, in exercising the right of eminent domain, to com-

17 (1902). Flooding crops with back water from a dam. *Fredericks v. Penna. Canal Co.*, 148 Pa. 317 (1892). The property injured need not abut on the property taken. *Lewis v. Homestead Borough*, 194 Pa. 199 (1899); *Mellor v. Phila.*, 160 Pa. 614 (1894); *In re Melon St.*, 182 Pa. 397 (1897); *In re Change of Grade of Chatham St.*, 191 Pa. 604 (1899); *Snyder v. Lancaster* (Supreme Ct.), 20 W. N. C. 184 (1887); *Cooper v. Scranton*, 21 Pa. Superior Ct. 17 (1902).

pensate only for property actually taken, and not for a depreciation of adjacent property. The eighth section of Article XVI of the Constitution of 1874 was adopted in view of those decisions, and for the purpose of remedying the injury to individual citizens caused by the non-liability of corporations for such consequential damages. Although it may have been the law in respect to the defendant prior to the Constitution of 1874, that under its charter and the statutes in regard to it, it was not liable for such consequential damages, yet there was no contract in that charter, or in any statute in regard to the defendant, prior to the Constitution of 1874, that it should always be exempt from such liability, or that the state, by a new constitutional provision, or the Legislature, should not have power to impose such liability upon it, in cases which should arise after the exercise of such power. But the defendant took its original charter subject to the general law of the state, and to such changes as might be made in such general law, and subject to future constitutional provisions or future general legislation, since there was no prior contract with the defendant, exempting it from liability to such future general legislation, in respect of the subject matter involved."⁶³

All private corporations therefore, in the absence of special contracts exempting them, are subject to the constitutional provision under discussion, whether chartered before or after the date of the adoption of the constitution.⁶⁴ Municipal corporations are also fully subject to the same clauses and, as has already been intimated, are bound to pay damages for property taken, injured or destroyed. Counties also are subject to its terms,⁶⁵ but townships are not, they being held to be not within the meaning of the constitution.⁶⁶

⁶³*Pennsylvania Railroad Co. v. Duncan* (Supreme Court of U. S.), 129 Pa. 181 (1889). The Supreme Court of Pennsylvania rested its decision largely on the ground that the Pennsylvania Railroad Company had subjected itself to the provision of the constitution reserving to the state the power to alter the terms of charters granted to corporations. See also *Penna. R. R. v. Miller*, 129 Pa. 181 (1889), 132 U. S. 75 (1889); *Phila. and Reading R. R. v. Patent*, 17 W. N. C. 198 (1885); *North. Cent. R. R. Co. v. Holland*, 117 Pa. 613 (1888).

⁶⁴See *Dutton v. Norristown Pass. Ry.*, 1 Montg. Co. 4 (1885).

⁶⁵*Chester Co. v. Brower*, 117 Pa. 647 (1888).

⁶⁶*Wagner v. Salzborg Twp.*, 132 Pa. 636 (1890); *Shoe v. Nether, etc., Twp.*, 3 Pa. Superior Ct. 137 (1896); *Richards v. Conneaut Twp.*, 10 D. R. 274 (1901).

§18. *Payment or Security of Damages.*—By the express terms of the constitution corporations or others invested with the right of eminent domain are prohibited from taking such property without first paying or giving security for the payment of such damages. If therefore they attempt to take possession or construct their works without first making the proper arrangements for the compensation of property owners, they may be enjoined by a court of equity,⁶⁷ and it has been decided that even if not thus prevented from taking the property yet in fact the company can acquire no title until the constitution has been complied with.⁶⁸

The recovery of such damages and the manner in which they may be assessed and computed is regulated by statute. It is not intended here to go into the questions of law or procedure connected therewith. They belong to a general discussion of the power of eminent domain rather than to a work dealing exclusively with constitutional construction, and a consideration of them would unduly extend this branch of the subject.

§19. *Appeals from Assessment of Damages.*—The latter part of Article XVI, section 8, provides that "The General

"Harrisburg Turnpike Co. v. Railway Co., 177 Pa. 585 (1896); *Colgan v. Allegheny Valley R. R. Co.*, 3 Pitts. 394 (1872); *Shenandoah Co.'s Appeal* (Superior Ct.), 2 W. N. C. 46 (1875); *Beidler's Appeal*, 23 W. N. C. 451 (1889); *Gilmore v. Pittsburg, etc., R. R.*, 104 Pa. 275 (1883).

There is a difference between the state and municipal corporations and corporations private in their nature in the security necessary to be given, before private property can be taken for public purposes. All that is necessary on the part of the state is that at the time the act is passed providing for the taking of the property, the means of payment shall be provided. *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101 (1843); *Yost's Report*, 17 Pa. 524 (1851); *McClinton v. Pittsburg, etc., R. R. Co.*, 66 Pa. 404 (1870).

The power of taxation existing in municipal corporations has been held sufficient security for the payment of damages for property taken under the right of eminent domain. *Delaware Co.'s Appeal*, 119 Pa. 159 (1888); *In re Sedgeley Ave.*, 88 Pa. 509 (1879). See also *Bromley v. Phila. et al.*, 8 Pa. C. C. 600 (1890); *Colgan v. Allegheny, etc., R. R. Co.*, 3 Pitts. 394 (1872); *Bates v. City of Titusville*, 3 Pitts. 434 (1872); *Marshall v. Township*, 15 W. N. C. 235 (1883).

But where the power of taxation in a municipality is so limited as to be inadequate to pay the damages occasioned by taking property under eminent domain, within a reasonable time, security for such payment must be given. *Keene v. Borough of Bristol*, 26 Pa. 46 (1856).

"Shevalier v. Postal Telegraph Co., 22 Pa. Superior Ct. 506 (1903); *Gilmore v. Pittsburg, etc., R. R.*, 104 Pa. 275 (1883); *Williamsport, etc., R. R. Co. v. Phila., etc., Co.*, 141 Pa. 407 (1891). See, however, *Carter v. Ridge Turnpike Co.*, 22 Pa. Superior Ct. 162 (1903).

Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to the course of the common law." This guarantees to every citizen whose property is taken the right to have his damages determined by a jury.⁶⁹ It was passed in further protection of individual rights,⁷⁰ and the Legislature in fairness to corporations has given them the same privilege.⁷¹

⁶⁹*Pusey's Appeal*, 83 Pa. 67 (1876); *Williams et al. v. Pittsburg*, 83 Pa. 71 (1876); *Bachler's Appeal*, 90 Pa. 207 (1879); *In re Towanda Bridge Co.*, 91 Pa. 216 (1879).

⁷⁰*Mount Pleasant Avenue*, 171 Pa. 38 (1895).

⁷¹Act June 13, 1874, P. L. 283, construed in *Long's Appeal*, 87 Pa. 114 (1878). The constitutional provision obviously applies only to the determination of damages for the taking or injuring of property under the power of eminent domain. It does not apply to assessments of the cost of constructing a sewer. *Brackney v. Crafton Borough*, 31 Pa. Superior Ct. 413 (1906).

CHAPTER XXVII.

RAILROADS AND CANALS.

§1. *Railroads and Canals. Companies to be Common Carriers. Railroad Crossings.*—The subject of the regulation of railroads and canals had assumed such importance in the history of Pennsylvania that the convention of 1873 deemed that a special article should be devoted to the subject. It consists in part of provisions which are declaratory of the common law, and in part of regulations either for the guidance of the corporations themselves, or to limit the power of the Legislature in granting them privileges.

Section 1 of Article XVII provides: "All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose, shall have the right to construct and operate a railroad between any points within this state, and to connect, at the state line, with railroads of other states. Every railroad company shall have the right, with its road, to intersect, connect with, or cross any other railroad; and shall receive and transport each the other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination."

The first sentence of this section is merely declaratory of the common law, and is intended to preserve the rights of the public in the public highways. The second sentence, giving any companies organized for the purpose, the right to construct and operate a railroad between any points within the state, and connect at the state line with other railroads, etc., did not change existing law. It was merely intended to promote the construction of such railroads by preserving the right to do so for all time. This clause does not mean that a railroad may be constructed in a straight line between two points, irrespective of the rights of third persons. It guarantees the right to construct, but the conditions under which the railroads shall be

built are to be prescribed by the General Assembly. It was contended in *Weigold v. Pittsburg, Carnegie and Western R. R. Co.*, 208 Pa. 81 (1904), that, inasmuch as the constitution gives the right to construct between any points within the state, this necessarily repealed the act of February 19, 1849, P. L. 79, which exempted dwelling houses, burial grounds and places of public worship from appropriation by railroad companies. As has already been indicated, however, this is not the law, and the contention was not upheld. A similar construction has been placed upon the third sentence of the section, relating to the crossings of one railroad with another. It was intended to guarantee the right to cross, but was not intended to take from the Legislature the power to regulate the terms upon which such crossings could be made. It has therefore been held that the laws relative to grade crossings, providing that they shall not be made unless it is absolutely necessary, are still in force. It was said in *Northern Central Railway Co.'s Appeal*, 103 Pa. 621 (1883), that the section of the constitution under discussion does not change the policy of the state, to prevent grade crossings wherever possible.¹

That part of the section giving a railroad the right to connect with another railroad has been held not to apply where one company is endeavoring to connect its road with another lateral road by a branch, in this case, about eight hundred feet in length.²

§2. *Stock Books to be Kept.*—For the protection of stockholders and creditors it was provided: "Every railroad and canal corporation organized in this state shall maintain an office therein, where transfers of its stock shall be made, and where its books shall be kept for inspection by any stockholder or creditor of such corporation, in which shall be recorded the amount of capital stock subscribed or paid in, and by whom, the names of the owners of its stock, and the amounts owned

¹See also to the same effect *Pittsburg & C. R. R. Co. v. Southwest Pennsylvania Ry. Co.*, 77 Pa. 173 (1875); *Perry County R. R. Co. v. Newport, etc., R. R. Co.*, 150 Pa. 193 (1892); *Northern Central Ry. Co.'s Appeal*, 103 Pa. 621 (1883); *Pittsburg v. Railroad Co.*, 205 Pa. 13 (1903). This subject is discussed more fully in Chapter XXVI, Eminent Domain.

²*Graff v. Evergreen R. R. Co.*, 2 Pa. County Ct. 502 (1886). See also *Norristown Pass. Ry. Co. v. Citizens' Pass. Ry. Co.*, 3 Montg. Co. 119 (1887).

by them respectively, the transfers of said stock, and the names and places of residence of its officers."³

This section does not guarantee to a stockholder or a creditor the right to take a list of all the stockholders, unless he alleges a proper reason therefor. "It simply provides that a list shall be kept at the office of the company, and that it shall be open to the inspection of stockholders and creditors, but does not confer the right to take copies of the list."⁴

§3. *Discrimination Forbidden.*—Section 3 of Article XVII provides: "All individuals, associations and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers, within the state, or coming from or going to any other state. Persons and property transported over any railroad, shall be delivered at any station, at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station; but excursion and commutation tickets may be issued at special rates." This should be considered in connection with section 7, which is as follows: "No discrimination in charges, or facilities for transportation, shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise; and no railroad or canal company, or any lessee, manager, or employee thereof, shall make any preferences in furnishing cars or motive power."

The purpose of both these sections is sufficiently clear from their language.⁵ Discrimination in rates and facilities by common carriers had long been a source of much evil, and it was

³Art. XVII, §2.

⁴*Commonwealth v. Empire Pass. Ry. Co.*, 134 Pa. 237 (1890).

⁵See note by Mr. Buckalew on the Constitution, p. 275, on these two sections. The act of June 4, 1883, P. L. 72, was passed to carry out the provisions of the third section of Article XVII of the Constitution. It permits the injured person to recover treble damages against the railroad. The act has been held to apply both to discrimination in the furnishing of facilities for transportation and in the charges made. It has been held that charging a greater fare to those who do not purchase tickets before taking passage on a train is not discrimination within the meaning of this section. *Ritter v. Phila. & Reading Ry. Co.*, 2 W. N. C. 382 (1876). See further as to the meaning of discrimination, *Bald Eagle Valley R. R. Co. v. The Nittany Valley R. R. Co.*,

hoped to put an end to it by section 3. These two sections, as is clear from their language, are self-executing.⁶

§4. *Free Transportation Forbidden.*—In line with the same purpose to prevent all discrimination, as well as to abolish the practice of granting free transportation, in return for political favors, it was provided, in section 8 of Article XVII, that "No railroad, railway, or other transportation company shall grant free passes, or passes at a discount, to any person, except officers or employees of the company." This also is undoubtedly self-executing. Although the act of June 15, 1874, P. L. 289, affords a very inadequate remedy for its enforcement, it is probable that proceedings at common law could be had to compel observance of its injunctions.⁷

In ordinary cases a remedy provided for the breach of a statute is exclusive of common law remedies, but this is not believed to be the case in regard to a constitutional provision such as that under discussion. In the first place, as has been said, the penalty provided by the statute is so small as to give rise to the inference that it was passed, as Mr. Buckalew says, in contempt of the section. It is not reasonable to suppose that the Legislature could by this means nullify the positive prohibition contained in the constitution. Even this statute, however, affords no remedy against offending corporations, but only against their officers or agents. This being the fact, and the constitutional provision being in express terms a prohibition laid upon certain companies, it is believed that an indictment against such corporations would lie at common law for the breach of such positive command. It is a rule of the common law that where a statutory command is laid upon an individual or corporation, in the enforcement of which the public has an interest, that individual or corporation is indictable at common law for disobedience of the statutory mandate. This is because a breach of such duty in which the public has an interest constitutes a public wrong. In the case of *Pittsburg, etc., Railway*

171 Pa. 284 (1895); *Paine & Co. v. Penna. Railroad Co.*, 14 Pa. C. C. 38 (1893); *Hoover v. Penna. R. R.*, 156 Pa. 220 (1893).

⁶See *Central Iron Works v. Pennsylvania Railroad Co.*, 5 Pa. Dist. Rep. 247 (1895).

⁷Mr. Buckalew says this act was passed in contempt of section 8. See his note on page 291 of "Buckalew on the Constitution."

Co. v. Commonwealth, 101 Pa. 192 (1882), it appeared that the Pittsburg, Virginia and Charleston Railroad Company had been indicted for failure to comply with the terms of the act of Assembly of February 19, 1849, requiring railroad companies finding it necessary to change the site of a public road, to reconstruct the same "in as favorable a location and in as perfect a manner as the original highway taken by them." There was also a count maintaining a nuisance at common law. The corporation was found not guilty of maintaining a nuisance, but was found guilty of violation of the statute requiring the construction of the highway, and a fine was imposed. The act did not provide that failure to construct should constitute a misdemeanor, nor was anything said in it as to a fine or penalty. The decision was based upon the ground that a corporation is indictable for failure to perform a statutory duty in which the public has an interest. The fact that the corporation was acquitted of the charge of maintaining a nuisance shows that there was no common law offense other than disobedience of the statute, and the court's opinion clearly shows that there was no duty resting upon it other than that created by the act of Assembly. In the course of his opinion, Mr. Justice Mercur said: "By such occupancy (of the public road) a necessity for the change of the site thereof was created, and the duty to forthwith reconstruct the same is imposed on the corporation by the express terms of the act. . . . Having taken the benefits, it cannot repudiate the burdens; it cannot be tolerated that the corporation may claim to enjoy everything beneficial to itself, and wholly omit to perform an act in which the public is so largely interested. . . . The injury is not to an individual only, but to the public. . . . The offense of which the company is convicted is not for taking possession of the public highway, in the construction of its railroad, but for the disregard of its duty to forthwith reconstruct, so as to provide a suitable highway in lieu of the one taken."

It was objected that other remedies were provided in the act, civil in their nature, and that these should have been made use of, but the court brushed these objections aside, and said: "The fact that these remedies exist furnish no reason why an indictment will not also lie. Indictment is to punish for the

past, mandamus is to provide for the future. The act provides no specific remedy for the enforcement of this duty. All common law remedies are therefore open against the violators of this law."

In this opinion will be found references to a number of English cases, which fully sustain the proposition that a corporation may be indicted, either for misfeasance or for nonfeasance, wherever its act results in a public injury.

It follows logically that if the act of transportation companies in issuing free passes, in violation of the constitution, constitutes a public injury, they are indictable for misdemeanor. There is no reasonable doubt that such is the fact, both actually and legally. The Constitution of Pennsylvania, which stands higher than statute law, has forbidden the issuance of such free transportation, and there can be no doubt that the purpose of so doing was to protect the public against this most insidious form of bribery. It would, therefore, be folly to contend that the public has no interest in the performance of this injunction. If this be so, the case clearly comes within the rule of *Pittsburg Railroad Co. v. Commonwealth*, and an indictment can be found.

Irrespective of the technical aspect of the question, it seems clear that on principle there must be a remedy for an open and defiant breach of a constitutional command. It is not to be supposed that the people of Pennsylvania are powerless to enforce a positive prohibition contained in the fundamental law and which was designed to prevent the commission of an act highly injurious to the public welfare, merely because the Legislature has failed to act or has provided a feeble and ineffective remedy.⁸

§5. *Consolidation of Competing Lines*.—Article XVII, section 4, provides: "No railroad, canal, or other corporation,

⁸Proceedings by indictment against corporations have been sanctioned in Pennsylvania. *Commonwealth v. Lehigh Valley Railroad*, 165 Pa. 162 (1895). In proceedings against corporations their officers may be summoned as witnesses and compelled to produce the books and papers of the corporation. *Hale v. Henkel*, 201 U. S. 43. (1906); *McAlister v. Henkel*, 201 U. S. 90 (1906); *Nelson v. United States*, 201 U. S. 92 (1906). As to passes, see *Hasson v. Venango Bridge Co.*, 1 Pa. Dist. R. 521 (1892); *Plymouth Borough v. Plymouth Street Ry. Co.*, 10 Kulp, 308 (1901); *Keogh v. Pittston & Scranton Street Ry. Co.*, 5 Lack. N. S. 242 (1899); *Meiwell v. Northampton, etc., Ry. Co.*, 7 North. Co. 274 (1900); *Buffalo, etc., R. R. Co. v. O'Hara*, 3 Penny. 190 (1882).

or the lessees, purchasers or managers of any railroad or canal corporation, shall consolidate the stock, property, or franchises of such corporation, with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation, owning or having under its control a parallel or competing line; nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation, owning or having the control of a parallel or competing line; and the question whether railroads or canals are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury, as in other civil issues.”⁹

The purpose of the enactment of this clause is sufficiently clear from an examination of its terms. The interests of the people of the commonwealth demand that there shall be free and open competition between the competing lines of railroad or canal companies, and where charters are granted to corporations for the purpose of permitting such competition, the consolidation of competing lines is opposed to public policy and should be forbidden. It will be perceived that the section was drawn with intent to prevent consolidation, no matter how it may take place. Its efficiency has not been thoroughly tested, as there have been but few cases where an effort has been made to prevent consolidation, although there are numerous instances where in fact such consolidation has taken place. It has been decided, however, that a court of equity will interfere by injunction to prevent a consolidation, if it can be shown that it is about to take place in violation of this section. This method was adopted when there was an effort by the Pennsylvania Railroad Company to acquire possession of a competing line, known as the South Pennsylvania Railroad Company, then in process of construction. The case, however, got no further than the common pleas courts.¹⁰ An effort was made to evade the constitutional provision in this case by providing for the transfer of the stock and securities of the competing line, through one or two intermediaries, to a third corporation, known as the Pennsylvania Company. The facts, however, showed that the

*Clauses similar to this are contained in the constitutions of a number of other states, but this is the first time a clause of this kind appeared in any constitution of Pennsylvania.

¹⁰*Commonwealth v. So. Pennsylvania R. R. Co.*, 1 Pa. C. C. 214 (1886).

so-called Pennsylvania Company was in fact acting on behalf of the Pennsylvania Railroad Company, and therefore the court felt itself justified in interfering by injunction.¹¹

It has also been held by a common pleas court that the constitutional clause does not prevent a company which leases a line of railroad from constructing another parallel with it. Such construction either amounts to the building of a competing line or the provision of an additional line for the handling of the traffic of the existing road, neither of which is forbidden by the constitution.¹²

The language of the section is confined to railroad and canal corporations; these words do not include street railway companies. This conclusion is based upon the facts that the expression "railroad company" is used elsewhere in the constitution to distinguish it from "railway company," and that the reason for the prohibition does not apply in the case of street railway companies. In *Gyger v. Philadelphia, etc., Railway Co.*, 136 Pa. 96 (1890), Mr. Justice Green said: "We think, also, that it is quite clear that the sense of 'competing' which is the essential sense of the prohibition, is not applicable to the travel upon the streets of cities and towns over passenger railways. The competition of traffic between distant points, by rival roads and canals, tends to promote cheap transportation and thereby tends to the public good. But, if this is suppressed by the absorption of one of the competing lines by the other, the wholesome competition ceases and higher rates soon result. This is the evil which was sought to be prevented by the fourth section of the seventeenth article. It will be seen at once that it is inapplicable to the travel upon streets of cities and towns on passenger railways. The travel over parallel streets is not necessarily a competing travel. Each street has travel of its own which is conducted upon its own railway. That travel may be almost entirely conducted without competition with the travel upon another though parallel street, nor do railways upon parallel streets have the same termini. Many of them, though

¹¹See also *Commonwealth v. Beech Creek, Clearfield & Southwestern Railroad Co.*, 1 Pa. C. C. 223 (1886); *Gummere v. Lehigh Valley R. R. Co.*, 1 Pa. Dist. R. 585 (1892).

¹²*Catawissa v. Phila. & Reading Ry. Co.*, 3 District Reports, 111 (1894).

running upon parallel streets for a considerable distance, diverge altogether from such a course at their extremities. Two roads would be competing if laid upon the same street, and running in the same direction, but that is not this case, and probably is not the case anywhere in the state. Moreover, no freight is carried upon passenger railways, and it is the carriage of freight that was probably of principal importance in the design of the fourth section. All the analogies which would liken the traffic upon street railways with that upon the railroads and canals of the state are wanting, and hence we are without authority to impose upon the language of the fourth section a meaning which does not reside in its words, and which does not result by any rational implication. The language used in the fourth section in designating the objects of its provisions is precisely the same as is used in all the other sections for the same purpose, and, when passenger railways are intended to be indicated a different phraseology is employed. We find nothing in the fourth section indicating that the word 'railroad' was there used in any other sense than that in which it was manifestly used in the other sections, and we are therefore not at liberty to give it any other meaning than is apparent in those sections."¹³

§6. *Officers and Employees Not to be Interested in Contracts with Railroads.*—Article XVII, section 6, provides: "No president, director, officer, agent or employee of any railroad or canal company, shall be interested, directly or indirectly, in the furnishing of material or supplies to such company, or in the business of transportation as a common carrier of freight or passengers, over the works owned, leased, controlled, or worked by such company."

"This section plainly applies to all railroad and canal companies of the commonwealth, whether old or new, and whether organized under general or special laws. It strikes at, and was intended to strike, a great abuse in railroad management, and it was placed in the constitution because it was believed that the Legislature would not voluntarily apply the remedy required."¹⁴

¹³See also *Shipley v. Continental Railroad Co.*, 13 Phila. 128 (1879).

¹⁴Buckalew on the Constitution, pp. 269-270. See *Rumsey v. New York & Penna. Railroad Co.*, 203 Pa. 579 (1902).

§7. *Street Railways to Secure Consent of Local Authorities.*—Article XVII, section 9, provides: "No street passenger railway shall be constructed within the limits of any city, borough, or township, without the consent of its local authorities." This limitation of the rights of a street railway company to place its tracks within the limits of cities, borough or townships is prospective in its operation, and was not intended to be imposed upon street railways which already occupied such streets. Neither has it been construed to destroy charter rights to use streets which were already possessed at the time of the adoption of the constitution.¹⁵

§8. *Acceptance of Article XVII by Transportation Companies.*—In order that such railroad, canal or other transportation companies as were in existence at the date of the adoption of the constitution might be made subject to the provisions of Article XVII, it was provided in section 10: "No railroad, canal, or other transportation company, in existence at the time of the adoption of this article, shall have the benefit of any future legislation by general or special laws, except on condition of complete acceptance of all the provisions of this article." This provision, while a more specific clause, has the same effect as Article XVI, section 2, which has been already referred to, and which forbids the passage of any legislation for the benefit of a corporation, until it has accepted the provisions of the constitution.

§9. *The Enforcement of the Constitutional Provision Respecting Railroads and Canals.*—Prior to the adoption of the Constitution of 1873, the Auditor General had supervision over the affairs of transportation companies, but by Article XVII, section 11, his powers and duties were transferred to the Secretary of Internal Affairs, who thereafter was to have general supervision over transportation companies.¹⁶ The section

¹⁵*Williamsport Pass. Ry. Co. v. Williamsport*, 120 Pa. 1 (1888). See also *Pittston Borough v. Pittston Ry. Co.*, 6 Luz. L. Reg. 223 (1877); *Steelton Borough v. East Harrisburg Pass. Ry. Co.*, 11 Pa. C. C. 161 (1892). As to what is a street railway within the meaning of the act, see *Phila. v. Commissioners of Fairmount Park*, 4 Pa. District Reports, 445 (1895); *Harrisburg Pass. Ry. Co. v. Harrisburg*, 7 Pa. County Ct. 584 (1884).

¹⁶As to the extent of the powers of the secretary, see *Railway Maps*, 1 District Reports, 577 (1892).

is as follows: "The existing powers and duties of the Auditor General in regard to railroads, canals, and other transportation companies, except as to their accounts, are hereby transferred to the Secretary of Internal Affairs, who shall have a general supervision over them, subject to such regulations and alterations as shall be provided by law; and in addition to the annual reports now required to be made, said secretary may require special reports at any time upon any subject relating to the business of said companies from any officer or officers thereof."

It is further provided: "The General Assembly shall enforce, by appropriate legislation, the provisions of this article."¹⁷

Although it has not as yet been attempted, there can be little doubt that under sections 11 and 12 of Article XVII the General Assembly has the power to provide a means for the regulation of charges to be made by transportation companies. It is now too well settled to require discussion that the rates to be charged by common carriers may be regulated by the government, and the sections referred to are an intimation that such regulations were contemplated by the framers of the constitution.¹⁸

§10. *Common Carriers not to Engage in Other Business, etc.*—There is the further provision, relative to the business of transportation, section 5, that "No incorporated company, doing the business of a common carrier, shall, directly or indirectly, prosecute or engage in mining or manufacturing articles, for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold, or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal, not exceeding fifty miles in length." While disobedience of this provision would probably forfeit the franchises of the offending company, it will not cause land illegally held by it to escheat.¹⁹

¹⁷Art. XVII, §12.

¹⁸See Buckalew on the Constitution. p. 275 *et seq.*

¹⁹*Com. v. New York, etc., R. R. Co.*, 132 Pa. 591 (1890).

CHAPTER XXVIII.

AMENDMENTS TO THE CONSTITUTION.

§1. *Constitutional Provision Relating to Amendments.*—Attention has been called incidentally to Art. XVIII, relating to amendments,¹ which provides as follows: “Any amendment or amendments to this constitution may be proposed in the senate or house of representatives; and if the same shall be agreed to by a majority of the members elected to each house, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the Secretary of the Commonwealth shall cause the same to be published, three months before the next general election, in at least two newspapers in every county in which such newspapers shall be published; and if, in the General Assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each house, the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid; and such proposed amendment or amendments shall be submitted to the qualified electors of the state, in such manner, and at such time, at least three months after being so agreed to by the two houses, as the General Assembly shall prescribe; and if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the constitution; but no amendment or amendments shall be submitted oftener than once in five years. When two or more amendments shall be submitted, they shall be voted upon separately.”

§2. *Construction. Not Exercise of Lawmaking Power.*—The only case which has construed this section of the constitution is that of *Commonwealth v. Griest*, 196 Pa. 396 (1900). The whole case related to the provisions of Art.

¹See Chapter II, Rights of Self-government; Chapter XVI, The Executive, §19.

XVIII, and the opinion of Mr. Chief Justice Green contains a comprehensive discussion of the law, which is quoted almost in full.

“It will be observed that the method of creating amendments to the constitution is fully provided for by this article of the existing constitution. It is a separate and independent article, standing alone and entirely unconnected with any other subject. Nor does it contain any reference to any other provision of the constitution as being needed, or to be used, in carrying out the particular work to which the eighteenth article is devoted. It is a system entirely complete in itself, requiring no extraneous aid, either in matters of detail or of general scope to its effectual execution. It is also necessary to bear in mind the character of the work for which it provides. It is constitution making, it is a concentration of all the power of the people in establishing organic law for the commonwealth, for it is provided by the article that, ‘if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the constitution.’ It is not lawmaking, which is a distinct and separate function, but it is a specific exercise of the power of a people to make its constitution.”

§3. *Steps in the Enactment of an Amendment.*—“Recurring to this subject later on, and proceeding now to analyze the requirements of the eighteenth article in the process of creating amendments, we notice in their order the successive particulars to be observed: First, the amendment is to be proposed in the senate or house. Second, it must be ‘agreed to by a majority of the members elected to each house.’ Third, it must ‘be entered on their journals, with the yeas and nays taken thereon.’ Fourth, in immediate sequence to the entry on the journals and as a part of the same sentence, the article provides, ‘and the Secretary of the Commonwealth shall cause the same to be published three months before the next general election in at least two newspapers in every county in which such newspapers shall be published.’

“It will be observed that the duty of the Secretary of the Commonwealth follows immediately upon the entry of the amendment on the journals of the two houses, with the yea and

may votes of the members. There is no other action by any department of the state government that is either required or allowed, prior to the action of the secretary. And that action of the secretary is prescribed in mandatory language, thus, 'And the Secretary of the Commonwealth shall cause the same to be published,' etc. He has no discretion in the premises. His action does not depend upon any other action whatever. It is his own, personal, individual and official duty, imperative in its character, and of the very highest and gravest obligation, because it is imposed by the constitution itself, and he can only discharge that duty by literally performing its terms. He cannot excuse himself for non-performance by setting up advice, opinion or action of any other person, organization or department, official or otherwise, for the simple reason that the article of the constitution which prescribes his duty does not allow it. There is no opportunity for any, even the least, intervention, between the entry of the amendment on the journals and the publication in the newspapers in the whole course of the proceeding for the creation of the amendment.

"The subsequent provisions of the article are equally devoid of any right or authority to intervene, derived from any source whatever. For, in the fifth place, the articles provide that, 'if in the General Assembly next afterwards chosen such proposed amendment or amendments shall be agreed to by a majority of the members elected to each house, the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid.' Here again the only precedent to the duty of a second publication by the secretary is the agreement by the two houses to the amendment. The same duty of publication the second time is imposed, and in the same mandatory terms as in the first. Thus, 'the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid.' Immediately thereafter follows the provision in the sixth place, that the amendment shall be submitted to a vote of the people, and, lastly, if the amendment is approved by a majority of the voters, it becomes a part of the constitution. These then are the several stages in the proceedings to create an amendment. A proposal of the amendment in either house, an agreement to the same by both houses, a publication thereof

by the Secretary of the Commonwealth, a second agreement by the two houses, a second publication by the secretary, a vote of the people, which, if a majority vote favorably, causes the amendment to become a part of the constitution.

"In orderly and logical sequence of such preceding facts it follows with, apparently, an unanswerable certainty, that an amendment thus originated, proceeded with and terminated, becomes an integral part of our state constitution."

§4. *Constitutional Amendments Not to be Submitted to Governor.*—"It remains only to consider the reasons which are urged against the validity of such a conclusion. They are all concentrated and find their only life in the provisions of another article of the constitution, to wit: the third, in the twenty-sixth section of which it is contended there is a provision which makes it necessary to the validity of a proposed amendment that it must be submitted to the Governor for his action thereon, and that if he disapproves of it, it fails at once, and no further proceedings can take place in the way of its establishment unless his disapproval shall be overcome by a vote of two-thirds of the members of both houses. The seriousness and gravity of this proposition will be at once conceived, when it is considered that it confers upon the Governor alone the power to prevent the adoption of an amendment to the organic law of the state, by a mere exercise of his veto power, unless the amendment is passed over his veto by a two-thirds vote of the members. It will be necessary to consider the twenty-sixth section of the third article with care in order to determine the question raised by this contention.

"The section is in these words: 'Every order, resolution or vote, to which the concurrence of both houses may be necessary, except on the question of adjournment, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved shall be repassed by two-thirds of both houses, according to the rules and limitations prescribed in case of a bill.' The question is, must a proposed amendment to the constitution be submitted to the Governor and be subjected to the requirement of his approval? The first and most obvious answer to this question is, that the article which provides for the adoption of an amendment is a complete system in itself,

from which the submission to the Governor is carefully excluded, and therefore such submission is not only not required, but cannot be permitted. It can only be done by reading into the eighteenth article words which are not there, and which are altogether inconsistent with, and contrary to, the words which are there. Under that article the amendment becomes a part of the constitution without any action of the Governor. Under the opposing contention it cannot become a part of the constitution, without the positive approval of the Governor, when no such approval is either expressed in, or implied from, the explicit words of the article. They cannot be implied, because there is no necessity for such implication, and without such necessity there can be no implication. This is a most familiar principle in the construction of mere ordinary statutes, and also in the construction of written contracts. And more than this, if the proposed amendment is to be submitted for the approval of the Governor, it follows that if he disapproves it, it may fail altogether, and thus an element of defeat be introduced into the eighteenth article, when that article manifestly does not permit the existence of such an element. The only authorities which have any right to assent or to dissent, to the adoption of the amendment, are the two houses of the General Assembly, and the people. If these latter vote adversely it falls; if the two houses do not agree it never has any existence even as a proposition. But nowhere in the article is any other assent, or any other dissent, permitted to affect the question of adoption, nor is there any place in the article into which the necessity or the propriety of any other assent or dissent imported by implication. Therefore it follows, upon the most obvious and ordinary principles of statutory interpretation, that, there being no warrant for executive intervention contained in the eighteenth article, it cannot be placed there by any kind of implication from the twenty-sixth section of the third article.

“But, in the second place, the language of that section does not purport, nor attempt, to impose any such construction upon the eighteenth article, nor does it give, by expression or by implication, any control over the subject of ‘future amendments,’ in the designation of the subjects over which the veto power may be exercised. The third article of the constitution

is confined exclusively to the subject of legislation. It is entitled 'Of legislation' and only purports to be an authorization and limitation of the legislation of the commonwealth. It prescribes the manner in which the business of making laws must be conducted, and the subjects with reference to which it may, and may not, be exercised. Thus, in its earlier sections, it provides that no law shall be passed except by bill, and that no bill shall be so altered by either house as to change its original purpose; that no bill be considered unless referred to a committee, returned therefrom and printed; that no bill, except appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; that every bill shall be read in each house on three different days, and prescribing the terms upon which alone it shall become a law; that all amendments to bills shall be concurred in by a majority of the members of each house and directing the manner in which this shall be done; that bills shall be revived, amended or extended in a particular manner. These provisions cover the first six sections. The seventh section prohibits all local or special legislation upon a great variety of enumerated subjects, and the eighth requires that public notice shall first be given of an intent to pass any kind of local legislation. The remaining sections, down to the twenty-sixth, contain prohibitive limitations as to some subjects and directory provisions as to others, but all of an exclusively legislative character. Then follows the twenty-sixth section, providing for the submission of 'every order, resolution or vote,' to the Governor for his approval or disapproval, and how a bill may be passed again, notwithstanding his disapproval. Then follow a few further restrictions of the subjects of legislation, and provisions for criminal penalties for prohibited acts, and with these the article closes. Nowhere in the article is there the slightest reference to, or provision for, the subject of amendments to the constitution. It is not even alluded to in the remotest manner. On the contrary, the entire article is confined exclusively to the subject of legislation, that is, the actual exercise of the lawmaking power of the commonwealth in its usual and ordinary acceptance. It is too plain for argument that unless there were somewhere else in the constitution, a provision for creating amendments thereto, that

power could not be exercised under any provision of the third article. It follows that a direction to submit 'every order, resolution or vote' of the two houses to the Governor for his approval does not carry with it any other matter than such as is authorized by the article. As constitutional amendments are not authorized by the third article, they cannot be within the purview of those orders, resolutions or votes, which must be submitted for the action of the Governor.

"But, independently of this consideration, which seems conclusive, it is perfectly manifest that the orders, resolutions and votes, which must be so submitted, are, and can only be, such as relate to and are a part of the business of legislation, as provided for and regulated by the terms of Article III. These are the affairs that are the exclusive subjects of the article. They constitute the matters which are fully and carefully committed to that department of the government which is clothed with its whole legislative power. The things that are to be done by the two houses are legislative only, and hence, when orders, resolutions and votes, are directed to be submitted to the Governor, it is orders, resolutions and votes referring to matters of legislation only that are to be so submitted. It is not contended that an 'order' or a 'vote' is an amendment to the constitution, but it is contended that, because a resolution is the form in which a proposed amendment must be introduced, that kind of a resolution must be submitted. This is a *non sequitur*, because the word 'resolution' has a subject which it necessarily embraces and fills, to wit: legislation, the whole legislation which may be enacted by the two houses, and it has no need of an enlarged meaning in order to take in something which is not otherwise provided for. But a still more serious objection to its being enlarged so as to include constitutional amendments is, that the eighteenth article excludes it from such enlargement, by giving a different name to that thing which the two houses must do in performing their part of the work of establishing a constitutional amendment. The jurisdiction is conferred by providing that 'any amendment to this constitution may be proposed in the senate or house,' etc., 'and if the same shall be agreed to by a majority . . . such proposed amendment or amendments shall be entered on their journals,' etc. It is not a law, an

order, a bill or a resolution, that may thus be proposed and must be enrolled, but distinctively and exclusively 'an amendment to the constitution' that must be so introduced and dealt with. Now, 'an amendment to the constitution' is specially named as the subject of the power to be exercised by the two houses in this connection, and the form of their action is to be 'an agreement' and not an enactment, as it is also provided that, 'if the same shall be agreed to by a majority of the members elected to each house, such proposed amendment or amendments shall be entered on their journals,' etc. Thus it is seen that throughout the article the separate and distinctive character of this particular exercise of the power of the two houses is preserved, and is excluded from association with the orders, resolutions and votes, which constitute the ordinary legislation of the legislative body. But the great and overshadowing distinction, between this and the ordinary legislation, lies in the fact that the organism which decides questions of constitutional amendment, is an entirely different and distinct organism from that which decides questions of legislation, even in its broadest sense. The two houses and the Governor constitute the entirety of the body which considers and finally determines all matters of legislation. But it is the two houses and the great mass of the electors of the commonwealth combined which constitute the body which considers and determines questions of constitutional amendment. With all matters of legislation the people in their capacity of electors have nothing to do. But with constitutional amendments they have everything to do, for the ultimate fate of all proposed amendments depends absolutely upon their approval. If they approve, the proposed amendment at once becomes a part of the constitution; if they disapprove, it fails utterly and never comes into existence. The fundamental distinction which thus becomes most manifest, between the mere legislative machinery of the government, and that machinery which alone possesses the power to ordain amendments to the constitution of the commonwealth is most radical and extreme. Hence it follows by an inevitable conclusion that when the twenty-sixth section of the third article of the constitution says that 'every order, resolution or vote' of the two houses shall be submitted to the Governor for his approval or

disapproval, it does not, and cannot have, any reference to the action which the two houses take in performing their part of the work of creating amendments. After them comes the Governor in matters of legislation, but after them come the electors of the commonwealth in matters of constitutional amendment. In the latter the power and will of the people are final and conclusive, in the former the power and the will of the Governor are supplemental only. His action may be final, or it may not, depending on an ultimate vote of the two houses by a two-thirds, instead of a majority, vote. If it is two-thirds, he is not an element even in matters of legislation, but he is never an element in matters of constitutional amendment. Before passing to the question of authority, only one more thought needs expression. It is that these two articles of the constitution are not inconsistent with each other, and both may stand and be fully executed without any conflict. One relates to legislation only, and the other relates to the establishment of constitutional amendments. Each one contains all the essentials for its complete enforcement without impinging at all upon any function of the other. And it follows further that because each of these articles is of equal dignity and obligatory force with the other, neither can be used to change, alter or overturn the other. It is not a tenable proposition, therefore, that because the twenty-sixth section of the third article requires that all orders, resolutions and votes of the two houses shall be submitted to the Governor, the same provision shall be thrust into the eighteenth article, where it is not found and does not belong." . . .

" . . . the Governor is without right to intervene in the proceedings for the creation of the amendments. We have endeavored to show heretofore, and we are of opinion and so decide, that upon the proper construction of our Article XVIII of the constitution, he has not authority to approve or to disapprove of the proposed amendments, and, therefore, that his action in withholding his approval was altogether nugatory."

§5. *Publication of Amendments.*—"Two other questions arose upon the hearing in the court below, and they are brought before us by the appeal. The first of them is, that as no appropriation was made of moneys from the public treasury to defray

the cost of publication in the newspapers, the Secretary of the Commonwealth could not lawfully make the publication. We do not consider that this question is of any serious force, because, in the first place, it does not appear, and is not averred, that any newspapers have refused to make the publication without being paid or secured for the cost, or even that any of them have been asked to make the publication. The secretary is not therefore able to say that he cannot make the publication for the reason stated, and hence such inability cannot be set up as a bar to the enforcement of the act proposing the amendments. It was at least his duty to try to make the publication before he could be heard to say that it could not be done. But, in the next place, the mandate of the constitution is upon him and he must obey it in terms. If it is utterly impossible for him to obey it literally, he can make that clear to the court, stating the reasons, and then it would be for the court to determine in a proper proceeding whether the publication can be made or not. In the third place, it is not to be assumed that the state will not pay, or cannot be made to pay, by judicial decree, the necessary cost of carrying out a peremptory order which has been officially promulgated by the State Legislature, in strict conformity with the requirements of the state constitution. Indeed, it is not possible to conceive that the State Legislature would be so derelict to its manifest duty, as to refuse to make the necessary appropriation to pay for the execution of its own order. Or even if it did so refuse, can it be seriously doubted that a way would be found, by means of a judicial proceeding, to enforce the clear monetary liability of the commonwealth to defray the necessary expense in question?

"The other proposition upon which reliance is placed by the appellee is, that the secretary cannot be compelled to do a vain thing, to wit: publish for three months prior to an election which was to take place in November, 1899, the amendments in question. There are two replies to this, the first of which is, that it is by no means certain that the publication must necessarily be made three months before that general election which followed next after the amendments were agreed to by the two houses. The very next succeeding clause of Article XVIII is in these words, 'And if in the General Assembly next

afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each house, the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid,' etc. Now the next general election at which the General Assembly next afterwards chosen is, or can be, elected, does not occur till the month of November in the year 1900, as there was no such election held in 1899. It is manifest, therefore, that the next general election, after the amendments were agreed to by the two houses, was of no importance, so far as the publication was concerned, and that the next General Assembly that had any authority to act in the matter is the one which is to be elected in November, 1900. So far as that General Assembly is concerned, there is abundance of time in which to make the publication, and any order now made for such publication will not be a vain order by any means. The second reply to the contention of the appellee is, that where a thing is to be done, on or before a certain date, if a literal compliance as to the date becomes impossible without fault of the power which created the duty, the thing may be done, or the act performed, as soon as it becomes possible to be done after the time fixed has passed. Thus, in the execution of criminals guilty of a capital offense, and sentenced or ordered to be executed on or before a fixed date, the sentence or order may be executed after the day fixed has passed. This was decided by this court in an exhaustive opinion by our Brother Mitchell in the case of *Com. v. Hill*, 185 Pa. 385. We there held that the time of execution in a capital case is no part of the judgment, but a mere ministerial or executive act in pursuance of it, and the judgment is, therefore, not affected by the prisoner's escape, or other occurrence which merely prevents or delays execution. The judgment is not satisfied until the sentence is fully carried out. It is also very familiar doctrine in the law of contracts that where money is to be paid, or other acts done, on or before a fixed date, if performance on or before the day named is prevented, subsequent performance will satisfy the demand of the contract, unless, indeed, in the exceptional instances in which time is of the very essence of the contract.

"So we apprehend in matters of legislation where a per-

formance of an authorized act has become impossible through no fault of the law, a later performance, if it satisfy the terms of the original duty, will be a sufficient compliance. We think that the provision as to the publication three months before the next general election, as prescribed in the first clause of Article XVIII, should be regarded as merely a directory provision, where strict compliance with a time limit is not essential. . . .

“The Legislature that is to act upon the proposed amendments is not the one which was in existence when the amendments were proposed and ‘agreed to.’ There was no election in 1899 for members of the Legislature, and the first election of members of the next succeeding Legislature is the one which will take place in November, 1900, as has been already explained. That is the Legislature which is to take the next action upon these proposed amendments, and a publication of the amendments, three months before the election of 1899, could serve no possible purpose that cannot be equally well served by a publication for three months before the general election of the year 1900. We are very clearly of opinion, therefore, that such an order may now be made without the least material violation of the terms of the law proposing the amendments. We are of opinion that the learned court below was in error in refusing the mandamus prayed for.”

APPENDIX

CONSTITUTION OF PENNSYLVANIA

[The references are to the pages where each section or portion thereof is quoted.]

PREAMBLE.

WE, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this constitution. 29

ARTICLE I.

DECLARATION OF RIGHTS.

That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE THAT 30

SECTION 1. All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. 114

SEC. 2. All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends, they have, at all times, an inalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper. 32

SEC. 3. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given, by law, to any religious establishments or modes of worship. 45

SEC. 4. No person who acknowledges the being of a God, and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office, or place of trust or profit, under this commonwealth. 46

SEC. 5. Elections shall be free and equal; and no power, civil or military, shall, at any time, interfere to prevent the free exercise of the right of suffrage. 349

SEC. 6. Trial by jury shall be as heretofore, and the right thereof remain inviolate. 66

SEC. 7. The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature, or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers, or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases. 84

SEC. 8. The people shall be secure in their persons, houses, papers, and possessions from unreasonable searches, and seizures; and no warrant to search any place, or to seize any person or things, shall issue, without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation, subscribed to by the affiant. 158

SEC. 9. In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, 99
to demand the nature and cause of the accusation against him, 101
to meet the witnesses face to face, 101
to have compulsory process for obtaining witnesses in his favor; 102
and in prosecutions by indictment or information, a speedy public trial. 3
by an impartial jury of the vicinage; 102
he cannot be compelled to give evidence against himself, 104
nor can he be deprived of his life, liberty or property, unless by the judgment of his peers, or the law of the land. 114

SEC. 10. No person shall, for any indictable offense, be proceeded against criminally, by information, 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; or, by leave of the court, for oppression or misdemeanor in office. 99, 106

No person shall, for the same offense, be twice put in jeopardy of life or limb, 107
nor shall private property be taken or applied to public use, without authority of law, and without just compensation being first made or secured. 458

SEC. 11. All courts shall be open; and every man for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial or delay. 160

Suits may be brought against the commonwealth, in such manner, in such courts, and in such cases, as the Legislature may by law direct, 161

SEC. 12. No power of suspending laws shall be exercised, unless by the Legislature, or by its authority. 161

SEC. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted. 110

SEC. 14. All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or presumption great; 111
and the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it. 112

SEC. 15. No commission of oyer and terminer or jail delivery shall be issued. 162

SEC. 16. The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison, after delivering up his

estate for the benefit of his creditors, in such manner as shall be prescribed by law. 164

SEC. 17. No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed. 134, 137n., 155

SEC. 18. No person shall be attainted of treason or felony by the Legislature. 164

SEC. 19. No attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth. 165

The estate of such persons as shall destroy their own lives shall descend or vest as in cases of natural death; 166

and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof. 166

SEC. 20. The citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address, or remonstrance. 167

SEC. 21. The right of the citizens to bear arms in defense of themselves and the state, shall not be questioned. 167

SEC. 22. No standing army shall, in time of peace, be kept up, without the consent of the Legislature; and the military shall in all cases, and at all times, be in strict subordination to the civil power. 168

SEC. 23. 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. 168

SEC. 24. The Legislature shall not grant any title of nobility or hereditary distinction; nor create any office, the appointment to which shall be for a longer term than during good behavior. 170

SEC. 25. Emigration from the state shall not be prohibited. 171

SEC. 26. To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate. 171

ARTICLE II.

THE LEGISLATURE.

SECTION 1. The legislative power of this commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives. 5, 172

SEC. 2. Members of the General Assembly shall be chosen at the general election, every second year. 187

Their term of service shall begin on the first day of December next after their election. 188

Whenever a vacancy shall occur in either house, the presiding officer thereof shall issue a writ of election, to fill such vacancy for the remainder of the term. 188

SEC. 3. Senators shall be elected for the term of four years, and representatives for the term of two years. 189

SEC. 4. The General Assembly shall meet at twelve o'clock noon, on the first Tuesday of January, every second year, and at other times when convened by the Governor, but shall hold no adjourned annual session after the year 1878. 206

In case of a vacancy in the office of United States senator from this commonwealth, in a recess between sessions, the Governor shall convene the two houses, by proclamation, on notice, not exceeding sixty days, to fill the same. 206

SEC. 5. Senators shall be at least twenty-five years of age, and representatives twenty-one years of age. They shall have been citizens and inhabitants of the state four years, and inhabitants of their respective districts one year next before their election (unless absent on the public business of the United States or of this state), and shall reside in their respective districts during their terms of service. 200

SEC. 6. No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this commonwealth; and no member of Congress, or other person holding any office (except of attorney-at-law or in the militia), under the United States or this commonwealth, shall be a member of either house during his continuance in office. 201

SEC. 7. No person hereafter convicted of embezzlement of public moneys, bribery, perjury, or other infamous crime, shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this commonwealth. 202

SEC. 8. The members of the General Assembly shall receive such salary and mileage, for regular and special sessions, as shall be fixed by law, and no other compensation whatever, whether for service upon committee or otherwise. No member of either house shall, during the term for which he may have been elected, receive any increase of salary, or mileage, under any law passed during such term. 204

SEC. 9. The Senate shall, at the beginning and close of each regular session, and at such other times as may be necessary, elect one of its members president *pro tempore*, who shall perform the duties of the Lieutenant Governor, in any case of absence or disability of that officer, and whenever the said office of Lieutenant Governor shall be vacant. The House of Representatives shall elect one of its members as speaker. Each house shall choose its other officers, 207 and shall judge of the election and qualifications of its members. 208

SEC. 10. A majority of each house shall constitute a quorum; but a smaller number may adjourn from day to day and compel the attendance of absent members. 209

SEC. 11. Each house shall have power to determine the rules of its proceedings, and punish its members, or other persons, for contempt or disorderly behavior in its presence, to enforce obedience to its process, to protect its members against violence, or offers of bribes or private solicitation, and, with the concurrence of two-thirds, to expel a member, but not a second time, for the same cause; and shall have all other powers necessary for the Legislature of a free state. A member expelled for corruption shall not thereafter be eligible to either house; and punishment for contempt or disorderly behavior shall not bar an indictment for the same offense. 209

SEC. 12. Each house shall keep a journal of its proceedings, and, from time to time, publish the same, except such parts as require secrecy; and the yeas and nays of the members on any question shall, at the desire of any two of them, be entered on the journal. 210

SEC. 13. The sessions of each house, and of committees of the whole, shall be open, unless when the business is such as ought to be kept secret. 210

SEC. 14. Neither house 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. 210

SEC. 15. The members of the General Assembly shall, in all cases, except treason, felony, violation of their oath of office, and breach or surety of the peace, be privileged from arrest during their attendance at the sessions 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, 205

SEC. 16. The state shall be divided into fifty senatorial districts of compact and contiguous territory, as nearly equal in population as may be; and each district shall be entitled to elect one senator. Each county containing one or more ratios of population, shall be entitled to one senator for each ratio, and to an additional senator for a surplus of population exceeding three-fifths of a ratio, but no county shall form a separate district, unless it shall contain four-fifths of a ratio, except where the adjoining counties are each entitled to one or more senators, when such county may be assigned a senator on less than four-fifths and exceeding one-half of a ratio; and no county shall be divided unless entitled to two or more senators. No city or county shall be entitled to separate representation exceeding one-sixth of the whole number of senators. No ward, borough, or township shall be divided in the formation of a district. The senatorial ratio shall be ascertained by dividing the whole population of the state by the number fifty. 196

SEC. 17. The members of the House of Representatives shall be apportioned among the several counties, on a ratio obtained by dividing the population of the state, as ascertained by the most recent United States census, by two hundred. Every county containing less than five ratios shall have one representative for every full ratio, and an additional representative when the surplus exceeds half a ratio; but each county shall have at least one representative. Every county containing five ratios or more, shall have one representative for every full ratio. Every city containing a population equal to a ratio, shall elect separately its proportion of the representatives allotted to the county in which it is located. Every city entitled to more than four representatives, and every county having over one hundred thousand inhabitants, shall be divided into districts of compact and contiguous territory; each district to elect its proportion of representatives according to its population; but no district shall elect more than four representatives. 190

SEC. 18. The General Assembly, at its first session after the adoption of this constitution, and immediately after each United States decennial census, shall apportion the state into senatorial and representative districts, agreeably to the provisions of the two next preceding sections. 198

ARTICLE III.

LEGISLATION.

SECTION 1. No law shall be passed except by bill; and no bill shall be so altered or amended, on its passage through either house, as to change its original purpose. 211

SEC. 2. No bill shall be considered unless referred to a committee, returned therefrom and printed for the use of the members. 211

SEC. 3. No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title. 214

SEC. 4. Every bill shall be read at length, on three different days, in each house; all amendments made thereto shall be printed for the use of the members, before the final vote is taken on the bill; and no bill shall become a law unless, on its final passage, the vote be taken by yeas and nays, the names of the persons voting for and against the same be entered on the journal, and a majority of the members elected to each house be recorded thereon as voting in its favor. 211

SEC. 5. No amendment to bills by one house shall be concurred in by the other except by the vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting for and against recorded upon the journal thereof; and reports of committees of

conference shall be adopted in either house only by the vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting recorded upon the journals. 211

SEC. 6. No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length. 229

SEC. 7. The General Assembly shall not pass any local or special law authorizing the creation, extension or impairing of liens; regulating the affairs of counties, cities, townships, wards, boroughs, or school districts; changing the names of persons or places; changing the venue in civil or criminal cases; authorizing the laying out, opening, altering, or maintaining roads, highways, streets, or alleys; relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other state; vacating roads, town-plats, streets, or alleys; relating to cemeteries, graveyards, or public grounds not of the state; authorizing the adoption or legitimation of children; locating or changing county seats; erecting new counties or changing county lines; incorporating cities, towns or villages, or changing their charters; for the opening and conducting of elections, or fixing or changing the place of voting; granting divorces; erecting new townships or boroughs, changing township lines, borough limits, or school districts; creating offices, or prescribing the powers and duties of officers, in counties, cities, boroughs, townships, election or school districts; changing the law of descent or succession; regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding, or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery, or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate; regulating the fees, or extending the powers and duties of aldermen, justices of the peace, magistrates, or constables; regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes; fixing the rate of interest; affecting the estates of minors or persons under disability, except after due notice to all parties in interest, to be recited in the special enactment; remitting fines, penalties, and forfeitures, or refunding money legally paid into the treasury; exempting property from taxation; regulating labor, trade, mining or manufacturing; creating corporations, or amending, renewing or extending the charters thereof; granting to any corporation, association or individual, any special or exclusive privilege or immunity, or to any corporation, association, or individual the right to lay down a railroad track; nor shall the General Assembly indirectly enact such special or local law, by the partial repeal of a general law; but laws repealing local or special acts may be passed; nor shall any law be passed granting powers or privileges, in any case where the granting of such powers and privileges shall have been provided for by general law, nor where the courts have jurisdiction to grant the same, or give the relief asked for. 236

SEC. 8. No local or special bill shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be affected may be situated, which notice shall be at least thirty days prior to the introduction into the General Assembly of such bill, and in the manner to be provided by law; the evidence of such notice having been published shall be exhibited in the General Assembly, before such act shall be passed. 263

SEC. 9. The presiding officer of each house shall, in the presence

of the house over which he presides, sign all bills and joint resolutions passed by the General Assembly after their titles have been publicly read immediately before signing; and the fact of signing shall be entered on the journal. 213

SEC. 10. The General Assembly shall prescribe by law the number, duties, and compensation of the officers and employees of each house; and no payment shall be made from the state treasury, or be in any way authorized, to any person, except to an acting officer or employee elected or appointed in pursuance of law. 208

SEC. 11. No bill shall be passed giving any extra compensation to any public officer, servant, employee, agent, or contractor, after services shall have been rendered or contract made, nor providing for the payment of any claim against the commonwealth, without previous authority of law. 265

SEC. 12. All stationery, printing, paper and fuel used in the legislative and other departments of government, shall be furnished, and the printing, binding, and distributing of the laws, journals, department reports, and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees, shall be performed under contract to be given to the lowest responsible bidder below such maximum price, and under such regulations as shall be prescribed by law; no member or officer of any department of the government shall be, in any way, interested in such contracts; and all such contracts shall be subject to the approval of the Governor, Auditor General, and State Treasurer. 269

SEC. 13. No law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment. 265, 339

SEC. 14. All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose amendments as in other bills. 273

SEC. 15. The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the commonwealth, interest on the public debt and for public schools; all other appropriations shall be made by separate bills, each embracing but one subject. 273

SEC. 16. No money shall be paid out of the treasury, except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof. 274

SEC. 17. No appropriation shall be made to any charitable or educational institution, not under the absolute control of the commonwealth, other than normal schools, established by law, for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house. 274

SEC. 18. No appropriations, except for pensions, or gratuities for military services, shall be made for charitable, educational, or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association. 274

SEC. 19. The General Assembly may make appropriations of money to institutions wherein the widows of soldiers are supported or assisted, or the orphans of soldiers are maintained and educated; but such appropriation shall be applied exclusively to the support of such widows and orphans. 275

SEC. 20. The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes, or perform any municipal function whatever. 270

SEC. 21. No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; 270

and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted. 270

No act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes, different from those fixed by general laws regulating actions against natural persons; and such acts now existing are avoided. 271

SEC. 22. No act of the General Assembly shall authorize the investment of trust funds by executors, administrators, guardians, or other trustees, in the bonds or stock of any private corporation; and such acts now existing are avoided, saving investments heretofore made. 272

SEC. 23. The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law. 313

SEC. 24. No obligation or liability of any railroad or other corporation, held or owned by the commonwealth, shall ever be exchanged, transferred, remitted, postponed, or in any way diminished, by the General Assembly; nor shall such liability or obligation be released, except by payment thereof into the state treasury. 272

SEC. 25. When the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session. 287

SEC. 26. Every order, resolution or vote to which the concurrence of both houses may be necessary, except on the question of adjournment, shall be presented to the Governor, and before it shall take effect, be approved by him, or being disapproved, shall be repassed by two-thirds of both houses, according to the rules and limitations prescribed in case of a bill. 213, 289

SEC. 27. No state office shall be continued or created for the inspection or measuring of any merchandise, manufacture, or commodity; but any county or municipality may appoint such officers, when authorized by law. 272

SEC. 28. No law changing the location of the capital of the state shall be valid, until the same shall have been submitted to the qualified electors of the commonwealth, at a general election, and ratified and approved by them. 273

SEC. 29. A member of the General Assembly who shall solicit, demand, or receive, or consent to receive directly or indirectly, for himself or for another, from any company, corporation, or person, any money, office, appointment, employment, testimonial, reward, thing of value or enjoyment, or of personal advantage, or promise thereof, for his vote or official influence, or for withholding the same, or with an understanding, expressed or implied, that his vote or official action shall be, in any way, influenced thereby; or who shall solicit or demand any such money or other advantage, matter, or thing aforesaid, for another, as the consideration of his vote or official influence, or for withholding the same, or shall give or withhold his vote or influence, in consideration of the payment or promise of such money, advantage, matter, or thing to another, shall be held guilty of bribery, within the meaning of this constitution and shall incur the disabilities provided thereby for said offense, and such additional punishment as is or shall be provided by law. 203

SEC. 30. Any person who shall, directly or indirectly, offer, give or promise, any money or thing of value, testimonial, privilege, or personal

advantage, to any executive or judicial officer, or member of the General Assembly, to influence him in the performance of any of his public or official duties, shall be guilty of bribery, and be punished in such manner as shall be provided by law. 203

SEC. 31. The offense of corrupt solicitation of members of the General Assembly, or of public officers of the state, or of any municipal division thereof, and any occupation or practice of solicitation of such members or officers, to influence their official action, shall be defined by law, and shall be punished by fine and imprisonment. 203

SEC. 32. Any person may be compelled to testify, in any lawful investigation or judicial proceeding, against any person who may be charged with having committed the offense of bribery or corrupt solicitation, or practices of solicitation, and shall not be permitted to withhold his testimony, upon the ground that it may criminate himself, or subject him to public infamy; but such testimony shall not afterwards be used against him, in any judicial proceeding, except for perjury in giving such testimony; and any person convicted of either of the offenses aforesaid, shall, as part of the punishment therefor, be disqualified from holding any office or position of honor, trust, or profit in this commonwealth. 105

SEC. 33. A member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly, shall disclose the fact to the house of which he is a member, and shall not vote thereon. 212

ARTICLE IV.

THE EXECUTIVE.

SECTION 1. The executive department of this commonwealth shall consist of a Governor, Lieutenant Governor, Secretary of the Commonwealth, Attorney General, Auditor General, State Treasurer, Secretary of Internal Affairs, and a Superintendent of Public Instruction. 276

SEC. 2. The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed; he shall be chosen on the day of the general election, by the qualified electors of the commonwealth, at the places where they shall vote for representatives. The returns of every election for Governor shall be sealed up and transmitted to the seat of government, directed to the president of the Senate, who shall open and publish them, in the presence of the members of both houses of the General Assembly. The person having the highest number of votes shall be Governor; but if two or more be equal, and highest in votes, one of them shall be chosen Governor by the joint vote of the members of both houses. Contested elections shall be determined by a committee, to be selected from both houses of the General Assembly, and formed and regulated in such manner as shall be directed by law. 279

SEC. 3. The Governor shall hold his office during four years from the third Tuesday of January next ensuing his election, and shall not be eligible to the office for the next succeeding term. 280

SEC. 4. A Lieutenant Governor shall be chosen at the same time, in the same manner, for the same term, and subject to the same provisions as the Governor; he shall be president of the Senate, but shall have no vote, unless they be equally divided. 280

SEC. 5. No person shall be eligible to the office of Governor or Lieutenant Governor, except a citizen of the United States, who shall have attained the age of thirty years, and have been seven years next preceding his election an inhabitant of the state, unless he shall have

been absent on the public business of the United States, or of this state.

280

SEC. 6. No member of Congress, or person holding any office under the United States, or this state, shall exercise the office of Governor or Lieutenant Governor.

280

SEC. 7. The Governor shall be commander-in-chief of the army and navy of the commonwealth, and of the militia, except when they shall be called into the actual service of the United States.

280

SEC. 8. He shall nominate, and by and with the advice and consent of two-thirds of all the members of the Senate appoint a Secretary of the Commonwealth and an Attorney General, during pleasure, a Superintendent of Public Instruction for four years, and such other officers of the commonwealth as he is or may be authorized by the constitution or by law to appoint.

281

He shall have power to fill all vacancies that may happen in offices to which he may appoint, during the recess of the Senate, by granting commissions which shall expire at the end of their next session. He shall have power to fill any vacancy that may happen during the recess of the Senate in the office of Auditor General, State Treasurer, Secretary of Internal Affairs, or Superintendent of Public Instruction, in a judicial office, or in any other elective office which he is or may be authorized to fill; if the vacancy shall happen during the session of the Senate, the Governor shall nominate to the Senate before their final adjournment a proper person to fill said vacancy, but in any such case of vacancy in an elective office a person shall be chosen to said office at the next general election unless the vacancy shall happen within three calendar months immediately preceding such election, in which case the election for said office shall be held at the second succeeding general election. In acting on executive nominations, the Senate shall sit with open doors and in confirming or rejecting the nominations of the governor, the vote shall be taken by yeas and nays and shall be entered on the journal.

281

SEC. 9. He shall have power to remit fines and forfeitures, to grant reprieves, commutations of sentence, and pardons, except in cases of impeachment; but no pardon shall be granted nor sentence commuted, except upon the recommendation in writing of the Lieutenant Governor, Secretary of the Commonwealth, Attorney General, and Secretary of Internal Affairs, or any three of them, after full hearing upon due public notice and in open session; and such recommendations with the reasons therefor at length, shall be recorded and filed in the office of the Secretary of the Commonwealth.

285

SEC. 10. He may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices.

286

SEC. 11. He shall, from time to time, give to the General Assembly information of the state of the commonwealth, and recommend to their consideration such measures as he may judge expedient.

286

SEC. 12. He may on extraordinary occasions convene the General Assembly, and in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not exceeding four months. He shall have power to convene the Senate in extraordinary session, by proclamation, for the transaction of executive business.

287

SEC. 13. In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the Governor, the powers, duties, and emoluments of the office for the remainder of the term, or until the disability be removed, shall devolve upon the Lieutenant Governor.

288

SEC. 14. In case of a vacancy in the office of Lieutenant Governor, or when the Lieutenant Governor shall be impeached by the House of Representatives, or shall be unable to exercise the duties of his office, the powers, duties, and emoluments thereof, for the remainder of the term, or until the disability be removed, shall devolve upon the president *pro tempore* of the Senate; and the president *pro tempore* of the Senate shall in like manner become Governor if a vacancy or disability shall occur in the office of Governor; his seat as senator shall become vacant whenever he shall become Governor, and shall be filled by election as any other vacancy in the Senate. 288

SEC. 15. Every bill which shall have passed both houses, shall be presented to the Governor; if he approve he shall sign it, but if he shall not approve he shall return it with his objections to the house in which it shall have originated, which house shall enter the objections at large upon their journal and proceed to reconsider it. If, after such reconsideration two-thirds of all the members elected to that house shall agree to pass the bill, it shall be sent with the objections to the other house, by which likewise it shall be reconsidered, and if approved by two-thirds of all the members elected to that house, it shall be a law; but in such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered on the journals of each house, respectively. If any bill shall not be returned by the Governor within ten days 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 General Assembly by their adjournment prevent its return, in which case it shall be a law, unless he shall file the same, with his objections, in the office of the Secretary of the Commonwealth, and give notice thereof by public proclamation within thirty days after such adjournment. 289

SEC. 16. The Governor shall have power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriations disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the Executive veto. 273, 292

SEC. 17. The chief justice of the Supreme Court shall preside upon the trial of any contested election of Governor or Lieutenant Governor, and shall decide questions regarding the admissibility of evidence, and shall, upon request of the committee, pronounce his opinion upon other questions of law involved in the trial. 295

The Governor and Lieutenant Governor shall exercise the duties of their respective offices until their successors shall be duly qualified. 280, 295

SEC. 18. The Secretary of the Commonwealth shall keep a record of all official acts and proceedings of the Governor, and when required, lay the same, with all papers, minutes, and vouchers relating thereto, before either branch of the General Assembly, and perform such other duties as may be enjoined upon him by law. 295

SEC. 19. The Secretary of Internal Affairs shall exercise all the powers and perform all the duties of the Surveyor General, subject to such changes as shall be made by law. His department shall embrace a bureau of industrial statistics, and he shall discharge such duties relating to corporations, to the charitable institutions, the agricultural, manufacturing, mining, mineral, timber and other material or business interests of the state, as may be prescribed by law. He shall annually, and at such other times as may be required by law, make report to the General Assembly. 296

SEC. 20. The Superintendent of Public Instruction shall exercise all the powers and perform all the duties of the Superintendent of Common Schools, subject to such changes as shall be made by law. 296

SEC. 21. The term of the Secretary of Internal Affairs shall be four years, of the Auditor General three years, and of the State Treasurer two years. These officers shall be chosen by the qualified electors of the state at general elections. No person elected to the office of Auditor General, or State Treasurer, shall be capable of holding the same office for two consecutive terms. 296

SEC. 22. The present great seal of Pennsylvania shall be the seal of the state. All commissions shall be in the name and by authority of the Commonwealth of Pennsylvania, and be sealed with the state seal, and signed by the Governor. 296

ARTICLE V.

THE JUDICIARY.

SECTION 1. The judicial power of this commonwealth shall be vested in a Supreme Court, in courts of common pleas, courts of oyer and terminer and general jail delivery, courts of quarter sessions of the peace, orphans' courts, magistrates' courts, and in such other courts as the General Assembly may from time to time establish. 297

SEC. 2. The Supreme Court shall consist of seven judges, who shall be elected by the qualified electors of the state at large. They shall hold their offices for the term of twenty-one years, if they so long behave themselves well, but shall not be again eligible. The judge whose commission shall first expire shall be chief justice, and thereafter each judge whose commission shall first expire shall, in turn, be chief justice. 315

SEC. 3. The jurisdiction of the Supreme Court shall extend over the state, and the judges thereof shall, by virtue of their offices, be justices of oyer and terminer and general jail delivery in the several counties; they shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of *habeas corpus*, of *mandamus* to courts of inferior jurisdiction, and of *quo warranto* as to all officers of the commonwealth whose jurisdiction extends over the state, but shall not exercise any other original jurisdiction; they shall have appellate jurisdiction by appeal, *certiorari*, or writ of error in all cases as is now or may hereafter be provided by law. 327, 334

SEC. 4. Until otherwise directed by law, the courts of common pleas shall continue as at present established, except as herein changed; not more than four counties shall at any time be included in one judicial district organized for said courts. 318

SEC. 5. Whenever a county shall contain forty thousand inhabitants it shall constitute a separate judicial district and shall elect one judge learned in the law, and the General Assembly shall provide for additional judges as the business of the said districts may require. Counties containing a population less than is sufficient to constitute separate districts, shall be formed into convenient single districts, or, if necessary, may be attached to contiguous districts, as the General Assembly may provide. The office of associate judge, not learned in the law, is abolished in counties forming separate districts, but the several associate judges in office when this constitution shall be adopted shall serve for their unexpired terms. 318

SEC. 6. In the counties of Philadelphia and Allegheny all the jurisdiction and powers now vested in the district courts and courts of common pleas, subject to such changes as may be made by this constitution, or by law, shall be in Philadelphia vested in four, and in Allegheny in two, distinct and separate courts, of equal and co-ordinate jurisdiction, composed of three judges each; the said courts in Philadelphia shall be designated respectively as the court of common pleas number one, number two, number three, and number four, and in Allegheny as the

court of common pleas number one and number two, but the number of said courts may be by law increased from time to time, and shall be, in like manner, designated by successive numbers; the number of judges in any of said courts, or in any county where the establishment of an additional court may be authorized by law, may be increased from time to time, and whenever such increase shall amount in the whole to three, such three judges shall compose a distinct and separate court as aforesaid, which shall be numbered as aforesaid. In Philadelphia all suits shall be instituted in the said courts of common pleas without designating the number of said court, and the several courts shall distribute and apportion the business among them in such manner as shall be provided by rules of court, and each court to which any suit shall be thus assigned shall have exclusive jurisdiction thereof, subject to change of venue as shall be provided by law. In Allegheny each court shall have exclusive jurisdiction of all proceedings at law and in equity, commenced therein, subject to change of venue as may be provided by law. 323

SEC. 7. For Philadelphia there shall be one prothonotary's office, and one prothonotary for all said courts, to be appointed by the judges of said courts, and to hold office for three years, subject to removal by a majority of the said judges; the said prothonotary shall appoint such assistants as may be necessary, and authorized by said courts, and he and his assistants shall receive fixed salaries to be determined by law, and paid by said county; all fees collected in said office, except such as may be by law due to the commonwealth, shall be paid by the prothonotary into the county treasury. Each court shall have its separate dockets, except the judgment docket, which shall contain the judgments and liens of all the said courts, as is or may be directed by law. 323

SEC. 8. The said courts in the counties of Philadelphia and Allegheny, respectively, shall, from time to time, in turn, detail one or more of their judges to hold the courts of oyer and terminer and the courts of quarter sessions of the peace of said counties, in such manner as may be directed by law. 323

SEC. 9. Judges of the courts of common pleas, learned in the law, shall be judges of the courts of oyer and terminer, quarter sessions of the peace and general jail delivery, and of the orphans' court, and within their respective districts shall be justices of the peace as to criminal matters. 322

SEC. 10. The judges of the courts of common pleas, within their respective counties, shall have power to issue writs of *certiorari* to justices of the peace and other inferior courts, not of record, and to cause their proceedings to be brought before them, and right and justice to be done. 337

SEC. 11. Except as otherwise provided in this constitution, justices of the peace or aldermen shall be elected in the several wards, districts, boroughs, and townships, at the time of the election of constables, by the qualified electors thereof, in such manner as shall be directed by law, and shall be commissioned by the Governor for a term of five years. No township, ward, district, or borough shall elect more than two justices of the peace or aldermen without the consent of a majority of the qualified electors within such township, ward or borough. No person shall be elected to such office unless he shall have resided within the township, borough, ward or district, for one year next preceding his election. In cities containing over fifty thousand inhabitants, not more than one alderman shall be elected in each ward or district. 326

SEC. 12. In Philadelphia there shall be established for each thirty thousand inhabitants one court not of record, of police and civil causes, with jurisdiction not exceeding one hundred dollars; such courts shall

be held by magistrates, whose term of office shall be five years, and they shall be elected on general ticket by the qualified voters at large, and, in the election of the said magistrates, no voter shall vote for more than two-thirds of the number of persons to be elected when more than one are to be chosen; they shall be compensated only by fixed salaries, to be paid by said county, and shall exercise such jurisdiction, civil and criminal, except as herein provided, as is now exercised by aldermen, subject to such changes, not involving an increase of civil jurisdiction or conferring political duties, as may be made by law. In Philadelphia the office of alderman is abolished. 327

SEC. 13. All fees, fines, and penalties in said courts shall be paid into the county treasury. 327

SEC. 14. In all cases of summary conviction in this commonwealth, or of judgment in suit for a penalty, before a magistrate or court not of record, either party may appeal to such court of record as may be prescribed by law, upon allowance of the appellate court, or judge thereof, upon cause shown. 327, 337

SEC. 15. All judges required to be learned in the law, except the judges of the Supreme Court, shall be elected by the qualified electors of the respective districts over which they are to preside, and shall hold their offices for the period of ten years if they shall so long behave themselves well; but for any reasonable cause, which shall not be sufficient ground for impeachment, the Governor may remove any of them on the address of two-thirds of each house of the General Assembly. 325

SEC. 16. Whenever two judges of the Supreme Court are to be chosen for the same term of service, each voter shall vote for one only, and when three are to be chosen he shall vote for no more than two. Candidates highest in vote shall be declared elected. 316

SEC. 17. Should any two or more judges of the Supreme Court, or any two or more judges of the court of common pleas for the same district, be elected at the same time, they shall as soon after the election as convenient, cast lots for priority of commission and certify the result to the Governor, who shall issue their commissions in accordance therewith. 317, 326n.

SEC. 18. The judges of the supreme court and of the several courts of common pleas, and all other judges required to be learned in the law, shall at stated times receive for their services an adequate compensation which shall be fixed by law, and paid by the state. They shall receive no other compensation, fees, or perquisites of office, for their services, from any source, nor hold any other office of profit under the United States, this state, or any other state. 267, 339

SEC. 19. The judges of the Supreme Court during their continuance in office, shall reside within this commonwealth, and the other judges, during their continuance in office, shall reside within the districts for which they shall be, respectively, elected. 317, 326

SEC. 20. The several courts of common pleas, besides the powers herein conferred, shall have and exercise within their respective districts, subject to such changes as may be made by law, such chancery powers as are now vested by law in the several courts of common pleas of this commonwealth, or as may hereafter be conferred upon them by law. 338

SEC. 21. No duties shall be imposed by law upon the Supreme Court, or any of the judges thereof, except such as are judicial; nor shall any of the judges thereof exercise any power of appointment except as herein provided. The court of *nisi prius* is hereby abolished, and no court of original jurisdiction, to be presided over by any one or more of the judges of the supreme court, shall be established. 329, 336

SEC. 22. In every county wherein the population shall exceed one

hundred and fifty thousand the General Assembly shall, and in any other county may, establish a separate orphans' court to consist of one or more judges, who shall be learned in the law, which court shall exercise all the jurisdiction and powers now vested in, or which may hereafter be conferred upon, the orphans' courts, and thereupon the jurisdiction of the judges of the court of common pleas within such county in orphans' court proceedings shall cease and determine. In any county in which a separate orphans' court shall be established, the register of wills shall be clerk of such court, and subject to its directions in all matters pertaining to his office; he may appoint assistant clerks, but only with the consent and approval of said court. All accounts filed with him as register or as clerk of the said separate orphans' court shall be audited by the court without expense to parties, except where all parties in interest in a pending proceeding shall nominate an auditor, whom the court may in its discretion appoint. In every county orphans' courts shall possess all the powers and jurisdiction of a registers' court, and separate registers' courts are hereby abolished. 324

SEC. 23. The style of all process shall be, "The Commonwealth of Pennsylvania." All prosecutions shall be carried on in the name and by the authority of the Commonwealth of Pennsylvania, and conclude "against the peace and dignity of the same." 322

SEC. 24. In all cases of felonious homicide, and in such other criminal cases as may be provided for by law, the accused, after conviction and sentence, may remove the indictment, record, and all proceedings to the Supreme Court for review. 335

SEC. 25. Any vacancy happening by death, resignation, or otherwise, in any court of record, shall be filled by appointment by the Governor, to continue till the first Monday of January next succeeding the first general election, which shall occur three or more months after the happening of such a vacancy. 317, 326

SEC. 26. All laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction, and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgments of such courts shall be uniform; and the General Assembly is hereby prohibited from creating other courts to exercise the powers vested by this constitution in the judges of the courts of common pleas and orphans' courts. 339

SEC. 27. The parties by agreement filed may, in any civil case, dispense with trial by jury, and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same; and the judgment thereon shall be subject to a writ of error, as in other cases. 80

ARTICLE VI.

IMPEACHMENT AND REMOVAL FROM OFFICE.

SECTION 1. The House of Representatives shall have the sole power of impeachment. 341

SEC. 2. All impeachments shall be tried by the Senate; when sitting for that purpose the senators shall be upon oath or affirmation; no person shall be convicted without concurrence of two-thirds of the members present. 341

SEC. 3. The Governor and all other civil officers shall be liable to impeachment for any misdemeanor in office, but judgment in such cases shall not extend further than to removal from office and disqualification to hold any office of trust or profit under this commonwealth. The person accused, whether convicted or acquitted, shall nevertheless be

liable to indictment, trial, judgment, and punishment according to law.

343

SEC. 4. All officers shall hold their offices on the condition that they behave themselves while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed officers, other than judges of the courts of record and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed. All officers elected by the people, except Governor, Lieutenant Governor, members of the General Assembly, and judges of the courts of record learned in the law, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.

325, 343

ARTICLE VII.

OATH OF OFFICE.

SECTION 1. Senators and representatives and all judicial, state and county officers shall, before entering on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support, obey, and defend the Constitution of the United States and the Constitution of this Commonwealth; and that I will discharge the duties of my office with fidelity; that I have not paid or contributed, or promised to pay or contribute, either directly or indirectly, any money or other valuable thing to procure my nomination or election (or appointment), except for necessary and proper expenses expressly authorized by law; that I have not knowingly violated any election law of this commonwealth, or procured it to be done by others in my behalf; that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law."

The foregoing oath shall be administered by some person authorized to administer oaths, and in the case of state officers and judges of the Supreme Court shall be filed in the office of the Secretary of the Commonwealth, and in the case of other judicial and county officers in the office of the prothonotary of the county in which the same is taken; any person refusing to take said oath or affirmation shall forfeit his office, and any person who shall be convicted of having sworn or affirmed falsely, or of having violated said oath or affirmation, shall be guilty of perjury, and be forever disqualified from holding any office of trust or profit within this commonwealth. The oath to the members of the Senate and House of Representatives shall be administered by one of the judges of the Supreme Court, or of a court of common pleas, learned in the law, in the hall of the house to which the member shall be elected.

202n., 345

, ARTICLE VIII.

SUFFRAGE AND ELECTIONS.

SECTION 1. Every male citizen, twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections, subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.¹

First. He shall have been a citizen of the United States at least one month.

Second. He shall have resided in the state one year (or if, having previously been a qualified elector or native-born citizen of the state he shall have removed therefrom and returned, then six months), immediately preceding the election.

¹Amendment of 1901, P. L. 427.

Third. He shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election.

Fourth. If twenty-two years of age, or upwards, he shall have paid within two years a state or county tax, which shall have been assessed at least two months and paid at least one month before the election. 350

SEC. 2. The general election shall be held annually on the Tuesday next following the first Monday of November, but the General Assembly may by law fix a different day, two-thirds of all the members of each house consenting thereto. 362

SEC. 3. All elections for city, ward, borough, and township officers, for regular terms of service, shall be held on the third Tuesday of February. 363

SEC. 4. All elections by the citizens shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.² 362

SEC. 5. Electors shall in all cases except treason, felony, and breach or surety of the peace, be privileged from arrest during their attendance on elections and in going to and returning therefrom. 367

SEC. 6. Whenever any of the qualified electors of this commonwealth shall be in actual military service under a requisition from the President of the United States, or by the authority of this commonwealth, such electors may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual places of election. 362

SEC. 7. All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the state; but laws regulating and requiring the registration of electors may be enacted to apply to cities only, provided that such laws be uniform for cities of the same class.³ 356

SEC. 8. Any person who shall give, or promise or offer to give, to an elector any money, reward, or other valuable consideration for his vote at an election or for withholding the same, or who shall give or promise to give such consideration to any other person or party for such elector's vote, or for the withholding thereof, and any elector who shall receive or agree to receive, for himself or for another, any money, reward, or other valuable consideration for his vote at an election, or for withholding the same, shall thereby forfeit the right to vote at such election; and any elector whose right to vote shall be challenged for such case before the election officers shall be required to swear or affirm that the matter of the challenge is untrue before his vote shall be received. 363

SEC. 9. Any person who shall, while a candidate for office, be guilty of bribery, fraud, or wilful violation of any election law, shall be forever disqualified from holding an office of trust or profit in this commonwealth; and any person convicted of wilful violation of the election laws shall, in addition to any penalties provided by law, be deprived of the right of suffrage absolutely for a term of four years. 363

SEC. 10. In trials of contested elections and in proceedings for the investigation of elections, no person shall be permitted to withhold his testimony upon the ground that it may criminate himself or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding except for perjury in giving such testimony. 105, 364

SEC. 11. Townships, and wards of cities or boroughs shall form or be divided into election districts of compact and contiguous territory,

²Amendment of 1901, P. L. 427.

³Amendment of 1901, P. L. 427.

in such manner as the court of quarter sessions of the city or county in which the same are located may direct; but districts in cities of over one hundred thousand inhabitants shall be divided by the courts of quarter sessions having jurisdiction therein, whenever at the next preceding election more than two hundred and fifty votes shall have been polled therein; and other election districts, whenever the court of the proper county shall be of opinion that the convenience of the electors and the public interests will be promoted thereby. 364

SEC. 12. All elections by persons in a representative capacity shall be *viva voce*. 362

SEC. 13. For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence while employed in the service, either civil or military, of this state, or of the United States, nor while engaged in the navigation of the waters of the state or of the United States, or on the high seas, nor while a student of any institution of learning, nor while kept in any poorhouse, or other asylum at public expense, nor while confined in public prison. 361

SEC. 14. District election boards shall consist of a judge and two inspectors, who shall be chosen annually by the citizens. Each elector shall have the right to vote for the judge and one inspector, and each inspector shall appoint one clerk. The first election board for any new district shall be selected, and vacancies in election boards filled, as shall be provided by law. Election officers shall be privileged from arrest upon days of election and while engaged in making up and transmitting returns, except upon warrant of a court of record, or judge thereof, for an election fraud, for felony, or for wanton breach of the peace. In cities they may claim exemption from jury duty during their terms of service. 365

SEC. 15. No person shall be qualified to serve as an election officer who shall hold, or shall within two months have held, any office, appointment, or employment in or under the government of the United States, or of this state, or of any city or county, or of any municipal board, commission, or trust in any city, save only justices of the peace and aldermen, notaries public, and persons in the militia service of the state; nor shall any election officer be eligible to any civil office to be filled at an election at which he shall serve, save only to such subordinate municipal or local offices, below the grade of city or county offices, as shall be designated by general law.

SEC. 16. The courts of common pleas of the several counties of the commonwealth shall have power within their respective jurisdictions to appoint overseers of election to supervise the proceedings of election officers and to make report to the court as may be required; such appointments to be made for any district in a city or county upon petition of five citizens, lawful voters of such election district, setting forth that such appointment is a reasonable precaution to secure the purity and fairness of elections; overseers shall be two in number for an election district, shall be residents therein, and shall be persons qualified to serve upon elections boards, and in each case members of different political parties; whenever the members of an election board shall differ in opinion, the overseers, if they shall be agreed thereon, shall decide the question of difference; in appointing overseers of election all the law judges of the proper court, able to act at the time, shall concur in the appointments made. 366

SEC. 17. The trial and determination of contested elections of electors of President and Vice-President, members of the General Assembly, and of all public officers, whether state, judicial, municipal, or

local, shall be by the courts of law, or by one or more of the law judges thereof. The General Assembly shall by general law designate the courts and judges by whom the several classes of election contests shall be tried and regulate the manner of trial and all matters incident thereto; but no such law assigning jurisdiction or regulating its exercise, shall apply to any contest arising out of an election held before its passage. 208, 364

ARTICLE IX.

TAXATION AND FINANCE.

SECTION 1. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; 373
but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity. 397

SEC. 2. All laws exempting property from taxation, other than the property above enumerated, shall be void. 398, 420

SEC. 3. The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party. 421

SEC. 4. No debt shall be created by or on behalf of the state, except to supply casual deficiencies of revenue, repel invasions, suppress insurrection, defend the state in war, or to pay existing debt, and the debt created to supply deficiencies in revenue shall never exceed in the aggregate at any one time one million of dollars. 422

SEC. 5. All laws authorizing the borrowing of money by and on behalf of the state shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for the purpose specified, and no other. 422

SEC. 6. The credit of the commonwealth shall not be pledged or loaned to any individual, company, corporation, or association, nor shall the commonwealth become a joint owner or stockholder in any company, association or corporation. 422

SEC. 7. The General Assembly shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution, or individual. 423

SEC. 8. The debt of any county, city, borough, township, school district or other municipality or incorporated district, except as herein provided shall never exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur any new debt or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property, without the assent of the electors thereof at a public election, in such manner as shall be provided by law; but any city, the debt of which now exceeds seven per centum of such assessed valuation, may be authorized by law to increase the same three per centum in the aggregate, at any one time, upon such valuation. 425

SEC. 9. The commonwealth shall not assume the debt, or any part thereof, of any city, county, borough, or township unless such debt shall have been contracted to enable the state to repel invasion, suppress domestic insurrection, defend itself in time of war, or to assist the state in the discharge of any portion of its present indebtedness. 431

SEC. 10. Any county, township, school district, or other municipality incurring any indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof within thirty years. 431

SEC. 11. To provide for the payment of the present state debt, and any additional debt contracted as aforesaid, the General Assembly shall continue and maintain the sinking fund, sufficient to pay the accruing interest on such debt, and annually to reduce the principal thereof by a sum not less than two hundred and fifty thousand dollars; the said sinking fund shall consist of the proceeds of the sales of the public works, or any part thereof, and of the income or proceeds of the sale of any stocks owned by the commonwealth, together with other funds and resources that may be designated by law, and shall be increased from time to time by assigning to it any part of the taxes or other revenues of the state not required for the ordinary and current expenses of government; and, unless in case of war, invasion, or insurrection, no part of the said sinking fund shall be used or applied otherwise than in the extinguishment of the public debt. 432

SEC. 12. The moneys of the state, over and above the necessary reserve, shall be used in the payment of the debt of the state, either directly or through the sinking fund, and the moneys of the sinking fund shall never be invested in or loaned upon the security of anything, except the bonds of the United States or of this state. 432

SEC. 13. The moneys held as necessary reserve shall be limited by law to the amount required for current expenses, and shall be secured and kept as may be provided by law. Monthly statements shall be published showing the amount of such moneys, where the same are deposited, and how secured. 432

SEC. 14. The making of profit out of the public moneys or using the same for any purpose not authorized by law by any officer of the state, or member or officer of the General Assembly, shall be a misdemeanor, and shall be punished as may be provided by law; but part of such punishment shall be disqualification to hold office for a period of not less than five years. 432

ARTICLE X.

EDUCATION.

SECTION 1. The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose. 434

SEC. 2. No money raised for the support of the public schools of the commonwealth shall be appropriated to or used for the support of any sectarian school. 434

SEC. 3. Women twenty-one years of age and upwards shall be eligible to any office of control or management under the school laws of this state. 435

ARTICLE XI.

MILITIA.

SECTION 1. The freemen of this commonwealth shall be armed, organized, and disciplined for its defense when and in such manner as may be directed by law. The General Assembly shall provide for maintaining the militia by appropriations from the treasury of the commonwealth and may exempt from military service persons having conscientious scruples against bearing arms. 169

ARTICLE XII.

PUBLIC OFFICERS.

SECTION 1. All officers whose selection is not provided for in this constitution, shall be elected or appointed as may be directed by law. 437

SEC. 2. No member of Congress from this state, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this state to which a salary, fees, or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible. 437

SEC. 3. Any person who shall fight a duel or send a challenge for that purpose, or be aider or abettor in fighting a duel, shall be deprived of the right of holding any office of honor or profit in this state, and may be otherwise punished as shall be prescribed by law. 438

ARTICLE XIII.

NEW COUNTIES.

SECTION 1. No new county shall be established which shall reduce any county to less than four hundred square miles, or to less than twenty thousand inhabitants; nor shall any county be formed of less area, or containing a less population; nor shall any line thereof pass within ten miles of the county seat of any county proposed to be divided. 439

ARTICLE XIV.

COUNTY OFFICERS.

SECTION 1. County officers shall consist of sheriffs, coroners, prothonotaries, registers of wills, recorders of deeds, commissioners, treasurers, surveyors, auditors, or controllers, clerks of the courts, district attorneys and such others as may from time to time be established by law; and no sheriff or treasurer shall be eligible for the term next succeeding the one for which he may be elected. 439

SEC. 2. County officers shall be elected at the general elections and shall hold their offices for the term of three years, beginning on the first Monday of January next after their election, and until their successors shall be duly qualified; all vacancies not otherwise provided for shall be filled in such manner as may be provided by law. 439

SEC. 3. No person shall be appointed to any office within any county who shall not have been a citizen and an inhabitant therein one year next before his appointment, if the county shall have been so long erected; but if it shall not have been so long erected, then within the limits of the county or counties out of which it shall have been taken. 440

SEC. 4. Prothonotaries, clerks of the courts, recorders of deeds, registers of wills, county surveyors, and sheriffs shall keep their offices in the county town of the county in which they respectively shall be officers. 440

SEC. 5. The compensation of county officers shall be regulated by law and all county officers who are or may be salaried shall pay all fees which they may be authorized to receive into the treasury of the county or state, as may be directed by law. In counties containing over one hundred and fifty thousand inhabitants all county officers shall be paid by salary, and the salary of any such officer and his clerks, heretofore paid by fees, shall not exceed the aggregate amount of fees earned during his term and collected by or for him. 440

SEC. 6. The General Assembly shall provide by law for the strict

accountability of all county, township, and borough officers, as well as for the fees which may be collected by them, as for all public or municipal moneys which may be paid to them. 442

Sec. 7. Three county commissioners and three county auditors shall be elected in each county where such officers are chosen, in the year one thousand eight hundred and seventy-five, and every third year thereafter; and in the election of said officers each qualified elector shall vote for no more than two persons, and the three persons having the highest number of votes shall be elected; any casual vacancy in the office of county commissioner or county auditor shall be filled by the court of common pleas of the county in which such vacancy shall occur, by the appointment of an elector of the proper county who shall have voted for the commissioner or auditor whose place is to be filled. 443

ARTICLE XV.

CITIES AND CITY CHARTERS.

SECTION 1. Cities may be chartered whenever a majority of the electors of any town or borough having a population of at least ten thousand shall vote at any general election in favor of the same. 443

Sec. 2. No debt shall be contracted or liability incurred by any municipal commission, except in pursuance of an appropriation previously made therefor by the municipal government. 433

Sec. 3. Every city shall create a sinking fund, which shall be inviolably pledged for the payment of its funded debt. 433

ARTICLE XVI.

PRIVATE CORPORATIONS.

SECTION 1. All existing charters, or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place and business been commenced in good faith, at the time of the adoption of this constitution, shall thereafter have no validity. 444

Sec. 2. The General Assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution. 444

Sec. 3. The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals; and the exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state. 445

Sec. 4. In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer. 445

Sec. 5. No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served. 447

Sec. 6. No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business. 451

SEC. 7. No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained, at meeting to be held after sixty days' notice given in pursuance of law. 451

SEC. 8. Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall on the demand of either party, be determined by a jury, according to the course of the common law. 70n., 459

SEC. 9. Every banking law shall provide for the registry and countersigning, by an officer of the state, of all notes or bills designed for circulation, and that ample security to the full amount thereof shall be deposited with the Auditor General for the redemption of such notes or bills. 455

SEC. 10. The General Assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing, and revocable at the adoption of this constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this commonwealth, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create renew, or extend the charter of more than one corporation. 139, 455

SEC. 11. No corporate body to possess banking and discounting privileges, shall be created or organized, in pursuance of any law, without three months' previous public notice, at the place of the intended location, of the intention to apply for such privileges, in such manner as shall be prescribed by law; nor shall a charter for such privilege be granted for a longer period than twenty years. 455

SEC. 12. Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this state and to connect the same with other lines; and the General Assembly shall by general law, of uniform operation, provide reasonable regulations to give full effect to this section. No telegraph company shall consolidate with, or hold a controlling interest in the stock or bonds of any other telegraph company, owning a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph. 455

SEC. 13. The term "corporations," as used in this article, shall be construed to include all joint stock companies or associations, having any of the powers or privileges of corporations not possessed by individuals or partnerships. 456

ARTICLE XVII.

RAILROADS AND CANALS.

SECTION 1. All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose, shall have the right to construct and operate a railroad between any points within this state, and to connect, at the state line, with railroads of other states.

Every railroad company shall have the right, with its road, to intersect, connect with, or cross any other railroad; and shall receive and transport each the other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination. 498

SEC. 2. Every railroad and canal corporation organized in this state shall maintain an office therein, where transfers of its stock shall be made, and where its books shall be kept for inspection by any stockholder or creditor of such corporation, in which shall be recorded the amount of capital stock subscribed or paid in, and by whom, the names of the owners of its stock, and the amounts owned by them, respectively, the transfers of said stock, and the names and places of residence of its officers. 499

SEC. 3. All individuals, associations and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers, within the state, or coming from or going to any other state. Persons and property transported over any railroad, shall be delivered at any station, at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station; but excursion and commutation tickets may be issued at special rates. 500

SEC. 4. No railroad, canal, or other corporation, or the lessees, purchasers or managers of any railroad or canal corporation, shall consolidate the stock, property, or franchises of such corporation, with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation, owning or having under its control a parallel or competing line; nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation, owning or having the control of a parallel or competing line; and the question whether railroads or canals are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury, as in other civil issues. 503

SEC. 5. No incorporated company, doing the business of a common carrier, shall, directly or indirectly, prosecute or engage in mining or manufacturing articles, for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold, or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal, not exceeding fifty miles in length. 508

SEC. 6. No president, director, officer, agent, or employee of any railroad or canal company, shall be interested, directly or indirectly, in the furnishing of material or supplies to such company, or in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled, or worked by such company. 506

SEC. 7. No discrimination in charges, or facilities for transportation, shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise; and no railroad or canal company, or any lessee, manager, or employee thereof, shall make any preferences in furnishing cars or motive power. 500

SEC. 8. No railroad, railway, or other transportation company shall grant free passes, or passes at a discount, to any person, except officers or employees of the company. 501

SEC. 9. No street passenger railway shall be constructed within the limits of any city, borough, or township without the consent of its local authorities. 507

SEC. 10. No railroad canal, or other transportation company, in existence at the time of the adoption of this article, shall have the benefit of any future legislation, by general or special laws, except on condition of complete acceptance of all the provisions of this article. 507

SEC. 11. The existing powers and duties of the Auditor General, in regard to railroads, canals, and other transportation companies, except as to their accounts, are hereby transferred to the Secretary of Internal Affairs, who shall have a general supervision over them, subject to such regulations and alterations as shall be provided by law; and in addition to the annual reports now required to be made, said secretary may require special reports, at any time, upon any subject relating to the business of said companies, from any officer or officers thereof. 508

SEC. 12. The General Assembly shall enforce by appropriate legislation, the provisions of this article. 508

ARTICLE XVIII.

FUTURE AMENDMENTS.

SECTION 1. Any amendment or amendments to this constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by a majority of the members elected to each house, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the Secretary of the commonwealth shall cause the same to be published, three months before the next general election, in at least two newspapers in every county in which such newspapers shall be published; and if, in the General Assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each house, the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid; and such proposed amendment or amendments shall be submitted to the qualified electors of the state, in such manner, and at such time, at least three months after being so agreed to by the two houses, as the General Assembly shall prescribe; and if such amendment or amendments shall be approved by a majority of those voting thereon such amendment or amendments shall become a part of the constitution; but no amendment or amendments shall be submitted oftener than once in five years. When two or more amendments shall be submitted, they shall be voted upon separately. 36n, 295, 509

SCHEDULE.

THAT no inconvenience may arise from the changes in the constitution of the commonwealth, and in order to carry the same into complete operation, it is hereby declared, that—

SECTION 1. This constitution shall take effect on the first day of January, in the year 1874, for all purposes not otherwise provided for therein.

SEC. 2. All laws in force in this commonwealth at the time of the adoption of this constitution, not inconsistent therewith, and all rights, actions, prosecutions, and contracts, shall continue as if this constitution had not been adopted.

SEC. 3. At the general election in the years 1874 and 1875, senators shall be elected in all districts where there shall be vacancies. Those elected in the year 1874 shall serve for two years, and those elected in the year 1875 shall serve for one year. Senators now elected, and those whose terms are unexpired, shall represent the districts in which they reside, until the end of the terms for which they were elected.

SEC. 4. At the general election in the year 1876, senators shall be elected from even numbered districts, to serve for two years, and from odd numbered districts, to serve for four years.

SEC. 5. The first election of Governor, under this constitution, shall be at the general election in the year 1875, when a Governor shall be elected for three years; and the term of the Governor elected in the year 1878, and of those thereafter elected, shall be for four years, according to the provisions of this constitution.

SEC. 6. At the general election in the year 1874, a Lieutenant Governor shall be elected, according to the provisions of this constitution.

SEC. 7. The Secretary of Internal Affairs shall be elected at the first general election after the adoption of this constitution; and, when the said officer shall be duly elected and qualified, the office of Surveyor General shall be abolished. The Surveyor General in office at the time of the adoption of this constitution shall continue in office until the expiration of the term for which he was elected.

SEC. 8. When the Superintendent of Public Instruction shall be duly qualified, the office of Superintendent of Common Schools shall cease.

SEC. 9. Nothing contained in this constitution shall be construed to render any person now holding any state office for a first official term ineligible for re-election, at the end of such term.

SEC. 10. The judges of the Supreme Court in office when this constitution shall take effect, shall continue until their commissions severally expire. Two judges, in addition to the number now composing the said court, shall be elected at the first general election after the adoption of this constitution.

SEC. 11. All courts of record, and all existing courts which are not specified in this constitution, shall continue in existence until the 1st day of December in the year 1875, without abridgment of their present jurisdiction, but no longer. The court of first criminal jurisdiction for the counties of Schuylkill, Lebanon, and Dauphin is hereby abolished; and all causes and proceedings pending therein in the county of Schuylkill, shall be tried and disposed of in the courts of oyer and terminer and quarter sessions of the peace of said county.

SEC. 12. The registers' courts now in existence shall be abolished on the first day of January next succeeding the adoption of this constitution.

SEC. 13. The General Assembly shall, at the next session after the adoption of this constitution, designate the several judicial districts, as required by this constitution. The judges in commission, when such designation shall be made, shall continue, during their unexpired terms, judges of the new districts in which they reside; but when there shall be two judges residing in the same district, the president judge shall elect to which district he shall be assigned, and the additional law judge shall be assigned to the other district.

SEC. 14. The General Assembly shall, at the next succeeding session after each decennial census, and not oftener, designate the several judicial districts, as required by this constitution.

SEC. 15. Judges learned in the law of any court of record, holding commissions in force at the adoption of this constitution, shall hold their respective offices until the expiration of the terms for which they were commissioned, and until their successors shall be duly qualified. The Governor shall commission the president judge of the court of first criminal jurisdiction for the counties of Schuylkill, Lebanon and Dauphin, as a judge of the court of common pleas of Schuylkill county, for the unexpired term of his office.

SEC. 16. After the expiration of the term of any president judge of any court of common pleas, in commission at the adoption of this constitution, the judge of such court, learned in the law, and oldest in commission, shall be the president judge thereof; and when two or more judges are elected at the same time, in any judicial district, they shall decide by lot which shall be president judge; but when the president judge of a court shall be re-elected, he shall continue to be president judge of that court. Associate judges not learned in the law, elected after the adoption of this constitution, shall be commissioned to hold their offices for the term of five years from the first day of January next after their election.

SEC. 17. The General Assembly, at the first session after the adoption of this constitution, shall fix and determine the compensation of the judges of the Supreme Court, and of the judges of the several judicial districts of the commonwealth; and the provisions of the thirteenth section of the article on legislation shall not be deemed inconsistent herewith. Nothing contained in this constitution shall be held to reduce the compensation now paid to any law judge of this commonwealth now in commission.

SEC. 18. The courts of common pleas in the counties of Philadelphia and Allegheny shall be composed of the present judges of the district court and court of common pleas of said counties, until their offices shall severally end, and of such other judges as may, from time to time, be elected. For the purpose of first organization in Philadelphia, the judges of the court number one, shall be Judges Allison, Pierce, and Paxson; of the court number two, Judges Hare, Mitchell, and one other judge, to be elected; of the court number three, Judges Ludlow, Finletter, and Lynd; and of the court number four, Judges Thayer, Briggs, and one other judge, to be elected. The judge first named shall be the president judge of said courts respectively, and thereafter, the president judge shall be the judge oldest in commission; but any president judge re-elected in the same court or district, shall continue to be president judge thereof. The additional judges for courts numbers two and four shall be voted for and elected at the first general election after the adoption of this constitution, in the same manner as the two additional judges of the Supreme Court, and they shall decide by lot to which court they shall belong. Their term of office shall commence on the first Monday of January in the year 1875.

SEC. 19. In the county of Allegheny, for the purpose of first organi-

zation under this constitution, the judges of the court of common pleas, at the time of the adoption of this constitution, shall be the judges of the court number one and the judges of the district court, at the same date, shall be the judges of the common pleas number two. The president judges of the common pleas and district court shall be president judge of said courts number one and two, respectively, until their offices shall end; and thereafter, the judge oldest in commission shall be president judge; but any president judge re-elected in the same court or district shall continue to be president judge thereof.

Sec. 20. The organization of the courts of common pleas under this constitution, for the counties of Philadelphia and Allegheny, shall take effect on the first Monday of January, 1875, and existing courts in said counties shall continue, with their present powers and jurisdiction, until that date; but no new suits shall be instituted in the courts of *nisi prius* after the adoption of this constitution.

Sec. 21. The causes and proceedings pending in the court of *nisi prius*, court of common pleas, and district court in Philadelphia shall be tried and disposed of in the court of common pleas. The records and dockets of said courts shall be transferred to the prothonotary's office of said county.

Sec. 22. The causes and proceedings pending in the court of common pleas in the county of Allegheny shall be tried and disposed of in the court number one; and the causes and proceedings pending in the district court, shall be tried and disposed of in the court number two.

Sec. 23. The prothonotary of the court of common pleas of Philadelphia shall be first appointed by the judges of said court, on the first Monday of December in the year 1875, and the present prothonotary of the district court in said county shall be the prothonotary of the said court of common pleas until said date, when his commission shall expire, and the present clerk of the court of oyer and terminer and quarter sessions of the peace in Philadelphia shall be the clerk of such court, until the expiration of his present commission on the first Monday of December in the year 1875.

Sec. 24. In cities containing over fifty thousand inhabitants, except Philadelphia, all aldermen in office at the time of the adoption of this constitution shall continue in office until the expiration of their commissions; and at the election for city and ward officers in the year 1875 one alderman shall be elected in each ward, as provided in this constitution.

Sec. 25. In Philadelphia, magistrates, in lieu of aldermen, shall be chosen, as required in this constitution, at the election in said city for city and ward officers, in the year 1875; their term of office shall commence on the first Monday of April succeeding their election. The terms of office of aldermen in said city, holding, or entitled to, commissions at the time of the adoption of this constitution, shall not be affected thereby.

Sec. 26. All persons in office in this commonwealth at the time of the adoption of this constitution, and at the first election under it, shall hold their respective offices until the term for which they have been elected or appointed shall expire, and until their successors shall be duly qualified, unless otherwise provided in this constitution.

Sec. 27. The seventh article of this constitution prescribing an oath of office, shall take effect on and after the first day of January, 1875.

Sec. 28. The terms of office of county commissioners and county auditors, chosen prior to the year 1875, which shall not have expired before the first Monday of January in the year 1876, shall expire on that day.

SEC. 29. All state, county, city, ward, borough, and township officers, in office at the time of the adoption of this constitution, whose compensation is not provided for by salaries alone, shall continue to receive the compensation allowed them by law, until the expiration of their respective terms of office.

SEC. 30. All state and judicial officers heretofore elected, sworn, affirmed, or in office when this constitution shall take effect, shall severally, within one month after such adoption, take and subscribe an oath or affirmation to support this constitution.

SEC. 31. The General Assembly, at its first session, or as soon as may be after the adoption of this constitution, shall pass such laws as may be necessary to carry the same into full force and effect.

SEC. 32. The ordinance passed by this convention entitled "An ordinance for submitting the amended Constitution of Pennsylvania to a vote of the electors thereof," shall be held to be valid, for all the purposes thereof.

SEC. 33. The words "County Commissioners," wherever used in this constitution and in any ordinance accompanying the same, shall be held to include the commissioners for the city of Philadelphia.

Adopted at Philadelphia, on the third day of November, in the year of our Lord one thousand eight hundred and seventy-three.

Filed in the office of the Secretary of the Commonwealth, November 13, 1873.

M. S. QUAY,
Secretary of the Commonwealth.

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